

**United States Department of Labor
Employees' Compensation Appeals Board**

J.P., Appellant)
)

and)
)

DEPARTMENT OF THE NAVY, PUGET)
SOUND NAVAL SHIPYARD, Bremerton, WA,)
Employer)

Docket No. 10-2038
Issued: September 19, 2011

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 5, 2010 appellant filed a timely appeal of a July 16, 2010 Office of Workers' Compensation Programs' (OWCP) merit decision. Pursuant to the Federal Employees' Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUE

The issue is whether appellant has a ratable impairment entitling him to a schedule award due to his accepted binaural hearing loss.

FACTUAL HISTORY

On January 13, 2010 appellant, then a 72-year-old general foreman, tool and die maker, filed an occupational disease claim alleging that he developed a loss of hearing due to working around loud noises. He first became aware of his condition on January 1, 1988 and first

¹ 5 U.S.C. § 8101 *et seq.*

attributed the condition to his employment on that date. Appellant stated that he was unaware that he could file a claim. On the reverse of the form, his supervisor indicated that appellant was retired and was currently on the periodic rolls due to another injury.

Appellant provided hearing conservation data from the employing establishment dated 1969 through 1992.² He also provided a compilation of audiograms from 1969 through 1983. The 1992 hearing conservation data consisted of an audiologic report with the decibel losses listed under the corresponding hertz for each ear. On the left this report included losses at 500, 1,000, 2,000 and 3,000 hertz of 15, 10, 5 and 30 respectively while on the right losses of 10, 10, 5 and 20 respectively.

Appellant submitted a medical report dated January 18, 2010 from Dr. Gerald G. Randolph, a Board-certified otolaryngologist, diagnosing bilateral sensorineural hearing loss. Dr. Randolph noted that appellant left his federal employment in 1993. He stated that appellant's audiogram dated January 13, 2010 was consistent with hearing loss caused by a combination of past noise exposure and the aging process. The audiogram demonstrated at 500, 1,000, 2,000 and 3,000 hertz, decibel losses of 30, 30, 40 and 55 in the right ear, respectively and in the left ear, decibel losses of 35, 35, 55 and 70 respectively. Dr. Randolph found that appellant had 20.625 percent loss of hearing in the right ear and 31.875 percent loss of hearing in the left ear for 22.5 percent loss of hearing binaurally. The audiogram demonstrated 96 percent word recognition threshold on the right and 80 percent word recognition threshold on the left. Dr. Randolph recommended an additional two percent impairment rating for tinnitus on the basis that appellant had considerable difficulty understanding conversation due to tinnitus.

In a letter dated February 16, 2010, OWCP requested additional factual and medical evidence in support of appellant's claim, including his employment history and that date he was last exposed to hazardous noise at work. Appellant responded on February 25, 2010 and stated that he was last exposed to employment-related noise exposure in March 1993.

OWCP requested a supplemental report from Dr. Randolph on May 12, 2010. Dr. Randolph submitted an addendum on May 27, 2010 stating that the audiogram performed in his office dated January 13, 2010 revealed a significant bilateral sensorineural hearing loss in excess of that which would normally be predicted on the basis of presbycusis. He also found significant hearing loss in the lower frequencies which were generally not affected by industrial noise exposure. Dr. Randolph stated that, if appellant stopped working in 1993, the 1992 audiologic report would be most appropriate in time to determine a noise-induced hearing loss as a direct consequence of his federal employment. He concluded that based on this audiologic data appellant did not have a ratable hearing loss in September 1992. Dr. Randolph found that appellant's workplace noise exposure was sufficient to have caused or aggravated his hearing loss.

OWCP requested a second report on June 4, 2010 and asked that Dr. Randolph clarify whether appellant's ratable impairment was due to his federal employment. Dr. Randolph

² The Board has held that a program of annual audiometric examination conducted by an employing establishment in conjunction with an employee testing program is sufficient to constructively establish actual knowledge of a hearing loss such as to put the immediate supervisor on notice of an on-the-job injury and establish that an occupational hearing loss claim is timely. *Ralph L. Dill*, 57 ECAB 248, 251-52 (2005).

replied on June 14, 2010 stating, “Hearing loss due to noise exposure occurs at the time of noise exposure and does not get worse at a later date because of past noise exposure. Unless [appellant] had very, very significant industrial noise exposure between September 1992 and March 1993 the most appropriate audiogram to utilize in rating the claimant’s noise-induced hearing loss would have been the audiogram performed September 21, 1992. Since then, the claimant’s hearing loss would have gotten worse due to causes other than his federal civil service employment.” Dr. Randolph concluded that based on the 1992 audiologic report appellant would not have had a ratable loss of hearing due to his federal noise exposure.

OWCP referred appellant’s medical evidence to an OWCP medical adviser on June 22, 2010. The medical adviser completed a report on June 23, 2010 finding that appellant reached maximum medical improvement on January 13, 2010. He stated, “The closest audiogram to the claimant’s last known federal workplace noise exposure which meets the [Office’s] impairment validity criteria was performed by [Dr. Randolph] on January 13, 2010.” The medical adviser utilized the January 13, 2010 audiogram and found that appellant had 31.88 monaural loss in the left ear and 20.63 percent monaural loss in the right ear. He concluded that appellant’s binaural loss of hearing was 22.5 percent. The medical adviser further recommended an additional two percent impairment due to tinnitus on the grounds that appellant had significant hearing loss at frequencies important for discrimination of speech which affected appellant’s activities of daily living for a total impairment rating of 24.5 percent.

By decision dated July 16, 2010, OWCP accepted that appellant sustained a binaural hearing loss due to his accepted employment exposure. It noted that Dr. Randolph used the 1992 audiologic report to determine appellant’s hearing loss and found zero percent ratable loss of hearing in both ears. OWCP noted, “The physician further provides rationale that hearing loss due to noise exposure occurs at the time of noise exposure and does not get worse at a later date because of past noise exposure.” It concluded that appellant was not entitled to a schedule award.

LEGAL PRECEDENT

The schedule award provision of FECA³ and its implementing regulations⁴ set forth the number of weeks of compensation payable to employees sustaining permanent impairment for loss or loss of use, of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. OWCP evaluates the

³ 5 U.S.C. §§ 8101-8193, 8107.

⁴ 20 C.F.R. § 10.404.

degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.⁵

Section 8107(c)(19) of FECA provides that the degree of loss of vision or hearing under this schedule is determined without regard to correction.⁶ It is the policy of OWCP to round the calculated percentage of impairment to the nearest whole number.⁷

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.⁸ Using the frequencies of 500, 1,000, 2,000 and 3,000 cycles per second, the losses at each frequency are added up and averaged.⁹ The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.¹⁰ The binaural loss is determined by calculating the loss in each ear using the formula for monaural loss; the lesser loss is multiplied by five, then added to the greater loss and the total is divided by six to arrive at the amount of the binaural hearing loss.¹¹ The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.¹²

In order to establish a work-related loss of hearing, OWCP requires that the employee undergo both audiometric and otologic examination; that the audiometric testing precede the otologic examination; that the audiometric testing be performed by an appropriately certified audiologist; that the otologic examination be performed by an otolaryngologist certified or eligible for certification by the American Academy of Otolaryngologist and that the audiometric and otologic examination be performed by different individuals as a method of evaluating the reliability of the findings. OWCP procedures require that all audiological equipment authorized for testing meet the calibration protocol contained in the accreditation manual of the American Speech and Hearing Association and that audiometric test results include both bone conduction and pure tone air conduction thresholds, speech reception thresholds and monaural discrimination scores. The otolaryngologist's report must include: date and hour of examination; date and hour of employee's last exposure to loud noise; a rationalized medical

⁵ For new decisions issued after May 1, 2009 OWCP began using the sixth edition of the A.M.A., *Guides*. A.M.A., *Guides*, 6th ed. (2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6a (January 2010); Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

⁶ *J.H.*, 59 ECAB 377, 379 (2008).

⁷ *J.Q.*, 59 ECAB 366, 371 (2009); *Robert E. Cullison*, 55 ECAB 570, 573 (2004)

⁸ A.M.A., *Guides* 249-51.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *J.H.*, *supra* note 6.

opinion regarding the relation of the hearing loss to the employment-related noise exposure and a statement of the reliability of the tests.¹³

It is well established that, when the attending physician fails to provide an estimate of impairment conforming to the A.M.A., *Guides*, his or her opinion is of diminished probative value in establishing the degree of permanent impairment and OWCP may rely on the opinion of its medical adviser to apply the A.M.A., *Guides* to the findings reported by the attending physician.¹⁴

ANALYSIS

The Board finds that OWCP did not properly assess the ratability of appellant's hearing loss. OWCP accepted that he has a bilateral sensorineural hearing loss due to noise. By accepting the claim, it found that appellant's hearing loss was causally related to his federal employment. Once OWCP accepts a claim it has a duty to assess the ratability of a schedule award claim.¹⁵

Appellant's physician, Dr. Randolph, completed a report on January 18, 2010 diagnosing bilateral sensorineural hearing loss and noting that appellant stopped work in 1993. He found elements of both past noise exposure and aging as contributing to appellant's loss of hearing demonstrated on audiogram. Dr. Randolph properly applied the appropriate provisions of the A.M.A., *Guides* to his January 13, 2010 audiogram and determined that appellant had 22.5 percent loss of hearing binaurally and recommended an additional two percent impairment rating for tinnitus on the basis that appellant had considerable difficulty understanding conversation. He submitted an addendum on May 27, 2010 stating that the audiogram performed in his office dated January 13, 2010 revealed a significant bilateral sensorineural hearing loss in excess of that which would normally be predicted on the basis of presbycusis. Dr. Randolph concluded that appellant's workplace noise exposure was sufficient to have caused or aggravated appellant's hearing loss. He did not provide a statement of appellant's date of maximum medical improvement.

OWCP referred the medical evidence to its medical adviser to determine the extent and degree of appellant's loss of hearing. OWCP medical adviser found that appellant reached maximum medical improvement on January 13, 2010 and properly noted that the only audiogram to comply with OWCP's requirements was the January 13, 2010 audiogram of Dr. Randolph. The losses at the frequencies of 500, 1,000, 2,000 and 3,000 cycles hertz were added and averaged and the "fence of 25 decibels was deducted."¹⁶ The remaining amount was multiplied by 1.5 to arrive at the percentage of monaural hearing loss. For a binaural hearing loss, the loss in each ear is calculated using the above formula. The lesser loss is then multiplied by five and

¹³ *Id.*

¹⁴ *Linda Beale*, 57 ECAB 429 (2006).

¹⁵ *J.H.*, *supra* note 6.

¹⁶ The A.M.A., *Guides* points out that the loss below an average of 25 decibels is deducted as it does not result in impairment in the ability to hear everyday sounds under everyday listening conditions.

added to the greater loss. This amount is then divided by six to arrive at the total binaural hearing loss. For levels recorded in the left ear of 35, 35, 45 and 70, the above formula derives 31.9 percent monaural loss and for levels recorded in the right ear of 30, 30, 40 and 55, the above formula derives 20.6 percent monaural loss. According to the accepted formula these combine to reach a 22.5 percent binaural loss of hearing. Both Dr. Randolph and OWCP's medical adviser agree on the percentage of appellant's loss of hearing.

The A.M.A., *Guides* provided that up to five percent impairment may be added to a measurable binaural hearing impairment.¹⁷ Both Dr. Randolph and OWCP's medical adviser found that appellant had two percent impairment due to tinnitus. The physicians noted that appellant's tinnitus interfered with activities of daily living in that appellant had difficulty with speech discrimination as a result of his tinnitus. As noted above appellant's 22.5 percent loss of hearing combined with 2 percent impairment due to tinnitus would be rounded to the nearest whole number for 25 percent binaural impairment.

The scheduled provisions of FECA specify the number of weeks of compensation to be paid for each permanent impairment listed in the schedule.¹⁸ As appellant has a 25 percent loss of use of both ears, he is entitled to 25 percent of the 200 weeks of compensation which is 50 weeks.

The Board will reverse OWCP's July 16, 2010 schedule award determination as if relied on audiologic reports obtained prior to appellant's date of maximum medical improvement. The report of Dr. Randolph noted that appellant's prior noise explosive at work contributed to the loss found in 2010, the date of maximum medical improvement. A schedule award is appropriate where the physical condition of an injured member has stabilized, despite the possibility of an eventual change in the degree of functional impairment in the member.¹⁹ The question of when maximum medical improvement has been reached is a factual one which depends on the medical findings in the record and the determination of such date is made in each case upon the basis of submitted medical evidence.²⁰

CONCLUSION

The Board finds that the weight of the medical evidence establishes that appellant has 23 percent binaural loss of hearing and 2 percent impairment for tinnitus for which he is entitled to a schedule award.

¹⁷ A.M.A., *Guides* 249.

¹⁸ 5 U.S.C. § 8107; 20 C.F.R. § 10.304(b).

¹⁹ *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989).

²⁰ *Eugenia L. Smith*, 41 ECAB 409, 413 (1990).

ORDER

IT IS HEREBY ORDERED THAT the July 16, 2010 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 19, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board