

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

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E.L., Appellant

and

**DEPARTMENT OF THE NAVY, MARE  
ISLAND NAVAL SHIPYARD, Vallejo, CA,  
Employer**

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**Docket No. 11-291  
Issued: September 7, 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 November 16, 2010 appellant filed a timely appeal from an October 7, 2010 schedule award decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act (FECA)<sup>1</sup> and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award issue.

**ISSUE**

The issue is whether appellant has more than a three percent binaural loss of hearing for which OWCP granted a schedule award.

**FACTUAL HISTORY**

On July 3, 2008 appellant, then a 53-year-old equipment specialist, filed an occupational disease claim alleging that he sustained hearing loss due to his work as a shipfitter and pneumatic

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

tools operator for the employing establishment from 1974 to 1995. He became aware of his condition and its relationship to his federal employment on July 1, 2008.<sup>2</sup>

OWCP received audiograms for the period August 19, 1974 to June 30, 2008. An August 19, 1974 baseline audiogram from the employing establishment exhibited the following decibel (dBA) losses at 500, 1,000, 2,000 and 3,000 Hertz (Hz): 0, 0, 0 and 20 for the right ear and 0, 0, 0 and 5 for the left ear. At the same frequency levels, July 16 and 18, 1994 audiograms showed dBA losses of 5, 0, 5 and 25 for the right ear and 0, 0, 5 and 5 for the left ear. At 500, 1,000, 2,000 and 3,000 Hz, a June 5, 2003 audiogram revealed losses of 0, 5, 0 and 30 dBA for the right ear and 0, 0, 0 and 5 for the left ear while a June 30, 2008 audiogram recorded losses of 10, 15, 15 and 35 dBA for the right ear and 10, 10, 10 and 15 for the left ear.

A January 5, 2009 statement of accepted facts detailed that appellant was hired by the employing establishment as a pneumatic tools operator in 1974 and was exposed to noise generated by chippers, grinders, needle guns and reciprocating pumps until 1995. During this period, appellant was enrolled in the hearing conservation program and wore hearing protection onsite. He was also exposed to loud pneumatic pumps while he was an equipment specialist from December 1995 to September 2008. The statement acknowledged that appellant had normal hearing prior to his federal civilian employment and was routinely exposed to occupational noise levels above 85 dBA.<sup>3</sup>

OWCP referred appellant for a second opinion examination to Dr. Theodore M. Mazer, a Board-certified otolaryngologist. In a February 24, 2009 report, Dr. Mazer related that appellant was a pneumatic tools operator and shipfitter until 1995. Thereafter, he worked in an administrative auditing position. Appellant complained of binaural hearing loss and nonpulsatile tinnitus, the latter of which began to disrupt his sleep in or around June 2008.<sup>4</sup> He did not exhibit any physical abnormalities on examination while a February 10, 2009 audiogram exhibited the following dBA losses at 500, 1,000, 2,000 and 3,000 Hz: 15, 15, 10 and 45 for the right ear and 10, 10, 10 and 20 for the left ear. After reviewing the statement of accepted facts and previous audiometric data, Dr. Mazer noted that the earliest audiogram from August 19, 1974 indicated a limited preemployment hearing loss of the right ear at 3,000 Hz. However, despite accepted occupational noise exposure, subsequent findings through 1994 did not demonstrate any significant change from the 1974 baseline. June 5, 2003 and June 30, 2008 audiograms showed nominal noise notches in the right ear at 3,000 and 4,000 Hz, but hearing loss remained nonratable. In addition, Dr. Mazer pointed out that appellant's tinnitus first arose in June 2008, even though his exposure to loud noise diminished since 1996. He opined:

“Given the absence of a clear progression of loss of hearing, even nonratable, directly due to noise exposure, it is difficult to assign causation for the tinnitus to

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<sup>2</sup> In December 1995, appellant transferred to the Southwest Regional Maintenance Center located in San Diego, California. He retired effective February 2, 2009.

<sup>3</sup> The statement of accepted facts noted that appellant served in the military as an aircraft maintenance specialist between October 5, 1971 and August 2, 1974.

<sup>4</sup> Appellant informed Dr. Mazer that he underwent a magnetic resonance imaging (MRI) scan in or around June 2008. The record does not contain any evidence of this.

his federal employment, and absent age changes he likely would not have the tinnitus as even a ratable loss.”

Nonetheless, based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment*<sup>5</sup> (hereinafter A.M.A., *Guides*), Dr. Mazer assigned a three percent hearing loss on account of appellant’s tinnitus, concluding that the condition was primarily caused by occupational noise exposure. He did not recommend hearing aids.

By decision dated March 26, 2009, OWCP denied appellant’s claim for binaural hearing loss, finding the medical evidence insufficient to establish that the accepted occupational noise exposure caused the condition. It accepted his claim for employment-related bilateral tinnitus. On July 14, 2009 appellant filed a claim for a schedule award.

In a January 2, 2010 report, OWCP’s medical adviser found that appellant’s bilateral high-frequency hearing loss was due to federal occupational noise exposure. He agreed with Dr. Mazer that appellant’s tinnitus was employment related. Applying the A.M.A., *Guides* to the February 10, 2009 audiogram, OWCP’s medical adviser determined that there was no ratable impairment, but added three percent for tinnitus based on page 249 of the A.M.A., *Guides*.

On January 21, 2010 OWCP granted a schedule award for three percent binaural hearing loss for the period February 10 to March 22, 2009.

Appellant requested a telephonic hearing, which was held on August 3, 2010. He testified that the tinnitus continued to interfere with his activities of daily living, particularly sleep and air travel. Appellant added that he was still exposed to noise when he worked as a field calibration auditor starting in 1995 before being assigned administrative duties.

In an October 7, 2010 decision, OWCP’s hearing representative affirmed the January 21, 2010 schedule award.

### **LEGAL PRECEDENT**

FECA’s schedule award provision and its implementing regulations<sup>6</sup> set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss of or loss of use of scheduled members or functions of the body. An employee is entitled to a maximum award of 52 weeks of compensation for complete loss of hearing of one ear and 200 weeks of compensation for complete loss of hearing of both ears.<sup>7</sup> However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to

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<sup>5</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2008).

<sup>6</sup> 20 C.F.R. § 10.404.

<sup>7</sup> 5 U.S.C. § 8107(c)(13).

all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.<sup>8</sup>

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*. 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. Then, the “fence” of 25 dBA is deducted because, as the A.M.A., *Guides* points out, losses below 25 dBA result in no impairment in the ability to hear everyday speech under everyday conditions. The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss. Binaural loss is determined by first 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. The Board has concurred in OWCP’s adoption of this standard for evaluating hearing loss.<sup>9</sup>

The A.M.A., *Guides* provides that, if tinnitus interferes with activities of daily living such as sleeping, reading and other tasks requiring concentration, up to five percent may be added to a measurable binaural hearing impairment.<sup>10</sup> The Board has held that a claimant is not entitled to an additional schedule award for tinnitus if the record does not contain medical evidence directly addressing the impact of tinnitus on an employee’s activities of daily living<sup>11</sup> or if the measurable hearing loss is not ratable under the standards set forth in the A.M.A., *Guides*.<sup>12</sup>

## ANALYSIS

Appellant filed a claim for hearing loss and was referred to Dr. Mazer for a second opinion examination. After conducting a thorough examination and reviewing the medical file, Dr. Mazer determined that there was no ratable, work-related hearing impairment, but assigned a rating of three percent on account of tinnitus. While OWCP’s medical adviser found that both appellant’s high-frequency hearing loss and tinnitus were caused by occupational noise exposure, he agreed that the loss was nonratable and concurred with Dr. Mazer’s final rating. The medical adviser attributed three percent impairment to tinnitus. Thereafter, OWCP granted a schedule award for three percent binaural hearing loss for the period February 10 to March 22, 2009.

Applying the A.M.A., *Guides* standard to the February 10, 2009 audiogram, appellant’s right ear recorded losses of 15, 15, 10 and 45 dBA. The total loss was 85 dBA. When divided by four, the result was an average hearing loss of 21.25 dBA. The average hearing of 21.25 dBA was reduced by the fence of 25 dBA to zero dBA. This figure was then multiplied by the established factor of 1.5, yielding zero percent monaural impairment of the right ear. At the

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<sup>8</sup> 20 C.F.R. § 10.404. *See also* *Mark A. Holloway*, 55 ECAB 321, 325 (2004).

<sup>9</sup> *J.H.*, Docket No. 08-2432 (issued June 15, 2009); *J.B.*, Docket No. 08-1735 (issued January 27, 2009).

<sup>10</sup> A.M.A., *Guides*, *supra* note 5 at 249. *See also* *R.D.*, 59 ECAB 127 (2007).

<sup>11</sup> *R.D.*, *supra* note 10.

<sup>12</sup> *Juan A. Trevino*, 54 ECAB 358 (2003); *L.F.*, Docket No. 10-2115 (issued June 3, 2011); *J.Q.*, Docket No. 10-1660 (issued April 5, 2011).

same frequency levels, appellant's left ear recorded losses of 10, 10, 10 and 20 dBA at 500, 1,000, 2,000 and 3,000 Hz, respectively. The total loss was 50 dBA. When divided by four, the result was an average hearing loss of 12.5 dBA. The average hearing of 12.5 dBA was reduced by the fence of 25 dBA to equal zero dBA. This figure was then multiplied by the established factor of 1.5, yielding zero percent monaural impairment of the left ear. Therefore, OWCP properly determined that appellant did not sustain a ratable hearing impairment.

As noted, OWCP issued a schedule award for a three percent binaural hearing loss due to tinnitus. As appellant had no ratable hearing loss, as explained, this was error. Although OWCP's medical adviser cited page 249 of the A.M.A., *Guides* to support his finding of three percent impairment due to tinnitus, this provision of the A.M.A., *Guides* only allows an impairment rating for tinnitus when there is "a measurable binaural hearing impairment."<sup>13</sup> The Board has repeatedly held that there is no basis for paying a schedule award for a condition such as tinnitus unless the evidence establishes that the condition caused or contributed to a ratable hearing loss.<sup>14</sup> As appellant's hearing loss was nonratable, OWCP erroneously granted a schedule award based on tinnitus. Consequently, the evidence does not establish that appellant has any greater hearing loss than that for which OWCP has issued a schedule award.

Appellant argues on appeal that the unrelenting nature of his tinnitus has disabled him and that he is entitled to the maximum schedule award. However, the medical evidence of record clearly establishes that he did not sustain a ratable binaural hearing impairment and, as such, he is not entitled to a greater award.<sup>15</sup>

Appellant may request a schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

### **CONCLUSION**

The Board finds that appellant has not established that he has any greater impairment of his hearing than that for which he has received a schedule award.

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<sup>13</sup> *Supra* note 10.

<sup>14</sup> *L.F.*, *supra* note 12.

<sup>15</sup> Following medical evaluation of a claim, if a hearing loss is determined to be nonratable for schedule award purposes, other benefits may still be payable if any employment-related hearing loss exists. *See J.B.*, *supra* note 9; *F.D.*, Docket No. 10-1175 (issued January 4, 2011); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Services and Supplies*, Chapter 3.400.3(d)(2) (March 2010).

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 7, 2010 decision of the Office of Workers' Compensation Programs is affirmed, as modified.

Issued: September 7, 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