United States Department of Labor
Employees' Compensation Appeals Board

W.H., Appellant	)	
and	)	**Docket No. 12-38**
	)	**Issued: June 11, 2012**
DEPARTMENT OF THE NAVY, PUGET SOUND NAVAL SHIPYARD, Bremerton, WA, Employer	)	

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 October 12, 2011 appellant filed a timely appeal from a September 20, 2011 schedule award decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he sustained a ratable hearing loss entitling him to a schedule award.

FACTUAL HISTORY

On October 13, 2010 appellant, then a 70-year-old retired crane operator, filed an occupational disease claim (Form CA-2) alleging that he developed hearing loss as a result of

[1] 5 U.S.C. § 8101 *et seq.*

employment-related noise exposure from cranes and loud noises. Appellant first became aware of his condition on January 1, 1990 and of its relationship to his employment on September 1, 2010. He stated that he delayed in filing because he was not aware that he could file an OWCP claim. The employing establishment noted that appellant had retired in May 1993.

Appellant provided dates of his employment history and reported that he was a federally employed crane operator from 1966 to 1993 for the employing establishment. From 2000 to 2007 he worked in non-Federal employment as a crane operator for Schnitzer Steel Industries.[2]

Appellant submitted a history of audiograms from his non-Federal employment dated February 19, 2001 to October 13, 2010.

In an October 15, 2010 medical report, Dr. Gerald G. Randolph, a Board-certified otolaryngologist, reported that appellant developed hearing loss over the last 10 years and experienced tinnitus in his left ear for the last 15 years. An October 13, 2010 audiogram revealed the following decibel (dBA) losses at 500, 1,000, 2,000 and 3,000 hertz (Hz): 25, 25, 35 and 55 for the right ear and 20, 20, 45 and 80 for the left ear. Dr. Randolph noted that appellant's audiograms revealed bilateral sensorineural hearing loss with speech reception thresholds of 30 decibels in both ears. Discrimination scores were measured at 88 percent in both ears. He further stated that appellant's hearing loss was a result of a combination of past noise exposure and the aging process. Using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,[3] (A.M.A., *Guides*), Dr. Randolph stated that appellant had a ratable hearing loss of 15 percent in the right ear, 24.375 percent in the left ear and a binaural hearing loss ratable at 16.56 percent with no additional rating for tinnitus.[4]

By letter dated December 29, 2010, OWCP requested the Department of the Navy provide a copy of all medical examinations pertaining to appellant's hearing or ear problems, including any preemployment examinations and all audiograms. By letter dated December 29, 2010, it requested additional factual evidence from appellant.

By letter dated January 10, 2011, appellant reported that he underwent yearly hearing tests while employed at the employing establishment. He stated that his immediate supervisor at the employing establishment had knowledge of his employment-related hearing loss and notified him that he had a baseline shift in hearing and should undergo further testing.

[2] On June 6, 2007 the Department of Labor & Industries awarded appellant 17.25 percent binaural hearing loss in the amount of $13,129.05 for hearing loss sustained in his non-Federal employment with Schnitzer Steel Industries. The Board notes that OWCP does not apportion hearing loss claims.

[3] A.M.A., *Guides* (6th ed. 2009).

[4] Dr. Randolph noted that appellant left his federal employment at Puget Sound Naval Shipyard in 1993 and that review of appellant's employing establishment industrial audiograms would allow him to make a determination regarding how much hearing loss he had at or near the time he left that employment.

Appellant submitted a June 9, 2006 medical report from Dr. Richard W. Seaman, a Board-certified otolaryngologist, who reported that appellant began to experience hearing loss and tinnitus in 1990 when he was working at the employing establishment. Dr. Seaman reported that appellant's October 2005 audiogram revealed bilateral high-frequency hearing loss and left ear tinnitus which he opined was directly related to industrial noise exposure.

On March 31, 2011 OWCP requested Dr. Randolph provide clarification on his report and provided him with a series of questions. A statement of accepted facts was submitted providing details regarding appellant's employment history. OWCP noted that appellant's federal employment spanned from 1966 to 1993 where he worked as a crane operator for the employing establishment. From 2000 to 2007, appellant was employed by Schnitzer Steel Industries in non-Federal employment.

In an April 15, 2011 otologic report, Dr. Randolph reviewed the statement of accepted facts and reported that the employing establishment did not supply him with the necessary industrial audiograms to determine the degree of hearing loss appellant may have had at or near the time he left his federal employment in 1993. He noted that appellant's bilateral sensorineural hearing loss was due to a combination of noise exposure and the aging process. Dr. Randolph stated that appellant's hearing loss would probably not have been as severe when he left his federal employment in 1993 and opined that appellant's noise exposure at Schnitzer Steel Industries likely aggravated the hearing loss he already had at the time he left his federal employment.

By decision dated April 26, 2011, OWCP accepted appellant's claim for bilateral sensorineural hearing loss.

On May 5, 2011 appellant filed a claim for compensation (Form CA-7) for a schedule award.

A history of audiograms was submitted dated June 8, 1976 to June 30, 1992. Appellant's June 30, 1992 audiogram revealed the following dBA losses at 500, 1,000, 2,000 and 3,000 Hz: 15, 15, 10 and 35 for the right ear and 15, 15, 15 and 55 for the left ear.

By letter dated June 21, 2011, OWCP requested Dr. Randolph review appellant's past industrial audiograms and complete its questionnaire.

In a June 24, 2011 otologic report, Dr. Randolph reviewed appellant's past audiograms and stated that the earliest audiogram of June 8, 1976 revealed evidence of high tone sensorineural hearing loss in the left ear ratable at zero percent and that hearing was relatively normal in the right ear. He also reviewed appellant's June 30, 1992 audiogram, the last audiogram taken prior to appellant's departure from his federal employment in 1993. Dr. Randolph noted that the audiogram showed bilateral high-frequency sensorineural hearing loss compatible with hearing loss due to noise exposure. In accordance with the sixth edition of the A.M.A., *Guides*, appellant would have had a ratable hearing loss of zero percent in both ears based on the June 30, 1992 audiogram. Dr. Randolph noted that appellant would have been a candidate for hearing aid evaluation at that time. He further stated that from appellant's June 30, 1992 audiogram to his most recent audiogram performed on October 13, 2010, appellant's

hearing had degenerated significantly resulting in a ratable hearing loss of 15 percent in the right ear and 24.375 percent in the left ear with binaural hearing loss ratable at 16.56 percent. Dr. Randolph noted that appellant's workplace exposure was of sufficient intensity and duration to have caused or aggravated his hearing loss. He concluded that the increase in appellant's hearing loss since his last industrial audiogram of June 30, 1992 would not have been due to his federal employment industrial noise exposure and that his hearing loss was likely aggravated from his non-Federal employment.

On September 1, 2011 OWCP referred the case file to an OWCP medical adviser to determine the extent of appellant's permanent partial impairment and date of maximum medical improvement.

On September 7, 2011 an OWCP medical adviser reviewed appellant's case file and diagnosed work-related binaural sensorineural hearing loss. He noted that the closest audiogram to appellant's last known federal workplace noise exposure was his October 13, 2010 audiogram. Using the October 13, 2010 audiogram, the medical adviser calculated 24.38 percent monaural hearing impairment on the left, 15 percent monaural hearing impairment on the right and 16.6 percent total binaural hearing loss based upon the sixth edition of the A.M.A., *Guides*.[5] He recommended hearing aids and noted the maximum date of medical improvement as October 13, 2010.

By decision dated September 20, 2011, OWCP denied appellant's schedule award claim finding that his hearing loss was not severe enough to be considered ratable. It noted that according to Dr. Randolph's June 24, 2011 report, appellant had a ratable hearing loss of zero percent in both ears based upon the June 30, 1992 audiogram and that his current hearing loss was aggravated by his non-Federal employment.

LEGAL PRECEDENT

The schedule award provision of FECA[6] and its implementing regulations set forth the number of weeks of compensation payable to employees sustaining permanent impairment from 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 sound 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. The A.M.A., *Guides* (6th ed. 2009), has been adopted by OWCP for evaluating schedule losses and the Board has concurred in such adoption.[7]

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

[5] A.M.A., *Guides* 250.

[6] 5 U.S.C. §§ 8101-8193.

[7] *See R.D.*, 59 ECAB 127 (2007); *Bernard Babcock, Jr.*, 52 ECAB 143 (2000).

losses at each frequency are added up and averaged. Then, the fence of 25 decibels is deducted because, as the A.M.A., *Guides* points out, losses below 25 decibels result in no impairment in the ability to hear everyday speech under everyday conditions.[8] The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss. 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. The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.[9]

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden to establish his or her claim, OWCP also has a responsibility in the development of the evidence.[10]

ANALYSIS

The Board finds that this case is not in posture for decision. OWCP accepted appellant's claim for bilateral sensorineural hearing loss. The issue is whether appellant sustained a ratable hearing loss from his federal employment entitling him to a schedule award.

OWCP sent Dr. Randolph appellant's industrial audiograms dated June 8, 1976 to June 30, 1992 prior to his retirement from federal employment in 1993. From 2000 to 2007, appellant worked as a crane operator for Schnitzer Steel Industries in a non-Federal employment. In his June 24, 2011 report, Dr. Randolph used appellant's June 30, 1992 audiogram to determine that appellant developed bilateral high frequency sensorineural hearing loss due to noise exposure prior to his departure from federal employment in 1993. According to the A.M.A., *Guides*, appellant would have had a ratable hearing loss of zero percent in both ears based on the June 30, 1992 audiogram. Dr. Randolph noted that appellant's most recent audiogram of October 13, 2010 showed that his hearing had degenerated significantly resulting in a ratable hearing loss of 15 percent in the right ear and 24.375 percent in the left ear with binaural hearing loss ratable at 16.56 percent. Dr. Randolph concluded that the increase in appellant's hearing loss since his last industrial audiogram of June 30, 1992 would not have been due to his federal employment noise exposure and was likely aggravated from his non-Federal employment.

OWCP properly referred the medical evidence to an OWCP medical adviser for a rating of permanent impairment in accordance with the A.M.A., *Guides*.[11] In a September 7, 2011 report, the medical adviser used appellant's October 13, 2010 audiogram to determine that appellant sustained 16.6 percent binaural hearing loss, noting that it was the closest audiogram to

[8] *See supra* note 4.

[9] *See E.S.*, 59 ECAB 249 (2007); *Donald Stockstad*, 53 ECAB 301 (2002), *petition for recon. granted (modifying prior decision)*, Docket No. 01-1570 (issued August 13, 2002).

[10] *See Claudia A. Dixon*, 47 ECAB 168 (1995).

[11] *See Hildred I. Lloyd*, 42 ECAB 944 (1991).

appellant's last known federal workplace noise exposure.[12] He recommended hearing aids and noted the maximum date of medical improvement as October 13, 2010. The medical adviser did not address or calculate appellant's hearing impairment based on the June 30, 1992 audiogram.

In its September 20, 2011 decision, OWCP denied appellant's schedule award claim finding that his hearing loss was not severe enough to be considered ratable. It relied on Dr. Randolph's June 24, 2011 report which found that appellant had a ratable hearing loss of zero percent in both ears at the time of the June 30, 1992 audiogram and that his current hearing loss was aggravated by his non-Federal employment after he left the employing establishment.

In its schedule award decision, OWCP did not address the medical adviser's findings. OWCP's procedure manual provides that the claims examiner should review the medical adviser's findings and, "if he or she believes that the impairment has not been correctly described or that the percentage is not reasonable, a new or supplemental evaluation should be obtained. The claims examiner should not attempt to assign a different percentage of impairment without benefit of further medical advice."[13] In this instance, OWCP relied exclusively on Dr. Randolph's June 24, 2011 report which based his impairment rating on the June 30, 1992 audiogram to determine that appellant's hearing loss was not severe enough to be considered ratable, noting that appellant retired from his federal employment in 1993. OWCP's medical adviser's report, however, provided an impairment rating of 16.6 percent binaural hearing loss. While the medical adviser's impairment rating was based on the October 13, 2010 audiogram, the Board has long recognized that a claimant may be entitled to an award for an increased hearing loss, even after exposure to employment hazardous noise has ceased, if causal relationship is supported by the medical evidence of record.[14] Thus, OWCP failed to follow its procedures to further develop the medical evidence.

Once OWCP undertakes development of the record it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.[15] Given the deficiency in the medical adviser's report, OWCP should not have denied appellant's claim regarding whether he sustained a ratable impairment of hearing loss for a schedule award. Accordingly, the Board will remand the case to OWCP for further appropriate medical development.

[12] *Supra* note 4.

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6.d(2) (January 2010).

[14] The Board held in *Adelbert E. Buzzell*, 34 ECAB 96 (1982) that it is not a *per se* rule that noise-induced hearing loss does not progress following cessation of occupational noise exposure, but indicated that such a conclusion must be based on a well-rationalized medical opinion. *See H.H.*, Docket No. 11-938 (issued December 23, 2011) (concurring opinion of Michael E. Groom, Alternate Member); *Louis E. Brown*, Docket No. 96-600 (issued June 9, 1998).

[15] *Phillip L. Barnes*, 55 ECAB 426 (2004); *see also Virginia Richard (Lionel F. Richard)*, 53 ECAB 430 (2002); *Dorothy L. Sidwell*, 36 ECAB 699 (1985); *William J. Cantrell*, 34 ECAB 1233 (1993).

On remand, OWCP should ask the medical adviser to clarify his opinion on whether appellant sustained a ratable hearing loss causally related to his federal employment.[16] If so, the medical adviser should determine the appropriate audiogram to use in calculating appellant's employment-related hearing loss and provide medical rationale supporting the selection of that audiogram. He should also determine whether appellant had any ratable hearing loss causally related to factors of his federal employment and whether any progression of hearing loss since his last occupational noise exposure could be attributed to his federal employment.[17] If the medical adviser is unable or unwilling to provide such clarification, then OWCP should refer appellant to another specialist for an opinion on the relevant issue. Following this and any other further development deemed necessary, OWCP shall issue an appropriate merit decision on appellant's schedule award claim.[18]

CONCLUSION

The Board finds that this case is not in posture for a decision as to whether appellant sustained a ratable hearing loss entitling him to a schedule award.

[16] When a medical evaluation is made at its request, OWCP has the responsibility of obtaining a proper evaluation. *Leonard Gray*, 25 ECAB 147, 151 (1974).

[17] *Paul R. Reedy*, 45 ECAB 488 (1994).

[18] *See P.K.*, Docket No. 08-2551 (issued June 2, 2009); *see also Horace Langhorne*, 29 ECAB 820 (1978).

ORDER

IT IS HEREBY ORDERED THAT the September 20, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development consistent with this decision.

Issued: June 11, 2012
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