United States Department of Labor
Employees' Compensation Appeals Board

K.S., Appellant	)	
and	)	**Docket No. 13-154**
	)	**Issued: April 17, 2013**
DEPARTMENT OF HOMELAND SECURITY, CUSTOMS & BORDER PROTECTION, UVALDE STATION, Uvalder, TX, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 31, 2012 appellant filed a timely appeal of the October 15, 2012 merit 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 schedule award case.

ISSUES

The issues are: (1) whether appellant established an employment-related binaural (both ears) hearing loss entitling him to a schedule award; and (2) whether he was entitled to hearing aids.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 19, 2012 appellant, then a 54-year-old border patrol agent, filed an occupational disease claim alleging that on March 12, 2012 he first became aware of his hearing loss and realized that his condition was caused by over 26 years of noise exposure related to checkpoint operations, train checks, firearms qualifications, training and firearms instructor duties. He stated that Dr. William C. Smith, a Board-certified otolaryngologist, was his attending physician. In a March 20, 2012 narrative statement, appellant provided an employment history, including positions in which he was exposed to noise at the employing establishment. He stated that on March 15, 2012 his physician advised him that his hearing loss was almost certainly caused by his exposure to firearms.

In a March 15, 2012 report, Dr. Smith reviewed an accompanying audiogram performed on that date and advised that appellant had cerumen impaction in the external ear and tinnitus in the inner ear.

By letter dated April 17, 2012, OWCP requested that the employing establishment respond to appellant's allegations and provide a copy of all medical examinations pertaining to his hearing or ear problems, including any preemployment examinations and audiograms.

In an April 22, 2012 letter, the employing establishment stated that, during the course of appellant's employment and within the scope of his job, he was exposed to loud noises during a 10-hour workday, five days a week. Appellant was also exposed to high noise levels while performing train and traffic check operations, checkpoint operations and quarterly firearms qualifications. He was further exposed to high noise levels as a member of the Marfa Sector Special Response Team. The employing establishment concurred with the information appellant provided on March 20, 2012.

By letter dated September 6, 2012, OWCP referred appellant, together with a statement of accepted facts, to Dr. Smith for an otologic examination and audiological evaluation to determine whether appellant sustained hearing loss causally related to his federal employment and, if so, whether the loss was ratable under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*[2] (A.M.A., *Guides*). In a September 20, 2012 report, Dr. Smith set forth findings on examination and diagnosed bilateral mild high frequency sensorineural hearing loss, which he attributed to noise exposure in appellant's federal employment. He explained that the diagnosed condition was worse in the left ear than right as appellant fired weapons with his right hand. An audiometric test was conducted on the same day as Dr. Smith's examination. Testing at the frequency levels of 500, 1,000, 2,000 and 3,000 hertz (Hz) revealed decibel losses of the right ear as 10, 10, 10 and 10, respectively. Dr. Smith averaged the losses to determine that appellant had an average hearing loss of 10 decibels. He then subtracted the fence of 25 decibels and multiplied the balance by 1.5, resulting in a zero percent right ear monaural hearing loss. Testing at the same frequency levels noted above revealed decibel losses of 10, 15, 15 and 20, respectively, regarding the left ear. Dr. Smith averaged the losses to obtain an average loss of 15 decibels. After subtracting a

[2] A.M.A., *Guides* (6th ed. 2008).

fence of 25 decibels, he multiplied the remaining balance by 1.5 to calculate a zero percent left ear monaural hearing loss. Dr. Smith concluded that appellant had no ratable hearing impairment or need for hearing aids. He advised that the date of maximum medical improvement was September 20, 2012.

On December 9, 2012 an OWCP medical adviser reviewed Dr. Smith's report and the September 20, 2012 audiometric test results. He agreed that appellant's bilateral sensorineural hearing loss was due to occupational noise exposure. The medical adviser applied the audiometric data to OWCP's standard for evaluating hearing loss under the sixth edition of the (A.M.A., *Guides*) and following the same analysis determined that appellant had zero percent binaural hearing loss. He advised that the date of maximum medical improvement was September 20, 2012, the date of Dr. Smith's examination. The medical adviser recommended that hearing aids not be authorized.

In an October 15, 2012 decision, OWCP accepted appellant's claim for bilateral hearing loss, but determined that his hearing loss was not severe enough to be considered ratable under the sixth edition of the A.M.A., *Guides*. It did not authorize hearing aids or additional medical benefits.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA[3] 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 of 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 under the law, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. The implementing regulations have adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.[4] Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides*.[5]

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 Hz, the 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 dBs result in no impairment in the ability to hear everyday speech under everyday conditions.[6] 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

[3] 5 U.S.C. §§ 8101-8193.

[4] 20 C.F.R. § 10.404.

[5] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6a (January 2010).

[6] *See* A.M.A., *Guides* 250.

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.[7]

Regarding tinnitus, the A.M.A., *Guides* provide that tinnitus is not a disease but rather a symptom that may be the result of disease or injury.[8] The A.M.A., *Guides* state that, if tinnitus interferes with activities of daily living (ADLs), including sleep, reading (and other tasks requiring concentration), enjoyment of quiet recreation and emotional well-being, up to five percent may be added to a measurable binaural hearing impairment.[9]

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained binaural sensorineural hearing loss due to work-related noise exposure. It developed this claim by referring appellant to Dr. Smith who examined appellant and obtained an audiogram on September 20, 2012. The Board notes, however, that, prior to the referral, he served as appellant's treating physician. Thus, the Board finds that Dr. Smith was a treating physician and not an OWCP referral physician. On September 20, 2012 Dr. Smith found that appellant had bilateral mild high frequency sensorineural hearing loss due to his employment-related noise exposure as a border patrol agent. The audiogram performed on that date revealed decibel losses of 10, 10, 10 and 10 at 500, 1,000, 2,000 and 3,000 Hz, respectively, for the right ear, which were averaged to total 10. The average of 10 decibels, reduced by 25 decibels (the first 25 decibels were discounted as discussed above), equals zero decibels. Testing of the left ear revealed decibel losses of 10, 15, 15 and 20, at 500, 1,000, 2,000 and 3,000 Hz, respectively, which were averaged to total 15. The average of 15 decibels, reduced by 25 decibels, equals 0 decibels. Based on this test, Dr. Smith determined that appellant did not sustain a ratable binaural hearing loss.[10] The Board finds that he properly applied the A.M.A., *Guides* to the September 20, 2012 audiogram to determine that appellant did not sustain a ratable hearing loss for schedule award purposes.[11]

On December 9, 2012 an OWCP medical adviser reviewed the otologic and audiologic testing performed on appellant on September 20, 2012 and properly applied the applicable standards of the A.M.A., *Guides*, to determine that he did not have a work-related ratable binaural hearing loss. Consequently, the Board finds that the weight of the medical evidence establishes that appellant has no ratable loss of hearing pursuant to the A.M.A., *Guides*.

[7] *J.H.*, Docket No. 08-2432 (issued June 15, 2009); *E.S.*, 59 ECAB 249 (2007); *Reynaldo R. Lichtenberger*, 52 ECAB 462 (2001).

[8] *See* A.M.A., *Guides* 249.

[9] *Id. R.H.*, Docket No. 10-2139 (issued July 13, 2011); *see also Robert E. Cullison*, 55 ECAB 570 (2004).

[10] A.M.A., *Guides* 249-51.

[11] *See S.G.*, 58 ECAB 383 (2007).

Dr. Smith's March 15, 2012 report found that appellant had tinnitus. FECA does not list tinnitus in the schedule of eligible members, organs or functions of the body. Therefore, no claimant may directly receive a schedule award for tinnitus. Hearing loss is a covered function of the body, so if tinnitus contributes to a ratable loss of hearing, a claimant's schedule award will reflect that contribution. The A.M.A., *Guides* provide that, if tinnitus interferes with ADLs, up to five percent may be added to a measurable binaural hearing impairment.[12] The Board has repeatedly held, however, 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.[13] Although appellant submitted medical evidence that provided a firm diagnosis of tinnitus, as his hearing loss is not ratable, the Board will affirm OWCP's October 15, 2012 decision finding that he was not entitled to a schedule award.

Appellant may request a schedule award or increased 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.

LEGAL PRECEDENT -- ISSUE 2

Section 8103 of FECA provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances and supplies prescribed or recommended by a qualified physician, which OWCP considers likely to cure, give relief, reduce the degree of the period of disability or aid in lessening the amount of monthly compensation.[14] OWCP must therefore exercise discretion in determining whether the particular service, appliance or supply is likely to affect the purposes specified in FECA.[15] Following medical evaluation of a claim, if the hearing loss is determined to be nonratable for schedule award purposes, other benefits such as hearing aids may still be payable if any employment-related hearing loss exists.[16]

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied authorization for hearing aids. As noted, hearing aids and other medical benefits may still be payable if an employment-related hearing loss exists. While OWCP is obligated to pay for medical treatment of a work-related injury, the employee has the burden of establishing that the expenditure is incurred for treatment of the effects of such injury. Proof of causal relationship must include supporting rationalized medical evidence.[17] In the present case, OWCP properly found that appellant had not met this burden.

[12] *See supra* note 8.

[13] *See Richard Larry Enders*, 48 ECAB 184 (1996).

[14] 5 U.S.C. § 8103; *Thomas W. Stevens*, 50 ECAB 288 (1999).

[15] *Id.* at § 8103.

[16] *See F.D.*, Docket No. 10-1175 (issued January 4, 2011); *supra* note 5, *Medical Services and Supplies*, Chapter 3.400.3(d)(2) (October 1990).

[17] *See Charlie A. Penney*, Docket No. 04-1432 (issued October 5, 2004).

Appellant did not submit any rationalized medical evidence to establish entitlement to hearing amplification. On the other hand, both Dr. Smith and OWCP's medical adviser specifically opined in their September 20 and December 9, 2012 reports, respectively, that amplification was unwarranted. Thus, OWCP did not abuse its discretion in authorization for denying hearing aids.

CONCLUSION

The Board finds that appellant has failed to establish that he has an employment-related ratable binaural (both ears) hearing loss entitling him to a schedule award. The Board further finds that OWCP properly denied hearing aids.

ORDER

IT IS HEREBY ORDERED THAT the October 15, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 17, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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