

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

V.D., Appellant)

and)

DEPARTMENT OF THE NAVY, NORFOLK)
NAVAL SHIPYARD, Portsmouth, VA, Employer)

**Docket No. 13-331
Issued: August 12, 2013**

Appearances:

David G. Jennings, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 28, 2012 appellant, through his attorney, filed a timely appeal of an August 22, 2012 decision of the Office of Workers' Compensation Programs (OWCP) concerning a schedule award. Pursuant to the Federal Employees' Compensation Act¹ (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 has more than a 14 percent binaural (both ears) hearing loss, for which he received a schedule award.

On appeal, appellant's counsel contends that appellant is entitled to a greater hearing loss based upon the opinion of OWCP's referral physician.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On January 31, 2012 appellant then a 60-year-old pipefitter leader, filed an occupational disease claim alleging that February 3, 2005 he first realized that his bilateral hearing loss was employment related. OWCP accepted the claim for bilateral sensorineural hearing loss and bilateral hearing loss due to noise.

OWCP referred appellant, together with a statement of accepted facts, to Dr. L. Frederick Lassen, a Board-certified otolaryngologist, for a second opinion evaluation. An audiogram was completed on April 10, 2012 which revealed the following decibel (dBA) losses at 500, 1,000, 2,000 and 3,000 hertz (Hz): 10, 15, 50 and 70 for the left ear and 5, 20, 45 and 65 for the right ear. Dr. Lassen diagnosed bilateral sensorineural hearing loss and noise-induced hearing loss. He opined that the hearing loss was due to appellant's workplace noise exposure and recommended hearing aids. Dr. Lassen reported that appellant had 3+ tinnitus. Applying the standards provided by the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*² (A.M.A., *Guides*) to the April 10, 2012 audiometric data, he calculated that appellant sustained 13.125 percent monaural hearing impairment in the right ear and 16.875 percent monaural hearing impairment in the left ear. On the form report, Dr. Lassen added 3 percent impairment for tinnitus, resulting in a total 16.125 percent monaural hearing impairment in the right ear (13.125 percent + 3 percent for tinnitus) and 19.875 percent monaural hearing impairment in the left ear (16.875 percent + 3 percent for tinnitus). He calculated a binaural hearing impairment of 16.75 percent. Dr. Lassen listed April 10, 2012 as the date of maximum medical improvement.

On June 13, 2012 appellant filed a claim for a schedule award.

On July 11, 2012 OWCP received an April 23, 2012 report from OWCP's medical adviser who reviewed Dr. Lassen's otologic examination report and agreed that appellant's bilateral high frequency 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 determined that appellant sustained 13.75 percent binaural hearing loss. He averaged appellant's left ear hearing levels of 10, 15, 50 and 70 dBA at 500, 1,000, 2,000 and 3,000 Hz, which totaled 145 which he divided by 4. The medical adviser then subtracted a 25-dBA fence and multiplied the balance of 11.25 by 1.5 to find 16.875 percent left ear monaural hearing loss. He then averaged appellant's right ear hearing levels of 5, 20, 45 and 65 dBA at 500, 1,000, 2,000 and 3,000 Hz, which totaled 135, which then divided by 4. After subtracting out a 25-dBA fence, the medical adviser multiplied the remaining 8.5³ balance by 1.5 to calculate a 13.125 percent right ear monaural hearing loss. He then calculated 13.75 percent binaural hearing loss by multiplying the lesser right ear loss of 13.125 percent by five, adding the greater 16.875 percent left ear loss and dividing this sum by six. The medical adviser did not list any impairment due to tinnitus. He concluded that hearing aids were authorized and the date of maximum medical improvement was April 10, 2012.

² A.M.A., *Guides* (6th ed. 2009).

³ This appears to be a typographical error as the correct number is 8.75 as the calculation of 13.125 was based on 8.75 not 8.5.

By decision dated August 22, 2012, OWCP granted appellant a schedule award for 14 percent binaural hearing loss. The award covered a period of 28 weeks from April 10⁴ to October 22, 2012.

LEGAL PRECEDENT

The schedule award provision of FECA⁵ and its implementing regulations⁶ 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. 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 all claimants.⁷ The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁸ Effective May 1, 2009, OWCP adopted the sixth edition of the A.M.A., *Guides* as the appropriate edition for all awards issued after that date.⁹

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.¹⁰ Using the frequencies of 500, 1,000, 2,000 and 3,000 Hz, the losses at each frequency are added up and averaged.¹¹ 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.¹² The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.¹³ 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

⁴ OWCP noted the year as “2010” which appears to be a typographical error as the date of maximum medical improvement was April 10, 2012.

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404.

⁷ See *D.K.*, Docket No. 10-174 (issued July 2, 2010); *Michael S. Mina*, 57 ECAB 379 (2006).

⁸ *Supra* note 6; see *F.D.*, Docket No. 09-1346 (issued July 19, 2010); *Billy B. Scoles*, 57 ECAB 258 (2005).

⁹ Federal (FECA) Procedure Manual, Part 3 -- Claims, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 9, 2010). See *P.B.*, Docket No. 10-103 (issued July 23, 2010).

¹⁰ A.M.A., *Guides* 250 (6th ed. 2009).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

binaural hearing loss.¹⁴ The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.¹⁵

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.¹⁶ 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.¹⁷

ANALYSIS

OWCP accepted the claim for bilateral sensorineural hearing loss and bilateral hearing loss due to noise. By decision dated August 22, 2012, appellant was granted a schedule award for a 14 percent binaural hearing loss. The issue is whether he has established that he is entitled to more than a 14 percent binaural hearing loss. The Board finds that this case is not in posture for a decision.

OWCP referred appellant, together with a statement of accepted facts, to Dr. Lassen, a Board-certified otolaryngologist, for a second opinion evaluation. Dr. Lassen noted +3 tinnitus and diagnosed bilateral sensorineural hearing loss and noise-induced hearing loss. He opined that the hearing loss was due to appellant's workplace noise exposure and recommended hearing aids. Applying the April 10, 2012 audiometric data, Dr. Lassen calculated that appellant 16.125 percent monaural hearing impairment in the right ear and 19.875 percent monaural hearing impairment in the left ear. On the form report, he added 3 percent impairment for tinnitus, resulting in a total 16.125 percent monaural hearing impairment in the right ear (13.125 percent + 3 percent for tinnitus) and 19.875 percent monaural hearing impairment in the left ear (16.875 percent + 3 percent for tinnitus). Dr. Lassen calculated a binaural hearing impairment of 16.75 percent.

The Board finds this case is not in posture for a decision as clarification is required from Dr. Lassen as to why he added a three percent impairment for tinnitus. Regarding tinnitus, the A.M.A., *Guides* states, tinnitus in the presence of unilateral or bilateral hearing impairment may impair speech discrimination. Therefore, add up to five percent for tinnitus in the presence of measurable hearing loss if the tinnitus impacts the ability to perform ADLs.¹⁸ Although Dr. Lassen included three percent impairment for tinnitus in his monaural impairment

¹⁴ *Id.*

¹⁵ *J.H.*, Docket No. 08-2432 (issued June 15, 2009); *Thomas O. Bouis*, 57 ECAB 602 (2006); *Donald E. Stockstad*, 53 ECAB 301 (2002), *petition for recon. granted (modifying prior decision)*, Docket No. 01-1570 (issued August 13, 2002).

¹⁶ *See A.M.A., Guides* 249.

¹⁷ *Id.* *See also R.H.*, Docket No. 10-2139 (issued July 13, 2011); *Robert E. Cullison*, 55 ECAB 570 (2004).

¹⁸ *Supra* note 16. *See R.D.*, 59 ECAB 127 (2007); *David W. Ferrall*, 56 ECAB 362 (2005).

determinations, he did not describe how this condition impacted appellant's ADLs.¹⁹ Further, while Dr. Lassen noted +3 tinnitus in his report, he did not include tinnitus as a diagnosis.

It is well established that proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares the responsibility in the development of the evidence to see that justice is done. As OWCP undertook development of the evidence by referring appellant to a second opinion physician, it has the duty to secure an appropriate report addressing the relevant issues.²⁰ Because Dr. Lassen did not explain why he included tinnitus in his impairment rating for appellant's hearing loss, the case will be remanded to OWCP to request Dr. Lassen to provide a supplemental report explaining his rationale for giving a three percent impairment for tinnitus when he did not list it as a diagnosis. Following this and any necessary further development, OWCP shall issue a *de novo* decision relative to the extent and degree of appellant's hearing impairment.

CONCLUSION

The Board finds that this case is not in posture for a decision as it must be remanded to OWCP for further development.

¹⁹ *R.G.*, Docket No. 11-19 (issued August 3, 2011); *J.P.*, Docket No. 09-1520 (issued March 1, 2010).

²⁰ *Peter C. Belkind*, 56 ECAB 580 (2005).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 22, 2012 is set aside and the case remanded for further development consistent with the above opinion.

Issued: August 12, 2013
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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