United States Department of Labor
Employees' Compensation Appeals Board

D.S., Appellant	)	
and	)	**Docket No. 13-401**
	)	**Issued: August 26, 2013**
DEPARTMENT OF THE ARMY, U.S. ARMY TEST & EVALUATION COMMAND, White Sands, NM, 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 December 10, 2012 appellant filed a timely appeal from the November 8, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) regarding a schedule award and denying hearing aids. 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.

ISSUES

The issues are: (1) whether appellant has greater than a six percent binaural (both ears) loss of hearing for which he received a schedule award; if so, (2) whether OWCP properly identified the date of maximum medical improvement; and (3) whether OWCP abused its discretion by refusing to authorize hearing aids.

On appeal, appellant contends that the start date of his schedule award, July 7, 2011, is incorrect as he should be compensated as far back as 1979. He further contends that he needs

[1] 5 U.S.C. § 8101 *et seq.*

hearing aids due to his exposure high from 1976 to 2000 and to "on and off: high noise level on inspections from 2000 to 2011.

FACTUAL HISTORY

On May 19, 2011 appellant, a 58-year-old contract performance evaluator, filed an occupational disease claim (Form CA-2) alleging hearing loss due to exposure to high noise levels on a constant basis in the performance of duty over 35 years.

OWCP referred appellant to Dr. Ronald Blumenfeld, a Board-certified otolaryngologist, for a second opinion evaluation. On July 7, 2011 Dr. Blumenfeld reviewed appellant's medical records and history and conducted a physical examination including audiometric testing. A report of a July 7, 2011 audiogram performed by Celia Reyes, an audiologist, accompanied Dr. Blumenfeld's report. Testing of the right ear at frequency levels of 500, 1,000, 2,000 and 3,000 hertz revealed decibel losses of 25, 35, 40 and 50, and in the left ear decibel losses of 20, 25, 25 and 40. Dr. Blumenfeld diagnosed sensorineural hearing loss and occasional tinnitus. He found that appellant's conditions were causally related to exposure to loud noise in the workplace and recommended periodic testing and hearing aids when necessary.

On July 17, 2011 Dr. Morley Slutsky, an OWCP medical adviser, reviewed Dr. Blumenfeld's report and calculated a six percent permanent impairment in both ears under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). He noted that the date of maximum medical improvement was July 7, 2011, the date of Dr. Blumenfeld's examination and report. The medical adviser checked the block marked "no" in response to the question as to whether hearing aids were authorized. He indicated that appellant had mild hearing loss in both ears at 3,000 hertz, and in the right ear at 500 hertz through 2,000 hertz, the frequencies important for discrimination of speech. Dr. Slutsky found that appellant's speech discrimination scores were 100 percent and stated that his mild hearing loss "may not" require amplification.

By decision dated July 20, 2011, OWCP accepted the claim for binaural hearing loss.

On July 24, 2011 appellant filed a claim for a schedule award.

By decision dated November 8, 2012, OWCP granted a schedule award for six percent binaural hearing loss impairment, entitling appellant to 12 weeks of compensation. The period of the award ran from July 7 to September 28, 2011. Hearing aids were not authorized.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA[2] and its implementing regulations[3] 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

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404.

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.[4] The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[5] 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.[6]

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.[7] 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.[8] 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.[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]

ANALYSIS -- ISSUE 1

Appellant does not contest the percentage of impairment; however, he does contest the period of the schedule award, six weeks. He states that the schedule award should compensate him for all of his noise exposure in federal employment, as far back as 1979.

The Board finds that, based on the report of the second opinion physician, Dr. Blumenfeld, Dr. Slutsky properly applied the protocols of the sixth edition of the A.M.A., *Guides* to determine that appellant sustained a six percent binaural hearing loss causally related to factors of his federal employment. With regard to the period of the award, the Board notes

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

[5] 20 C.F.R. § 10.404; *see F.D.*, Docket No. 09-1346 (issued July 19, 2010); *Billy B. Scoles*, 57 ECAB 258 (2005).

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

[7] A.M.A., *Guides* 250 (6th ed. 2009).

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *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).

that section 8107(c)(13)(B) of FECA,[13] provides that for a total of 100 percent binaural employment-related loss of hearing, a claimant is entitled to 200 weeks of compensation. The medical evidence establishes that appellant sustained a six percent binaural loss of hearing. Multiplying 200 weeks times six percent, amounts to 12 weeks of compensation. OWCP awarded appellant six weeks of compensation. He is not entitled to a schedule award of greater amount.

LEGAL PRECEDENT -- ISSUE 2

FECA authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body.[14] Such loss or loss of use is known as permanent impairment. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.[15]

Only permanent impairment may be rated according to the A.M.A., *Guides* and only after the status of maximum medical improvement is determined. Impairment should not be considered permanent until a reasonable time has passed for the healing or recovery to occur. This will depend on the nature of underlying pathology, as the optimal duration for recovery may vary considerably from days to months. The clinical findings must indicate that date for the person to have reached maximum medical improvement.[16]

The period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of the injury. The question of when maximum medical improvement has been reached is a factual one which depends upon the medical findings in the record. The determination of such date is to be made in each case upon the basis of the medical evidence in that case.[17] The date of maximum medical improvement is usually considered to be the date of the medical examination that determined the extent of the impairment.[18]

[13] 5 U.S.C. § 8107(c)(13)(B).

[14] *Id*. at § 8107.

[15] 20 C.F.R. § 10.404. For impairment ratings calculated on and after May 1, 2009, OWCP should advise any physician evaluating permanent impairment to use the sixth edition of the A.M.A., *Guides*. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(a) (January 2010).

[16] A.M.A., *Guides* (6th ed. 2009); *see Orlando Vivens*, 42 ECAB 303 (1991) (a schedule award is not payable until maximum medical improvement -- meaning that the physical condition of the injured member of the body has stabilized and will not improve further -- has been reached).

[17] *See Marie J. Born*, 27 ECAB 623 (1976).

[18] *See Richard Larry Enders*, 48 ECAB 184 at n.12 (1996) (date of the audiologic examination).

ANALYSIS -- ISSUE 1

Appellant contests the date the schedule award began. The Board will therefore review whether OWCP properly determined the date of maximum medical improvement.

As noted, the date of maximum medical improvement is usually considered to be the date of the medical examination that determined the extent of the impairment.[19] OWCP used July 7, 2011 as the date of maximum medical improvement in its schedule award determination. That was the date Dr. Blumenfeld, the referral otolaryngologist, conducted a second opinion evaluation. That was also the date Ms. Reyes, an audiologist, performed an audiogram. On July 17, 2011 an OWCP medical adviser confirmed that the date of maximum medical improvement was July 7, 2011, the date of Dr. Blumenfeld's report and the audiologic examination. For these reasons, the Board finds that OWCP properly identified the date of maximum medical improvement as July 7, 2011 and that the period of his schedule award should begin that date.[20]

LEGAL PRECEDENT -- ISSUE 3

Section 8103(a) 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 the Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of any disability or aid in lessening the amount of any monthly compensation.[21] OWCP must therefore exercise discretion in determining whether the particular service, appliance or supply is likely to affect the purposes specified in FECA.[22]

ANALYSIS -- ISSUE 3

In his July 7, 2011 report, Dr. Blumenfeld recommended periodic testing and hearing aids when necessary for appellant's hearing loss. After reviewing Dr. Blumenfeld's findings and accompanying audiogram, OWCP's medical adviser checked the block marked "no" in response to the question as to whether hearing aids were authorized. He indicated that appellant had mild hearing loss in both ears at 3,000 hertz, and in the right ear at 500 hertz through 2,000 hertz, the frequencies important for discrimination of speech. The medical adviser found that appellant's speech discrimination scores were 100 percent and opined that his mild hearing loss may not require amplification.

[19] *Id.*

[20] *Cf. K.M.*, Docket No. 12-1137 (issued October 19, 2012) (where the Board found that OWCP improperly identified the date of maximum medical improvement and, thus, modified the date to be when the referral physician examined appellant for the purpose of evaluating permanent impairment, not the date he recalculated his rating under the sixth edition of the A.M.A., *Guides*).

[21] 5 U.S.C. § 8103(a).

[22] *See Marjorie S. Geer*, 39 ECAB 1099 (1988) (OWCP has broad discretionary authority in the administration of FECA and must exercise that discretion to achieve the objectives of section 8103).

OWCP's procedure manual provides that hearing aids will be authorized when hearing loss has resulted from an accepted injury or disease if the attending physician so recommends.[23] In this case, Dr. Blumenfeld recommended hearing aids "when necessary." This statement is equivocal. The Board notes that OWCP's medical adviser's opinion that appellant's hearing loss "may not" require amplification was also speculative and equivocal in nature.[24]

Once OWCP starts to procure medical opinion, it must do a complete job.[25] It has the responsibility to obtain from its referral physician an evaluation that will resolve the issue involved in the case.[26] Accordingly, the Board will remand the case to OWCP for a supplemental opinion from Dr. Blumenfeld. Following this and any further development of the evidence, OWCP shall then properly exercise its discretion and issue a *de novo* decision on the issue of whether hearing aids should be authorized.[27]

CONCLUSION

The Board finds that appellant has no greater than a six percent binaural loss of hearing for which he received a schedule award and that OWCP properly identified the date of maximum medical improvement. The Board further finds that the case is not in posture for decision as to whether hearing aids should be authorized for appellant's employment-related hearing loss.

[23] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Services and Supplies*, Chapter 3.400.3(d)(2) (October 1995); *see D.C.*, Docket No. 06-883 (issued August 1, 2006).

[24] Medical opinions that are speculative or equivocal in character are of little probative value. *See Kathy A. Kelley*, 55 ECAB 206 (2004).

[25] *K.P.*, Docket No. 13-676 (issued June 11, 2013); *see also William N. Saathoff*, 8 ECAB 769 (1956).

[26] *K.P., supra* note 25; *Mae Z. Hackett*, 34 ECAB 1421, 1426 (1983).

[27] *See J.D.*, Docket No. 07-720 (issued June 19, 2007).

ORDER

IT IS HEREBY ORDERED THAT the November 8, 2012 decision of the Office of Workers' Compensation Programs is affirmed as to the schedule award and the date of maximum medical improvement; the case is remanded to OWCP for further development on the issue of whether hearing aids should be authorized.

Issued: August 26, 2013
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