

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

J.R., Appellant)
)
)
and) **Docket No. 13-1845**
) **Issued: December 23, 2013**
)
DEPARTMENT OF HOMELAND SECURITY,)
CUSTOMS & BORDER PROTECTION,)
San Antonio, TX, Employer)

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 2, 2013 appellant filed a timely appeal from a February 6, 2013 schedule award decision of the Office of Workers' Compensation Programs (OWCP). 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 sustained more than an eight percent binaural hearing loss, for which he received a schedule award.

FACTUAL HISTORY

On December 2, 2011 appellant, then a 52-year-old customs and border protection officer, filed an occupational disease claim (Form CA-2) alleging hearing loss as a result of high

¹ 5 U.S.C. § 8101 *et seq.*

levels of noise exposure while working at a seaport boarding vessels and working in cargo. He became aware of his condition and of its relationship to his employment on December 1, 2011. Appellant notified his supervisor on December 2, 2011.

By letter dated December 16, 2011, OWCP requested additional factual and medical evidence from appellant. It afforded him 30 days to submit additional evidence. OWCP also requested that appellant's employing establishment respond to its inquiries regarding his employment duties.

In an undated letter, appellant stated that he had worked for the employing establishment since February 10, 1997, in passenger processing and cargo processing. While working in passenger processing, he was exposed to loud noise from vehicles and buses and was not provided hearing protection. While working in cargo processing, appellant was exposed to loud noise from tractor trailers, airplanes, rail cars and engine rooms in ocean tugs and fishing boats. He had no history of hearing problems and was still exposed to noise at work. Appellant frequently asked members of his family to repeat themselves when they spoke to him at a normal volume, raised the volume on his television to a level that was too loud for his wife or others in the room and experienced ringing in both ears. He had no hobbies involving exposure to loud noise.

Appellant submitted audiogram results from examinations performed on August 11 and September 13, 2010 from a person with an illegible signature. Audiometric testing obtained on August 11, 2010 at the frequency levels of 500, 1,000, 2,000 and 3,000 hertz (Hz) revealed the following: left ear -- 5, 10, 15 and 55 decibels (dBs); right ear -- 10, 5, 35 and 70 dBs. Audiometric testing obtained on September 13, 2010 revealed the following: left ear -- 0, 10, 10 and 55 dBs; right ear -- 0, 5, 40 and 65 dBs.

By letters dated March 8 and 13, 2012, OWCP referred appellant to Dr. Gregory S. Rowin, a Board-certified otolaryngologist and osteopath, for measurements of appellant's current hearing acuity. It included a statement of accepted facts regarding appellant's federal employment history.

In a report dated April 17, 2012, Dr. Rowin reviewed appellant's history of occupational exposure to hazardous noise and performed an otologic evaluation. Audiometric testing obtained by Charles Butler, M.A., on April 17, 2012 at the frequency levels of 500, 1,000, 2,000 and 3,000 Hz revealed the following: left ear -- 5, 10, 15 and 50 dBs; right ear -- 5, 15, 50 and 70 dBs. He noted that the testing occurred at 2:35 p.m. and that the time of appellant's last exposure to loud noise was at least 16 hours before the examination. The audiological equipment had been last calibrated on October 13, 2011. Dr. Rowin determined that appellant sustained mild-to-moderate high-frequency sensorineural hearing loss of the left ear and mild-to-moderately severe high-frequency sensorineural hearing loss of the right ear, with poor speech discrimination. He found that appellant's hearing loss was due to noise exposure in his federal employment, writing that the pattern of appellant's audiogram was consistent with noise exposure. Dr. Rowin also stated that hearing aids were recommended although the left ear was a borderline candidate. In calculating appellant's binaural hearing impairment, he added five percent to appellant's percentage of impairment for tinnitus impacting his ability to perform activities of daily living.

On May 17, 2012 Dr. Ronald H. Blum, a district medical adviser, calculated that, under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), appellant had 7.5 percent ratable binaural hearing loss; 2.5 percent binaural loss and 5 percent for tinnitus. He concluded that noise exposure in the course of appellant's federal employment was sufficient to cause appellant's hearing loss. Hearing aids were authorized.

By decision dated June 4, 2012, OWCP accepted appellant's claim for binaural hearing loss. On September 20, 2012 appellant filed a claim for a schedule award.

By decision dated February 6, 2013, OWCP granted appellant a schedule award for 7.5 percent binaural hearing loss. The award ran for 16 weeks from April 17 to August 6, 2012.

LEGAL PRECEDENT

The schedule award provision of FECA² and its implementing regulations³ 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.⁴ The A.M.A., *Guides* have been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁵

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.⁶ 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 dBs is deducted because, as the A.M.A., *Guides* point out, losses below 25 dBs 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. 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 binaural hearing loss. The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.⁷

It is well established that the period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of the accepted

² *Id.* at § 8107.

³ 20 C.F.R. § 10.404.

⁴ *See D.K.*, Docket No. 10-174 (issued July 2, 2010); *Michael S. Mina*, 57 ECAB 379, 385 (2006).

⁵ *Supra* note 3; *see F.D.*, Docket No. 09-1346 (issued July 19, 2010).

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

⁷ *J.H.*, Docket No. 08-2432 (issued June 15, 2009); *J.B.*, Docket No. 08-1735 (issued January 27, 2009).

employment injury. The Board has explained that maximum medical improvement means that the physical condition of the injured member of the body has stabilized and will not improve further. The determination of whether maximum medical improvement has been reached is based on the probative medical evidence of record and is usually considered to be the date of the evaluation by the attending physician which is accepted as definitive by OWCP.⁸

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.⁹ 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.¹⁰

ANALYSIS

The Board finds that appellant has eight percent binaural hearing loss.

Appellant's claim of occupational hearing loss was accepted by OWCP based on the reports of Dr. Rowin and Dr. Blum, a district medical adviser. OWCP's standardized procedures were applied to Dr. Rowin's April 17, 2012 report. Test results at the frequency levels recorded at 500, 1,000, 2,000 and 3,000 Hz on the left revealed decibel losses of 5, 10, 15 and 50 dBs respectively, for a total of 80 dBs. This figure, divided by four, results in an average hearing loss of 30 dBs. The average of 25 dBs, when reduced by the 25 dB fence and multiplied by 1.5, results in a zero percent monaural hearing loss of the left ear. Testing for the right ear at the frequency levels of 500, 1,000, 2,000 and 3,000 Hz revealed dBs losses of 5, 15, 50 and 70 dBs respectively, for a total loss of 140 dBs. One hundred forty dBs divided by four results in an average of 35 dBs, which when reduced by the 25 dB fence and multiplied by 1.5, results in a 15 percent monaural hearing loss of the right ear. Multiplying the lesser loss of zero dB by five arrives at a product of zero dB. Adding this figure to the 15 percent hearing loss for the right ear obtains a total of 15 percent. Dividing this total by six in order to calculate a binaural hearing loss yields a 2.5 percent binaural impairment. Adding five percent to appellant's impairment due to tinnitus, as recommended by Dr. Rowin, results in a final figure of 7.5 percent binaural hearing loss.

There is no other medical evidence of record establishing greater loss under OWCP procedures. The record of audiometric tests performed on August 11 and September 13, 2010 does not meet the requirements of evidence to be used in evaluating occupational hearing loss

⁸ *Mark A. Holloway*, 55 ECAB 321, 325 (2004).

⁹ *See A.M.A., Guides* 249 (6th ed. 2009).

¹⁰ *Id.* *See also R.O.*, Docket No. 13-1036 (issued August 28, 2013); *R.H.*, Docket No. 10-2139 (issued July 13, 2011); *Robert E. Cullison*, 55 ECAB 570, 573 (2004).

claims as defined in the Federal (FECA) Procedure Manual, because the reports merely provide the results of each test.¹¹

The Board notes that OWCP's procedures provide that, in computing binaural hearing loss, percentages should not be rounded until the final percent for award purposes is obtained, and fractions should be rounded down from .49 or up from .50.¹² Dr. Blum did not round up from 7.5 percent binaural hearing loss to 8 percent in his report. The 7.5 percent figure was listed on OWCP's schedule award decision of February 6, 2013, but this error was harmless. In calculating the number of weeks of entitlement and the gross amount of the schedule award, OWCP paid eight percent. The maximum number of weeks of compensation for binaural hearing loss is 200 weeks.¹³ Eight percent of 200 weeks is 16 weeks of compensation, the amount awarded in this case.¹⁴

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.

CONCLUSION

The Board finds that appellant has eight percent binaural hearing loss.

¹¹ The requirements of the evidence to be used in evaluating occupational hearing loss claims are defined by the Federal (FECA) Procedure Manual, which provides: that the employee should undergo audiological evaluation and otological examination; that the audiological testing precede the otologic examination; that the audiological evaluation and otologic examination be performed by different individuals as a method of evaluating the reliability of the findings; that the clinical audiologist and otolaryngologist be certified; that all audiological equipment authorized for testing meet the calibration protocol contained in the accreditation manual of the American Speech and Hearing Association; that the audiometric test results include both bone conduction and pure-tone air conduction thresholds; speech reception thresholds and monaural discrimination scores; and that the otolaryngologist's report include the date and hour of examination; date and hour of the employee's last exposure to loud noise; and a rationalized medical opinion regarding the relationship. Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.600, *Requirements for Medical Reports*, Exhibit No. 4 (April 1996).

¹² Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4.b(2)(b) (March 2005).

¹³ 5 U.S.C. § 8107(c)(13)(b).

¹⁴ The maximum number of weeks of compensation for hearing loss in one ear is 52 weeks. 5 U.S.C. § 8107(c)(13)(a). Appellant's monaural hearing loss of the right ear is 15 percent. Fifteen percent of 52 weeks equals 7.8 weeks of compensation. The left ear's ratable loss of zero percent equals zero weeks of compensation. Because the calculations for binaural hearing loss result in greater compensation than calculations for monaural hearing loss, OWCP properly used the binaural hearing loss calculation. See *W.Z.*, Docket No. 11-1371 (issued January 6, 2012); *Reynaldo R. Lichtenberger*, 52 ECAB 462, 464 (2001).

ORDER

IT IS HEREBY ORDERED THAT the February 6, 2013 merit decision of the Office of Workers' Compensation Programs is affirmed, as modified.

Issued: December 23, 2013
Washington, DC

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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