

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

L.W., Appellant

and

**DEPARTMENT OF THE ARMY, Anniston, AL,
Employer**

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**Docket No. 13-98
Issued: July 5, 2013**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 18, 2012 appellant filed a timely appeal from a September 28, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his claim for schedule award and hearing aids. 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 the case.

ISSUES

The issues are: (1) whether OWCP properly determined that appellant's hearing impairment was not ratable; and (2) whether it abused its discretion by refusing to authorize hearing aids.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On April 2, 2012 appellant, then a 64-year-old electronics industrial controls mechanic, filed an occupational disease claim (Form CA-2) alleging that he sustained a loss of hearing in both ears due to exposure to high noise levels in the performance of duty. He explained that he worked with air tools, grinders, air drills, skill saws, paint guns and impact wrenches. Appellant first became aware of his hearing loss and related it to his employment on September 11, 2006.

In response to a developmental letter from OWCP, appellant submitted his statement of employment history, personnel action forms, position descriptions, as well as audiometric diagnostic results and medical reports from the employing establishment. A history of tinnitus is related in a December 5, 2011 report.

These documents included results from an audiometric examination performed on August 29, 2011. This test result indicated that testing at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed the following: right ear 10, 0, 15 and 40 decibels; left ear 10, 15, 25 and 35 decibels.

Finding that the evidence appellant submitted was insufficient to establish his claim, OWCP referred appellant and a statement of accepted facts to Dr. Dennis G. Pappas, Jr., a Board-certified otolaryngologist, for an audiometric examination and a second opinion evaluation. Lynn Carmichael, an audiologist, performed audiometric testing of appellant on September 3, 2010. Testing at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed the following: right ear 10, 15, 15 and 40 decibels; left ear 10, 10, 25 and 40 decibels. Dr. Pappas concluded that appellant had sustained sensorineural bilateral hearing loss as a result of his federal employment. He rationalized this conclusion by stating that the sensorineural hearing loss was a symmetric loss with a matching audiometric pattern, consistent with noise exposure. Dr. Pappas also opined that the hearing loss was not ratable as the extent of hearing loss was zero percent after deduction of the 25 decibel fence. However, he recommended hearing aids for appellant's condition.

OWCP notified appellant that his claim was accepted for bilateral sensorineural hearing loss due to workplace exposure to noise, and his case was forwarded to the district medical adviser (DMA) for assessment of the percentage of permanent hearing loss.

On September 27, 2010 an OWCP medical adviser reviewed Dr. Pappas' report and the audiometric test of August 15, 2012. The medical adviser concluded that appellant had a noise-induced sensorineural hearing loss which is not ratable in either ear. In accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*), appellant had a zero percent binaural sensorineural hearing loss, and that the date of maximum medical improvement was August 15, 2012. In addition, by checkmark the DMA denied authorization for hearing aids.

In its September 28, 2012 decision, OWCP determined that appellant was not entitled to a schedule award of compensation, and that the weight of the medical evidence established that he would not benefit from hearing aids.

LEGAL PRECEDENT -- ISSUE 1

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

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 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. 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.⁵

Further, 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.⁶

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404. Effective May 1, 2009, OWCP began using the A.M.A., *Guides* (6th ed. 2009).

⁴ *Id.*

⁵ *J.H.*, Docket No. 08-2432 (issued June 15, 2009); *J.B.*, Docket No. 08-1735 (issued January 27, 2009).

⁶ *Joshua A. Holmes*, 42 ECAB 231 n.2 (1990).

ANALYSIS -- ISSUE 1

As an initial matter, the Board finds that OWCP properly relied on the test results of the second opinion doctor, which met all the calibration protocol requirements demanded by the Federal (FECA) Procedure Manual.⁷

An OWCP medical adviser applied OWCP's standardized procedures to the August 15, 2012 audiogram performed at the request of Dr. Pappas. Test result for the right ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed decibel losses of 10, 15, 15 and 40 decibels, respectively. These decibels were totaled at 80 and were divided by 4 to obtain an average hearing loss at those cycles of 20 decibels. The average of 20 decibels was then reduced by 25 decibels (the first 25 decibels were discounted as discussed above) to equal 0, which was multiplied by the established factor of 1.5 to compute a 0 percent monaural loss of hearing for the right ear.

Testing for the left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second revealed decibel losses of 10, 10, 25 and 40, respectively. These decibels were totaled at 85 and were divided by 4 to obtain the average hearing loss at those cycles of 21.25 decibels. The average of 21.25 decibels was then reduced by 25 decibels (the first 25 decibels were discounted as discussed above) to equal 0 which was multiplied by the established factor of 1.5 to compute a 0 percent hearing monaural loss for the left ear. As such, the binaural loss is zero percent.

While medical reports of record mention a history of tinnitus, the A.M.A., *Guides*, allow for compensation of up to five percent for tinnitus in the presence of measurable hearing loss, if the tinnitus impacts the ability to perform the activities of daily living.⁸ As appellant does not have measurable hearing loss, he is not entitled to an additional award for tinnitus.

LEGAL PRECEDENT -- ISSUE 2

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.⁹ OWCP must therefore exercise discretion in determining whether the particular service, appliance or supply is likely to affect the purposes specified in FECA.¹⁰

⁷ The Board finds that the August 29, 2011 audiogram, as well as the other audiograms of record, yield the same result.

⁸ See *Leslie M. Mahin*, 55 ECAB 311 (2004).

⁹ 5 U.S.C. § 8103(a).

¹⁰ *Marjorie S. Geer*, 39 ECAB 1099 (1988); see also *W.S.*, Docket No.11-707 (issued September 28, 2011).

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 loss exists when supported by medical rationale.¹¹

ANALYSIS -- ISSUE 2

The Board finds that the case is not in posture for decision as to whether hearing aids should be authorized. Dr. Pappas, OWCP's second opinion physician, recommended in his August 15, 2012 report that hearing aids should be authorized. He explained that while appellant's employment-related hearing loss was not ratable, authorization of hearing aids was appropriate. OWCP's medical adviser noted by check mark that hearing aids should not be authorized, but he did not provide any explanation of this opinion. As previously noted, appellant is eligible for hearing aids if he has sustained some hearing loss causally related to his employment, even if the hearing loss is not ratable.

The Board notes that proceedings under FECA are not adversarial in nature. OWCP shares in the responsibility to develop the evidence and has an obligation to see that justice is done.¹² Accordingly, the case will be remanded to OWCP for further development on the question of whether appellant should be authorized hearing aids. Following this and such other development as is deemed necessary, OWCP shall issue an appropriate decision.

CONCLUSION

The Board finds that appellant did not sustain a permanent hearing impairment greater than zero percent as dictated by the A.M.A., *Guides*, and that OWCP improperly denied appellant's request for hearing aids.

¹¹ A.S., Docket No. 10-2048 (issued June 7, 2011); *see also* F.D., Docket No. 10-1175 (issued January 4, 2011) (OWCP's reliance on the DMA's conclusion, which was not supported by medical rationale, that appellant did not qualify for hearing aids was erroneous); Federal (FECA) Procedural Manual, Part 3 -- Medical, *Medical Services and Supplies*, Chapter 3.400.3(d)(2) (March 2010).

¹² *Id.*

ORDER

IT IS HEREBY ORDERED THAT the September 28, 2012 decision of the Office of Workers' Compensation Programs is affirmed, in part, and set aside and remanded in part.

Issued: July 5, 2013
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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