

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

H.B., Appellant

and

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

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**Docket No. 13-332
Issued: March 29, 2013**

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 28, 2012 appellant, through his representative, filed a timely appeal from the October 17, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP), which awarded schedule compensation. 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 22 percent binaural (both ears) hearing loss.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 1, 2012 appellant, a 72-year-old toolmaker, filed an occupational disease claim alleging that his loss of hearing was a result of his federal employment. OWCP accepted his claim for bilateral (binaural) sensorineural hearing loss. Appellant claimed a schedule award.

Dr. Eugenia M.G. Gray, a Board-certified otolaryngologist and OWCP referral physician, evaluated appellant's hearing. She noted that appellant had tinnitus "just once in a while." On the right, hearing thresholds at 500, 1,000, 2,000 and 3,000 cycles per second were 20, 35, 65 and 60 decibels respectively. On the left, they were 20, 20, 50 and 65. Dr. Gray calculated a 30 percent hearing impairment on the right and a 20.625 percent impairment on the left. She added a one percent impairment on each side for tinnitus. Dr. Gray rated a 23 percent binaural impairment.

An OWCP medical adviser reviewed Dr. Gray's evaluation and determined that appellant had a 22 percent binaural hearing loss. He did not add a percent on each side for tinnitus.

On October 17, 2012 OWCP issued a schedule award for a 22 percent binaural hearing loss.

Appellant's representative argues on appeal that OWCP's medical adviser excluded the rating for tinnitus without explanation. Thus, appellant's compensable loss should be 23 percent.

LEGAL PRECEDENT

The schedule award provision of FECA² and the 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. FECA, however, does not specify the manner in which the percentage of loss shall be determined. The method used in making such a determination is a matter that rests within the sound discretion of OWCP.⁴

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. OWCP has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating schedule losses.⁵ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁶

² *Id.* at § 8107.

³ 20 C.F.R. § 10.404.

⁴ *Linda R. Sherman*, 56 ECAB 127 (2004); *Danniel C. Goings*, 37 ECAB 781 (1986).

⁵ *Supra* note 3; *Ronald R. Kraynak*, 53 ECAB 130 (2001).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010).

The criteria for evaluating permanent hearing loss are found in Chapter 11 of the sixth edition of the A.M.A., *Guides*. Hearing thresholds at 500, 1,000, 2,000 and 3,000 cycles per second are averaged for each ear. Then, a “fence” of 25 decibels is deducted because, according to audiometric standards, average losses below 25 decibels result in no change in the ability to hear everyday speech under everyday listening conditions. The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss. Binaural loss is determined by multiplying the lesser monaural loss by five, adding the greater loss and dividing the total by six.⁷ The Board has concurred in OWCP’s adoption of this standard for evaluating hearing loss.⁸

If tinnitus interferes with activities of daily living, including sleep, reading (and other tasks requiring concentration), enjoyment or quiet recreation and emotional well-being, up to five percent may be added to a measurable binaural hearing impairment.⁹

ANALYSIS

According to the audiometry obtained for Dr. Gray, the referral otolaryngologist, appellant’s hearing thresholds were 20, 35, 65 and 60 decibels on the right and 20, 20, 50 and 65 on the left. These total 180 and 155 decibels, respectively, for averages of 45 and 38.75. Subtracting the “fence” of 25 decibels leaves 20 and 13.75 decibels. Multiplying by 1.5 to determine monaural impairment yields percentage losses of 30 on the right and 20.625 on the left.

To this point in the calculation, there is no dispute, but it is here that Dr. Gray added, without explanation, a one percent loss to each side for tinnitus. She noted that appellant had tinnitus “just once in a while.”¹⁰ Dr. Gray gave no indication that appellant’s tinnitus interfered with his activities of daily living and there appears to be no basis under the sixth edition of the A.M.A., *Guides* to allow an additional percentage.

Appellant’s representative contends that OWCP’s medical adviser excluded, likewise without explanation, the one percent on each side Dr. Gray awarded for tinnitus. As noted, Dr. Gray did not address how appellant’s occasional tinnitus interfered with his sleep or concentration or enjoyment of quiet recreation or emotional well-being, or to what extent.

To determine appellant’s binaural hearing loss, the lesser loss, 20.625, is multiplied by 5 and then added to the greater loss, 30. This result, 133.125, is divided by 6 for a binaural hearing

⁷ A.M.A., *Guides* 250-51 (6th ed. 2009).

⁸ *E.g.*, *G.D.*, Docket No. 12-1633 (issued January 25, 2013).

⁹ A.M.A., *Guides* 249.

¹⁰ *See id.* (although nearly everyone has mild tinnitus momentarily at some point in life, continuous tinnitus is abnormal).

loss estimate of 22.1875 percent, which rounds to 22.¹¹ This is what OWCP awarded. The Board will affirm OWCP's October 17, 2012 decision.

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 no more than a 22 percent binaural hearing loss.

ORDER

IT IS HEREBY ORDERED THAT the October 17, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 29, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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

¹¹ Percentages are not rounded until the final percent for award purposes is obtained. Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4.b(2) (January 2010).