United States Department of Labor
Employees' Compensation Appeals Board

J.B., Appellant	)	
and	)	**Docket No. 13-1057**
	)	**Issued: November 22, 2013**
DEPARTMENT OF THE ARMY, U.S. ARMY CORPS OF ENGINEERS, Irvington, AL, Employer	)	

Appearances:
Capp Taylor, P.A., 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 March 28, 2013 appellant, through his representative, filed a timely appeal from a February 27, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his claim for a schedule award for binaural hearing loss. 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.

ISSUE

The issue is whether appellant sustained a ratable binaural hearing loss.

FACTUAL HISTORY

On February 8, 1999 appellant filed an occupational disease claim alleging hearing loss due to factors of his federal employment. He was employed as a survey boat operator with the

[1] 5 U.S.C. § 8101 *et seq.*

Army Corps of Engineers for 27 years when he filed his claim. Appellant worked on boats, dredges, towboats and survey boats in plants, exposing him to high levels of vibration and noise from engines, which resulted in his gradual hearing loss. On the reverse side of the claim form, his supervisor indicated that appellant was last exposed to high noise levels on September 9, 1998. Appellant was thereafter assigned to light-duty tasks of a clerical nature due to a knee condition.

By decision dated June 7, 1999, OWCP accepted that appellant sustained a binaural hearing loss due to occupational noise exposure. It found that he was not entitled to a schedule award because his hearing loss was not severe enough to be considered ratable.

Appellant filed a timely appeal of that decision on September 9, 1999. By decision dated August 21, 2000, the Board affirmed OWCP's June 7, 1999 decision. The facts and history contained in the prior appeal are incorporated by reference.[2]

On September 22, 2011 appellant filed a request for schedule award compensation based on his accepted binaural hearing loss. Along with his request, he submitted a report dated December 21, 2009, in which Dr. P. Van Crocker, an otolaryngologist, noted tinnitus and gradual loss of hearing; referenced a January 21, 1999 audiogram performed in the same office that stated that appellant had bilateral moderate severe high frequency sensorineural hearing loss and recommended the use of hearing aids. Appellant also included with his request a report dated August 26, 2011, containing Dr. Van Crocker's analysis of a more recent audiogram test performed on July 28, 2011, in which Dr. Van Crocker assessed appellant's binaural hearing impairment at 55.9 percent and stated that both appellant's tinnitus and his binaural hearing impairment were caused by workplace noise exposure.

Dr. A.E. Anderson, Jr., an OWCP district medical adviser (DMA) reviewed appellant's claim on October 5, 2011. He stated that the July 28, 2011 audiogram showed substantial worsening of hearing loss such that it was ratable. Dr. Anderson also found that the worsening of appellant's hearing loss was not work related, because his last exposure to hazardous noise was on September 9, 1998. He stated that there was no medical evidence supporting progressive hearing loss due to noise once exposure to noise has ended.

On December 15, 2011 OWCP determined that there was a conflict of medical opinion between appellant's personal physician, Dr. Van Crocker and Dr. Anderson. It referred appellant to Dr. John Sobiesk, a Board-certified otolaryngologist, for a referee medical examination to resolve the conflict of medical opinion as to whether there was additional noise-induced hearing loss as a result of appellant's federal employment.

On June 5, 2012 Dr. Sobiesk reported that appellant experienced hearing loss due to long-term noise exposure during his federal employment. He stated that there was a marked decline in appellant's hearing since the last audiogram performed on March 23, 1999; that the workplace exposure was sufficient as to intensity and duration to have caused the loss in question; and that appellant's sensorineural hearing loss was attributable in part or in whole to his federal employment, based on appellant's previous history, testing and the July 28, 2011 audiogram.

[2] Docket No. 1999-2208 (issued August 21, 2000).

On July 17, 2012 the claims examiner sent a copy of Dr. Sobiesk's report to Dr. Eric Puestow, a second DMA, who determined on July 19, 2012 that the October 5, 2011 report from Dr. Anderson was correct and that appellant's hearing loss after March 23, 1999 was not attributable to appellant's federal employment. On July 27, 2012 OWCP requested clarification from Dr. Sobiesk as to whether appellant's additional hearing loss after March 23, 1999 was causally related to his workplace noise exposure.

By report dated August 21, 2012, Dr. Sobiesk found that appellant's additional hearing loss subsequent to his March 23, 1999 audiogram examination was attributable to his prior work-related noise exposure. The audiogram contained a 4,000 hertz (Hz) noise notch typical of noise-induced hearing loss.

On September 7, 2012 the claims examiner referred Dr. Sobiesk's reports to the DMA for evaluation. On September 11, 2012 the DMA and Dr. Sobiesk did not address the correct issue as to whether appellant's hearing loss after the March 23, 1999 audiogram examination was caused by exposure to noise due to his federal employment, noting that his federal employment after the examination did not involve exposure to high noise levels and that there are no documented studies supporting progressive deafness due to noise exposure. On September 18, 2012 OWCP requested that Dr. Sobiesk clarify his medical opinion in support of causal relationship. Dr. Sobiesk did not reply.

On November 6, 2012 OWCP referred appellant to Dr. Michael Ellis, a Board-certified otolaryngologist, for a second referee evaluation. It determined that a new examination was required because Dr. Sobiesk did not respond to requests to clarify his opinion.

On January 16, 2013 Dr. Ellis examined appellant and determined that he sustained hearing loss due to long-term noise exposure during his federal employment; but there was a relatively small difference between the results of appellant's audiogram of March 23, 1999 to the audiogram of January 16, 2013. In response to the query of whether the workplace exposure was sufficient as to intensity and duration to have caused the loss in question, Dr. Ellis stated that it was "very likely based on the history patient provided of loud noise and daily time of exposure -- but no measuring data included in statement of facts." As to whether the sensorineural hearing loss seen was, in part or all, due to the noise exposure in appellant's federal civilian employment, Dr. Ellis stated that "almost all" was due to his employment, "although some minor worsening since 1999" was "due to normal aging (presbycusis.)" In a January 16, 2013 progress note, Dr. Ellis opined that appellant's hearing remained essentially the same as it was at the time of the March 23, 1999 audiogram, such that the permanent, functional loss of hearing in both ears resulted in no impairment based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) sixth edition. Any additional minor hearing change would be attributed to the normal aging process, presbycusis or test-retest reliability.

By decision dated February 27, 2013, OWCP denied appellant's claim for schedule award. It found that Dr. Ellis represented the weight of medical evidence.

LEGAL PRECEDENT

The schedule award provision of FECA[3] and its implementing regulations[4] 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.[5] The A.M.A., *Guides* have been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[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 Hz, 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* point 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 binaural hearing loss. The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.[8]

The Board has long recognized that, if a claimant's employment-related hearing loss worsens in the future, he or she may apply for an additional schedule award for any increased permanent impairment. The Board has also recognized that a claimant may be entitled to a schedule award for increased hearing loss, even after exposure to hazardous noise has ceased, if causal relationship is supported by the medical evidence of record.[9] In *Adelbert E. Buzzell*,[10] the Board cautioned against OWCP's medical adviser providing a blanket unrationalized statement that hearing loss does not progress following the cessation of hazardous noise exposure.[11]

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[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404.

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

[6] *Supra* note 4; *see F.D.*, Docket No. 09-1346 (issued July 19, 2010).

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

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

[9] *J.R.*, 59 ECAB 710, 713 (2008).

[10] 34 ECAB 96 (1982).

[11] The Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4(b)(3) (January 2010) notes that, if the progression of a noise-induced hearing loss is to be denied, the medical adviser must provide a well-reasoned opinion.

If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination and resolve the conflict of medical evidence.[12] This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[13] When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[14]

If a referee physician's opinion requires clarification or elaboration, OWCP must secure a supplemental report that corrects the defect in the original opinion; if the referee is unwilling or unable to do so, OWCP must refer the case to another impartial specialist.[15]

ANALYSIS

The Board finds that this case is not in posture for decision.

In 1999, OWCP accepted that appellant sustained a binaural hearing loss. It initially denied a schedule award based upon a finding that his hearing loss was not ratable. Appellant filed a claim for schedule award in September 2011, alleging that his employment-related hearing loss had worsened. OWCP determined that a conflict existed in the medical opinion evidence between his physician, Dr. Van Crocker and Dr. Anderson as to whether appellant sustained a work-related hearing loss. Appellant was initially referred to Dr. Sobiesk for an impartial medical evaluation; but the physician did not respond to a request to clarify his opinon. OWCP then referred him for an impartial medical evaluation with Dr. Ellis.

In a January 16, 2013 report, Dr. Ellis responded to the question of whether the workplace exposure was sufficient as to intensity and duration to have caused the hearing loss in question. He stated that it was "very likely based on the history patient provided of loud noise and daily time of exposure -- but no measuring data included in statement of facts." In response to whether the sensorineural hearing loss seen was, in part or all, due to noise exposure encountered in appellant's federal civilian employment, Dr. Ellis stated that "almost all" was due to such exposure, "although some minor worsening since 1999" was "due to normal aging (presbycusis.)"

When OWCP obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, it must secure a supplemental report from the specialist to correct the defect in his

[12] 5 U.S.C. § 8123(a).

[13] 20 C.F.R. § 10.321; *R.C.*, 58 ECAB 238 (2006).

[14] *K.B.*, Docket No. 13-443 (issued May 10, 2013); *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

[15] *A.G.*, Docket No. 12-1076 (issued July 5, 2013); *see supra* note 11 at *Developing and Evaluating Medical Evidence*, Chapter 2.810.11(e) (June 2012); *see Phillip H. Conte*, 56 ECAB 213 (2004).

original report.[16] Here, Dr. Ellis' opinion requires clarification, because his report is inconsistent as to whether appellant's hearing loss since 1999 was employment related. He states both that workplace exposure "very likely" caused the loss in question and that "some minor worsening since 1999" was "due to normal aging (presbycusis.)" Dr. Ellis did not clearly explain whether the minor worsening since 1999 attributable to normal aging constituted the whole of appellant's increased hearing loss since that year or whether it constituted only part.

On remand, OWCP should secure a supplemental report from Dr. Ellis to correct the defect in his January 16, 2013 report. Following this and any other development deemed necessary, it shall issue an appropriate decision on appellant's entitlement to a schedule award.

On appeal, counsel argues that the claims examiner sent appellant to a second referee examination without just cause. FECA procedure manual provides that if a referee physician's opinion lacks rationale or fails to address the specified medical issue or if a request for clarification goes unanswered, the claims examiner may request a new referee examination.[17] Dr. Sobiesk's clarification on August 21, 2012 explained that appellant's additional hearing loss subsequent to his March 23, 1999 audiogram examination was attributable to his prior work-related noise exposure and that his audiogram contained a 4,000 Hz noise notch typical of noise-induced hearing loss. The DMA determined that Dr. Sobiesk did not address the correct issue as to whether claimant's hearing loss after the March 23, 1999 audiogram examination was caused by exposure to noise due to his federal employment.

Dr. Sobiesk was requested to provide further clarification of his opinion regarding causal relationship, but he did not respond. This necessitated a new referee examination. In *Joseph R. Alsing*,[18] the Board held that it was improper for the claims examiner to refer appellant to a second impartial specialist before attempting to obtain a supplemental report from the first impartial specialist. The remedy for such improper referral was exclusion of the second specialist's report. In this case the claims examiner sent a request for clarification to Dr. Sobiesk on September 18, 2012, after his first clarification failed to resolve the issue. As Dr. Sobiesk did not reply to the request for clarification, the referral to a second referee examiner was proper.

CONCLUSION

The Board finds this case is not in posture for decision.

[16] *Raymond A. Fondots*, 53 ECAB 637, 641 (2002); *Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232 (1988); *Rayon K. Ferrin, Jr.*, 39 ECAB 736 (1988).

[17] *Id*.

[18] 39 ECAB 1013 (1998).

ORDER

IT IS HEREBY ORDERED THAT the February 27, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for proceedings consistent with this opinion of the Board.

Issued: November 22, 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