United States Department of Labor
Employees' Compensation Appeals Board

D.M., Appellant	)	
and	)	**Docket No. 13-1390**
	)	**Issued: November 20, 2013**
DEPARTMENT OF THE ARMY, ANNISTON ARMY DEPOT, Oxford, AL, 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
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 22, 2013 appellant filed a timely appeal from the May 1, 2013 schedule award decision of the Office of Workers' Compensation Programs(OWCP). 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 met his burden of proof to establish that he sustained greater than 35 percent bilateral hearing loss, for which he received a schedule award.

FACTUAL HISTORY

On September 8, 2011 appellant, then a 58-year-old welder leader, filed an occupational disease claim alleging hearing loss attributed to factors of his federal employment. He retired on January 1, 2011.The record reflects that appellant previously received a schedule award for eight percent bilateral hearing loss, for 16 weeks of compensation, on August 14, 1999 under Claim

[1] 5 U.S.C. § 8101 *et seq.*

No. xxxxxx712. Appellant received a schedule award for 23 percent bilateral hearing loss, for 46 weeks of compensation, on January 12, 2009 under Claim No. xxxxxx598. The claims have been combined with the present claim.

Appellant worked for the employing establishment as a welder and welder supervisor from October 1972 to January 1, 2011. He was exposed to noise from air grinders, air drills, air chipper hammers, air arcs, hammers, tanks and welding machines 10 hours daily, 6 days per week and he used earplugs when working.

By letter dated September 15, 2011, OWCP referred appellant to Dr. Jack W. Aland, a Board-certified otolaryngologist for examination and testing.In a report dated October 11, 2011, Dr. Aland examined appellant and provided findings. He determined that appellant had bilateral sensorineural hearing loss.

On October 25, 2011 OWCP referred the claim to the medical adviser for a determination as to whether appellant had permanent impairment and provided him with a copy of Dr. Aland's report. In a report dated October 26, 2011, the medical adviser found that appellant had 21 percent bilateral hearing loss.

On October 28, 2011 OWCP accepted the claim for bilateral sensorineural hearing loss. On November 17, 2011 appellant requested a schedule award.

On January 17, 2012 OWCP referred the claim to the medical adviser and requested clarification with regard to the 21 percent increase in hearing loss.In a report dated February 3, 2012, the medical adviser explained that the 21 percent represented appellant's total bilateral hearing loss. Heexplained that it was less than what appellant had previously been awarded and therefore, he was not entitled to an additional award.

By decision dated February 14, 2012, OWCP denied appellant's request for an increased schedule award.

On March 6, 2012 appellant requested a hearing.

By decision dated May 14, 2012, an OWCP hearing representative set aside the February 14, 2012 decision and remanded the claim. She found that the percentage of hearing loss was not definitively established. Appellant's claim files were combined and OWCP was directed to update the statement of accepted facts and refer all the hearing loss examination reports and audiograms to an OWCP medical adviser for review. The hearing representative noted that, if the medical adviser believed that none of the audiograms were representative of the hearing loss, OWCP should refer appellant, the statement of accepted facts and medical records from all of his claims to an appropriate specialist for examination and a *de novo* decision with regard to the percentage of hearing loss.

In a May 23, 2012 report, an OWCP medical adviser recommended that appellant be referred for a second opinion.

On May 29, 2012 OWCP referred appellant for a second opinion to Dr. Jeffery Scott Robertson, a Board-certified otolaryngologist.In a report dated June 25, 2012, Dr. Robertson

described appellant's history of injury and treatment. The initial audiogram in 1998 demonstrated normal hearing through 2,000 hertz (Hz) sloping to moderate sensorineural hearing loss for the left ear and a mild sloping to moderate sensorineural hearing loss for the right ear. Dr. Robertson also noted a history of asymmetry between the ears. Between 2007 and 2009, there was an improvement in thresholds for the right ear in the high frequencies. Dr. Robertsonconducted audiometric testing and the test results revealed a stable audiogram compared to a priorMarch 13, 2011 audiogram. He noted that a significant variance was found at 6,000 Hz with the right ear measuring at 85decibelsand the left ear measuring at 55decibels. Dr. Robertsonnoted that his findings were consistent with previous audiograms.

Dr. Robertson advised that appellant had mild to moderately severe sensorineural hearing loss with an asymmetry between the ears, the right greater than the left. He determined that appellant's hearing loss was in excess of typical presbycusis. Dr. Robertson opined that workplace noise exposure was significant enough to cause a shift in thresholds. He also noted that appellant did not have a significant family history of hearing loss. Dr. Robertson diagnosed moderate sloping to moderately severe sensorineural hearing loss. He opined that the sensorineural hearing loss was in part due to noise exposure encountered in appellant's employment. Dr. Robertson recommended binaural amplification for both the left and right ears. Results from June 25, 2012 audiometric testing accompanied his report. Itrevealed hearing levels of 40, 45, 50 and 55 decibels in the right ear and 45, 50, 50 and 60 decibels in the left ear at Hz levels of 500, 1,000, 2,000 and 3,000, respectively.

On September 4, 2012 OWCP referred the report of Dr. Robertson to the medical adviser for an impairment rating in accordance with the American Medical Association,*Guides to the Evaluation of Permanent Impairment*, (6th ed. 2008)(A.M.A., *Guides*).

In a September 5, 2012 report, an OWCP medical adviser reviewed Dr. Robertson's findings. He noted the hearing levels set forth in theJune 25, 2012 audiogram of 40, 45, 50 and 55 decibels in the right ear and 45, 50, 50 and 60 decibels in the left ear at Hz levels of 500, 1,000, 2,000 and 3,000, respectively. Appellant had 33.75 percent monaural hearing impairment in the right ear and 39.38 percent monaural hearing impairment in the left ear. The medical adviser calculated binaural sensorineural hearing loss and found that appellant had a 35 percent binaural hearing impairment. He noted a maximum medical improvement date of June 25, 2012 and recommended hearing aids.

By decision dated October 5, 2012, OWCP granted appellant a schedule award for 35 percent binaural hearing loss.Asappellant had previously received schedule awards for binaural hearing loss totaling 31 percent,theaward was for an additional 4 percent bilateral loss of hearing. It ran from June 25 to August 19, 2012, covering eight weeks.

Appellant requested a hearing, which was held on February 19, 2013. He didnot dispute the additional four percent butcontended that his payment for the award should have been longer than two months. Appellantalso statedthat it should have begun in September 2009 and continued until his retirement. He asserted that he believed that he should be compensated for 15 months minus the 2 months he already received. Appellantstated that there was no "maximum medical improvement."

By decision dated May 1, 2013, an OWCP hearing representative affirmed the October 5, 2012 decision.

LEGAL PRECEDENT

The schedule award provision of FECA provides compensation to employees sustaining permanent loss or loss of use, of specified members of the body.[2] FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such a determination is a matter which results in the sound discretion of OWCP. For consistent results and to insure equal justice, the Board has authorized 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 OWCP for evaluating schedule losses and the Board has concurred in such adoption.[3]

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.[4] 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.[5] The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.[6] 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.[7] The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.[8]

ANALYSIS

The issue is whether appellant has more than 35 percent binaural hearing loss. OWCP referred appellant to Dr. Robertson, a Board-certified otolaryngologist, for a second opinion evaluation. Dr. Robertson examined appellant and provided audiometric findings. He recommended hearing protection. OWCP properly referred the medical evidence to an OWCP medical adviser for a rating of permanent impairment in accordance with the A.M.A., *Guides*.[9]

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[2] 5 U.S.C. § 8107.

[3] *See* 20 C.F.R. § 10.404; *Bernard A. Babcock*, Jr., 52 ECAB 143 (2000).

[4] A.M.A.,*Guides* 250.

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Donald E. Stockstad*, 53 ECAB 301 (2002); *petition for recon.*,*granted* (*modifying prior decision*), Docket No. 01-1570 (issued august 13, 2002); *Reynaldo R. Lichtenberger*, 52 ECAB 462 (2001).

[9] *See Hildred I. Lloyd*, 42 ECAB 944 (1991).

In a September 5, 2012 report, the medical adviser utilized the examination findings provided by Dr. Robertson. He applied the findings of the June 25, 2012 audiogram to calculate 35 percent binaural hearing loss. The medical adviser averaged appellant's hearing levels of 40, 45, 50 and 55 decibels in the right ear and 45, 50, 50 and 60 decibels in the left ear at Hz levels of 500, 1,000, 2,000 and 3,000, respectively, to find average hearing levels of 47.5 on the right and 51.25 on the left. He subtracted a 25-decibel fence and multiplied the remaining balance of 22.25 on the right and 26.25 on the left, by 1.5 to calculate 33.75 percent right ear monaural loss and 39.38 percent left ear monaural loss.[10] The medical adviser calculated 35 percent binaural hearing loss by multiplying the lesser right ear monaural loss of 33.75 percent by 5, adding the greater 39.38 percent left ear loss and dividing this sum by six. The Board finds that the medical adviser properly applied OWCP's standardsto rate appellant's 35 percent binaural hearing loss. The medical adviser determined that the date of maximum medical improvement was the date of the second opinion evaluation, June 25, 2012.

The Board notes that appellant previously received schedule awards totaling a 31 percent permanent partial loss of hearing in both ears. Therefore, he was entitled to an additional award of four percent.As the medical adviser properly applied the A.M.A., *Guides* in calculating appellant's impairment rating, OWCP correctly relied upon his opinion to find that appellant sustained 35 percent binaural hearing loss.[11] The Board finds that there is no evidence of greater impairment.

On appeal, appellant questioned the starting date of his schedule award, June 25, 2012, the date of Dr. Robertson's report and the length of his schedule award. He asserted that he was permanently disabled, had not reached maximum medical improvement and questioned why his schedule award was less than his previous ones. The Board has held that the period covered by a schedule award commences on the date of maximum medical improvement or the point at which appellant's condition has stabilized and will not improve further.[12] That determination is based on the medical evidence and the date is generally the date of the medical examination which determined the extent of the hearing loss.[13] In this case, the date of maximum medical improvement is based on the June 25, 2012 audiogram and report conducted for Dr. Robertson. OWCP properly began the schedule award on that date. Regarding the length of the schedule award, 5 U.S.C. § 8107(c)(13)(B) provides that for complete or 100 percent, loss of hearing in both ears, a claimant is entitled to a maximum of 200 weeks of compensation. Appellant was found to have 35 percent binaural hearing loss. Thirty-five percent of the 200-week maximum statutory amount is 70 weeks. The record reveals that the August 4, 1999 8 percent schedule award totaled 16 weeks of compensation and the January 12, 2009 23 percent award totaled 46 weeks of compensation. The October 5, 2012 four percent award totaled eight weeks of compensation. The separate awards total 70 weeks of compensation. There is no evidence that

[10] *Id.*

[11] *See Linda Beale*, 57 ECAB 429 (2006).

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

[13] *See James L. Thomas*, 31 ECAB 1088 (1980).A schedule award also cannot be made until a claimant reached maximum medical improvement. *See J.P.*, Docket No. 08-832 (issued November 13, 2008).

appellant has any greater hearing loss than that for which he has received compensation under 5 U.S.C. § 8107.Neither, the Board nor OWCP has the authority to enlarge the terms of FECA.[14]

The Board notes that appellant may request a 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 not met his burden of proof to establish more than 35 percent bilateral hearing loss, for which he received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the May 1, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 20, 2013
Washington, DC

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

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

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

[14] *S.K.*, Docket No. 08-848 (issued January 26, 2009).