

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

V.D., Appellant)

and)

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

**Docket No. 14-782
Issued: July 9, 2014**

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, Acting Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 25, 2014 appellant, through counsel, filed a timely appeal of a January 10, 2014 decision of the Office of Workers' Compensation Programs (OWCP) concerning a schedule award. 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 14 percent binaural (both ears) hearing loss, for which he received a schedule award.

On appeal appellant's counsel contends that, based upon the opinion of OWCP's referral physician, appellant has a greater hearing loss than the 14 percent binaural loss for which he received a schedule award.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. In an August 12, 2013 decision, the Board set aside an August 22, 2012 OWCP schedule award decision.² The Board found that clarification was required from Dr. L. Frederick Lassen, a second opinion Board-certified otolaryngologist, as to why he included an impairment rating for tinnitus. The Board noted that while Dr. Lassen provided three percent impairment for tinnitus in his monaural determination, he failed to describe how this condition impacted appellant's activities of daily living (ADLs). The facts and the circumstances of the Board's prior decisions are incorporated by reference.³

On remand OWCP prepared an amended statement of accepted facts to include tinnitus as an additional accepted condition. It then requested that Dr. Lassen provide clarification on his inclusion of three percent impairment for tinnitus. In an October 4, 2013 addendum, Dr. Lassen diagnosed subjective tinnitus and bilateral hearing loss which he attributed to appellant's federal employment. An audiogram completed on April 10, 2012 revealed the following decibel (dB) losses at 500, 1,000, 2,000 and 3,000 hertz (Hz): 10, 15, 50 and 70 for the left ear and 5, 20, 45 and 65 for the right ear. Speech reception thresholds were 25 dB on the right and 25 dB on the left, while auditory discrimination were 68 percent on the right and 80 percent on the left. Dr. Lassen stated that appellant's tinnitus impaired his ADL. The tinnitus caused problems with concentration, reading and sleeping and the constant humming "interferes with his emotional well-being causing anxiety and wellness."

Applying the standard provided by the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*⁴ (A.M.A., *Guides*) to the April 10, 2012 audiometric data, Dr. Lassen calculated that appellant sustained 13.125 percent monaural hearing impairment in the right ear and 16.875 percent monaural hearing impairment in the left ear. On the form report, he added 3 percent impairment for tinnitus, resulting in a total 16.125 percent monaural hearing impairment in the right ear (13.125 percent + 3 percent for tinnitus) and 19.875 percent monaural hearing impairment in the left ear (16.875 percent + 3 percent for tinnitus). Dr. Lassen calculated a binaural hearing impairment of 16.75 percent. He listed April 10, 2012 as the date of maximum medical improvement.

On December 17, 2013 an OWCP medical adviser reviewed Dr. Lassen's report and concluded that appellant was not entitled to any additional impairment rating for tinnitus. He applied the audiometric data to OWCP's standard for evaluating hearing loss under the sixth edition of the A.M.A., *Guides* to determine that appellant sustained 13.74 percent binaural hearing loss. The medical adviser averaged appellant's left ear hearing levels of 10, 15, 50 and 70 dB at 500, 1,000, 2,000 and 3,000 Hz, which totaled 14.5 which he divided by 4. He then

² Docket No. 13-331 (issued August 12, 2013).

³ On January 31, 2012 appellant, then a 60-year-old pipefitter leader, filed an occupational disease claim alleging that on February 3, 2005 he first realized that his bilateral hearing loss was employment related. OWCP accepted the claim for bilateral sensorineural hearing loss and bilateral hearing loss due to noise.

⁴ A.M.A., *Guides* (6th ed. 2009).

subtracted a 25-dB fence and multiplied the balance of 11.25 by 1.5 to find 16.37⁵ percent left ear monaural hearing loss. The medical adviser then averaged appellant's right ear hearing levels of 5, 20, 45 and 65 dB at 500, 1,000, 2,000 and 3,000 Hz, which totaled 135, which then divided by 4. After subtracting out a 25-dB fence, he multiplied the remaining 8.75 balance by 1.5 to calculate a 13.37 percent right ear monaural hearing loss. The medical adviser then calculated 13.74 percent binaural hearing loss by multiplying the lesser right ear loss of 13.13 percent by five, adding the greater 16.37 percent left ear loss and dividing this sum by six. He did not list any impairment due to tinnitus.

By decision dated January 10, 2014, OWCP informed appellant that his claim had been expanded to include the condition of tinnitus. It then found that he had 0 percent impairment for tinnitus and 14 percent binaural hearing loss impairment.

LEGAL PRECEDENT

The schedule award provision of FECA⁶ and its implementing regulations⁷ 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.⁸ The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁹ Effective May 1, 2009, OWCP adopted the sixth edition of the A.M.A., *Guides* as the appropriate edition for all awards issued after that date.¹⁰

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.¹¹ Using the frequencies of 500, 1,000, 2,000 and 3,000 Hz, the losses at each frequency are added up and averaged.¹² Then, the fence of 25 dB is deducted because, as the A.M.A., *Guides* points out, losses below 25 dB result in no impairment in the ability to hear everyday speech under everyday conditions.¹³ The remaining amount is multiplied by a factor of

⁵ This appears to be a mathematical error as $11.25 \times 1.25 = 16.875$.

⁶ 5 U.S.C. § 8107.

⁷ 20 C.F.R. § 10.404.

⁸ See *D.K.*, Docket No. 10-174 (issued July 2, 2010); *Michael S. Mina*, 57 ECAB 379 (2006).

⁹ 20 C.F.R. § 10.404; see *F.D.*, Docket No. 09-1346 (issued July 19, 2010); *Billy B. Scoles*, 57 ECAB 258 (2005).

¹⁰ Federal (FECA) Procedure Manual, Part 3 -- Claims, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 9, 2010). See *P.B.*, Docket No. 10-103 (issued July 23, 2010).

¹¹ A.M.A., *Guides* 250 (6th ed. 2009).

¹² *Id.*

¹³ *Id.*

1.5 to arrive at the percentage of monaural hearing loss.¹⁴ 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.¹⁵ The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.¹⁶ The Board has also noted OWCP's policy to round the calculated percentage of impairment to the nearest whole number.¹⁷

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.¹⁸ The A.M.A., *Guides* state that, if tinnitus interferes with 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.¹⁹

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed through an OWCP medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with an OWCP medical adviser providing rationale for the percentage of impairment specified.²⁰ OWCP may follow the advice of its medical adviser or consultant where he or she has properly utilized the A.M.A., *Guides*.²¹

ANALYSIS

OWCP accepted the claim for bilateral sensorineural hearing loss and bilateral hearing loss due to noise. On remand from the Board, it expanded acceptance of appellant's claim to include tinnitus. In its remand order, OWCP was instructed to obtain a clarification from Dr. Lassen regarding the three percent impairment he assigned for appellant's tinnitus. In its January 10, 2014 decision, it determined that appellant had 0 percent impairment for tinnitus and 14 percent impairment for his binaural hearing loss. The issue on appeal is whether appellant is entitled to an impairment rating for his tinnitus. The Board finds that the evidence of record

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *J.H.*, Docket No. 08-2432 (issued June 15, 2009); *Thomas O. Bouis*, 57 ECAB 602 (2006); *Donald E. Stockstad*, 53 ECAB 301 (2002), *petition for recon. granted (modifying prior decision)*, Docket No. 01-1570 (issued August 13, 2002).

¹⁷ *J.H.*, *supra* note 16; *J.Q.*, 59 ECAB 366 (2008); *Robert E. Cullison*, 55 ECAB 570 (2004). See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4(b)(2)(b) (January 2010).

¹⁸ See A.M.A., *Guides* 249.

¹⁹ *Id.* See also *R.H.*, Docket No. 10-2139 (issued July 13, 2011); *Robert E. Cullison*, *supra* note 17.

²⁰ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(f) (February 2013). See *C.K.*, Docket No. 09-2371 (issued August 18, 2010); *Frantz Ghassan*, 57 ECAB 349 (2006).

²¹ See *Ronald J. Pavlik*, 33 ECAB 1596 (1982).

establishes that appellant is entitled to an additional three percent impairment for tinnitus, resulting in a total 17 percent binaural hearing loss impairment.

In an October 4, 2013 addendum, Dr. Lassen diagnosed subjective tinnitus and bilateral hearing loss which he attributed to appellant's federal employment. An audiogram was completed on April 10, 2012 which revealed the following dB losses at 500, 1,000, 2,000 and 3,000 Hz: 10, 15, 50 and 70 for the left ear and 5, 20, 45 and 65 for the right ear. Dr. Lassen noted +3 tinnitus and diagnosed bilateral sensorineural hearing loss and noise-induced hearing loss. He opined that the hearing loss was due to appellant's workplace noise exposure and recommended hearing aids. Applying the April 10, 2012 audiometric data, Dr. Lassen calculated that appellant had 16.125 percent monaural hearing impairment in the right ear and 19.875 percent monaural hearing impairment in the left ear. On the form report, he added 3 percent impairment for tinnitus, resulting in a total 16.125 percent monaural hearing impairment in the right ear (13.125 percent + 3 percent for tinnitus) and 19.875 percent monaural hearing impairment in the left ear (16.875 percent + 3 percent for tinnitus). Dr. Lassen calculated a binaural hearing impairment of 16.75 percent. He listed October 26, 2010 as the date of maximum medical improvement.

Dr. Lassen reported that appellant had 3+ tinnitus based on the tinnitus impairing appellant's ADLs. Specifically, he noted that appellant had problems with concentration, reading and sleeping and that the constant humming caused nervousness and anxiety. Based on these findings, Dr. Lassen added 3 percent impairment for tinnitus and calculated a binaural hearing impairment of 16.75 percent.

OWCP then referred the medical evidence to an OWCP medical adviser, for a rating of permanent impairment in accordance with the A.M.A., *Guides*.²² OWCP's medical adviser opined that appellant had a 14 percent binaural hearing loss under the sixth edition of the A.M.A., *Guides* based on the results of the April 10, 2012 audiogram and Dr. Lassen's two reports. The medical adviser opined that appellant was not entitled to an additional impairment rating for tinnitus with no explanation.

The Board finds that Dr. Lassen, the second opinion physician properly evaluated appellant's hearing loss. Using the April 10, 2012 audiogram to calculate appellant's hearing loss in accordance with the A.M.A., *Guides*, Dr. Lassen averaged appellant's left hearing levels of 10, 15, 50 and 70 dB at 500, 1,000, 2,000 and 3,000 Hz, which then averaged to total 36.25. He subtracted the 25-dB fence and multiplied the remaining balance of 11.25 by 1.5 and then added 3 percent for tinnitus to calculate a 19.875 percent hearing loss for the left ear. Appellant's right ear hearing levels of 5, 20, 45 and 65 dB at 500, 1,000, 2,000 and 3,000 Hz were then averaged to total 33.75. Dr. Lassen subtracted the 25-dB fence and multiplied the remaining balance of 8.75 by 1.5 and then added 3 percent for tinnitus to calculate a 16.125 percent hearing loss for the right ear. He calculated a 16.75 percent binaural hearing loss by multiplying the lesser right ear loss of 16.125 percent by 5, adding the greater 19.875 left ear loss and dividing this sum by 6.²³ Dr. Lassen included an impairment rating for appellant's tinnitus

²² See *Hildred I. Lloyd*, 42 ECAB 944 (1991).

²³ *Supra* note 18.

of three percent when calculating the monaural impairment as the tinnitus impacted his ability to perform ADLs. He determined that appellant sustained a total 16.75 percent, which is rounded up to a 17 percent binaural hearing loss. The Board finds that he properly evaluated the evidence of record. Dr. Lassen's report is entitled to the weight of the medical evidence.

CONCLUSION

The Board finds that appellant has established that he has an additional 3 percent bilateral hearing loss for a total 17 percent permanent bilateral hearing loss, causally related to factors of his federal employment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 10, 2014 is affirmed as modified.

Issued: July 9, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

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

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