

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

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**J.O., Appellant**

**and**

**DEPARTMENT OF THE NAVY, AIR  
SYSTEMS COMMAND, Cherry Point, NC,  
Employer**

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**Docket No. 14-1359  
Issued: November 20, 2014**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Alternate Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On May 29, 2014 appellant filed a timely appeal from an April 8, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his claim for a schedule award and denying authorization for hearing aids. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether appellant sustained a ratable hearing loss causally related to factors of his federal employment; and (2) whether OWCP properly denied authorization for hearing aids.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

This case has previously been before the Board. In an order dated November 25, 2011, the Board set aside a November 18, 2010 OWCP decision rescinding acceptance of appellant's claim for bilateral hearing loss on the grounds that the claim duplicated a previously accepted April 1998 hearing loss claim, assigned file number xxxxxx353.<sup>2</sup> The Board also set aside a January 6, 2011 nonmerit decision denying his request for reconsideration. The Board found that the record for file number xxxxxx353 was not of record and, therefore, the basis for the rescission was not subject to review. The Board remanded the case for OWCP to combine the evidence from file number xxxxxx353 with the current case record. By decision dated January 3, 2013, the Board affirmed in part and set aside in part a June 1, 2012 decision denying appellant's claim for a schedule award due to hearing loss and denying authorization for hearing aids.<sup>3</sup> The Board reviewed OWCP's 1998 finding in file number xxxxxx353 that appellant's hearing loss was not severe enough to be ratable. The Board noted that OWCP had combined the current file with file number xxxxxx353 and again accepted that appellant sustained bilateral hearing loss based on the December 27, 2011 report of Dr. Robert H. Hosea, a Board-certified otolaryngologist and OWCP referral physician. The Board found that OWCP properly determined that the increase in his hearing loss after the April 1998 acceptance of his claim was not work related. The Board affirmed OWCP's denial of appellant's schedule award based on its determination that his hearing loss was not ratable and that the subsequent increase in hearing loss did not result from his federal employment. The Board determined, however, that appellant might still be entitled to hearing aids and remanded the case for further development of this issue. The facts and circumstances from the prior decisions and order are hereby incorporated by reference.

On January 29, 2013 an OWCP medical adviser reviewed the medical evidence and stated, "In summary, it appears that this claimant has a hearing loss that is due in part to workplace noise exposure, but that this loss is nonratable. On that basis, hearing aids are not authorized. Any hearing loss experienced by this claimant following his retirement [is] not related to his federal employment."

In a decision dated March 1, 2013, OWCP denied authorization for hearing aids.

On December 18, 2013 appellant requested reconsideration of the denial of his schedule award claim. He listed the evidence submitted in support of his request. Appellant submitted statements previously submitted on a prior appeal to the Board, a March 10, 2010 report from Dr. Charles Beasley, a Board-certified otolaryngologist and OWCP referral physician, and a May 3, 2012 report from Dr. Paul S. Camnitz, a Board-certified otolaryngologist. He also submitted a November 11, 2009 audiogram.

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<sup>2</sup> *Order Remanding Case*, Docket No. 11-804 (issued November 25, 2011).

<sup>3</sup> Docket No. 12-1482 (issued January 3, 2013). On December 3, 2009 appellant, then a 68-year-old retired jet engine mechanic, filed an occupational disease claim alleging that he sustained hearing loss due to noise exposure in the course of his federal employment. He was last exposed to the employment factors identifying as causing his condition on September 1, 1995.

In a letter dated January 30, 2013, appellant argued that OWCP did not take any action on his prior hearing loss claim, assigned file number xxxxxx353. He related that he obtained his records from the employing establishment but received nothing regarding an accepted claim. Appellant stated that he was last exposed to hazardous noise and jet engines in 1981, not 1995. He noted that Dr. Beasley and Dr. Hosea shared an audiologist and alleged that Dr. Hosea lied and violated the privacy act by sharing his records.

On February 10, 2014 appellant related that when he began work there was no hearing conservation program. He asserted that the opinion of Dr. Jonathan R. Workman, a Board-certified otolaryngologist, supported that his current hearing loss and tinnitus resulted from his noise exposure. Appellant resubmitted audiograms from the employing establishment commencing in 1965.

In a report dated April 8, 2013, Dr. Workman related that appellant had “decreased hearing and tinnitus starting back when he had noise exposure years ago when he worked with the [employing establishment].” He stated that audiograms obtained on that date showed “a modest hearing loss throughout mid and high frequencies. This would all be consistent with multifactorial hearing loss problems. Certainly, noise exposure can play a key role in this hearing loss. I think that he would do well to benefit from a hearing aid.” Dr. Workman diagnosed bilateral high and mid frequency sensorineural hearing loss due to noise exposure, diabetes, hypertension and presbycusis.

By letter dated February 11, 2014, appellant challenged OWCP’s finding that he had a claim accepted in 1998. He related that he went to see Dr. Beasley in 1998 on his own and provided him with his own records. Appellant maintained that OWCP violated his privacy by obtaining his records and made false statements.

On February 13, 2014 appellant requested reconsideration of the March 1, 2013 decision.

By decision dated April 8, 2014, OWCP denied modification of its denial of appellant’s schedule award claim and its March 1, 2013 decision denying hearing aids.

### **LEGAL PRECEDENT -- ISSUE 1**

FECA<sup>4</sup> provides compensation for both disability and physical impairment. “Disability” means the incapacity of an employee, because of an employment injury, to earn the wages the employee was receiving at the time of injury.<sup>5</sup> In such cases, FECA compensates an employee for loss of wage-earning capacity. In cases of physical impairment, FECA, under section 8107(a), compensates an employee, pursuant to a compensation schedule, for the permanent loss of use of certain specified members of the body, regardless of the employee’s ability to earn wages.<sup>6</sup>

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<sup>4</sup> 5 U.S.C. § 8101 *et seq.*

<sup>5</sup> *Lyle E. Dayberry*, 49 ECAB 369 (1998).

<sup>6</sup> *Renee M. Straubinger*, 51 ECAB 667 (2000).

A claimant seeking compensation under FECA has the burden of establishing the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence; it is thus the claimant's burden to establish that he or she sustained a permanent impairment of a scheduled member or function as a result of his or her employment injury entitling him or her to a schedule award.<sup>7</sup>

Regarding progression of hearing loss, OWCP's procedures provide, "Noise-induced hearing loss does not typically progress after exposure to noise ceases. A claimant with an audiogram showing less than a 25 decibel loss soon after exposure ceases and a second audiogram showing a ratable loss may be denied if the DMA [district medical adviser] provides a well-reasoned opinion."<sup>8</sup>

### ANALYSIS -- ISSUE 1

In a decision dated January 3, 2013, the Board affirmed OWCP's finding that the evidence was insufficient to establish that appellant sustained an increase in hearing loss after 1998 as a result of noise exposure during the course of his federal employment. It found that the May 21, 2012 report from Dr. Hosea, an OWCP referral physician, constituted the weight of the medical evidence and established that the deterioration in his hearing after 1998 was not work related.

Appellant submitted a May 2, 2012 report from Dr. Camnitz and the results from prior audiograms. The Board, however, previously considered this same evidence and found that it was insufficient to outweigh the report of Dr. Hosea or to create a conflict in medical opinion.

Appellant submitted a March 10, 2010 report from Dr. Beasley, an OWCP referral physician, who found that his bilateral sensorineural hearing loss due to noise exposure; however, he did not address the issue of whether appellant's hearing loss after 1998 resulted from job-related noise exposure prior to that date.

In a report dated April 8, 2013, Dr. Workman interpreted audiograms as showing a modest hearing loss in the mid and high frequencies. He discussed appellant's history of noise exposure years ago. Dr. Workman attributed his hearing loss to multiple issues, including noise exposure. He recommended hearing aids. Dr. Workman did not, however, address whether appellant's increase in hearing loss after 1998 resulted from job-related noise exposure prior to that date. Thus, his opinion is of diminished probative value.

As discussed, hearing loss does not usually progress after noise exposure ceases.<sup>9</sup> At the time of his retirement in 1995, appellant's hearing loss was not significant enough to be ratable. After comparing audiometric testing in 1995 with current audiometric testing, Dr. Hosea, an OWCP referral physician, determined that the progression of his hearing loss was not employment related but instead due to presbycusis. Appellant did not submit a report addressing

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<sup>7</sup> See *Veronica Williams*, 56 ECAB 367 (2005); *Annette M. Dent*, 44 ECAB 403 (1993).

<sup>8</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4(b)(3) (January 2010).

<sup>9</sup> *Id.*

his work stoppage in 1995 or explaining why his subsequent increase in hearing loss resulted from noise exposure during the course of his employment. Consequently, he has not met his burden of proof.

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.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8103 of FECA<sup>10</sup> 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 OWCP considers likely to cure, give relief, reduce the degree of the period of disability or aid in lessening the amount of monthly compensation.<sup>11</sup> OWCP must therefore exercise discretion in determining whether the particular service, appliance or supply is likely to affect the purposes specified in FECA.<sup>12</sup>

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 hearing loss exists.<sup>13</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that the case is not in posture for decision regarding whether OWCP should authorize hearing aids. On prior appeal, the Board noted that Dr. Hosea, the second opinion physician, recommended that hearing aids be authorized and the medical adviser did not sufficiently explain why hearing aids should not be authorized.

In a report dated January 29, 2013, an OWCP medical adviser recommended that OWCP deny appellant's request for hearing aids because the hearing loss that occurred subsequent to the cessation of his noise exposure was not ratable. He opined that the hearing loss sustained following appellant's retirement was unrelated to his federal employment. As noted by the Board, however, if hearing loss is determined to be nonratable for schedule award purposes, other benefits such as a hearing aid may still be provided if any causally related hearing loss exists.<sup>14</sup> Consequently, as OWCP has not provided an acceptable reason for denying authorization for hearing aids, the Board finds that the case must be remanded for further development on this issue. Following this and other such development as deemed necessary, it should issue a *de novo* decision.

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<sup>10</sup> 5 U.S.C. § 8101 *et seq.*

<sup>11</sup> *Id.* at § 8103; *see Thomas W. Stevens*, 50 ECAB 288 (1999).

<sup>12</sup> *Id.* at § 8103.

<sup>13</sup> *See F.D.*, Docket No. 10-1175 (issued January 4, 2011); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Services and Supplies*, Chapter 3.400.3(d)(2) (October 1995).

<sup>14</sup> *Id.*

**CONCLUSION**

The Board finds that appellant has not established that he sustained a ratable hearing loss causally related to factors of his federal employment. The Board further finds that the case is not in posture for decision regarding whether OWCP properly denied authorization for hearing aids.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 8, 2014 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: November 20, 2014  
Washington, DC

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

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

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