

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

K.G., Appellant

and

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

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**Docket No. 14-1827
Issued: January 5, 2015**

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 19, 2014 appellant, through counsel, filed a timely appeal from a May 14, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation¹ Act (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 established more than five percent binaural hearing loss causally related to his federal employment, for which he received a schedule award.

FACTUAL HISTORY

Appellant, a 59-year-old rigger, filed an occupational disease claim (Form CA-2) on August 10, 2012, alleging bilateral hearing loss caused by factors of his federal employment. Since he began working at the employing establishment in 1988, he had been exposed to loud

¹ 5 U.S.C. § 8101 *et seq.*

noises from pneumatic tools, forklifts, cranes, and other machinery. Appellant used earplugs for protection. He submitted an audiogram dated May 11, 2012 which showed mild bilateral hearing loss.

On December 31, 2012 OWCP referred appellant, along with a statement of accepted facts, to Dr. Eugenia M.G. Gray, a Board-certified otolaryngologist, for a second opinion examination. In a January 23, 2013 report, Dr. Gray stated that appellant's workplace exposure was sufficient as to intensity and duration to have caused the hearing loss in question. She diagnosed mild, bilateral noise-induced sensorineural hearing loss and opined that this condition was due to noise exposure at appellant's federal employment. Dr. Gray recommended hearing aids. An audiogram performed on Dr. Gray's behalf on January 23, 2013 reflected testing at the frequency levels of 500, 1,000, 2,000, and 3,000 cycles per second (cps) and revealed the following decibel losses: 25, 30, 35, and 35 for the right ear and 20, 20, 25, and 45 for the left ear respectively. Based on these results and in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th edition) (A.M.A., *Guides*), Dr. Gray determined that appellant had a 3.75 percent monaural loss of the left ear, and a 9.375 percent monaural loss of the right ear, which converted to a 4.68 percent binaural hearing loss, plus an additional 3 percent impairment due to employment-related tinnitus. She stated that appellant had intermittent tinnitus which, when problematic, was aggravating and caused ringing and dizziness for approximately six seconds per episode.

In a February 6, 2013 decision, OWCP accepted appellant's claim for binaural hearing loss.

On November 5, 2013 appellant filed a Form CA-7 claim for a schedule award based on his binaural hearing loss.

In a December 17, 2013 report, an OWCP medical adviser reviewed Dr. Gray's report and audiometric test results. He concurred with Dr. Gray's audiometric findings that appellant had a 9.375 percent monaural hearing in the right ear and a 3.75 monaural hearing in the left ear, but did not add three percent impairment due to tinnitus. The medical adviser therefore found that appellant had a 4.68 percent sensorineural binaural hearing loss. He determined that the date of maximum medical improvement was January 23, 2013, the date of Dr. Gray's examination, and authorized hearing aids.

By decision dated May 14, 2014, OWCP granted appellant a schedule award for a five percent binaural hearing loss. This award covered the period January 23 to April 2, 2013, for a total of 10 weeks of compensation.

LEGAL PRECEDENT

The schedule award provision of FECA² and its implementing regulations³ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from

² *Id.* at § 8107.

³ 20 C.F.R. § 10.404. Effective May 1, 2009, OWCP began using the A.M.A., *Guides* (6th ed. 2009).

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. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁴

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.⁵ Using the frequencies of 500, 1,000, 2,000, and 3,000 cps, the losses at each frequency are added up and averaged.⁶ Then, the fence of 25 decibels is deducted. The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.⁷ 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.⁸ The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.⁹

ANALYSIS

OWCP accepted that appellant sustained a binaural hearing loss due to noise. It developed the claim by referring him to Dr. Gray. On January 23, 2013 Dr. Gray examined appellant and an audiogram was obtained on the referral physician's behalf. She found, using OWCP's standard procedures, that appellant's noise exposure in his federal employment was sufficient to cause binaural hearing loss. The January 23, 2013 audiogram tested decibel losses at 500, 1,000, 2,000, and 3,000 cps and recorded decibel losses of 25, 30, 35, and 35 respectively in the right ear. The total decibel loss in the right ear is 125. When divided by 4, the result is an average hearing loss of 31.25 decibels. The average of 31.25 decibels, reduced by 25 decibels (the first 25 decibels were discounted as discussed above), equals 6.25 decibels, which when multiplied by the established factor of 1.5 computes a 9.375 percent hearing loss in the right ear.

The audiogram tested decibel losses for the left ear at 500, 1,000, 2,000, and 3,000 cycles per second and recorded decibel losses of 20, 20, 25, and 45 respectively. The total decibel loss in the left ear is 110. When divided by 4, the result is an average hearing loss of 27.5 decibels. The average hearing loss of 27.5 is reduced by the fence of 25 decibels to 2.5, which when multiplied by the established factor of 1.5 computes a 3.75 percent hearing loss in the left ear. To determine the binaural loss, the lesser loss of 3.75 percent is multiplied by 5, to yield 18.75, and

⁴ *Id.*

⁵ Federal (FECA) Procedure Manual, Part 3 -- Schedule Awards, *Special Determinations*, Chapter 2.700.4.b (January 2010).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ See *Donald Stockstad*, 53 ECAB 301 (2002), *petition for recon. granted (modifying prior decision)*, Docket No. 01-1570 (issued August 13, 2002).

is then added to the greater loss of 9.37 percent. The total for this loss is then 28.12, which is divided by 6 to equal the binaural loss of 4.68 percent.¹⁰

An OWCP medical adviser concurred in the finding of 4.68 percent binaural hearing loss based on the audiogram results, which OWCP rounded to grant appellant a schedule award for five percent binaural hearing loss. OWCP's procedures provide that in computing hearing loss, percentages should not be rounded until the final percent for award purposes is obtained and fractions should be rounded down from .49 or up from .50. The medical adviser, however, did not credit Dr. Gray's finding of an additional three percent right-sided hearing loss due to tinnitus. On appeal, appellant's counsel argues that the medical adviser erred by failing to include Dr. Gray's rating of a three percent impairment for tinnitus. The Board notes that the A.M.A., *Guides* at section 11.2b, page 249¹¹ states that if the tinnitus interferes with daily living activities such as sleep, reading, enjoyment of quiet recreation, and emotional well-being, up to five percent may be added to a measurable binaural hearing impairment. Dr. Gray did not find that the tinnitus impacted appellant's ability to perform activities of daily living. Thus, her rating for an additional three percent impairment for tinnitus is not substantiated in this case.

Although appellant submitted results from a May 11, 2012 audiometric test which showed mild bilateral hearing loss, this audiogram is insufficient to satisfy appellant's burden of proof as it did not comply with the requirements set forth by OWCP. This test lacks speech testing and bone conduction scores and was not prepared or certified as accurate by a physician as defined by FECA. The audiogram was accompanied by a physician's opinion addressing how appellant's employment-related noise exposure caused or aggravated any hearing loss. OWCP is not required to rely on this evidence in determining the degree of appellant's hearing loss because it does not constitute competent medical evidence and, therefore, is insufficient to satisfy appellant's burden of proof.¹² Dr. Gray provided a thorough examination and a reasoned opinion explaining how the findings on examination and testing were due to the noise in appellant's employment. The Board finds that Dr. Gray's audiometric test results, showing a five percent binaural hearing loss, represent the weight of the evidence. As there was no other medical evidence showing that appellant had a greater hearing loss causally related to

¹⁰ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4b(2)(b) (January 2010). *See also* R.C., Docket No. 14-502 (issued July 2, 2014).

¹¹ A.M.A., *Guides* 249.

¹² *Joshua A. Holmes*, 42 ECAB 231, 236 (1990).

employment factors, the Board affirms OWCP's May 14, 2014 decision granting appellant a schedule award based on a five percent binaural hearing loss.¹³

CONCLUSION

The Board finds that appellant has no greater than a five percent binaural hearing loss causally related to his federal employment, for which OWCP granted him a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 14, 2014 be affirmed.

Issued: January 5, 2015
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

¹³ It is well established that, if calculations based on the monaural loss for each ear would result in greater compensation than calculations for binaural loss, then the monaural hearing loss calculations should be used. *See Reynaldo R. Lichtenberger*, 52 ECAB 462 (2001). In this case, appellant's compensation is greater under the procedures used for calculating binaural loss. The maximum number of weeks of compensation for binaural hearing loss is 200 weeks. *See* 5 U.S.C. § 8107(c)(13)(B). Appellant's monaural hearing loss of the left ear is four percent, whereas his monaural hearing loss of the right ear is nine percent. The maximum number of weeks of compensation for monaural hearing loss is 52 weeks. *See* 5 U.S.C. § 8107(c)(13)(A). Four percent of 52 weeks equals 2.08 weeks of compensation, and nine percent of 52 weeks equals 4.68 weeks. The five percent binaural hearing loss award of 10 weeks of compensation is therefore the greater award.