

FACTUAL HISTORY

On February 28, 2013 appellant, then a 51-year-old U.S. Border Patrol Agent, filed an occupational disease claim (Form CA-2) alleging that he developed hearing loss as a result of noise exposure from federal employment. He reported exposure to noise from the field and firing range stemming from 1989 to present. Appellant first became aware of his condition on January 1, 2003 and of its relationship to his employment on December 4, 2012.

By letter dated March 21, 2013, OWCP requested additional factual information from both appellant and the employing establishment. Appellant was requested to provide information regarding his employment history, when he related his hearing loss to conditions of employment, and all nonoccupational exposure to noise. OWCP also requested that he provide medical documentation pertaining to any prior treatment he received for ear or hearing problems. It requested that the employing establishment provide noise survey reports for each site where appellant worked, the sources and period of noise exposure for each location, whether he wore ear protection, and copies of all medical examinations pertaining to hearing or ear problems, including preemployment examinations and audiograms.

Hearing conservation data, medical notes and audiograms were submitted dated May 6, 1996, September 4, 2002, and December 3, 2012. A May 5, 1981 sound level survey was submitted showing firearm noise levels ranging from 125 to 152 decibels (dB). A position description for a Border Patrol Agent was also submitted establishing that appellant's federal employment began on September 30, 1987.

In a March 8, 2013 medical report, Dr. Alastair Lynn-Macrae, a Board-certified otolaryngologist, noted complaints of hearing loss and ringing in the ears. She reported that appellant worked as a Border Patrol Officer and occasionally exposed to loud noises. Upon review of a March 8, 2013 audiogram, Dr. Lynn-Macrae diagnosed high frequency bilateral symmetric sensorineural hearing loss starting around 3,000 hertz (Hz) and tinnitus which she opined was likely work related.

In an October 15, 2013 statement of accepted facts (SOAF), OWCP reported that appellant worked as a Border Patrol Agent from 1988 to the present. Appellant was provided hearing protection while working at the shooting range but none was provided during his normal duties. OWCP noted that appellant was exposed to noise from firearms on a quarterly basis and heavy vehicles and machinery on a daily basis. Appellant had no other hobbies which exposed him to loud noises.

OWCP referred appellant, together with the SOAF, to Dr. Gregory R. Rowin, a Board-certified otolaryngologist, for a second opinion evaluation on December 3, 2013. An audiogram was completed on December 3, 2013 which revealed the following dB losses at 500, 1,000, 2,000, and 3,000 Hz: 15, 20, 20, and 30 for the right ear and 15, 15, 15, and 25 for the left ear. Speech reception thresholds were 20 dB on the right and 15 dB on the left, while auditory discrimination scores were 100 percent bilaterally. Dr. Rowin diagnosed mild-to-moderate bilateral sensorineural hearing loss which he opined was caused by his federal employment-related noise exposure. He stated that the hearing loss was in excess of what would normally be predicated on the basis of presbycusis and that the workplace exposure was sufficient as to

intensity and duration to have caused the loss in question. Dr. Rowin recommended binaural hearing aids and the use of ear protection around noise.

Applying the standard provided by the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*² (A.M.A., *Guides*) to the December 3, 2013 audiometric data, Dr. Rowin calculated zero percent monaural hearing impairment in the right ear and zero percent monaural hearing impairment in the left ear. He calculated a binaural hearing impairment of zero percent. On the form report, Dr. Rowin added five percent impairment for tinnitus, which impacted the ability to perform activities of daily living, for a total of five percent binaural hearing impairment. He concluded that appellant had reached maximum medical improvement (MMI) and recommended hearing aids.

On December 27, 2013 OWCP referred the case file along with Dr. Rowin's report to Dr. H. Mobley, a district medical adviser (DMA), to determine the extent of appellant's permanent partial impairment and date of maximum medical improvement.

In a December 30, 2013 report, the DMA reported that appellant suffered work-related binaural hearing loss. In accordance with the sixth edition of the A.M.A., *Guides*, he applied the December 3, 2013 audiometric data to OWCP's standard for evaluating hearing loss and determined that appellant had zero percent monaural hearing loss in the left ear, zero percent monaural hearing loss in the right ear, and zero percent binaural hearing loss.³ The DMA disagreed with Dr. Rowin's assessment of five percent binaural hearing loss for tinnitus, stating that the A.M.A., *Guides* allow up to five percent for tinnitus when there is a measurable binaural hearing impairment.⁴ As appellant had no measurable hearing impairment, there could be no additional rating for tinnitus. Thus, the DMA concluded that appellant had no ratable hearing loss. He noted that Dr. Rowin recommended hearing aids and requested a supplementary report from the second opinion physician outlining his reasoning and rationale for this recommendation. The date of maximum medical improvement was noted as December 3, 2013.

On February 10, 2014 OWCP requested that Dr. Rowin provide a supplemental report outlining his reasoning and rationale for recommending hearing aids.

In an April 4, 2014 supplemental report, Dr. Rowin reported that appellant had mild-to-moderate sensorineural hearing loss in the high frequency range in both ears. As a result, appellant would have problems understanding speech which is soft, at the distance, or in noise. Hearing aids were recommended which would correct these issues and improve appellant's overall communication ability.

By decision dated June 18, 2014, OWCP accepted appellant's claim for bilateral hearing loss.

On July 1, 2014 appellant filed a claim for a schedule award (Form CA-7).

² A.M.A., *Guides* (6th ed. 2009).

³ *Id.* at 252, Table 11-2.

⁴ *Id.* at 249.

By decision dated December 22, 2014, OWCP found that appellant's hearing loss was not severe enough to be considered ratable and thus, was entitled to zero percent schedule award. With regard to hearing aids, it noted that the medical evidence did not establish that he required hearing aids and denied authorization for these additional medical benefits.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA⁵ and its implementing regulations 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. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of OWCP. For consistent results and to ensure 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* (6th ed. 2009), has been adopted by OWCP for evaluating schedule losses and the Board has concurred in such adoption.⁶

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*. 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.⁷ 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 the binaural hearing loss. The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.⁸

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.⁹ The A.M.A., *Guides* state that, if tinnitus interferes with activities of daily living (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.¹⁰

⁵ 5 U.S.C. §§ 8101-8193.

⁶ See *R.D.*, 59 ECAB 127 (2007); *Bernard Babcock, Jr.*, 52 ECAB 143 (2000).

⁷ See A.M.A., *Guides* 250.

⁸ See *E.S.*, 59 ECAB 249 (2007); *Donald Stockstad*, 53 ECAB 301 (2002), *petition for recon. granted (modifying prior decision)*, Docket No. 01-1570 (issued August 13, 2002).

⁹ See A.M.A., *Guides* 249.

¹⁰ *Id.* See also *Robert E. Cullison*, 55 ECAB 570 (2004); *R.H.*, Docket No. 10-2139 (issued July 13, 2011).

ANALYSIS -- ISSUE 1

OWCP accepted appellant's claim for bilateral noise-induced hearing loss. The issue is whether he sustained a ratable impairment in accordance with the A.M.A., *Guides*. The Board finds that OWCP properly denied appellant's schedule award claim.¹¹

OWCP referred appellant, together with a SOAF, to Dr. Rowin, a Board-certified otolaryngologist, for a second opinion evaluation. An audiogram was completed on December 3, 2013. Dr. Rowin diagnosed work-related mild-to-moderate high frequency sensorineural noise-induced hearing loss. Applying the December 3, 2013 audiometric data to the sixth edition of the A.M.A., *Guides*, Dr. Rowin calculated that appellant sustained zero percent monaural hearing impairment in the right ear and zero percent monaural hearing impairment in the left ear. He calculated a binaural hearing impairment of zero percent and added five percent for tinnitus, for a total of five percent binaural hearing impairment. Dr. Rowin stated that MMI had been reached and recommended hearing aids.

OWCP then referred the medical evidence to Dr. Hobley, an OWCP DMA, for a rating of permanent impairment in accordance with the A.M.A., *Guides*.¹² The DMA opined that appellant had zero percent binaural hearing loss under the sixth edition of the A.M.A., *Guides* based on the results of the December 3, 2013 audiogram and Dr. Rowin's second opinion report. With respect to tinnitus, he disagreed with Dr. Rowin stating that five percent could not be added for tinnitus as appellant did not have a measurable binaural hearing impairment.

The Board finds that the DMA properly determined that appellant was not entitled to an impairment rating for his bilateral hearing loss. According to the audiometry obtained on December 3, 2013, appellant's hearing thresholds were 15, 20, 20, and 30 on the right and 15, 15, 15, and 25 on the left. These total 85 and 70 decibels, respectively, for averages of 21.25 and 17.5 decibels. Because these averages are below the fence of 25 decibels, appellant is deemed to have no impairment in his ability to hear everyday sounds under everyday listening conditions.¹³ This does not mean that he has no hearing loss. It means that the extent or degree of loss is not sufficient to show a practical impairment in hearing according to the A.M.A., *Guides*. The A.M.A., *Guides* set a threshold for impairment and appellant's occupational hearing loss did not cross that threshold. Thus, the DMA applied the proper standards to the December 3, 2013 audiogram to determine that appellant's hearing loss was not ratable. For this reason, the Board finds that OWCP properly denied a schedule award for appellant's nonratable hearing loss.

The Board further finds that OWCP properly denied a schedule award for tinnitus.¹⁴ While the DMA and Dr. Rowin both calculated zero percent binaural hearing impairment, Dr. Rowin added five percent for tinnitus for a total binaural impairment rating of five percent. The Board notes that FECA does not list tinnitus in the schedule of eligible members, organs, or

¹¹ *A.B.*, Docket No. 13-316 (issued June 20, 2013).

¹² *See Hildred I. Lloyd*, 42 ECAB 944 (1991).

¹³ *See L.F.*, Docket No. 10-2115 (issued June 3, 2011).

¹⁴ *Id.*

functions of the body. Therefore, no claimant may directly receive a schedule award for tinnitus. Hearing loss is a covered function of the body, so if tinnitus contributes to a ratable loss of hearing, a claimant's schedule award will reflect that contribution. The A.M.A., *Guides* provide that, if tinnitus interferes with ADLs, up to five percent may be added to a measurable binaural hearing impairment.¹⁵ The Board has repeatedly held, however, that there is no basis for paying a schedule award for a condition such as tinnitus unless the evidence establishes that the condition caused or contributed to a ratable hearing loss.¹⁶ As the medical evidence establishes that appellant's hearing loss is not ratable, the DMA properly determined that an additional impairment rating may not be added for tinnitus. The Board will affirm OWCP's December 22, 2014 decision finding that he was not entitled to a schedule award.¹⁷

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(a) of FECA 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 the Secretary of Labor considers likely to cure, give relief, reduces the degree, or the period of any disability, or aid in lessening the amount of any monthly compensation.¹⁸ OWCP must therefore exercise discretion in determining whether the particular service, appliance, or supply is likely to affect the purposes specified in FECA.¹⁹

An OWCP decision must contain findings of fact and statement of reasons.²⁰

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.²¹

Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgement, or actions taken which are clearly contrary to both logic and probable deduction from established facts.²²

¹⁵ *Supra* note 9.

¹⁶ See *Richard Larry Enders*, 48 ECAB 184 (1996).

¹⁷ *D.P.*, Docket No. 12-666 (issued August 9, 2012).

¹⁸ See *Joshua A. Holmes*, 42 ECAB 231, 236 (1990).

¹⁹ 5 U.S.C. § 8103.

²⁰ 20 C.F.R. § 10.126 (2012).

²¹ See *F.D.*, Docket No. 10-1175 (issued January 4, 2011).

²² *W.M.*, 59 ECAB 132 (2007).

ANALYSIS -- ISSUE 2

The Board finds that the case is not in posture for decision on whether appellant is entitled to hearing aids.²³

The Board has held that, 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 provided if any causally related hearing loss exists.²⁴ Dr. Rowin's December 3, 2013 report indicated that the noise at appellant's workplace was sufficient to cause his hearing loss and recommended hearing aids. Dr. Mobley, an OWCP DMA, requested that Dr. Rowin provide a supplementary report explaining his reasons for recommending hearing aids. On February 10, 2014 OWCP requested that Dr. Rowin provide a supplemental report outlining his reasoning and rationale for recommending hearing aids. In an April 4, 2014 supplemental report, Dr. Rowin reported that appellant had mild to moderate sensorineural hearing loss in the high frequency range in both ears. As a result, he would have problems understanding speech which is soft, at the distance, or in noise. Hearing aids were recommended which would correct these issues and improve appellant's overall communication ability.

OWCP's December 22, 2014 decision denying hearing aids provided no findings as to why hearing aids were not authorized. The decision noted, "the weight of the medical evidence establishes that [appellant] would not benefit from hearing aids...."

OWCP must provide appellant with a statement of reasons as to why a claim is being denied.²⁵ The Board finds that the decision dated December 22, 2014 did not meet that requirement, and OWCP abused its discretion. Accordingly, the case will be remanded to OWCP for issuance of an appropriate merit decision on the issue of whether hearing aids should be authorized.²⁶

CONCLUSION

The Board finds that appellant does not have a ratable hearing loss for schedule award purposes. The Board also finds that the case is not in posture for decision as to whether hearing aids should be authorized.

²³ *R.N.*, Docket No. 13-284 (issued July 3, 2013).

²⁴ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Services and Supplies*, Chapter 3.400.3(d)(2) (October 1995); *Raymond VanNett*, 44 ECAB 480 (1993).

²⁵ *Supra* note 20. See *V.W.*, Docket No. 14-1487 (issued November 14, 2014); *Larry Garrett*, Docket No. 02-998 (issued October 24, 2003).

²⁶ See *J.D.*, Docket No. 07-720 (issued June 19, 2007).

ORDER

IT IS HEREBY ORDERED THAT the December 22, 2014 decision of the Office of Workers' Compensation Programs is affirmed, in part, and set aside in part for further development of the medical evidence.

Issued: June 1, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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