

FACTUAL HISTORY

This case has previously been before the Board on appeal.² In an October 21, 2004 decision, the Board affirmed a February 12, 2004 OWCP decision which found that appellant's request for reconsideration was untimely filed and failed to establish clear evidence of error in OWCP's April 4, 2001 decision. The facts and circumstances set forth in the prior appeal are incorporated herein by reference. The relevant facts include the following.

In an April 4, 2001 decision, OWCP accepted appellant's claim for hearing loss due to his employment-related hearing exposure. However, it determined that because his hearing loss was not severe enough to be ratable he was not entitled to schedule award compensation for hearing loss. Appellant was advised that his case was open for medical benefits and that he could contact OWCP if he was interested in obtaining further information regarding hearing aids. More specifically, the decision found that in the opinion of Dr. Shawn C. Jones, a second opinion Board-certified otolaryngologist, appellant would benefit from hearing aids and therefore the claim was open for medical benefits and if he needed a new set of hearing aids they continued to be authorized.

Following the Board's October 21, 2004 decision, the claim was dormant until 2011. On June 14, 2011 appellant telephoned OWCP regarding obtaining his authorized hearing aids. In a June 16, 2011 telephone memorandum, OWCP informed appellant that he remained eligible to request hearing aids. Appellant renewed his request for hearing aids in an undated letter received by OWCP on June 16, 2011.

On August 4, 2011 OWCP asked its medical adviser to address whether the requested hearing aids were medically necessary. In an August 8, 2011 report, the OWCP medical adviser noted that, while a trial of hearing aids was previously authorized, there was no indication that the hearing aids "were actually deemed necessary, desired or authorized at that time." He noted that, as hearing loss does not worsen upon removal from noise and because appellant retired on May 2, 1999, any worsening of his hearing loss and need for hearing aids after May 1999 was not work related.³

By decision dated August 9, 2011, OWCP denied appellant's request to obtain hearing aids. It found that any worsening of his hearing and his need for hearing aids were not work related. Appellant requested reconsideration on several occasions and these requests were denied by OWCP in decisions dated March 12, November 1, and September 18, 2013,⁴ and April 15, 2014.⁵ He again requested reconsideration on August 25, 2014. By decision dated

² Docket No. 04-1784 (issued October 21, 2004).

³ The medical adviser later reiterated this opinion in a March 8, 2012 report.

⁴ In a September 16, 2013 report, a different OWCP medical adviser noted that appellant retired in May 1999 and that his hearing loss was found to be not ratable in 2001. He concluded that, as noise-induced hearing loss did not progress upon removal from noise, any later hearing loss was not due to work factors and hearing aids should be denied. This medical adviser reiterated his conclusion on February 13, 2014. He reiterated it again on September 9, 2014, asserting that because appellant's hearing loss was not ratable, he was not eligible for hearing aids.

⁵ In decisions dated July 2 and August 8, 2014, OWCP refused to reopen appellant's case on the merits.

November 21, 2014, OWCP denied modification of the prior decisions denying his request for hearing aids. It found that the current medical evidence did not establish a worsening of his hearing, which now required hearing aids, which was related to the work-related noise exposure.

On January 15, 2015 appellant requested reconsideration and submitted additional evidence. He argued that his claim was previously approved for hearing aids as his need was work related. Appellant related that he had suffered tremendously and spent numerous hours and time attempting to receive the hearing aids which were authorized by OWCP and that they later went back on the recommendation. Furthermore, he argued that the prior OWCP medical advisers did not correctly calculate his percentage of hearing loss. Appellant also argued that he had more than 30 years of noise exposure and regardless of the fact that not being exposed to continuing noise after leaving the employing establishment he still had work-related, noise-induced hearing loss and was previously authorized to obtain hearing aids for his work-related hearing loss. The additional evidence also included e-mail correspondence, copies of previously considered evidence, hearing loss information sheets, and a copy of a November 20, 2014 Board decision regarding whether appellant had established an employment-related hearing loss.

On May 21, 2015 OWCP requested that a medical adviser revisit the issue of hearing aids and explain his decision in detail.

In a report dated May 27, 2015, OWCP's medical adviser⁶ noted that on February 28, 2001 a previous OWCP medical adviser, diagnosed bilateral sensorineural hearing loss consequential to noise exposure, but found that the hearing loss was not severe enough to be ratable. He further opined that it was "the practice of this [a]gency to not approve the use of hearing aids for hearing loss that is not ratable."

By decision dated May 28, 2015, OWCP denied modification of its November 21, 2014 decision. In support of its finding, it noted that its medical adviser indicated that it was "the practice" of OWCP to not approve "hearing aids for hearing loss that is not ratable."

LEGAL PRECEDENT

Following medical evaluation of a claim, if a hearing loss is determined to be not ratable for schedule award purposes, other benefits such as hearing aids may still be payable if any employment-related hearing loss exists.

Section 8103 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 OWCP considers likely to cure, give relief, reduce the degree of the period of disability, or aid in lessening the amount of monthly compensation.⁷ OWCP must exercise discretion in determining whether the particular service, appliance, or

⁶ This is the same medical adviser who authored the September 16, 2013, February 13 and September 9, 2014 reports. *See supra* note 4.

⁷ 5 U.S.C. § 8103. *Thomas W. Stevens*, 50 ECAB 288 (1999).

supply is likely to affect the purposes specified in FECA. The only limitation on OWCP's authority is that of reasonableness.⁸

ANALYSIS

The Board finds that OWCP abused its discretion in denying appellant's request for hearing aids.

The Board has held that, following medical evaluation of a claim, if the hearing loss is determined to be not ratable for schedule award purposes, other benefits such as hearing aids may still be provided if any causally-related hearing loss exists.⁹ In this case, the record supports that OWCP accepted appellant's claim for hearing loss due to his employment-related hearing exposure. While appellant's hearing loss was not severe enough to be considered ratable, appellant was advised that his case was open for medical benefits and consideration of hearing aids. Based upon the well-reasoned medical opinion of a second opinion examining physician, Dr. Jones, in its April 4, 2001 decision OWCP authorized appellant to obtain hearing aids. The Board ultimately affirmed the findings of the April 4, 2001 decision. Although appellant thereafter waited to obtain hearing aids, he is not precluded from requesting such devices from OWCP who previously notified him that they were authorized.

Following appellant's renewed request for the authorized hearing aids, OWCP's medical adviser recommended that OWCP not authorize hearing aids because, while a trial of hearing aids was previously authorized, there is no indication that the hearing aids "were actually deemed necessary, desired or authorized." However, the medical adviser is incorrect because within the aforementioned April 4, 2001 decision OWCP did expressly authorize hearing aids for appellant. The Board previously reviewed and affirmed the February 12, 2004 decision which found that OWCP had authorized hearing aids in this case. Thus, as to this matter, the authorization for hearing aids is *res judicata*.¹⁰ OWCP's medical adviser also determined that appellant's authorization for hearing aids be denied because, he noted, it was OWCP's practice to not approve hearing aids for hearing loss that was not ratable. However, as previously cited, if a hearing loss is determined to be not ratable for schedule award purposes, other benefits such as hearing aids may still be payable if any employment-related hearing loss exists.¹¹ The medical adviser's opinion as to OWCP claims practices is afforded no weight. As OWCP previously authorized hearing aids for appellant's occupational hearing loss, it acted unreasonably in denying hearing aids based only upon the statements and assertions of the medical adviser, made approximately ten years later, which are incorrect.

⁸ *Daniel J. Perea*, 42 ECAB 214 (1990); *see also D.M.*, Docket No. 15-0814 (issued July 16, 2015).

⁹ *See Raymond VanNett*, 44 ECAB 480 (1993).

¹⁰ *See Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

¹¹ *Supra* note 9.

The Board therefore finds that OWCP abused its discretion in denying appellant's request for hearing aids. OWCP shall furnish hearing aids to appellant based upon its prior authorization as outlined in its April 4, 2001 office memorandum.

The Board does not address as an issue whether appellant has proven an increased schedule award. While appellant has made a general argument for an increased schedule award, the argument was limited to the basis on which he asserted the right to obtain hearing aids. Appellant may request an increased schedule award, at any time, 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 OWCP abused its discretion in denying appellant's request for hearing aids.

ORDER

IT IS HEREBY ORDERED THAT the May 28, 2015 decision of the Office of Workers' Compensation Programs is reversed. OWCP shall furnish hearing aids to appellant in accordance with this decision.

Issued: April 18, 2016
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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