

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

_____)	
A.W., Appellant)	
)	
and)	Docket No. 16-0795
)	Issued: August 29, 2016
DEPARTMENT OF LABOR, MINE SAFETY & HEALTH ADMINISTRATION, Barbourville, KY, Employer)	
_____)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
 CHRISTOPHER J. GODFREY, Chief Judge
 PATRICIA H. FITZGERALD, Deputy Chief Judge
 VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 9, 2016 appellant filed a timely appeal from a January 5, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). 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.²

ISSUE

The issue is whether appellant has established that he sustained a ratable hearing loss entitling him to a schedule award.

¹ 5 U.S.C. § 8101 *et seq.*

² Appellant timely requested an oral argument. On April 4, 2016 the Board received appellant's request to withdraw his request for oral argument. Accordingly, the Board has decided the appeal on the record.

FACTUAL HISTORY

On May 5, 2015 appellant, then a 59-year-old mine safety and health specialist, filed an occupational disease claim (Form CA-2) alleging that he sustained hearing loss and ringing in both ears as a result of exposure to noise from mining equipment.³ He first became aware of his condition and realized that it resulted from his employment on December 15, 2014. Appellant did not stop work.

By letter dated May 7, 2015, OWCP advised appellant that no evidence was received to support his claim. It requested that appellant provide additional details and respond to the attached questionnaire in order to substantiate the factual elements of his claim. OWCP also asked for appellant to provide a medical report which established that he sustained diagnosed hearing loss as a result of the alleged factors of employment. Appellant was afforded 30 days to submit this additional evidence. A similar letter was sent to appellant's employing establishment.

In response, appellant submitted a May 5, 2015 statement, which listed his employment and described his noise exposure. From August 1973 to October 1979 he was in the U.S. Army and was exposed to noise from firing ranges and other noisy locations. Appellant was provided with hearing protection. From October 1979 to February 1988, September 1989 to September 1990, and October 1990 to January 1991, appellant worked for various mining companies as a mechanical and electrical repairman and was exposed to noisy environments underground and above ground. He was provided hearing protection. From February 1988 to May 1988 he was unemployed. From May 1988 to August 1989 and February to July 1991, appellant was employed as a safety consultant and director. He was exposed to noisy environments when retraining coal miners and making safety examinations. Appellant was provided with hearing protection. From September 1989 to September 1990 he worked as a mine inspector and was exposed to a noisy environment when conducting inspections. Appellant was provided hearing protection. Beginning July 1991 he worked as a coal mine inspector and was exposed to noise from the operating equipment that he inspected. Appellant explained that the length of time that he was exposed to these elements varied due to the nature of the inspection activities, but it was approximately 6 to 10 hours per day for 4 to 5 days per week. He further indicated that he was still exposed to hazardous noise at work. Appellant related filling a prior claim which was accepted for bilateral sensorineural hearing loss on June 20, 2003 (File No. xxxxxx559). He indicated that an employing establishment physician recommended hearing aids.

On May 11, 2015 Jim Langley, the district manager of the employing establishment, responded to OWCP's development letter. He related that the employing establishment conducted noise surveys at the surface and underground and verified that all of appellant's jobs involved exposure to hazardous noise levels.

³ The record reflects that appellant has a previously accepted hearing loss claim under File No. xxxxxx559. In a decision dated June 20, 2003, OWCP accepted that appellant sustained bilateral sensorineural hearing loss as a result of his federal employment. It also found that the medical evidence failed to demonstrate that appellant sustained any permanent impairment due to his work-related hearing loss and denied the authorization of hearing aids. The documents and evidence pertaining to case, File No. xxxxxx559 are not before the Board at this time.

The employing establishment provided annual audiometric testing and audiogram history reports from June 12, 1991 until December 15, 2014. In a December 10, 2014 audiogram history report, Liz Rogers, an audiologist, indicated that appellant was exposed to a steady noise from mining equipment for two to three hours a day and intermittent noise from mining equipment facilities. She noted that appellant was exposed to noise from power tools and lawn equipment for 6 to 10 hours in the summer. Ms. Rogers reported that physical examination of appellant's ears revealed that they were both clear and intact.

OWCP referred appellant, along with the record and statement of accepted facts (SOAF), for audiometric testing and for a second opinion examination with Dr. William Parell, a Board-certified otolaryngologist, to determine whether appellant sustained permanent impairment due to his hearing loss. In a June 30, 2015 report, Dr. Parell reviewed appellant's history, including the SOAF, and related that appellant had over a 25-year history of loud noise exposure working in the Federal Government. Upon physical examination, he observed clear ear canals and normal drum motility and eardrums. Dr. Parell diagnosed mild-to-severe bilateral symmetrical sensorineural hearing loss beginning at 3,000 Hertz (Hz). He indicated that appellant's hearing loss was in excess of what would normally be expected on the basis of presbycusis. Dr. Parell noted that appellant's workplace exposure was of sufficient intensity and duration to have caused his hearing loss. He calculated that based on appellant's audiogram results he had zero percent binaural hearing loss impairment.

Dr. Parell included a copy of the audiogram which indicated that at 500, 1,000, 2,000, and 3,000 Hz appellant sustained losses of 20, 10, 10, and 35 decibels (dB) for the right ear and 20, 10, 10, and 45 dB for the left ear. He calculated that the total sum of hearing was 75 dB for the right ear and 85 dB for the left ear. Dr. Parell concluded that appellant had zero percent binaural hearing impairment.

In a July 14, 2015 letter, Karen Bray, a workers' compensation program manager for the employing establishment, controverted appellant's hearing loss claim. She noted that by comparing his most recent audiogram with his baseline (2003) audiogram, appellant had a minimal change in his hearing at 500, 1,000, 2,000, and 3,000 Hz and no standard threshold shift or change. Ms. Bray included 2003 and 2014 audiometric testing results for side-by-side comparison and an audiogram of tests from June 12, 1991 to December 15, 2014.

On July 17, 2015 Dr. Daniel Zimmerman, an OWCP medical adviser, reviewed Dr. Parell's June 30, 2015 report and the otologic and audiologic testing performed on his behalf. He indicated that appellant had excellent hearing in speech thresholds. Dr. Zimmerman utilized the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (A.M.A., *Guides*) and determined that appellant had zero percent binaural hearing loss. He did not authorize hearing aids. Dr. Zimmerman determined that maximum medical improvement (MMI) was achieved on June 30, 2015.

On July 21, 2015 OWCP accepted appellant's claim for bilateral sensorineural hearing loss. In a separate decision, it determined that appellant had not established that he sustained a ratable impairment and denied authorization for hearing aids to treat his work-related hearing loss.

Appellant requested a review of the written record by an OWCP hearing representative, which was received by OWCP on July 31, 2015. In a July 29, 2015 statement, appellant noted that he was awarded hearing aids four years prior but he never obtained them because he did not understand the terminology of the award. He noted that appellant had moderate-to-severe hearing loss and questioned how appellant was not eligible for hearing aids to help with his hearing loss.

By decision dated January 5, 2016, an OWCP hearing representative affirmed the July 21, 2015 denial decision.

LEGAL PRECEDENT

The schedule award provision of FECA⁴ 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 of 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* has been adopted by OWCP as the appropriate standards for evaluating schedule losses.⁵

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.⁶ Using the frequencies of 500, 1,000, 2,000, and 3,000 cycles per second (cps), 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.⁸ The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.⁹

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.¹⁰ The A.M.A., *Guides* state that, if tinnitus

⁴ *Supra* note 1.

⁵ 20 C.F.R. § 10.404 (1999); *see also* Jacqueline S. Harris, 54 ECAB 139 (2002).

⁶ R.D., 59 ECAB 127 (2007); Bernard Babcock, Jr., 52 ECAB 143 (2000); *see also* 20 C.F.R. § 10.404.

⁷ *See* A.M.A., *Guides* 250 (6th ed. 2009).

⁸ *Id.*

⁹ E.S., 59 ECAB 249 (2007); Reynaldo R. Lichtenberger, 52 ECAB 462 (2001).

¹⁰ A.M.A., *Guides* 249.

interferes with activities of daily living, 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.¹¹ A schedule award for tinnitus is not payable unless the medical evidence establishes that the condition caused or contributed to a ratable hearing loss.¹²

ANALYSIS

Appellant filed an occupational disease claim for work-related hearing loss. In a decision dated July 21, 2015, OWCP accepted that he sustained binaural hearing loss as a result of his employment, but also found that his hearing loss was not severe enough to be considered ratable for a schedule award. The Board finds that the medical evidence is insufficient to establish a ratable hearing loss for purposes of a schedule award.

In a June 30, 2015 second opinion report, Dr. Parell examined appellant and diagnosed binaural symmetrical sensorineural hearing loss as a result of appellant's workplace noise exposure. He calculated that based upon the audiogram performed by an audiologist on his behalf appellant had zero percent binaural hearing loss impairment.

On July 17, 2015 Dr. Zimmerman, an OWCP medical adviser, reviewed the otologic and audiologic testing performed on appellant and properly applied OWCP's procedures to this evaluation. He determined that MMI was achieved on June 30, 2015. Testing for the right ear at the frequency levels of 500, 1,000, 2,000, and 3,000 cps revealed dB losses of 20, 10, 10, and 35 respectively. These dB losses were totaled at 75 dBs and were divided by 4 to obtain the average hearing loss of 18.75 dBs. This average loss was then reduced by the threshold 25 dBs to equal a negative figure. Testing for the left ear at the frequency levels of 500, 1,000, 2,000, and 3,000 cps revealed dB losses of 20, 10, 10, and 45 respectively. These dB losses total 85 dBs and when divided by 4 result in an average hearing loss of 21.25 dBs. This average loss when reduced by 25 dBs, also resulting in a negative figure. The medical adviser properly concluded that the calculations showed that appellant did not have a ratable hearing loss under the relevant standards of the A.M.A., *Guides*. The Board notes that this does not mean that appellant does not have a hearing loss. Rather, it means that the extent of loss is insufficient to constitute a ratable impairment according to the A.M.A., *Guides*.¹³

The Board finds that there is no current medical evidence of record supporting that appellant has a ratable hearing loss under OWCP's procedures for ratable hearing impairment. Appellant did not submit any medical evidence which demonstrated that his work-related hearing loss was severe enough to warrant a schedule award in accordance with the A.M.A., *Guides*. Furthermore, while appellant alleged that he had ringing in his ears, tinnitus, as there is no ratable hearing impairment, appellant is not eligible for the additional rating for tinnitus.¹⁴

¹¹ *Id.*; see also *Robert E. Cullison*, 55 ECAB 570 (2004).

¹² See *Charles H. Potter*, 39 ECAB 645 (1988).

¹³ See *R.M.*, Docket No. 15-1747 (issued January 19, 2016).

¹⁴ *P.V.*, Docket No. 13-1870 (issued January 7, 2014).

Thus, the Board finds that appellant has not established ratable hearing loss warranting a schedule award.

On appeal, appellant alleges that OWCP did not consider the entirety of the written record. He relates that he had suffered significant hearing loss. As explained above, however, the medical evidence of record is insufficient to establish that appellant had ratable binaural hearing impairment for this claim. Accordingly, appellant is not entitled to a schedule award due to his binaural hearing loss.

Appellant may request a 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.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish ratable hearing loss entitling him to a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the January 5, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 29, 2016
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board