

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

G.B., Appellant)	
)	
and)	Docket No. 16-0300
)	Issued: March 28, 2016
DEPARTMENT OF THE NAVY, PEARL)	
HARBOR NAVAL SHIPYARD, Honolulu, HI,)	
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 December 1, 2015 appellant filed a timely appeal from a June 5, 2015 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 the case.²

ISSUE

The issue is whether appellant has met his burden of proof to establish that he has a ratable hearing loss entitling him to a schedule award.

¹ 5 U.S.C. § 8101 *et seq.*

² Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of OWCP's decision. An appeal is considered filed upon receipt by the Clerk of the Appellant Boards. *See* 20 C.F.R. § 501.3(e)-(f). The 180th day from the June 5, 2015 decision was December 2, 2015. Since using December 8, 2015, the date the appeal was received by the Clerk of the Board, would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is December 1, 2015, which renders the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

FACTUAL HISTORY

On April 1, 2014 appellant, then a 51-year-old welder supervisor, filed an occupational disease claim (Form CA-2a) alleging that he sustained bilateral hearing loss and tinnitus due to exposure to loud noise in the performance of duty. He indicated that he first realized the disease or illness was caused or aggravated by his employment on April 1, 2014. Appellant did not stop work. In a separate statement, he described his noise exposure at work and explained that his hearing loss was an accumulation of many events over his 36-year work history on many different ships, submarines, and shop areas at the employing establishment.

OWCP received copies of personnel actions, work records, a position description, and copies of employing establishment audiograms for the period June 19, 1978 to March 7, 2014.³

By letters dated April 9, 2014, OWCP informed appellant and the employing establishment of the type of evidence needed to support his claim and requested that he submit such evidence within 30 days.

In response, appellant submitted an April 28, 2014 statement describing his work experience and noted that he had submitted the requested documentation, but would submit additional copies.

On August 18, 2014 OWCP referred appellant, together with a statement of accepted facts to Dr. Ronald Peroff, a Board-certified otolaryngologist, for a second opinion evaluation regarding the nature and extent of appellant's hearing loss and its relationship to his federal employment. It also referred appellant for an audiometric examination on this date.

In an August 27, 2014 report, Dr. Peroff noted seeing appellant on August 26, 2014 and reported appellant's history of noise exposure during his federal employment. He noted reviewing available medical records and examined appellant. Dr. Peroff advised that both ear canals were totally impacted with cerumen and using suction and the microscope, he cleaned out both ears. He determined that the drums were normal. Dr. Peroff diagnosed noise-induced hearing loss and tinnitus. He opined that if he calculated impairment based upon the audiogram, performed by an audiologist on his behalf, appellant would have zero percent impairment. Dr. Peroff explained that, as far as tinnitus, they would have to wait to see if the tinnitus improved since the ears were just cleaned. He attached a copy of the August 22, 2014 audiogram that was performed for him.⁴

By decision dated September 23, 2014, OWCP accepted appellant's claim for binaural noise-induced hearing loss due to his employment-related hearing exposure.

³ The March 7, 2014 audiogram showed that testing for the right ear at the frequency levels of 500, 1,000, 2,000, and 3,000 cycles per second (cps), revealed decibel (dB) losses of 10, 15, 20, and 25. Testing for the left ear at the same frequency levels revealed dB losses of 5, 15, 20, and 15.

⁴ Testing for the right ear at the frequency levels of 500, 1,000, 2,000, and 3,000 cps revealed dB losses of 20, 25, and 25 respectively. Testing for the left ear at the frequency levels of 500, 1,000, 2,000, and 3,000 cps revealed dB losses of 20, 25, 25, and 20 respectively.

On October 13, 2014 Dr. David N. Schindler, a Board-certified otolaryngologist and OWCP medical adviser, reviewed Dr. Peroff's report and the otologic and audiologic testing performed on his behalf. He noted that appellant was exposed to noise in excess of 85 dB while employed by the employing establishment. The medical adviser further noted that the earliest audiogram was from January 17, 1978, and was a preemployment audiogram, which revealed normal hearing and subsequent screening audiograms revealed minimal high frequency hearing loss. He found that Dr. Peroff's examination revealed a mild bilateral high frequency neurosensory hearing loss and the speech reception thresholds and speech discrimination scores were consistent with the pure tones as recorded. The medical adviser diagnosed mild bilateral high frequency sensorineural hearing loss, consistent in part with hearing loss due to noise exposure. He determined that maximum medical improvement was achieved on August 21, 2014. The medical adviser 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 advised that tinnitus was mentioned as present. However, it was not reported as impacting on activities of daily living. Consequently, tinnitus was not rated using the A.M.A., *Guides*. The medical adviser explained that appellant was not a candidate for hearing aids.

In a June 5, 2015 decision, OWCP explained that, while it had accepted appellant's claim for hearing loss, it had determined that his hearing loss was not severe enough to be considered ratable and, therefore, he was not entitled to schedule award compensation for hearing loss. It also explained that the medical evidence established that appellant would not benefit from hearing aids and denied his claim for additional medical benefits.

LEGAL PRECEDENT

The schedule award provision of FECA⁵ and its implementing regulations⁶ 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. 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 regulation as the appropriate standard for evaluating schedule losses.⁷

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 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.⁸ 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

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404.

⁷ *Id.*

⁸ See A.M.A., *Guides* 250.

calculating the loss in each ear using the formula for monaural loss. The lesser loss is multiplied by five and 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.⁹

ANALYSIS

The evidence of record is insufficient to establish that appellant has a ratable hearing loss entitling him to a schedule award. The Board therefore also finds the record insufficient to support an award for tinnitus as a ratable hearing loss must first be proven.¹⁰

In an August 27, 2014 report, Dr. Peroff examined appellant and diagnosed noise-induced hearing loss and tinnitus. He opined that if he calculated impairment based upon the audiogram performed by an audiologist on his behalf, he would find that appellant has zero percent impairment.

On October 13, 2014 the medical adviser reviewed the otologic and audiologic testing performed on appellant and properly applied OWCP's procedures to this evaluation. Testing for the right ear at the frequency levels of 500, 1,000, 2,000, and 3,000 cps revealed dB losses of 20, 25, 25, and 25 respectively. These dB losses were totaled at 95 dBs and were divided by 4 to obtain the average hearing loss of 23.75 dBs. This average loss was then reduced by 25 dBs (25 dBs being discounted as discussed above) 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, 25, 25, and 20 respectively. These dB losses total 90 dBs and when divided by 4 result in an average hearing loss of 22.5 dBs. This average loss when reduced by 25 dBs (25 dBs being discounted as discussed above) equals 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*. This does not mean that he does not have a hearing loss. It means the extent of loss is not sufficient to constitute a ratable impairment according to the A.M.A., *Guides*.¹¹

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 rating hearing impairment.

On appeal appellant argues that his tinnitus was the problem that was affecting his quality of life and had been ignored by OWCP. The A.M.A., *Guides* provides that, if tinnitus interferes with activities of daily living, up to five percent may be added to measurable binaural impairment.¹² As explained, appellant does not have a measurable binaural hearing impairment. Consequently, he would not be entitled to a schedule award due to his tinnitus.¹³

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

¹⁰ See *Juan A. Trevino*, 54 ECAB 358 (2003) (the Board found that, as appellant's hearing loss was not ratable, he was not entitled to the additional award for tinnitus).

¹¹ *R.M.*, Docket No. 15-1747 (issued January 19, 2016); *J.S.*, Docket No. 12-0967 (issued October 12, 2012).

¹² A.M.A., *Guides* 249.

¹³ *Supra* note 10.

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 that he has a ratable hearing loss entitling him to a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the June 5, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 28, 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