

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

L.C., Appellant)

and)

**DEPARTMENT OF LABOR, MINE SAFETY &
HEALTH ADMINISTRATION, COAL
DISTRICT 4, Mount Hope, WV, Employer**)

**Docket No. 16-0465
Issued: May 17, 2016**

Appearances:

*Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 8, 2016 appellant, through counsel, filed a timely appeal of a December 21, 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 to consider the merits of the case.

ISSUE

The issue is whether appellant has met his burden of proof to establish more than 28 percent binaural (both ears) hearing loss for which he received a schedule award.

On appeal counsel contends that appellant's schedule award should have included an additional impairment rating for tinnitus. He further argued that appellant's audiogram supported additional impairment on the left.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 12, 2015 appellant, then a 64-year-old mine safety and health inspector, filed an occupational disease claim (Form CA-2) alleging that he developed hearing loss due to his exposure to noise emitted by mining machinery while performing his job duties.

In letters dated February 23, 2015, OWCP requested that appellant and the employing establishment provide additional factual and medical evidence supporting his claim. The employing establishment responded and acknowledged that appellant was exposed to hazardous noise in the performance of his job duties.

In a statement dated January 26, 2015, appellant indicated that he had noticed a significant change in his hearing beginning in 2011. He also reported continuous ringing in both ears. Appellant received an e-mail from the employing establishment on September 14, 2014 noting that the results of his 2014 audiogram were significantly worse than his baseline in 2007 and that of 2013. He submitted audiograms from the employing establishment hearing loss conservation program.

On April 17, 2015 OWCP referred appellant for a second opinion evaluation with Dr. Albert James Paine, Jr., a Board-certified otolaryngologist. On June 2, 2015 appellant informed OWCP of the ringing in his ears which he stated made it difficult to hear and ruined the quality of his life. He alleged that during OWCP's scheduled audiogram, the audiologist berated him for not indicating that he heard a tone. Appellant further noted that Dr. Paine did not address the ringing in appellant's ears, despite the fact that appellant mentioned this condition.

In a report dated June 2, 2015, Dr. Paine reviewed the statement of accepted facts and noted that appellant's initial audiogram in 2007 showed bilateral sensorineural hearing loss, worse on the left. He found that appellant's current audiogram demonstrated bilateral low, mid, and high frequency sensorineural hearing loss worse at high frequencies. Dr. Paine concluded that appellant's hearing loss was in excess of what would normally be predicted on the basis of presbycusis and that the workplace exposure was sufficient to have caused this loss. He noted that appellant's reliability was not good and recommended that appellant undergo another audiogram to obtain good reliability in both ears.

Appellant's audiogram demonstrated testing at 500, 1,000, 2,000, and 3,000 hertz (Hz) and in the right ear resulting respectively in decibel losses of 30, 35, 40, and 55 while on the left at the same levels demonstrated losses of 35, 45, 45, and 65.

OWCP's medical adviser reviewed Dr. Paine's report on June 18, 2015 and recommended an additional audiogram.

On June 26, 2015 OWCP accepted appellant's claim for bilateral sensorineural hearing loss.

OWCP referred appellant for an additional second opinion evaluation with Dr. Charles Abraham, a Board-certified otolaryngologist on June 24, 2015. In a report dated July 15, 2015, Dr. Abraham reviewed the statement of accepted facts and described appellant's hearing loss and tinnitus. He opined, "Tinnitus is a problem [appellant] must deal with daily." Dr. Abraham

found bilateral sensorineural hearing loss consistent with appellant's employment history of noise exposure. He recommended that appellant be evaluated for hearing aids.

Appellant's July 15, 2015 audiogram demonstrated testing at 500, 1,000, 2,000, and 3,000 Hz and revealed on the right decibel losses of 40, 30, 45, and 55, respectively. On the left his decibel losses at the above levels were 40, 40, 55, and 70, respectively. OWCP's medical adviser reviewed this test on July 27, 2015 and applied the hearing loss formula from the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (6th ed. 2009).² He added the right decibel losses to reach 170 and averaged this sum to reach 42.5. The medical adviser then subtracted the fence of 25 as directed by the A.M.A., *Guides* to reach 17.5 and multiplied this amount by 1.5 to reach a monaural loss on the right of 26.25 percent. He followed the same procedure with the audiographic results of appellant's left ear to reach 39.375 percent monaural hearing loss. The medical adviser then applied the formula to reach binaural hearing loss by multiplying the lesser loss by 5 and dividing the sum of the two losses by 6 to reach 28.437 percent binaural loss or 28 percent binaural hearing loss.

By decision dated August 18, 2015, OWCP granted appellant a schedule award for 28 percent binaural hearing loss. It based this award on the reports of Dr. Abraham and the medical adviser.

Counsel requested reconsideration on September 22, 2015. He alleged that OWCP had improperly omitted appellant's diagnosed condition of tinnitus when calculating his schedule award. Counsel further contended that based on appellant's audiogram his decibel loss in the left ear at 3,000 Hz was 70 not 65. He requested an additional audiogram to establish appellant's hearing loss.

By decision dated December 21, 2015, OWCP denied modification of the August 18, 2015 decision. It found that appellant's (Form CA-2) did not include the condition of tinnitus. OWCP further found that Dr. Abraham's report did not address or support additional impairment due to tinnitus. It further found that even if the audiogram demonstrated 70 rather than 65 decibel loss, this would not change the amount of the schedule award.

LEGAL PRECEDENT

The schedule award provision of FECA³ and its implementing regulations⁴ set forth the number of weeks of compensation payable to employees sustaining permanent impairment for 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 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. OWCP evaluates the degree of

² A.M.A., *Guides*, 6th ed. (2009).

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404.

permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.⁵

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 decibel result in no impairment in the ability to hear everyday speech under everyday conditions.⁶ 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 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.⁷ The Board has also noted OWCP's policy to round the calculated percentage of impairment to the nearest whole number.⁸

If tinnitus 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.⁹

ANALYSIS

The Board finds that this case not in posture for a decision.

OWCP's medical adviser applied the A.M.A., *Guides* to the medical report submitted from Dr. Abraham, which conforms to applicable criteria. The losses at the frequencies of 500, 1,000, 2,000 and 3,000 cycles per second were added and averaged and the "fence of 25 decibels was deducted."¹⁰ The remaining amount was multiplied by 1.5 to arrive at the percentage of monaural hearing loss. For a binaural hearing loss, the loss in each ear is calculated using the above formula. The lesser loss is then multiplied by five and added to the greater loss. This amount is then divided by six to arrive at the total binaural hearing loss. For levels recorded in the right ear of 40, 30, 45, and 55, the above formula derives 26.25 percent monaural loss and for levels recorded in the left ear of 40, 40, 55 and 70, the above formula derives 39.375 percent

⁵ For new decisions issued after May 1, 2009 OWCP began using the sixth edition of the A.M.A., *Guides*. A.M.A., *Guides*, 6th ed. (2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.5a (February 2013); *id.*, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

⁶ See A.M.A., *Guides* 250.

⁷ *E.S.*, 59 ECAB 249 (2007); *Reynaldo R. Lichtenberger*, 52 ECAB 462 (2001).

⁸ *J.H.*, Docket No. 08-2432 (issued June 15, 2009), *Robert E. Cullison*, 55 ECAB 570 (2004). See *supra* note 5 at Chapter 3.700.4(b)(2)(b) (September 2010).

⁹ A.M.A., *Guides* 249.

¹⁰ The A.M.A., *Guides* points out that the loss below an average of 25 decibels is deducted as it does not result in impairment in the ability to hear every day sounds under everyday listening conditions.

monaural loss. According to the accepted formula these combine to reach a 28 percent binaural loss of hearing.

On appeal, counsel argued that there was ambiguity in the left ear loss at 3,000 Hz based on the audiogram completed with Dr. Abraham's report. The Board notes that the OWCP medical adviser did utilize the higher value of 70 decibels as demonstrated on the audiogram rather than the lesser amount of 65 decibels erroneously included by the audiologist on the audiological report.

The Board notes that, regarding tinnitus, the A.M.A., *Guides* provides that tinnitus in the presence of hearing impairment may impair speech discrimination. Therefore, up to five percent may be added for tinnitus in the presence of measurable hearing loss if the tinnitus impacts the ability to perform activities of daily living.¹¹ Dr. Abraham noted that appellant experienced daily tinnitus, however, the medical adviser did not address this aspect of appellant's claim when calculating his schedule award.

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.¹² The Board finds that the case is not in posture for decision regarding the award or extent of tinnitus.

On remand, OWCP should further develop the record regarding the extent and impairment of appellant's hearing due to tinnitus. After this and such other development as it deems necessary, OWCP should issue a *de novo* decision.

CONCLUSION

The Board finds that the case is not in posture for a decision.

¹¹ See *S.M.*, Docket No. 14-1688 (issued May 1, 2015); *D.W.*, Docket No.14-931 (issued August 11, 2014).

¹² *Phillip L. Barnes*, 55 ECAB 426 (2004).

ORDER

IT IS HEREBY ORDERED THAT the December 21, 2015 decision of the Office of Workers' Compensation Programs is set aside and remanded for additional development consistent with the Board's decision.

Issued: May 17, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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