

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

J.F., Appellant

and

**DEPARTMENT OF THE NAVY, FLEET
FORCES COMMAND, SHIPYARDS FLEET
HRO, NORFOLK NAVAL SHIPYARD,
Portsmouth, VA, Employer**

**Docket No. 16-1225
Issued: November 21, 2016**

Appearances:

David G. Jennings, Esq., for the appellant¹
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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On May 18, 2016 appellant, through counsel, filed a timely appeal from an April 12, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant sustained more than three percent binaural hearing loss for which he received a schedule award.

FACTUAL HISTORY

On October 8, 2015 appellant, then a 65-year-old pipefitter, filed an occupational disease claim (Form CA-2) alleging bilateral hearing loss as a result of employment-related noise exposure. He worked as a pipefitter for the employing establishment from 2002 until he retired on October 2, 2013. Appellant was exposed to loud noise from various pneumatic tools, grinding, chipping, nitrogen tanks, testing systems, brazing torches, and metal cutting machines for eight hours per day, five days per week.

On December 23, 2013 appellant filed a claim for a schedule award (Form CA-7).

OWCP referred appellant, together with a statement of accepted facts, to Dr. Jeffrey Powell, a Board-certified otolaryngologist, for a second opinion evaluation on March 15, 2016. An audiogram was completed on March 15, 2016 which revealed the following decibel (dB) losses at 500, 1,000, 2,000, and 3,000 hertz (Hz): 20, 20, 25, and 25 for the right ear and 20, 25, 25, and 75 for the left ear. Speech reception thresholds were 20 dB bilaterally while auditory discrimination scores were 96 percent on the right and 84 percent on the left. Appellant complained of trouble hearing conversations, as well as difficulty hearing noisy equipment at work, background noise, and multiple people talking. He further complained of constant high pitch ringing in his ears which caused him to lose significant amounts of sleep.

Dr. Powell diagnosed severe bilateral tinnitus and bilateral high-frequency sensorineurial hearing loss, worse in left than right. He opined that appellant's hearing loss was in part due to his federal employment, noting that it was also caused from his civilian employment in shipyards from 1975 to 2002. Dr. Powell explained that appellant continued to suffer from residuals of his hearing loss as the ringing in his ears would continue in years to come as tinnitus. He recommended bilateral hearing aids.

Applying the standard provided by the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*³ (A.M.A., *Guides*) to the March 15, 2016 audiometric data, Dr. Powell calculated that appellant sustained 16.875 percent monaural hearing impairment in the right ear and 0 percent monaural hearing impairment in the left ear.⁴ No additional rating was provided for tinnitus and Dr. Powell did not calculate a binaural hearing impairment.

By decision dated March 30, 2016, OWCP accepted appellant's claim for bilateral high-frequency sensorineurial hearing loss, bilateral tinnitus, and impaired auditory discrimination of

³ A.M.A., *Guides* (6th ed. 2009).

⁴ The Board notes that Dr. Powell mistakenly calculated the impairment rating for the left ear using the right ear decibel losses and vice versa. As he correctly noted, appellant's left ear hearing loss is worse than the right. As such, he sustained 16.875 percent monaural hearing impairment in the left ear and 0 percent monaural hearing impairment in the right ear.

the left ear. It further noted that the record established that appellant would benefit from hearing aids.

On March 20, 2016 OWCP referred the case file to Dr. Jeffrey M. Israel, an OWCP district medical adviser (DMA) and Board-certified otolaryngologist, to determine the extent of appellant's hearing loss and permanent impairment due to his employment-related noise exposure. It noted that the claim had been accepted for bilateral high-frequency sensorineural hearing loss, bilateral tinnitus, and impaired auditory discrimination of the left ear.

On April 3, 2016 Dr. Israel reviewed Dr. Powell's March 15, 2016 otologic examination report and agreed that appellant's bilateral sensorineural hearing loss was due to occupational noise exposure. He applied the audiometric data to OWCP's standard for evaluating hearing loss under the sixth edition of the A.M.A., *Guides* and determined that appellant sustained 0 percent monaural hearing impairment in the right ear, 16.88 percent monaural hearing impairment in the left ear, and a binaural hearing impairment of 2.8 percent.⁵

Dr. Israel added no percentage for tinnitus, noting no tinnitus handicap inventory was available. He concluded that hearing aids were authorized and noted the date of maximum medical improvement (MMI) as March 15, 2016.

By decision dated April 12, 2016, OWCP granted appellant a schedule award for three percent binaural hearing loss. The date of MMI was determined to be March 15, 2016, the date of audiogram performed with Dr. Powell's examination. The award covered a period of six weeks from March 15 through April 25, 2016 and the weekly pay was computed at the 75 percent augmented rate for employees with dependents.

LEGAL PRECEDENT

The schedule award provision of FECA⁶ 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.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 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

⁵ *Id.*

⁶ *Supra* note 2.

⁷ See R.D., 59 ECAB 127 (2007); *Bernard Babcock, Jr.*, 52 ECAB 143 (2000).

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 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.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 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

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to OWCP's medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified.¹² OWCP may follow the advice of its medical adviser or consultant where he or she has properly utilized the A.M.A., *Guides*.¹³

ANALYSIS

OWCP accepted appellant's claim for bilateral high-frequency sensorineural hearing loss, bilateral tinnitus, and impaired auditory discrimination of the left ear. The issue is whether appellant was properly awarded three percent binaural hearing loss for which he received a schedule award. The Board finds that this case is not in posture for decision.

OWCP referred appellant, together with a statement of accepted facts, to Dr. Powell, a Board-certified otolaryngologist, for a second opinion evaluation on March 15, 2016. Dr. Powell diagnosed severe bilateral tinnitus and work-related bilateral high-frequency sensorineural hearing loss, worse in left ear than the right. He opined that appellant sustained 0 percent monaural hearing impairment in the right ear and 16.875 percent monaural hearing impairment in the left ear. Dr. Powell did not provide any additional impairment for tinnitus.

OWCP referred the medical evidence to Dr. Israel, the DMA, for a rating of permanent impairment in accordance with the A.M.A., *Guides*.¹⁴ Dr. Israel opined that appellant sustained

⁸ See A.M.A., *Guides* 250.

⁹ 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).

¹⁰ See A.M.A., *Guides* 249.

¹¹ *Id.* See also R.H., Docket No. 10-2139 (issued July 13, 2011); Robert E. Cullison, 55 ECAB 570 (2004).

¹² See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(f) (February 2013).

¹³ See Ronald J. Pavlik, 33 ECAB 1596 (1982).

¹⁴ See Hildred I. Lloyd, 42 ECAB 944 (1991).

0 percent monaural hearing impairment in the right ear, 16.88 percent monaural hearing impairment in the left ear, or a binaural hearing impairment of 2.8 percent based on the results of the March 15, 2016 audiogram and Dr. Powell's second opinion report. OWCP's April 12, 2016 decision was based largely on Dr. Israel's recommendation.

Using the March 15, 2016 audiogram, Dr. Israel averaged appellant's right ear hearing levels of 20, 20, 25, and 25 dB at 500, 1,000, 2,000, and 3,000 Hz, which totaled 22.5. Because this average was below the fence of 25 dB, he determined that appellant had zero percent right ear monaural hearing loss. Dr. Israel then averaged appellant's left ear hearing levels of 20, 25, 25, and 75 dB at 500, 1,000, 2,000, and 3,000 Hz, which totaled 36.25. After subtracting out a 25 dB fence, he multiplied the remaining 11.25 balance by 1.5 to calculate a 16.88 percent left ear monaural hearing loss (rounded up from 16.875).¹⁵ Dr. Israel then calculated 2.8 percent binaural hearing loss by multiplying the lesser right ear loss of 0 percent by 5, adding the greater 16.88 percent left ear loss, and dividing this sum by 6. He concluded that hearing aids were authorized and noted the date of MMI as March 15, 2016.

The A.M.A., *Guides* allows for compensation of up to five percent for tinnitus in the presence of measurable hearing loss if the tinnitus impacts the ability to perform activities of daily living.¹⁶ In this case, Dr. Powell diagnosed severe bilateral tinnitus and explained that appellant continued to suffer from residuals of his work-related injury in the form of tinnitus and ringing in the ears. He noted that appellant complained of trouble hearing conversation, difficulty hearing noisy equipment at work, background noise, and multiple people talking. Dr. Powell further noted that appellant's tinnitus caused him to lose significant hours of sleep. He provided a detailed description of appellant's symptoms pertaining to tinnitus and how the condition interfered with his activities of daily living. However, no additional rating was provided for tinnitus.

The Board finds Dr. Powell's report sufficient to require OWCP to further develop the medical evidence to determine the extent of impairment for tinnitus.¹⁷ Accordingly, the Board will remand the case to OWCP.

OWCP awarded appellant three percent binaural hearing loss, an award which covered a period of six weeks from March 15 through April 25, 2016. A schedule award provides for payment of compensation for a specific number of weeks as prescribed by the statute.¹⁸ FECA provides that a claimant is entitled to 52 weeks of compensation for 100 percent loss of hearing in one ear and 200 weeks compensation for 100 percent hearing loss in both ears. OWCP used three percent binaural hearing loss impairment (rounded up from 2.8) to calculate the period of the award. Multiplying three percent by the 200 weeks provided for binaural hearing loss results in a total of 6 weeks of compensation. With respect to the 17 percent left ear monaural hearing

¹⁵ The policy of OWCP is to round the calculated percentage of impairment to the nearest whole point. Results should be rounded down for figures less than .5 and up for .5 and over. See FECA Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3.b (January 2010); Carolyn E. Sellers, 50 ECAB 393, 394 (1999).

¹⁶ See Robert E. Cullison, 55 ECAB 570 (2004); R.H., Docket No. 10-2139 (issued July 13, 2011).

¹⁷ See Jimmy A. Hammons, 51 ECAB 219 (1999); John J. Caralone, 41 ECAB 354 (1989).

¹⁸ 5 U.S.C. § 8107.

loss impairment (rounded up from 16.88), multiplying 17 percent by the 52 weeks for monaural hearing loss results in a total of 8.84 weeks of compensation.

The Board notes that if the allowance for monaural hearing loss would be greater than that for binaural hearing loss, the claimant should receive the benefit of the more favorable allowance.¹⁹ Thus the Board finds that OWCP improperly awarded three percent binaural hearing loss allowance for six weeks of compensation. Rather, appellant should have been awarded 8.84 weeks of compensation for the more favorable allowance of 17 percent left ear monaural hearing loss.²⁰ Following this and any other further development deemed necessary, OWCP shall issue an appropriate merit decision on appellant's schedule award claim.²¹

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the April 12, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development consistent with this decision.

Issued: November 21, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁹ *M.M.*, Docket No. 15-1719 (issued November 2, 2015).

²⁰ *C.f., T.H.*, Docket No. 07-965 (issued August 6, 2007).

²¹ See *P.K.*, Docket No. 08-2551 (issued June 2, 2009); see also *Horace Langhorne*, 29 ECAB 820 (1978).