

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

R.O., Appellant)	
)	
and)	Docket No. 15-0194
)	Issued: September 19, 2016
DEPARTMENT OF THE NAVY, NORFOLK)	
NAVAL SHIPYARD, Portsmouth, VA, Employer)	
)	

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
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 5, 2014 appellant, through counsel, filed a timely appeal of an October 9, 2014 Office of Workers' Compensation Programs' (OWCP) merit decision. Pursuant to the Federal Employees' Compensation Act² (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 more than six percent binaural hearing loss for which he received a schedule award.

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.*

On appeal counsel argued that he should have received a schedule award for his bilateral tinnitus.

FACTUAL HISTORY

On May 29, 2014 appellant, then a 58-year-old crane and rigging operator, filed an occupational disease claim alleging that he developed bilateral hearing loss. He attributed his hearing loss to noise at work. Appellant stated that he first became aware of his condition and attributed it to his federal employment on October 3, 2002. In a letter dated June 3, 2014, OWCP requested that appellant provide additional factual and medical evidence in support of his claim.

Appellant submitted employing establishment audiograms. He indicated that he worked at the employing establishment from 1977 as a rigger, nuclear inspector and quality assurance specialist. Appellant stated that he was exposed to noise from pneumatic tools, chipping, grinding, sandblasting, machinery, cranes and sirens. He utilized earplugs at work. Appellant stated that he was last exposed to noise on January 3, 2014.

OWCP referred appellant and a statement of accepted facts for a second opinion evaluation with Dr. Jeffrey Powell, a Board-certified otolaryngologist. Dr. Powell completed a report on July 22, 2014 and indicated that appellant demonstrated a progressive high frequency bilateral sensorineural hearing loss. He opined that the workplace exposure was sufficient to cause the hearing loss. Dr. Powell indicated that appellant had tinnitus secondary to his hearing loss. Appellant's audiogram demonstrated in the right ear at the frequencies of 500, 1,000, 2,000 and 3,000 cycles per second (cps) 15, 35, 25, and 40 decibel losses, respectively and on the left 20, 25, 30 and 50 decibel losses, respectively. Dr. Powell applied a formula, totaling the losses, subtracting 25 and multiplying by 1.5 to reach monaural losses of 9.375 on the left and 5.625 on the right. He also found one percent impairment for tinnitus bilaterally. To reach appellant's binaural loss, he multiplied the percentage of the better ear, including the 1 percent for tinnitus in both ears, by 5 and added the other ear and then divided by 6 to reach 7.25 binaural loss of hearing.

An OWCP medical adviser reviewed Dr. Powell's report on July 31, 2014 and agreed with his findings regarding impairments without tinnitus. He applied the formulas and concluded that appellant had 6.25 or 6 percent loss of hearing.

By decision dated August 5, 2014, OWCP accepted appellant's claim for bilateral sensorineural hearing loss and bilateral tinnitus. Appellant filed a claim for a schedule award on August 28, 2014 and by decision dated October 9, 2014 OWCP granted him a schedule award for six percent bilateral hearing loss.

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 from

³ *Id.*

⁴ 20 C.F.R. § 10.404. Effective May 1, 2009, OWCP began using the A.M.A., *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (6th ed. 2009).

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 regulations as the appropriate standard 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 cps, the losses at each frequency are added up and averaged.⁷ Then, the fence of 25 decibels is deducted. The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.⁸ 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.⁹ The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.

ANALYSIS

OWCP accepted that appellant sustained binaural hearing loss due to noise. It developed the claim by referring him to Dr. Powell. On July 22, 2014 Dr. Powell examined appellant and an audiogram was obtained. She found, using OWCP's standard procedures, that appellant's noise exposure in his federal employment was sufficient to cause binaural hearing loss. The July 22, 2014 tested decibel losses at the frequencies of 500, 1,000, 2,000 and 3,000 cps 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 left ear of 20, 25, 30, and 50, the above formula derives 9.375 percent monaural loss and for levels recorded in the right ear of 15, 35, 25, and 40, the above formula derives 5.625 percent monaural loss. According to the accepted formula these combine to reach a 6.25 percent binaural loss of hearing.

An OWCP medical adviser concurred in the finding of 6.25 percent binaural hearing loss based on the audiogram results, which OWCP rounded to grant appellant a schedule award for six percent binaural hearing loss. OWCP's procedures provide that in computing hearing loss,

⁵ *Id.*

⁶ Federal (FECA) Procedure Manual, Part 3 -- Schedule Awards, *Special Determinations*, Chapter 3.700.4.b (January 2010).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

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 everyday sounds under everyday listening conditions.

percentages should not be rounded until the final percent for award purposes is obtained and fractions should be rounded down from .49 or up from .50.¹¹

The medical adviser, however, did not credit Dr. Powell's finding of an additional one percent bilateral hearing loss due to tinnitus. On appeal, appellant's counsel argues that the medical adviser erred by failing to include Dr. Powell's rating of impairment for tinnitus. The Board notes that the A.M.A., *Guides* at section 11.2b, page 249¹² states that, if the tinnitus interferes with daily living activities such as sleep, reading, enjoyment of quiet recreation, and emotional well-being, up to five percent may be added to a measurable binaural hearing impairment.

The Board finds this case not in posture for a decision as clarification is required from Dr. Powell as to why he added one percent impairment for tinnitus. Regarding tinnitus, the A.M.A., *Guides* states, tinnitus in the presence of unilateral or bilateral 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 (ADLs).¹³ Although Dr. Powell included one percent impairment for tinnitus in appellant's monaural impairment determinations, he did not address how this impacted him in his ADLs.¹⁴

It is well established that 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 the responsibility in the development of the evidence to see that justice is done. As OWCP undertook development of the evidence by referring appellant to Dr. Powell, it has the duty to secure an appropriate report addressing the relevant issues.¹⁵ Because Dr. Powell did not explain why he included a rating for tinnitus in his determination of appellant's hearing loss, the case will be remanded to OWCP to request Dr. Powell to provide a supplemental report explaining his rationale for giving a one percent impairment rating for tinnitus. Following this and any necessary further development, OWCP shall issue a *de novo* decision relative to the extent and degree of appellant's hearing impairment.

CONCLUSION

The Board finds that this case is not in posture for a decision as to whether appellant has more than six percent binaural hearing loss, for which he received a schedule award.

¹¹ See *supra* note 4; see e.g., *V.B.*, Docket No. 14-8 (issued March 6, 2014).

¹² A.M.A., *Guides* 249.

¹³ *David W. Ferrall*, 56 ECAB 362 (2005).

¹⁴ *R.G.*, Docket No. 11-19 (issued August 3, 2011); *J.P.*, Docket No. 09-1520 (issued March 1, 2010).

¹⁵ *Peter C. Belkind*, 56 ECAB 580 (2005).

ORDER

IT IS HEREBY ORDERED THAT the October 9, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development consistent with this decision of the Board.¹⁶

Issued: September 19, 2016
Washington, DC

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

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

¹⁶ James A. Haynes, Alternate Judge, participated in the original decision but was no longer a member of the Board effective November 16, 2015.