

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

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**D.F., Appellant**

**and**

**DEPARTMENT OF THE NAVY, NORFOLK  
NAVAL SHIPYARD, Portsmouth, VA, Employer**

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**Docket No. 15-0246  
Issued: September 19, 2016**

*Appearances:*  
*David G. Jennings, Esq., for the appellant*<sup>1</sup>  
*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  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On November 12, 2014 appellant, through counsel, filed a timely appeal from an October 16, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether appellant has more than 19 percent binaural hearing loss causally related to his federal employment, for which he received a schedule award.

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

On appeal, counsel notes that a second opinion physician added 1 percent impairment to appellant's hearing loss for tinnitus, thereby totaling 20 percent binaural hearing loss while an OWCP medical adviser excluded the 1 percent impairment for tinnitus without explanation. He further notes that up to five percent may be added for tinnitus according to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). Counsel cites Board precedent and contends that the case should be remanded to OWCP to request that the second opinion physician provide a supplemental report explaining her rationale for giving one percent impairment for tinnitus.

### **FACTUAL HISTORY**

On December 5, 2012 appellant, then a 59-year-old supervisory mechanical project zone manager, filed an occupational disease claim (Form CA-2) alleging that on June 25, 1992 he first became aware of hearing loss in both ears and first realized that his condition was caused by noise at work. He retired from the employing establishment effective January 1, 2011.

On May 29, 2013 OWCP referred appellant to Dr. Eugenia M. Gray, a Board-certified otolaryngologist, for a second opinion impairment evaluation. In a June 27, 2013 report, Dr. Gray diagnosed bilateral high frequency sensorineural hearing loss and checked a box indicating that appellant's noise exposure in his federal employment was sufficient to cause binaural hearing loss. An audiogram performed on her behalf on the same date reflected testing at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second (cps) and revealed the following decibel (dB) losses: 10, 15, 60, and 65 for the right ear and 15, 20, 60, and 65 for the left ear, respectively. Based on these results and in accordance with the sixth edition of the A.M.A., *Guides*, Dr. Gray determined that appellant had a 20.375 percent binaural hearing loss. She advised that he had reached maximum medical improvement on the date of her examination. Dr. Gray recommended hearing protection when indicated and hearing aids. On the form report she added 1 percent impairment for tinnitus, resulting in a total 19.75 percent monaural hearing impairment in the right ear (18.75 percent + 1 percent for tinnitus) and 23.5 percent monaural hearing impairment in the left ear (22.5 percent + 1 percent for tinnitus). Dr. Gray calculated a binaural hearing impairment of 20.375 percent.

In a June 27, 2013 decision, OWCP accepted appellant's claim for bilateral hearing loss.

On November 15, 2013 appellant filed a Form CA-7 claim for a schedule award.

In a December 2, 2013 report, Dr. Duane J. Taylor, a Board-certified otolaryngologist and OWCP medical adviser, reviewed Dr. Gray's report and audiometric test results. He concurred with her audiometric findings that appellant had 18.75 percent monaural hearing loss in the right ear and 22.5 percent monaural hearing loss in the left ear, which yielded a 19.37 percent binaural hearing loss. Dr. Taylor omitted the rating for tinnitus. He determined that the date of maximum medical improvement was June 11, 2013, the date of Dr. Gray's second opinion examination and audiometric test. He recommended authorization for hearing aids and protection, and yearly audiograms.

In an October 16, 2014 decision, OWCP granted appellant a schedule award for 19 percent binaural hearing loss impairment, entitling him to 38 weeks of compensation. The period of the award ran from June 11, 2013 to March 3, 2014.

### **LEGAL PRECEDENT**

The schedule award provision of FECA<sup>3</sup> 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* (6<sup>th</sup> ed. 2009), has been adopted by OWCP for evaluating schedule losses and the Board has concurred in such adoption.<sup>4</sup>

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 dB is deducted because, as the A.M.A., *Guides* points out, losses below 25 dB result in no impairment in the ability to hear everyday speech under everyday conditions. 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.<sup>5</sup>

### **ANALYSIS**

On appeal counsel contends that appellant has greater impairment based upon the opinion of Dr. Gray.

OWCP accepted that appellant sustained a bilateral hearing loss due to noise. It developed the claim by referring him to Dr. Gray. Dr. Gray diagnosed bilateral sensorineural hearing loss. She opined that the hearing loss was due to appellant's workplace noise exposure and recommended hearing protection and hearing aids. Applying the June 27, 2013 audiometric data, Dr. Gray calculated that appellant had 18.75 percent monaural hearing impairment in the right ear and 22.5 percent hearing impairment in the left ear. On the form report, she added 1 percent impairment for tinnitus, resulting in a total 19.75 percent monaural hearing impairment in the right ear (18.75 percent + 1 percent for tinnitus) and 23.5 percent monaural hearing

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<sup>3</sup> *Id.*

<sup>4</sup> *See R.D.*, 59 ECAB 127 (2007); *Bernard Babcock, Jr.*, 52 ECAB 143 (2000).

<sup>5</sup> *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).

impairment in the left ear (22.5 percent + 1 percent for tinnitus). Dr. Gray calculated a binaural hearing impairment of 20.375 percent.

The Board finds this case not in posture for a decision as clarification is required from Dr. Gray as to why she 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).<sup>6</sup> Although Dr. Gray included one percent impairment for tinnitus in appellant's monaural impairment determinations, she did not address how this impacted him in his ADLs.<sup>7</sup> Further, while she noted +1 tinnitus in her report, Dr. Gray did not include tinnitus as a diagnosis.

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. Gray, it has the duty to secure an appropriate report addressing the relevant issues.<sup>8</sup> Because Dr. Gray did not explain why she included a rating for tinnitus in her determination of appellant's hearing loss, the case will be remanded to OWCP to request Dr. Gray to provide a supplemental report explaining her rationale for giving a one percent impairment rating for tinnitus when she did not list it as a diagnosis.<sup>9</sup> 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 19 percent binaural hearing loss, for which he received a schedule award.

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<sup>6</sup> See *R.D.*, *supra* note 4; *David W. Ferrall*, 56 ECAB 362 (2005).

<sup>7</sup> *R.G.*, Docket No. 11-19 (issued August 3, 2011); *J.P.*, Docket No. 09-1520 (issued March 1, 2010).

<sup>8</sup> *Peter C. Belkind*, 56 ECAB 580 (2005).

<sup>9</sup> *D.W.*, Docket No. 14-931 (issued August 11, 2014); *V.D.*, Docket No. 13-331 (issued August 12, 2013).

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 16, 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.

Issued: September 19, 2016  
Washington, DC

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

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

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