United States Department of Labor
Employees' Compensation Appeals Board

T.J., Appellant	)	
and	)	**Docket No. 17-0267**
	)	**Issued: January 27, 2017**
DEPARTMENT OF THE NAVY, PUGET SOUND NAVAL SHIPYARD, Bremerton, WA, 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 November 15, 2016 appellant filed a timely appeal from a June 6, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUE

The issue is whether appellant has met his burden of proof to establish ratable hearing loss.

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that appellant submitted additional medical evidence after OWCP rendered its June 6, 2016 decision. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision. Therefore, this additional evidence cannot be considered by the Board. 20 C.F.R. § 501.2(c)(1).

FACTUAL HISTORY

On June 9, 2015 appellant, then a 60-year-old police officer, filed an occupational disease claim (Form CA-2) for bilateral hearing loss, which he attributed to his federal employment. He submitted a series of annual audiograms from July 2005 through October 2014, some of which were administered as part of the employing establishment's hearing conservation program.[3] Appellant indicated that he first became aware of his employment-related hearing loss on October 1, 2010. He reported that as a police officer, he was exposed to noise from trades working in industrial areas, such as chipping, grinding, etc. Appellant was also exposed to noise from vehicles and trucks while working the gates. His occupational noise exposure occurred for up to eight hours per day and hearing protection was not permitted to be worn.

OWCP referred appellant to Dr. Julie Gustafson, a Board-certified otolaryngologist, for a second opinion. In an October 20, 2015 report, Dr. Gustafson diagnosed sensorineural hearing loss and tinnitus. She stated that appellant's workplace exposure would be considered of sufficient intensity and duration to have materially impacted the hearing loss in question. In conclusion, Dr. Gustafson indicated that appellant had a mild high-frequency sensorineural hearing loss that may be related to presbycusis, but could have a contribution from noise exposure. An October 20, 2015 audiogram, performed on Dr. Gustafson's behalf, reflected testing at the frequency levels of 500, 1,000, 2,000, and 3,000 cycles per second and revealed the following decibel (dB) losses: 10, 15, 10, and 25 for the right ear and 20, 15, 15, and 15 for the left ear. Based on these results and in accordance with American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001), Dr. Gustafson determined that appellant had zero percent binaural hearing loss. She also noted that appellant's hearing loss did not appear to be severe enough to warrant amplification at that time.

On November 6, 2015 OWCP accepted appellant's claim for bilateral sensorineural hearing loss and bilateral tinnitus, with an October 1, 2010 date of injury.

In a November 12, 2015 report, OWCP's district medical adviser (DMA) reviewed Dr. Gustafson's report and October 20, 2015 audiometric test results. He concurred with Dr. Gustafson's finding of an "extremely mild" hearing loss. The DMA further noted that the October 20, 2015 audiogram results showed no impairment for hearing loss or tinnitus based on either the fifth or sixth editions of the A.M.A., *Guides*. He determined that the date of maximum medical improvement was October 20, 2015, which coincided with the date of Dr. Gustafson's examination.[4]

[3] The record indicates that appellant served in the Navy from August 1972 through August 1998. He worked in the private sector from 1998 until May 2003, with no significant noise exposure. From May 2003 through September 2008, appellant worked for the Department of Defense as a security guard. During that timeframe, he reported limited exposure to noise from ships and tankers, approximately one hour per day. Appellant began work as a police officer with the employing establishment on September 28, 2008.

[4] The DMA further noted that appellant's hearing loss was not severe enough to justify authorization of hearing aids. Notwithstanding the consensus among Dr. Gustafson and the DMA that hearing aids (amplification) were unnecessary, OWCP authorized hearing aids by letter dated November 17, 2015.

By decision dated November 20, 2015, OWCP found that the medical evidence of record failed to establish a permanent, measurable, scheduled impairment under the A.M.A., *Guides* (6th ed. 2009).

On December 18, 2015 appellant requested a review of the written record before a representative of the Branch of Hearings and Review. He did not submit any additional medical evidence with his request.

By decision dated June 6, 2016, an OWCP hearing representative affirmed the November 20, 2015 decision. She noted that appellant did not submit any additional evidence to support that his hearing loss was ratable for schedule award purposes.

LEGAL PRECEDENT

Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions, and organs of the body.[5] FECA, however, does not specify the manner by which the percentage loss of a member, function, or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.[6] Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).[7]

Using the frequencies of 500, 1,000, 2,000, and 3,000 hertz (Hz), the losses at each frequency are added up and averaged.[8] 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.[9] The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.[10] 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.[11]

[5] For complete loss of hearing of one ear, an employee shall receive 52 weeks' compensation. 5 U.S.C. § 8107(c)(13). For complete loss of hearing of both ears, an employee shall receive 200 weeks' compensation. *Id.*

[6] 20 C.F.R. § 10.404.

[7] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); *see also* Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6a (February 2013).

[8] *See* A.M.A., *Guides* 248-51 (6th ed. 2009), section 11.2, Hearing and Tinnitus.

[9] *Id.* at 250.

[10] *Id.* at 250-51.

[11] *Id.* at 251.

ANALYSIS

On November 6, 2015 OWCP accepted appellant's claim for bilateral sensorineural hearing loss and bilateral tinnitus, with an October 1, 2010 date of injury. It had previously referred appellant to Dr. Gustafson for an October 20, 2015 evaluation, which included an audiogram. Dr. Gustafson correctly noted that the October 20, 2015 audiogram tested dB losses at 500, 1,000, 2,000, and 3,000 cycles per second and recorded dB losses of 10, 15, 10, and 25, respectively in the right ear. The total dB loss in the right ear is 60. When divided by 4, the result is an average hearing loss of 15 dB. The average of 15 dB, reduced by 25 dB (the first 25 dB were discounted as discussed above), equals 0 dB, which when multiplied by the established factor of 1.5 computes to zero percent hearing loss in the right ear. The October 20, 2015 audiogram tested dB losses for the left ear at 500, 1,000, 2,000, and 3,000 cycles per second and recorded dB losses of 20, 15, 15 and 15, respectively. The total dB loss in the left ear is 65. When divided by four, the result is an average hearing loss of 16.25 dB. The average hearing loss of 16.25 is reduced by the fence of 25 dB to zero, which when multiplied by the established factor of 1.5 computes zero percent hearing loss in the left ear. Therefore under this calculation appellant had zero percent binaural hearing loss.

OWCP's medical adviser concurred in the finding of zero percent binaural hearing loss based on the October 20, 2015 audiogram results and found that appellant had no ratable hearing loss under the A.M.A., *Guides* (6th ed. 2009).

Although appellant submitted annual audiometric test results dating back to July 2005, these earlier audiograms are insufficient to meet appellant's burden of proof as they did not comply with the requirements set forth by OWCP. These tests lack speech testing and bone conduction scores and were not prepared or certified as accurate by a physician as defined under FECA. The audiograms were not accompanied by a physician's opinion addressing how appellant's post-September 2008 employment-related noise exposure caused or aggravated any hearing loss. OWCP is not required to rely on this evidence in determining the degree of appellant's hearing loss because it does not constitute competent medical evidence and, therefore, is insufficient to satisfy appellant's burden of proof.[12]

Dr. Gustafson provided a thorough examination and a reasoned opinion explaining how the findings on examination and testing were causally related to the noise in appellant's employment. The Board finds that Dr. Gustafson's audiometric test results showing zero percent hearing loss represent the weight of the evidence. As there was no other medical evidence of record establishing that appellant had ratable hearing loss causally related to employment factors, the Board affirms OWCP's June 6, 2016 decision affirming the November 20, 2015 decision denying appellant a schedule award.

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

[12] *Joshua A. Holmes*, 42 ECAB 231, 236 (1990).

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish ratable hearing loss.

ORDER

IT IS HEREBY ORDERED THAT the June 6, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 27, 2017
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