United States Department of Labor
Employees' Compensation Appeals Board

S.R., Appellant	)	
and	)	**Docket No. 17-1007**
	)	**Issued: January 2, 2018**
DEPARTMENT OF THE NAVY, NORFOLK NAVAL SHIPYARD, Portsmouth, VA, Employer	)	

Appearances:
David G. Jennings, Esq., for the appellant[1]
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
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On April 7, 2017 appellant, through counsel, filed a timely appeal from a March 9, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (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 met his burden to proof to establish more than 47 percent binaural hearing loss, for which he previously 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 contends that appellant is entitled to a greater schedule award due to his tinnitus condition as determined by an OWCP second opinion physician.

FACTUAL HISTORY

On January 14, 2016 appellant, then a 68-year-old shipfitter supervisor, filed an occupational disease claim (Form CA-2) alleging hearing loss as a result of noise at work. He first became aware of his condition and its relationship to his federal employment on October 25, 1985. Appellant noted that he only recently became aware that he could file a claim for hearing loss. He did not stop work. Appellant also did not submit any additional evidence.

By letter dated January 21, 2016, OWCP informed appellant of the deficiencies in his claim and requested that he respond to inquiries within 30 days. It also requested that the employing establishment submit information including the job sites where he worked, the sources of noise he was exposed to, the period of exposure, and the decibel and frequency of the exposure.

In a January 20, 2016 memorandum, appellant's supervisor indicated that he agreed with appellant's statement of injury.

In a January 26, 2016 response to OWCP's queries, the employing establishment indicated that appellant was routinely exposed to hazardous noise operations/equipment and stated that his hearing loss may be attributed to his employment at the shipyard. The employing establishment maintained that it provided various types of safety equipment and that earplugs were provided at the time of an employee's initial hearing test which was part of a preemployment physical. At that time, employees were fitted and given verbal instructions regarding their use. The employing establishment noted that earplugs could be obtained anytime at various places (*e.g.*, waterfront shops, aboard ships, and Branch Medical Clinic) throughout the shipyard. Employees were required to wear hearing protection anytime noise levels exceeded 85 decibels. Double hearing protection was required when noise levels exceeded 96 decibels. Policies for notification of employees of safety regulations were conveyed both in writing and verbally (or visually).

OWCP received employment records, including several notification of personnel action forms (Form SF-50) and a description of a shipfitter position. It also received audiograms performed by the employing establishment as part of a hearing conservation program dated September 27, 2000 to October 22, 2015.

By letter dated February 19, 2016, appellant, through counsel, provided a history of his federal and nonfederal employment and military service from 1969 to the present and his exposure to employment-related noise. He noted that appellant was still exposed to noise at the employing establishment. Appellant submitted a copy of the October 22, 2015 employing establishment audiogram.

By letters dated May 3 and 10, 2016, OWCP referred appellant, together with a statement of accepted facts (SOAF), the medical record, and a list of questions, to Dr. Jeffrey P. Powell, a Board-certified otolaryngologist, for an otologic examination.

In a May 25, 2016 medical report, Dr. Powell reviewed an audiogram performed on the date of his examination which revealed the following decibel (dB) losses at 500, 1,000, 2,000, and 3,000 hertz (Hz): 45, 50, 55, and 65 for the right ear and 55, 70, 70, and 80 for the left ear. He reported that appellant had difficulty understanding speech in all environments. Appellant first noticed his hearing loss 15 to 20 years ago and it had worsened. He further complained of tinnitus in his ears that was buzzing, constant, and high-pitched. Dr. Powell diagnosed binaural noise-induced severe neurosensory hearing loss and binaural tinnitus as a result of appellant's occupational noise exposure in his federal employment. He explained that his opinion was based on his review of audiograms dated October 18, 1976 to the date of his examination and his analysis of appellant's work history and place of employment.

Dr. Powell noted that appellant's audiogram at the beginning of his noise exposure in federal civilian employment revealed normal thresholds in both ears. Subsequent audiograms, up to 2015 and including the audiogram performed on the date of his examination showed a very severe bilateral deterioration of his hearing, a bit worse in the left ear than the right ear. Appellant had moderate to severe neurosensory loss in the right ear and moderate to profound sensorineural loss in the left ear. He also had very poor word recognition and his speech discrimination scores reflected significant difficulty understanding the spoken word. Dr. Powell related that appellant's workplace noise exposure was sufficient as to intensity and duration to have caused the loss in question and the hearing loss was well in excess of what would normally be predicated on the basis of presbycusis. He recommended an annual ear, noise, and throat examination with a full audiometric workup, bilateral hearing aids, and hearing protection devices to be used around any type of noise, occupational or recreational. Dr. Powell indicated that appellant would reach maximum medical improvement (MMI) on the date his hearing aids were issued and fitted. He determined that appellant sustained a 48.125 percent monaural hearing impairment in the right ear, a 70.625 percent monaural hearing impairment in the left ear, and a 51.875 percent binaural hearing impairment.

On June 28, 2016 OWCP accepted appellant's claim for bilateral noise effects on the inner ear and bilateral tinnitus.

On August 10, 2016 appellant filed a claim for a schedule award (Form CA-7).

On August 12, 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.

On August 15, 2016 Dr. Israel reviewed Dr. Powell's May 25, 2016 otologic examination report and agreed that appellant's binaural 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment*,[3] (A.M.A., *Guides*) and determined that appellant sustained 43.125 percent monaural hearing impairment in the right ear, 65.625 percent monaural hearing impairment in the left ear, and a binaural hearing impairment of 46.9 percent. Dr. Israel

[3] A.M.A., *Guides* (6th ed. 2009).

averaged appellant's right ear hearing levels of 45, 50, 55, and 65 dB at 500, 1,000, 2,000, and 3,000 Hz, which totaled 53.375. After subtracting out a 25 dB fence, he multiplied the remaining 28.75 balance by 1.5 to calculate a 43.125 percent right ear monaural hearing loss. Dr. Israel then averaged appellant's left ear hearing levels of 55, 70, 70, and 80 dB at 500, 1,000, 2,000, and 3,000 Hz, which totaled 68.75. After subtracting out a 25 dB fence, he multiplied the remaining 43.75 balance by 1.5 to calculate a 65.625 percent left ear monaural hearing loss. Dr. Israel then calculated 46.9 percent binaural hearing loss by multiplying the right ear loss of 43.13 percent by 5, adding the 65.63 percent left ear loss, and dividing this sum by 6. He added no percentage for tinnitus. Dr. Israel acknowledged that appellant had tinnitus and that Dr. Powell added a five percent loss for tinnitus loss. He deferred to Dr. Powell's tinnitus rating. Dr. Israel recommended that appellant undergo yearly audiograms and wear noise protection for his ears, and authorized hearing aids. He determined that appellant had reached MMI on May 25, 2016, the date of Dr. Powell's examination.

In a March 9, 2017 decision, OWCP granted appellant a schedule award for 47 percent binaural hearing loss. The date of MMI was May 25, 2016. The period of the award ran from May 25, 2016 to March 13, 2018.

LEGAL PRECEDENT

The schedule award provision of FECA[4] and its implementing regulations[5] 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. 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.[6]

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.[7] 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.[8] Then, the fence of 25 dBs is deducted because, as the A.M.A., *Guides* points out, losses below 25 dBs 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

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

[6] *Id. See also Jacqueline S. Harris*, 54 ECAB 139 (2002).

[7] A.M.A., *Guides* 250 (6th ed. 2009).

[8] *Id.*

[9] *Id.*

[10] *Id.*

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.[11] The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.[12]

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.[13] The A.M.A., *Guides* also provide that, if tinnitus interferes with [Activities of Daily Living (ADLs)], 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.[14]

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to OWCP's DMA for an opinion concerning the nature and percentage in accordance with the A.M.A., *Guides* with the DMA providing rationale for the percentage of impairment specified.[15]

ANALYSIS

OWCP accepted appellant's claim for binaural noise-induced hearing loss and binaural tinnitus. The issue is whether appellant has more than 47 percent binaural hearing loss for which he previously received a schedule award. The Board finds that the evidence of record establishes that he has established 52 percent binaural hearing loss.[16]

OWCP referred appellant, together with a SOAF and the medical record, to Dr. Powell, a Board-certified otolaryngologist, for a second opinion evaluation. An audiogram was completed on May 25, 2016 on behalf of Dr. Powell, which revealed the following dB losses at 500, 1,000, 2,000, and 3,000 Hz: 45, 50, 55, and 65 for the right ear and 55, 70, 70, and 80 for the left ear. Dr. Powell diagnosed binaural noise-induced severe neurosensory hearing loss and binaural tinnitus as a result of appellant's federal occupational noise exposure. Regarding his tinnitus diagnosis, he noted that appellant experienced constant high-pitch buzzing in both ears. Based on the May 25, 2016 audiometric data, Dr. Powell determined that appellant sustained 48.125 percent monaural hearing impairment in the right ear and 70.625 percent monaural hearing impairment in the left ear. He determined a binaural hearing impairment rating of 51.875 percent. Dr. Powell's monaural and binaural impairment ratings included an additional five

[11] *Id.*

[12] *Donald E. Stockstad*, 53 ECAB 301 (2002), *petition for recon. granted (modifying prior decision)*, Docket No. 01-1570 (issued August 13, 2002); *Reynaldo R. Lichtenberger*, 52 ECAB 462 (2001).

[13] *See* A.M.A., *Guides* 249.

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

[15] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6(f) (February 2013); *Hildred I. Lloyd*, 42 ECAB 944 (1991).

[16] *M.F.*, Docket No. 16-1565 (issued March 15, 2017); *C.W.*, Docket No. 13-1168 (issued October 23, 2013).

percent tinnitus loss to each ear.[17] The Board finds that he properly evaluated appellant's binaural hearing loss.

OWCP then referred the medical evidence to Dr. Israel serving as OWCP's DMA for a rating of permanent impairment in accordance with the sixth edition of A.M.A., *Guides*. The DMA reviewed Dr. Powell's report and agreed that appellant had work-related binaural sensorineural hearing loss. Using the May 25, 2016 audiogram to calculate appellant's hearing loss in accordance with the A.M.A., *Guides*, he averaged appellant's right hearing levels of 45, 50, 55, and 65 dB at 500, 1,000, 2,000 and 3,000 Hz, which then averaged to total 53.375. Dr. Israel subtracted the 25-dB fence and multiplied the remaining balance of 28.75 by 1.5 to calculate a 43.125 percent monaural hearing loss for the right ear. Appellant's left ear hearing levels of 55, 70, 70, and 80 dB at 500, 1,000, 2,000 and 3,000 Hz were then averaged to total 68.75. Dr. Israel subtracted the 25-dB fence and multiplied the remaining balance of 43.75 by 1.5 to calculate a 65.625 percent monaural hearing loss for the left ear. He calculated a 46.9 percent binaural hearing loss by multiplying the lesser right ear loss of 43.125 percent by 5, adding the greater 65.63 percent right ear loss and dividing this sum by 6. Although Dr. Israel did not include five percent impairment for tinnitus, he noted that he was deferring to Dr. Powell with regards to his tinnitus rating. He also determined that appellant had reached MMI on May 25, 2016.

The Board finds that Dr. Powell properly added the allowable five percent permanent impairment for tinnitus, an accepted condition, to each ear as it impacted appellant's ability to perform ADLs. This resulted in a total right ear monaural hearing loss of 48.125 and left ear monaural hearing loss of 70.625 percent. Accordingly, the Board will grant an additional five percent award for each ear for tinnitus.[18]

Thus, the Board finds that appellant sustained 52 percent binaural hearing loss (rounded up from 51.875).[19] The Board further finds that OWCP properly determined that the date of MMI was May 25, 2016, the date of Dr. Powell's examination.[20]

On appeal, counsel contends that appellant is entitled to a greater schedule award due to his tinnitus condition as determined by an OWCP second opinion physician. As stated above,

[17] S*upra* note 13.

[18] *R.A.*, Docket No. 15-138 (issued March 13, 2015).

[19] 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).

[20] In assessing eligibility for a schedule award, the medical evidence must show that the impairment has reached a permanent and fixed state, which is generally referred to as MMI. *See supra* note 15 at Chapter 2.808.5b(1) (February 2013). Assuming MMI has been attained, the date of MMI is usually considered to be the date of the evaluation by the attending physician that is accepted as definitive by OWCP. Schedule awards begin on the date of MMI, unless circumstances show that a later date should be used. A retroactive determination of the date of MMI is not per se erroneous. When the medical evidence establishes that the employee did in fact reach maximum improvement by such date, the determination is proper. *Id.* at Chapter 2.808.7b.

the weight of the medical evidence establishes that appellant sustained 52 percent permanent binaural hearing impairment.

CONCLUSION

The Board finds that appellant has established that he has 52 percent permanent binaural hearing loss.

ORDER

IT IS HEREBY ORDERED THAT the March 9, 2017 decision of the Office of Workers' Compensation Programs is affirmed, as modified.[21]

Issued: January 2, 2018
Washington, DC

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

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

[21] Colleen Duffy Kiko, Judge, participated in the original decision, but was no longer a member of the Board effective December 11, 2017.