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

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| **P.L., Appellant**<br><br>**and**<br><br>**DEPARTMENT OF ENERGY, WESTERN POWER ADMINISTRATION, Loveland, CO, Employer** | ) | **Docket No. 17-0355**<br>**Issued: June 27, 2018** |

*Appearances:*
*John S. Evangelesti, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

## *JURISDICTION*

On December 5, 2016 appellant, through counsel, filed a timely appeal from a June 16, 2016 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.

[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 has met his burden of proof to establish greater than 12 percent binaural hearing loss, for which he previously received a schedule award.

## ***FACTUAL HISTORY***

On March 11, 2014 appellant, then a 54-year-old electrician, filed an occupational disease claim (Form CA-2) alleging that his binaural hearing loss was caused by factors of his federal employment. He indicated that he first became aware of his condition and its relation to his federal employment on January 6, 2014.

The record reflects that appellant worked with heavy equipment, power tools, gas operated tools, generators, pumps, transformers, breakers, helicopters, turbines running, air handling equipment, vehicles, and hand tools for 2 to 10 hours a day. Earmuffs and earplugs were provided. The employing establishment did not provide noise levels.

On May 27, 2014 OWCP referred appellant for a second opinion, along with a statement of accepted facts (SOAF), a set of questions, and the medical record to Dr. Mark C. Griffin, a Board-certified otolaryngologist.

In a report dated June 17, 2014, Dr. Griffin described appellant's history of injury and treatment, and diagnosed noise-induced bilateral sensorineural hearing loss, which was due to the noise exposure encountered at work. He noted that there was no subjective tinnitus upon physical examination. Dr. Griffin recommended hearing aid amplification for use whenever appellant is not around loud noise. He explained that appellant's presbycusis was more of a slanting hearing loss and there was a rapid drop in the higher frequencies around 4,000 hertz, which was typical with a history of severe noise exposure. Audiometric test results included audiometric testing performed by a certified audiologist on June 17, 2014. Dr. Griffin found that appellant sustained hearing thresholds of the right ear at 500, 1,000, 2,000, and 3,000 cycles per second of 35, 45, 40, and 55 decibels (dB), respectively and to the left ear at 500, 1,000, 2,000, and 3,000 cycles per second of 40, 45, 35, and 75 dBs, respectively. The audiogram did reveal tinnitus.

On September 24, 2014 OWCP's medical adviser utilized the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)[3] and noted that additional information was needed with regard to when the audiometer used on June 17, 2014 was calibrated. The medical adviser also explained that tinnitus was mentioned on the audiogram, but it was not characterized by the second opinion physician.

On November 17, 2014 OWCP accepted appellant's claim for binaural noise-induced hearing loss due to his employment-related hearing exposure.

In a November 19, 2014 report, OWCP's medical adviser noted that the second opinion physician found that appellant had no "subjective Tinnitus" despite the audiologist indicating that tinnitus was present. The medical adviser recommended that OWCP obtain additional information

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[3] A.M.A., *Guides* ($6^{th}$ ed. 2009).

from the second opinion physician regarding this issue as there was no follow up note. He explained that there was no ratable hearing impairment for this issue with the available information.

In a letter dated December 8, 2014, counsel noted that OWCP's medical adviser recommended that OWCP obtain additional information from the second opinion physician regarding tinnitus and whether it permanently impacted appellant's activities of daily living (ADL). He noted that appellant was eligible for an impairment rating of up to five percent for tinnitus pursuant to the A.M.A., *Guides*.[4]

In a letter dated January 14, 2015, counsel provided results of new audiometric testing dated December 1, 2014 and noted that it showed that appellant's hearing loss had worsened.

By letter dated January 7, 2015, OWCP notified counsel that additional information had been requested from the second opinion physician and that they were awaiting the information.

On June 23, 2015 counsel requested a status update on the claim file.

On June 19, 2015 OWCP referred appellant, together with a SOAF, to Dr. Gregory Schackel, a Board-certified otolaryngologist, for a second opinion evaluation regarding whether appellant was eligible for an impairment rating due to his work-related tinnitus, based upon whether it affected his ADLs.

In a July 16, 2015 report, Dr. Schackel noted appellant's history of injury and treatment. He advised that appellant presented for a second opinion with regard to tinnitus. Dr. Schackel explained that appellant had a change in hearing over the past two years and had constant tinnitus bilaterally, sometimes louder on the right. He indicated that appellant had tinnitus that occasionally awakened him from his sleep and could keep him from falling back to sleep. Dr. Schackel diagnosed mild-to-moderate severe sensorineural hearing loss, with mild asymmetry likely two degrees to noise exposure and tinnitus, of two to one degrees. The audiologist advised that verification of audiometric testing was completed on August 26, 2014. Dr. Schackel also submitted results of audiometric testing performed by a certified audiologist on July 16, 2015 who found that appellant sustained hearing thresholds of the right ear at 500, 1,000, 2,000, and 3,000 cycles per second of 25, 35, 25, and 40 dBs, respectively and to the left ear at 500, 1,000, 2,000, and 3,000 cycles per second of 25, 35, 35, and 70 dBs, respectively.

In a January 3, 2016 report, OWCP's medical adviser noted appellant's history of injury and treatment. He utilized the A.M.A., *Guides* for monaural and binaural hearing loss at Table 11-1 and Table 11-2.[5] The medical adviser noted that Dr. Schackel utilized the July 16, 2015 audiogram results and determined that appellant was qualified for left monaural hearing impairment of 24.2 percent and right monaural hearing impairment of 9.4 percent. OWCP's medical adviser computed the binaural hearing impairment of 11.9 percent. He recommended hearing aids for both ears. Regarding tinnitus, the medical adviser noted that Dr. Schackel

[4] *Id.* at page 249.

[5] A.M.A., *Guides* 250, 252.

indicated that appellant's tinnitus occasionally awakened him from his sleep and kept him from falling back to sleep. He concluded that, since appellant did not have a permanent impact on his ADL, there was no impairment for tinnitus.

On March 2, 2016 appellant filed a claim for a schedule award (Form CA-7).

On March 21, 2016 OWCP granted appellant a schedule award for 12 percent permanent binaural hearing loss. The award covered a period of 24 weeks from July 17 to December 31, 2015.[6]

On March 31, 2016 counsel requested reconsideration. He noted that the January 3, 2016 report from OWCP's medical adviser included a discussion of tinnitus. Counsel indicated that OWCP's medical adviser noted that Dr. Schackel related that appellant had tinnitus that occasionally woke appellant from his sleep and could keep him from falling back to sleep and concluded that there was no permanent impact on his ADL. However, he explained that the A.M.A., *Guides* provided a rating of up to five percent for a measurable binaural hearing impairment "if the tinnitus interferes with ADL, including sleep." Counsel referred to Chapter 11.2b of the A.M.A., *Guides.*

On April 11, 2016 OWCP requested clarification from OWCP's medical adviser.

On April 15, 2016 an OWCP medical adviser reviewed the otologic and audiological testing performed on appellant by Dr. Schackel. He repeated his opinion that clarification was needed from the second opinion physician regarding the issue of tinnitus. The medical adviser repeated "All I can do is reiterate what I have already [stated] in my January 3, 2016 report." He determined that maximum medical improvement was achieved on July 16, 2015. The medical adviser utilized the A.M.A., *Guides* and again determined that appellant had 11.9 percent permanent binaural hearing loss. He also recommended authorizing hearing aids.

On June 7, 2016 OWCP expanded the acceptance of the claim to include bilateral tinnitus.

In a June 12, 2016 report, an OWCP medical adviser reiterated that appellant's binaural hearing loss was 11.9 percent. He also explained that the second opinion physician found that appellant did not have subjective tinnitus. Regarding occasionally being awakened in appellant's sleep by tinnitus and being kept from falling back to sleep, the medical adviser indicated that, since appellant did not have a permanent impact on his ADLs, there was no additional permanent impairment for tinnitus. He recommended hearing aids in both ears.

By decision dated June 16, 2016, OWCP denied modification of its prior decision, finding that the evidence of record was insufficient to establish that appellant sustained additional permanent impairment due to tinnitus.

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[6] OWCP rounded up from 11.9 percent.

## ***LEGAL PRECEDENT***

The schedule award provisions of FECA[7] and its implementing regulations[8] 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.[9]

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 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.[10] 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 and 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.[11]

The policy of OWCP is to round the calculated percentage of impairment to the nearest whole number.[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* state that if tinnitus interferes with 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 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

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[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404.

[9] *Id*.

[10] *See* A.M.A., *Guides* 250.

[11] *E.S.*, 59 ECAB 249 (2007); *Reynaldo R. Lichetenberger*, 52 ECAB 462 (2001).

[12] *J.P*., Docket No. 08-0832 (issued November 13, 2008).

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

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

rationale for the percentage of impairment specified.[15] It may follow the advice of its medical adviser or consultant where he or she has properly utilized the A.M.A., *Guides*.[16]

## ***ANALYSIS***

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

OWCP accepted appellant's claim for binaural hearing loss and tinnitus and referred him, together with a SOAF, to Dr. Griffin, a Board-certified otolaryngologist, for a second opinion. Dr. Griffin diagnosed noise-induced hearing loss and sensorineural hearing loss, and bilateral. He provided a June 17, 2014 report from an audiologist, which mentioned tinnitus. However, Dr. Griffin did not provide additional impairment for tinnitus.

OWCP referred the medical evidence to an OWCP medical adviser for a rating of permanent impairment in accordance with the A.M.A., *Guides*.[17]

On September 24, 2014 OWCP's medical adviser explained that tinnitus was mentioned on the audiogram. However, it was not characterized by the second opinion physician. Subsequently, in a November 19, 2014 report, the medical adviser noted that the second opinion physician found that appellant had no "subjective [t]innitus," despite the audiologist indicating that tinnitus was present. He recommended that OWCP obtain additional information from the second opinion physician regarding this issue, however, there was no follow up note. The medical adviser explained that there was no ratable impairment for this issue with the available information.

On June 19, 2015 OWCP referred appellant, together with a SOAF, to Dr. Schackel, a Board-certified otolaryngologist, for a second opinion evaluation regarding whether appellant was eligible for an impairment rating due to his work-related tinnitus, based upon whether it affected his ADL.

In a July 16, 2015 report, Dr. Schackel advised that appellant presented for a second opinion with regard to tinnitus. He explained that appellant had a change in hearing over the past two years and had constant tinnitus bilaterally, sometimes louder on the right. Dr. Schackel indicated that appellant had tinnitus that occasionally awakened him from his sleep and could keep him from falling back to sleep. He diagnosed mild-to-moderate severe sensorineural hearing loss, with mild asymmetry likely two degrees to noise exposure and tinnitus, of two to one degrees. The audiologist advised that verification of audiometric testing was completed on August 26, 2014. Dr. Schackel also submitted results of audiometric testing performed by a certified audiologist on July 16, 2015, who found that appellant sustained hearing thresholds of the right ear at 500, 1,000, 2,000, and 3,000 cycles per second of 25, 35, 25, and 40 dBs, respectively and to the left ear at 500, 1,000, 2,000, and 3,000 cycles per second of 25, 35, 35, and 70 dBs, respectively.

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

[16] *See Ronald J. Pavlik*, 33 ECAB 1596 (1982).

[17] *See Hildred I. Lloyd*, 42 ECAB 944 (1991).

In a January 3, 2016 report, OWCP's medical adviser noted appellant's history of injury and treatment. He utilized the A.M.A., *Guides* for monaural and binaural hearing loss at Table 11-1 and Table 11-2.[18] After application of the A.M.A., *Guides* the medical adviser found 11.9 percent binaural hearing loss.[19] There is no dispute as to the extent of appellant's binaural hearing loss. Rather, he disputes that no rating was given for the accepted bilateral tinnitus condition.

Regarding tinnitus, 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 ADL.[20] In this case, an OWCP medical adviser recommended further development based upon the first second opinion report from Dr. Griffin. After OWCP initially developed the case, a new second opinion was obtained from Dr. Schackel. He indicated that appellant's tinnitus occasionally awakened him from his sleep and kept him from falling back to sleep. Dr. Schackel, however, did not provide a reasoned opinion as to the extent of appellant's permanent impairment, if any, related to his accepted bilateral tinnitus condition. The medical adviser likewise failed to provide a permanent impairment rating regarding the tinnitus condition despite the medical finding that appellant's ADL's were impacted by the condition.

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While appellant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.[21]

The Board finds that further development is required to determine the award or extent of tinnitus.[22] Accordingly, the Board will remand the case to OWCP to obtain a supplemental opinion from Dr. Schackel as to whether appellant is entitled to an increased schedule award due to tinnitus. Following this and any other further development deemed necessary, OWCP shall issue a *de novo* decision on appellant's schedule award claim.

## ***CONCLUSION***

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

[18] A.M.A., *Guides* 250, 252.

[19] *See supra* note 11.

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

[21] *Phillip L. Barnes*, 55 ECAB 426 (2004).

[22] *See J.F.*, Docket No. 16-1225 (issued November 21, 2016).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the June 16, 2016 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further development consistent with this decision.

Issued: June 27, 2018
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