

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

J.O., Appellant

and

**DEPARTMENT OF THE ARMY, AVIATION &
MISSILE COMMAND, CORPUS CHRISTI
ARMY DEPOT, TX, Employer**

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**Docket No. 17-1618
Issued: June 14, 2018**

Appearances:
*Glenda Turner, for the appellant*¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 21, 2017 appellant, through his representative, filed a timely appeal from a May 30, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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 a ratable hearing loss due to factors of his federal employment.

FACTUAL HISTORY

On July 15, 2015 appellant, then a 68-year-old retired aircraft sheet metal mechanic, filed an occupational disease claim (Form CA-2) for a bilateral hearing loss condition due to factors of his federal employment.³ He indicated that, while working as a sheet metal mechanic between 1983 and 2014, he was exposed to excessively loud, high frequency noises (over 130 decibels) from hammering, banging, and rivet guns on a continuous basis. Appellant indicated that he first became aware of his claimed condition on December 3, 2013 and first realized on April 27, 2015 that it was caused or aggravated by his federal employment.

Appellant submitted a statement in which he provided a detailed account of his employment and exposure to hazardous noise since 1967. He indicated that, with respect to his work as a sheet metal mechanic since 1983, he had to use a rivet gun to shoot rivets into helicopter frames (creating noises of more than 130 decibels) and a cutting machine to cut metal (creating noise of more than 110 decibels). Appellant noted that he was exposed to these noises for 8 to 10 hours per day and that he was not required to use hearing protection until 2007.⁴

Appellant submitted an April 27, 2015 audiogram performed by an audiologist and an April 27, 2015 report in which Dr. Paul W. Loeffler, an attending Board-certified otolaryngologist, diagnosed tinnitus.

OWCP referred appellant, along with a SOAF and the case file, to Dr. Matthew Steehler, a Board-certified otolaryngologist, for a comprehensive otologic and audiological evaluation. In a report dated November 5, 2015, Dr. Steehler discussed appellant's work history and his findings on examination, and indicated that appellant had bilateral high-frequency hearing loss and bilateral tinnitus that was related to noise exposure from his federal employment. In an accompanying report, Cheryl Gould, an audiologist, described her findings, including the results of a November 5, 2015 audiogram which revealed decibel losses in the frequencies of 500, 1,000, 2,000, and 3,000 Hertz. Appellant had the following decibel losses at these respective levels: 15, 15, 30, and 25 decibels in the left ear, and 25, 25, 20, and 20 decibels in the right ear.⁵ Dr. Steehler specifically certified the results of the November 5, 2015 audiogram as accurate. He provided a calculation

³ Appellant voluntarily retired effective December 24, 2014.

⁴ Appellant indicated that he also was exposed to hazardous noise when he was in the U.S. Army from 1967 to 1969 and when he was a temporary federal employee (air frame repairman) for the Corpus Christ Army Depot from 1972 to 1973. He denoted periods of private employment, but did not indicate that he was exposed to significant hazardous noise during these periods. In a July 10, 2015 letter, OWCP requested that the employing establishment submit information about appellant's exposure to hazardous noise in the workplace. The employing establishment did not respond to this letter. The Board notes that OWCP accepted appellant's claimed noise exposures as alleged and incorporated his statements about these exposures into its September 21, 2015 statement of accepted facts (SOAF).

⁵ The report included a copy of the November 5, 2015 audiogram.

showing that appellant's decibel losses did not qualify him for a ratable hearing loss under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁶ However, Dr. Steehler added a five percent rating for appellant's tinnitus.

On December 7, 2015 OWCP accepted appellant's claim for bilateral sensorineural hearing loss and bilateral tinnitus.

On January 12, 2016 appellant filed a claim for a schedule award (Form CA-7).

OWCP referred appellant's case to Dr. Morley Slutsky, a Board-certified occupational medicine physician serving as an OWCP medical adviser, and requested that he evaluate appellant's hearing loss under the standards of the sixth edition of the A.M.A., *Guides*.

On February 21, 2016 Dr. Slutsky reviewed the otologic and audiologic testing performed on November 5, 2015 by Dr. Steehler and applied the standards of the sixth edition of the A.M.A., *Guides* to this evaluation. Testing for the left ear at the frequency levels of 500, 1,000, 2,000, and 3,000 cycles per second revealed decibel losses of 15, 15, 30, and 25, respectively. These decibel losses were totaled at 85 decibels and were divided by 4 to obtain the average hearing loss of 21.25 decibels. This average loss was then reduced by 25 decibels to equal 0, which was multiplied by the established factor of 1.5 to compute 0 percent hearing loss in the left ear. Testing for the right ear at the frequency levels of 500, 1,000, 2,000, and 3,000 cycles per second revealed decibel losses of 25, 25, 20, and 20, respectively. These decibel losses total 90 decibels and when divided by 4 result in an average hearing loss of 22.5 decibels. This average loss when reduced by 25 decibels equals 0 which when multiplied by the established factor of 1.5 to equals 0 percent hearing loss in the right ear. Dr. Slutsky noted that appellant would not be entitled to an impairment rating for tinnitus because he did not have a ratable hearing loss due to decibel losses at the relevant decibel levels. He indicated that appellant reached maximum medical improvement on November 5, 2015, the date of Dr. Steehler's evaluation.

By decision dated July 27, 2016, OWCP found that appellant's hearing loss was not sufficiently severe to be considered ratable for a schedule award under the standards of the sixth edition of the A.M.A., *Guides*. It indicated that this finding was supported by the February 21, 2016 report of Dr. Slutsky, OWCP's medical adviser, noting that he properly applied the sixth edition of the A.M.A., *Guides* to the November 5, 2015 findings of Dr. Steehler, OWCP's referral physician.

Appellant disagreed with OWCP's July 27, 2016 decision and requested a telephonic hearing with a representative of OWCP's Branch of Hearings and Review.

During the hearing, held on March 16, 2017, appellant's representative indicated that she disagreed with OWCP's decision that appellant's hearing loss was not ratable. She noted that appellant had worked for more than 30 years as a sheet metal mechanic during which time he was

⁶ A.M.A., *Guides* (6th ed. 2009).

exposed to loud noises. Appellant's representative advised that appellant reported having ringing in his ears and difficulty hearing normal conversations.

Appellant submitted a February 15, 2017 report from Dr. Robert Oshman, an attending Board-certified otolaryngologist. In his report Dr. Oshman diagnosed bilateral sensorineural hearing loss and bilateral tinnitus. A February 15, 2017 audiogram, which was obtained by an audiologist, was attached to the report.

By decision dated May 30, 2017, OWCP's hearing representative affirmed OWCP's July 27, 2016 decision noting that the evidence of record did not establish that appellant had a ratable hearing loss due to factors of his federal employment. He noted that this finding was justified by the February 21, 2016 report of Dr. Slutsky, noting that he properly applied the sixth edition of the A.M.A., *Guides* to the November 5, 2015 findings of Dr. Steehler.

LEGAL PRECEDENT

The schedule award provision of FECA⁷ and its implementing regulation⁸ 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. As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).⁹ The Board has approved OWCP's use of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.¹⁰

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.¹¹ 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.¹² Then, the "fence" of 25 decibels is deducted because, as the A.M.A., *Guides* points out, losses below 25 decibels result in no impairment in the ability to hear everyday speech under everyday conditions.¹³ The remaining amount is multiplied

⁷ 5 U.S.C. § 8107.

⁸ 20 C.F.R. § 10.404.

⁹ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017).

¹⁰ *Isidoro Rivera*, 12 ECAB 348 (1961).

¹¹ A.M.A., *Guides* 250-51 (6th ed. 2009).

¹² *Id.*

¹³ *Id.*

by a factor of 1.5 to arrive at the percentage of monaural hearing loss.¹⁴ 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.¹⁵ The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.¹⁶

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 rationale for the percentage of impairment specified.¹⁷ It may follow the advice of its medical adviser or consultant where he or she has properly utilized the A.M.A., *Guides*.¹⁸

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish a ratable hearing loss due to factors of his federal employment.

On February 21, 2016 OWCP's medical adviser reviewed the otologic and audiologic testing performed on November 5, 2015 by Dr. Steehler and applied the standards of the sixth edition of the A.M.A., *Guides* to this evaluation. The Board concludes that Dr. Slutsky properly applied these standards to find that appellant did not have a ratable hearing loss.

Dr. Slutsky noted that testing for the left ear at the frequency levels of 500, 1,000, 2,000, and 3,000 cycles per second revealed decibel losses of 15, 15, 30, and 25 respectively. These decibel losses were totaled at 85 decibels and were divided by 4 to obtain the average hearing loss of 21.25 decibels. This average loss was then reduced by 25 decibels (25 decibels being discounted as discussed above) to equal 0 which was multiplied by the established factor of 1.5 to compute a 0 percent hearing loss in the left ear. Testing for the right ear at the frequency levels of 500, 1,000, 2,000, and 3,000 cycles per second revealed decibel losses of 25, 25, 20, and 20 respectively. These decibel losses total 90 decibels and when divided by 4 result in an average hearing loss of 22.5 decibels. This average loss when reduced by 25 decibels (25 decibels being discounted as discussed above) equals 0 which when multiplied by the established factor of 1.5 to equals a 0 percent hearing loss in the right ear.

Appellant submitted April 27 and November 5, 2015 audiograms obtained by an audiologist. However, these audiograms do not constitute probative medical evidence of hearing loss because they have not been certified by a physician as being accurate. The Board has held

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Donald Stockstad*, 53 ECAB 301 (2002); *petition for recon. granted (modifying prior decision)*, Docket No. 01-1570 (issued August 13, 2002).

¹⁷ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(f) (March 2017); *Hildred I. Lloyd*, 42 ECAB 944 (1991).

¹⁸ See *Ronald J. Pavlik*, 33 ECAB 1596 (1982).

that, if an audiogram is prepared by an audiologist, it must be certified by a physician as being accurate before it can be used to determine the percentage of hearing loss.¹⁹

Appellant submitted a February 15, 2017 report from Dr. Robert Oshman, an attending physician, but he did not provide any opinion on the extent of his hearing loss under the A.M.A., *Guides*.

On appeal appellant contends that he should receive a schedule award for tinnitus which interferes with his sleep.²⁰ Regarding tinnitus, the A.M.A., *Guides* provides that tinnitus is not a disease, but rather a symptom that may be the result of disease or injury.²¹ The A.M.A., *Guides* notes that, if tinnitus interferes with the activities of daily living, 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.²² For the reasons explained above, appellant has not established a measurable binaural hearing impairment under the A.M.A., *Guides* and Dr. Slutsky properly noted in his February 21, 2016 report that, due to this circumstance, he would not be entitled to receive schedule award compensation for his tinnitus.²³

For these reasons, appellant did not meet his burden of proof to establish a ratable hearing loss due to factors of his federal employment.

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.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish a ratable hearing loss due to factors of his federal employment.

¹⁹ See *Joshua A. Holmes*, 42 ECAB 231, 236 (1990).

²⁰ The Board notes that, in his November 5, 2015 report, Dr. Steehler provided a calculation showing that appellant's decibel losses did not qualify him for a ratable hearing loss under the sixth edition of A.M.A., *Guides*. However, he also added a five percent rating for appellant's tinnitus.

²¹ See A.M.A., *Guides* 249.

²² *Id.* See also *Robert E. Cullison*, 55 ECAB 570 (2004).

²³ See *id.*

ORDER

IT IS HEREBY ORDERED THAT the May 30, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 14, 2018
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board