

On appeal appellant contends that he has greater hearing loss, noting that Dr. Stephen Bane, a Board-certified otolaryngologist, and Brittany Komes, a clinical audiologist, determined that he had 28 percent hearing loss. He asserts that the medical opinion of OWCP's district medical adviser (DMA) is not entitled to the weight of the medical evidence.

FACTUAL HISTORY

On November 12, 2015 appellant, then a 66-year-old retired supervisory special agent, filed an occupational disease claim (Form CA-2) alleging hearing loss as a result of noise exposure at work. He claimed that he was exposed to firearm noise while firing various caliber firearms during Special Weapons and Tactics (SWAT) operations. Appellant also claimed that he was exposed to helicopter noise and flash bangs during SWAT operations. He first became aware of his condition and its relationship to his federal employment on August 30, 2013. Appellant related that he did not realize that his alleged work-related injury would worsen over the years.

OWCP, by development letter dated November 18, 2015, informed appellant of the deficiencies in his claim and requested that he provide additional evidence within 30 days. On the same date, it requested that the employing establishment submit information, including the job sites where appellant worked, the sources of noise appellant was exposed to, the period of exposure, and the decibel and frequency of the exposure. Neither appellant nor the employing establishment responded to OWCP's queries.

In an April 4, 2016 decision, OWCP denied appellant's claim for a schedule award. It found that he failed to submit evidence to establish that the alleged events occurred as alleged.

On June 13, 2016 appellant requested reconsideration. He submitted a June 7, 2016 letter from Dr. Paul D. Kuster, an audiologist. Dr. Kuster saw appellant on February 19, 2014 for numerous auditory communicational problems and constant bilateral tinnitus. Appellant reported a history of military noise exposure and in his work duties at the employing establishment. Dr. Kuster related that audiometric evaluations performed during his employment at the employing establishment clearly showed increasing bilateral high frequency hearing loss, which was consistent with traumatic noise exposure. He advised that it was likely appellant's hearing loss and tinnitus were caused by exposure to loud acoustic trauma during his employment. Dr. Kuster noted that appellant was currently wearing binaural hearing aids to ease communicational difficulties. He recommended hearing protection usage. Appellant also submitted audiograms performed by the employing establishment as part of a hearing conservation program dated October 21, 1982 through March 4, 2002.

In a decision dated September 13, 2016, OWCP denied modification of its April 4, 2016 decision. It found that appellant failed to submit the requested factual evidence in response to its November 18, 2015 development letter.

On January 2, 2017 appellant again requested reconsideration. In an undated statement, he described the history of his exposure to noise from January 3, 1968 through February 22, 1983, the date he began working at the employing establishment. Appellant advised that he was not exposed to any excessive noise until he started working at the employing establishment in

1983. He indicated that he was exposed to extensive noise from various weapons during 16 weeks of firearms training and qualification on outdoor and indoor ranges. Appellant noted that substandard hearing protection was provided. Upon graduation from the employing establishment's training academy, he worked in several field offices as a SWAT team member which required extra firearms and assault training and exercises that involved firing weapons and throwing flash bang grenades from a helicopter onto a target. Appellant had no hobbies that involved exposure to loud noise. He noted that he retired from the employing establishment and was last exposed to loud noise on October 3, 2003. Appellant had not previously filed a workers' compensation claim. He related that, although he reported August 30, 2013 as the date he first became aware of his hearing loss, he had become aware of his condition over the years in social situations in loud environments and with his family. Appellant had difficulty hearing them talk to him, especially young children. He claimed that his condition progressed to the point where he wore hearing aids all the time to communicate. Appellant filed his claim after talking to his coworkers who had less hearing loss than him and filed successful claims.

By letter dated January 6, 2017, the employing establishment noted that on February 21, 1983 appellant was appointed as a special agent and attended new agents' training class from February 22 to June 6, 1983. During his training, appellant fired approximately 3,500 rounds of ammunition from various types of firearms. From June 7, 1983 until his retirement as a supervisory special agent on October 3, 2003 he was afforded firearms training. Appellant fired approximately 20,800 rounds of ammunition of various types during this period. As a SWAT team member and tactical operator he was exposed to an incalculable amount of ammunition rounds that were fired on a daily basis. Appellant was also exposed to noise from flash bang grenades. The employing establishment noted that special agents attended mandatory firearms training eight times a year, with four outdoor sessions held during the summer months and four indoor sessions held during the winter months. Actual firing on the range consisted of approximately five hours per outdoor session and one hour per indoor session. Typically, approximately 200 rounds of ammunition were fired during an outdoor session and 60 rounds were fired during an indoor session. In view of this, the employing establishment asserted that the annual exposure to firing noise on a range per agent was approximately 24 hours. It noted the use of ear guards (headsets) by special agents during firearms training was mandatory. In a separate January 6, 2017 letter, the employing establishment noted the jobs appellant held from February 22, 1983 through October 3, 2003 and his salaries in these jobs and duties as a special agent. It noted that he had returned to work as a federal civilian employee on August 9, 2015. The employing establishment also submitted a January 5, 1984 letter and an undated letter noting outdoor and indoor range noise level test results.

On February 1, 2017 OWCP referred appellant, together with a statement of accepted facts (SOAF) and the medical record, to Dr. Bane for an otologic examination and audiological testing. In a February 22, 2017 medical report, Dr. Bane noted normal findings on physical examination and diagnosed mild-to-moderate hearing loss in the right ear and mild-to-severe hearing loss in the left ear. He opined that appellant's hearing loss was in part, or all, due to noise exposure in his federal civil employment. Dr. Bane reasoned that he had significant noise exposure. He also reasoned that appellant's hearing loss was greater than expected with presbycusis. Dr. Bane recommended hearing protection, hearing aids, and yearly audiograms.

Britney Komes, an audiologist, performed an audiogram on the date of Dr. Bane's examination. She provided an impression of mild-to-moderate-severe high frequency sensorineural hearing loss in the right ear and mild-to-severe sensorineural hearing loss in the left ear. Ms. Komes also provided an impression of tinnitus in each ear. She reported testing at the frequency levels of 500, 1,000, 2,000, and 3,000 hertz (Hz) which revealed the following: right ear 25, 35, 35, and 60 decibels (dBs), respectively; left ear 35, 45, 35, and 45 dBs, respectively. Utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*³ (A.M.A., *Guides*), Ms. Komes calculated that appellant sustained 25.6 percent monaural hearing impairment in the right ear (20.625 percent + 5 percent for tinnitus) and 27.5 percent monaural hearing impairment in the left ear (22.5 percent + 5 percent for tinnitus). She calculated a binaural hearing impairment of 28 percent.

In a supplemental report dated February 28, 2017, Dr. Bane noted a history of appellant's accepted work-related noise exposure and reviewed the SOAF and medical record. He again reported normal examination findings and also reviewed Ms. Komes' February 22, 2017 audiogram. Dr. Bane agreed that appellant had bilateral high frequency sensorineural loss, mild-to-moderately severe in the right ear and mild-to-severe in the left ear. He also agreed that appellant had tinnitus. Dr. Bane advised that he had five percent monaural impairment of the right ear, five percent monaural impairment of the left ear, and 28 percent binaural hearing impairment. In response to questions posed by OWCP, he related that appellant had no recent noise exposure and that his hearing was normal in 1982. Dr. Bane reiterated that his sensorineural hearing loss was in excess of what would be normally predicated on the basis of presbycusis. He also reiterated that appellant's hearing loss was caused by work-related noise exposure, noting that he was exposed to firearms for a significant length of time and intensity. Dr. Bane restated his treatment recommendations.

In a March 7, 2017 decision, OWCP vacated its September 13, 2016 decision and accepted that appellant was exposed to noise during his federal employment and a diagnosis of bilateral sensorineural hearing loss.

On March 22, 2017 appellant filed a claim for a schedule award (Form CA-7).

On March 31, 2017 OWCP requested that its DMA provide an opinion on impairment. In an April 5, 2017 report, the DMA reviewed the SOAF and the medical record. He agreed with Ms. Komes and Dr. Bane that appellant had noise-induced sensorineural hearing loss. The DMA also agreed that appellant had 20.625 percent monaural hearing loss in the right ear and 22.5 percent monaural hearing loss in the left ear. He, however, related that he was unable to comment on the diagnosis of tinnitus as there was no discussion of tinnitus in the records and its impact on appellant's activities of daily living (ADLs) or completed Tinnitus Handicap Inventory or Federal Occupational Health (FOH) Tinnitus form. The DMA believed that Dr. Bane and Ms. Komes misspoke when they stated that appellant's right and left ear monaural hearing loss was five percent. Instead, he believed that they meant that appellant had tinnitus awards of five percent. Utilizing the sixth edition of the A.M.A., *Guides* the DMA determined that appellant had 20.9 percent binaural hearing loss. He recommended yearly audiograms,

³ A.M.A., *Guides* (6th ed. 2009).

hearing protection, and hearing aids. The DMA advised that appellant had reached MMI on February 22, 2017, the date of Dr. Bane's examination.

In a June 28, 2017 decision, OWCP granted appellant a schedule award for 21 percent binaural hearing loss. The period of the award, 42 weeks, ran from February 22 through December 12, 2017, a total of 42 weeks.⁴

LEGAL PRECEDENT

The schedule award provisions of FECA⁵ and its implementing regulations⁶ 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.⁷

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.⁸ 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.⁹ 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.¹¹ 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

⁴ The decision indicated that the award was for 20.9 percent binaural hearing loss. However, number of weeks of compensation awarded, 42, indicates that OWCP awarded 21 percent of the maximum of 200 weeks of compensation payable for a 100 percent hearing loss (20 percent x 200 weeks). See 5 U.S.C. § 8107(c)(13). See also Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3(b) (January 2010) (provides for rounding the calculated percentage of impairment to the nearest whole point).

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404.

⁷ *Id.* See also *Jacqueline S. Harris*, 54 ECAB 139 (2002).

⁸ A.M.A., *Guides* 250 (6th ed. 2009).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

arrive at the amount of the binaural hearing loss.¹² The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.¹³

If tinnitus interferes with 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.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 that appellant sustained a binaural hearing loss due to noise exposure at work. It developed the claim by referring him to Dr. Bane, a Board-certified otolaryngologist. In a February 22, 2017 report, Dr. Bane diagnosed bilateral hearing loss. He opined that the hearing loss was due to appellant's workplace noise exposure and recommended hearing protection, hearing aids, and yearly audiograms. Ms. Komes performed an audiogram on behalf of Dr. Bane. Based on the audiometric data from her audiogram, Ms. Komes calculated that appellant had 20.625 percent monaural hearing impairment in the right ear and 22.5 percent monaural hearing impairment in the left ear. She added five percent impairment for tinnitus, resulting in a total 25.6 percent monaural hearing impairment in the right ear (20.625 percent + 5 percent for tinnitus) and 27.5 percent monaural hearing impairment in the left ear (22.5 percent + 5 percent for tinnitus). Ms. Komes calculated a binaural hearing impairment of 28 percent. In a supplemental report dated February 28, 2017, Dr. Bane reviewed Ms. Komes' February 22, 2017 audiogram. He agreed that appellant had 28 percent binaural hearing impairment which included five percent for tinnitus in each ear.

On April 5, 2017 OWCP's DMA reviewed appellant's medical record, including Dr. Bane's February 28, 2017 findings. He concurred in the finding of 20.625 percent monaural hearing loss in the right ear and 22.5 percent monaural hearing loss in the left ear based on Ms. Komes' audiogram results. The DMA, however, did not credit the finding of Dr. Bane and Ms. Komes of an additional five percent bilateral hearing loss due to tinnitus and calculated a 20.9 percent binaural hearing loss. He reasoned that there was no discussion of tinnitus in the record and its impact on appellant's ADLs or completed Tinnitus Handicap Inventory or FOH Tinnitus form. The Board notes that, in a June 7, 2016 report, Dr. Kuster, an audiologist, noted a history that appellant complained of constant bilateral tinnitus.

¹² *Id.*

¹³ *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).

¹⁴ A.M.A., *Guides* 249.

¹⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6(f) (March 2017).

On appeal appellant contends that he has greater impairment based on the opinions of Dr. Bane and Ms. Komes. The Board notes that the A.M.A., *Guides* at section 11.2b, page 249¹⁶ states that, if the tinnitus interferes with ADLs such as sleep, reading, enjoyment of quiet recreation, and emotional well-being, up to five percent may be added to a measurable binaural hearing impairment.

The Board finds that this case is not in posture for a decision as clarification is required from Dr. Bane as to why he added five percent impairment for tinnitus. Regarding tinnitus, the A.M.A., *Guides* provides that 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 ADLs.¹⁷ Although Dr. Bane and Ms. Komes included five percent impairment for tinnitus in appellant's monaural impairment determinations, neither physician addressed how this impacted his ADLs.¹⁸

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 of proof 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. Bane, it has the duty to secure an appropriate report addressing the relevant issues.¹⁹ Because Dr. Bane did not explain why he included a rating for tinnitus in his determination of appellant's hearing loss, the case will be remanded to OWCP to request Dr. Bane to provide a supplemental report explaining his rationale for giving a five percent impairment rating for tinnitus. 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 21 percent binaural (both ears) hearing loss, for which he previously received a schedule award.

¹⁶ A.M.A., *Guides* 249.

¹⁷ *David W. Ferrall*, 56 ECAB 362 (2005).

¹⁸ *D.F.*, Docket No. 15-0246 (issued September 19, 2016); *R.O.*, Docket No. 15-0194 (issued September 19, 2016).

¹⁹ *Peter C. Belkind*, 56 ECAB 580 (2005).

ORDER

IT IS HEREBY ORDERED THAT the June 28, 2017 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: March 14, 2018
Washington, DC

Patricia H. Fitzgerald, Deputy 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