

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

T.O., Appellant)

and)

DEPARTMENT OF THE NAVY, NORFOLK)
NAVAL SHIPYARD, Portsmouth, VA, Employer)

**Docket No. 18-0659
Issued: August 8, 2019**

Appearances:

David G. Jennings, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On February 6, 2018 appellant, through counsel, filed a timely appeal from a January 3, 2018 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.³

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.*

³ The Board notes that, following the January 3, 2018 decision, OWCP received additional evidence. However, the Board’s *Rules of Procedure* provides: “The Board’s review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal.” 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant has met his burden of proof to establish more than 43 percent binaural hearing loss, for which he previously received a schedule award.

FACTUAL HISTORY

On December 8, 2015 appellant, then a 59-year-old retired tool room mechanic, filed an occupational disease claim (Form CA-2) for bilateral hearing loss, which he attributed to noise at work.⁴ He noted that he first became aware of his condition and realized that it resulted from his federal employment on July 31, 2002.

OWCP received the results of an August 13, 2015 audiogram.

In a March 8, 2016 statement, appellant indicated that from December 1979 to 1980 and December 1981 to March 2008 he worked as an insulator, and from March 2008 to July 2015 he worked as a toolroom mechanic at the employing establishment. He described the type of noise he was exposed to, which he believed contributed to his hearing loss. Appellant noted that he was last exposed to hazardous noise on July 3, 2015.

OWCP referred appellant, together with a statement of accepted facts (SOAF) and the relevant medical evidence of record, to Dr. Wayne Shaia, a Board-certified otolaryngologist and second opinion examiner, for an otologic examination and audiological testing. In a June 3, 2016 report, Dr. Shaia diagnosed noise-induced hearing loss. He indicated that appellant had sensorineural hearing loss in excess of what would be normally predicted on the basis of presbycusis. Dr. Shaia opined that appellant's hearing was "due to the noise exposure from his federal civilian employment." He explained that an August 2015 audiogram and an audiogram conducted that day both supported the pattern of noise-induced hearing loss. Dr. Shaia noted that appellant was already wearing bilateral hearing aids and had reached maximum medical improvement (MMI).

Maureen Nelson, an audiologist, performed an audiogram on the date of Dr. Shaia's examination. She diagnosed mild-to-severe sensorineural hearing loss bilaterally and also commented that appellant had tinnitus in each ear. Ms. Nelson reported testing at the frequency levels of 500, 1,000, 2,000, and 3,000 hertz (Hz) which revealed the following: right ear 35, 40, 60, and 80 decibels (dBs), respectively; left ear 45, 35, 60, and 80 dBs, respectively. Utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),⁵ she calculated that appellant sustained 48.12 percent monaural hearing impairment in the right ear (43.12 percent + 5 percent for tinnitus) and 50 percent monaural hearing impairment in the left ear (45 percent + 5 percent for tinnitus). Ms. Nelson calculated a binaural hearing impairment of 48.4 percent. This report was co-signed by Dr. Shaia.

On June 27, 2016 OWCP accepted appellant's claim for bilateral sensorineural hearing loss.

⁴ Appellant retired from federal employment on July 3, 2015.

⁵ A.M.A., *Guides* (6th ed. 2009).

On February 9, 2017 appellant filed a claim for a schedule award (Form CA-7).

In a March 2, 2017 report, Dr. Jeffrey M. Israel, a Board-certified otolaryngologist and OWCP district medical adviser (DMA) reviewed the SOAF and the medical record, including Dr. Shaia's June 3, 2016 second opinion report. He agreed with the finding that appellant had 43.12 percent monaural hearing loss in the right ear and 45 percent monaural hearing loss in the left ear. Dr. Israel also noted the additional five percent impairment for tinnitus. He related, however, that he was unable to comment on a tinnitus impairment because there was no discussion of tinnitus in the record, no discussion of how tinnitus impacted activities of daily living (ADL), and no Tinnitus Handicap Inventory to help determine a tinnitus award. Utilizing the sixth edition of the A.M.A., *Guides*, Dr. Israel determined that appellant had 43.4 percent binaural hearing loss. He reported that appellant had reached MMI on June 3, 2016, the date of the most recent audiogram examination.

In a January 3, 2018 decision, OWCP granted appellant a schedule award for 43 percent binaural hearing loss. The period of the award ran for 86 weeks from June 3, 2016 to January 25, 2018.

LEGAL PRECEDENT

The schedule award provisions of FECA⁶ and its implementing regulations⁷ 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. FECA, however, does not specify the manner in which the percentage of loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized 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 OWCP as a standard for evaluation of schedule losses and the Board has concurred in such adoption.⁸ For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2009.⁹

A claimant seeking compensation under FECA has the burden of proof to establish the essential elements of his or her claim.¹⁰ With respect to a schedule award, it is the claimant's burden of proof to establish permanent impairment of a scheduled member or function of the body as a result of his or her employment injury.¹¹ A claimant may seek an increased schedule award if the evidence establishes that he or she sustained an increased impairment causally related to an

⁶ 5 U.S.C. § 8107.

⁷ 20 C.F.R. § 10.404.

⁸ *Id.* at § 10.404; *see also Jacqueline S. Harris*, 54 ECAB 139 (2002).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

¹⁰ *John W. Montoya*, 54 ECAB 306 (2003).

¹¹ *Edward Spohr*, 54 ECAB 806, 810 (2003); *Tammy L. Meehan*, 53 ECAB 229 (2001).

employment injury.¹² The medical evidence must include a detailed description of the permanent impairment.¹³

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.¹⁴ Using the frequencies of 500, 1,000, 2,000, and 3,000 Hz, 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.¹⁵ The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.¹⁶ 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.¹⁷ The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.¹⁸

“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.¹⁹”

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to a DMA for an opinion concerning the nature and percentage of permanent impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified.²⁰

ANALYSIS

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

¹² See *Rose V. Ford*, 55 ECAB 449 (2004).

¹³ See *Vanessa Young*, 55 ECAB 575 (2004).

¹⁴ *R.D.*, 59 ECAB 127 (2007); *Bernard Babcock, Jr.*, 52 ECAB 143 (2000); see also 20 C.F.R. § 10.404.

¹⁵ See A.M.A., *Guides* 250 (6th ed. 2009).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *E.S.*, 59 ECAB 249 (2007); *Reynaldo R. Lichtenberger*, 52 ECAB 462 (2001).

¹⁹ A.M.A., *Guides* 249; see also *R.H.*, Docket No. 10-2139 (issued July 13, 2011).

²⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6f.

As noted above, the A.M.A., *Guides* provides that, “if tinnitus interferes with activities of daily living, 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.²¹” In this case, while Dr. Shaia’s June 3, 2016 rating included five percent impairment for tinnitus, the report itself did not provide specific justification for the additional rating, as noted by the DMA.²²

It is well-established that proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter.²³ While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence and to see that justice is done.²⁴ Once OWCP undertook development of the evidence by referring appellant to Dr. Shaia, a second opinion physician, it had a duty to secure an appropriate report addressing the relevant issues.²⁵ Because the basis for the additional rating for tinnitus absent, the case will be remanded to OWCP to request a supplemental report from Dr. Shaia to address the basis of his tinnitus diagnosis. 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 the case is not in posture for decision.

²¹ *Supra* note 18.

²² *D.M.*, Docket No. 17-1832 (issued March 14, 2018); *D.F.*, Docket No. 15-0246 (issued September 16, 2016).

²³ *See Vanessa Young*, 56 ECAB 575 (2004).

²⁴ *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *Jimmy A. Hammons*, 51 ECAB 219 (1999); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

²⁵ *Peter C. Belkind*, 56 ECAB 580 (2005); *Ayanle A. Hashi*, 56 ECAB 234 (2004).

ORDER

IT IS HEREBY ORDERED THAT the January 3, 2018 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision of the Board.

Issued: August 8, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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