

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

R.S., Appellant

and

**DEPARTMENT OF THE ARMY, TOOELE
ARMY DEPOT, Tooele, UT, Employer**

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 17-0344
Issued: February 15, 2019**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

ORDER REMANDING CASE

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

On November 29, 2016 appellant filed a timely appeal from a June 2, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP).¹ The Clerk of the Appellate Boards assigned Docket No. 17-0344.²

On June 25, 2013 appellant, then a 59-year-old former equipment specialist, filed an occupational disease claim (Form CA-2) for a hearing disorder (tinnitus) and chronic sinusitis, which allegedly arose in the performance of duty on or about February 11, 2013. He attributed his

¹ Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from June 2, 2016, the date of OWCP's last merit decision, was November 29, 2016. Because using December 5, 2016, the date the Clerk of the Appellate Boards received the appeal, would preclude review of the June 2, 2016 decision, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is November 29, 2016, rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

² The Board notes that following the June 2, 2016 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.*

hearing condition to workplace noise, which included exposure to loud machines and pneumatic/electric equipment. Appellant voluntarily retired effective May 3, 2011.

On January 29, 2014 OWCP accepted appellant's claim for binaural sensorineural hearing loss. By separate decision dated January 29, 2014, it found that he was not entitled to a schedule award because there was no ratable impairment in either ear. OWCP also declined to accept tinnitus.³

Appellant subsequently requested an oral hearing before OWCP's Branch of Hearings and Review. He also submitted additional medical evidence. By decision dated November 25, 2014, the hearing representative vacated OWCP's January 29, 2014 schedule award decision, and remanded the case for further medical development regarding whether appellant had a ratable hearing loss.

On remand, OWCP referred appellant for a second opinion evaluation. In a January 6, 2015 report, Dr. Stewart E. Barlow, a Board-certified otolaryngologist and OWCP referral physician, diagnosed bilateral high-frequency sensorineural hearing loss and tinnitus, which he attributed to appellant's federal civilian occupational noise exposure. He found 3.4 percent hearing impairment, plus an additional 4 percent permanent impairment due to tinnitus, for a total binaural hearing impairment of 7.4 percent.

In a January 8, 2015 report, OWCP's DMA agreed with Dr. Barlow's 7.4 percent permanent impairment rating, but found that the results of the latest audiogram, dated January 6, 2015, were unrelated to appellant's accepted occupational noise exposure. He noted that appellant retired in May 2011 and did not have a ratable hearing impairment as of December 16, 2013. The DMA explained that noise-induced hearing loss stops as soon as the claimant/employee is no longer exposed to hazardous workplace noise, which in this case was May 3, 2011. He further explained that the December 16, 2013 audiogram results, which showed no ratable impairment, were representative of appellant's work-related damage. As such, the increased impairment demonstrated on appellant's January 6, 2015 audiogram was unrelated to his federal workplace exposure.

By decision dated January 15, 2015, OWCP again denied appellant's claim for a schedule award. It explained that the ratable hearing impairment noted on the January 6, 2015 audiogram was unrelated to appellant's employment as he had not been exposed to hazardous workplace noise(s) since May 3, 2011. OWCP also declined to expand the claim to include tinnitus as an accepted condition.

Appellant timely requested reconsideration and submitted additional medical evidence.⁴

³ OWCP based its findings on the December 16, 2013 evaluation of Dr. Craig W. Anderson, a Board-certified otolaryngologist and OWCP referral physician, as well as the January 24, 2014 opinion of its district medical adviser (DMA). The DMA explained that appellant was not eligible for a tinnitus rating because there was no ratable hearing impairment in either ear as demonstrated by the December 16, 2013 audiogram.

⁴ In a March 13, 2015 report, Dr. Barlow indicated that appellant's hearing loss and tinnitus were due to noise exposure encountered in his federal civilian employment.

OWCP subsequently declared a conflict in medical opinion between the DMA and Dr. Barlow, the second opinion examiner, regarding whether appellant's tinnitus was causally related to his accepted employment exposure. In a January 22, 2016 statement of accepted facts (SOAF), it noted that the claim had been accepted for "binaural sensorineural hearing loss...." OWCP also noted that appellant's work environment included "exposure to high level noise and required use of protective equipment." It referred appellant to Dr. Justin D. Gull, a Board-certified otolaryngologist, to resolve the purported conflict in medical opinion.

In a May 16, 2016 report, Dr. Gull diagnosed bilateral sensorineural hearing loss and bilateral tinnitus. Based on the results of an April 28, 2016 audiogram, he calculated 8.47 percent binaural hearing impairment, which included 5 percent impairment due to tinnitus. However, Dr. Gull concluded that appellant's hearing loss was not due to noise exposure encountered in his federal civilian employment. He explained that preexisting asymmetry in hearing combined with presbycusis led to appellant's hearing loss. In his narrative report, Dr. Gull reiterated his belief that appellant's "symptoms" and his "impairment" were "unrelated to his employment."

In a May 27, 2016 report, another DMA reviewed Dr. Gull's findings and calculated 8.1 percent binaural hearing impairment, which included 4 percent impairment due to tinnitus.⁵

By decision dated June 2, 2016, OWCP denied modification of its January 15, 2015 schedule award decision. It found that Dr. Gull, the "referee examiner," represented the weight of the medical evidence, which demonstrated that there was no causal relationship between appellant's binaural hearing impairment and his federal employment exposure that ended May 3, 2011.⁶

The Board finds that the case is not in posture for decision regarding appellant's claimed entitlement to a schedule award. OWCP erroneously declared a conflict in medical opinion between its DMA and an OWCP referral physician (2nd opinion), Dr. Barlow. As neither physician was appellant's treating physician, OWCP improperly declared a conflict in medical opinion.⁷ Absent a true conflict in medical opinion, Dr. Gull's May 16, 2016 opinion cannot be afforded determinative weight as an impartial medical evaluation. However, even as a second opinion evaluation, Dr. Gull's finding regarding the cause of appellant's binaural hearing loss/impairment lacks probative value.

The January 22, 2016 SOAF clearly delineated that appellant's claim had been accepted for employment-related "binaural sensorineural hearing loss...." Dr. Gull ostensibly disagreed with OWCP regarding the cause of appellant's accepted hearing condition. He offered a contrary opinion noting that the current hearing loss was due to a combination of age-related change and an asymmetry that preexisted his employment. An OWCP referral physician's findings, be it a second opinion or impartial medical evaluation, must be based on the factual underpinnings of the

⁵ In a June 1, 2016 supplemental report, the DMA recommended hearing aids.

⁶ In a separate June 2, 2016 decision, OWCP authorized hearing aids.

⁷ See 5 U.S.C. § 8123(a); 20 C.F.R. § 10.321(b); *S.G.*, 58 ECAB 383, 387 (2007) (a conflict may only exist between an employee's physician and a physician designated or approved by OWCP); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.11a (September 2010).

claim, as set forth in the SOAF.⁸ The SOAF should be the framework of the referral physician's opinion.⁹ As Dr. Gull's May 16, 2016 second opinion evaluation is inconsistent with OWCP's January 22, 2016 SOAF, his opinion on causal relationship is of diminished probative value.¹⁰

Once OWCP undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.¹¹ Because of the above-noted deficiencies in Dr. Gull's report, additional medical development is warranted. Accordingly, the June 2, 2016 schedule award decision shall be set aside, and the case remanded for further medical development. After such further development as OWCP deems necessary, it shall issue a *de novo* decision regarding appellant's entitlement to a schedule award.

IT IS HEREBY ORDERED THAT the June 2, 2016 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this order.

Issued: February 15, 2019
Washington, DC

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

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

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

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statements of Accepted Facts*, Chapter 2.809.2c (September 2009).

⁹ *Id.* at Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.500.3f and 3.500.4g (June 2015).

¹⁰ *Id.* at Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3a (October 1990).

¹¹ *See A.P.*, Docket No. 17-0813 (issued January 3, 2018); *Richard F. Williams*, 55 ECAB 343, 346 (2004).