

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

_____)	
H.R., Appellant)	
)	
and)	Docket No. 19-0860
)	Issued: October 17, 2019
TENNESSEE VALLEY AUTHORITY,)	
DIVISION OF FOSSIL & HYDRO POWER,)	
Tuscumbia, AL, Employer)	
_____)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 14, 2019 appellant filed a timely appeal from a December 12, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted additional evidence on appeal. 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 greater than one percent monaural (right ear) hearing loss, for which he previously received a schedule award.

FACTUAL HISTORY

On June 12, 2017 appellant, then a 64-year-old senior instrument mechanic foreman, filed an occupational disease claim (Form CA-2) alleging that he had sustained hearing loss and tinnitus, due to persistent noise exposure while in the performance of duty. On the reverse side of the claim form, the employing establishment indicated that appellant was last exposed to conditions alleged to have caused his injury on July 1, 2016.

In a development letter dated July 6, 2017, OWCP informed the employing establishment of appellant's claim, and requested additional information, including all employing establishment audiograms of record, in order for it to render a decision as to whether he was eligible for FECA benefits. In a separate development letter to appellant dated July 7, 2017, it advised him of the deficiencies of his claim, requested additional factual and medical evidence, and provided a questionnaire for his completion. OWCP afforded appellant and the employing establishment 30 days to submit the necessary evidence.

On October 12, 2017 OWCP referred appellant, along with a statement of accepted facts (SOAF) and a copy of the medical record, to Dr. Dennis G. Pappas, a Board-certified otolaryngologist, for a second opinion impairment evaluation pursuant to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).³ In a November 6, 2017 report, Dr. Pappas reviewed appellant's history of noise exposure at work and provided examination findings. He performed an otologic evaluation and audiometric testing was obtained on his behalf on November 6, 2017. Testing at frequency levels of 500, 1,000, 2,000, and 3,000, Hertz (Hz) revealed the following: right ear 20, 10, 30, and 55 decibels (dBs); and left ear 20, 15, 20, and 35 dBs. Dr. Pappas calculated 0 percent hearing impairment on the left, 5.6 percent hearing impairment on the right, and 0.93 percent binaural hearing impairment. He determined a tinnitus impairment rating of 3 percent, and added that to the calculation for binaural hearing impairment of 0.93 percent to establish 3.93 percent total binaural hearing impairment. Dr. Pappas diagnosed bilateral sensorineural hearing loss and bilateral tinnitus. He noted that the hearing loss pattern and severity were consistent with employment-related noise-induced hearing loss, and listed the date of maximum medical improvement as November 6, 2017.

In a report dated January 24, 2018, Dr. Jeffrey M. Israel, a Board-certified otolaryngologist serving as the district medical adviser (DMA), reviewed the SOAF and medical records. He indicated that the earliest audiogram of record was from June 1999 and revealed normal hearing in appellant's right ear with the exception of a 25 dB level at 6,000 Hz, and normal hearing in appellant's left ear with the exception of a 35 dB level at 4,000 Hz. Dr. Israel noted that the several subsequent audiograms revealed a progressive sensorineural hearing loss. He then reviewed

³ A.M.A., *Guides* (6th ed. 2009).

appellant's most recent audiogram from November 6, 2017 performed by Dr. Pappas, and opined that the patterns were suggestive of sensorineural hearing loss due to at least in part to employment-related noise-induced acoustic trauma. Dr. Israel indicated a date of MMI of November 6, 2017, the date of appellant's last audiogram. He reviewed the audiogram performed on November 6, 2017 and concurred with Dr. Pappas' calculation of a right ear hearing impairment rating of 5.625 percent, a left ear hearing impairment rating of 0 percent, and binaural hearing loss rating of 0.9 percent. Dr. Israel related that Dr. Pappas used a "Tinnitus Impairment Chart to determine that there should be a 3 percent tinnitus award added to the calculated binaural loss ... there was no discussion of tinnitus in the records and its impact on the activities of daily life. Nevertheless, if one adds that 3 percent to the .9 percent binaural loss, one receives a total award of 3.9 percent."

On January 26, 2018 OWCP accepted appellant's claim for binaural sensorineural hearing loss.

On April 5, 2018 appellant filed a claim for a schedule award (Form CA-7).

By decision dated December 12, 2018, OWCP granted appellant a schedule award for one percent monaural (right ear) hearing loss. The award ran for .52 weeks from November 6 to 9, 2017. OWCP noted that the percentage of permanent impairment was based on Dr. Pappas' report dated November 6, 2017 and the report of the DMA, Dr. Israel, dated January 24, 2018.

LEGAL PRECEDENT

The schedule award provisions of FECA⁴ and its implementing regulations⁵ 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 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 for evaluating schedule losses and the Board has concurred in such adoption.⁶

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 Hz, the losses at each frequency are added up and averaged.⁷ 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

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

⁶ See *J.W.*, Docket No. 17-1339 (issued August 21, 2018); *R.D.*, 59 ECAB 127 (2007); *Bernard Babcock, Jr.*, 52 ECAB 143 (2000).

⁷ A.M.A., *Guides* 250.

everyday speech under everyday conditions.⁸ The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.⁹

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.¹⁰ 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 OWCP's procedures provide that percentages should not be rounded until the final percent for award purposes is obtained. Fractions should be rounded down from .49 and up from .50.¹³

If tinnitus interferes with ADL's, including sleep, reading, and other tasks requiring concentration, enjoyment of quiet recreation and emotional well-being, up to five percent may be added to measurable binaural hearing impairment.¹⁴ A schedule award for tinnitus is not payable unless the medical evidence establishes that the condition caused or contributed to a ratable hearing loss.¹⁵

ANALYSIS

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

In his November 6, 2017 report, Dr. Pappas performed an otologic evaluation and reviewed appellant's audiometric testing. Testing at frequency levels of 500, 1,000, 2,000, and 3,000 Hz revealed the following: right ear 20, 10, 30, and 55 decibels (dBs); and left ear 20, 15, 20, and 35 dBs. Dr. Pappas calculated a 0 percent hearing impairment on the left, 5.6 percent hearing impairment on the right, and 0.93 percent binaural hearing impairment. He determined a tinnitus impairment rating of 3 percent, and added that to the calculation for binaural hearing impairment of 0.93 percent to find a 3.93 percent total binaural hearing impairment.

In his January 24, 2018 report, Dr. Israel, serving as the DMA, indicated a date of MMI of November 6, 2017, the date of appellant's last audiogram. He reviewed the November 6, 2017 audiogram and concurred that appellant had a right ear hearing impairment rating of 5.625 percent, a left ear hearing impairment rating of 0 percent, and binaural hearing loss rating of 0.9 percent.

⁸ *Id.*; *C.D.*, Docket No. 18-0251 (issued August 1, 2018).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *V.M.*, Docket No. 18-1800 (issued April 23, 2019); *see J.W.*, *supra* note 6; *C.D.*, *supra* note 8.

¹² *V.M.*, *supra* note 11; *P.L.*, Docket No. 17-0355 (issued June 27, 2018).

¹³ *V.M.*, *id.*; *C.D.*, *supra* note 8; Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4 (January 2010).

¹⁴ *A.M.A.*, *Guides* 249.

¹⁵ *V.M.*, *supra* note 11; *see Charles H. Potter*, 39 ECAB 645 (1988).

Dr. Israel found that the medical record lacked findings regarding tinnitus and its impact on ADL's, but he noted that when Dr. Pappas "uses a Tinnitus Impairment Chart to determine that there should be a 3 percent tinnitus award added to the calculated binaural loss ... there was no discussion of tinnitus in the records and its impact on the activities of daily life. Nevertheless, if one adds that 3 percent to the .9 percent binaural loss, one receives a total award of 3.9 percent." The Board finds that the DMA's statement is unclear regarding whether he agrees with the rating of three percent for tinnitus.

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 both Dr. Pappas, the second opinion examiner, and Dr. Israel, the DMA, it has the duty to secure an appropriate report addressing the relevant issues.¹⁶ The Board finds, however, that OWCP did not properly obtain a rationalized opinion from the DMA regarding the application of the A.M.A., *Guides* for a rating for tinnitus.

The case must therefore be remanded to OWCP for clarification. 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.

¹⁶ *D.M.*, Docket No. 17-1832 (issued March 14, 2018); *Peter C. Belkind*, 56 ECAB 580 (2005).

ORDER

IT IS HEREBY ORDERED THAT the December 12, 2018 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: October 17, 2019
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