

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

R.B., Appellant)	
)	
and)	
)	
DEPARTMENT OF THE NAVY, PUGET)	Docket No. 19-1466
SOUND NAVAL SHIPYARD &)	Issued: April 9, 2020
INTERMEDIATE MAINTENANCE FACILITY,)	
Bremerton, WA, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 26, 2019 appellant filed a timely appeal from March 21 and May 8, 2019 merit decisions 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.

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish ratable hearing loss for schedule award purposes; and (2) whether OWCP properly exercised its discretion in denying authorization for a right-side hearing aid.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On December 4, 2018 appellant, then an 87-year-old retired tool and parts attendant, filed an occupational disease claim (Form CA-2) alleging that he developed hearing loss due to factors of his federal employment.² He indicated that he first became aware of his hearing loss and its relationship to his federal employment on March 3, 1988.

Appellant submitted employment-related audiometric reports providing the results of audiometric testing from January 24, 1966 to March 3, 1988. The March 3, 1988 results of audiometric testing for the right ear at the frequency levels of 500, 1,000, 2,000, and 3,000 Hertz (Hz) revealed decibel losses of 10, 5, 5, and 20, respectively. Testing for the left ear at the same frequency levels revealed decibel losses of 25, 15, 20, and 30, respectively.

In a development letter dated December 13, 2018, OWCP requested that the employing establishment review appellant's claim and provide comments from a knowledgeable supervisor regarding appellant's employment-related exposure to hazardous noise.

In an undated summary of occupational exposure to noise, the employing establishment noted that, from May 30, 1971 until June 2, 1989, appellant worked as a tool and parts attendant. The background sound level range of the ship work area was measured as 80 to 85 decibels (dBs) continuously, while the background sound level range of the shop work area was measured as 70 to 80 dBs continuously.

OWCP subsequently prepared a statement of accepted facts (SOAF) and referred appellant for a second opinion examination.

In a February 28, 2019 report, Dr. Edward Treyve, a Board-certified otolaryngologist serving as an OWCP second opinion physician, noted appellant's history of noise exposure during his federal employment. He also examined appellant, obtained a current audiogram, and reviewed the results of appellant's previous audiograms from January 24, 1966 through October 10, 2018. Dr. Treyve advised that the ear canals were normal, while the tympanic membranes were scarred. He noted that the latest audiometric testing, on February 28, 2019, revealed moderate-to-moderately-severe sensorineural hearing loss on the right with moderate-to-profound sensorineural hearing loss on the left. Dr. Treyve noted that review of appellant's audiometry results from January 24, 1966 through March 3, 1988 revealed high-frequency hearing loss involving 4,000 to 6,000 Hz in the right ear and 3,000 to 6,000 Hz in the left ear, resulting in a deterioration of hearing at 4,000 Hz in both ears over the course of employment. Audiometry results from October 10, 2018 revealed moderate-to-severe binaural hearing loss, worse on the left than the right. Dr. Treyve diagnosed binaural hearing loss. He indicated that deterioration in hearing over the course of employment was in excess of what would have been predicted on the basis of presbycusis alone, and workplace exposures were of significant intensity and duration to have contributed to appellant's hearing loss. Dr. Treyve calculated that, under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A.,

² Appellant voluntarily retired effective June 2, 1989.

Guides),³ appellant had a binaural hearing impairment of 46.3 percent, with monaural impairments of 61.9 percent on the left and 43.1 percent on the right. He recommended binaural amplification, the need for which was, in part, related to the combination of occupational noise exposure and presbycusis. Dr. Treyve explained that, based on the results of his industrial audiometry from 1988, amplification would have been recommended only for the left ear at that time.

By decision dated March 21, 2019, OWCP accepted appellant's claim for binaural hearing loss. It found that the medical evidence of record established that he would benefit from a hearing aid for the left ear only. Appellant was informed that he could file a claim for a schedule award and/or wage-loss compensation.

On April 4, 2019 appellant filed a claim for a schedule award (Form CA-7).

OWCP forwarded the case, including Dr. Treyve's February 28, 2019 second opinion evaluation and audiogram, to a district medical adviser (DMA) for an assessment of the extent, if any, of appellant's binaural hearing loss.

In an April 22, 2019 report, Dr. Stephen Maturo, a Board-certified otolaryngologist serving as the DMA, reviewed the otologic and audiologic testing performed by Dr. Treyve and applied OWCP's standardized procedures to his evaluation. He noted that in 1966 appellant had high-frequency hearing loss, worse in the left ear than the right ear, and that over the next decade this became a severe loss in the left ear and a moderate loss in the right ear. From 1976 through 1988 appellant's hearing loss remained stable, and he retired in 1989. Dr. Maturo found zero percent binaural hearing loss based upon the hearing testing from 1988, noting that appellant had retired in 1989, and thus hearing tests after that time period should not be used to calculate hearing loss. He indicated that occupational hearing loss does not progress once a person is removed from the noise environment. Dr. Maturo disagreed with Dr. Treyve's findings regarding the extent of appellant's ratable hearing loss noting that the rating should be based on appellant's 1988 audiogram data.

By decision dated May 8, 2019, OWCP denied appellant's schedule award claim. It explained that while the claim had been accepted for employment-related hearing loss, based upon the 1988 audiogram appellant had no ratable hearing loss. OWCP noted the DMA's comment that as appellant retired in 1989, his impairment rating should be based on the 1988 audiogram data, as occupational hearing loss does not progress once one is removed from a loud noise environment.

LEGAL PRECEDENT -- ISSUE 1

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 by which the percentage loss of a member, function, or organ shall be

³ A.M.A., *Guides* (6th ed. 2009).

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. Through its implementing regulations, OWCP adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.⁶ As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).⁷

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. 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.⁸ The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss. 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 and then added to the greater loss and the total is divided by six to arrive at the amount of the binaural hearing loss. The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.⁹

Regarding progression of hearing loss, OWCP's procedures provide, that noise-induced hearing loss does not typically progress after exposure to noise ceases. A claimant with an audiogram showing less than a 25-dB loss soon after exposure ceases and a second audiogram showing a ratable loss may be denied if a DMA provides a well-reasoned opinion. Other benefits remain payable if any employment-related hearing loss exists.¹⁰

ANALYSIS -- ISSUE 1

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

OWCP referred appellant for a second opinion evaluation with Dr. Treyve, who obtained audiometric data on February 28, 2019. In his February 28, 2019 report, Dr. Treyve determined that appellant sustained work-related binaural hearing loss and calculated binaural hearing impairment of 46.3 percent, with monaural impairments of 61.9 percent on the left, and 43.1 percent on the right under the sixth edition of the A.M.A., *Guides*.

OWCP's DMA, Dr. Maturo, disagreed with Dr. Treyve, noting that occupational hearing loss does not progress once a person is removed from the source of noise. He concluded that based

⁶ *Id.* B.B., Docket No. 19-1491 (issued February 3, 2020); *see also* Ronald R. Kraynak, 53 ECAB 130 (2001).

⁷ *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).

⁸ *See* A.M.A., *Guides* 250.

⁹ V.M., Docket No. 18-1800 (issued April 23, 2019); E.S., 59 ECAB 249 (2007); Reynaldo R. Lichtenberger, 52 ECAB 462 (2001).

¹⁰ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010); W.H., Docket No. 13-1470 (issued January 6, 2014).

on appellant's March 3, 1988 audiogram, he had no ratable hearing loss. As previously noted, a DMA's opinion that hearing loss due to hazardous noise exposure does not progress after noise exposure ceases must be supported by medical rationale.¹¹ The Board finds, however, that the DMA merely concluded that hearing loss does not progress after exposure to hazardous noise ends. The DMA did not offer a rationalized medical opinion explaining why appellant's hearing loss progression was not compensable, given the factual and medical evidence of record.¹²

Further, there is evidentiary support in the record, based upon the report of Dr. Treyve, OWCP's second opinion physician, that the progression of appellant's hearing loss after 1989 should be compensable. The Board has recognized that a claimant may be entitled to a schedule award for hearing loss, even after exposure to hazardous noise has ceased, if causal relationship is supported by the medical evidence of record.¹³

When a DMA fails or neglects to provide rationale for a percentage of impairment specified, OWCP should request a clarification or supplemental report from the DMA.¹⁴ The Board finds that OWCP failed to request a clarification or supplemental report containing necessary rationalization from the DMA as to whether appellant had a progression of sensorineural hearing loss after 1989 due to his accepted employment-related hearing loss based upon the medical evidence of recording including the report of Dr. Treyve.

On remand OWCP should request a supplemental report from the DMA which addresses, with the necessary medical rationale, whether appellant sustained a progression of hearing loss due to the accepted employment injury. Following this and such further development as deemed necessary, OWCP shall issue a *de novo* decision.

LEGAL PRECEDENT -- ISSUE 2

Section 8103(a) of FECA provides that the United States shall furnish to an employee who is injured while in the performance of duty the services, appliances, and supplies prescribed or recommended by a qualified physician, which the Secretary of Labor considers likely to cure, give relief, reduces the degree, or the period of any disability, or aid in lessening the amount of any monthly compensation.¹⁵ OWCP must therefore exercise discretion in determining whether the particular service, appliance, or supply is likely to affect the purposes specified in FECA.¹⁶

¹¹ *Id.*; see also *E.C.*, Docket No. 19-1007 (issued November 8, 2019); *Adelbert E Buzzell*, 34 ECAB 96 (1982).

¹² *Id.*

¹³ See *E.R.*, Docket No. 16-1529 (issued March 3, 2017); *Adelbert E. Buzzell*, *supra* note 11.

¹⁴ *Supra* note 7 at 2.808.6.f(2)(a).

¹⁵ See *J.W.*, Docket No. 16-0231 (issued March 10, 2016); *Joshua A. Holmes*, 42 ECAB 231, 236 (1990).

¹⁶ 5 U.S.C. § 8103.

Following medical evaluation of a claim, if the hearing loss is determined to be nonratable for schedule award purposes, other benefits such as hearing aids may still be payable if any employment-related hearing loss exists.¹⁷

ANALYSIS -- ISSUE 2

The Board finds that OWCP abused its discretion in denying appellant's request for a right-side hearing aid.¹⁸

The Board has held that, following medical evaluation of a claim, if the hearing loss is determined to be nonratable for schedule award purposes, other benefits such as hearing aids may still be provided if any causally related hearing loss exists.¹⁹ Dr. Treyve's February 28, 2019 report recommended binaural amplification, the need for which was in part related to the combination of occupational noise exposure and presbycusis. Dr. Treyve explained that based on industrial audiometry in 1988, amplification would have been recommended only for the left ear. However, as previously noted, OWCP's procedures provide that other benefits are still payable if any employment related hearing loss exists, even if progression of hearing loss after exposure to hazardous noise ends was not related to the accepted exposure.²⁰

Dr. Treyve recommended bilateral amplification based in part on appellant's occupational noise exposure, and the DMA did not offer any opinion disputing appellant's need for bilateral hearing aids. The Board therefore finds that OWCP abused its discretion in denying appellant's request for a right-side hearing aid. Upon return of the case record, OWCP shall authorize a right-side hearing aid.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant met his burden of proof to establish a ratable hearing loss, warranting a schedule award. The Board also finds that OWCP abused its discretion in denying a right-side hearing aid.

¹⁷ *J.M.*, Docket No. 16-0526 (issued May 13, 2016); *see F.D.*, Docket No. 10-1175 (issued January 4, 2011).

¹⁸ *See J.W.*, *supra* note 15; *R.N.*, Docket No. 13-284 (issued July 3, 2013).

¹⁹ *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Services and Supplies*, Chapter 3.400.3(d)(2) (October 1995); *J.W.*, *supra* note 15; *Raymond VanNett*, 44 ECAB 480 (1993).

²⁰ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010); *W.H.*, Docket No. 13-1470 (issued January 6, 2014).

ORDER

IT IS HEREBY ORDERED THAT the March 21, 2019 decision of the Office of Workers' Compensation Programs is reversed in part regarding the denial of the right-sided hearing aid.

IT IS FURTHER ORDERED THAT the May 8, 2019 decision is set aside and this case is remanded for further proceedings consistent with this decision of the Board.

Issued: April 9, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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