United States Department of Labor
Employees' Compensation Appeals Board

G.T., Appellant	)	
and	)	**Docket No. 19-1705**
	)	**Issued: April 16, 2020**
DEPARTMENT OF THE NAVY, PEARL HARBOR NAVAL SHIPYARD, Pearl Harbor, HI, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On July 29, 2019 appellant filed a timely appeal from a February 6, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP).[1] Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[3]

[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 February 6, 2019, the date of OWCP's last decision, was August 5, 2019. Since using August 13, 2019, the date the appeal was received by the Clerk of the Appellate Boards, would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is July 29, 2019, rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

[2] 5 U.S.C. § 8101 *et seq*.

[3] The Board notes that following the February 6, 2019 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provide: "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 ratable hearing loss for schedule award purposes.

FACTUAL HISTORY

On August 30, 2018 appellant, then a 63-year-old marine machinery mechanic, filed an occupational disease claim (Form CA-2) alleging that he developed binaural hearing loss and tinnitus due to factors of his federal employment. He indicated that he first became aware of the condition and attributed it to factors of his federal employment on June 20, 2018. Appellant did not stop work.

In an accompanying narrative statement, appellant explained that he first became aware of his hearing loss in June 2018 after he experienced difficulty hearing conversations. He noted that he had audiograms taken yearly which showed a decline in his hearing. Appellant reported that he started to experience a constant ringing in his ears that made hearing more difficult. He indicated that his work as a marine mechanic exposed him to loud noises from pumps, diesel engines, compressors, generators, blowers, cranes, loud speakers, operating equipment, air systems, needle guns, grinders, drill presses, and saws. Appellant noted that when feasible he used earplugs and earmuffs for protection. He indicated that he was exposed to loud noises between three to six hours per day, five days per week. Appellant related that he had not experienced any hearing problems prior to his federal employment.

In an August 27, 2018 employment history form, appellant listed his jobs from June 1975 to August 2018. He reported that he was not exposed to any significant loud noises prior to his federal employment. Appellant noted that from September to August 2018 he worked as a shipfitter laborer and a marine mechanic which exposed him to loud noises two to six hours daily. He related that he used earplugs and earmuffs for protection.

In a May 15, 2012 report, Dr. Caton Harris, an employing establishment audiologist, saw appellant for an annual hearing screening and diagnostic evaluation. He related that appellant worked as a marine mechanic and was exposed to hazardous noises for 50 percent of his day. Dr. Harris indicated that appellant reported constant tinnitus. He performed audiometry tests and diagnosed sensorineural hearing loss.

In an April 24, 2014 report, Dr. Kathryn Watts, an employing establishment audiologist, indicated that appellant experienced deterioration in hearing sensitivity in his right ear as a result of noise exposure. She related that he was exposed to hazardous noises as a result of his work as a marine mechanic. Dr. Watts performed audiometry tests and found sensorineural hearing loss. She diagnosed bilateral sensorineural hearing loss and tinnitus.

Appellant submitted audiograms performed by the employing establishment as part of a hearing conservation program dated from April 23, 1984 through April 11, 2018.

In a September 6, 2018 development letter, OWCP informed appellant that the evidence of record was insufficient to establish his claim. It advised him of the type of medical evidence needed. OWCP indicated that it was scheduling a second opinion examination for appellant to address this deficiency.

On September 6, 2018 OWCP referred appellant, along with a statement of accepted facts (SOAF) and the medical record, to Dr. Ronald Peroff, a Board-certified otolaryngologist, for a second opinion evaluation.

In a report dated October 4, 2018, Dr. Peroff reviewed the SOAF and a September 27, 2018 audiogram, performed a physical examination, and completed OWCP's evaluation questionnaire. He indicated that there was no significant variation from the SOAF. Dr. Peroff diagnosed mild sensorineural hearing loss that he opined was due to noise exposure related to appellant's federal employment. He reviewed appellant's audiogram, which demonstrated losses of 15, 20, 15, and 30 decibels (dBs) on the right and 5, 15, 25, and 25 dBs on the left at 500, 1,000, 2,000, and 3,000 Hertz (Hz), respectively. Utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),[4] Dr. Peroff calculated that appellant had a monaural loss of zero percent in each ear for a binaural loss of zero percent. He rated appellant's tinnitus at four percent permanent impairment to arrive at a total binaural hearing loss of four percent.

By decision dated December 26, 2018, OWCP accepted appellant's claim for binaural sensorineural hearing loss and binaural tinnitus.

On December 26, 2018 OWCP referred the medical record and SOAF to its district medical adviser (DMA), Dr. Jeffrey M. Israel, a Board-certified otolaryngologist, for calculation of appellant's percentage of permanent hearing impairment and assignment of the date of maximum medical improvement (MMI). In a January 9, 2019 report, Dr. Israel concurred with Dr. Peroff's assessment of zero percent monaural loss in each ear. However, he opined that under the sixth edition of the A.M.A., *Guides*, a tinnitus award could not be given when there was zero percent binaural hearing impairment. As such, Dr. Israel found that the total binaural loss was zero percent. He recommended that appellant receive yearly audiograms and provided authorization for hearing aids. Dr. Israel determined that the date of MMI was September 27, 2018, the date of appellant's last audiogram.

By decision dated February 6, 2019, OWCP found that appellant's hearing loss was not sufficiently severe to be considered ratable, and he was therefore not entitled to schedule award compensation. It found, however, that he was entitled to medical benefits for the effects of his injury, including hearing aids, if recommended by his physician.

LEGAL PRECEDENT

The schedule award provisions of FECA[5] and its implementing regulations[6] 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 for all claimants, OWCP has adopted the A.M.A., *Guides* as

[4] A.M.A., *Guides* (6th ed. 2009).

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404.

the uniform standard applicable to all claimants.[7] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[8]

A claimant seeking compensation under FECA has the burden of proof to establish the essential elements of his or her claim.[9] 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.[10] A claimant may seek an increased schedule award if the evidence establishes that he or she sustained an increased impairment causally related to an employment injury.[11] The medical evidence must include a detailed description of the permanent impairment.[12]

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.[13] 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* point out, losses below 25 dBs result in no impairment in the ability to hear everyday speech under everyday conditions. 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, then added to the greater loss, and the total is divided by six to arrive at the amount of binaural hearing loss. The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.[14]

Regarding tinnitus, the A.M.A., *Guides* provides that tinnitus is not a disease, but rather a symptom that may be the result of disease or injury.[15] If tinnitus interferes with activities of daily living, including sleep, reading, and other tasks requiring concentration, up to five percent may be added to a measurable binaural hearing impairment.[16]

[7] *Id*. at § 10.404(a).

[8] 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).

[9] *B.B.*, Docket No. 19-1491 (issued February 3, 2020); *John W. Montoya*, 54 ECAB 306 (2003).

[10] *R.R.*, Docket No. 19-0750 (issued November 15, 2019); *Edward Spohr*, 54 ECAB 806, 810 (2003); *Tammy L. Meehan*, 53 ECAB 229 (2001).

[11] *B.B.*, *supra* note 9; *Rose V. Ford*, 55 ECAB 449 (2004).

[12] *B.B.*, *supra* note 9; *Vanessa Young*, 55 ECAB 575 (2004).

[13] A.M.A., *Guides* 250.

[14] *J.E.*, Docket No. 19-1325 (issued December 13, 2019); *E.C.*, Docket No. 19-1007 (issued November 8, 2019).

[15] *See* A.M.A., *Guides* 249.

[16] *Id*.

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish ratable hearing loss for schedule award purposes.

OWCP referred appellant to Dr. Peroff for a second opinion examination to evaluate his hearing loss. In his October 4, 2018 report, Dr. Peroff found mild sensorineural hearing loss and binaural tinnitus due to noise exposure related to appellant's federal employment and calculated that appellant had a monaural loss of zero percent in each ear for a binaural loss of zero percent. He then rated appellant's tinnitus at four percent permanent impairment to arrive at a total binaural hearing impairment of four percent.

In a January 9, 2019 report, Dr. Israel, OWCP's DMA, reviewed Dr. Peroff's report and determined that appellant had zero percent monaural hearing loss in each ear. He related that September 27, 2018 testing revealed losses of 15, 20, 15, and 30 dBs on the right and 5, 15, 25, and 25 dBs on the left at 500, 1,000, 2,000, and 3,000 Hz, respectively. Dr. Israel totaled the dB losses to 80 on the right and 70 on the left. These values, when divided by four, resulted in an average hearing loss of 20 on the right and 17.5 on the left, which when reduced by the 25 dB fence, resulted in zero percent loss.

The Board finds that as the September 27, 2018 audiogram did not demonstrate that appellant's hearing loss was ratable, he is not entitled to a schedule award for his accepted hearing loss condition. Although appellant has an employment-related hearing loss, it is not significant enough to be ratable for schedule award purposes.[17]

While Dr. Peroff added a four percent impairment rating based on appellant's tinnitus, Dr. Israel correctly explained that tinnitus may not be added to an impairment rating for hearing loss under the sixth edition of the A.M.A., *Guides* unless such hearing loss is ratable.[18] Accordingly, as appellant does not have ratable hearing loss, the Board finds that he is not entitled to a schedule award for tinnitus.

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased permanent impairment.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish ratable hearing loss for schedule award purposes.

[17] *See L.R.*, Docket No. 18-0823 (issued December 9, 2019); *L.H.*, Docket No. 18-0696 (issued November 28, 2018); *G.G.*, Docket No. 18-0566 (issued October 2, 2018).

[18] *B.B.*, *supra* note 9; *J.E.*, *supra* note 14.

ORDER

IT IS HEREBY ORDERED THAT the February 6, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 16, 2020
Washington, DC

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

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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