

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

M.N., Appellant)	
)	
and)	Docket No. 19-0132
)	Issued: May 20, 2020
DEPARTMENT OF THE NAVY, NORFOLK)	
NAVAL SHIPYARD, Portsmouth, VA, Employer)	
)	

Appearances:
David G. Jennings, Esq., for the appellant¹
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 October 23, 2018 appellant, through counsel, filed a timely appeal from a September 19, 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.

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.*

ISSUE

The issue is whether appellant has met his burden of proof to establish greater than 15 percent binaural hearing loss for which he previously received a schedule award.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On November 17, 2016 appellant, then a 64-year-old retired training instructor, filed an occupational disease claim (Form CA-2) alleging that, following an employing establishment hearing evaluation on March 30, 2000, he first became aware of his binaural loss and realized that it was caused or aggravated by factors of his federal employment.⁴

In a letter dated September 19, 2016, Dr. David Leonard, a Board-certified otolaryngologist, noted that he had evaluated appellant on April 5, 2012 and September 19, 2016 for binaural hearing loss and tinnitus. He described a history of noise exposure at work and advised that, based on appellant's audiogram, it was more likely than not that his hearing loss was due to his occupational noise exposure. In an attached diagnostic evaluation dated April 5, 2012, Dr. Leonard described audiogram findings and recommended hearing protection and tinnitus coping strategies.

The employing establishment forwarded a December 5, 2016 letter documenting appellant's employment and noise exposure at work.

By decision dated December 21, 2016, OWCP denied appellant's claim finding that it was untimely filed.

On January 11, 2017 appellant, through counsel, requested reconsideration. With the request, counsel attached copies of audiograms performed by the employing establishment dated August 14, 1978 to March 29, 2007. An audiogram dated April 10, 1985 included positive findings for hearing loss.

By decision dated March 2, 2017, OWCP denied modification of its prior decision. It found that appellant failed to file his claim within three years of becoming aware of his hearing loss.

On March 24, 2017 appellant filed an appeal with the Board from OWCP's March 2, 2017 merit decision.

³ Docket No. 17-0931 (issued August 15, 2017).

⁴ Appellant had retired on April 3, 2007.

By decision dated August 15, 2017, the Board found that appellant's case was not in posture for decision.⁵ The Board found that his claim was timely filed, noting that audiograms dated April 10, 1985 and March 29, 2007 showed decibel losses which constituted actual knowledge by the employing establishment of a possible work-related hearing loss within 30 days of his last noise exposure on April 3, 2007. The Board remanded the case to OWCP to address the merits of appellant's claim.

In October 2017, OWCP referred appellant to Dr. Charles Beasley, a Board-certified otolaryngologist, for a second opinion evaluation. It provided him a statement of accepted facts (SOAF) and an Outline for Otologic Evaluation (Form CA-1332) for completion. On October 23, 2017 Dr. Beasley evaluated appellant and provided answers on the CA-1332 form. He noted that he had reviewed the SOAF and concluded that appellant's work exposure was of sufficient intensity and duration to have caused hearing loss. Dr. Beasley wrote "none" when asked if appellant had other significant history. He advised that appellant's ear examination was normal with no indications of other medical conditions. Dr. Beasley diagnosed bilateral sensorineural hearing loss and attached an audiogram done that day. Using the frequency levels of 500, 1,000, 2,000, and 3,000 Hertz (Hz), the audiogram revealed the following: left ear 15, 20, 50, and 60 decibels (dBs); right ear 15, 25, 35, and 65 dBs. Dr. Beasley recommended noise protection and annual audiograms, and noted that appellant had hearing aids.

On October 24, 2017 OWCP forwarded medical evidence and the SOAF to Dr. Morley Slutsky, Board-certified in occupational medicine serving as a district medical adviser (DMA). It requested that he indicate permanent functional loss of hearing and the date of maximum medical improvement (MMI) using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁶

In a November 8, 2017 report, the DMA noted that he had reviewed the SOAF and Dr. Beasley's October 23, 2017 report. He applied the sixth edition of the A.M.A., *Guides* to Dr. Beasley's findings. The DMA determined that the date of MMI was October 23, 2017 and calculated that appellant had 15.3 percent binaural hearing loss. He reported that appellant had no tinnitus and recommended no additional impairment for tinnitus. The DMA further recommended hearing aid authorization.

On November 14, 2017 OWCP accepted bilateral sensorineural hearing loss.

On March 27, 2018 appellant filed a claim for a schedule award (Form CA-7).

By decision dated April 24, 2018, OWCP granted appellant a schedule award for 15 percent binaural hearing loss. It indicated that it based the award on the physical findings of Dr. Beasley and the report of the DMA. The award ran from October 23, 2017 to March 31, 2018, for a total of 30 weeks.

⁵ *Supra* note 3.

⁶ A.M.A., *Guides* (6th ed. 2009).

In correspondence dated May 14, 2018, counsel noted that appellant had informed him that he suffered from tinnitus, and requested that OWCP schedule appellant another appointment with Dr. Beasley in order to address the issue of tinnitus because his initial report had not mentioned tinnitus, nor had it contained the standard tinnitus questionnaire.

In a May 24, 2018 response, OWCP informed counsel that it was unable to approve the request for an appointment with Dr. Beasley as requested, as neither Dr. Beasley nor the DMA noted a finding of tinnitus.

On June 15, 2018 appellant, through counsel, requested reconsideration of OWCP's April 24, 2018 decision.

In support of the request, counsel submitted treatment notes from Dr. Leonard. On April 5, 2012 Dr. Leonard noted that he examined appellant for a complaint of bilateral tinnitus that had occurred for years, that it was characterized as ringing, and that it was associated with hearing loss. He reported normal findings on ear examination. Dr. Leonard diagnosed subjective bilateral tinnitus that had worsened over the past five years. He recommended a comprehensive hearing test and tympanometry.

In a treatment note dated September 19, 2016, Dr. Leonard described appellant's complaint of gradual binaural hearing loss. He noted that appellant's symptoms were associated with the inability to "pop" his ears, occupational noise exposure, and tinnitus. Dr. Leonard reported normal findings on examination of the ears and diagnosed bilateral tinnitus. He advised that appellant's hearing loss had worsened since 2012, noting a complaint that he was having difficulty hearing his wife. Dr. Leonard diagnosed bilateral tinnitus and recommended that appellant have a comprehensive hearing test and tympanometry. A tinnitus handicap inventory (THI) dated May 10, 2018 was attached. This indicated that appellant had a catastrophic level of tinnitus.

By decision dated September 19, 2018, OWCP denied modification of its April 24, 2018 decision. It found the evidence insufficient to warrant expansion of the claim to include tinnitus or for further medical review or development.

LEGAL PRECEDENT

The schedule award provisions of FECA⁷ and its implementing regulations⁸ 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

⁷ 5 U.S.C. § 8107.

⁸ 20 C.F.R. § 10.404.

the uniform standard applicable to all claimants.⁹ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.¹⁰

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.¹¹ 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.¹²

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.¹³ 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.¹⁴

It is well established that proceedings under FECA are not adversarial in nature and, while appellant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.¹⁵ OWCP has an obligation to see that justice is done.¹⁶

ANALYSIS

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

OWCP accepted binaural hearing loss. It referred appellant to Dr. Beasley for a second opinion evaluation to determine his entitlement to a schedule award for his hearing loss. When

⁹ *Id.* at § 10.404(a).

¹⁰ 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 2020).

¹¹ *Supra* note 6.

¹² *J.E.*, Docket No. 19-1620 (issued March 9, 2020); *R.D.*, 59 ECAB 127 (2007).

¹³ *Supra* note 6 at 248-51.

¹⁴ *Id.*; *see also R.H.*, Docket No. 10-2139 (issued July 13, 2011).

¹⁵ *E.S.*, Docket No. 18-1312 (issued April 3, 2020).

¹⁶ *Id.*; *see Donald R. Gervasi*, 57 ECAB 281 (2005); *Jimmy A. Hammons*, 51 ECAB 219 (1999); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

referring appellant to Dr. Beasley, OWCP provided him a SOAF and a CA-1332 for completion. The record does not specifically indicate that OWCP sent appellant's medical records from Dr. Leonard to Dr. Beasley. On October 23, 2017 Dr. Beasley provided answers on the CA-1332 form. The CA-1332 form does not contain a question about tinnitus, and Dr. Beasley did not provide a narrative report that would perhaps list appellant's complaints and history. Furthermore, he did not indicate that he had reviewed Dr. Leonard's reports. The record also does not indicate that OWCP forwarded Dr. Leonard's reports to Dr. Slutsky who was acting as DMA, nor did he indicate that he had reviewed Dr. Leonard's reports. Dr. Slutsky only commented on Dr. Beasley's report, indicating that he had not found tinnitus whereas, as noted, Dr. Leonard diagnosed bilateral tinnitus.

The Board finds that OWCP did not properly develop appellant's schedule award claim with regard to whether his diagnosed tinnitus warranted an increased impairment rating. 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.¹⁷

It is well established that proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter.¹⁸ 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.¹⁹ When OWCP undertakes to develop the evidence it has an obligation to seek clarification from its physician upon receiving a report that did not adequately address the issues that OWCP sought to develop.²⁰

The issue before the DMA was the determination of permanent functional loss of hearing under the sixth edition A.M.A., *Guides*. As the presence or absence of tinnitus can impact the percentage of permanent impairment under the A.M.A., *Guides*, and as there is medical evidence of record indicating a diagnosis of tinnitus that was not addressed by either Dr. Beasley or the DMA, the Board finds that the claim was not properly developed.²¹

Thus, the Board will remand the case to OWCP to obtain supplemental reports, first from Dr. Beasley and then from a DMA, for opinions as to whether appellant has tinnitus and whether it entitles him to a greater schedule award. Following this and any other development deemed necessary, OWCP shall issue a *de novo* schedule award decision.

¹⁷ *Supra* note 14.

¹⁸ *Y.D.*, Docket No. 19-1200 (issued April 6, 2020); *Vanessa Young*, 56 ECAB 575 (2004).

¹⁹ *E.S.*, *supra* note 15.

²⁰ *S.C.*, Docket No. 17-1587 (issued January 2, 2019); *E.B.*, Docket No. 17-0795 (issued January 18, 2018).

²¹ When OWCP refers a claimant for a second opinion evaluation and the report does not adequately address the relevant issues, OWCP should secure an appropriate report on the relevant issues. *See C.H.*, Docket No. 19-1315 (issued March 16, 2020); *Ayanle A. Hashi*, 56 ECAB 234 (2004).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the September 19, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for proceedings consistent with this decision of the Board.

Issued: May 20, 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