

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

_____)	
J.E., Appellant)	
)	
and)	Docket No. 19-1620
)	Issued: March 9, 2020
DEPARTMENT OF THE NAVY, PUGET)	
SOUND NAVAL SHIPYARD, Bremerton, WA,)	
Employer)	
_____)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 25, 2019 appellant filed a timely appeal from a March 26, 2019 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, following the March 26, 2019 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.*

ISSUE

The issue is whether appellant has met his burden of proof to establish greater than 14 percent binaural hearing loss for which he previously received a schedule award.

FACTUAL HISTORY

On June 20, 2018 appellant, then a 61-year-old marine machinery mechanic, filed an occupational disease claim (Form CA-2) alleging that he developed binaural sensorineural hearing loss and ringing in his ears due to factors of his federal employment. He noted that he first became aware of the condition on February 27, 2016 and first attributed the condition to factors of his federal employment on July 27, 2016. Appellant was last exposed to the employment factors on August 31, 2016 the date of his retirement.

In a development letter dated June 22, 2018, OWCP informed appellant that the evidence of record was insufficient to establish his claim. It advised him of the type of factual and medical evidence needed and provided a questionnaire for his completion. In a separate development letter of even date, OWCP notified the employing establishment of appellant's occupational disease claim. It requested additional information regarding his exposure to noise due to factors of his federal employment. OWCP afforded both parties 30 days to submit the necessary information.

On June 28, 2018 appellant responded to OWCP's development questionnaire. He noted that, from 1975 to 1978, he worked in an engine room where he was exposed to noise 8 to 10 hours a day. From 1979 to 1986, appellant reported working as a machinist repairing ships using loud pneumatic tools, grinders, chippers, and hammers. From 1987 to 2016, he indicated that he worked in engine rooms and dry docks and was exposed to loud industrial noises, including blowers, exhaust fans, sandblasting equipment, grinders, chippers, and hammers. Appellant noted that the employing establishment provided earplugs over the course of his employment.

On August 14, 2018 the employing establishment confirmed sound level readings for equipment and processes which could have been present in appellant's work environment.

In an August 27, 2018 report, Robin Fescues, an audiologist, noted that appellant experienced constant bilateral tinnitus and reported having significant difficulty understanding in the presence of background noise. She also found that pure tone audiometry revealed mild-sloping to moderately-severe mixed hearing loss in both of his ears.

On November 15, 2018 OWCP referred appellant, a statement of accepted facts (SOAF), and an otologic evaluation questionnaire for a second opinion evaluation with Dr. Edward Treyve, a Board-certified otolaryngologist. In a report dated December 13, 2018, Dr. Treyve reviewed the SOAF, obtained an audiological examination, and completed OWCP's evaluation questionnaire. He diagnosed bilateral sensorineural hearing loss and tinnitus and opined that the workplace exposure described in the SOAF "was sufficient in intensity and duration to have contributed to the hearing loss in question." Dr. Treyve reviewed the audiogram report of December 13, 2018 from audiologist Lynn E. Byrne, which demonstrated losses of 25, 20, 35, and 55 decibels (dBs) on the left and 20, 25, 35, and 60 dBs on the right 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*),³ he calculated that appellant had a left monaural loss of 13.125 percent and a right monaural loss of 15 percent for a binaural loss of 13.44 percent. Dr. Treyve further rated appellant's tinnitus at one percent impairment in each ear.

By decision dated December 20, 2018, OWCP accepted appellant's claim for binaural hearing loss and bilateral tinnitus.

On December 20, 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). On January 20, 2019 Dr. Israel concurred with Dr. Treyve's assessment of a 13.4 percent binaural loss and a 1 percent tinnitus impairment for a total binaural award of 14.4 percent. He determined that the date of MMI was December 13, 2018, the date of appellant's last audiogram.

On February 13, 2019 appellant filed a claim for a schedule award (Form CA-7).

In a letter dated February 21, 2019, OWCP requested that Dr. Israel clarify his opinion regarding appellant's entitlement to a tinnitus award. It pointed out that Dr. Treyve had opined that appellant should be rated for one percent tinnitus in each ear; therefore, Dr. Israel was asked to recalculate appellant's total binaural hearing loss.

In a February 27, 2019 report, Dr. Israel clarified that he found one percent tinnitus award because Dr. Treyve implied that appellant's activities of daily living (ADLs) were minimally impacted. However, he recommended using a tinnitus handicap inventory (THI) to render a tinnitus award. Dr. Israel noted that the A.M.A., *Guides* suggest using a THI and that the "THI is a widely used measure for tinnitus handicap that has been extensively researched and proven to have both consistent reliability and repeatability." He attached a THI with his report and indicated that "I would suggest leaving the binaural score that I calculated as is due to the fact that Dr. Treyve implied that the ADLs were impacted minimally, thus, yielding a one percent award." Alternatively, Dr. Israel suggested that, if OWCP had appellant to complete the THI, he would "be happy to review it and adjust the award accordingly."

By decision dated March 26, 2019, OWCP granted appellant a schedule award for 14 percent binaural hearing loss. The award ran from December 13, 2018 to June 26, 2019 for a total of 28 weeks of compensation.

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. However, FECA does not

³ A.M.A., *Guides* (6th ed. 2009).

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

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 the uniform standard applicable to all claimants.⁶ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁷

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.⁸ 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.⁹

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.¹⁰ If tinnitus interferes with ADLs, including sleep, reading, and other tasks requiring concentration, up to five percent may be added to a measurable binaural hearing impairment.¹¹

ANALYSIS

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

OWCP properly referred appellant to Dr. Treyve for a second opinion examination to determine his entitlement to a schedule award for his hearing loss.¹² Dr. Treyve's December 13, 2018 report reviewed appellant's audiogram findings and concluded that appellant's bilateral hearing loss and tinnitus were due to his workplace noise exposure. On January 20, 2019 Dr. Israel, serving as OWCP's DMA, reviewed Dr. Treyve's report and concurred with his findings and conclusions.

Dr. Treyve and Dr. Israel both properly applied the standardized procedures to the December 13, 2018 audiogram report to determine that appellant had 13.4 percent binaural hearing

⁶ *Id.* at § 10.404(a).

⁷ 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).

⁸ A.M.A., *Guides* at 250.

⁹ *E.C.*, Docket No. 19-1007 (issued November 8, 2019).

¹⁰ *See* A.M.A., *Guides* at 249.

¹¹ *Id.*

¹² *Id.*

loss. Testing for the left ear at frequency levels of 500, 1,000, 2,000, and 3,000 Hz revealed dB losses of 25, 20, 35, and 55 respectively for a total loss of 135 dBs. Testing for the right ear at the same frequency levels revealed dB losses of 20, 25, 35, and 60 for a total loss of 140 dBs. The total dB losses were averaged by dividing by 4 to obtain an average hearing loss of 33.75 dBs in the left ear and 35 dBs in the right ear. After subtracting the 25 dB fence and multiplying by 1.5 (as explained above), a 13.125 percent monaural loss was found for the left ear, and a 15 percent monaural loss was found for the right ear.

However, OWCP did not properly develop appellant's degree of impairment for his accepted bilateral tinnitus. 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.¹³

It is well established that proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter.¹⁴ 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.¹⁵ Once OWCP undertook development of the evidence it had a duty to secure an appropriate report addressing the relevant issues.¹⁶

OWCP issued a one percent tinnitus impairment award, resulting in a total schedule award for 14 percent binaural hearing loss. However, the DMA, Dr. Israel, noted that he based this award on Dr. Treyve's abbreviated statement that appellant "has noted a bilateral high-pitched tinnitus for approximately 20 years which is persistent, typically better in the morning and worse as the day goes on. It is rarely bothersome." This statement does not fully address whether appellant's tinnitus impacted his ADLs, such as sleep, reading, enjoyment of quiet recreation, and emotional wellbeing. Dr. Israel recommended that a THI be prepared to render a tinnitus award. He attached a THI to his February 27, 2019 report and indicated that he would adjust the tinnitus award if OWCP had appellant complete it. However, OWCP did not obtain a THI from appellant or any further documentation regarding appellant's tinnitus. Since it did not obtain the necessary evidence to properly determine his entitlement to an award for his accepted bilateral tinnitus, the case will be remanded to OWCP to obtain the necessary documentation. Following this and any necessary further development, OWCP shall issue a *de novo* decision on appellant's claim for schedule award.

CONCLUSION

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

¹³ *Id.*

¹⁴ *D.L.*, Docket No. 19-0987 (issued October 23, 2019); *T.O.*, Docket No. 18-0659 (issued August 8, 2019).

¹⁵ *D.L.*, *id.*; *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *Jimmy A. Hammons*, 51 ECAB 219 (1999).

¹⁶ *D.L.*, *id.*; *Peter C. Belkind*, 56 ECAB 580 (2005); *Ayanle A. Hashi*, 56 ECAB 234 (2004).

ORDER

IT IS HEREBY ORDERED THAT the March 26, 2019 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: March 9, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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