

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

E.E., Appellant)

and)

DEPARTMENT OF THE ARMY, CORPUS)
CHRISTI ARMY DEPOT, Corpus Christi, TX,)
Employer)

Docket No. 19-1763
Issued: March 24, 2020

Appearances:

Glenda Turner, 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
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On August 16, 2019 appellant, through his representative, filed a timely appeal from a June 17, 2019 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.³

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.*

³ The Board notes that following the June 17, 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 evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant has met his burden of proof to establish greater than 13 percent binaural hearing loss, for which he previously received a schedule award.

FACTUAL HISTORY

On August 15, 2018 appellant, then a 63-year-old electrical equipment repairer, filed an occupational disease claim (Form CA-2) alleging that he developed binaural hearing loss with tinnitus due to factors of his federal employment, including working around hammering, banging, grinding, and electrical equipment machinery which simulated helicopter flight operations. He noted that he first became aware of his hearing loss and first realized that it was caused or aggravated by his federal employment on April 17, 2018. On the reverse side of the claim form, the employing establishment indicated that appellant had retired on October 31, 2015 and first received medical care on April 17, 2018.

In an undated statement, appellant provided his employment history. He also explained that in March 2018 he experienced ringing in his ears, and that his family had to speak loudly in order for him to hear them. Appellant related that in April 2018 he was diagnosed with hearing loss and tinnitus.

OWCP received an April 17, 2018 report from Dr. George Fisher, Board-certified in otolaryngology, wherein he noted that appellant had binaural hearing loss and bilateral tinnitus. An audiogram report dated April 17, 2018 prepared by audiologist Diana Chagoya accompanied Dr. Fisher's report.

In an August 27, 2018 development letter, OWCP informed the employing establishment of appellant's hearing loss claim and requested additional factual information regarding his exposure to hazardous noise.

In an October 22, 2018 development letter, OWCP advised appellant regarding the factual and medical evidence necessary to establish his claim and indicated that it was scheduling a second opinion examination.

On October 23, 2018 OWCP referred appellant, a statement of accepted facts (SOAF), and an otologic evaluation questionnaire to Dr. Paul Loeffler, a Board-certified otolaryngologist, for a second opinion evaluation.

In his December 10, 2018 report, Dr. Loeffler reviewed the SOAF and completed the questionnaire. He related that appellant presented with a loss of hearing and tinnitus. In describing appellant's tinnitus, Dr. Loeffler indicated that the ringing was present during appellant's normal daily activities and that he required background noise to keep it under control. The tinnitus kept appellant up at night and increased in volume in quiet environments. Dr. Loeffler noted that a new audiogram⁴ revealed the following decibel (dB) losses at 500, 1,000, 2,000, and 3,000 hertz (Hz): 35, 40, 25, and 35 for the right ear and 30, 35, 30, and 30 for the left ear. He calculated 9 percent hearing impairment on the left, 14 percent hearing impairment on the right, and 9.8 percent binaural hearing impairment. Using a tinnitus impairment chart, Dr. Loeffler determined that

⁴ A new audiogram was performed by Audiologist Chagoya on December 10, 2018.

appellant had a tinnitus impairment rating of three percent, which corresponded with a description of a moderate impairment where the tinnitus may be noticed even in the presence of background or environmental noise, although daily activities may still be performed. He then added 3 percent to the calculation for binaural hearing impairment of 9.8 percent to find a total of 12.8 percent binaural hearing impairment. Dr. Loeffler diagnosed binaural hearing loss and attributed this loss of hearing to noise exposure during appellant's federal civilian employment. He also diagnosed binaural tinnitus due to appellant's employment-related noise exposure. Dr. Loeffler indicated that appellant reached maximum medical improvement (MMI) on December 10, 2018.

By decision dated January 7, 2019, OWCP accepted appellant's claim for binaural hearing loss and bilateral tinnitus.

On January 7, 2019 OWCP referred the medical evidence to Dr. Jeffrey Israel, a Board-certified otolaryngologist serving as a district medical adviser (DMA). On January 8, 2019 the DMA utilized the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)⁵ to review Dr. Loeffler's December 10, 2018 report, including the December 10, 2018 audiogram, and the SOAF. He calculated that appellant had 13.125 percent right ear monaural hearing loss and 9.375 percent left ear monaural hearing loss. Dr. Israel then calculated 10 percent binaural hearing loss. He deferred to Dr. Loeffler's tinnitus rating of 3 percent and added 3 percent to the 10 percent binaural hearing loss to find a total of 13 percent binaural hearing impairment. Dr. Israel determined that appellant reached MMI on December 10, 2018, the date of the most recent audiogram examination.

By decision dated January 22, 2019, OWCP granted appellant a schedule award for 13 percent binaural hearing loss.

On February 8, 2019 appellant requested a review of the written record. In an accompanying letter, he indicated that he was entitled to an award for five percent bilateral tinnitus because he continued to experience constant ringing in his ears, which interfered with his equilibrium and prevented him from getting a full night of sleep.

In an April 17, 2019 report, Dr. Fisher continued to diagnose binaural hearing loss and bilateral tinnitus.

By decision dated June 17, 2019, an OWCP hearing representative affirmed the January 22, 2019 OWCP decision.

LEGAL PRECEDENT

The schedule award provisions of FECA⁶ and its implementing regulations⁷ 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 of 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

⁵ A.M.A., *Guides* (6th ed. 2009).

⁶ 5 U.S.C. § 8107.

⁷ 20 C.F.R. § 10.404.

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 as a standard for evaluation of schedule losses and the Board has concurred in such adoption.⁸ For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*.⁹

The Board requires that the employee undergo both audiometric and otologic examination, that the audiometric testing precede the otologic examination, and that the audiometric testing be performed by an appropriately certified audiologist. The Board has explained that all audiological equipment authorized for testing meet the calibration protocol contained in the accreditation manual of the American Speech and Hearing Association. The audiometric test results must include both bone conduction and pure tone air conduction thresholds, speech reception thresholds and monaural discrimination scores, and the otolaryngologist's report must include: date and hour of examination, date and hour of employee's last exposure to loud noise, and a statement of the reliability of the tests.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* points out, losses below 25 dBs result in no impairment in the ability to hear everyday speech under everyday conditions.¹² The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.¹³ 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.¹⁴ The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.¹⁵

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. If tinnitus interferes with activities of daily living, including sleep, reading (and other tasks requiring concentration), enjoyment of quiet recreation, and

⁸ *Id.* at § 10.404; *T.O.*, Docket No. 18-0659 (issued August 8, 2019); *Jacqueline S. Harris*, 54 ECAB 139 (2002).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

¹⁰ *W.G.*, Docket No. 17-1090 (issued March 12, 2018).

¹¹ *T.O.*, *supra* note 8; *R.D.*, 59 ECAB 127 (2007); *Bernard Babcock, Jr.*, 52 ECAB 143 (2000); *see also* 20 C.F.R. § 10.404.

¹² A.M.A., *Guides* 250 (6th ed. 2009).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *T.O.*, *supra* note 8; *E.S.*, 59 ECAB 249 (2007); *Reynaldo R. Lichtenberger*, 52 ECAB 462 (2001).

emotional well-being, up to five percent may be added to a measurable binaural hearing impairment.¹⁶

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to a DMA for an opinion concerning the nature and percentage of permanent impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified.¹⁷

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish greater than 13 percent binaural hearing loss, for which he previously received a schedule award.

As the initial report from Dr. Fisher did not document the components of the audiometric protocol, OWCP properly referred appellant to Dr. Loeffler for a second opinion examination.¹⁸ Dr. Loeffler's December 10, 2018 report set forth appellant's audiogram findings and concluded that his binaural hearing loss was due to his workplace noise exposure.

On January 8, 2019 the DMA reviewed Dr. Loeffler's report and found testing for the right ear at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz revealed dB losses of 35, 40, 25, and 35, respectively. Dr. Israel determined a binaural loss of 10 percent and deferred to Dr. Loeffler's tinnitus impairment rating of 3 percent, and he added 3 percent to the 10 percent binaural loss to find a total of 13 percent binaural hearing impairment. The Board finds that Dr. Israel properly evaluated appellant's binaural hearing loss.

In his February 8, 2019 request for review of the written record, appellant alleged that his tinnitus should have been rated as five percent binaural impairment, instead of three percent binaural impairment. Dr. Loeffler's December 10, 2018 report related appellant's tinnitus symptoms and using the tinnitus impairment chart, Dr. Loeffler determined that appellant had a tinnitus impairment rating of three percent, which corresponded with the description of a moderate impairment where the tinnitus may be noticed even in the presence of background or environmental noise, although daily activities may still be performed. The DMA reviewed Dr. Loeffler's findings and concurred with his conclusion.

Appellant additionally submitted an April 17, 2019 medical report which indicated that Dr. Fisher continued to diagnose binaural hearing loss and bilateral tinnitus. However, as this April 17, 2019 report does not indicate that appellant sustained a hearing loss impairment greater than 13 percent causally related to the accepted factors of his federal employment, it is insufficient to establish an additional schedule award.

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.

¹⁶ A.M.A., *Guides* 249.

¹⁷ *Supra* note 9 at Chapter 2.808.6(f).

¹⁸ *J.G.*, Docket No. 12-1469 (issued January 11, 2013).

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish greater than 13 percent binaural hearing loss, for which he previously received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the June 17, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 24, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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