

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

D.M., Appellant)	
)	
and)	Docket No. 24-0288
)	Issued: April 19, 2024
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:

ALEC J. KOROMILAS, Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On January 29, 2024 appellant filed a timely appeal from an October 23, 2023 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

ISSUE

The issue is whether OWCP properly denied authorization for binaural hearing aids.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the October 23, 2023 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.*

FACTUAL HISTORY

On July 23, 2001 appellant, then a 51-year-old data clerk, filed an occupational disease claim (Form CA-2) alleging that he developed hearing loss as a result of noise exposure due to factors of employment during his work as an oiler/crane operator. On the back of the claim form, the employing establishment noted that appellant was last exposed to the conditions alleged to have caused his hearing loss on February 11, 1992.

Hearing conservation data, medical notes, and audiograms were submitted dated April 11, 1985 to April 12, 2001.

OWCP referred appellant, together with a statement of accepted facts, to Dr. James C. Rockwell, a Board-certified otolaryngologist, for a second opinion evaluation on December 19, 2001. An audiogram was completed on that date which revealed decibel (dB) losses at 500, 1,000, 2,000, and 3,000 Hertz (Hz): 15, 15, 15, and 20 for the right ear and 15, 10, 15, and 25 for the left ear, respectively. Dr. Rockwell reported complaints of hearing loss. He diagnosed severe high frequency hearing loss in the left ear and moderately severe high frequency loss in the right ear both of which, he opined, was caused by his federal employment-related noise exposure. Dr. Rockwell further opined that the workplace exposure was sufficient as to intensity and duration to have caused the loss in question. He noted that he questioned whether hearing aids would be beneficial for appellant at that time. Dr. Rockwell advised that if appellant felt that socially, and at the workplace that hearing was an issue, a hearing aid would be the only treatment option for him.

On June 14, 2002 appellant filed a claim for compensation (Form CA-7) for a schedule award.

On July 15, 2002 an OWCP District Medical Adviser (DMA), Donald G. Harvey, PhD, an audiologist, utilized the findings from Dr. Rockwell's December 19, 2001 report and found that appellant had zero percent monaural loss of hearing on the right side, and zero percent monaural loss of hearing on the left side. He remarked that appellant "should have the opportunity to try a hearing aid to see if it helps."

By decision dated August 1, 2002, OWCP accepted appellant's claim for a binaural hearing loss. It informed him that FECA provided payment of appropriate medical expenses related to his occupational disease claim. OWCP noted that it was suggested by the physicians who recently conducted an evaluation of appellant's ability to hear that the use of hearing aids might be beneficial. If appellant wished to have hearing aids, it informed him that additional evidence was required and advised him to see a clinical audiologist of his choosing or possibly an audiologist seen at OWCP's request.

By a separate decision also dated August 1, 2002, OWCP denied appellant's schedule award claim, finding that the evidence of record was insufficient to establish that his accepted hearing loss condition was severe enough to be considered ratable.

In a letter dated September 19, 2023 from a hearing aid clinic, Kim A. McCoy requested authorization for hearing aids and attached an audiometric evaluation. She related that appellant's

audiometric results revealed a bilateral, moderate low frequency sloping to severe high frequency hearing loss. Ms. McCoy requested that OWCP approve a pair of hearing aids and she provided an itemized bill for hearing aids.

In a letter dated September 22, 2023, OWCP informed appellant that the medical evidence of record was insufficient to support authorization or approval of hearing aids. It attached a copy of the August 1, 2002 decision, in which it discussed authorization or approval of hearing aids. OWCP further advised appellant to see a clinical audiologist of his choice or possibly an audiologist seen at the request of OWCP for additional evaluation. It afforded appellant 30 days to provide the requested information.

In a separate letter also dated September 22, 2023, OWCP informed the hearing aid clinic that authorization for the requested hearing aids could not be approved at that time. It further noted that further medical development was required and would be completed by OWCP.

By decision dated October 23, 2023, OWCP denied authorization of binaural hearing aids as the medical evidence did not establish that they were medically necessary and causally related to appellant's accepted employment injury.

LEGAL PRECEDENT

Section 8103(a) of FECA³ 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.⁴ OWCP must therefore exercise discretion in determining whether the particular service, appliance, or supply is likely to affect the purposes specified in FECA.⁵

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.⁶

ANALYSIS

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

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

³ 5 U.S.C. § 8103(a).

⁴ See *J.S.*, Docket No. 22-0274 (issued September 13, 2022); *B.C.*, Docket No. 20-0566 (issued March 8, 2022); *R.P.*, Docket No. 17-0428 (issued April 19, 2018); *J.W.*, Docket No. 16-0231 (issued March 10, 2016); *Joshua A. Holmes*, 42 ECAB 231, 236 (1990).

⁵ 5 U.S.C. § 8103.

⁶ *J.S.*, *supra* note 4; *R.B.*, Docket No. 19-1466 (issued April 9, 2020); *J.M.*, Docket No. 16-0526 (issued May 13, 2016); see *F.D.*, Docket No. 10-1175 (issued January 4, 2011).

still be provided if any causally related hearing loss exists.⁷ On December 19, 2001 OWCP's second opinion physician, Dr. Rockwell, found that appellant's hearing loss was causally related to factors of his federal employment, but questioned whether hearing aids would be beneficial for appellant at that time. However, he also noted that if appellant felt that socially, and at the workplace that hearing was an issue, a hearing aid would be the only treatment option for him. OWCP's DMA concurred with Dr. Rockwell's opinion and related that appellant should be given a chance to try hearing aids.

On September 19, 2023 a hearing aid clinic requested authorization for hearing aids, attached an audiometric evaluation, and an estimate of costs for a specific hearing aid device. OWCP informed the hearing aid clinic that further medical development was required and that it would complete the additional medical development. At the same time, it advised appellant that he should see a clinical audiologist of his choice and possibly an audiologist at OWCP's request.

The Board notes that proceedings under FECA are not adversarial in nature. OWCP shares in the responsibility to develop the evidence and has an obligation to see that justice is done.⁸ It informed the hearing aid clinic that it would be further developing the medical evidence while at the same time advising appellant to schedule a visit with an audiologist of his choice and possibly an audiologist at its request, although he had submitted the September 19, 2023 report from the hearing aid clinic. OWCP did not refer the medical evidence for review by a district medical adviser (DMA), nor did it refer appellant for an evaluation with either an audiologist or second opinion physician. Accordingly, the case will be remanded to OWCP for further development on the question of whether appellant is entitled to hearing aids for his employment-related hearing loss. Following this and such other development as deemed necessary, it shall issue a *de novo* decision regarding appellant's entitlement to hearing aids.

CONCLUSION

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

⁷ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Services and Supplies*, Chapter 3.400.3d(2) (October 1995); *J.S.*, Docket No. 22-0274 (issued September 13, 2022); *J.W.*, Docket No. 16-0231 (issued March 10, 2016); *Raymond VanNett*, 44 ECAB 480 (1993).

⁸ See *R.R.*, Docket No. 22-1236 (issued May 16, 2023); *C.F.*, Docket No. 21-0213 (issued January 11, 2022); *W.H.*, Docket No. 21-0139 (issued October 26, 2021); *J.M.*, Docket No. 16-0526 (issued May 13, 2016).

ORDER

IT IS HEREBY ORDERED THAT the October 23, 2023 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: April 19, 2024
Washington, DC

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

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board