

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

L.M., Appellant

and

**DEPARTMENT OF THE AIR FORCE,
RANDOLPH AIR FORCE BASE, TX, Employer**

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**Docket No. 14-773
Issued: August 1, 2014**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Acting Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 19, 2014 appellant, through counsel, filed a timely appeal from a December 24, 2013 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 the case.

ISSUE

The issue is whether appellant met his burden of proof to establish a ratable impairment caused by the accepted noise-induced hearing loss that would warrant a schedule award and/or hearing aids.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On April 1, 2012 appellant, then a 57-year-old retired² powered support systems mechanic, filed an occupational disease claim alleging that noise exposure at work caused hearing loss. He stated that he worked on flight lines for 35 years and was exposed to noise from jet engines and aerospace ground support equipment. In letters dated April 19, 2012, OWCP informed appellant of the evidence needed to support his claim and asked that the employing establishment provide information regarding his noise exposure and hearing conservation measures.

Appellant provided a statement describing the type of equipment to which he was exposed along with copies of audiograms dated February 10, 1987 and January 23, 2012. The employing establishment provided copies of appellant's work history and qualifications along with a chronological record of medical care, which included audiograms.

OWCP prepared a statement of accepted facts and referred appellant along with the medical record to Dr. David Kiener, a Board-certified otolaryngologist, for a second opinion examination to assess if he had sustained noise-induced hearing loss caused by his exposure to hazardous noise during his federal employment. In an August 21, 2012 report, Dr. Kiener reviewed appellant's file and the statement of accepted facts along with an August 21, 2012 audiogram performed during appellant's visit. He opined that the August 21, 2012 audiogram, which he certified, revealed mild left-sided hearing loss due to federal employment exposure. The audiogram performed on August 21, 2012, reflected testing at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second and revealed the following: right ear 15, 15, 15 and 5 decibels; left ear 5, 10, 10 and 15 decibels, respectively.

On September 6, 2012 an OWCP medical adviser reviewed Dr. Kiener's report and the August 21, 2012 audiogram. He advised that the date of maximum medial improvement was August 21, 2012 and determined that appellant's bilateral hearing loss was not severe enough to be ratable under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*).³ The medical adviser also related that hearing aids should not be authorized. A copy of his calculations was provided.

By decision dated September 21, 2012, OWCP accepted that appellant sustained bilateral sensorineural hearing loss due to employment-related noise exposure but found that he was not entitled to a schedule award because the extent of hearing loss was not severe enough to be ratable. It further found that the weight of the medical evidence established that he would not benefit from hearing aids and denied his claim for additional medical benefits.

On October 14, 2012 appellant requested a telephonic hearing before an OWCP hearing representative, which was held on February 12, 2012. He testified at the hearing. Appellant indicated that he always wore ear protection and underwent a hearing test every year. He asserted that he has a sleep disorder and argued that the second opinion audiogram results were

² Appellant retired from his federal employment on March 1, 2012.

³ A.M.A., *Guides* (6th ed. 2008).

not valid as he had fallen asleep during the testing in the audio booth. Appellant also submitted copies of unsigned February 4, 2013 audiogram and tympanogram reports. The audiogram did not provide documentation that it was performed by a certified audiologist, that the audiometric equipment met the calibration protocol, that both bone conduction and pure tone air conduction testing had been performed, nor was the date and hour of appellant's last exposure to loud noise noted.

By decision dated May 1, 2013, an OWCP hearing representative affirmed the September 21, 2012 decision. The hearing representative further found no additional schedule allowance was payable and there was no evidence to support that the February 4, 2013 audiogram was certified by a physician.

On September 26, 2013 appellant, through his attorney, requested reconsideration. In support of the request, a September 11, 2013 report from Dr. Clayton R. Borden, a Board-certified otolaryngologist, was submitted. Dr. Borden indicated that appellant was seen in his office on February 4, 2013 for hearing loss and received audiological testing. He found that appellant had normal to moderate sensorineural hearing loss and tinnitus. The percentage of hearing loss was based on pure tone average and the A.M.A., Hearing Loss Percentile Calculator, which equaled 1.25 percent hearing loss. Dr. Borden stated that appellant's examination, other than his findings, was essentially normal. He did not provide any calculations or certify the results of the February 4, 2013 audiogram, previously submitted.

By decision dated December 24, 2013, OWCP denied modification of its prior decision.

LEGAL PRECEDENT

The schedule award provision of FECA,⁴ and its implementing federal regulations,⁵ 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 the uniform standard applicable to all claimants.⁶ For decisions after February 1, 2001, the fifth edition of the A.M.A., *Guides* was used to calculate schedule awards.⁷ For decisions issued after May 1, 2009, the sixth edition is to be used.⁸

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*. Using the frequencies of 500, 1,000, 2,000 and 3,000 cycles per second, the

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

⁶ *Id.* at § 10.404(a).

⁷ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

⁸ FECA Bulletin No. 09-03 (issued March 15, 2009).

losses at each frequency are added and averaged.⁹ The fence of 25 decibels is then deducted because, as the A.M.A., *Guides* points out, losses below 25 decibels result in no impairment in the ability to hear everyday speech under everyday conditions.¹⁰ The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.¹¹ 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.¹² The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.¹³

ANALYSIS

The Board finds that the evidence of record does not establish that appellant has a ratable hearing loss based on his accepted bilateral hearing loss. The August 21, 2012 audiogram results did not demonstrate values.

The August 21, 2012 audiogram is the only study that complied with OWCP certification procedures.¹⁴ It demonstrated record values at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second of 15, 15, 15 and 5 decibels on the right for a total of 50 decibels. This figure, when divided by 4, results in an average hearing loss of 12.5 decibels. The average of 12.5 decibels, when reduced by the 25-decibel fence, results in zero percent monaural hearing loss in the right ear. The frequency levels on the left at 500, 1,000, 2,000 and 3,000 cycles per second revealed decibel losses of 5, 10, 10 and 15, for a total of 40 decibels. This figure, when divided by four, results in an average hearing loss of 10 decibels, which when reduced by 25 decibels, also results in zero percent monaural hearing loss of the left ear.

⁹ *Supra* note 2 at 250.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 251.

¹³ *Horace L. Fuller*, 53 ECAB 775 (2002).

¹⁴ OWCP procedures set forth requirements for the type of medical evidence used in evaluating hearing loss. These include that the employee undergo both audiometric and otologic examination; that the audiometric testing precede the otologic examination; that the audiometric testing be performed by an appropriately certified audiologist; that the otologic examination be performed by an otolaryngologist certified or eligible for certification by the American Academy of Otolaryngology; that the audiometric and otologic examination be performed by different individuals as a method of evaluating the reliability of the findings; that all audiological equipment authorized for testing meet the calibration protocol contained in the accreditation manual of the American Speech and Hearing Association; that the audiometric test results include both bone conduction and pure tone air conduction thresholds, speech reception thresholds and monaural discrimination scores; and that the otolaryngologist's report include: date and hour of examination; date and hour of employee's last exposure to loud noise; a rationalized medical opinion regarding the relation of the hearing loss to the employment-related noise exposure; and a statement of the reliability of the tests. Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirement for Medical Records*, Chapter 3.600.8(a) (September 1995); see *Vernon Brown*, 54 ECAB 376 (2003).

The Board finds that OWCP's medical adviser applied the proper standards to the findings stated in Dr. Kiener's report and the August 21, 2012 audiogram. The result, as shown above, is no ratable hearing loss. Thus, appellant's hearing loss is not compensable for schedule award purposes.

It is noted that the other audiograms of record contained no identification or certification of the examiner. Audiologists are not included among the healthcare professionals recognized as a physician under FECA.¹⁵

To the extent Dr. Borden's report could be seen as certifying the February 4, 2013 audiological testing, the audiogram did not meet the certification protocols as noted previously. Furthermore, Dr. Borden provided no calculations as to how he arrived at the 1.25 percent hearing loss and whether the hearing loss was binaural or monaural and, if so, for which ear. This evidence does not establish appellant's claim.

As appellant did not have a ratable hearing loss, OWCP properly determined that he was not entitled to a schedule award for tinnitus.¹⁶ Also, the medical evidence of record does not support that hearing aids are needed. OWCP's medical adviser related that hearing aids should not be authorized and there is no medical evidence of record to substantiate appellant's need for hearing aids.

On appeal appellant's counsel argues OWCP's decision is contrary to fact and law. Since the August 21, 2012 audiogram, the only certified audiogram of record, did not demonstrate that appellant's hearing loss was ratable, he is not entitled to a schedule award for his accepted hearing loss condition or tinnitus. Additionally the medical evidence of record does not indicate hearing aids are needed.

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

CONCLUSION

The Board finds that appellant did not establish that he is entitled to a schedule award for his employment-related hearing loss as his hearing loss was not ratable. Appellant also is not entitled to a schedule award for tinnitus and hearing aids are not indicated.

¹⁵ *Thomas O. Bouis*, 57 ECAB 602 (2006). Section 8101(2) of FECA provides that physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law. 5 U.S.C. § 8101(2). See *Joshua A. Holmes*, 42 ECAB 231 (1990) (an audiogram prepared by an audiologist must be certified by a physician before it can be used to determine hearing loss).

¹⁶ *Charles H. Potter*, 39 ECAB 645 (1988); *Royce L. Chute*, 36 ECAB 202 (1984).

ORDER

IT IS HEREBY ORDERED THAT the December 24, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 1, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board