

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

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**J.M., Appellant**

**and**

**DEPARTMENT OF HOMELAND SECURITY,  
CUSTOMS & BORDER PROTECTION,  
San Antonio, TX, Employer**

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**Docket No. 14-982  
Issued: August 26, 2014**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On March 25, 2014 appellant filed a timely appeal from a February 24, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this 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 or hearing aids.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On August 26, 2013 appellant, then a 58-year-old retired customs and border patrol officer, filed an occupational disease claim alleging that noise exposure at work caused hearing loss.

Appellant provided a statement describing his work-related noise exposure during firearms training and while working at airports and seaports. He submitted an audiogram dated December 14, 2006, reflecting testing at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second (cps) and revealing the following: right ear 0, 5, 0 and 5 decibels (dB); left ear 15, 15, 10 and 15 dB, respectively.

In letters dated September 3, 2013, OWCP informed appellant of the evidence needed to support his claim. It asked that the employing establishment provide information regarding his noise exposure and hearing conservation measures.

Appellant responded to OWCP's inquiries on September 9, 2013. He stated that he had never filed any kind of workers' compensation claim before and had no history of previous hearing problems.

On September 17, 2013 the employing establishment responded to OWCP's inquiries. It stated that appellant had been exposed to loud noise during his federal employment, including noise from firearms training, tractors, rail traffic, vehicle traffic, airplane jet engines and ships' engines at a seaport. The employing establishment noted that he was no longer employed, having retired as of January 1, 2011.

On October 30, 2013 OWCP referred appellant to Dr. Simon Milov, a Board-certified otolaryngologist, for an otologic examination and audiological evaluation. In a December 12, 2013 report, Dr. Milov reviewed appellant's history of noise exposure at work, the statement of accepted facts and the medical record. He advised that the workplace noise exposure was sufficient to cause hearing loss. On examination, the ears appeared normal. Dr. Milov submitted a calibration certification and results of audiometric testing performed by a certified audiologist. The audiogram performed on December 12, 2013 reflected testing at the frequency levels of 500, 1,000, 2,000 and 3,000 cps and revealed the following: right ear 5, 10, 10 and 10 dBs; left ear 5, 15, 15 and 30 dBs, respectively. Dr. Milov advised that tinnitus was present and that appellant was a borderline candidate for hearing aids in the left ear.

On February 19, 2014 Dr. H. Mobley, an OWCP medical adviser, reviewed Dr. Milov's report and the December 12, 2013 audiogram. He advised that the date of maximum medical improvement was December 11, 2013 and determined that appellant's binaural 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* (A.M.A., *Guides*) (hereinafter).<sup>2</sup> Dr. Mobley noted that Dr. Milov had added five percent to appellant's impairment for tinnitus; but because appellant did not have a measureable binaural hearing impairment, such addition was contrary to

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<sup>2</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2008).

the A.M.A., *Guides*, which provide “up to five percent may be added to a measureable hearing impairment.” He advised that hearing aids should not be authorized.

In a February 24, 2014 decision, OWCP accepted that appellant sustained bilateral hearing loss due to employment-related noise exposure but found that he was not entitled to a schedule award because the extent of his loss was not severe enough to be ratable. It further found that he would not benefit from hearing aids.

### **LEGAL PRECEDENT**

The schedule award provision of FECA<sup>3</sup> and its implementing regulations<sup>4</sup> 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 to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants.<sup>5</sup> The A.M.A., *Guides* have been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.<sup>6</sup>

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.<sup>7</sup> Using the frequencies of 500, 1,000, 2,000 and 3,000 hertz, 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.<sup>8</sup>

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.<sup>9</sup> The A.M.A., *Guides* states that, if tinnitus interferes with activities of daily living, including sleep, reading (and other tasks requiring

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<sup>3</sup> 5 U.S.C. § 8107.

<sup>4</sup> 20 C.F.R. § 10.404.

<sup>5</sup> See *D.K.*, Docket No. 10-174 (issued July 2, 2010); *Michael S. Mina*, 57 ECAB 379, 385 (2006).

<sup>6</sup> See *supra* note 4; see *F.D.*, Docket No. 09-1346 (issued July 19, 2010).

<sup>7</sup> See A.M.A., *Guides* 250 (6<sup>th</sup> ed. 2009).

<sup>8</sup> *J.H.*, Docket No. 08-2432 (issued June 15, 2009); *J.B.*, Docket No. 08-1735 (issued January 27, 2009).

<sup>9</sup> See *supra* note 7.

concentration), enjoyment of quiet recreation and emotional well-being, up to five percent may be added to a measurable binaural hearing impairment.<sup>10</sup>

### 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 December 12, 2013 audiogram results did not demonstrate ratable values.

The December 12, 2013 audiogram is the only study that complied with OWCP certification procedures.<sup>11</sup> It demonstrated record values at the frequency levels of 1,000, 2,000 and 3,000 cps of 5, 10, 10 and 10 dBs on the right for a total of 35 dBs. This figure, when divided by four, results in an average hearing loss of 8.75 dBs. The average of 8.75 dBs, when reduced by the 25 dB 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 cps revealed dB losses of 5, 15, 15 and 30, for a total of 65 dBs. This figure, when divided by four, results in an average hearing loss of 16.25 dBs, which when reduced by the 25 dB fence, results in zero percent monaural hearing loss of the left ear. The Board notes that Dr. Milov also diagnosed tinnitus. Where a claimant's hearing loss is not ratable, the claimant is not entitled to an award for tinnitus.<sup>12</sup> The Board finds that, as the December 12, 2013 audiogram 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 for tinnitus.

As to the need for hearing aids, Dr. Milov indicated that appellant was a borderline candidate, which is not a recommendation that appellant would benefit from hearing aids, but rather a speculative opinion that appellant may or may not benefit. The district medical adviser reviewed the record and opined that hearing aids should not be authorized.

Section 8103(a) of FECA 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

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<sup>10</sup> *Id.* See also *R.O.*, Docket No. 13-1036 (issued August 28, 2013); *R.H.*, Docket No. 10-2139 (issued July 13, 2011); *Robert E. Cullison*, 55 ECAB 570, 573 (2004).

<sup>11</sup> OWCP's 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, 377 (2003).

<sup>12</sup> *Juan A. Trevino*, 54 ECAB 358, 360 (2003).

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.<sup>13</sup> OWCP must therefore exercise discretion in determining whether the particular service, appliance or supply is likely to affect the purposes specified in FECA.<sup>14</sup>

There is therefore no probative medical evidence of record that appellant requires hearing aids. As he did not establish a compensable hearing loss due to his federal noise exposure, the Board finds that OWCP did not abuse its discretion under section 8103(a) by denying authorization for hearing aids.<sup>15</sup>

A December 14, 2006 audiogram indicated that it was obtained by a registered nurse. The audiogram is unsigned by a physician and does not comport with OWCP certification procedures. Registered nurses are not included among the health care professionals recognized as physicians under FECA.<sup>16</sup>

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 or hearing aids for his employment-related hearing loss, as his hearing loss was not ratable.

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<sup>13</sup> 5 U.S.C. § 8103(a).

<sup>14</sup> OWCP has broad discretionary authority in the administration of FECA and must exercise its discretion to achieve the objectives of section 8103. *Marjorie S. Greer*, 39 ECAB 1099 (1988).

<sup>15</sup> *M.M.*, Docket No. 13-1819 (issued February 19, 2014).

<sup>16</sup> *See M.B.*, Docket No. 12-1695 (issued January 29, 2013) (finding that nurse practitioners do not qualify as physicians under FECA). 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 also Joshua A. Holmes*, 42 ECAB 231, 236 (1990) (an audiogram prepared by an audiologist must be certified by a physician before it can be used to determine hearing loss).

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 24, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 26, 2014  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

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