United States Department of Labor
Employees' Compensation Appeals Board

G.N., Appellant	)	
and	)	**Docket No. 16-0160**
	)	**Issued: April 6, 2016**
DEPARTMENT OF THE NAVY, NAVAL FACILITIES ENGINEERING COMMAND, Philadelphia, PA, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On November 3, 2015 appellant, through counsel, filed a timely appeal from an October 22, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP).[1] Pursuant to the Federal Employees' Compensation Act[2] (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 has met his burden of proof to establish that he has more than nine percent binaural hearing loss.

[1] On appeal counsel asserts that he is also appealing a July 2, 2015 OWCP decision accepting appellant's claim for bilateral hearing loss. He contends that OWCP should have also accepted tinnitus as employment related. The Board's jurisdiction, however, extends only to reviewing final adverse decisions of OWCP. 20 C.F.R. §§ 501.2(c) and 501.3(a). The July 2, 2015 decision is not adverse to appellant and, thus it is not appealable to the Board.

[2] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 28, 2014 appellant, then a 66-year-old auto mechanic, filed an occupational disease claim (Form CA-2) alleging that he sustained severe hearing loss due to noise exposure from compressors, air guns, and equipment during the course of his federal employment. He did not stop work.

On September 26, 2014 OWCP requested that appellant submit additional factual and medical information in support of his claim, including a detailed description of his history of noise exposure.

By decision dated November 6, 2014, OWCP denied appellant's claim, finding that he had not factually established the occurrence of the identified work factors or submitted any supporting medical evidence. It noted that he had not responded to its request for further evidence in support of his claim.

On January 28, 2015 OWCP received the results of audiological testing and evaluations performed from 1992 to 2014 by the employing establishment as part of a hearing conservation program.

In a statement dated March 6, 2015, appellant described his noise exposure at the employing establishment from 1977 until January 2, 2015, the date he retired from employment.

In a report dated March 6, 2015, Dr. Kenneth B. Briskin, a Board-certified otolaryngologist, diagnosed an impacted cerumen and bilateral sensorineural hearing loss. He provided the results of audiological testing.

On March 11, 2015 appellant, through counsel, requested reconsideration.

On April 24, 2015 OWCP referred appellant, together with a statement of accepted facts, to Dr. Emil P. Liebman, a Board-certified otolaryngologist, for a second opinion examination.

In a report dated June 16, 2015, Dr. Liebman discussed appellant's complaints of hearing loss and "occasional intermittent tinnitus bilaterally." He diagnosed hearing loss causally related to noise exposure at work. Dr. Liebman interpreted the results of audiological testing conducted that date as showing "bilateral symmetrical high-frequency sensorineural hearing loss with good discrimination scores bilaterally." Audiometric testing for the left ear at the frequency levels of 500, 1,000, 2,000, and 3,000 Hertz (Hz) demonstrated decibel (dB) losses of 15, 35, 45, and 50 dBs, respectively. Audiometric testing for the right ear at the same frequency levels revealed dB losses of 10, 25, 35, and 50, respectively. Citing the formula from the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), Dr. Liebman found that appellant had 7.5 percent hearing loss in the right ear, 16.8 percent hearing loss in the left ear, and 9.4 percent binaural hearing loss.

In a decision dated July 2, 2015, OWCP vacated its November 6, 2014 decision and accepted appellant's claim for binaural hearing loss due to noise exposure.

On July 24, 2015 appellant filed a claim for a schedule award (Form CA-7). On July 28, 2014 an OWCP medical adviser reviewed Dr. Liebman's June 16, 2015 report and audiometric test results. For the right ear, he totaled the 500, 1,000, 2,000, and 3,000 Hz, dB losses of 10, 25, 35, and 50 to equal 120. The medical adviser divided by 4 to find that appellant had an average hearing loss of 30 dBs. He then subtracted the fence of 25 dBs and multiplied the balance of 5 by 1.5, resulting in 7.5 percent monaural hearing loss for the right ear. For the left ear, the medical adviser added the dB losses of 15, 35, 45, and 50 to find 145, or an average loss of 36.25 dBs. After subtracting a fence of 25 dBs, he multiplied the remaining balance of 11.25 by 1.5 to find 16.88 percent left monaural hearing loss. The medical adviser calculated the binaural hearing loss by multiplying the lesser loss of 7.5 in the right ear by 5, then adding the greater left ear loss of 16.88 and dividing by 6 to find 9.07 percent binaural hearing loss. He advised that OWCP should authorize hearing aids. The medical adviser determined that the test results obtained by Dr. Liebman were consistent and concurred with his findings. He opined that appellant reached maximum medical improvement on June 2, 2015.

On August 5, 2015 appellant's counsel questioned why the OWCP medical adviser did not provide an impairment rating for tinnitus in calculating the extent of his permanent impairment. He submitted a statement from appellant dated March 6, 2015 describing his symptoms of tinnitus and its interference with his daily activities.

On October 16, 2015 OWCP requested that the medical adviser consider whether the impairment rating should be adjusted for tinnitus. On October 20, 2015 the medical adviser found that Dr. Liebman had increased appellant's binaural hearing loss impairment rating from 9.07 percent to 9.4 percent for tinnitus.

By decision dated October 22, 2015, OWCP granted appellant a schedule award for nine percent binaural hearing loss. The period of the award ran for 18 weeks from June 2 to October 5, 2015.

On appeal appellant's counsel asserts that OWCP erred in failing to accept tinnitus and in interpreting Dr. Liebman's opinion as including a rating for tinnitus. He contends that the medical adviser did not explain why he believed that Dr. Liebman provided a rating for tinnitus.

LEGAL PRECEDENT

The schedule award provision of FECA,[3] and its implementing federal regulations,[4] 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

[3] *Id*. at § 8107.

[4] 20 C.F.R. § 10.404.

the A.M.A., *Guides* as the uniform standard applicable to all claimants.[5] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[6]

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.[7] 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. 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.[8]

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.[9] If tinnitus interferes with activities of daily living, including sleep, reading and other tasks requiring concentration, enjoyment of quiet recreation, and emotional well being, up to five percent may be added to a measurable binaural hearing impairment.[10]

ANALYSIS

OWCP accepted that appellant sustained binaural hearing loss due to noise exposure based on the June 16, 2015 report of Dr. Liebman, who provided a second opinion examination. Dr. Liebman noted that he complained of hearing loss and periodic tinnitus. He diagnosed hearing loss due to noise exposure and concluded that appellant had an impairment due to hearing loss of 7.5 percent on the right, 16.8 percent on the left, and 9.4 percent binaural hearing loss. Dr. Liebman referenced the A.M.A., *Guides* in reaching his impairment rating, but did not set forth his calculations or indicate whether he was providing an additional award for tinnitus.

On July 28, 2014 an OWCP medical adviser reviewed Dr. Liebman's report and audiogram. He found that testing of the right ear at the frequencies of 500, 1,000, 2,000, and 3,000 Hz revealed losses of 10, 25, 35, and 50 dBs, which he added to total 120. The medical adviser divided by 4 to find an average loss of 30, from which he deducted the threshold fence of 25 dBs to find a balance of 5. He multiplied 5 by 1.5 to find 7.5 percent monaural loss. For the

[5] *Id*. at § 10.404(a).

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (February 2013); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[7] A.M.A., *Guides* 250.

[8] *See J.H.*, Docket No. 08-2432 (issued June 15, 2009); *J.B.*, Docket No. 08-1735 (issued January 27, 2009).

[9] *See* A.M.A., *Guides* 249.

[10] *Id.*; *see also R.H.*, Docket No. 10-2139 (issued July 13, 2011).

left ear, the medical adviser found that appellant had losses of 15, 35, 45, and 50 dBs at the frequencies 500, 1,000, 2,000, and 3,000 Hz, for a total of 145 and an average loss of 36.25. Subtracting the fence of 25 dBs yielded a balance of 11.25, which he multiplied by 1.5 to find 16.88 percent monaural loss. To obtain the binaural loss, the medical adviser multiplied the lesser loss of 7.5 by 5, which he added to the greater loss of 16.88 and divided by 6 to find 9.07 percent binaural loss.

On October 16, 2015 OWCP requested that the medical adviser determine whether appellant had a greater binaural hearing loss as the result of tinnitus. In an October 20, 2015 response, he indicated that Dr. Liebman had increased the impairment rating from 9.07 percent to 9.4 percent due to tinnitus.

The Board finds that this case is not in posture for a decision as clarification is required from Dr. Liebman regarding whether he added an impairment rating for tinnitus. The A.M.A., *Guides* states that "tinnitus in the presence of unilateral or bilateral hearing impairment may impair speech discrimination. Therefore, add up to five percent for tinnitus in the presence of measurable hearing loss if the tinnitus impacts the ability to perform the activities of daily living."[11] It is not clear whether Dr. Liebman added a rating for tinnitus as he did not explain how he arrived at his impairment rating.

It is well established that proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares the responsibility in the development of the evidence to see that justice is done. As OWCP undertook development of the evidence by referring appellant to a second opinion physician, it has the duty to secure an appropriate report addressing the relevant issues.[12] As Dr. Liebman did not explain whether he included tinnitus in his impairment rating for appellant's hearing loss, the case will be remanded to OWCP to request a supplemental report from the physician. Following this and any necessary further development, OWCP shall issue an appropriate decision regarding to the extent and degree of appellant's hearing impairment.

CONCLUSION

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

[11] A.M.A., *Guides* 249; *see also V.D.*, Docket No. 13-331 (issued August 12, 2013).

[12] *See D.W.*, Docket No. 14-931 (issued August 11, 2014); *Peter C. Belkind*, 56 ECAB 580 (2005).

ORDER

IT IS HEREBY ORDERED THAT the October 22, 2015 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: April 6, 2016
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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