United States Department of Labor
Employees' Compensation Appeals Board

M.F., Appellant	)	
and	)	**Docket No. 16-1296**
	)	**Issued: December 15, 2016**
NATIONAL AERONAUTICS & SPACE ADMINISTRATION, NASA LANGLEY RESEARCH CENTER, Hampton, VA, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 3, 2016 appellant, through counsel, filed a timely appeal from an April 12, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 established ratable binaural hearing loss for schedule award purposes.

[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.*

On appeal, counsel contends that OWCP's decision is contrary to fact and law.

FACTUAL HISTORY

On May 29, 2014 appellant, then a 61-year-old supervisory fabrication specialist, filed an occupational disease claim (Form CA-2) alleging that on November 29, 2012 he first became aware of his hearing loss and ringing in both ears. He noted that he had severe hearing loss in his right ear and moderate hearing loss in his left ear. Appellant claimed that on December 3, 2013 he first realized that his conditions were caused or aggravated by his exposure to high noise levels from the work he performed and equipment at the employing establishment.

In an undated narrative statement, appellant described the development of his claimed hearing loss. He worked in a noisy environment, mostly in the machine shop, at the employing establishment for 41 years. Appellant retired on January 3, 2014. He wore hearing protection at work and beginning in 1984, he underwent an annual hearing test. Appellant claimed that his hearing test results showed that his hearing loss had gradually worsened over the years. He reiterated that his hearing loss was more severe in the right ear rather than the left ear.

In an undated narrative statement, Carl Voglewede, appellant's coworker, indicated that the employing establishment required employees to undergo a hearing test and it conducted a workplace survey of noise levels on an annual basis.

A December 3, 2013 medical report from an employing establishment physician with an unknown signature noted the results of audiograms that appellant underwent from January 18, 1984 to November 17, 2010. The report noted that he had progressive moderate-to-severe hearing loss.

In a February 4, 2014 report, Devon Spencer, a licensed hearing instrument specialist, noted that appellant underwent an otoscopic examination on that date, which revealed clear ear canals and only visible tympanic membranes. He performed an audiogram on January 13, 2014 which revealed bilateral sensorineural hearing loss in the high frequencies only. Mr. Spencer related that this structure of loss made soft sounds of speech hard to hear, especially in groups, or noise. After additional speech testing to establish the most comfortable level, loudness discomfort level, and preferred frequency response, he recommended that appellant be fitted with binaural hearing instruments. The audiometric testing completed on January 13, 2014 revealed hearing levels of 15, 15, 30, and 40 decibels (dBs) in the right ear and 10, 10, 30, and 50 dBs in the left ear at frequency levels of 500, 1,000, 2,000, and 3,000 hertz (Hz), respectively.

By letter dated June 2, 2014, OWCP advised appellant of the type of evidence needed to establish his claim.

In a June 27, 2014 letter, appellant reiterated the history of his alleged employment-related bilateral hearing loss. He noted that he was exposed to workplace noise 8 hours a day, 5 to 7 days a week for 41 years.

In a June 26, 2014 memorandum, the employing establishment noted that appellant was exposed to noise in the machine shop and related equipment 8 hours a day, 5 days a week and during over-time work over the past 41 years. Appellant wore hearing protection provided by a facility safety head. The employing establishment noted that he retired on January 3, 2014.

OWCP received audiograms performed by the employing establishment as part of a hearing conservation program dated January 18, 1984 through December 3, 2013, which revealed that appellant had moderate-to-severe bilateral sensorineural hearing loss. It also received employment records, which included noise survey data dated September 9, 1987 through December 8, 2006.

On September 12, 2014 appellant filed a claim for a schedule award (Form CA-7).

By letter dated February 26, 2015, OWCP referred appellant, together with a statement of accepted facts and the medical record, to Dr. Jeffrey P. Powell, a Board-certified otolaryngologist, for an otologic examination and an audiological evaluation. In a March 17, 2015 report, Dr. Powell noted that he examined appellant on that date and referenced appellant's exposure to workplace noise. He reviewed the employing establishment's audiometric data and advised that appellant had bilateral high frequency neurosensory noise-induced hearing loss secondary to his federal employment and bilateral tinnitus secondary to this noise exposure.

Dr. Powell reported that his examination of appellant's ear, nose, and throat was normal. The ear canals were clear and free of cerumen. Appellant's tympanic membranes were intact and mobile to pneumotoscopy. The rest of his complete head, neck, ear, nose, and throat examination was normal. Dr. Powell noted that the sensorineural hearing loss was in part, or all, due to noise exposure in appellant's federal civil employment. He also noted that appellant would reach maximum medical improvement (MMI) when appellant was fitted for appropriate hearing aid amplification for both ears. Dr. Powell recommended an annual audiogram and ear, nose, and throat checkup, and an evaluation by an otolaryngologist and audiologist if any urgent problems arose such as onset of acute vertigo and sudden hearing loss.

Audiometric testing was performed for Dr. Powell on the date of his examination. Testing for the right ear at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz revealed dB losses of 20, 15, 20, and 45, respectively. These dBs were totaled at 100 and were divided by 4 to obtain an average hearing loss at those cycles of 25 dBs. The average of 25 dBs was then reduced by the fence of 25 dBs to equal zero, which was multiplied by the established factor of 1.5 to compute a zero percent hearing loss for the right ear. Testing for the left ear at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz revealed dBs losses of 20, 15, 20, and 45 respectively. These dBs were totaled at 100 and were divided by 4 to obtain the average hearing loss at those cycles of 25 dBs. The average of 25 dBs was then reduced by 25 dBs to zero, which was multiplied by the established factor of 1.5 to compute a zero percent hearing loss for the left ear. Dr. Powell reported that appellant had a binaural impairment rating of zero percent. He concluded that appellant did not have ratable hearing loss in either ear.

On April 17, 2015 an OWCP district medical adviser (DMA) reviewed Dr. Powell's report and the March 17, 2015 audiometric test. He agreed that appellant had noise-induced bilateral sensorineural hearing loss. The DMA applied the audiometric data to OWCP's standard for evaluating hearing loss under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,[3] (A.M.A., *Guides*), and following the same analysis determined that appellant had zero percent monaural hearing loss in the right ear, zero percent monaural hearing loss in the left ear, and zero percent binaural hearing loss. He, therefore,

[3] A.M.A., *Guides* (6th ed. 2009).

concluded that the medical evidence did not support OWCP's authorization of hearing aids to treat his condition. The DMA further concluded that appellant had reached MMI on March 17, 2015, the date of Dr. Powell's examination.

On May 6, 2015 OWCP accepted appellant's claim for bilateral hearing loss due to noise and bilateral subjective tinnitus.

In a decision dated May 8, 2015, OWCP found that, although appellant's hearing loss was employment related, it was not severe enough to be considered ratable for purposes of a schedule award based on the medical opinions of Dr. Powell and its DMA. It also denied authorization for hearing aids and additional medical benefits.

On June 4, 2015 appellant requested an oral hearing before an OWCP hearing representative.

Appellant submitted a January 13, 2016 audiogram performed by D. Hannah, a hearing care professional. Testing at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz revealed 15, 10, 25, and 40 dBs for the right ear and 10, 15, 25, and 45 dBs for the left ear, respectively. The audiogram revealed that appellant had 2.5 percent binaural hearing loss.

An audiogram performed on March 7, 2016 at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz revealed the following: right ear 20, 15, 30, and 45 dBs; left ear 15, 15, 30, and 55 dBs. Appellant submitted a certificate of calibration dated April 22, 2015 regarding this audiogram.

In an April 12, 2016 decision, an OWCP hearing representative affirmed the May 8, 2015 decision. He found that the medical evidence submitted was insufficient to outweigh the weight accorded to Dr. Powell's opinion that appellant had no measurable hearing loss.

LEGAL PRECEDENT

The schedule award provision of FECA[4] and its implementing 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 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. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[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 cycles per second, the

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

[6] *Id. See also Jacqueline S. Harris*, 54 ECAB 139 (2002).

[7] A.M.A., *Guides* 250 (6th ed. 2009).

losses at each frequency are added up and averaged.[8] 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.[9] The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.[10] 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.[11] The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.[12]

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to OWCP's DMA for an opinion concerning the nature and percentage in accordance with the A.M.A., *Guides* with the DMA providing rationale for the percentage of impairment specified.[13]

ANALYSIS

The Board finds that appellant has not established ratable hearing loss based on his accepted bilateral hearing loss and tinnitus.

OWCP referred appellant to Dr. Powell, a second opinion physician, regarding his hearing loss. Dr. Powell's March 17, 2015 examination found that appellant's bilateral high frequency sensorineural hearing loss and tinnitus were due to his workplace noise exposure. The audiogram performed on that date revealed dB losses of 20, 15, 20, and 45 at 500, 1,000, 2,000, and 3,000 Hz, respectively, for the right ear, which were averaged to total 100. The average of 100 dBs, reduced by 25 dBs (the first 25 dBs were discounted as discussed above), equals 0 dBs, which multiplied by the established factor of 1.5 results in a zero percent hearing loss for the right ear. Testing of the left ear revealed dB losses of 20, 15, 20, and 45 at 500, 1,000, 2,000, and 3,000 Hz, respectively, which were averaged to total 100. The average of 100 dBs, reduced by 25 dBs, equaled 0 dBs. Based on this test, Dr. Powell determined that appellant did not sustain a ratable binaural hearing loss.[14] The Board finds that he properly applied the A.M.A., *Guides* to the March 17, 2015 audiogram to determine that appellant did not sustain a ratable hearing loss for schedule award purposes.[15]

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Donald E. Stockstad*, 53 ECAB 301 (2002), *petition for recon. granted (modifying prior decision)*, Docket No. 01-1570 (issued August 13, 2002); *Reynaldo R. Lichtenberger*, 52 ECAB 462 (2001).

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6(f) (February 2013).

[14] A.M.A., *Guides* 249-51.

[15] *See S.G.*, 58 ECAB 383 (2007).

Consistent with its procedures, OWCP properly referred the file to its DMA for a rating of permanent impairment in accordance with the sixth edition of the A.M.A., *Guides*.

On April 17, 2015 OWCP's DMA reviewed Dr. Powell's report and the March 17, 2015 audiogram. He properly applied the applicable standards of the sixth edition of the A.M.A., *Guides* to determine that appellant did not have ratable, work related, binaural hearing loss. Consequently, the Board finds that the weight of the medical evidence establishes that appellant has no ratable loss of hearing pursuant to the A.M.A., *Guides*. While OWCP accepted bilateral tinnitus as a condition under appellant's claim, tinnitus may not be added to an impairment rating for hearing loss under the sixth edition of the A.M.A., *Guides* unless such hearing loss is ratable.[16]

Although appellant submitted results from the employing establishment's annual audiometric testing from January 18, 1984 to December 3, 2013; a January 13, 2014 audiogram performed by Mr. Spencer, a licensed hearing instrument specialist; a January 13, 2016 audiogram performed by D. Hannah, a hearing care professional who found that appellant had 2.5 percent binaural hearing loss; and a March 7, 2016 audiogram, these audiograms are insufficient to establish his burden of proof as they do not comply with the requirements set forth by OWCP. They lack proper certification of calibration, speech testing, and bone conduction scores and were not prepared or certified as accurate by a physician as defined by FECA.[17] The Board also notes that neither a licensed hearing instrument specialist nor a hearing care professional is included among the health care professionals considered physicians under FECA.[18] It is appellant's burden of proof to submit a properly prepared and certified audiogram to OWCP.[19] OWCP was not required to rely on this evidence in determining the degree of his hearing loss as it failed to constitute competent medical evidence.[20]

On appeal, counsel contends that OWCP's decision is contrary to fact and law. For the reasons stated above, the Board finds that the weight of the medical evidence of record does not establish that appellant sustained a ratable binaural hearing loss for schedule award purposes.

[16] *See Juan A. Trevino*, 54 ECAB 358, 360 (2003).

[17] The Board notes that while the January 13, 2016 audiogram provided speech test results and the record contains an April 22, 2015 certificate of calibration for the March 7, 2016 audiogram, neither audiogram complied with the remaining requirements set forth by OWCP.

[18] 5 U.S.C. § 8101(2) of FECA provides as follows: (2) physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. *See also B.B.*, Docket No. 09-1858 (issued April 16, 2010); *J.M.*, 58 ECAB 303 (2007); *Roy L. Humphrey*, 57 ECAB 238 (2005).

[19] *See R.B.*, Docket No. 10-1512 (issued March 24, 2011); *Robert E. Cullison*, 55 ECAB 570 (2004); *Vincent Holmes*, 53 ECAB 468 (2002) (OWCP does not have to review audiograms not certified by a physician and it is the claimant's burden to submit a properly certified audiogram for review if he objects to the audiogram selected by OWCP for determining the degree of hearing loss).

[20] *Id. See also H.M.*, Docket No. 13-1061 (issued July 29, 2013); *M.T.*, Docket No. 12-1294 (issued December 6, 2012).

Appellant may request a 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 or increased impairment.

CONCLUSION

The Board finds that appellant has failed to meet his burden to proof to establish a ratable binaural hearing loss warranting him a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the April 12, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 15, 2016
Washington, DC

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

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

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