

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

G.Q., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
CUSTOMS & BORDER PROTECTION,)
El Paso, TX, Employer)

Docket No. 15-1794
Issued: January 11, 2016

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 1, 2015 appellant filed a timely appeal from a March 30, 2015 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.

ISSUE

The issue is whether appellant met his burden of proof to establish a ratable hearing loss warranting a schedule award.

On appeal, appellant contends that previous records indicate increased hearing loss since the original filing date. He further contends that his hearing has become progressively worse and requests review of his claim.

¹ 20 C.F.R. § 8101 *et seq.*

FACTUAL HISTORY

On August 25, 2014 appellant, a 40-year-old supervisory border patrol agent, filed an occupational disease claim (Form CA-2) alleging that he developed significant hearing loss due to varying degrees of noise exposure during the course of his federal employment. He did not stop work.

Medical and audiological records accompanied the claim. An August 11, 2014 audiogram exhibited decibel (dBA) losses at 500, 1,000, 2,000, and 3,000 Hertz (Hz): 15, 20, 25, and 35 for the right ear and 25, 25, 30, and 35 for the left ear. At the same frequency levels, a June 27, 2013 audiogram showed dBA losses of 5, 5, 0, and 0 for the right ear and 20, 15, 10, and 5 for the left ear. In a June 27, 2013 Federal Occupational Health form report, Dr. Fred Rosenberg, an osteopath specializing in preventive and occupational medicine, advised that appellant's audiogram showed abnormal hearing. He recommended an evaluation by a specialist.

In a September 15, 2014 letter, OWCP notified appellant of the deficiencies of his claim and afforded him 30 days to submit additional evidence and respond to its inquiries.

Appellant provided an employment history and noted his history of noise exposure in the military and with the employing establishment. On September 22, 2014 the employing establishment provided comments regarding the claim.

On February 13, 2015 OWCP referred appellant to Dr. Ronald J. Blumenfeld, a Board-certified otolaryngologist, for a second opinion evaluation. In his March 10, 2015 report, Dr. Blumenfeld reviewed a statement of accepted facts and the medical evidence of record, and reported the findings of his evaluation. He reviewed the results of an audiogram obtained on March 10, 2015 and diagnosed bilateral sensorineural hearing loss and tinnitus. Dr. Blumenfeld opined that this hearing loss was due, all or in part, to noise exposure in appellant's civilian federal employment. Audiometric testing at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz revealed dBA losses in the right ear of 25, 20, 20, and 20 dBAs, respectively; and dBA losses in the left ear of 20, 15, 15, and 20 dBAs, respectively. Dr. Blumenfeld advised that the audiogram revealed no ratable hearing loss and opined that appellant had five percent permanent impairment on the basis that his tinnitus condition impaired his sleep. He did not recommend hearing aids at that time, but noted that appellant would need them in the future.

On March 13, 2015 an OWCP medical adviser, Dr. Ronald H. Blum, a Board-certified internist of professional rank, reviewed the medical evidence and audiometric testing. He opined that appellant's workplace noise exposure was a contributing factor to his hearing loss. Using Dr. Blumenfeld's findings, Dr. Blum calculated that under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*² (A.M.A., *Guides*), appellant had zero percent monaural hearing loss in the left ear, zero percent monaural hearing loss in the right ear, and zero percent binaural hearing loss.³ He identified the date of maximum

² A.M.A., *Guides* (6th ed. 2009).

³ *Id.* at 252, Table 11-2.

medical improvement as March 10, 2015, the date of Dr. Blumenfeld's second opinion examination. Regarding Dr. Blumenfeld's five percent permanent impairment rating for tinnitus, Dr. Blum explained that as appellant did not have any ratable or measurable binaural hearing impairment, no further impairment based on tinnitus was available under the A.M.A., *Guides*. The medical adviser noted that hearing aids were not authorized.

By decision dated March 16, 2015, OWCP accepted appellant's claim for bilateral hearing loss due to noise exposure.

On March 24, 2015 appellant filed a claim for a schedule award (Form CA-7).

By decision dated March 30, 2015, OWCP found that appellant's hearing loss was unratable for schedule award purposes. It also informed him that he was not entitled to hearing aids.

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 As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁷

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.⁸ 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 dBAs is deducted because, as the A.M.A., *Guides* point out, losses below 25 dBAs 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.⁹

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 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).

⁸ A.M.A., *Guides* 250.

⁹ *See J.H.*, Docket No. 08-2432 (issued June 15, 2009).

Regarding tinnitus, the A.M.A., *Guides* provide that tinnitus is not a disease, but rather a symptom that may be the result of disease or injury.¹⁰ The A.M.A., *Guides* state that, if tinnitus interferes with activities of daily living (ADLs), 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.¹¹ A schedule award for tinnitus is not payable unless the medical evidence establishes that the condition caused or contributed to a ratable hearing loss.¹²

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish a ratable hearing loss warranting a schedule award.

OWCP referred appellant to Dr. Blumenfeld for a second opinion evaluation. After reviewing a statement of accepted facts and the medical evidence of record, conducting a thorough physical evaluation, and obtaining an audiogram on March 10, 2015, Dr. Blumenfeld diagnosed bilateral work-related sensorineural hearing loss and tinnitus. Dr. Blum, an OWCP medical adviser, reviewed Dr. Blumenfeld's report and concluded that appellant had no ratable hearing loss to warrant a schedule award. By decision dated March 30, 2015, OWCP denied appellant's schedule award claim.

The medical adviser applied OWCP's standards to the March 10, 2015 audiogram performed as part of Dr. Blumenfeld's second opinion evaluation to arrive at a binaural impairment rating of zero percent. Test results for the frequency levels recorded at 500, 1,000, 2,000, and 3,000 Hz on the right revealed dBA losses of 25, 20, 20, and 20 dBAs respectively, for a total of 85 dBAs. This figure, when divided by four, results in an average hearing loss of 21.25 dBAs. The average of 21.25 dBAs, when reduced by the 25-dBA fence and multiplied by 1.5, results in a zero percent monaural hearing loss of the right ear. Testing for the left ear at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz revealed dBA losses of 20, 15, 15, and 20 dBAs respectively, for a total loss of 70 dBAs; 70 dBAs divided by 4 results in an average of 17.5 dBAs, which, when reduced by the 25-dBA fence and multiplied by 1.5, results in a zero percent monaural hearing loss of the left ear. As the monaural hearing loss rating was zero percent for both the left and right ears, the binaural hearing loss was also zero percent. This does not mean that appellant has no hearing loss. It means that the extent or degree of loss is insufficient to show a practical impairment in hearing according to the A.M.A., *Guides*.¹³ The A.M.A., *Guides* set a threshold for impairment and appellant's occupational hearing loss did not cross that threshold. Dr. Blum applied the proper standards to the March 10, 2015 audiogram. Appellant's hearing loss was not ratable and, thus, a schedule award is not warranted.

¹⁰ A.M.A., *Guides* 249.

¹¹ *Id.*; see also *Robert E. Cullison*, 55 ECAB 570 (2004).

¹² See *Charles H. Potter*, 39 ECAB 645 (1988).

¹³ See *P.V.*, Docket No. 13-1870 (issued January 7, 2014).

The Board further finds that a schedule award for tinnitus is not warranted.¹⁴ FECA does not list tinnitus in the schedule of eligible members, organs, or functions of the body. A claimant may not directly receive a schedule award for tinnitus. Hearing loss is a covered function of the body, so if tinnitus contributes to a ratable loss of hearing, a claimant's schedule award will reflect that contribution. The A.M.A., *Guides* provide that if tinnitus interferes with activities of daily living, up to five percent may be added to a measurable binaural hearing impairment.¹⁵ The Board has held, however, that there is no basis for paying a schedule award for a condition such as tinnitus unless the evidence establishes that the condition caused or contributed to a ratable hearing loss.¹⁶ Although Dr. Blumenfeld diagnosed tinnitus, appellant's hearing loss is not ratable and, therefore, the Board will affirm OWCP's March 30, 2015 decision finding that he was not entitled to a schedule award.

On appeal, appellant contends that previous records indicate hearing loss since the original filing date. He further contends that his hearing has gotten progressively worse. However, the audiogram prepared for Dr. Blumenfeld, as explained, does not show a ratable hearing loss. Furthermore, the June 27, 2013 audiogram reviewed by Dr. Rosenberg does not show a ratable hearing loss.¹⁷ While appellant also provided an August 11, 2014 audiogram, prepared by an audiologist, this cannot constitute probative medical evidence as it was not certified by a physician as accurate.¹⁸ Based on the findings and reasons stated above, the Board finds that appellant has not established that he has a ratable hearing loss and, as such, a schedule award is not warranted.

Appellant may request a schedule award or increased 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 has not met his burden of proof to establish a ratable hearing loss warranting a schedule award.

¹⁴ *Id.*

¹⁵ See A.M.A., *Guides* 249.

¹⁶ See *Juan A. Trevino*, 54 ECAB 358 (2003); *T.W.*, Docket No. 13-1967 (issued February 10, 2014); *Richard Larry Enders*, 48 ECAB 184 (1996).

¹⁷ As noted, at the relevant frequencies it showed dBA losses of 5, 5, 0, and 0 for the right ear and 20, 15, 10, and 5 for the left ear.

¹⁸ See *R.B.*, Docket No. 10-1512 (issued March 24, 2011); *Joshua A. Holmes*, 42 ECAB 231 (1990) (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). See also 5 U.S.C. § 8101(2) (defines the term "physician"); *Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (medical opinion, in general, can only be given by a qualified physician).

ORDER

IT IS HEREBY ORDERED THAT the March 30, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 11, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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