

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT CUNNINGHAM and DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION, ANCHORAGE AIR TRAFFIC CONTROL
CENTER, Anchorage, AK

*Docket No. 99-466 & No. 99-2017; Submitted on the Record;
Issued December 26, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
VALERIE D. EVANS-HARRELL

The issues are: (1) whether appellant has more than a two percent hearing loss in his left ear; and (2) whether the Office of Workers' Compensation Programs properly determined appellant's loss of wage-earning capacity due to the loss of premium pay.

On July 15, 1994 appellant, then a 29-year-old air traffic controller, was exposed to an exceedingly loud, high pitch tone delivered to his left ear by an earphone. He indicated that he was exposed to the tone for two to three seconds before he removed his earphone. Appellant was removed from air traffic controller duties and eventually assigned to other duties. He received continuation of pay for intermittent periods from July 16 through August 31, 1994 and used extensive periods of leave from July 15, 1994 through May 16, 1995. He entered a leave-without-pay status on May 17, 1995. The Office accepted appellant's claim for acoustic trauma to the left ear and migraine headaches. The Office paid temporary total disability compensation for the period May 17 through July 28, 1995.¹

In a November 21, 1995 decision, the Office found that appellant had not established that he had a recurrence of disability due to his employment injury. Appellant requested a hearing before an Office hearing representative. In an August 20, 1996 decision, issued without a hearing, the Office hearing representative found that the Office had not considered whether appellant had a loss of wage-earning capacity due to loss of premium pay after he was removed from air traffic control duties. He also indicated that the Office had not considered whether appellant had any permanent impairment due to the acoustic trauma he experienced. The Office hearing representative further found that the Office had not determined whether appellant's disqualification for air traffic control duties led to the termination of his employment. He

¹ Appellant returned to work at the employing establishment on December 29, 1995. The record is unclear on whether he received compensation for the period he did not work.

therefore set aside the Office's November 21, 1995 decision and remanded the case for further development of the issues he had specified.

In a March 10, 1998 decision, the Office issued a schedule award for a two percent loss of hearing in the left ear. The Office used appellant's pay rate as of May 17, 1995 in calculating his compensation.

In a May 18, 1998 decision, the Office found that appellant had a loss of wage-earning capacity due to his loss of premium pay. The Office calculated appellant's annual earnings as of May 17, 1995, the date he stopped working. Appellant requested reconsideration of his loss of wage-earning capacity decision, contending that his premium pay should have been computed on the basis of 25 percent of his base pay. In a July 29, 1998 decision, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was immaterial and cumulative and therefore insufficient to warrant review of the prior decision.

The Board finds that appellant has no more than a two percent loss of hearing in the left ear.

Section 8107 of the Federal Employees' Compensation Act² specifies the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body. The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. The method used by in making such a determination is a matter that rests in the sound discretion of the Office.³ 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.⁴

The Office evaluates permanent hearing loss in accordance with the standards contained in the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, using the hearing levels recorded at frequencies of 500, 1,000, 2,000 and 3,000 cycles per second. The losses at each frequency are added up and averaged and a "fence" of 25 decibels is deducted because, as the A.M.A., *Guides* points out, losses below 25 decibels result in no impairment in the ability to hear everyday sounds under everyday conditions. Each amount is then multiplied by 1.5. The amount of the better ear is multiplied by 5 and added to the amount from the worse ear. The entire amount is then divided by 6 to arrive at the percentage of binaural hearing loss⁵. The Board has concurred in the Office's adoption of this standard for evaluating hearing loss for schedule award purposes.⁶

² 5 U.S.C. § 8107(c).

³ *Daniel C. Goings*, 37 ECAB 781 (1986); *Richard Beggs*, 28 ECAB 387 (1977).

⁴ *Henry L. King*, 25 ECAB 39 (1973); *August M. Buffa*, 12 ECAB 324 (1961).

⁵ p. 166 (3^d ed. 1987).

⁶ *Goings*, *supra* note 3.

The Office medical adviser correctly applied the Office's standard procedures to the audiogram obtained by Dr. Charles Tschopp, a Board-certified otolaryngologist. Testing for the right ear at frequencies of 500, 1,000, 2,000 and 3,000 cycles per second revealed decibel losses of 0, 5, 0, and 5 respectively for a total of 10 decibels. These losses were divided by 4 for an average hearing loss of 2.5 decibels. The average was reduced by 25 decibels (the first 25 decibels are deducted, as explained above) to equal zero decibels which was multiplied by 1.5 to arrive at a zero percent loss for the right ear. Testing for the left ear at the same frequencies revealed decibel losses of 25, 25, 25, and 30 decibels respectively for a total of 105 decibels. These losses were divided by 4 for an average hearing loss of 26.25 decibels. The average was reduced by 25 decibels (as explained above) to equal 1.25 decibels which was multiplied by 1.5 to arrive at a 1.88 percent loss of hearing for the left ear which was rounded up to 2 percent. The medical evidence therefore showed that appellant had a two percent loss of hearing in the left ear as calculated under the standards of the A.M.A., *Guides*.

The Board finds, however, that the Office used an incorrect rate of pay in calculating appellant's compensation. Under section 8101(4) of the Act,⁷ the rate of pay to be used in the calculation of a claimant's compensation is to be based on the greater of the rate of pay at the date of injury, the date disability began or the date disability recurred if the recurrence occurred more than six months after a claimant returned to regular, full-time employment with the federal government. In this case, appellant sustained a traumatic, one time exposure to a loud burst of noise on July 15, 1994. He was removed from direct air traffic control duties at that time. He subsequently stopped working completely on May 17, 1995. The Office, however, erred in finding that May 17, 1995 was the date disability began. In *Thomas Donaghue*,⁸ the Board noted that an employee who was assigned to administrative duties and lost premium pay as a result had a recurrence of compensable disability. Therefore, in this case, appellant's date of disability coincided with the date of injury as he lost premium pay after the employment injury because he was removed from the air traffic control duties which caused a reduction in his premium pay. The Office therefore should have used appellant's pay rate as of July 15, 1994 in calculating appellant's compensation.

The Board further finds that the Office improperly calculated appellant's wage-earning capacity.

The Office calculated appellant's loss of wage-earning capacity by taking the current pay of appellant's former position, adding 25 percent for the cost-of-living adjustment, 1 percent of base pay for night differential and 6 percent of base pay for Sunday differential. The Office then compared this amount with the amount of pay appellant would receive without night differential and Sunday differential. As appellant's loss of wage-earning capacity was based on his loss of premium pay, this comparison was appropriate for determining the percentage of appellant's loss of wage-earning capacity.⁹

⁷ 5 U.S.C. § 8101(4).

⁸ 39 ECAB 336, 340 (1988).

⁹ See *Dempsey Jackson*, 40 ECAB 942 (1989).

To determine the amount of compensation, the percentage derived from the above comparison is multiplied by the claimant's rate of pay. The Office, however, received two different reports on appellant's pay. The employing establishment submitted a set of electronic mail messages in June 1997 which indicated that, in the year prior to July 15, 1994, appellant had a base pay of \$48,345.28, operational differential pay of \$2,417.26, night differential of \$1,420.03, overtime pay of \$19.65, a cost-of-living adjustment of \$12,086.35 for living in Alaska, Sunday premium of \$2,458.18, holiday premium pay of \$1,341.70 and back pay interest of \$14.80. As overtime pay is not included in the rate of pay calculation,¹⁰ appellant's rate of pay for compensation purposes would be \$68,083.60. The employing establishment indicated that appellant's rate of pay as of the year prior to May 17, 1995, which included base pay of \$43,428.34, operational differential pay of \$2,171.42, night differential of \$544.35, overtime pay of \$4.01, cost-of-living adjustment of \$10,859.16, Sunday premium pay of \$998.40 and \$384.00, totaled \$58,389.58. For computation purposes, the rate of pay would be \$58,385.57 after the deduction of overtime pay.

Subsequently, in response to appellant's filing of a claim for loss of pay due to loss of premium pay, the employing establishment indicated that appellant's pay rate as of July 15, 1994 was \$49,517.00 a year plus a 25 percent cost-of-living adjustment. It reported that the pay rate as of May 17, 1995 was \$52,136.00 plus the 25 percent cost-of-living adjustment. The Office reported premium pay based generally on appellant's pay for 1994 and 1995 of \$3,008.00 a year for holiday premium pay, \$2,600.00 a year for Sunday pay, \$1,820.00 for a year for night differential, \$2,957.92 a year for operational differential and \$834.18 a year for currency differential. In calculating appellant's compensation for loss of wage-earning capacity, the Office used appellant's pay rate as of May 17, 1995 as reported by the employing establishment in conjunction with appellant's claim form, concluding that he had \$52,136.00 in base pay, \$13,034.00 for the 25 percent cost-of-living adjustment, \$544.25 of night differential based on 1 percent of base pay and Sunday differential of \$3,169.82 based on 6 percent of base pay. However, as stated above, the Office should have used appellant's pay rate as of July 15, 1994 in calculating appellant's compensation. The June 24, 1997 electronic mail message reported a pay rate of \$68,103.25 a year. The information included with the claim form was incomplete, giving a report of a higher base pay of \$49,517.00 plus 25 percent of the cost-of-living adjustment which would be \$12,388.25 or a total of \$62,905.25. The employing establishment only gave a general report of appellant's premium pay in conjunction with his claim form. In the earlier electronic message, the employing establishment gave more definite figures for appellant's premium pay in the year prior to July 15, 1994. When the premium pay from the electronic mail message is added to the subsequent report of appellant's base pay and cost-of-living adjustment, the result would be an annual salary of \$70,557.62. The Office, therefore, has given two different statements of appellant's rate of pay as of July 15, 1994. The case must therefore be remanded for clarification of appellant's rate of pay, taking into account his pay as of July 15, 1994 and the exact amount of his premium pay for the year prior to July 15, 1994. After further development as it may find necessary, the Office should issue a *de novo* decision.

The decisions of the Office of Workers' Compensation Programs, dated July 29, May 18 and March 10, 1998 are hereby affirmed insofar as they properly determine the extent of

¹⁰ 5 U.S.C. § 8114(e).

appellant's loss of hearing in the left ear and the percentage of his loss of wage-earning capacity due to loss of premium pay. The decisions are set aside and the case is remanded for a determination of appellant's rate of pay for computation purposes.

Dated, Washington, DC
December 26, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Valerie D. Evans-Harrell
Alternate Member