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

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| **W.S., Appellant** | ) | |
| **and** | ) | **Docket No. 09-946** |
| | ) | **Issued: November 24, 2009** |
| **DEPARTMENT OF THE ARMY, ARMY CORPS OF ENGINEERS, Portland, OR, Employer** | ) | |

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

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

### ***JURISDICTION***

On February 19, 2009 appellant filed a timely appeal of the August 25, 2008 merit decision of the Office of Workers' Compensation Programs determining his permanent impairment and a November 26, 2008 nonmerit decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit and nonmerit issues of this case.

### ***ISSUES***

The issues are: (1) whether appellant has more than 12 percent binaural hearing loss for which he has received a schedule award; and (2) whether the Office properly refused to reopen his case for further consideration of the merits pursuant to 5 U.S.C. § 8128(a).

### ***FACTUAL HISTORY***

On October 31, 2007 appellant, then a 63-year-old power plant operator, filed an occupational disease claim alleging that he developed substantial nerve damage in his ears as a result of exposure to loud noises in the performance of duty. He first became aware of his

condition on January 1, 2003 and first attributed his hearing loss to his employment on April 23, 2003. The employing establishment noted that appellant retired on June 12, 2007 and was last exposed to noise on that date. Appellant also noted that he had a nonemployment-related condition of cholestreatoma in his right ear which had required two surgeries. He submitted hearing assessment reports from the employing establishment health program beginning in 1983.

Appellant submitted operative reports from Dr. Caroline Y. Yang, a Board-certified otolaryngologist, dated April 23, 2003 and January 22, 2004. Dr. Yang performed right tympanoplasty and mastoidectomy. She diagnosed mixed hearing loss with a conductive component caused by Eustachian tube dysfunction and cholesteatoma was well as nerve hearing loss. Dr. Yang stated, "The nerve portion of his hearing loss could definitely have been exacerbated by noise exposure through work."

The Office referred appellant for a second opinion evaluation with Dr. Craig Hertler, a Board-certified otolaryngologist on December 12, 2007. In a report dated January 8, 2008, Dr. Hertler noted appellant's history of noise exposure at the employing establishment and stated that appellant reported constant tone-like tinnitus particularly in the right ear. He opined that appellant's exposure to loud noise was sufficient in intensity and duration to have contributed to appellant's hearing loss. Dr. Hertler noted that a substantial portion of appellant's hearing loss was due to chronic middle ear disease and cholesteatoma. He diagnosed mixed sensorineural and conductive hearing loss which was in part due to noise exposure. Dr. Hertler included an audiogram which demonstrated on the right 30 decibels at 500 hertz (Hz); 20 decibels at 1,000 Hz; 60 decibels at 2,000 Hz and 65 decibels at 3,000 Hz. On the left appellant's audiogram demonstrated 35, 20, 35 and 45 decibels respectively.

The district medical adviser reviewed Dr. Hertler's report on February 5, 2008 and found that appellant had 13.13 percent left monaural hearing impairment; 28.13 percent right monaural impairment and binaural hearing impairment of 15.6 percent. He recommended a hearing aid. The Office accepted appellant's claim for bilateral sensorineural hearing loss.

Dr. Yang performed a right tympanoplasty on April 17, 2008. In a letter dated June 17, 2008, appellant noted that Dr. Yang opined that he had reached maximum medical improvement and that his tinnitus was permanent. He requested a schedule award on June 17, 2008. On June 12, 2008 Dr. Yang stated that appellant had mixed hearing loss with a conductive component caused by Eustachian tube dysfunction and cholesteatoma. She also opined that appellant had nerve hearing loss which could have been exacerbated by noise exposure through work and had reached maximum medical improvement. Dr. Yang submitted an audiogram dated June 12, 2008 which demonstrated 500 Hz, 20 decibels; 1,000 Hz, 20 decibels, 2,000 Hz, 45 decibels and 3,000 Hz, 65 decibels on the right. On the left appellant had 35, 20, 30 and 45 decibels respectively. Appellant's speech discrimination scores were 96 on the right and 100 percent on the left.

The Office authorized Dr. Hertler to perform additional testing on July 1, 2008 to determine appellant's hearing loss for schedule award purposes. Dr. Hertler reviewed audiographic testing on June 12, 2008 taken eight weeks after appellant's most recent surgery

and opined that appellant had reached maximum medical improvement with a slight improvement in his hearing loss.

The district medical adviser reviewed the medical records on August 6, 2008 and found that appellant's June 12, 2008 audiogram demonstrated 11.25 percent left monaural hearing loss and 18.75 percent right monaural hearing loss for a 13 percent binaural hearing impairment.

On August 14, 2008 the Office requested that the employing establishment provide appellant's pay rate information as the date of last exposure, June 12, 2007, the date he retired. It determined that appellant was earning $32.81 per hour when he retired for a weekly pay rate of $1,316.82.

By decision dated August 25, 2008, the Office granted appellant a schedule award for 13 percent binaural loss of hearing or 26 weeks of compensation beginning June 12, 2008. It found that appellant's weekly pay rate for schedule award purposes was $1,316.82.

Appellant requested reconsideration on October 8, 2008 and resubmitted the June 12, 2008 audiogram, the February 5, 2008 decision and the August 25, 2008 schedule award decision. He asked that the Office clarify how his impairment rating was reached, how the period of his award was determined and his pay rate.

By decision dated November 26, 2008, the Office declined to reopen appellant's claim for reconsideration of the merits finding that he failed to submit relevant and pertinent new evidence or argument in support of his reconsideration request.

## ***LEGAL PRECEDENT -- ISSUE 1***

The schedule award provision of the Federal Employees' Compensation Act[1] and its implementing regulations[2] 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. Where the loss of use is less than 100 percent the amount of compensation is paid in proportion to the percentage loss of use.[3] However, the Act 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[4]

[1] 5 U.S.C. § 8107.

[2] 20 C.F.R. § 10.404 (1999).

[3] 5 U.S.C. § 8107(c)(19).

[4] *Id.*

Effective February 1, 2001, the Office adopted the fifth edition of the A.M.A., *Guides* as the appropriate edition for all awards issued after that date.[5]

The Office evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.[6] Using the frequencies of 500, 1,000, 2,000, and 3,000 Hz, the losses at each frequency are added up and averaged.[7] Then, the "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 speech under everyday conditions.[8] The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.[9] 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.[10] The Board has concurred in the Office's adoption of this standard for evaluating hearing loss.[11]

The A.M.A., *Guides* provides 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 activities of daily living.[12]

It is well established that the period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of the employment injury. The Board has defined maximum medical improvement as meaning "that the physical condition of the injury member of the body has stabilized and will not improve further."[13] The determination of whether maximum medical improvement has been reached is based on the probative medical evidence of record and is usually considered to be the date of the evaluation by the attending physician which is accepted as definitive by the Office.[14]

Section 8105(a) of the Federal Employees' Compensation Act provides: "If the disability is total, the United States shall pay the employee during the disability monthly monetary

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[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(a) (August 2002).

[6] A.M.A., *Guides* 226-51 (5th ed. 2001).

[7] *Id.*

[8] *Id*.

[9] *Id*.

[10] *Id*.

[11] *Donald Stockstad*, 53 ECAB 301 (2002), *petition for recon. granted (modifying prior decision)*, Docket No. 01-1570 (issued August 13, 2002).

[12] *Id.*

[13] *J.C.*, 58 ECAB ___ (Docket No. 06-1018, issued January 10, 2007); *James E. Earle*, 51 ECAB 567 (2000).

[14] *Mark A. Holloway*, 55 ECAB 321, 325 (2004).

compensation equal to 66 2/3 percent of his monthly pay, which is known as his basic compensation for total disability."[15] Under 5 U.S.C. § 8101(4), "monthly pay" means the monthly pay at the time of injury, or the monthly pay at the time disability begins or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater.

## ***ANALYSIS -- ISSUE 1***

The Office accepted that appellant sustained a binaural sensorineural hearing loss as a result of noise exposure in the performance of his federal duties. Appellant's attending physician, Dr. Yang, performed surgery for a right tympanoplasty on April 17, 2008. She determined that appellant reached maximum medical improvement on June 12, 2008 and submitted an audiogram of that date. The Office properly determined that appellant's schedule award should begin on the date of maximum medical improvement as reported by his attending physician.

The district medical adviser calculated appellant's schedule award by adding the losses at the frequencies of 500, 1,000, 2,000 and 3,000 Hz and then averaging these losses and deducting the "fence of 25 decibels."[16] The remaining amount was multiplied by 1.5 to arrive at the percentage of monaural hearing loss. For decibels in the left ear of 35, 20, 30 and 45, the above formula derives 11.5 percent monaural loss and for decibel levels recorded in the right ear of 20, 20, 45 and 65, the formula derives 18.75 percent monaural loss. The binaural loss is determined by calculating the loss in each ear using the formula for monaural loss; the lesser loss, in this case 11.5 is multiplied by five, equaling 57.5 then added to the greater loss or 18.75 for a sum of 76.25 and the total is divided by six to arrive at the amount of the binaural hearing loss of 12.71, rounded up to 13 percent.[17] The record does not contain evidence that appellant's tinnitus impacted activities of daily living as his discrimination scores were 96 on the right and 100 percent on the left. The Board finds the medical evidence does not establish that tinnitus is an impairment factor to be considered in calculating appellant's schedule award.

The Act provides that complete loss of hearing in both ears is 200 weeks' compensation.[18] Appellant had 13 percent binaural hearing loss or entitlement to 26 weeks of compensation.[19] The Board finds that the Office properly determined appellant's pay rate at the date injury occurred, in this case his retirement of June 12, 2007, the date of his last employment-related noise exposure.

[15] 5 U.S.C. § 8105(a). Section 8110(b) of the Act provides that total disability compensation will equal three fourths of an employee's monthly pay when the employee has one or more dependents. 5 U.S.C. § 8110(b).

[16] The A.M.A., *Guides* points out that the loss below an average of 25 decibels is deducted as it does not result in impairment in the ability to hear everyday sounds under everyday listening conditions.

[17] The policy of the Office is to round the calculated percentage of impairment to the nearest decimal point. Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards,* Chapter 3.700.3.b (June 2003).

[18] 5 U.S.C. § 8107(a)(13)(B).

[19] This figure is reached by multiplying 200 by 13 percent.

## ***LEGAL PRECEDENT -- ISSUE 2***

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[20] the Office's regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[21] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[22]

## ***ANALYSIS -- ISSUE 2***

Appellant requested reconsideration of the Office's August 25, 2008 schedule award decision and resubmitted documents already included in the record. In support of his request, he asked that the Office provide him with information describing how his schedule award was calculated. The Board finds that appellant failed to submit any relevant new evidence or argument in support of his request for reconsideration and that the Office properly declined to reopen his claim for review of the merits.

## ***CONCLUSION***

The Board finds that appellant has no more than 13 percent binaural loss of hearing for which he has received a schedule award beginning on the appropriate date of maximum medical improvement, for the appropriate number of weeks and based on the proper pay rate. The Board further finds that the Office properly declined to reopen appellant's claim for consideration of the merits on November 26, 2008.

[20] 5 U.S.C. §§ 8101-8193, 8128(a).

[21] 20 C.F.R. § 10.606(b)(2).

[22] *Id*. at § 10.608(b).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the November 26 and August 25, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 24, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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