

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

R.D., Appellant)	
)	
and)	Docket No. 15-0966
)	Issued: September 4, 2015
DEPARTMENT OF LABOR, MINE SAFETY & HEALTH ADMINISTRATION, Homewood, AL, Employer)	
)	

Appearances:
Appellant, pro se
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 March 27, 2015 appellant filed a timely appeal from a March 16, 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 the case.

ISSUE

The issue is whether appellant has more than 23 percent bilateral hearing loss, for which he previously received a schedule award.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On July 24, 2014 appellant, then a 63-year-old special investigator, filed an occupational disease claim (Form CA-2) alleging that he experienced a threshold shift and noticed louder ringing in his ears. He reported that he first became aware of his condition on August 19, 2004.

In an August 22, 2014 letter, OWCP advised appellant of the type of evidence needed to establish his claim. On the same date it requested the employing establishment to address the sources of his noise exposure, decibel and frequency level, period of exposure, and whether hearing protection was provided.

On September 3, 2014 appellant explained that he worked for the employing establishment since 1998 and was exposed to noise from coal-mining equipment during that time. He also acknowledged that he was previously awarded compensation benefits for his hearing loss after experiencing a 2007 threshold shift. In an April 8, 2008 decision, OWCP granted appellant a schedule award for 23 percent bilateral hearing loss in case number xxxxxx005. The period of the award ran from July 11, 2007 to April 12, 2008. Appellant declared that his hearing had progressively deteriorated and that he had difficulty understanding women and children.

The employing establishment, in a July 23, 2014 letter, specified that appellant was exposed to noise from mining machinery for five to six hours a day and five days per week. It provided him with various types of hearing protection.

OWCP received medical records and audiograms administered by the employing establishment, dated October 6, 1998 to May 29, 2014. Also received were two e-mails, dated August 3, 2012 and June 27, 2014, from the employing establishment's human resources division, advising appellant that repeat audiograms revealed increased hearing loss.

On January 13, 2015 OWCP referred appellant, along with a statement of accepted facts, to Dr. Jack Aland, a Board-certified otolaryngologist, for a second opinion to evaluate the nature and extent of his claimed hearing loss. In a January 29, 2015 report, Dr. Aland described the examination and diagnosed bilateral neurosensory hearing loss. He opined that the condition was due to employment-related noise exposure. Dr. Aland submitted the results of an audiometric examination performed for him on January 29, 2015, reflecting testing at the frequency levels of 500, 1,000, 2,000, and 3,000 cycles per second (cps). The results revealed the following decibel losses: right ear 30, 35, 40, and 60 decibels (dBs); and left ear 25, 25, 45, and 60 dBs. He advised that appellant may require new hearing aids.

By report dated February 23, 2015, an OWCP medical adviser, utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*), opined that appellant sustained 18 percent binaural hearing loss. The medical adviser's report was based on the results of the January 29, 2015 audiogram and Dr. Aland's second opinion report. To calculate appellant's hearing loss, the medical adviser added appellant's decibel losses at the frequencies of 500, 1,000, 2,000, and 3,000 cps, averaged the losses, and then deducted the fence of 25 dBs. The remaining amounts were multiplied by 1.5 to arrive at the percentage of monaural hearing loss. According to the medical adviser's report, the

above formula resulted in 16.875 percent monaural loss in the left ear and 24.375 percent monaural loss in the right ear. The binaural loss was determined by calculating the loss in each ear using the formula for monaural loss, then multiplying the lesser loss, in this case 16.875, by five, and adding the greater loss, 24.375. The total was divided by six to arrive at a binaural hearing loss of 18.125, rounded down to 18 percent. The medical adviser recommended authorizing hearing aids and recorded the date of maximum medical improvement as January 29, 2015. By comparing appellant's 18 percent bilateral hearing loss to his 23 percent bilateral hearing loss, for which he previously received a schedule award, the medical adviser concluded that appellant did not suffer an increased impairment.

In a March 16, 2015 decision, OWCP advised appellant that his claim had been accepted for bilateral hearing loss due to employment-related noise exposure. However, it denied his claim for a schedule award, finding that the evidence did not support more than 23 percent bilateral hearing loss, for which he was previously compensated in case number xxxxxx005. OWCP informed appellant that he remained entitled to medical benefits, including hearing aids.

LEGAL PRECEDENT

The schedule award provision of FECA and its implementing regulations² 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.³ The A.M.A., *Guides* (6th ed. 2009) have been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁴

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.⁵ Using the frequencies of 500, 1,000, 2,000, and 3,000 cps, 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* point 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.⁶

² 20 C.F.R. § 10.404.

³ See *D.K.*, Docket No. 10-174 (issued July 2, 2010); *Michael S. Mina*, 57 ECAB 379, 385 (2006).

⁴ *Supra* note 3; see *F.D.*, Docket No. 09-1346 (issued July 19, 2010).

⁵ See A.M.A., *Guides* 250 (6th ed. 2009).

⁶ *J.H.*, Docket No. 08-2432 (issued June 15, 2009); *J.B.*, Docket No. 08-1735 (issued January 27, 2009).

FECA, and its implementing regulations, provide for the reduction of compensation for subsequent injury to the same scheduled member.⁷ Benefits payable under 5 U.S.C. § 8107(c) shall be reduced by the period of compensation paid under the schedule for an earlier injury if: (1) compensation in both cases is for impairment of the same member or function or different parts of the same member or function; and (2) the latter impairment in whole or in part would duplicate the compensation payable for the preexisting impairment.⁸

ANALYSIS

OWCP previously awarded appellant a schedule award for 23 percent bilateral hearing loss on April 8, 2008, in case number xxxxxx005. In the current case, it accepted that he sustained bilateral hearing loss due to employment-related noise exposure. To develop the claim, OWCP referred appellant to Dr. Aland, who, on January 29, 2015, examined appellant and had an audiogram performed on his behalf. The audiogram tested decibel losses at 500, 1,000, 2,000, and 3,000 cps. The audiogram revealed losses in the right ear of 30, 35, 40, and 60 dBs, respectively, totaling 165 dBs. When divided by four, the result is an average hearing loss of 41.25 dBs. The average loss of 41.25 dBs is reduced by the 25 dBs fence and multiplied by the established factor of 1.5. The result is 24.375 percent monaural hearing loss in the right ear.

For appellant's left ear, the audiogram revealed decibel losses of 25, 25, 45, and 60 dBs, resulting in a total decibel loss of 155. When divided by 4, the result is an average hearing loss of 38.75 dBs. The average loss of 38.75 dBs is reduced by the 25 dBs fence to equal 13.75 dBs. When multiplied by the established factor of 1.5, it results in a 20.625 percent monaural hearing loss for the left ear.

The 20.625 percent monaural loss in the left ear is multiplied by five, added to the 24.375 percent monaural loss in the right ear, and divided by six. The result is 21.25, which when rounded down in accordance with OWCP policy, equals 21 percent binaural hearing loss.⁹

There is no other current medical evidence of record which contains audiometric testing supporting a bilateral hearing loss greater than 23 percent.

In a February 23, 2015 report, an OWCP medical adviser concluded that appellant was not entitled to an additional schedule award, as he had not suffered an increased impairment. The Board notes that the medical adviser erroneously recorded a loss of 50 dBs at 3,000 cps for appellant's left ear, leading to the miscalculation of 18 percent bilateral hearing loss. As recorded in the January 29, 2015 audiogram, at 3,000 cps his left ear rated a 60 dBs loss, which, when used in the standardized formula, yields a bilateral loss of 21 percent, as explained above. The medical adviser's miscalculation, however, amounts to harmless error, as appellant's 21 percent bilateral hearing loss still results in a percentage of impairment lower than his original schedule award for which he previously received compensation.

⁷ 5 U.S.C. § 8108; 20 C.F.R. § 10.404(c).

⁸ 20 C.F.R. § 10.404(c)(1), (c)(2).

⁹ See *L.B.*, Docket No. 14-479 (issued August 6, 2014); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4(b)(2)(b) (September 2010).

As appellant's current impairment is 21 percent bilateral hearing loss and he was previously paid for 23 percent bilateral hearing loss, the Board finds that he is not entitled to an additional schedule award. OWCP properly denied his claim for an increased schedule award.

On appeal appellant contends that the August 3, 2012 and June 27, 2014 e-mails from the employing establishment's human resources division show that he experienced a threshold shift. He also maintains that Dr. Aland's January 29, 2015 report confirmed that he suffered hearing loss. While Dr. Aland's report clearly confirms that appellant sustained bilateral sensorineural hearing loss, it does not demonstrate that he suffered a greater impairment for which he was previously awarded. Under OWCP's standardized formula, there is no current medical evidence of record showing a greater hearing loss. Appellant also asserts that he should be compensated for disability caused by his injury, noting that he cannot perform an underground mine inspection while wearing hearing aids. The Board notes that it has no jurisdiction over whether the accepted injury has caused disability as OWCP has not issued a decision regarding this.¹⁰ To the extent that appellant asserts that his accepted hearing loss has limited his activities, the Board has held that factors such as employability or limitations on daily activities have no bearing on the calculation of a schedule award.¹¹

The Board's decision in this case does not preclude appellant's entitlement to medical benefits for his accepted bilateral hearing loss. Moreover, appellant may request an increased schedule award based on evidence of 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 established that he is entitled to an additional schedule award for hearing loss due to noise exposure from his federal employment.

¹⁰ See 20 C.F.R. § 501.2(c). The record does not indicate that appellant stopped work because of his accepted condition nor does it contain a claim for wage loss caused by his accepted condition.

¹¹ *Kimberly M. Held*, 56 ECAB 670 (2005).

ORDER

IT IS HEREBY ORDERED THAT the March 16, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 4, 2015
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