

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of WALTER J. LINOSKI and DEPARTMENT OF JUSTICE,  
DRUG ENFORCEMENT ADMINISTRATION, Detroit, MI

*Docket No. 00-2580; Submitted on the Record;  
Issued November 25, 2002*

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DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,  
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined appellant's pay rate for purposes of schedule award compensation; and (2) whether the Office properly determined that appellant had no loss of wage-earning capacity.<sup>1</sup>

On July 26, 1996 appellant, then a 51-year-old intelligence research specialist and a former criminal investigator, filed a notice of occupational disease and claim for compensation (Form CA-2), alleging that he suffered a sensorineural hearing loss in both ears as a result of unprotected firearms training. The claim was denied by the Office in a decision dated November 8, 1996, as the evidence failed to establish that an injury or disease was sustained while appellant worked for the Treasury Department. A subsequent Form CA-2 was filed on March 25, 1997 wherein appellant listed the employing establishment that he worked for when he was last exposed to excessive noise.<sup>2</sup>

In a letter dated November 14, 1996, appellant stated that his hearing loss was based on unprotected firearms training during his federal employment from 1971 to 1977. He noted that none of his subsequent employment required firearms use and training. In an August 21, 1998 letter, appellant noted that his last exposure to unprotected firearms noise was when he separated from the employing establishment on August 13, 1977. He noted that he applied for reinstatement as a special agent with the employing establishment on or about May 1, 1984, but was subsequently disqualified for reinstatement as a special agent because he had failed his hearing test. Appellant alleged that he first became aware of a possible connection between his work for the employing establishment and his hearing loss in June 1996, when talking to another agent.

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<sup>1</sup> Appellant does not contest the Office's finding that he sustained a work-related 43 percent binaural hearing loss. (See December 19, 2001 letter to the Board.) Appellant also does not contest the date he reached maximum medical improvement. Thus, the Board has not addressed these issues on appeal.

<sup>2</sup> Appellant was employed at the employing establishment from 1971 until August 13, 1977. He commenced working for the Department of the Treasury in January 1987.

In a decision dated November 16, 1998, appellant's claim was initially denied as the Office found that it was not timely filed. By letter dated November 20, 1998, appellant requested an oral hearing, which was held on July 15, 1999. In a decision dated October 6, 1999, the hearing representative found that appellant timely filed his claim and remanded this case for further development to determine if the hearing loss was causally related to work exposure between 1971 and 1977.

On May 18, 2000 the Office issued a schedule award for a 43 percent binaural hearing loss, based on a weekly pay rate of \$480.85.<sup>3</sup> The period of the award was from November 29, 1999 to July 23, 2001.

By letters dated May 22, 23 and 24, 2000, appellant requested reconsideration of the award. He stated that the Office correctly utilized the date of the examination and audiogram by the Office medical adviser, November 29, 1999, to establish the date of maximum medical improvement. However, he contested the rate of pay.

By decision dated June 26, 2000, the Office denied modification of the May 18, 2000 decision.

By letters dated July 6 and August 14, 2000, appellant stated that he was claiming loss of wage-earning capacity retroactive to October 1986 including CPIs as he established a prior permanent disability for law enforcement work May 1, 1984 and could not vocationally rehabilitate himself until he got a position in another agency in October 1986.

On February 15, 2000 appellant filed a claim for compensation (Form CA-7) requesting lost wages. By decision dated August 30, 2000, the Office disallowed appellant's claim for benefits, finding that appellant was not entitled to a loss of wage-earning capacity. The Office noted that a wage-earning capacity award was different from an award under the schedule provisions of the Federal Employees' Compensation Act.

The Board finds that the Office properly computed appellant's pay rate for payment of monetary compensation.

Section 8101(4) of the Act<sup>4</sup> defines "monthly pay" for purposes of computing compensation benefits as the "monthly pay at the time of injury." In a situation such as this, the date of injury is the date of the last noise exposure which adversely affected the employee's hearing. This is so because every exposure, which had an adverse affect (an aggravation) constitutes a new and independent injury.<sup>5</sup>

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<sup>3</sup> The \$480.85 weekly pay rate was based on an annual pay rate of \$25,004.00.

<sup>4</sup> 5 U.S.C. § 8101(4).

<sup>5</sup> *Louis L. DeFrances*, 33 ECAB 1407 (1982).

The pay rate that was provided by the employing establishment for computation of rate of pay included the Administratively Uncontrollable Overtime Pay (AUOP)<sup>6</sup> that appellant was receiving as of the date of his last exposure to the noise that could have caused his permanent hearing loss. When appellant's pay rate was set, it included the amount of \$3,881.00 per annum that the employing establishment identified as AUOP and it was added to appellant's yearly rate of pay per annum of \$21,123.00, for a total of \$25,004.00. This was appellant's pay rate when he voluntarily stopped working for the employing establishment on August 13, 1977 which was also his last date of exposure to detrimental noise. The Board has held that where an injury is sustained over a period of time, as in the present case, the date of injury is the date of last exposure to those work factors established to have caused an injury.<sup>7</sup> Although appellant previously suggested that locality pay should be included in the pay computation, at the time, appellant left federal employment in 1977, locality pay did not exist. Furthermore, the contention that appellant would have been a GS-13 if he had not been disqualified from returning to work in May 1984 is speculative and has no relevance to what he was being paid when he voluntarily left the employing establishment in 1977. For similar reasons, appellant's current position in the federal government does not change the fact that his date of injury was August 13, 1977, the date that he voluntarily removed himself from work for the employing establishment.

It is well established that the period covered by a schedule award commences on the date appellant reaches maximum medical improvement.<sup>8</sup> In the instant case, this date was November 29, 1999, the date of the audiogram that was used to establish his hearing loss. As appellant never lost time because of the accepted condition of bilateral hearing loss,<sup>9</sup> the Office also properly used the date as that date for application of CPIs. According to the procedure manual:

“Where the schedule award represents the first payment for compensable disability, the claimant's entitlement to CPIs does not begin until one year after the award begins (*see Franklin A. Armfield*, 28 ECAB 445).”<sup>10</sup>

The Office determined that appellant reached maximum medical improvement on November 29, 1999. Where a schedule award is being paid and the claimant had no disability for work prior to the date of maximum medical improvement, the one-year waiting period begins

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<sup>6</sup> Administratively, uncontrollable overtime is included when calculating the basic pay rate. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.7(b)(5) (December 1995).

<sup>7</sup> *See Sherron A. Roberts*, 47 ECAB 617 (1996); *Hugh A. Feeley*, 45 ECAB 255 (1993); *Jack R. Lindgren*, 35 ECAB 676 (1984).

<sup>8</sup> *Yolanda Librera*, 37 ECAB 388 (1986); *Daniel Dunmire*, 36 ECAB 249 (1984).

<sup>9</sup> The fact that he was unable to be rehired in his previous position when he applied in 1984 does not demonstrate that he lost time due to the injury, as he voluntarily left the position with the employing establishment on August 13, 1977.

<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.7(a)(4) (May 1997).

on the starting date of the award. This date represents the claimant's first entitlement to compensation, even though the effective date of the pay rate (date of injury) may be earlier.<sup>11</sup>

Finally, the Board finds that appellant has not established that he is entitled to a loss of wage-earning capacity.

Wage-earning capacity is a measure of the employee's ability to earn wages in the open market under normal employment conditions.<sup>12</sup> It is well established that the schedule award provisions of the Act are made without regard to actual loss of wage-earning capacity resulting from the injury.<sup>13</sup>

Appellant voluntarily resigned from his position with the employing establishment in 1977. Appellant reapplied for that position in 1984, but was not rehired. Appellant contends that he sustained a loss of wage-earning capacity retroactive to 1984 based on the presumption that he would have earned approximately 25 percent more money if he had been rehired by the employing establishment and received availability pay. However, appellant's argument is speculative, as appellant was not rehired. The probability that an employee, if not for his injury-related condition, might have had greater earnings does not afford a basis for payment under the Act.<sup>14</sup>

The August 30, June 26 and May 18, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC  
November 25, 2002

Alec J. Koromilas  
Member

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member

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<sup>11</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.901.12(a)(3) (December 1995).

<sup>12</sup> *Richard Alexander*, 48 ECAB 432, 434 (1997).

<sup>13</sup> *See Stanley F. Stuczynski*, 12 ECAB 159 (1960).

<sup>14</sup> *Donald R. Johnson*, 48 ECAB 455, 458 (1997).