

hearing loss. The Office accepted the claim. On June 28, 2000 he was granted a schedule award for a seven percent binaural hearing loss, for a total of 14 weeks, to run from March 14 to June 19, 2000. The augmented pay rate for compensation purposes was \$552.95, for a total of \$7,741.30. On November 2, 2004 appellant filed a second occupational disease claim for employment-related hearing loss. This claim was also accepted and, on May 10, 2005, he filed a schedule award claim. By decision dated June 28, 2005, appellant was granted a schedule award for a 16 percent binaural hearing loss, or a total of 32 weeks, to run from January 26 to September 6, 2005. The augmented pay rate for compensation purposes was \$605.03, for total compensation of \$19,360.96. On April 4, 2007 he filed a third occupational disease claim for hearing loss and submitted a March 12, 2007 audiogram from the employing establishment.¹

On May 7, 2007 the Office referred appellant to Dr. Clifford N. Steinig, a Board-certified osteopath specializing in otolaryngology. In a report dated May 31, 2007, Dr. Steinig described his examination findings and diagnosed binaural neurosensory hearing loss secondary to noise exposure at work. He recommended that appellant change his hearing aids. Dr. Steinig submitted results of audiometric testing performed by a certified audiologist on May 31, 2007. This reflected testing at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second and revealed the following: right ear 0, 10, 65 and 65 decibels; left ear 5, 25, 70 and 90 decibels, respectively.

On July 7, 2007 an Office medical adviser reviewed Dr. Steinig's report and audiometric findings. He determined that maximum medical improvement was reached on May 31, 2007 and authorized hearing aids. The Office medical adviser applied the Office's standardized procedures to the audiogram, finding that appellant sustained an 18.13 percent binaural hearing loss impairment. He noted that the May 31, 2007 audiogram performed on Dr. Steinig's behalf at the 500, 1,000, 2,000 and 3,000 cycles per second (cps) revealed decibel losses of 0, 10, 65 and 65 respectively in the right ear for a total decibel loss of 140 on the right. The Office medical adviser then followed established procedures and divided this total by 4 which resulted in an average loss of 35 decibels and subtracted the fence of 25 decibels to equal 10 decibels. He then multiplied this by the established factor of 1.5 to result in a 15 percent monaural hearing loss for the right ear. The Office medical adviser then properly followed the same procedure on the left, noting that the test results for the left ear at the frequencies of 500, 1,000, 2,000 and 3,000 cps revealed decibel losses of 5, 25, 70 and 90 decibels respectively, for a total of 190 decibels. He divided this by 4, for an average hearing loss of 47.50 decibels, subtracted the fence of 25 decibels to equal 22.50 decibels and multiplied this by the established factor of 1.5, for a 33.75 percent monaural hearing loss for the left ear. The Office medical adviser then multiplied the 15 percent monaural hearing loss for the left ear by 5, as it was the lesser loss, to find a product of 75. As the procedures provide, he then added the 75 to the 33.75 percent hearing loss for the right ear, to obtain a total of 108.75 which was divided by 6 in order to calculate a binaural hearing loss of 18.13 percent.

By decision dated July 11, 2007, the Office found that appellant was not entitled to an additional schedule award. It explained that under Office file numbers 030246741 and

¹ The October 1999 claim was adjudicated by the Office under file number 030246741, the November 2004 claim under file number 032034563 and the April 2007 claim under file number 032057267. On July 11, 2007 the claims were tripled, with 032034563 becoming the master file.

032034563 he had received two prior schedule awards for a total of 7 and 16 percent respectively. However, the second award was issued in error because, while he had a 16 percent binaural hearing loss at the time, the previous schedule award of 7 percent had not been deducted from the total. The Office recognized that, under file number 032057267, filed in 2007, appellant had established that he now had 18 percent binaural hearing loss, but that since he had previously been granted awards totaling 23 percent, he was not entitled to an additional schedule award and an overpayment in compensation had been created.

On July 11, 2007 the Office issued a preliminary finding that an overpayment in compensation in the amount of \$5,971.05 had been created for the period June 29 through September 6, 2005. It explained that the overpayment resulted because appellant received a 7 percent schedule award under file number 030246741 and a 16 percent schedule award under file number 032034563 when he was only entitled to an additional 9 percent award, as the evidence at that time established that he had a 16 percent binaural hearing loss. The Office acknowledged that appellant was presently entitled to an 18 percent award but as he had previously received a 23 percent award, the overpayment was equal to 5 percent impairment. It found appellant without fault in the creation of the overpayment.

Office memoranda and computer print-outs contained in the record provide that appellant was paid \$7,741.30 for a schedule award in 2000 and \$19,361.20 for a schedule award in 2005.

On July 14, 2007 appellant requested a precoupment conference regarding the preliminary overpayment determination and submitted financial information and an overpayment questionnaire. A telephone conference was held on July 26, 2007. The conference memorandum noted that appellant had filed three separate schedule awards for hearing loss and had received payment totaling 23 percent binaural hearing loss while he only had an 18 percent impairment. Appellant's monthly income and expenses were discussed and he requested waiver. Following the conference, appellant submitted additional financial information and a second overpayment questionnaire.

By decision dated August 13, 2007, the Office finalized the preliminary finding that appellant had received an overpayment in compensation in the amount of \$5,971.05, for which he was not at fault. He was not entitled to waiver because his monthly income of \$4,626.20 exceeded his monthly expenses of \$2,045.48. Appellant was instructed to repay the overpayment in monthly installments of \$340.00. By check dated September 7, 2007, he paid the overpayment in full.

LEGAL PRECEDENT -- ISSUE 1

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

² 5 U.S.C. §§ 8101-8193.

³ *Id.* at § 8107(c).

determination is a matter which rests in the sound discretion of the Office. 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 industrial hearing loss in accordance with the standards contained in the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter 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 and averaged.⁶ The “fence” of 25 decibels is then 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. 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 the binaural hearing loss.⁷ The Board has concurred in the Office’s adoption of this standard for evaluating hearing loss.⁸

Where a claimant has previously received a schedule award and subsequently claims an additional schedule award due to a worsening of his or her condition, the claimant bears the burden of proof to establish a greater impairment causally related to the employment injury.⁹

ANALYSIS -- ISSUE 1

The Board finds that appellant has no more than an 18 percent binaural hearing loss. The May 31, 2007 medical report of Dr. Steinig conforms to applicable criteria and constitutes the weight of the medical evidence. The Office medical adviser properly applied the Office’s standardized procedures in finding that appellant had an 18.13 percent binaural hearing loss.¹⁰ He noted that the May 31, 2007 audiogram performed on Dr. Steinig’s behalf at the 500, 1,000, 2,000 and 3,000 cps revealed decibel losses of 0, 10, 65 and 65 respectively in the right ear for a total decibel loss of 140 on the right. The Office medical adviser then followed established procedures and divided this total by 4 which resulted in an average loss of 35 decibels and subtracted the fence of 25 decibels to equal 10 decibels. He then multiplied this by the established factor of 1.5 to result in a 15 percent monaural hearing loss for the right ear. The Office medical adviser then properly followed the same procedure on the left, noting that the test results for the left ear at the frequencies of 500, 1,000, 2,000 and 3,000 cps revealed decibel losses of 5, 25, 70 and 90 decibels respectively, for a total of 190 decibels. He divided this by 4, for an average hearing loss of 47.50 decibels, subtracted the fence of 25 decibels to equal 22.50

⁴ *Renee M. Straubinger*, 51 ECAB 667 (2000).

⁵ A.M.A., *Guides* (5th ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB 331 (2002).

⁶ *Id.* at 250.

⁷ *Id.*

⁸ *Horace L. Fuller*, 53 ECAB 775 (2002).

⁹ *Edward W. Spohr*, 54 ECAB 806 (2003).

¹⁰ A.M.A., *Guides*, *supra* note 5 at 250.

decibels and multiplied this by the established factor of 1.5, for a 33.75 percent monaural hearing loss for the left ear. The Office medical adviser then multiplied the 15 percent monaural hearing loss for the left ear by 5, as it was the lesser loss, to find a product of 75. As the procedures provide, he then added the 75 to the 33.75 percent hearing loss for the right ear, to obtain a total of 108.75 which was divided by 6 in order to calculate a binaural hearing loss of 18.13 percent. As appellant has previously received awards totaling 23 percent, by its July 11, 2007 decision, the Office properly found that he is not entitled to an additional schedule award.¹¹

LEGAL PRECEDENT -- ISSUE 2

Section 8107 of the Act provides that compensation for a schedule award shall be based on the employee's "monthly pay."¹² For all claims under the Act, compensation is to be based on the pay rate as determined under section 8101(4) which defines "monthly pay" as:

"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..."¹³

In applying section 8101(4), the statute requires the Office to determine monthly pay by determining the date of the greater pay rate, based on the date of injury, date of disability or the date of recurrent disability. The Board has held that rate of pay for schedule award purposes is the highest rate which satisfies the terms of section 8101(4).

In an occupational disease claim, the date of injury is the date of last exposure to the employment factors that caused or aggravated the claimed condition.¹⁴ In schedule award claims, the claim covers all exposures that occurred up to the filing of the claim and in cases of continued exposure, the date of the medical report upon which the Office relies in determining the degree of permanent impairment may constitute the date that the injury occurred.¹⁵ Thus, in schedule award claims where an injury is sustained over a period of time, to determine the date of injury, the Office must ascertain the date of last exposure to employment factors as well as the date of the medical evaluation which substantiates the degree of permanent impairment. Where exposure to work factors continues, the date of injury is the date of the relevant medical evaluation, *i.e.*, the date of the medical examination upon which the extent of permanent impairment has been determined.¹⁶

¹¹ The Board notes that the record includes a March 12, 2007 audiogram performed by the employing establishment. There is no indication that these procedures were followed in the March 12, 2007 audiogram. *Luis M. Villanueva*, 54 ECAB 666 (2003).

¹² 5 U.S.C. § 8107.

¹³ 5 U.S.C. § 8101(4).

¹⁴ *Jon Hoagland*, 57 ECAB 635 (2006).

¹⁵ *Patricia K. Cummings*, 53 ECAB 623 (2002).

¹⁶ *Id.*

If a claimant receives a schedule award and the medical evidence does not support the degree of permanent impairment awarded, an overpayment in compensation may be created.¹⁷ When the Office makes a determination that an overpayment in compensation has occurred because the claimant received an erroneous schedule award, it must properly resolve the schedule award issue. Before the amount of the overpayment can be determined, the evidence must establish the degree of permanent impairment.¹⁸

ANALYSIS -- ISSUE 2

The Office paid appellant schedule awards representing a total impairment of 23 percent. It issued an initial schedule award on June 28, 2000 for a seven percent binaural hearing loss. On June 28, 2005 an additional schedule award for 16 percent impairment was granted. At the time the Office issued the June 2005 schedule award, appellant was only entitled to an additional 9 percent, not the 16 percent awarded. An overpayment in compensation was thus created.

The Board, however, finds that the Office improperly calculated the amount of the overpayment. Appellant filed an additional schedule award claim on March 26, 2007 and, based on Dr. Steinig's May 31, 2007 report, the medical evidence established that he was entitled to an 18 percent hearing loss impairment. In determining the amount of the overpayment, the Office used the pay rate in effect at the time of the June 2005 award and merely deducted the amount appellant should receive for an 18 percent impairment from the 23 percent he had received in the June 28, 2005 award. The Board finds this in error. The Office should have initially calculated the amount appellant was overpaid in June 2005 based on his pay rate at that time. It should have then calculated the additional schedule award to which appellant would be entitled in 2007. As appellant continued to work, the proper pay rate for determining the additional schedule award to which he was entitled in 2007, was the pay rate in effect on the date of Dr. Steinig's examination, or May 31, 2007, as the schedule award calculation should be based on the date of the medical evaluation which substantiated the degree of permanent impairment.¹⁹ To determine the proper amount of the overpayment in compensation, the amount to which appellant was entitled in 2007 should have been deducted from the amount he was overpaid in 2005. The case must therefore be remanded to the Office to determine appellant's pay rate for schedule award compensation purposes based on Dr. Steinig's May 31, 2007 examination, to calculate the additional schedule award to which he was entitled at that time and to recalculate the amount of the overpayment. The Office should then determine if appellant is entitled to waiver.²⁰ In view of the Board's disposition of issue number two, it would be premature to adjudicate issue number three regarding waiver of the overpayment in compensation.

¹⁷ *B.T.*, Docket No. 07-1164 (issued April 22, 2008).

¹⁸ See *Richard Saldibar*, 51 ECAB 585 (2000).

¹⁹ *Patricia K. Cummings*, *supra* note 15.

²⁰ The Board notes that appellant fully repaid the overpayment in compensation.

CONCLUSION

The Board finds that the Office properly determined that appellant had no more than an 18 percent permanent impairment for binaural hearing loss and that he received an overpayment in compensation. The Board further finds that the case is not in posture for decision regarding the amount of the overpayment in compensation and whether appellant is entitled to waiver of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 11, 2007 is affirmed. The decision dated August 13, 2007 is affirmed in part and set aside in part and the case is remanded to the Office for proceedings consistent with this opinion of the Board.

Issued: July 21, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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