



On appeal, appellant asserts that OWCP failed to include tinnitus in its schedule award rating.

### **FACTUAL HISTORY**

OWCP accepted that on or before February 17, 2010 appellant, then a 63-year-old heavy mobile equipment repairer, sustained a bilateral sensorineural hearing loss due to hazardous noise exposure at work. He submitted annual employing establishment audiograms from 2007 and 2009 obtained as part of a hearing conservation program.

In a January 11, 2010 report, Dr. Kristin Lower, an attending Board-certified otolaryngologist, noted a one-year history of bilateral tinnitus, worse on the left. She described appellant's military and occupational noise exposure. Dr. Lower obtained audiometric test results. Testing for the right ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second (cps) revealed decibel losses of 15, 20, 15 and 20 respectively. Testing for the left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cps revealed decibel losses of 20, 20, 25 and 40 decibels. Dr. Lower opined that appellant had essentially normal hearing in the right ear through 3,000 hertz (Hz) and a mild sensorineural hearing loss in the left ear. She diagnosed a bilateral high-frequency sensorineural hearing loss with tinnitus.

On June 24, 2010 OWCP referred appellant to Dr. Charles E. Hollingsworth, a Board-certified otolaryngologist, for a second opinion examination. A statement of accepted facts noted hazardous occupational noise exposure. In a July 14, 2010 report, Dr. Hollingsworth diagnosed occupationally-related bilateral low, mid- and high-frequency sensorineural hearing losses. Testing for the right ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cps revealed decibel losses of 15, 20, 15 and 20 respectively. Testing for the left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cps revealed decibel losses of 20, 20, 25 and 40 decibels. Referring to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), Dr. Hollingsworth found a 9.4 percent right monaural impairment, a 28.1 percent left monaural impairment, resulting in a 12.5 percent binaural impairment. He recommended bilateral hearing aids.

OWCP referred Dr. Hollingsworth's reports and the medical record to an OWCP medical adviser for review. In an August 11, 2010 report, the medical adviser concurred with Dr. Hollingsworth's diagnosis of a work-related bilateral hearing loss. He found that appellant had attained maximum medical improvement as of July 14, 2010. The medical adviser totaled the decibel losses for the right ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cps of 25, 30, 30 and 40 to equal 125. He then divided this total by 4 to obtain the average hearing loss at those cycles of 31 decibels. The average of 31 decibels was then reduced by the 25 decibel "fence" to equal 6. Multiplying the balance of 6 by 1.5 resulted in a 9 percent monaural hearing loss for the right ear. The medical adviser then totaled the 35, 35, 40 and 65 decibel losses in the left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cps to equal 175. He then divided this total by 4 to obtain the average hearing loss at those cycles of 44 decibels. The average of 44 decibels was then reduced by 25 decibels to equal a balance of 19 decibels. Multiplying the balance of 19 decibels by 1.5 resulted in a 29 percent monaural hearing loss for the left ear. OWCP medical adviser then multiplied 9, the lesser monaural loss, by 5, for a result of 45. He

then added the greater monaural loss of 29, to equal 74. The medical adviser then divided the result of 74 by 6, to equal a 13 percent binaural sensorineural hearing loss. He authorized bilateral hearing aids.

By decision dated December 16, 2010, OWCP granted appellant a schedule award for a 13 percent binaural hearing loss.

In a letter dated January 22, 2011, appellant requested a review of the written record. He enclosed copies of evidence previously of record. OWCP's Branch of Hearings and Review received the letter on January 26, 2011. The envelope in which appellant mailed the hearing request is not of record.

By decision dated March 24, 2011, OWCP denied appellant's request for a review of the written record on the grounds that it was not timely filed within 30 days of the December 16, 2010 schedule award. It further denied appellant's request as the issue in the case could be addressed equally well pursuant to a valid request for reconsideration.

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

The schedule award provision of FECA<sup>2</sup> and its implementing regulations 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. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by OWCP for evaluating schedule losses and the Board has concurred in such adoption.<sup>3</sup>

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.<sup>4</sup> Using the frequencies of 500, 1,000, 2,000 and 3,000 cps the losses at each frequency are added up and averaged.<sup>5</sup> The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.<sup>6</sup> 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

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<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> See 20 C.F.R. § 10.404; *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

<sup>4</sup> A.M.A., *Guides* 250.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

binaural hearing loss.<sup>7</sup> The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.<sup>8</sup>

Regarding tinnitus, the A.M.A., *Guides* provide that tinnitus is not a disease but rather a symptom that may be the result of disease or injury.<sup>9</sup> The A.M.A., *Guides* state that, if tinnitus interferes with activities of daily living, including sleep, reading and other tasks requiring concentration, enjoyment of quiet recreation, and emotional well being, up to five percent may be added to a measurable binaural hearing impairment.<sup>10</sup>

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

OWCP accepted that appellant sustained a binaural sensorineural hearing loss due to hazardous noise exposure at work. To determine his entitlement to a schedule award, OWCP obtained a second opinion report and audiometric test results from Dr. Hollingsworth, a Board-certified otolaryngologist, who found a 12.5 percent binaural hearing loss due to occupational noise exposure. OWCP then referred Dr. Hollingsworth's findings to an OWCP medical adviser for calculation of a schedule award according to the A.M.A., *Guides*.

OWCP medical adviser properly applied OWCP's standardized procedures to the July 14, 2010 audiogram obtained by Dr. Hollingsworth. Testing for the left ear at the frequencies of 500, 1,000, 2,000 and 3,000 cps revealed decibel losses of 35, 35, 40 and 65 decibels, respectively. These decibel losses were totaled at 175 and divided by 4 to obtain the average hearing loss per cycle of 44 decibels. The average of 44 was then reduced by the 25 decibels fence to equal 19 decibels for the left ear.<sup>11</sup> Following the same mathematical procedure, the medical adviser totaled the 25, 30, 30 and 40 decibel losses in the right ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cps to equal 125. He divided the total by 4 to obtain the average hearing loss at those cycles of 31 decibels, reduced by 25 decibels to equal 6.

The binaural hearing loss is determined by calculating the loss in each ear using the formula for monaural loss; the lesser loss, in this case 9, is multiplied by five, equaling 45, then added to the greater loss of 29 for a sum of 74, and the total is divided by six to arrive at the amount of the binaural hearing loss of 12.5 rounded up to 13 percent.<sup>12</sup>

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<sup>7</sup> *Id.*

<sup>8</sup> *C.C.*, Docket No. 11-731 (issued October 11, 2011).

<sup>9</sup> *See* A.M.A., *Guides* 249. *See also* *C.C.*, *supra* note 8.

<sup>10</sup> A.M.A., *Guides* 249. *See also* *Robert E. Cullison*, 55 ECAB 570 (2004); *R.H.*, Docket No. 10-2139 (issued July 13, 2011); *C.C.*, *supra* note 8.

<sup>11</sup> The decibel fence is subtracted as it has been shown that the ability to hear everyday sounds under everyday listening conditions is not impaired when the average of the designated hearing levels is 25 decibels or less. *See* A.M.A., *Guides* 250.

<sup>12</sup> The policy of OWCP 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).

The Board finds that OWCP's medical adviser applied the proper standards to the findings in the July 14, 2010 report of Dr. Hollingsworth and accompanying audiogram performed on his behalf. The result is a 13 percent binaural hearing loss. The Board further finds that OWCP's medical adviser properly relied upon the July 14, 2010 audiogram as it was part of Dr. Hollingsworth's evaluation and met OWCP's standards.<sup>13</sup> OWCP properly found that appellant had a 13 percent binaural hearing loss due to hazardous noise exposures at work.

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

On appeal, appellant asserts that OWCP did not consider tinnitus in calculating the schedule award; but Dr. Hollingsworth did not mention tinnitus in his report or state that appellant reported tinnitus on examination. Dr. Lower, an attending Board-certified otolaryngologist, diagnosed tinnitus on January 11, 2010 but did not opine that it impacted activities of daily living. Therefore, OWCP did not include tinnitus as an element in the schedule award calculation.<sup>14</sup>

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

Section 8124(b)(1) of FECA states unequivocally that a claimant not satisfied with a decision of OWCP has a right, upon timely request, to a hearing before an OWCP representative.<sup>15</sup> Section 10.615 of Title 20 of the Code of Federal Regulations provide that a hearing is a review of an adverse decision by an OWCP hearing representative. Initially, the claimant can choose between two formats: An oral hearing or a review of the written record.<sup>16</sup>

A claimant is not entitled to a hearing if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark or other carrier's date marking of the request.<sup>17</sup> OWCP has discretion, however, to grant or deny a request that is made after this 30-day period.<sup>18</sup> In such a case, it will determine whether to grant a discretionary hearing and, if not, will so advise the claimant with reasons.<sup>19</sup>

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<sup>13</sup> See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirement for Medical Reports*, Chapter 3.600.8(a) (September 1994).

<sup>14</sup> See *R.D.*, 59 ECAB 127 (2007).

<sup>15</sup> 5 U.S.C. § 8124 (b)(1). See *A.B.*, 58 ECAB 546 (2007); *Joe Brewer*, 48 ECAB 411 (1997).

<sup>16</sup> 20 C.F.R. § 10.615.

<sup>17</sup> *Id.* at § 10.616(a).

<sup>18</sup> *Herbert C. Holley*, 33 ECAB 140 (1981); see also *G.W.*, Docket No. 10-782 (issued April 23, 2010).

<sup>19</sup> *Id.* See also *Rudolph Bermann*, 26 ECAB 354 (1975).

## **ANALYSIS -- ISSUE 2**

On December 16, 2010 OWCP issued a schedule award. Appellant had 30 days from the date of that decision or until January 18, 2011, to make a timely request for a hearing.<sup>20</sup> His letter requesting a review of the written record was dated January 22, 2011. Although the postmark and envelope are not of record, the letter was dated after January 18, 2011. Therefore, the Board finds that the letter requesting a review of the written record was not timely even in the absence of the postmark.<sup>21</sup>

Because appellant's request was untimely, the Board finds that OWCP properly found that he was not entitled to a hearing as a matter of statutory right under section 8124(b)(1) of FECA. Exercising its discretion to grant an oral hearing, OWCP denied his request on the grounds that he could equally well address any issues in his case by requesting reconsideration. Because reconsideration exists as an alternative appeal right to address the issues raised by OWCP's December 16, 2010 decision, the Board finds that OWCP did not abuse its discretion in denying appellant's untimely request for an oral hearing.<sup>22</sup>

## **CONCLUSION**

The Board finds that appellant has not established that he sustained greater than a 13 percent binaural hearing loss in the performance of duty. The Board further finds that OWCP properly denied his request for an oral hearing as untimely.

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<sup>20</sup> The 30<sup>th</sup> day from December 16, 2010 was Saturday January 15, 2011. The Board has held that, in computing a time period, the date of the event from which the designated period of time begins to run shall not be included while the last day of the period so computed shall be included unless it is a Saturday, a Sunday, or a legal holiday. *John B. Montoya*, 43 ECAB 1148 (1992). As Monday, January 17, 2011 was a federal holiday, the first regular business day after January 15, 2011 was Tuesday, January 18, 2011.

<sup>21</sup> See *Glenda G. Muri*, Docket No. 05-437 (issued July 1, 2005).

<sup>22</sup> See *Gerard F. Workinger*, 56 ECAB 259 (2005).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated March 24, 2011 and December 16, 2010 are affirmed.

Issued: December 21, 2011  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board