

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

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**T.J., Appellant**

**and**

**DEPARTMENT OF THE NAVY, NORFOLK  
NAVAL SHIPYARD, Portsmouth, VA, Employer**

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**Docket No. 13-366  
Issued: June 14, 2013**

*Appearances:*  
*David G. Jennings, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
PATRICIA HOWARD FITZGERALD, Judge

**JURISDICTION**

On December 6, 2012 appellant, through counsel, filed a timely appeal of an October 4, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether appellant sustained more than two percent binaural (both ears) hearing loss for which he received a schedule award.

On appeal appellant's counsel argues that OWCP erred in its calculation of appellant's hearing loss impairment.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On February 15, 2012 appellant, then a 61-year-old pipefitter leader, filed an occupational disease claim alleging that on January 1, 2005 he developed hearing loss due to noise exposure due to his employment. OWCP accepted his claim for binaural hearing loss.

In a July 13, 2012 report, Dr. L. Frederick Lassen, a second opinion Board-certified otolaryngologist, diagnosed bilateral noise-induced sensorineural hearing loss. There was no suggestion of presbycusis or other etiologies for the hearing loss. An audiogram performed on Dr. Lassen's behalf on May 22, 2012 showed the decibel losses at frequencies of 500, 1,000, 2,000 and 3,000 hertz (Hz): 15, 10, 25 and 55, respectively, for the right ear and 10, 10, 30 and 55, respectively, for the left ear. Dr. Lassen concluded that appellant had a 3.9 percent binaural hearing loss using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. (A.M.A., *Guides*). In reaching his calculation, he added two percent for tinnitus to the 1.875 percent monaural loss in both ears resulting in a 3.875 percent total monaural loss in the right ear and a 3.875 percent total monaural loss in the left ear. Lastly, Dr. Lassen found a 3.875 binaural hearing loss, which he rounded up to 3.9 percent.

On July 11, 2012 appellant filed a claim for a schedule award.

On July 12, 2012 an OWCP medical adviser reviewed Dr. Lassen's report and May 22, 2012 audiogram. Based on the May 22, 2012 audiometric findings, he calculated that appellant sustained 1.875 percent monaural hearing loss in the right ear, 1.875 percent monaural hearing loss in the left ear or 1.875 percent binaural hearing loss. In calculating the impairment rating, the medical adviser found a zero percent impairment for tinnitus. He listed October 22, 2009 as the date of maximum medical improvement.

On October 4, 2012 OWCP granted a schedule award for a two percent binaural hearing loss for the period May 22 to June 18, 2012.

## **LEGAL PRECEDENT**

The schedule award provision of FECA<sup>2</sup> and its implementing regulations<sup>3</sup> 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.<sup>4</sup> The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.<sup>5</sup> Effective May 1, 2009, OWCP adopted the

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<sup>2</sup> 5 U.S.C. § 8107.

<sup>3</sup> 20 C.F.R. § 10.404.

<sup>4</sup> See *D.K.*, Docket No. 10-174 (issued July 2, 2010); *Michael S. Mina*, 57 ECAB 379 (2006).

<sup>5</sup> 20 C.F.R. § 10.404; see *F.D.*, Docket No. 09-1346 (issued July 19, 2010); *Billy B. Scoles*, 57 ECAB 258 (2005).

sixth edition of the A.M.A., *Guides* as the appropriate edition for all awards issued after that date.<sup>6</sup>

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.<sup>7</sup> Using the frequencies of 500, 1,000, 2,000 and 3,000 Hz, the losses at each frequency are added up and averaged.<sup>8</sup> 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.<sup>9</sup> The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.<sup>10</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 binaural hearing loss.<sup>11</sup> The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.<sup>12</sup> The Board has also noted OWCP's policy to round the calculated percentage of impairment to the nearest whole number.<sup>13</sup>

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to OWCP's medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified.<sup>14</sup>

### ANALYSIS

Applying OWCP's standard procedures to the May 22, 2012 audiogram, appellant's right ear recorded losses of 10, 10, 30 and 55 decibels at 500, 1,000, 2,000 and 3,000 Hz, respectively. The total loss was 105 decibels. When divided by 4, the result was an average hearing loss of 26.25 decibels. The average hearing of 26.25 decibels was reduced by the fence of 25 decibels to equal 1.25 decibels. This figure was then multiplied by the established factor of 1.5, yielding 1.875 percent monaural impairment of the right ear. At the same frequencies, appellant's left ear

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<sup>6</sup> Federal (FECA) Procedure Manual, Part 3 -- Claims, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 9, 2010). *See P.B.*, Docket No. 10-103 (issued July 23, 2010).

<sup>7</sup> A.M.A., *Guides* 250 (6<sup>th</sup> ed. 2009).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *J.H.*, Docket No. 08-2432 (issued June 15, 2009); *Thomas O. Bouis*, 57 ECAB 602 (2006); *Donald E. Stockstad*, 53 ECAB 301 (2002), *petition for recon. granted (modifying prior decision)*, Docket No. 01-1570 (issued August 13, 2002).

<sup>13</sup> *J.H.*, *supra* note 12; *J.Q.*, 59 ECAB 366 (2008); *Robert E. Cullison*, 55 ECAB 570 (2004). *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4(b)(2)(b) (January 2010).

<sup>14</sup> *See G.M.*, Docket No. 11-1295 (issued January 25, 2012); *C.K.*, Docket No. 09-2371 (issued August 18, 2010); *Frantz Ghassan*, 57 ECAB 349 (2006); *Tommy R. Martin*, 56 ECAB 273 (2005).

recorded losses of 15, 10, 25 and 55 decibels. The total loss was 105 decibels. When divided by 4, the result was an average hearing loss of 26.25 decibels. The average hearing of 28.25 decibels was reduced by the fence of 25 decibels to equal 1.25 decibels. This figure was then multiplied by the established factor of 1.5, yielding 1.875 monaural impairment of the left ear.

The binaural loss was calculated by taking the loss, 1.875, multiplying it by 5, (9.375) then adding it to the loss of 1.875, with the total divided by 6 to arrive at the amount of the binaural hearing loss of 1.875 which equals two percent after rounding.

Under FECA, the maximum award for 100 percent binaural hearing loss is 200 weeks of compensation. In this case, appellant is entitled to two percent of 200 weeks or 4 weeks of compensation. This was properly rounded up to two percent by OWCP.<sup>15</sup> Consequently, the evidence of record does not establish that appellant has greater than two percent binaural hearing loss.

On appeal counsel argues that appellant is entitled to a four percent binaural impairment based on Dr. Lassen's report and that OWCP's medical adviser does not explain why he found a lesser impairment. Dr. Lassen had added two percent due to tinnitus. The A.M.A., *Guides* provides that if tinnitus interferes with activities of daily living such as sleeping, reading and other tasks requiring concentration, up to five percent may be added to a measurable binaural hearing impairment.<sup>16</sup> The Board has held, however, that a claimant is not entitled to an additional schedule award where the record contains no medical evidence directly addressing the impact of tinnitus on appellant's activities of daily living.<sup>17</sup> The condition of tinnitus has not been accepted by OWCP as employment related and there is no medical evidence addressing whether tinnitus interfered with his activities of daily living. Appellant, therefore, has not established entitlement to compensation due to tinnitus.

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.

### CONCLUSION

The Board finds that appellant failed to establish that he has more than two percent binaural hearing loss.

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<sup>15</sup> The Board notes that OWCP policy is to round the calculated percentage of impairment to the nearest whole number. Federal (FECA) Procedure Manual, *supra* note 13 at Chapter 3.700.3(b) (January 2010). See *J.H.*, *supra* note 13.

<sup>16</sup> See A.M.A., *Guides* 249. See also *R.D.*, 59 ECAB 127 (2007).

<sup>17</sup> *R.D.*, *id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated October 4, 2012 is affirmed.

Issued: June 14, 2013  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board