

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

B.W., Appellant

and

**DEPARTMENT OF HOMELAND SECURITY,
U.S. COAST GUARD, Baltimore, MD, Employer**

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**Docket No. 13-2154
Issued: April 16, 2014**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 23, 2013 appellant filed a timely appeal from the June 12 and September 9, 2013 merit decisions of the Office of Workers' Compensation Programs (OWCP) granting him an increased schedule award. 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 this case.²

ISSUE

The issue is whether appellant has more than a 63 percent binaural (both ears) hearing loss for which he received schedule awards.

¹ 5 U.S.C. § 8101 *et seq.*

² By order dated February 26, 2014, the Board denied appellant's request for oral argument on the grounds that his arguments could adequately be addressed in a decision based on a review of the case record. *Order Denying Request for Oral Argument*, Docket No. 13-2154 (issued February 26, 2014).

FACTUAL HISTORY

This case has previously been before the Board. In a decision dated August 16, 2011, the Board affirmed an October 21, 2010 nonmerit decision denying appellant's request for reconsideration.³ By decision dated February 4, 2013, the Board set aside a March 30, 2012 decision denying his request for reconsideration as untimely and insufficient to establish clear evidence of error.⁴ The Board noted that OWCP had accepted that appellant sustained binaural hearing loss under file number xxxxxx627. OWCP granted him a schedule award on May 21, 1996 for 12 percent binaural hearing loss and a schedule award on April 16, 1999 for an additional 30 percent binaural hearing loss. The Board noted that appellant had requested an additional schedule award. OWCP, however, denied the claim under file number xxxxxx599 after finding that he should file a new occupational disease claim based on his additional noise exposure. The Board determined, however, that as a claim need not be on a particular form, appellant's informal written claim was sufficient to constitute a new occupational disease claim, and remanded the case for adjudication by OWCP. The facts and circumstances as set forth in the prior decisions are hereby incorporated by reference.

On remand OWCP prepared a statement of accepted facts that appellant sustained binaural hearing loss under master file number xxxxxx599 and file number xxxxxx627. It found that it would adjudicate the new occupational disease claim under master file number xxxxxx599, as the new hearing loss claim would be doubled into the master file number. OWCP requested that a medical adviser review the medical evidence to determine whether appellant was entitled to an additional schedule award for hearing loss.

On March 5, 2013 an OWCP medical adviser reviewed the June 19, 2008 report from Dr. Juan M. Pardo, an attending Board-certified otolaryngologist. In his June 19, 2008 evaluation, Dr. Pardo obtained audiological testing and diagnosed severe progressive sensorineural hearing loss. Testing for the left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second (cps) revealed decibel losses of 70, 55, 60 and 75, respectively. Testing for the right ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cps revealed decibel losses of 80, 75, 75 and 85, respectively. Dr. Pardo requested replacement hearing aids.

After reviewing Dr. Pardo's findings, 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 80, 75, 75 and 85 to

³ Docket No. 11-230 (issued August 16, 2011). In 1993 OWCP accepted that appellant, then a 54-year-old pipefitting foreman, sustained binaural hearing loss due to factors of his federal employment under subsidiary file number xxxxxx627. It granted him a schedule award on May 21, 1996 for a 12 percent binaural hearing loss. By decision dated April 16, 1999, OWCP granted appellant a schedule award for an additional 30 percent binaural hearing loss. In a decision dated December 4, 2008, it denied his claim for an increased schedule award due to hearing loss. OWCP advised appellant to file a new claim as he had additional noise exposure after it accepted his claim. In decisions dated February 25 and June 24, 2009, it modified its December 4, 2008 decision after finding that he did not establish a causal relationship between his increased hearing loss and work factors. In nonmerit decisions dated March 25 and October 21, 2010, OWCP denied appellant's request for reconsideration and again noted that he should file a new occupational disease claim.

⁴ Docket No. 12-1105 (issued February 4, 2013); *petition for recon. denied*, Docket No. 12-1105 (issued July 11, 2013).

equal 315. He divided this total by 4 to obtain the average hearing loss at those cycles of 78.75 decibels. The average of 78.75 decibels was then reduced by the 25-decibel fence to equal 53.75. Multiplying the balance of 53.75 by 1.5 resulted in an 80.63 percent monaural hearing loss for the right ear. The medical adviser totaled the 70, 55, 60 and 75 decibel losses in the left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cps to equal 260. He divided this total by 4 to obtain the average hearing loss at those cycles of 65 decibels. The average of 65 decibels was reduced by 25 decibels to equal a balance of 40 decibels. Multiplying the balance of 40 decibels by 1.5 resulted in a 60 percent monaural hearing loss for the left ear. The medical adviser multiplied 60, the lesser monaural loss, by 5, for a result of 300. He added the greater monaural loss of 80.63, to equal 380.62. The medical adviser divided the result of 380.62 by 6, to equal a 63.44 percent binaural sensorineural permanent hearing loss.

By decision dated June 12, 2013, OWCP granted appellant a schedule award for an additional 21 percent binaural hearing loss. As it had previously granted him a schedule award for 42 percent impairment, it subtracted from the total binaural hearing loss of 63 percent to find an additional 21 percent impairment. The period of the award ran for 42 weeks from June 19, 2008 to April 8, 2009.

On July 17, 2013 appellant requested reconsideration. He argued that OWCP should have treated his prior schedule awards as preexisting impairments in the calculation losses. Appellant asserted that prior awards were deducted only after the total numbers of weeks were calculated and not subtracted from the results of audiometric testing. Citing *R.D.*,⁵ he maintained that the Board found that it was improper to deduct a prior award from audiometric test results. Appellant also argued that he was entitled to an additional award for tinnitus.

By decision dated September 9, 2013, OWCP denied modification of its June 12, 2013 decision. It found that in *R.D.*, it had subtracted a schedule award for monaural loss from a later schedule award for binaural loss, which differed from appellant's case as the prior award was for a binaural loss.

On appeal appellant argued that OWCP should not have deducted his prior schedule awards from the audiometric test results under Board case law. He also maintains that OWCP's procedures indicate that preexisting impairments to the member are included in determining the percent of loss. Appellant cites *R.D.*⁶ As finding that a prior award is deducted only after calculating the total number of weeks for an award. He also alleged that he is entitled to a schedule award for tinnitus as it created difficulty for him in sleeping and performing activities of daily living.

⁵ 59 ECAB 127 (2007).

⁶ *Id.*

LEGAL PRECEDENT

The schedule award provision of FECA,⁷ and its implementing federal regulations,⁸ 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 for all claimants, OWCP has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the uniform standard applicable to all claimants.⁹ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.¹⁰

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.¹¹ Using the frequencies of 500, 1,000, 2,000 and 3,000 cps the losses at each frequency are added up and averaged.¹² The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.¹³ 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.¹⁴ The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.¹⁵

ANALYSIS

OWCP accepted that appellant sustained binaural hearing loss under file numbers xxxxxx627 and xxxxxx599. It paid him schedule awards for a total of a 42 percent binaural hearing loss. In an impairment evaluation dated June 19, 2008, Dr. Pardo diagnosed severe, progressive sensorineural hearing loss and conducted audiometric testing.

OWCP referred Dr. Pardo's findings to an OWCP medical adviser for calculation of a schedule award according to the A.M.A., *Guides*. The medical adviser properly applied OWCP's standardized procedures to the June 19, 2008 audiogram obtained by Dr. Pardo.

⁷ 5 U.S.C. § 8107.

⁸ 20 C.F.R. § 10.404.

⁹ *Id.* at § 10.404(a).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (February 2013); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

¹¹ A.M.A., *Guides* 250.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *See C.C.*, Docket No. 11-731 (issued October 11, 2011).

Testing for the left ear at the frequencies of 500, 1,000, 2,000 and 3,000 cps revealed losses of 70, 55, 60 and 75 decibels, respectively. These decibel losses were totaled at 260 and divided by 4 to obtain the average hearing loss per cycle of 65 decibels. The average of 65 was then reduced by the 25-decibel fence to equal 40 decibels for the left ear.¹⁶ Following the same mathematical procedure, the medical adviser totaled the 80, 75, 75 and 85 decibels losses in the right ear at the frequency levels of 500, 1,000, 2,000 and 3,000 cps to equal 315. He divided the total by 4 to obtain the average hearing loss at those cycles of 78.75 decibels, reduced by 25 decibels to equal 53.75.

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 60, is multiplied by 5, equaling 300, then added to the greater loss of 80.63 for a sum of 380.63 and the total is divided by 6 to arrive at the amount of the binaural hearing loss of 63.44 rounded down to 63 percent.¹⁷

The Board finds that OWCP's medical adviser applied the proper standards to the findings in Dr. Pardo's report and audiogram. The result is a 63 percent binaural hearing loss. Appellant previously received scheduled awards totaling a 42 percent binaural hearing loss. OWCP, therefore, properly determined that he was entitled to a schedule award for an additional 21 percent binaural loss.

On appeal appellant contends that, pursuant to *R.D.*, OWCP should not have subtracted the prior award from the audiometric test results but instead should have subtracted the prior award only after calculating the duration of the award in weeks. In *R.D.*, however, an OWCP medical adviser subtracted a prior award for a monaural hearing loss from the current audiometric test results for monaural hearing loss prior to applying the formula for calculating binaural hearing loss. In the instant case, an OWCP hearing representative did not subtract the prior award before applying the standardized procedures to Dr. Pardo's audiometric findings. He concluded that appellant had a total binaural hearing loss of 63 percent. From this percentage OWCP properly subtracted the prior award.

An employee is entitled to a maximum schedule award of 200 weeks of compensation for complete (100 percent) loss of hearing of both ears. Appellant's total schedule award based on his binaural hearing loss of 63 percent would be 126 weeks of compensation.¹⁸ On the other hand, an employee is entitled to a maximum schedule award for 52 weeks of compensation for a complete loss of hearing in one ear.¹⁹ Appellant's award for monaural hearing loss would thus be 42 weeks of compensation for right monaural hearing loss of 80 percent and 31 weeks of compensation for left monaural hearing loss of 60 percent, for a total monaural hearing loss of 73

¹⁶ The decibel fence is subtracted as it has been shown that the ability to hear every day 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.

¹⁷ 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).

¹⁸ 5 U.S.C. § 8107(c)(13)(B).

¹⁹ *Id.* at § 8107(c)(13)(A).

weeks. OWCP properly based its award on the binaural hearing loss as most favorable for appellant.

Appellant contends that he is entitled to an additional schedule award due to tinnitus. However, he has the burden to submit a medical report providing a rationalized opinion that a diagnosis of tinnitus affected his activities of daily living.²⁰ This appellant has not done.

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 has no more than a 63 percent binaural hearing loss for which he received schedule awards.

ORDER

IT IS HEREBY ORDERED THAT the September 9 and June 12, 2013 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 16, 2014
Washington, DC

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

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

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

²⁰ See *Joshua A. Holmes*, 42 ECAB 231 (1990).