

ISSUES

The issues in this case are: (1) whether appellant sustained more than a four percent monaural hearing loss, for which he received a schedule award; (2) whether OWCP used the proper pay rate in calculating appellant's schedule award; and (3) whether OWCP properly calculated appellant's schedule award at the augmented rate.

FACTUAL HISTORY

On May 4, 2012 appellant, then a 55-year-old supervisory agent, filed a recurrence of disability claim (Form CA-2a) alleging hearing loss as a result of noise exposure during his federal employment. He did not lose time from work due to his condition, but had difficulty understanding others in meetings or on the telephone. Appellant stated that his original injury occurred on July 16, 2002 and that the recurrence occurred on May 3, 2012. The employing establishment noted that he was exposed to work-related noise related to quarterly firearms qualification and that it had provided ear muffs and foam plugs for this activity.

By letter dated July 25, 2012, OWCP informed appellant that it would adjudicate his claim as an occupational disease and assign a new claim number. On March 22, 2013 it requested additional factual evidence from him. OWCP afforded appellant 30 days to submit the additional evidence. It also requested that the employing establishment respond to questions regarding the duties of his employment.

In a report dated May 3, 2012, Dr. Eugene S. Mackie, a Board-certified otolaryngologist, diagnosed appellant with tinnitus and sensorineural hearing loss. He noted that an audiogram performed on that date demonstrated bilateral normal to moderate hearing loss consistent with noise damage.

Appellant responded to OWCP's inquiries on April 15, 2013. He stated that he first noticed his hearing loss and realized that its relationship to his employment on February 12, 2007. Appellant previously filed a workers' compensation claim for hearing loss on August 14, 2007 but he did not receive benefits.³ He stated that he did not have any hobbies involving exposure to loud noise and that he was no longer exposed to hazardous noise at work. Appellant attributed his hearing loss to exposure to firearms and firearms qualifications, air pressure from a variety of aircraft during his tenure at the air branch unit in San Antonio, Texas and inadequate precautions and protective equipment supplied by the government during the 1980s and 1990s to protect his hearing.

In a statement dated April 15, 2013, appellant's supervisor noted that he had witnessed appellant's difficulty in hearing at meetings and other events. He recalled that in the 1980s and 1990s, border patrol agents and customs criminal investigators were not always provided with proper or adequate hearing protection.

³ The Board notes that OWCP created two case numbers dealing with the same injury, case numbers xxxxxx912 and xxxxxx215. Under case number xxxxxx215, on January 11, 2008, OWCP accepted appellant's claim for hearing loss, but found that it was not ratable under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

On June 14, 2013 OWCP referred appellant to Dr. William C. Smith, a Board-certified otolaryngologist, for a second opinion evaluation. It provided a statement of accepted facts listing appellant's federal employment history.

In a report dated July 8, 2013, Dr. Smith described appellant's examination and diagnosed bilateral high frequency sensorineural hearing loss. He opined that appellant's condition was due to noise exposure encountered during his federal civilian employment and recommended a trial of hearing aids. Dr. Smith submitted the results of an audiometric examination performed that day, which reflected testing at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second (cps) and revealed the following: right ear 20, 25, 20 and 45 decibels (dBs); left ear 20, 15, 25, 35 dBs, respectively. He did not recommend adding to appellant's binaural hearing impairment for tinnitus affecting activities of daily living.

On July 16, 2013 OWCP accepted that appellant sustained bilateral hearing loss due to occupational noise exposure. It authorized purchase of hearing aids. On July 22, 2013 appellant filed a claim for a schedule award, listing his wife and daughter as dependents.

In an August 6, 2013 report, Dr. H. Mobley, a district medical adviser, reviewed Dr. Smith's report and audiometric findings. He found that maximum medical improvement had been reached on July 8, 2013. Dr. Mobley opined that appellant had an employment-related hearing loss and noted that hearing aids were authorized. He calculated that, under the sixth edition of the A.M.A., *Guides*, appellant had a four percent ratable right monaural hearing loss.

In an e-mail dated December 3, 2012, the employing establishment informed OWCP that appellant had retired on January 3, 2013, with a pay rate of \$122,472.00 in salary and \$30,618.00 in Law Enforcement Availability Pay (LEAP). At the time of injury, February 12, 2007, the date he first realized that his hearing loss was work related, his pay rate was \$106,937.00 in salary and \$26,734.00 in LEAP.

On December 16, 2013 a claims examiner determined appellant's weekly total pay rate under a schedule award from July 8 through 22, 2013. She used the date of injury as the pay rate type, which was the date of last exposure or his retirement date of January 3, 2013. Adding appellant's base weekly pay rate of \$2,355.53 to his weekly LEAP pay rate of \$588.80, the claims examiner arrived at a total pay rate of \$2,944.04. She noted that the compensation rate was 75 percent based on his qualifying dependents.

By decision dated December 18, 2013, OWCP granted appellant a schedule award for a four percent right monaural hearing impairment, for a total of 2.08 weeks of compensation based on a weekly pay rate of \$2,944.04. It noted that the effective date of pay rate was July 7, 2013. OWCP calculated that, under the augmented compensation rate of 75 percent, appellant was entitled to \$736.01 per week and noted that his total payment was \$3,885.50 from July 8 through 22, 2013.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA⁴ and its implementing regulations⁵ 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.⁶ The A.M.A., *Guides* have been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁷

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.⁸ Using the frequencies of 500, 1,000, 2,000 and 3,000 hertz (Hz), the losses at each frequency are added up and averaged. Then, the fence of 25 dBs is deducted because, as the A.M.A., *Guides* point out, losses below 25 dBs 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 binaural hearing loss. The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.⁹

It is well established that the period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of the accepted employment injury. The Board has explained that maximum medical improvement means that the physical condition of the injured member of the body has stabilized and will not improve further. The determination of whether maximum medical improvement has been reached is based on the probative medical evidence of record and is usually considered to be the date of the evaluation by the attending physician which is accepted as definitive by OWCP.¹⁰

ANALYSIS -- ISSUE 1

The Board finds that appellant has a four percent right monaural hearing loss.

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

⁶ See *D.K.*, Docket No. 10-174 (issued July 2, 2010); *Michael S. Mina*, 57 ECAB 379, 385 (2006).

⁷ 20 C.F.R. § 10.404; see *F.D.*, Docket No. 09-1346 (issued July 19, 2010).

⁸ See A.M.A., *Guides* 250 (6th ed. 2009).

⁹ *J.H.*, Docket No. 08-2432 (issued June 15, 2009); *J.B.*, Docket No. 08-1735 (issued January 27, 2009).

¹⁰ *Mark A. Holloway*, 55 ECAB 321, 325 (2004).

Appellant's claim of occupational hearing loss was accepted by OWCP based on the reports of Dr. Smith and a district medical adviser. OWCP's standardized procedures were applied to Dr. Smith's July 8, 2013 report. Test results at the frequency levels recorded at 500, 1,000, 2,000 and 3,000 Hz on the left revealed decibel losses of 20, 15, 25, 35 dBs, respectively, for a total of 95 dBs. This figure, divided by four, results in an average hearing loss of 23.75 dBs. The average of 23.75 dBs, when reduced by the 25-dB fence and multiplied by 1.5, results in a zero percent monaural hearing loss of the left ear. Testing for the right ear at the frequency levels of 500, 1,000, 2,000 and 3,000 Hz revealed dB losses of 20, 25, 20 and 45 dBs, respectively, for a total loss of 110 dBs. One hundred ten dBs divided by 4 results in an average of 27.5 dB, which, when reduced by the 25-dB fence and multiplied by 1.5, results in a 3.75 percent monaural hearing loss of the right ear, which was rounded up to 4 percent.¹¹ The Board finds that Dr. Mobley properly used Dr. Smith's report to determine appellant's ratable hearing loss.

It is well established that, if calculations based on the monaural loss for each ear would result in greater compensation than calculations for binaural loss, then the monaural hearing loss calculations should be used.¹² In this case, appellant's compensation is greater under the procedures used for calculating monaural loss. The maximum number of weeks of compensation for binaural hearing loss is 200 weeks.¹³ Appellant's monaural hearing loss of the left ear is zero percent, whereas his monaural hearing loss of the right ear is four percent. Multiplying the lesser loss of zero percent by five arrives at a product of zero. Adding this figure to the four percent hearing loss for the right ear obtains a total of four. Dividing this total by 6 in order to calculate a binaural hearing loss yields a 0.67 percent binaural impairment. Multiplying 0.67 percent by 200 weeks equals 1.34 weeks of compensation. The maximum number of weeks of compensation for monaural hearing loss is 52 weeks.¹⁴ Appellant's right monaural hearing loss is four percent. Four percent of 52 weeks equals 2.08 weeks of compensation, the amount awarded in this case. Because the calculations for monaural hearing loss result in greater compensation than calculations for binaural hearing loss, OWCP properly used the monaural hearing loss calculation.¹⁵

There is no other medical evidence of record to establish greater loss under OWCP's procedures. The audiogram performed for Dr. Mackie does not meet the requirements of

¹¹ OWCP's procedures provide that in computing hearing loss, percentages should not be rounded until the final percent for award purposes is obtained and fractions should be rounded down from .49 or up from .50. Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4b(2)(b) (March 2005).

¹² *Reynaldo R. Lichtenberger*, 52 ECAB 462, 464 (2001).

¹³ 5 U.S.C. § 8107(c)(13)(B).

¹⁴ *Id.* at § 8107(c)(13)(A).

¹⁵ *See W.Z.*, Docket No. 11-1371 (issued January 6, 2012).

evidence to be used in evaluating occupational hearing loss claims as under the Federal (FECA) Procedure Manual, as it merely provides a graphical representation of the results of the test.¹⁶

On appeal, appellant argues that OWCP used an incorrect date of maximum medical improvement. As noted above, the date of maximum medical improvement is based on the probative medical evidence of record and is usually considered to be the date of the evaluation by the attending physician that is accepted as definitive by OWCP.¹⁷ The evaluation accepted as definitive by OWCP was Dr. Smith's July 8, 2013 report, which was reviewed and affirmed by Dr. Mobley. OWCP found the date of maximum medical improvement as July 8, 2013. It used the proper date of maximum medical improvement for schedule award purposes.

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.

LEGAL PRECEDENT -- ISSUE 2

Section 8107 of FECA provides that compensation for a schedule award shall be based on the employee's monthly pay.¹⁸ For all claims under FECA, 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[....]”¹⁹

In applying section 8101(4), the statute requires OWCP 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).²⁰

¹⁶ The requirements of the evidence to be used in evaluating occupational hearing loss claims are defined by the Federal (FECA) Procedure Manual, which provides: that the employee should undergo audiological evaluation and otological examination; that the audiological testing precede the otologic examination; that the audiological evaluation and otologic examination be performed by different individuals as a method of evaluating the reliability of the findings; that the clinical audiologist and otolaryngologist be certified; that all audiological equipment authorized for testing meet the calibration protocol contained in the accreditation manual of the American Speech and Hearing Association; that the audiometric test results include both bone conduction and pure-tone air conduction thresholds; speech reception thresholds and monaural discrimination scores; and that the otolaryngologist's report include the date and hour of examination; date and hour of the employee's last exposure to loud noise; and a rationalized medical opinion regarding the relationship. *Supra* note 11 at Chapter 3.600, Requirements for Medical Reports, Exhibit No. 4 (April 1996).

¹⁷ *Supra* note 10.

¹⁸ 5 U.S.C. § 8107.

¹⁹ *Id.* at § 8101(4).

²⁰ See *Robert A. Flint*, 57 ECAB 369, 374 (2006).

ANALYSIS -- ISSUE 2

The Board finds that OWCP used the proper pay rate in calculating appellant's schedule award.

In all situations, including those involving a schedule award, compensation is to be based on the pay rate either at the time of injury, the rate at the time disability for work begins or the rate at the time of recurrence of disability of the type described in section 8101(4) of FECA, whichever is greater.²¹ Where an injury is sustained over a period of time, as in this case, the date of injury is the date of last exposure to the employment factors causing the injury.²² In determining the amount of compensation payable under the schedule award, OWCP properly used the pay rate of \$2,944.04 per week, which was the rate in effect on January 3, 2013, the date of appellant's retirement and last exposure to hazardous noise.

The Board notes that OWCP's December 18, 2013 schedule award incorrectly lists the effective date of pay rate as July 7, 2013. The Board finds that, although OWCP listed an incorrect date of injury, this was harmless error because OWCP used the proper pay rate, the date of last exposure, January 3, 2013, to calculate his schedule award.

Thus, the Board finds that OWCP used the proper pay rate in calculating appellant's schedule award.

LEGAL PRECEDENT -- ISSUE 3

The basic rate of compensation under FECA is 66 2/3 percent of the injured employee's monthly pay. Where the employee has one or more dependents as defined in FECA, he or she is entitled to have his or her basic compensation augmented at the rate of 8 1/3 percent, for a total of 75 percent of monthly pay.²³

ANALYSIS -- ISSUE 3

Appellant received a schedule award for four percent right monaural hearing loss which was paid at the augmented rate of 75 percent of his monthly pay. OWCP accepted his entitlement to the augmented compensation rate as he reported having a wife and a daughter as dependents. The Board notes that OWCP incorrectly listed that 75 percent of appellant's \$2,944.04 weekly pay rate was \$736.01, when the correct amount was \$2,208.03. OWCP also incorrectly calculated the total schedule award payment as \$3,885.50 from July 8 through 22, 2013: \$736.01 multiplied by 2.08 weeks is \$1,530.90, while the correct weekly compensation of \$2,208.03, multiplied by 2.08 weeks, totals \$4,592.70. An examination of appellant's compensation history reveals that OWCP paid appellant \$3,885.50 on December 20, 2013.

²¹ See *supra* note 12; see also *Charles P. Mulholland*, 48 ECAB 604, 605-06 (1997).

²² *Barbara A. Dunnivant*, 48 ECAB 517, 519 (1997); *Sherron A. Roberts*, 47 ECAB 617, 619 (1996).

²³ 5 U.S.C. § 8110(b); see also *William G. Dimick*, 38 ECAB 751 (1987).

The Board finds that OWCP incorrectly calculated appellant's schedule award in its December 18, 2013 decision. The case will be remanded to correctly calculate his schedule award. It shall then issue an appropriate *de novo* decision.

CONCLUSION

The Board finds that appellant has a four percent right monaural hearing loss. The Board finds that OWCP used the proper pay rate for compensation purposes in its December 18, 2013 decision, but did properly calculate appellant's schedule award.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 18, 2013 is affirmed in part and set aside in part and remanded for further development consistent with this decision.

Issued: July 2, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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