

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

R.R., Appellant)
and) **Docket No. 14-2031**
DEPARTMENT OF HOMELAND SECURITY,) **Issued: March 9, 2015**
IMMIGRATION & CUSTOMS)
ENFORCEMENT, Irving, TX, Employer)

Appearances:
Debra Hauser, *Esq.*, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 22, 2014 appellant, through counsel, filed a timely appeal from an August 6, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). 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.

ISSUES

The issues are: (1) whether appellant received an overpayment in the amount of \$2,134.89 because OWCP paid him compensation for a schedule award to which he was not entitled; and (2) whether OWCP properly denied waiver of recovery of the overpayment.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On April 20, 2012 appellant, then a 51-year-old special agent, filed an occupational disease claim alleging hearing loss causally related to factors of his federal employment. OWCP accepted the claim for bilateral hearing loss.

On April 24, 2012 appellant filed a claim for a schedule award. On July 13, 2012 OWCP referred him to Dr. Donald N. Matheson, a Board-certified otolaryngologist, for a second opinion examination. In a report dated August 8, 2012, Dr. Matheson diagnosed noise-induced high frequency hearing loss due to noise exposure in the course of his federal employment. He found that an August 8, 2012 audiogram revealed a zero percent monaural impairment of the right ear and a two percent monaural impairment of the left ear, for a total binaural impairment of zero percent. Dr. Matheson additionally found that appellant had a five percent binaural impairment due to tinnitus.

On August 30, 2012 an OWCP medical adviser found that appellant had a five percent impairment due to tinnitus.

By decision dated October 3, 2012, OWCP granted him a schedule award for five percent binaural hearing loss. It paid appellant compensation for 10 weeks from August 8 to October 16, 2012.

In a report dated October 18, 2012, Dr. Courtney A. Noell, a Board-certified otolaryngologist, performed an audiogram and diagnosed sensorineural hearing loss and tinnitus. On October 24, 2012 Dr. Joseph P. Santiago, Board-certified in family practice, related that an October 18, 2012 audiogram showed bilateral sensorineural hearing loss consistent with noise exposure.

On October 30, 2012 appellant requested a review of the written record by an OWCP hearing representative.

Following a preliminary review of the record, on February 20, 2013 OWCP hearing representative vacated the October 3, 2012 decision. She found that appellant was entitled to a schedule award for a two percent monaural loss of hearing in the left ear in addition to the five percent impairment given for tinnitus. The hearing representative additionally determined that appellant had submitted medical evidence from Dr. Santiago showing a possible greater hearing loss. She remanded the case for further development and the issuance of an amended schedule award.

On March 1, 2013 an OWCP medical adviser reviewed the October 18, 2012 audiogram and medical evidence from Dr. Santiago. He found that, while Dr. Santiago's audiogram did not conform to OWCP procedures, it supported possible additional hearing loss. The medical adviser recommended obtaining another impairment evaluation. On March 25, 2013 OWCP referred appellant to Dr. Thomas Cadenhead, a Board-certified otolaryngologist, for a second opinion evaluation.

By decision dated April 10, 2013, OWCP granted appellant a schedule award for a two percent loss of hearing of the left ear. The period of the award ran for 1.04 weeks from October 17 to 24, 2012.

In an impairment evaluation dated April 23, 2013, Dr. Cadenhead diagnosed noise-induced hearing loss, bilateral sensorineural hearing loss, and tinnitus due to noise exposure in the course of appellant's employment. An audiogram performed on April 23, 2013 recorded decibel (dB) losses of 25, 25, 25, and 25 for the right ear and 40, 25, 35, and 45 for the left ear at 500, 1,000, 2,000, and 3,000 Hertz (Hz), respectively. In an attached hearing evaluation, Dr. Cadenhead found that appellant had no impairment of the right ear and a 16.5 percent monaural impairment of the left ear. He further determined that appellant had a 2.75 binaural hearing impairment and a 5 percent impairment due to tinnitus, for a total binaural hearing impairment of 7.75 percent.

On April 28, 2013 appellant requested a review of the written record on the April 10, 2013 decision.

In a report dated May 8, 2013, amended June 11, 2013, an OWCP medical adviser calculated appellant's hearing loss using the April 23, 2013 audiogram. He added the dB losses in the left ear for 500, 1,000, 2,000, and 3,000 Hz of 40, 25, 35, and 45 for a total dB loss of 145. The medical adviser divided this by 4 to find an average hearing loss of 36.3 and subtracted the fence of 25 dB to equal 11.3. He multiplied the 11.3 by 1.5 to find a 17 percent monaural loss in the left ear. For the right ear, the medical adviser added the dB losses of 25, 25, 25, and 25, to find a total of 100, which he divided by 4 to find an average dB loss of 25. He subtracted the fence of 25 dB to find no ratable monaural loss in the right ear. The medical adviser multiplied the hearing loss of 0 for the right ear by 5, added the 17 percent left monaural loss and divided the total by 6, which resulted in a rounded result of a 3 percent binaural hearing loss. He added five percent for tinnitus to find a total binaural hearing loss of eight percent. The medical adviser noted that appellant had previously received a schedule award for a five percent binaural hearing loss and a two percent monaural loss of the left ear. He determined that the two percent left ear monaural loss equaled a 0.33 binaural loss, which he rounded down to 0. The medical adviser concluded that appellant was entitled to a schedule award for an additional three percent binaural loss.

By decision dated June 18, 2013, OWCP granted appellant a schedule award for an additional three percent impairment for binaural hearing loss. The period of the award ran for six weeks from April 23 to June 3, 2013.

In a decision dated December 11, 2013, an OWCP hearing representative reversed the April 10, 2013 decision granting appellant a schedule award for a two percent hearing loss of the left ear. She noted that OWCP had subsequently developed the medical evidence and found that he had an eight percent binaural hearing loss. The hearing representative noted that OWCP paid appellant 70 days of compensation for a five percent monaural loss, 8 days of compensation for a two percent left ear monaural loss and 42 days of compensation for an additional three percent binaural loss, which totaled 120 days of compensation. She found, however, that he should have only received 112 days of compensation for an eight percent binaural hearing loss, and instructed OWCP to develop the overpayment issue.

On January 7, 2014 OWCP multiplied the daily amount of compensation for each 28-day period, \$266.86 by 8 to find an overpayment of \$2,124.89.

By letter dated February 3, 2014, OWCP notified appellant of its preliminary determination that he received an overpayment of \$2,134.89 for the period May 27 to June 3, 2013 because it overpaid the schedule award compensation. It further advised him of its preliminary determination that he was not at fault in the creation of the overpayment. OWCP requested that appellant complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, it notified him that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence, or a precoupment hearing.

On February 17, 2014 appellant submitted an overpayment action form requesting a decision on the written evidence. He challenged the finding that he received an overpayment of compensation. In his February 17, 2014 response to the preliminary overpayment finding, appellant's counsel argued that an OWCP medical adviser determined that he was entitled to an additional three percent binaural hearing loss in addition to the previously awarded five percent binaural hearing loss and two percent monaural left hearing loss.

By decision dated August 6, 2014, OWCP determined that appellant received an overpayment of \$2,134.89 for the period May 27 to June 3, 2013 because he received 120 days of compensation for an eight percent binaural hearing loss instead of the correct amount of 112 days of compensation. It further found that he had not submitted evidence showing that he was entitled to waiver of recovery of the overpayment. OWCP found that it should request payment of the entire amount within 30 days.

On appeal appellant's counsel contends that appellant did not receive an overpayment of compensation. She argues that he received three separate and appropriate schedule award decisions. Counsel notes that each award was based on findings by the medical adviser who took into account the prior awards. She asserts that the hearing representative rescinded a schedule award without a clear explanation. Counsel cites to the finding by the medical adviser that the previously awarded two percent monaural hearing loss equaled a 0.33 binaural hearing loss, which rounded to zero percent, and that consequently he was entitled to an additional three percent binaural impairment in addition to the previously paid five percent binaural hearing loss and two percent impairment of the left ear.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA,² and its implementing federal regulations,³ 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

² 5 U.S.C. § 8107.

³ *Id.* at § 10.404.

the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*) as the uniform standard applicable to all claimants.⁴ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁵

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.⁶ Using the frequencies of 500, 1,000, 2,000, and 3,000 Hz, the losses at each frequency are added up and averaged. Then, the fence of 25 dB is deducted because, as the A.M.A., *Guides* point out, losses below 25 dB 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.⁷

FECA's implementing regulations prohibit the payment of duplicative schedule awards for the same member by the following provision:

“(c) The period of compensation payable under 5 U.S.C. § 8107(c) shall be reduced by the period of compensation paid or payable under the schedule for an earlier injury if--

(1) Compensation in both cases is for impairment of the same member or function or different parts of the same member or function or for disfigurement; and

(2) [OWCP] finds that compensation payable for the later impairment in whole or in part, would duplicate the compensation payable for the preexisting impairment.”⁸

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.⁹ The A.M.A., *Guides* state that, if tinnitus interferes with activities of daily living (ADLs), including sleep, reading (and other tasks requiring concentration), enjoyment of quiet recreation and emotional well-being, up to five

⁴ *Id.* at § 10.404(a).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

⁶ A.M.A., *Guides* 250.

⁷ *See J.H.*, Docket No. 08-2432 (issued June 15, 2009); *J.B.*, Docket No. 08-1735 (issued January 27, 2009).

⁸ 20 C.F.R. § 10.404(c).

⁹ A.M.A., *Guides* 249.

percent may be added to a measurable binaural hearing impairment.¹⁰ A schedule award for tinnitus is not payable unless the medical evidence establishes that the condition caused or contributed to a ratable hearing loss.¹¹

If a claimant receives a schedule award and the medical evidence does not support the degree of permanent impairment awarded, an overpayment of compensation may be created.¹²

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained bilateral hearing loss due to factors of his federal employment. On August 8, 2012 Dr. Matheson, an OWCP referral physician, found that appellant had a two percent monaural hearing loss of the left ear and no ratable hearing loss of the right ear, which yielded a zero percent binaural impairment. He further found a five percent binaural impairment due to tinnitus. On October 3, 2012 OWCP granted appellant a schedule award for a five percent binaural hearing loss due to tinnitus. The period of the award ran for 10 weeks. However, an impairment due to tinnitus is not payable absent a measurable binaural hearing impairment.¹³ As appellant did not have a measurable binaural hearing impairment, he was not entitled to a five percent binaural impairment due to tinnitus.

On February 20, 2013 an OWCP hearing representative determined that appellant was entitled to a schedule award for a two percent left monaural hearing loss in addition to the five percent binaural hearing loss rating due to tinnitus. She further noted that appellant had submitted an October 18, 2012 audiogram and medical evidence. In a decision dated April 10, 2013, OWCP granted him a schedule award for a two percent left monaural hearing loss, in addition to the previously awarded five percent binaural hearing loss. The period of the award ran for 1.04 weeks, or 7.28 days.

On March 25, 2013 OWCP referred appellant to Dr. Cadenhead for a second opinion examination. In a report dated April 23, 2013, Dr. Cadenhead diagnosed noise-induced hearing loss, bilateral sensorineural hearing loss, and tinnitus due to noise exposure at work. An audiogram performed on his behalf yielded dB losses of 25, 25, 25, and 25 for the right ear and 40, 25, 35, and 45 for the left ear at 500, 1,000, 2,000, and 3,000 Hz.

On May 8, 2013 OWCP medical adviser applied the formula for determining hearing loss. He added the dB losses in the left ear which totaled 145. The medical adviser divided 145 by 4, which yielded an average of 36.3, and subtracted the fence of 25 dB to equal 11.3. He multiplied the 11.3 by 1.5 to find a 17 percent left monaural hearing loss. For the right ear, OWCP medical adviser totaled the decibel loss to equal 100, which he divided by 4 to find an

¹⁰ *Id.*; see also *J.M.*, Docket No. 14-982 (issued August 26, 2014).

¹¹ See *Charles H. Potter*, 39 ECAB 645 (1988).

¹² See *L.C.*, Docket No. 09-2274 (issued July 7, 2010); *M.S.*, Docket No. 08-2070 (issued September 11, 2009); see also *Richard Saldibar*, 51 ECAB 585 (2000) (the Board found that the overpayment issue was not in posture because OWCP had not properly resolved the schedule award issue).

¹³ A.M.A., *Guides* 249.

average decibel loss of 25. He subtracted the fence of 25 dBs to find a 0 percent monaural right hearing loss. The medical adviser multiplied the hearing loss of 0 for the right ear by 5, added the 17 percent left monaural loss and divided the total by 6, which yielded a rounded 3 percent binaural hearing loss. He added a five percent for tinnitus to find a total binaural hearing loss of eight percent.

OWCP medical adviser found that the prior award for a two percent monaural hearing loss of the left ear equaled a 0.33 binaural hearing loss, which he rounded down to zero. He subtracted the prior award for a five percent binaural hearing loss to find that appellant was entitled to an additional binaural hearing loss award of three percent. There is no probative evidence establishing that appellant is entitled to a greater award for binaural hearing loss. Further, the total binaural award of 8 percent provides schedule award compensation for 16 weeks, or 112 days, while a monaural hearing loss of 17 percent provides compensation for a schedule award for 8.84 weeks, or 61.88 days.¹⁴ OWCP, consequently, properly based his schedule award on his binaural hearing loss.

On appeal counsel argues that appellant did not receive an overpayment of compensation but instead received separate awards based on findings by OWCP medical adviser that included consideration of the prior awards. However, as discussed, OWCP should not have paid the initial award for a five percent binaural loss as it was based on tinnitus without a measurable binaural hearing loss.¹⁵ It determined that appellant received an overpayment of compensation because on August 30, 2012 it paid him compensation for 70 days for a five percent binaural hearing loss, on April 10, 2013 it paid him 7.28 days for a two percent monaural loss of the left ear, and on June 18, 2013 paid him 42 days for an additional three percent binaural hearing loss, for a total of 119.28 days. For a total binaural hearing loss of eight percent, however, FECA provides for compensation for 112 days, a difference of 7.28 days. OWCP, consequently, properly determined that appellant received an overpayment of compensation. It determined, however, that it overpaid him by 8 days rather than the proper amount of 7.28 days. Consequently, while the evidence establishes that appellant received an overpayment of compensation, the case is not in posture for decision regarding the amount of the overpayment.¹⁶ The Board will remand the case for OWCP to recalculate the overpayment of compensation.

CONCLUSION

The Board finds that appellant received an overpayment of compensation but that the case is not in posture regarding the amount of the overpayment.

¹⁴ The maximum number of weeks of compensation for hearing loss in one ear is 52 weeks and for both ears is 200 weeks. 5 U.S.C. 8107(c)(13). Seventeen percent of 52 weeks is 8.84 weeks of compensation. Eight percent of 200 weeks is 16 weeks of compensation. OWCP, therefore, properly paid appellant based on the binaural hearing loss calculation as it was the greater amount. See *Reynaldo R. Lichtenberger*, 52 ECAB 462 (2001).

¹⁵ See *supra* note 13.

¹⁶ As the case is not in posture regarding the amount of the overpayment, it is premature to address the issue of waiver of recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the August 6, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: March 9, 2015
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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