

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

S.R., Appellant

and

**U.S. POSTAL SERVICE, PHILADELPHIA
NETWORK DISTRIBUTION CENTER,
Philadelphia, PA, Employer**

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**Docket No. 14-1856
Issued: November 20, 2015**

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 18, 2014 appellant, through counsel, filed a timely appeal from an August 14, 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.

ISSUE

The issue is whether appellant sustained more than two percent left monaural hearing loss, for which he received a schedule award.

On appeal, counsel contends that when OWCP issued its decision accepting as work-related appellant's left hearing loss, OWCP also effectively denied the claim for right-sided hearing loss. He argues that the Board has jurisdiction and should decide the propriety of OWCP's denial of the hearing loss for appellant's right-sided hearing loss.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On August 23, 2013 appellant, then a 58-year-old distribution machine operator, filed an occupational disease claim (Form CA-2) alleging hearing loss as a result of high levels of noise exposure until his retirement in January 2013. He first became aware of his condition and its relationship to his employment on September 23, 1999, and continued to be exposed to high levels of noise at work until January 20, 2013.

In a report dated February 18, 2013, Dr. Natasha Pollak, a Board-certified otolaryngologist, diagnosed mild-to-moderate high frequency sensorineural hearing loss of the left ear. She stated that appellant's right ear was deaf with no word recognition, but that its etiology was uncertain. Dr. Pollak noted that his deaf right ear could represent end-stage Ménière's disease, but that other etiologies were possible. She stated that appellant was diagnosed with right ear Ménière's disease 20 years ago, along with right-sided tinnitus, and has had no hearing in his right ear for approximately 20 years. Appellant noted that the left-sided hearing loss began only in the past four years.

Audiometric testing taken on February 14, 2013 for the left ear at the frequency levels of 500, 1,000, 2,000, and 3,000 cycles per second revealed 10, 30, 20, and 25 decibels. Testing for the right ear did not include decibel loss at 3,000 cycles per second, but indicated severe-to-profound hearing loss. Appellant also submitted reports from 1985 through 2013 documenting periodic visits to physicians regarding his left-sided hearing loss.

In a statement dated June 12, 2013, appellant stated that from January 1981 through January 2013, he was a distribution machine clerk, dock clerk, and a claims and inquiry clerk at the employing establishment. He stated that he was exposed to noise from a towline, sorting machines, container unloaders, forklifts, towmoters transporting mail, and a loud public address system. Appellant noted that the noise was continuous throughout this time period, and stated that he did not wear hearing protection until he was told his hearing was deteriorating. He retired from the employing establishment on January 31, 2013.

Appellant submitted narrative statements from three witnesses supporting the allegation that the employing establishment had high levels of noise from April 1980 through January 2013.

OWCP referred appellant, along with a statement of accepted facts, to Dr. Emil Liebman, a Board-certified otolaryngologist, for a second opinion evaluation. In a February 19, 2014 report, Dr. Liebman diagnosed bilateral sensorineural hearing loss, with profound loss on the right. He opined that appellant's left-sided hearing loss was due to noise exposure in appellant's Federal civilian employment, but that his right-sided hearing loss was not due to work-related noise exposure. Rather it was due to long-term Ménière's disease. Audiometric testing for the left ear at the frequency levels of 500, 1,000, 2,000, and 3,000 cycles per second revealed 15, 35, 25, and 30 decibels.

On April 10, 2014 OWCP accepted appellant's claim for left noise-induced hearing loss.

Appellant filed a claim for a schedule award on May 15, 2014. By letter dated May 6, 2014, appellant's counsel requested a decision supported by rationale and providing appeal rights explaining why appellant's right-sided hearing loss and tinnitus were not in any way related to noise exposure in his federal employment, noting that appellant's claim had only been accepted for left-sided hearing loss.

By letter dated June 6, 2014, OWCP advised that appellant's right-sided hearing loss had not been accepted because he had preexisting Ménière's disease that predated the date of injury. It noted that his claim for a schedule award for the left-sided hearing loss had been forwarded to an audiologist and a district medical adviser for an impairment evaluation.

By letter dated June 9, 2014, appellant's counsel again requested a final decision with appeal rights concerning the denial of appellant's claim for right-sided hearing loss and tinnitus.

OWCP forwarded Dr. Liebman's report to a district medical adviser for review and an impairment rating under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). In a June 16, 2014 report, the medical adviser concluded that, in accordance with the sixth edition of the A.M.A., *Guides*, appellant had a 1.88 percent left monaural hearing loss. He stated, "Medical and audiology records reviewed. Based upon noise exposure during federal employment, a [schedule award] is indicated for the left ear only. The right ear hearing loss is due to Ménière's disease and is not due to loud noise injury."

By decision dated August 14, 2014, OWCP issued a schedule award for two percent monaural impairment of appellant's left ear, or 1.04 weeks of compensation. It based its decision on the medical findings and reports of Dr. Liebman and its medical adviser.

LEGAL PRECEDENT

The schedule award provision of FECA² and its implementing regulations³ 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.⁴ The A.M.A., *Guides* have been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁵

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404.

⁴ See *D.K.*, Docket No. 10-174 (issued July 2, 2010); *Michael S. Mina*, 57 ECAB 379, 385 (2006).

⁵ *Supra* note 3; see *F.D.*, Docket No. 09-1346 (issued July 19, 2010).

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 cycles per second, the losses at each frequency are added up and averaged. Then, the fence of 25 decibels is deducted because, as the A.M.A., *Guides* point out, losses below 25 decibels 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

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.⁸

ANALYSIS

The Board finds that appellant has failed to establish more than two percent left monaural hearing loss, for which he received a schedule award.

Dr. Liebman, OWCP's referral physician, concluded that appellant sustained bilateral sensorineural hearing loss, with profound loss on the right. He stated that appellant's left-sided hearing loss was due to noise exposure in appellant's Federal civilian employment. OWCP's medical adviser reviewed Dr. Liebman's report and audiometric findings and applied standardized procedures to the results of the February 19, 2014 audiogram to find that appellant had 1.88 percent left monaural hearing loss. Testing at 500, 1,000, 2,000, and 3,000 cycles per seconds reflected decibel losses of 15, 35, 25, and 30 decibels, for a total of 105 decibels, and an average hearing loss of 26.25 decibels. The average loss of 26.25 decibels, when reduced by the fence of 25 decibels, equals 1.25 decibels. Multiplying this loss by a factor of 1.5 results in 1.88 percent impairment or 2 percent after rounding up. Complete loss of hearing under FECA provides for 52 weeks of compensation. A two percent schedule award for monaural hearing would equal 2 percent of 52 weeks or 1.04 weeks of compensation. Thus, the Board finds that the medical adviser correctly applied the A.M.A., *Guides* to the findings of the February 19, 2014 audiogram and properly concluded that appellant had two percent ratable impairment of the left ear, or 1.04 weeks of compensation.

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

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

⁸ *Mark A. Holloway*, 55 ECAB 321, 325 (2004).

The Board notes that OWCP has not yet issued a final decision with regards to appellant's right-sided hearing loss. The letter dated June 6, 2014 to counsel constituted an informational letter. The Board has jurisdiction to consider and decide appeals from final decisions of OWCP. The Board does not have jurisdiction with respect to any interlocutory matters.⁹ As OWCP has not issued a decision denying right-sided hearing loss, there is no final adverse decision before the Board. As of June 6, 2014, OWCP had failed to issue a proper denial of the claim for employment-related right-sided hearing loss. Until OWCP issues an adverse decision on that aspect of the timely filed occupational disease claim, the Board cannot address the issue.

The case cited by counsel in support of the Board's authority to order a final decision on the matter of appellant's right-sided hearing loss, *B.C.*, Docket No. 11-1903 (issued March 26, 2012) is inapposite, as in that case the Board remanded on the basis of an incomplete case record, whereas in this case there is no indication that the record is incomplete. Unlike in *B.C.*, the letter dated June 6, 2014 does not reference a decision denying compensation that is missing from the case record, or effectively denying his claim for right-sided hearing loss. Instead, it merely informs appellant as to why his claim had only been accepted for left-sided hearing loss. OWCP should still issue a final decision as to appellant's right-sided hearing loss, with findings of fact, and appropriate appeal rights.

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 two percent left monaural hearing loss, for which he received a schedule award.

⁹ 20 C.F.R. § 501.2(c); *Jennifer A. Guillary*, 57 ECAB 485 (2005).

ORDER

IT IS HEREBY ORDERED THAT the August 14, 2014 decision of the Office of Workers' Compensation Programs is affirmed.¹⁰

Issued: November 20, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

¹⁰ James A. Haynes, Alternate Judge, participated in the original decision but was no longer a member of the Board effective November 16, 2015.