



## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>2</sup> The facts and circumstances of the case as set forth in the Board's prior decisions are incorporated herein by reference. The facts relevant to this claim are set forth below.

On November 9, 2009 appellant, then a 70-year-old supply technician, filed an occupational disease claim (Form CA-2) alleging that he sustained bilateral hearing loss due to his work in areas of high noise levels at the employing establishment.<sup>3</sup> The record reflects that appellant had retired from federal employment on January 6, 1995.

OWCP denied appellant's claim in a decision dated February 4, 2010. It found that the medical evidence failed to demonstrate that his hearing loss resulted from noise exposure at the employment establishment.

Appellant filed an appeal before the Board. In a decision dated February 4, 2011, the Board set aside OWCP's February 4, 2010 denial decision and remanded appellant's case to OWCP for further development. It requested that OWCP combine appellant's current claim with his previously accepted claim for left ear hearing loss and further develop the medical evidence to determine the extent of any permanent impairment related to his binaural hearing loss.<sup>4</sup>

OWCP referred appellant's claim, along with a statement of accepted facts (SOAF) and the record, to Dr. William R. Lomax, a Board-certified otolaryngologist and second opinion examiner to determine whether appellant sustained bilateral sensorineural hearing loss as a result of noise exposure during his federal employment. In a report dated April 27, 2011, Dr. Lomax reviewed appellant's history and provided findings on physical examination. Audiometric testing was completed on April 25, 2011 and he diagnosed bilateral neurosensory hearing loss and bilateral tinnitus and opined that appellant's hearing loss was consistent with his history of noise exposure at the employing establishment. He applied appellant's audiometric test results to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) and determined that appellant had 39 percent permanent impairment due to binaural hearing loss.

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<sup>2</sup> In a decision dated February 4, 2011, the Board set aside OWCP's February 4, 2010 decision denying appellant's occupational disease claim and remanded the case for further development. Docket No. 10-1013 (issued February 4, 2011). In a decision dated May 7, 2012, the Board affirmed OWCP's July 27, 2011 decision, which found that appellant had not established that he had sustained more than 39 percent binaural hearing loss, for which he previously received a schedule award. Docket No. 12-15 (issued May 7, 2012). By order dated January 7, 2013, the Board denied appellant's May 30, 2012 petition for reconsideration because he failed to cite to any error of fact or law on the part of the Board. *Order Denying Petition for Reconsideration*, Docket No. 12-15 (issued January 7, 2013). In an order dated July 1, 2013, the Board dismissed appellant's appeal because the case record did not contain a final adverse decision of OWCP over which the Board had jurisdiction. *Order Dismissing Appeal*, Docket No. 13-1811 (issued July 1, 2013).

<sup>3</sup> Under File No. xxxxxx735, appellant has a previously accepted claim for employment-related monaural hearing loss in his left ear, for which he was granted a schedule award for 18 percent permanent impairment of the left ear.

<sup>4</sup> *Supra* note 1.

On May 2, 2011 an OWCP medical adviser reviewed Dr. Lomax's April 27, 2011 second opinion report and calculated that appellant had 34 percent binaural hearing loss and 5 percent impairment due to bilateral tinnitus for a total of 39 percent permanent impairment pursuant to the A.M.A., *Guides*. He noted that appellant's prior schedule award should be subtracted from appellant's current schedule award in weeks with appellant receiving the difference.

In a decision dated May 3, 2011, OWCP accepted appellant's claim for binaural sensorineural hearing loss and bilateral subjective tinnitus.

On July 25, 2011 appellant filed a claim for a schedule award (Form CA-7) due to his binaural hearing loss with tinnitus.

OWCP granted appellant a schedule award for 39 percent binaural hearing loss with tinnitus in a decision dated July 27, 2011. The award ran for 78 weeks. Because appellant was previously paid a schedule award for 9.36 weeks, OWCP determined that he was entitled to a remaining balance for 68.64 weeks.

Appellant filed an appeal before the Board. In a decision dated May 7, 2012, the Board affirmed OWCP's July 27, 2011 decision. The Board found that appellant had not established that he had sustained more than 39 percent binaural hearing loss, for which he had previously received a schedule award.<sup>5</sup>

On June 25, 2014 appellant filed a claim for an increased schedule award (Form CA-7).

By letter dated July 3, 2014, OWCP advised appellant that the evidence received was insufficient to support his claim for increased schedule award due to his employment-related binaural hearing loss. It requested that he respond to the attached questionnaire in order to substantiate the factual element of his claim. Appellant was afforded 30 days to submit the additional information.

On July 28, 2014 OWCP received appellant's response to its questionnaire. Appellant indicated that he was exposed to hazardous noise eight hours per day at the employing establishment. He noted that he had not worked since 1995 and was no longer exposed to any hazardous noise.

OWCP referred appellant's claim, along with an updated SOAF and the record, to Dr. Rocco Cassone, a Board-certified otolaryngologist, for a second opinion examination to determine whether appellant sustained additional hearing loss causally related to his federal noise exposure.

In a November 5, 2014 report, Dr. Cassone reviewed appellant's history of noise exposure. He related that appellant complained of worsening left ear hearing loss and ringing. Dr. Cassone indicated that according to the sixth edition of the A.M.A., *Guides* appellant had 35.62 percent hearing loss in the right ear, 45 percent hearing loss in the left ear, and 37.18

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<sup>5</sup> See *supra* note 2.

percent hearing loss in both ears. He provided the audiometric test results and his calculations for computing appellant's percent of hearing impairment according to the A.M.A., *Guides*.

In a December 4, 2014 report, an OWCP medical adviser reviewed Dr. Cassone's November 5, 2014 second opinion report and appellant's audiometric test results. He calculated that according to the sixth edition of the A.M.A., *Guides* appellant had 37 percent binaural sensorineural hearing loss. The medical adviser authorized hearing aids.

In a decision dated December 10, 2014, OWCP denied appellant's request for an additional schedule award. It found that pursuant to Dr. Cassone's November 5, 2014 second opinion report and the December 4, 2014 OWCP medical adviser report, appellant had 37 percent impairment for bilateral hearing loss. OWCP determined that since appellant's present impairment did not exceed the 39 percent impairment that appellant was previously paid, he was not entitled to additional permanent impairment for binaural hearing loss.

On February 9, 2015 OWCP received appellant's request for an oral hearing before an OWCP hearing representative. In a decision dated June 17, 2015, an OWCP hearing representative denied appellant's request for an oral hearing because it was not timely filed within 30 days of the December 10, 2014 decision. She noted that the Branch of Hearings and Review had, in its discretion, considered appellant's request and determined that the issue in his claim could equally well be addressed by requesting reconsideration.

In a letter dated June 10, 2016 and received by OWCP on July 18, 2016, appellant requested reconsideration of his schedule award hearing loss. He indicated that he was enclosing audiometric hearing tests dated January 28, 2013, March 3, 2014, and May 15, 2016, which showed a severe bilateral sensorineural hearing loss, and tinnitus.

Appellant submitted a May 18, 2016 report from audiologist Beth Alberto. Ms. Alberto indicated that appellant was examined in her office for a hearing evaluation. She related that test results showed a low frequency precipitously sloping to severe high frequency sensorineural hearing loss bilaterally. Ms. Alberto reported that using the "hearing handicap scale (AAO-ACO, 1979), appellant has binaural loss of 44.38 percent." She indicated that appellant's hearing loss was permanent and related that appellant also suffered from constant tinnitus. Ms. Alberto recommended that appellant receive new hearing instruments and undergo annual audiograms to monitor hearing.

Appellant also resubmitted audiograms from 2013 and 2014 and a June 10, 2016 audiogram.

On August 4, 2016 OWCP received Ms. Alberto's request for authorization for binaural hearing aids. Ms. Alberto explained that appellant's audiometric testing showed a mild low frequency, precipitously sloping to severe high-frequency sensorineural hearing loss, bilaterally. She noted that appellant's current hearing aids were more than three years old and no longer in warranty.

By decision dated August 12, 2016, OWCP denied appellant's July 18, 2016 reconsideration request because it was untimely filed and failed to demonstrate clear evidence of error. It determined that because appellant's reconsideration request of OWCP's December 10,

2014 merit decision was received on July 18, 2016 it was not timely filed within the one-year time limitation. OWCP further found that appellant's reconsideration request and evidence submitted failed to demonstrate clear evidence that OWCP's decision was in error.

### **LEGAL PRECEDENT**

The Board has long recognized that if a claimant's employment-related hearing loss worsens in the future, he or she may apply for an additional schedule award for any increased permanent impairment.<sup>6</sup> The Board has also recognized that a claimant may be entitled to a schedule award for increased hearing loss, even after exposure to hazardous noise has ceased, if causal relationship is supported by the medical evidence of record.<sup>7</sup>

As the Board explained in *Linda T. Brown*,<sup>8</sup> a claimant may seek a schedule award if the evidence establishes that she sustained an impairment causally related to the employment injury. Even if the term reconsideration is used, when a claimant is not attempting to show error in the prior schedule award decision and submits medical evidence regarding a permanent impairment at a date subsequent to the prior schedule award decision, it should be considered a claim for an increased schedule award. A request for an increased schedule award is not subject to time limitations. OWCP should issue a merit decision on the schedule award claim, rather than adjudicate an application for reconsideration.<sup>9</sup>

### **ANALYSIS**

The Board finds that OWCP improperly refused to reopen appellant's claim for further consideration of the merits under 5 U.S.C. § 8128(a) because it was untimely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.607(a) and failed to demonstrate clear evidence of error.<sup>10</sup>

OWCP accepted that appellant sustained sensorineural binaural hearing loss causally related to his history of noise exposure at the employing establishment. On July 27, 2011 OWCP granted appellant a schedule award for 39 percent binaural hearing loss. By decision dated December 10, 2014, OWCP denied appellant's request for an additional schedule award. Subsequently, on June 10, 2016 appellant requested reconsideration and submitted audiograms, including a May 15, 2016 audiogram. He also submitted a May 18, 2016 report from

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<sup>6</sup> See *Paul R. Reedy*, 45 ECAB 488 (1994); see also *J.F.*, Docket No. 13-112 (issued November 6, 2013).

<sup>7</sup> *Id.*, see also *Adelbert E. Buzzell*, 34 ECAB 96 (1982).

<sup>8</sup> 51 ECAB 115 (1999). In *Brown*, OWCP issued a 1995 decision denying entitlement to a schedule award as no ratable impairment was established. Appellant requested that it reconsider in 1997, submitting a current report with an opinion that she had 25 percent permanent impairment to the arms and legs. OWCP determined that she submitted an untimely request for reconsideration that did not demonstrate clear evidence of error. The Board remanded the case for a merit decision.

<sup>9</sup> *Id.*; see also *Paul R. Reedy*, *supra* note 6.

<sup>10</sup> *Supra* note 6.

Ms. Alberto who related that appellant had 44 percent binaural hearing loss, as well as constant tinnitus. Ms. Alberto also explained that appellant required new hearing aids.

As in *Paul R. Reedy*,<sup>11</sup> OWCP's August 12, 2016 decision, treated appellant's claim as a request for reconsideration. The Board finds, however, that he was not seeking reconsideration of the previous determination, but submitted new evidence contending an increased hearing loss and a need for new hearing aids. OWCP's procedures provide that if a claimant is seeking an increased schedule award due to increased impairment and/or additional exposure, but not contesting the decision or prior award, this should not be treated as a reconsideration request and OWCP should develop the issue of entitlement to an additional award.<sup>12</sup> The Board has long recognized that if a claimant's employment-related hearing loss worsens in the future, he or she may apply for an additional schedule award for any increased permanent impairment.<sup>13</sup> The Board has also recognized that a claimant may be entitled to an award for an increased hearing loss, even after exposure to hazardous noise has ceased, if causal relationship is supported by the medical evidence of record.<sup>14</sup>

OWCP did not adjudicate appellant's entitlement to a schedule award for his claimed increased hearing loss. The Board finds that the case is not in posture for decision. On remand, OWCP should further develop the evidence as necessary and issue a *de novo* decision on appellant's entitlement to a schedule award.

The Board finds that OWCP improperly determined that appellant's application for review was untimely filed and failed to demonstrate clear evidence of error. OWCP did not adjudicate appellant's entitlement to a schedule award for his claimed increased hearing loss.

### **CONCLUSION**

The Board finds that this case is not in posture for decision.

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

<sup>12</sup> The Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (February 2016).

<sup>13</sup> *Supra* note 6.

<sup>14</sup> *Supra* note 7.

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 12, 2016 nonmerit decision of the Office of Workers' Compensation Programs is set aside and this case is remanded for further proceedings consistent with this decision, to be followed by a *de novo* decision.

Issued: April 3, 2017  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

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

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board