

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

S.S., Appellant

and

**DEPARTMENT OF THE ARMY, RED RIVER
ARMY DEPOT, Texarkana, TX, Employer**

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**Docket No. 17-0616
Issued: August 4, 2017**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 25, 2017 appellant filed a timely appeal from a November 21, 2016 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 has met her burden of proof to establish more than four percent binaural hearing loss, for which she previously received a schedule award.

On appeal appellant contends that the date of maximum medical improvement (MMI) and period of her schedule award are incorrect. She questions how an OWCP district medical adviser (DMA) and an OWCP referral physician determined the information that was relied on by OWCP.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On November 23, 2015 appellant, then a 62-year-old weapon systems mechanic, filed an occupational disease claim (Form CA-2) alleging hearing loss as a result of noise at work. She claimed that she had a constant hum in her ears and was unable to understand what was being said unless there was no background noise and/or she could see someone talking. Appellant first became aware of her condition and its relationship to her federal employment on January 6, 2014. She noted that it was hard to tell what was being said at her nephew's birthday celebration. Appellant compared a March 2, 2005 audiogram to a 2014 audiogram and noticed a definite change in the audiograms findings. She maintained that she was only around noise at work.

By letter dated November 30, 2015, OWCP informed appellant of the deficiencies in her claim and requested that she respond to its inquiries within 30 days. It also requested that the employing establishment submit information including the job sites where appellant worked, the sources of noise appellant was exposed to, the period of exposure, and the decibel and frequency of the exposure.

OWCP received audiograms performed by the employing establishment as part of a hearing conservation program dated March 2, 2005 through November 18, 2015.

In a December 4, 2015 statement, appellant related that she was exposed to hazardous noise in the employing establishment's rubber shop from 1978 to 1979, 1980, 1983; fire control from 1984 to 1993; and combat division from 2005 to 2015. She noted that she was removed from the noise area in June 2015.² Appellant indicated that she had not previously filed a claim for hearing loss or an ear condition. She claimed that she had a constant hum/ringing in her ears. Appellant reiterated that it was hard for her to hear what was being said if there was background noise. She maintained that she had no hobbies that involved exposure to loud noise.

By letters dated February 3, 2016, OWCP referred appellant, together with a statement of accepted facts (SOAF) and the medical record, to Thomas D. Burns, Au.D., an audiologist, and Dr. Charles E. Hollingsworth, a Board-certified otolaryngologist, for an audiological evaluation and otologic examination, respectively.

On February 22, 2016 Dr. Burns performed an audiogram which demonstrated testing at 500, 1,000, 2,000, and 3,000 hertz (Hz) and revealed decibel (dB) losses of 50, 35, 20, and 10, respectively in appellant's right ear. On the left, appellant's dB losses at the above levels were 45, 35, 20, and 10, respectively.

In a February 22, 2016 medical report, Dr. Hollingsworth noted findings on physical examination and diagnosed bilateral moderate low frequency, very mild mid frequency, and very mild high frequency sensorineural hearing loss. He reviewed Dr. Burns' February 22, 2016 audiogram and determined that appellant had 5.6 percent right monaural impairment, 3.8 percent left monaural impairment, and 4.1 percent binaural impairment based on the sixth edition of the

² On November 30, 2015 appellant retired from the employing establishment.

American Medical Association, *Guides to the Evaluation of Permanent Impairment*,³ (A.M.A., *Guides*). Dr. Hollingsworth opined that her hearing loss was at least partially due to noise exposure in her federal civilian employment. He reasoned that progressive loss was documented on serial audiograms. Dr. Hollingsworth recommended proper ear protection as necessary and hearing aids.

On February 26, 2016 OWCP accepted appellant's claim for bilateral sensorineural hearing loss.

On March 15, 2016 an OWCP DMA reviewed the reports of Dr. Burns and Dr. Hollingsworth. She agreed with Dr. Hollingsworth that appellant had noise-induced moderate low frequency and very mild mid and high frequency hearing loss. The DMA also agreed that she had 5.6 percent monaural hearing loss in the right ear, 3.8 percent monaural hearing loss in the left ear, equating to 4.1 percent binaural hearing loss under the sixth edition of the A.M.A., *Guides*. She determined that appellant had reached MMI on February 22, 2016, the date of Dr. Hollingsworth's examination. The DMA related that hearing aids should be authorized.

On May 11, 2016 appellant filed a claim for a schedule award (Form CA-7).

In a May 23, 2016 decision, OWCP granted appellant a schedule award for four percent binaural hearing loss. It determined that the date of MMI was February 22, 2016. The period of the award ran from November 30, 2015 to January 24, 2016, a total of 56 days.

In an appeal request form and letter dated May 25, 2016, appellant requested a review of the written record by an OWCP hearing representative. In the May 25, 2016 letter, she disagreed with the findings regarding when her hearing impairment began and the percentage used to calculate her schedule award. Appellant noted that Dr. Hollingsworth reported that she had 9.4 percent monaural hearing impairment and four percent binaural hearing impairment. She believed that her schedule award should begin on August 9, 2010, the date of an accompanying audiogram that revealed significant hearing loss.

Appellant resubmitted employing establishment audiograms dated August 9, 2010, February 24, 2014, and November 18, 2015. She submitted employing establishment audiograms dated June 18, 2007, June 23, 2010, and March 19, 2014.

By decision dated November 21, 2016, an OWCP hearing representative found that appellant had no more than four percent binaural hearing loss for which she previously received a schedule award. He modified the May 23, 2016 decision to reflect that the period of the schedule award was from February 22 to April 17, 2016 as the DMA had found that the date of MMI was February 22, 2016.

³ A.M.A., *Guides* (6th ed. 2009).

LEGAL PRECEDENT

The schedule award provisions 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. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁶

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.⁷ 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.⁸ Then, the fence of 25 dBs is deducted because, as the A.M.A., *Guides* points out, losses below 25 dBs result in no impairment in the ability to hear everyday speech under everyday conditions.⁹ The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.¹⁰ 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.¹¹ The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.¹²

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP DMA for an opinion concerning the nature and percentage of binaural hearing loss in accordance with the A.M.A., *Guides* with the DMA providing rationale for the percentage of impairment specified.¹³

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

⁶ *Id.* See also *Jacqueline S. Harris*, 54 ECAB 139 (2002).

⁷ A.M.A., *Guides* 250 (6th ed. 2009).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Donald E. Stockstad*, 53 ECAB 301 (2002), *petition for recon. granted (modifying prior decision)*, Docket No. 01-1570 (issued August 13, 2002); *Reynaldo R. Lichtenberger*, 52 ECAB 462 (2001).

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6(f) (February 2013).

ANALYSIS

The Board finds that appellant has failed to establish more than four percent binaural hearing loss, for which she previously received a schedule award.

OWCP accepted appellant's claim for bilateral sensorineural hearing loss based on the February 22, 2016 medical opinion of Dr. Hollingsworth, an OWCP referral and Board-certified otolaryngologist. Dr. Hollingsworth reviewed an audiogram performed on that date by Dr. Burns, an OWCP referral audiologist, which revealed dB losses of 50, 35, 20, and 10 at 500, 1,000, 2,000, and 3,000 Hz, respectively, for the right ear. Testing of the left ear at the above levels revealed dB losses of 45, 35, 20, and 10, respectively. Dr. Hollingsworth found that appellant had 5.6 percent monaural hearing impairment of the right ear, 3.8 percent monaural hearing impairment of the left ear, and 4.1 percent binaural hearing impairment based on the sixth edition of the A.M.A., *Guides*.

Consistent with its procedures, OWCP properly referred the file to its DMA for a rating of permanent impairment in accordance with the sixth edition of the A.M.A., *Guides*. On March 15, 2016 OWCP's DMA reviewed Dr. Collingsworth's report and agreed that appellant had moderate low frequency and very mild mid and high frequency hearing loss and 4.1 percent binaural hearing impairment in accordance with the sixth edition of the A.M.A., *Guides*. Using Dr. Burns' February 22, 2016 audiogram to calculate appellant's hearing loss in accordance with the A.M.A., *Guides*, she averaged appellant's right hearing levels of 50, 35, 20, and 10 dB at 500, 1,000, 2,000, and 3,000 Hz, which then averaged to total 28.75. The DMA subtracted the 25-dB fence and multiplied the remaining balance of 3.75 by 1.5 to calculate 5.6 percent monaural hearing loss for the right ear. Appellant's left ear hearing levels of 45, 35, 20, and 10 dB at 500, 1,000, 2,000, and 3,000 Hz were then averaged to total 27.5. The DMA subtracted the 25-dB fence and multiplied the remaining balance of 2.5 by 1.5 to calculate 3.75 percent monaural hearing loss for the left ear. She calculated 4.1 percent binaural hearing loss by multiplying the lesser left ear loss of 3.8 percent by five, adding the greater 5.6 percent right ear loss and dividing this sum by six. The DMA determined that appellant sustained a total 4.1 percent binaural hearing loss. She also determined that appellant had reached MMI on February 22, 2016.

The Board finds that the weight of the medical evidence establishes that appellant has no more than four percent binaural hearing loss.¹⁴

Although appellant submitted results from the employing establishment's annual audiometric testing from March 2, 2005 to November 18, 2015, these audiograms are insufficient to establish her burden of proof as they do not comply with the requirements set forth by OWCP to assess permanent hearing loss. They lack proper certification of calibration, speech testing, and bone conduction scores and were not prepared or certified as accurate by a physician as defined under FECA. It is appellant's burden of proof to submit a properly prepared and

¹⁴ The policy of OWCP is to round the calculated percentage of impairment up or down to the nearest whole number. *J.H.*, Docket No. 08-2432 (issued June 15, 2009); *Robert E. Cullison*, 55 ECAB 570 (2004). See also Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4(b)(2)(b) (September 2010).

certified audiogram to OWCP.¹⁵ OWCP was not required to rely on this evidence in determining the degree of her hearing loss as it failed to constitute competent medical evidence.¹⁶

On appeal, appellant contends that the date of MMI and period of her schedule award are incorrect. The period covered by a schedule award commences on the date that the employee reaches MMI from the residuals of the injury. The question of when MMI has been reached is a factual one which depends upon the medical findings in the record. The determination of such date is to be made in each case upon the basis of the medical evidence in that case.¹⁷ The date of MMI is usually considered to be the date of the medical examination that determined the extent of the impairment.¹⁸ OWCP used February 22, 2016 as the date of MMI in its May 23, 2016 schedule award decision. OWCP's hearing representative modified this decision to reflect that the period of the award was from February 22 to April 17, 2016 rather than November 30, 2015 to January 24, 2016. February 22, 2016 was the date Dr. Hollingsworth, the referral otolaryngologist, conducted a second opinion evaluation. That was also the date Dr. Burns, the referral audiologist, performed an audiogram. On March 15, 2016 an OWCP DMA confirmed that the date of MMI was February 22, 2016, the date of Dr. Hollingsworth's report and the audiologic examination. For these reasons, the Board finds that OWCP properly identified the date of MMI as February 22, 2016 and that the period of appellant's schedule award should begin on that date.¹⁹

Appellant questions how the DMA and Dr. Hollingsworth determined the information relied on by OWCP. As discussed above, OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*. Both the DMA and Dr. Hollingsworth properly applied the standards of the sixth edition of the A.M.A., *Guides* to the February 22, 2016 audiogram to find that she has four percent binaural hearing loss. Appellant has not submitted any medical evidence in conformance with the standards set forth in the A.M.A., *Guides* establishing that she is entitled to a schedule award greater than that which she received.

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

¹⁵ See *R.B.*, Docket No. 10-1512 (issued March 24, 2011); *Robert E. Cullison, id.*; *Vincent Holmes*, 53 ECAB 468 (2002) (OWCP does not have to review audiograms not certified by a physician and it is the claimant's burden to submit a properly certified audiogram for review if he objects to the audiogram selected by OWCP for determining the degree of hearing loss).

¹⁶ *Id.* See also *H.M.*, Docket No. 13-1061 (issued July 29, 2013); *M.T.*, Docket No. 12-1294 (issued December 6, 2012).

¹⁷ See *Marie J. Born*, 27 ECAB 623 (1976).

¹⁸ See *Richard Larry Enders*, 48 ECAB 184 n.12 (1996) (date of the audiologic examination).

¹⁹ Cf. *K.M.*, Docket No. 12-1137 (issued October 19, 2012) (where the Board found that OWCP improperly identified the date of MMI and, thus, modified the date to be when the referral physician examined appellant for the purpose of evaluating permanent impairment, not the date he recalculated his rating under the sixth edition of the A.M.A., *Guides*).

CONCLUSION

The Board finds that appellant has failed to meet her burden of proof to establish that she sustained more than four percent binaural hearing loss for which she previously received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the November 21, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 4, 2017
Washington, DC

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

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

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