

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

S.G., Appellant)	
)	
and)	Docket No. 16-1683
)	Issued: January 3, 2017
)	
DEPARTMENT OF JUSTICE, FEDERAL)	
BUREAU OF INVESTIGATIONS,)	
Minneapolis, MN, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 15, 2016 appellant filed a timely appeal from a July 28, 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.²

ISSUE

The issue is whether appellant has met his burden of proof to establish more than 50 percent binaural hearing loss.

On appeal appellant contends that he is entitled to an additional schedule award.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted additional evidence on appeal. However, the Board may only review evidence that was in the record at the time OWCP issued its final decision. *See* 20 C.F.R. § 501.2(c)(1); *M.B.*, Docket No. 09-176 (issued September 23, 2009); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

FACTUAL HISTORY

On September 10, 1998 appellant, then a 55-year-old special agent, filed an occupational disease claim (Form CA-2) alleging hearing loss caused by exposure to loud noise in his employment. He became aware of his condition and of its relationship to his employment on January 1, 1982.³

On April 2, 1999 OWCP accepted the claim for binaural hearing loss.

In a December 17, 1999 decision, OWCP granted appellant a schedule award for 28 percent binaural hearing impairment. The period of the award ran for 56 weeks from December 3, 1998 to December 30, 1999. Thereafter, OWCP continued to authorize medical treatment, including hearing aids, for the accepted condition.

In a July 14, 2015 progress note, Dr. James E. Kuderer, an otolaryngologist, noted appellant's exposure to noise during his military service and while working at the employing establishment. He also noted appellant's medical history and reported findings on physical examination. Dr. Kuderer found that appellant appeared well, but he was obviously frustrated with his hearing. Appellant's head was normocephalic and atraumatic. An otoscopy revealed patent external canals with intact and mobile tympanic membranes. There was no middle ear effusion. Anterior rhinoscopy showed a midline septum without turbinate hypertrophy or rhinorrhea. There was no trismus and appellant had average dentition. The tongue was fully mobile. Uvula was midline. The posterior oropharynx was clear. Appellant's neck was soft without lymphadenopathy and the trachea was midline. Dr. Kuderer assessed mild-to-profound sensorineural bilateral hearing loss, worse in the right ear than the left ear. He advised that the likely etiology was due to significant noise exposure and acoustic trauma which was evidenced by 48 years of audiometry and appellant's workplace and military noise exposure. Dr. Kuderer noted that appellant had been using hearing aids for a long time and was having more difficulty with them. He recommended cochlear implantation.

An audiogram performed on August 21, 2015 by Kirsten J. Brock, an audiologist, demonstrated testing at 500, 1,000, 2,000, and 3,000 hertz (Hz) and revealed decibel losses of 15, 30, 90, and 95, respectively in appellant's right ear. On the left appellant's decibel losses at the above levels were 20, 45, 90, and 100, respectively.

On May 4, 2016 appellant filed a claim for an additional schedule award (Form CA-7).

The medical record, including the reports of Dr. Kuderer and Ms. Brock, and a statement of accepted facts were referred to an OWCP district medical adviser (DMA). On May 25, 2016 the DMA applied the hearing loss formula from the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (6th ed. 2009). He added the right decibel losses to reach 230 and averaged this sum to reach 57.5. The DMA then subtracted the fence of 25 as directed by the A.M.A., *Guides* to reach 32.5 and multiplied this amount by 1.5 to reach a monaural loss on the right of 48.75 percent. He followed the same procedure with the audiographic results of appellant's left ear to calculate a total of 255 decibel losses. The DMA averaged this sum to reach 63.75. He then subtracted the fence of 25 as directed by the A.M.A.,

³ On December 31, 1998 appellant retired from the employing establishment.

Guides to reach 38.75 decibels and multiplied this amount by 1.5 to reach a monaural loss of 58.125 percent on the left. The DMA then multiplied the 48.75 percent right ear hearing loss by 5, added the 58.125 percent left ear hearing loss, and divided the total by 6, for a total of 50.3 percent binaural hearing loss. From the 50.3 percent binaural impairment, he subtracted the previously awarded 28 percent binaural impairment, to find that appellant had an additional 22.3 percent binaural impairment. The DMA determined that appellant had reached maximum medical improvement (MMI) on August 21, 2015, the date of the most recent audiogram. He indicated that hearing aids should be authorized.

By decision dated July 28, 2016, OWCP issued an additional schedule award for 22.3 percent binaural hearing loss, as appellant had previously been paid an award for 28 percent binaural hearing loss. The increased award was for 44 weeks of compensation and ran from August 21, 2015 to June 23, 2016.

LEGAL PRECEDENT

The schedule award provision of FECA⁴ and its implementing regulations 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. FECA, however, does not specify the manner in which the percentage of loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* (6th ed. 2009), has been adopted by OWCP for evaluating schedule loss and the Board has concurred in such adoption.⁵

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*. 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 decibels is deducted because, as the A.M.A., *Guides* points out, losses below 25 decibels result in no impairment in the ability to hear everyday speech under everyday conditions.⁶ 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 and then added to the greater loss and the total is divided by six to arrive at the amount of the binaural hearing loss. The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.⁷

⁴ *Supra* note 1.

⁵ See 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, Exhibit 1 (January 2010).

⁶ See A.M.A., *Guides* 250.

⁷ *E.S.*, 59 ECAB 249 (2007); *Reynaldo R. Lichtenberger*, 52 ECAB 462 (2001).

ANALYSIS

OWCP accepted that appellant sustained binaural hearing loss due to noise exposure at work. On December 17, 1999 he received a schedule award for 28 percent binaural loss of hearing. Appellant requested an additional schedule award for binaural hearing loss. By decision dated July 28, 2016, OWCP awarded appellant an additional 22 percent binaural hearing loss, for a total impairment of 50 percent.

The Board finds that appellant has not established a schedule award greater than 50 percent binaural hearing impairment.

Appellant submitted an August 21, 2015 audiogram from Ms. Brock, an audiologist. Testing at 500, 1,000, 2,000, and 3,000 Hz revealed decibel losses of the right ear as 15, 30, 90, and 95, respectively. Testing on the left ear, revealed decibel losses at the above levels as 20, 45, 90, and 100, respectively.

FECA procedures relating to the evaluation of schedule awards provide that the file should be routed to OWCP's DMA for an opinion concerning the nature and percent of impairment.⁸ Accordingly, OWCP referred appellant's case to a DMA.

On May 25, 2016 OWCP's DMA utilized the decibel losses found by Ms. Brock with regard to hearing loss as found on the August 21, 2015 audiogram. He determined that appellant had reached MMI as of the date of this audiogram. The DMA found that he had an additional 22.3 percent binaural hearing impairment, totaling 50.3 percent binaural hearing loss. He properly applied OWCP standardized procedures to Ms. Brock's audiogram which recorded frequency levels at the 500, 1,000, 2,000, and 3,000 Hz and revealed decibel losses of 15, 30, 90, and 95, respectively in the right ear for a total decibel loss of 230. The DMA then followed established procedures and divided this total by 4 which resulted in an average loss of 57.5 decibels and subtracted the fence of 25 decibels to equal 32.5 decibels. He then multiplied this by the established factor of 1.5 to result in a 48.75 percent monaural hearing loss for the right ear. The DMA then properly followed the same procedure on the left, noting that the test results at the frequencies of 500, 1,000, 2,000, and 3,000 Hz revealed decibel losses of 20, 45, 90, and 100 decibels, respectively, for a total of 255 decibels. He divided this by 4, for an average hearing loss of 63.75 decibels, subtracted the fence of 25 decibels to equal 38.75 decibels, and multiplied this by the established factor of 1.5, for a 58.125 percent monaural hearing loss for the left ear. The DMA then multiplied the 48.75 percent right ear hearing loss by 5, added the 58.125 percent left ear hearing loss, and divided the total by 6, for a total of 50.3 percent binaural hearing loss which is rounded to 50 percent. He subtracted the previously awarded 28 percent binaural impairment, to find that appellant had an additional 22 percent binaural impairment.

Thus, the Board finds that OWCP's DMA applied the proper standards to the August 21, 2015 audiogram. The result is a 50.3 percent binaural hearing loss which is rounded to 50 percent. Appellant previously received a scheduled award totaling 28 percent binaural hearing

⁸ See *supra* note 5 at Chapter 2.808.6e (February 2013).

loss. OWCP, therefore, properly determined that he was entitled to a schedule award for an additional 22 percent binaural loss.⁹

On appeal, appellant contends that he is entitled to an additional schedule award. As discussed above, the weight of the medical evidence of record only establishes entitlement to a total 50 percent binaural hearing impairment. Appellant has not submitted any medical evidence establishing that he is entitled to a schedule award in addition to that previously received.

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 not met his burden of proof to establish that he has more than 50 percent binaural hearing loss.

⁹ While OWCP's decision advised that the new award was for 22.3 percent, the number of weeks covered by the award, 44, indicates that the award was for 22 percent. This is calculated by multiplying 22 percent times the maximum 200 weeks of compensation, under 5 U.S.C. § 8107(c)(13)(B), for 100 percent binaural hearing loss. This, 22 percent times 200, yields 44 weeks of compensation. Rounding the percentage down from 22.3 to 22 percent is consistent with OWCP procedures which provide that fractions should be rounded down from .49 or up from .50. See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4(b)(2) (January 2010).

ORDER

IT IS HEREBY ORDERED THAT the July 28, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 3, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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