

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

---

C.D., Appellant )

and )

DEPARTMENT OF THE NAVY, NAVAL )  
FACILITIES ENGINEERING COMMAND, )  
Norfolk, VA, Employer )

---

**Docket No. 18-0251  
Issued: August 1, 2018**

*Appearances:*

David G. Jennings, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On November 15, 2017 appellant, through counsel, filed a timely appeal from an October 2, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

---

<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## ISSUE

The issue is whether appellant has more than 4.25 percent binaural hearing loss, for which he previously received a schedule award.

On appeal counsel asserts that OWCP's medical adviser did not properly calculate appellant's binaural hearing loss. He alleges that appellant has five percent binaural hearing loss.

## FACTUAL HISTORY

On October 31, 2016 appellant, then a 62-year-old paper pumper operator, filed an occupational disease claim (Form CA-2) alleging that noise exposure at work caused binaural hearing loss. He indicated that he first became aware of the condition and its relationship to his federal employment on May 19, 2016. Appellant did not stop work.

On November 8, 2016 appellant filed a schedule award claim (Form CA-7).

In support of the claim, appellant submitted a list of noise exposures at work and a hearing conservation form from the employing establishment that described audiometry completed on May 19, 2016.<sup>3</sup> This reflected testing at the frequency levels of 500, 1,000, 2,000, and 3,000 cycles per second and revealed the following: right ear 5, 5, 10, and 15 decibels; left ear 20, 25, 35, and 30 decibels.

In December 2016, OWCP referred appellant to Dr. Jeffrey Powell, a Board-certified otolaryngologist, for an otologic examination and audiological evaluation. In a January 24, 2016 report, Dr. Powell noted a history of noise exposure at work, his review of the statement of accepted facts (SOAF) and medical record, and appellant's complaint of binaural hearing loss and tinnitus. He described physical examination findings and attached an audiogram report dated November 24, 2015 which reflected testing at the frequency levels of 500, 1,000, 2,000, and 3,000 cycles per second and revealed the following: right ear 20, 25, 30, and 30 decibels; left ear 25, 30, 30, and 30 decibels. Dr. Powell diagnosed binaural high-frequency noise-induced sensorineural hearing loss, and tinnitus due to appellant's federal employment. Regarding the tinnitus diagnosis, he indicated that the results of data collection showed that appellant was aware of his tinnitus 50 percent of the time and affected trying to get to sleep. Dr. Powell recommended an annual hearing aid evaluation. He advised that, in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*),<sup>4</sup> appellant had 1.875 percent impairment of the right ear with 2 percent added for tinnitus for a total 3.875 percent monaural loss, and 5.625 percent impairment of the left ear with 2 percent added for tinnitus, for 7.625 percent total monaural loss. Utilizing the combined hearing loss formula, Dr. Powell concluded that appellant had 4.5 percent binaural hearing loss.

---

<sup>3</sup> The May 19, 2016 audiogram was compared with an audiogram done on July 24, 2009.

<sup>4</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

On February 7, 2017 OWCP accepted the claim for binaural noise-induced neurosensory hearing loss. On February 8, 2017 it referred the case record to Dr. Robert Pettit, a Board-certified otolaryngologist and OWCP medical adviser, for review.

In a February 27, 2017 report, Dr. Pettit noted his review of the medical record, including Dr. Powell's January 24, 2016 report. He advised that appellant had a total of 2.25 percent binaural loss plus an additional 2 percent for tinnitus, for a total of 4.25 percent binaural hearing loss. Dr. Pettit indicated that appellant was a good hearing aid candidate and that the hearing impairment worksheet was attached.<sup>5</sup>

On August 17, 2017 OWCP requested that OWCP's medical adviser provide an addendum report which was to include a date of maximum medical improvement (MMI). The medical adviser was also to complete a hearing impairment calculation worksheet.

In an August 25, 2017 report, Dr. Pettit indicated that MMI was reached on January 24, 2017. He provided an impairment calculation worksheet which, based on Dr. Powell's frequency levels, indicated that appellant had 1.5 percent monaural loss in the right ear and 6 percent loss in the left ear. Dr. Pettit then applied the combined hearing loss formula, finding 2.25 percent binaural loss. He added 2 percent for troublesome tinnitus, for a total of 4.25 percent binaural loss. Dr. Pettit advised that hearing aids were authorized.

By decision dated October 2, 2017, OWCP granted appellant a schedule award for 4.25 binaural hearing loss, for eight weeks of compensation, to run from January 24, 2017, the date of MMI, to March 20, 2017.

### **LEGAL PRECEDENT**

The schedule award provisions of FECA,<sup>6</sup> and its implementing federal regulations,<sup>7</sup> 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 shall be determined. The method used in making such determination is a matter which rests in the discretion of OWCP. For consistent results and to ensure equal justice under the law for all claimants, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. OWCP evaluates the degree of permanent impairment in accordance with the standards set forth in the specified edition of the A.M.A., *Guides*. For decisions issued after May 1, 2009, the sixth edition is to be used.<sup>8</sup>

---

<sup>5</sup> The record does not include an attached worksheet. Appellant filed additional schedule award claims on July 7 and August 17, 2017.

<sup>6</sup> 5 U.S.C. § 8107.

<sup>7</sup> 20 C.F.R. § 10.404.

<sup>8</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *id.* at Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

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 cycles per second, the losses at each frequency are added and averaged.<sup>9</sup> The “fence” of 25 decibels is then 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.<sup>10</sup> The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.<sup>11</sup> 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.<sup>12</sup> The Board has concurred in OWCP’s adoption of this standard for evaluating hearing loss.<sup>13</sup>

The Board has also noted OWCP’s policy to round the calculated percentage of impairment to the nearest whole number.<sup>14</sup> OWCP procedures provide that percentages should not be rounded until the final percent for award purposes is obtained. Fractions should be rounded down from .49 and up from .50.<sup>15</sup>

If tinnitus interferes with activities of daily living, including sleep, reading, and other tasks requiring concentration, enjoyment of quiet recreation and emotional well-being, up to five percent may be added to measurable binaural hearing impairment.<sup>16</sup>

### ANALYSIS

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

In a January 24, 2016 report, Dr. Powell noted a history of appellant’s noise exposure at work, and his review of the SOAF and the medical record. He described physical examination findings and attached an audiogram report dated November 24, 2015 which reflected testing at the frequency levels of 500, 1,000, 2,000, and 3,000 cycles per second and revealed the following: right ear 20, 25, 30, and 30 decibels; left ear 25, 30, 30, and 30 decibels. Dr. Powell diagnosed bilateral high-frequency noise-induced sensorineural hearing loss, and tinnitus due to appellant’s federal employment. Regarding the tinnitus diagnosis, he indicated that the results of data collection showed that appellant was aware of his tinnitus 50 percent of the time and affected trying to get to sleep. Dr. Powell advised that, in accordance with the sixth edition of the A.M.A.,

---

<sup>9</sup> *Supra* note 4 at 250.

<sup>10</sup> *Id.*

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

<sup>12</sup> *Id.* at 251.

<sup>13</sup> *Horace L. Fuller*, 53 ECAB 775 (2002).

<sup>14</sup> *J.H.*, Docket No. 08-2432 (issued June 15, 2009); *Robert E. Cullison*, 55 ECAB 570 (2004); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4(b)(2)(b) (January 2010).

<sup>15</sup> Federal (FECA) Procedure Manual, *id.*

<sup>16</sup> *Supra* note 4 at 249.

*Guides*,<sup>17</sup> appellant had 1.875 percent impairment of the right ear with 2 percent added for tinnitus for a total 3.875 percent monaural loss, and a 5.625 percent impairment of the left ear with 2 percent added for tinnitus, for a 7.625 percent total monaural loss. He multiplied appellant's hearing loss in his better ear, 3.875 percent on the right, by 5 to yield 19.375 percent. Dr. Powell then added 7.625, appellant's loss in his left ear, reaching a subtotal of 27 which, when divided by 6, yields 4.5 percent binaural loss. Utilizing the combined hearing loss formula, he concluded that appellant had a 4.5 percent binaural hearing loss, he did not round up his final calculation.

OWCP asked its medical adviser, Dr. Pettit, to review the record and provide an impairment evaluation. In reports dated February 27 and August 25, 2017, Dr. Pettit reviewed the medical record, including Dr. Powell's January 24, 2017 report. He advised that maximum medical improvement was reached on January 24, 2017. On an impairment calculation worksheet, Dr. Pettit recorded Dr. Powell's frequency levels and indicated that appellant had a 1.5 percent monaural loss in the right ear and a 6 percent loss in the left ear. He then applied the combined hearing loss formula, finding a 2.25 percent binaural loss. Dr. Pettit added 2 percent for troublesome tinnitus, for a total 4.25 percent binaural loss. He, however, did round the hearing loss for each ear early in his calculations when dividing the total loss of each ear by 4. For a total loss of 105 decibels in the right ear, Dr. Pettit found an average threshold of 26, whereas the calculation before rounding yields an average threshold of 26.25, as found by Dr. Powell. He repeated this calculation in appellant's left ear, rounding a total loss of 225 decibels to 29 whereas the calculation before rounding yields 28.75.

As previously noted, OWCP procedures provide that percentages should not be rounded until the final percent for award purposes is obtained.<sup>18</sup> Dr. Pettit's calculation was therefore in error. This case must therefore be remanded to OWCP for recalculation of appellant's binaural hearing loss pursuant to OWCP procedures. After such further development as necessary, OWCP shall issue a *de novo* decision.

### CONCLUSION

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

---

<sup>17</sup> *Supra* note 4.

<sup>18</sup> Federal (FECA) Procedure Manual, *supra* note 8; *see R.G.*, 59 ECAB 127 (2007).

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 2, 2017 decision of the Office of Workers' Compensation Programs is set aside and this case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 1, 2018  
Washington, DC

Patricia H. Fitzgerald, Deputy 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