United States Department of Labor
Employees' Compensation Appeals Board

A.G., Appellant	)	
and	)	**Docket No. 17-1778**
	)	**Issued: December 18, 2018**
DEPARTMENT OF JUSTICE, U.S. MARSHALS SERVICE, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 16, 2017 appellant filed a timely appeal from an August 3, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant has met his burden of proof to establish greater than 32 percent binaural hearing loss, for which he previously received a schedule award.

FACTUAL HISTORY

On June 1, 2009 appellant, then a 65-year-old retired U.S. Marshal, filed an occupational disease claim (Form CA-2) alleging that he sustained binaural hearing loss due to exposure to loud noise in the performance of duty with the employing establishment. He noted that he first became

[1] 5 U.S.C. § 8101 *et seq.*

aware of his claimed condition in the mid 1980's and realized its relation to his federal employment on October 27, 2006.[2] On July 1, 2009 OWCP accepted appellant's claim for binaural sensorineural hearing loss.

By decision dated August 13, 2009, under File No. xxxxxx908, OWCP granted appellant a schedule award for 17 percent binaural hearing loss. The award ran for the period December 19, 2008 through April 11, 2009.

By decision dated November 9, 2009, OWCP amended the August 13, 2009 schedule award, as appellant was paid at an incorrect rate. It explained that since he had not sustained ratable binaural sensorineural hearing loss under File No. xxxxxx908, due to his employment with the Federal Bureau of Investigation, it should have paid the schedule award based on his employment with the employing establishment, under File No. xxxxxx964.

Accordingly, by amended decision dated November 9, 2009, OWCP granted appellant a schedule award for 17 percent binaural hearing loss under File No. xxxxxx964. It determined that he had reached maximum medical impairment (MMI) on December 19, 2008. OWCP determined that the award ran for a total of 34 weeks of compensation for the period December 19, 2008 through April 11, 2009.

By letter dated October 27, 2015, appellant requested an additional schedule award.

In a development letter dated December 18, 2015, OWCP noted its receipt of appellant's request for additional compensation due to his accepted work-related condition worsening and possible additional impairment. It noted that he needed to complete a claim for compensation (Form CA-7) for an additional schedule award. OWCP also advised appellant to submit a report from his physician and noted that he needed to utilize the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[3]

On September 27, 2016 appellant submitted a Form CA-7 and requested an additional schedule award.

In a letter dated October 14, 2016, OWCP requested additional information from appellant, noting that it appeared he was claiming disability due to a material change/worsening of his accepted work-related conditions. In a November 7, 2016 response, appellant noted that he was fully retired from the employing establishment. He explained that "without doubt exposure to loud noises caused my hearing to gradually decrease. I believe that my current hearing loss is a continuation. I was first examined for my claim on [December 19, 2008.] My hearing loss has increased. The loss was gradual."

[2] OWCP assigned the present claim File No. xxxxxx964. Appellant has a prior claim under File No. xxxxxx908. On February 7, 2008 he, then a 65-year-old retired special agent, filed an occupational disease claim (Form CA-2) alleging that he sustained binaural hearing loss due to exposure to loud noise in the performance of duty. OWCP accepted appellant's claim for binaural sensorineural loss causally related to his noise exposure as a special agent with the FBI.

[3] A.M.A., *Guides* (6th ed. 2009).

In a November 7, 2016 report, Dr. Paul C. Frake, an otolaryngologist, noted that appellant was seen for evaluation of his hearing loss. He examined appellant and reviewed audiometric findings, also dated November 7, 2016. Dr. Frake explained that he compared the findings with a previous audiogram from December 2008. He opined that the difference in testing revealed a 5 to 10 decibels (dB) worsening at 1,000 Hertz (Hz) in both ears as well as a 30 dB worsening in both ears at 2,000 Hz. Dr. Frake noted that word recognition was previously 100 percent and was not in the 80's. He diagnosed impacted cerumen of the right ear and sensorineural hearing loss. Dr. Frake recommended hearing aid amplification if appellant was bothered by his reduction in hearing.

On April 18, 2017 OWCP referred appellant, together with a statement of accepted facts to Dr. Inell Rosario, a Board-certified otolaryngologist, for a second opinion evaluation regarding whether appellant's current extent of hearing loss was attributable to the accepted conditions due to his federal employment.

In a May 23, 2017 report, Dr. Rosario noted appellant's history of injury and treatment and further noted that, in comparing the present audiometric findings to those of the beginning of his exposure, appellant's increasing hearing loss was more than would be expected by presbycusis. Dr. Rosario opined that the workplace exposure was sufficient in intensity and duration to have caused the loss in question. She found that appellant's ear canals and drums had normal dimension and the tympanic membranes were intact without significant typanosclerosis. Dr. Rosario found no indication of an acoustic neuroma or Meniere's disease. She opined that appellant had hearing loss related to his workplace exposure working in law enforcement. Dr. Rosario found bilateral sensorineural hearing loss and bilateral tinnitus, which was due to his federal employment. She explained that appellant had no loss prior to his noise exposure, that he had minimal social noise exposure, and that he had a negative family history of hearing loss. Dr. Rosario recommended hearing aids. The results of an audiometric examination performed that day reflected testing at the frequency levels of 500, 1,000, 2,000, and 3,000 cycles per second (cps) and revealed the following: right ear 25, 25, 55, and 75 dBs; left ear 30, 30, 55, 80 dBs, respectively. She determined that appellant had 30.9375 percent binaural hearing impairment. Dr. Rosario added one percent for slight tinnitus, which was only heard in a quiet environment and very easily masked. The extent of total binaural hearing loss was determined to be 31.93 percent.

On July 23, 2017 the district medical adviser (DMA), Dr. Jeffrey M. Israel, a Board-certified otolaryngologist, reviewed the otologic and audiologic testing performed by Dr. Rosario and advised that he concurred with her findings. He applied OWCP's standardized procedures to his evaluation. Dr. Israel determined that MMI had been achieved on May 23, 2017, the date of the audiogram. He utilized the sixth edition of the A.M.A., *Guides* and determined that appellant had previously received an award of 17 percent for binaural hearing loss. The DMA determined that 31.9 percent (which included 1 percent for mild tinnitus) minus 17 percent was equal to 14.9 percent, the adjusted award. He recommended yearly audiograms and noise protection for his hearing and authorized hearing aids.

By decision dated August 3, 2017, OWCP granted appellant a schedule award for an additional 15 percent binaural hearing loss, for a total of 30 weeks of compensation for the period May 23 through July 22, 2017. The total binaural hearing loss award was 32 percent.

LEGAL PRECEDENT

The schedule award provisions of FECA[4] and its implementing regulations[5] 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 OWCP through its 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 cps, the losses at each frequency are added up and averaged. 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.[8] 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.

ANALYSIS

The Board finds that appellant has not established greater than 32 percent binaural hearing loss, for which he previously received a schedule award.

On July 23, 2017 the DMA reviewed the otologic and audiologic testing performed by second opinion physician Dr. Rosario, a Board-certified otolaryngologist. He concurred with her findings and properly applied OWCP's standardized procedures to this evaluation. Testing for the right ear at the frequency levels of 500, 1,000, 2,000, and 3,000 cps revealed decibel losses of 25, 25, 55, and 75 respectively. These decibel losses were totaled at 180 dBs and were divided by 4 to obtain the average hearing loss of 45 dBs. This average loss was then reduced by 25 dBs (25 dBs being discounted as discussed above) to equal 20. The 20 was multiplied by 1.5 to equal 30 percent right monaural loss. Testing for the left ear at the frequency levels of 500, 1,000, 2,000, and 3,000 cps revealed decibel losses of 30, 30, 55, and 80 respectively. These decibel losses totaled 195 dBs and when divided by 4 result in an average hearing loss of 48.75 dBs. This average loss when reduced by 25 dBs (25 dBs being discounted as discussed above) equals 23.75. When multiplied by 1.5, this equals a 35.625 percent monaural loss on the left. The DMA determined

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

[6] *Id.*

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

[8] *See* A.M.A., *Guides* 250.

that for binaural hearing loss (5 multiplied by (30) plus (35.63) divided by 6 was equal to 30.9 percent binaural loss. The Board notes that this would equate to 31 percent as it is proper OWCP policy to round the calculated percentage of impairment up to the nearest whole number.[9] Fractions are rounded down from 0.49 and up from 0.50.[10] The DMA concurred that appellant also had one percent award for tinnitus. He explained that appellant previously received a past award of 17 percent for binaural hearing loss and subtracted this from the amount and arrived at 14.9 percent award, which OWCP rounded up to 15 percent.

The Board finds that there is no current medical evidence of record supporting that appellant has greater loss than that previously awarded under OWCP's standardized procedures for rating hearing loss.

On appeal appellant argues that OWCP used an incorrect date of MMI. As noted above, the date of MMI is based on the probative medical evidence of record and is usually considered to be the date of the evaluation by the attending physician that is accepted as definitive by OWCP.[11] The evaluation accepted as definitive by OWCP was Dr. Rosario's May 23, 2017 report, which was reviewed and affirmed by the DMA. The Board finds that OWCP properly determined the date of MMI for schedule award purposes.

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.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish greater than 32 percent binaural hearing loss, for which he previously received a schedule award.

[9] *J.Q.*, 59 ECAB 366 (2008).

[10] *Carl J. Cleary*, 57 ECAB 563 (2006).

[11] In assessing eligibility for a schedule award, the medical evidence must show that the impairment has reached a permanent and fixed state, which is generally referred to as MMI. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5b(1) (February 2013). Assuming MMI has been attained, the date of MMI is usually considered to be the date of the evaluation by the attending physician that is accepted as definitive by OWCP. Schedule awards begin on the date of MMI, unless circumstances show that a later date should be used. A retroactive determination of the date of MMI is not *per se* erroneous. When the medical evidence establishes that the employee did in fact reach MMI by such date, the determination is proper. *Id.* at Chapter 2.808.7b.

ORDER

IT IS HEREBY ORDERED THAT the August 3, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 18, 2018
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