



On appeal appellant contends that his pay rate for schedule award purposes should be based on his date of last exposure of May 21, 2015 rather than April 20, 2014 as selected by OWCP.

### **FACTUAL HISTORY**

On April 28, 2014 appellant, then a 49-year-old federal air marshal filed an occupational disease claim (Form CA-2) alleging that he developed bilateral hearing loss due to exposure to pressurization and depressurization while flying in the performance of his job duties. He also noted constant exposure to engine noise during flights. Appellant did not stop work. His supervisor indicated that appellant first reported his condition on April 29, 2014.

In letters dated June 17, 2014, OWCP requested additional factual and medical information from appellant and the employing establishment. It afforded 30 days for responses. Appellant provided audiograms from the employing establishment dated September 20, 2007 through August 29, 2013 which noted appellant's noise exposure to aircraft and gunfire for 10 hours a day. He also responded to OWCP's request for factual information on July 14, 2014 and indicated that he fired approximately 300 rounds per quarter training session or approximately 1,200 rounds of ammunition per year. Appellant also noted his exposure to airplane engine noise both inside and outside of aircraft. He indicated that his last date of noise exposure was April 20, 2014. Appellant provided a light-duty job description which entailed answering the telephone, using a computer, and greeting visitors with an effective date of August 24, 2014.

OWCP referred appellant, a statement of accepted facts (SOAF), and otologic evaluation questionnaire for a second opinion evaluation with Dr. Ajit C. Shah, a Board-certified otolaryngologist, on December 19, 2014. In a report dated January 13, 2015, Dr. Shah reviewed the SOAF and completed the questionnaire. He diagnosed mild-to-moderate bilateral sensorineural hearing loss and attributed this loss of hearing to noise exposure during appellant's federal employment. Dr. Shah reviewed appellant's audiogram which demonstrated at 500, 1,000, 2,000, and 3,000 hertz (Hz) decibel losses of 20, 15, 15, and 65 on the right respectively and 15, 10, 10, and 45 respectively on the left.

By decision dated March 11, 2015, OWCP accepted appellant's claim for bilateral mild-to-moderate sensory neural hearing loss.

Appellant submitted a report dated March 25, 2016 from Dr. Paul C. Martin, a family practitioner, addressing appellant's noise exposure as an air marshal. Dr. Martin noted that appellant had not flown for over one year because he was disabled from work due to a back injury. He determined that appellant had reached maximum medical improvement as he had been removed from his exposure to gunfire and jet airplanes. Dr. Martin found that appellant had 5.6 percent monaural hearing loss on the right and no ratable hearing loss on the left.

On June 12, 2016 appellant filed a claim for a schedule award (Form CA-7). He indicated that he retired from the employing establishment in March 2016. In a telephone memorandum dated August 23, 2016, OWCP confirmed with appellant that the employing establishment had moved so that its Ohio address was no longer valid.

In a letter dated September 9, 2016, OWCP referred appellant for a second opinion evaluation with Dr. John Babyak, Jr., a Board-certified otolaryngologist. In a report dated September 20, 2016, Dr. Babyak attributed appellant's bilateral sensorineural hearing loss to noise exposure to gunfire and jet tarmacs in his federal job duties. He reviewed appellant's audiogram and found at 500, 1,000, 2,000, and 3,000 Hz decibel losses of 20, 20, 50, and 80 on the right respectively and 20, 15, 15, and 40 respectively on the left.

On October 7, 2016 OWCP requested that appellant provide his pay rate information. He noted that he had retired in February 2016 and would attempt to locate a telephone number for the employing establishment.

An OWCP medical adviser reviewed Dr. Babyak's report on October 7, 2016 and found that appellant's decibel losses in the right ear totaled 170, divided by 4 equaled 42.5 and subtracting the "fence" of 25 resulted in 17.5 multiplied by 1.5 to reach an impairment rating of 26.25 of the right for monaural loss. For the left ear, OWCP's medical adviser applied the same formula and reached a total loss of hearing of 90, which divided by 4 equaled 22.5. When the fence of 25 was subtracted, the balance was negative resulting in no ratable loss of hearing. OWCP's medical adviser determined that appellant's binaural loss of hearing was 4.4 percent.

On October 14, 2016 appellant provided his January 10, 2016 pay information which indicated annual basic pay of \$67,399.00, locality adjustment of \$12,718.00, and other pay of \$20,029.00. He also provided contact information for R.K. at the employing establishment's facility in Arlington, Virginia.

OWCP's claims examiner left a message for R.K. on November 9, 2016 requesting that she verify appellant's pay rate as of January 10, 2016. She responded on November 15, 2016 and indicated that appellant's salary at retirement was \$100,146.25 and his retirement date was February 20, 2016. On December 9, 2016 OWCP requested that appellant and R.K. provide his pay rate on April 20, 2014, the date of his last noise exposure while flying in the performance of duty. R.K. responded on December 14, 2016 and indicated that appellant's pay rate on April 20, 2014 was \$98,016.25 per year.

Appellant provided a notification of personnel action (Form SF-50) dated January 11, 2015 which listed his annual base pay as \$66,732.00, his locality pay as \$12,466.00, and his other pay as \$19,800.00. On January 18, 2017 he contacted OWCP and indicated that he last flew in 2015. OWCP requested that appellant provide the actual date of his last exposure.

In a letter dated January 19, 2017, appellant's representative indicated that appellant's last flight status date was May 21, 2015 and his last day of work was May 27, 2015. She provided time and attendance forms for corroboration. OWCP attempted to confirm this data with R.K. on January 25, 2017 *via* telephone and left a message for her. On February 8, 2017 OWCP mailed a letter to the Ohio address of the employing establishment requesting pay rate information and confirmation of appellant's last flight. OWCP sent a second letter to the same address on April 12, 2017.

By decision dated June 19, 2017, OWCP granted appellant a schedule award for 26 percent monaural right ear, loss of hearing. It found that April 20, 2014 was the effective date

for appellant's pay rate. OWCP noted that it had not received information that he was in flight status after April 20, 2014. While appellant had provided the date of May 21, 2015 as the date of last exposure, OWCP was unable to substantiate this date. OWCP advised that it sought to contact the employing establishment on February 8, and April 12, 2017, but did not receive confirmation of a date of last exposure after April 20, 2014.

### **LEGAL PRECEDENT -- ISSUE 1**

The schedule award provisions of FECA<sup>2</sup> and its implementing regulations<sup>3</sup> set forth the number of weeks of compensation payable to employees sustaining permanent impairment for loss or loss of use, of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage loss of a member 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, 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 according to the standards set forth in the specified edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).<sup>4</sup> The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.<sup>5</sup>

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>6</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>7</sup> The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.<sup>8</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

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<sup>2</sup> 5 U.S.C. §§ 8101-8193, 8107.

<sup>3</sup> 20 C.F.R. § 10.404.

<sup>4</sup> For new decisions issued after May 1, 2009 OWCP began using the sixth edition of the A.M.A., *Guides*. A.M.A., *Guides*, 6<sup>th</sup> ed. (2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.5a (January 2010); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

<sup>5</sup> 20 C.F.R. § 10.404(a).

<sup>6</sup> A.M.A., *Guides* 250.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

arrive at the amount of the binaural hearing loss.<sup>9</sup> The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.<sup>10</sup>

It is well established that, if calculations based on the monaural hearing loss would result in greater compensation than calculations for binaural loss, then the monaural hearing loss calculations should be used.<sup>11</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant has not met his burden of proof to establish more than 26 percent hearing loss in his right ear for which he previously received a schedule award.

OWCP accepted that appellant sustained bilateral mild-to-moderate sensory neural hearing loss due to noise exposure at work and granted him a schedule award for 26 percent permanent impairment of the right ear, monaural, loss of hearing based on the September 20, 2016 second opinion report from Dr. Babyak, as reviewed by OWCP's medical adviser. The losses at the frequencies of 500, 1,000, 2,000 and 3,000 cycles per second were added and averaged and the "fence of 25 decibels was deducted."<sup>12</sup> The remaining amount was multiplied by 1.5 to arrive at the percentage of monaural hearing loss. For levels recorded in the left ear of 20, 15, 15, and 40, the above formula derives 0 percent monaural loss and for levels recorded in the right ear of 20, 20, 50, and 80, the above formula derives 26 percent monaural loss. Therefore, appellant's left ear impairment was not ratable.<sup>13</sup>

While section 8107(c)(13) provides separate calculations for loss of hearing in one ear and for loss of hearing in both,<sup>14</sup> as noted above, if calculations based on the monaural hearing loss would result in greater compensation than calculations for binaural loss, then the monaural hearing loss calculations should be used.<sup>15</sup> OWCP's medical adviser found four percent permanent impairment due to binaural hearing loss or eight weeks of compensation. Appellant received 13 weeks and a fraction of a day in compensation for the 26 percent right ear loss of hearing.

The Board, therefore, finds that appellant has not established impairment greater than the 26 percent monaural (right ear) hearing loss for which he previously received a schedule award.

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<sup>9</sup> *Id.* at 251.

<sup>10</sup> *Horace L. Fuller*, 53 ECAB 775 (2002); *B.B.*, Docket No. 16-0512 (issued May 17, 2016).

<sup>11</sup> *Reynoldo R. Lichtenberger*, 52 ECAB 462 (2001); *B.B.*, *id.*

<sup>12</sup> The A.M.A., *Guides* points out that the loss below an average of 25 decibels is deducted as it does not result in impairment in the ability to hear every day sounds under everyday listening conditions.

<sup>13</sup> *B.B.*, *supra* note 10.

<sup>14</sup> 5 U.S.C. § 8107(c)(13).

<sup>15</sup> *B.B.*, *supra* note 10.

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.

### **LEGAL PRECEDENT -- ISSUE 2**

Under FECA, monetary compensation for disability or impairment due to an employment injury is paid as a percentage of monthly rate.<sup>16</sup> Section 8101(4) provides that “monthly pay” means the monthly pay at the time of injury or the monthly pay at the time disability begins or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater.<sup>17</sup> The compensation rate for schedule awards is the same as compensation for wage loss.<sup>18</sup>

For occupational disease claims where the claimant remains exposed to the work factors claimed, the pay rate is the rate of pay effective the date of the last exposure to causal employment factors. If the claimant no longer remains exposed to the work factors claimed and there has been a change in work duties, *e.g.*, limited duty, then the date of last exposure is used.<sup>19</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that the case is not in posture for a decision regarding the appropriate pay rate for schedule award purposes.

On appeal and before OWCP, appellant gave varying dates of his last exposure to noise while flying in the performance of duty. Both OWCP and appellant agree that his pay rate for schedule award purposes should be the date of last exposure to the causal federal employment factors. Appellant initially informed OWCP that his date of last exposure was his last date of flying on April 20, 2014. He reported that he transferred into a limited-duty position which required desk work on August 24, 2014. Appellant, through counsel, reported on January 19, 2017 that he last flew for the employing establishment on May 21, 2015. OWCP attempted to verify the May 21, 2015 date as the date of last exposure through communication with R.K., the employing establishment contact person appellant provided. R.K. did not respond to OWCP’s telephone message and OWCP then attempted to contact her through the mail. However, OWCP failed to utilize the address appellant provided after he notified OWCP that his original employing establishment had relocated. Without information regarding the date of last exposure to noise, appellant cannot establish his appropriate pay rate.

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<sup>16</sup> See 5 U.S.C. §§ 8105-8107.

<sup>17</sup> *Id.* at § 8101(4).

<sup>18</sup> See 20 C.F.R. § 10.404(b); *K.H.*, 59 ECAB 495 (2008); *B.B.*, *supra* note 10.

<sup>19</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.5 (March 2011); see *Patricia K. Cummings*, 53 ECAB 623 (2002).

It is well established that proceedings under FECA are not adversarial in nature and that, while the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. OWCP has an obligation to see that justice is done.<sup>20</sup> In a case where OWCP “proceeds to develop the evidence and to procure evidence, it must do so in a fair and impartial manner.”<sup>21</sup> The employing establishment’s reluctance or refusal to submit the requested evidence regarding appellant’s date of last exposure should not be an impediment to appellant’s successful prosecution of his claim. The type of information being sought is normally within the custody of the employing establishment and not readily available to appellant.<sup>22</sup>

On remand, OWCP should again request that the employing establishment provide information regarding appellant’s date of last exposure to noise. After this and such other development as OWCP deems necessary, it shall issue a *de novo* decision.

### CONCLUSION

The Board finds that appellant has not established more than 26 percent monaural (right ear) loss of hearing, for which he previously received a schedule award. The Board further finds that the case is not in posture for decision with regard to appellant’s pay rate for schedule award purposes.

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<sup>20</sup> *John J. Carlone*, 41 ECAB 354, 358-60 (1989).

<sup>21</sup> *Walter A. Fundinger, Jr.*, 37 ECAB 200, 204 (1985).

<sup>22</sup> *See F.V.*, Docket No. 16-0786 (issued August 2, 2016). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.2(d) (sets forth OWCP procedures for clarifying pay rate discrepancies); *Gary Vancura*, 40 ECAB 427 (1989) (where Board remanded the case for OWCP to obtain a confirmation from the employing establishment to explain a discrepancy in appellant’s pay rate).

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 19, 2017 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further development consistent with this decision.

Issued: February 14, 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