United States Department of Labor
Employees' Compensation Appeals Board

R.H., Appellant	)	
and	)	**Docket No. 17-0434**
	)	**Issued: March 12, 2018**
DEPARTMENT OF JUSTICE, RAY BROOK FEDERAL CORRECTIONAL INSTITUTION, Ray Brook, NY, 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
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 19, 2016 appellant filed a timely appeal from an October 31, 2016 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 this case.

ISSUE

The issue is whether appellant sustained greater than 13 percent binaural (both ears) hearing loss, for which he previously received schedule awards.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted[2] that on or before December 1, 2008 appellant, then a 44-year-old correctional officer, sustained binaural sensorineural hearing loss caused by hazardous noise exposure in the performance of duty.[3] He documented exposure to weapons fire and explosives as a firearms instructor, and participation in special response and disturbance control teams. Appellant participated in an employing establishment hearing conservation program.[4] He remained exposed to these sources of hazardous noise through January 28, 2010.

A December 12, 2001 audiogram performed for Dr. John W. Decker, an attending Board-certified otolaryngologist, demonstrated decibel losses at the frequency levels of 500, 1,000, 2,000, and 3,000 hertz (Hz) in the right ear of 20, 20, 20, and 15 respectively. Testing at the same frequency levels for the left ear revealed decibel losses of 45, 45, 45, and 45 respectively.

Dr. Decker provided September 24 and October 8, 2009 reports. He noted appellant's employment as a firearms instructor, with a history of bilateral tympanometry with pressure equalization. Dr. Decker reviewed a December 2001 audiogram demonstrating a mild high-frequency sensorineural hearing loss with a left-sided 25 decibel (dB) conductive overlay. A December 2008 screening audiogram showed a "different pattern, with bilateral sloping hearing loss of mild-to-severe degree, worse in the left ear." Dr. Decker diagnosed "[h]earing loss with chronic Eustachian tube dysfunction."

On October 8, 2009 Dr. Decker obtained an audiogram showing decibel losses at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz in the right ear of 35, 25, 10, and 35 respectively. Testing at the same frequency levels for the left ear revealed decibel losses of 40, 30, 25, and 45 respectively. Dr. Decker opined that the audiogram showed a "bilateral high-frequency sensorineural hearing loss of mild to profound level," with a small, low-frequency conductive hearing loss, worse on the left. He noted that tympanometry demonstrated negative pressure on both sides, worse on the left. Dr. Decker diagnosed "mixed deafness."

A January 25, 2010 audiogram showed decibel losses at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz in the right ear of 25, 20, 20, and 25 respectively. Testing at the same frequency levels for the left ear revealed decibel losses of 45, 45, 40, and 45 respectively.

On June 23, 2010 OWCP obtained a second opinion from Dr. Jacques Piche, a Board-certified otolaryngologist. Dr. Piche reviewed the record and a statement of accepted facts

[2] OWCP initially denied the claim by decision dated March 22, 2010, finding that appellant did not submit sufficient evidence documenting his exposure to hazardous noise. Following additional development, it accepted the claim on July 27, 2010.

[3] The employing establishment provided a December 4, 2001 occupational disease claim (Form CA-2), in which appellant claimed that he sustained a binaural hearing loss on or before October 25, 2001 due to exposure to "continuous loud gunfire" while working as a firearms instructor. It noted on December 28, 2001 that appellant decided not to file a claim at that time.

[4] December 17, 2008 employing establishment screening audiograms showed that appellant's hearing at "pitches vital for understanding speech" was "significantly below normal." It recommended that appellant arrange "to be seen by an audiologist."

(SOAF). He noted that appellant underwent bilateral myringotomies with tube placement for serous otitis in 2000 and 2006. The tubes were subsequently removed, with residual scarring of the tympanic membranes. Dr. Piche obtained an audiogram on June 23, 2010 showing decibel losses at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz in the right ear of 30, 30, 40, and 25, respectively. Testing at 500, 1,000, 2,000, and 3,000 Hz in the left ear revealed decibel losses of 40, 35, 25, and 25 respectively. Dr. Piche diagnosed a significant binaural hearing loss attributable to hazardous noise exposure at work, superimposed on a conductive hearing loss on the left due to serous otitis unrelated to his job.

On July 27, 2010 OWCP requested an OWCP medical adviser review the record and a SOAF to determine whether appellant sustained a ratable hearing loss in the right ear, according to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[5] On July 28, 2010 an OWCP medical adviser opined that appellant attained maximum medical improvement (MMI) as of June 23, 2010, the date of Dr. Piche's audiogram. He totaled the 500, 1,000, 2,000 and 3,000 Hz decibel losses for the right ear of 30, 30, 40, and 25 dBs to equal 125. For the left ear, the medical adviser added the decibel losses of 40, 35, 25, and 35 respectively, totaling 135 dBs. Without providing additional calculations, he opined that appellant had 10 percent binaural hearing loss. The medical adviser recommended hearing aids.

OWCP's medical adviser averaged the losses to determine that appellant had hearing loss of 16 dBs. He then subtracted the fence of 25 dBs and multiplied the balance by 1.5, resulting in a zero percent right ear monaural hearing loss. For the left ear, the medical adviser added the dB losses of 20, 20, 25, and 20 respectively, to obtain an average loss of 21 dBs. After subtracting a fence of 25 dBs, he multiplied the remaining balance by 1.5 to calculate 0 percent left ear monaural hearing loss.

On August 9, 2010 appellant filed a claim for a schedule award (Form CA-7).

By decision dated February 1, 2011, OWCP issued appellant a schedule award for 10 percent binaural hearing loss. The period of the award ran from June 23 to November 9, 2010.

Appellant retired from the employing establishment effective February 25, 2012.

On March 14, 2016 appellant claimed an additional schedule award (Form CA-7). In a December 28, 2015 letter, he asserted that his hearing had worsened and that he required hearing aids. Appellant submitted a January 7, 2016 audiogram performed for Dr. Sarah Brady, a doctor of audiology. The audiogram showed decibel losses at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz in the right ear of 35, 25, 25, and 45, respectively. Testing at 500, 1,000, 2,000, and 3,000 Hz in the left ear revealed decibel losses of 35, 25, 40, and 55 respectively. Dr. Brady recommended bilateral hearing aids.

On April 18, 2016 OWCP referred the case to a different OWCP medical adviser to determine whether appellant sustained an additional hearing loss under the A.M.A., *Guides*. In an April 21, 2016 report, the medical adviser opined that appellant reached MMI as of January 7,

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

2016, the date of Dr. Brady's audiogram. He totaled the 500, 1,000, 2,000 and 3,000 Hz decibel losses for the right ear of 35, 25, 25, and 45 dBs to equal 130, divided by 4 to equal 32.5. Subtracting the 25 dB fence resulted in a balance of 7.5, multiplied by 1.5 to equal an 11.25 monaural hearing loss for the right ear. For the left ear, the medical adviser totaled the 500, 1,000, 2,000 and 3,000 Hz decibel losses of 35, 25, 40, and 55 dBs to equal 155, divided by 4 to equal 38.75. He then subtracted the fence of 25 dBs and multiplied the balance of 13.75 by 1.5, resulting in a 20.625 percent left monaural hearing loss. The medical adviser then multiplied the 11.25 monaural loss for the right ear by 5, added the 20.63 percent left ear hearing loss, and divided the total by 6 as directed by the A.M.A., *Guides*, resulting in 12.8 percent binaural hearing loss. He opined that appellant should be granted a schedule award for an additional 2.8 percent hearing loss above the 10 percent hearing loss awarded on February 1, 2011. The medical adviser indicated that hearing aids should be authorized.

By decision dated October 31, 2016, OWCP issued an additional schedule award for 13 percent binaural hearing loss, as appellant had previously been paid an award for 10 percent binaural hearing loss. The increased award was for 6.0 weeks of compensation and ran from January 7 to February 17, 2016.

LEGAL PRECEDENT

The schedule award provision of FECA 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.[6] 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 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* has been adopted by OWCP for evaluating schedule losses and the Board has concurred in such adoption.[7]

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.[8] 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.[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

[6] 5 U.S.C. § 8107.

[7] *See 2*0 C.F.R. § 10.404; *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

[8] A.M.A., *Guides* (6th ed. 2009) p. 250. *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013).

[9] *Id*.

[10] *Id*.

amount of the binaural hearing loss.[11] The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.[12]

ANALYSIS

OWCP accepted that appellant sustained binaural hearing loss due to noise exposure at work. On February 1, 2011 appellant received a schedule award for 10 percent binaural loss of hearing. He requested an additional schedule award for binaural hearing loss. By decision dated October 31, 2016, OWCP awarded appellant an additional 3 percent binaural hearing loss, for a total hearing loss of 13 percent.

The Board finds that appellant has not established a schedule award greater than 13 percent permanent binaural hearing impairment.

Appellant submitted a January 7, 2016 audiogram from Dr. Sarah Brady, a doctor of audiology. Testing at 500, 1,000, 2,000, and 3,000 Hz in the right ear revealed decibel losses of 35, 25, 25, and 45, respectively. Testing at 500, 1,000, 2,000, and 3,000 Hz in the left ear revealed decibel losses of 35, 25, 40, and 55 respectively.

OWCP procedures relating to the evaluation of schedule awards provide that the file should be routed to its district medical adviser (DMA) for an opinion concerning the nature and percent of impairment.[13] Accordingly, OWCP referred appellant's case to a DMA.

On April 21, 2016 OWCP's medical adviser utilized the decibel losses found by Dr. Brady with regard to hearing loss as found on the January 7, 2016 audiogram. He determined that appellant had reached MMI as of the date of this audiogram. The DMA found that he had an additional 2.8 percent binaural hearing loss, totaling 12.8 percent binaural hearing loss. He properly applied OWCP standardized procedures to Dr. Brady's audiogram which recorded frequency levels at the 500, 1,000, 2,000, and 3,000 Hz and revealed decibel losses of 35, 25, 25, and 45, respectively in the right ear for a total decibel loss of 130. The DMA then followed established procedures and divided this total by four which resulted in an average loss of 32.5 dBs and subtracted the fence of 25 dBs to equal 7.5 dBs. He then multiplied this by the established factor of 1.5 to result in 11.25 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 35, 25, 40, and 55 dBs, respectively, for a total of 155 dBs. He divided this by four, for an average hearing loss of 38.75 dBs, subtracted the fence of 25 dBs to equal 13.75 dBs, and multiplied this by the established factor of 1.5, for 20.625 percent monaural hearing loss for the left ear. The DMA then multiplied the 11.25 percent right ear hearing loss by five, added the 20.63 percent left ear hearing loss, and divided the total by six, for a total of 12.8 percent binaural hearing loss which

[11] *Id*.

[12] *P.D.*, Docket No. 15-1173 (issued September 2, 2015); *C.C.*, Docket No. 11-0731 (issued October 11, 2011).

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6e (February 2013).

is rounded upward to 13 percent. He subtracted the previously awarded 10 percent binaural hearing loss, to find that appellant had an additional 3 percent binaural hearing loss.

The Board finds that OWCP's DMA applied the proper standards to the January 7, 2016 audiogram. The result is 12.8 percent binaural hearing loss which is rounded up to 13 percent.[14] Appellant previously received a schedule award totaling 10 percent binaural hearing loss. OWCP, therefore, properly determined that he was entitled to a schedule award for an additional three percent binaural loss.

On appeal appellant contends that he is entitled to receive a schedule award for the period November 10, 2010 to February 17, 2016. The Board notes, however, that OWCP issued schedule award payments for the appropriate number of weeks, commencing with the dates of MMI.[15] Appellant has not submitted any medical evidence establishing that he is entitled to a schedule award in addition to those previously 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.

CONCLUSION

The Board finds that appellant did not establish greater than 13 percent binaural (both ears) hearing loss, for which he previously received schedule awards.

[14] The Board notes that OWCP's procedures provide that in computing binaural hearing loss, percentages should not be rounded until the final percent for award purposes is obtained and fractions should be rounded down from .49 or up from .50. Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4.b(2)(b) (January 2010). *See V.B.*, Docket No. 14-0008 (issued March 6, 2014).

[15] *See* 5 U.S.C. § 8107(c)(13)(B). This provision provides that for complete loss of hearing in both ears, or 100 percent loss, the claimant is entitled to 200 weeks of compensation. So, an additional three percent loss of hearing in both ears would yield six additional weeks of compensation (.03 x 200 = 6). This is what appellant received.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Program dated October 31, 2016 is affirmed.

Issued: March 12, 2018
Washington, DC

Christopher J. Godfrey, 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