

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish a ratable hearing loss warranting a schedule award; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

On appeal counsel contends that the correct issue is whether appellant has any measurable hearing loss, rather than whether he has a ratable hearing loss warranting a schedule award.

FACTUAL HISTORY

On December 21, 2015 appellant, then a 62-year-old marine machinery mechanic supervisor, filed an occupational disease claim (Form CA-2) alleging that he had developed hearing loss and tinnitus due to his federal employment.

In a letter dated December 24, 2015, OWCP requested additional factual and medical evidence from appellant supporting his occupational disease claim.

Appellant provided a listing of his positions at the employing establishment and the ear protection he utilized during his period of employment. He also provided an October 6, 2015 report from an audiologist diagnosing normal-to-moderate sensorineural hearing loss bilaterally. Appellant submitted an employing establishment hearing conservation program audiographic report dated November 25, 2015.

On January 18, 2016 OWCP referred appellant for a second opinion evaluation with Dr. Ronald P. Peroff, a Board-certified otolaryngologist. It also referred appellant for audiological examination with Marylee Ruth, an audiologist, on January 29, 2016. The audiogram from Ms. Ruth was dated February 3, 2016 and received by OWCP on February 25, 2016. Appellant's February 3, 2016 audiogram demonstrated testing at 500, 1,000, 2,000, and 3,000 Hertz (Hz). This test demonstrated bilateral losses of 15, 10, 15, and 40 decibels. The audiographic equipment was calibrated on July 22, 2015.

In his February 2, 2016 report, Dr. Peroff reviewed the statement of accepted facts, performed a physical examination, and mentioned both the November 25, 2015 audiogram and the February 3, 2016 audiogram from Ms. Ruth. He found that appellant did not have a ratable impairment under the A.M.A., *Guides* under either of these audiograms. Dr. Peroff diagnosed noise-induced sensorineural hearing loss. In a supplemental report dated February 21, 2016, he attributed appellant's noise-induced sensorineural hearing loss to his federal employment. OWCP referred the medical evidence to OWCP's medical adviser on February 26, 2016. The medical adviser reported on March 10, 2016, based on Dr. Peroff's report, that appellant had no ratable hearing loss.

By decision dated March 14, 2016, OWCP accepted appellant's claim for bilateral sensorineural hearing loss. In a separate decision also dated March 14, 2016, it denied his claim for a schedule award finding that his hearing loss was not sufficiently severe to be considered ratable.

On March 23, 2016 counsel requested an oral hearing from OWCP's Branch of Hearings and Review. Appellant testified at the oral hearing on November 8, 2016 and noted that he had retired from the employing establishment on January 2, 2016. He reported tinnitus in both ears.

By decision dated January 6, 2017, OWCP's hearing representative found that appellant did not have a ratable hearing loss as, after applying the hearing loss formula, appellant did not have a hearing loss percentage in either ear above zero. OWCP's hearing representative found that tinnitus could not be the sole basis for a schedule award, but could be included up to five percent when there was a ratable hearing loss.³

In a letter dated January 27, 2017, counsel requested reconsideration of the January 6, 2017 decision. He accepted that under the A.M.A., *Guides* the correct standard for including tinnitus in a schedule award was a "measurable" hearing loss not a "ratable" hearing loss. Counsel asserted that the *Trevino*⁴ case misstated the A.M.A., *Guides* and had long been used as false authority to deny compensation.

By decision dated February 8, 2017, OWCP declined to reopen appellant's claim for consideration of the merits of his case. It found that his January 27, 2017 request for reconsideration did not comply with the requirements for review of the merits.

LEGAL PRECEDENT -- ISSUE 1

Section 8149 of FECA delegates to the Secretary of Labor the authority to prescribe rules and regulations for the administration and enforcement of FECA. The Secretary of Labor has vested the authority to implement the FECA program with the Director of OWCP.⁵ Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions, and organs of the body.⁶ FECA, however, does not specify the manner by which the percentage loss of a member, function, or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. Through its implementing regulations, OWCP adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.⁷

As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).⁸ The Board has approved the use by OWCP of the A.M.A.,

³ *Juan A. Trevino*, 54 ECAB 358 (2003).

⁴ *Id.*

⁵ *See* 20 C.F.R. §§ 1.1-1.4.

⁶ For a complete loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

⁷ 20 C.F.R. § 10.404. *See also Ronald R. Kraynak*, 53 ECAB 130 (2001).

⁸ *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).

Guides for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.⁹

The Board requires that the employee undergo both audiometric and otologic examination, that the audiometric testing precede the otologic examination, that the audiometric testing be performed by an appropriately certified audiologist, that the otologic examination be performed by an otolaryngologist certified or eligible for certification by the American Academy of Otolaryngology, that the audiometric and otologic examination be performed by different individuals as a method of evaluating the reliability of the findings, that all audiological equipment authorized for testing meet the calibration protocol contained in the accreditation manual of the American Speech and Hearing Association. The audiometric test results must include both bone conduction and pure tone air conduction thresholds, speech reception thresholds and monaural discrimination scores, and the otolaryngologist's report must include: date and hour of examination, date and hour of employee's last exposure to loud noise, a rationalized medical opinion regarding the relation of the hearing loss to the employment-related noise exposure, and a statement of the reliability of the tests.¹⁰

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 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.¹¹ 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.¹² The Board has also noted OWCP's policy to round the calculated percentage of impairment to the nearest whole number.¹³

ANALYSIS -- ISSUE 1

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

OWCP referred appellant for a second opinion evaluation with Dr. Peroff, a Board-certified otolaryngologist, and also referred appellant for audiological examination with Ms. Ruth, an audiologist. In his February 2, 2016 report, Dr. Peroff determined that neither the November 25, 2015, nor the February 3, 2016 audiographic results constituted a ratable loss of

⁹ *Isidoro Rivera*, 12 ECAB 348 (1961).

¹⁰ *Raymond H. VanNett*, 44 ECAB 480, 482-83 (1993).

¹¹ See A.M.A., *Guides* 250.

¹² *E.S.*, 59 ECAB 249 (2007); *Reynaldo R. Lichtenberger*, 52 ECAB 462 (2001).

¹³ *J.H.*, Docket No. 08-2432 (issued June 15, 2009), *Robert E. Cullison*, 55 ECAB 570 (2004). See *supra* note 6 at Chapter 3.700.4(b)(2)(b) (January 2010).

hearing. OWCP's medical adviser agreed with Dr. Peroff's assessment that there was no ratable hearing loss after he had reviewed the medical evidence on March 11, 2016. Instead of reviewing the most recent audiogram performed by Ms. Ruth, complying with the calibration and other standards required by the Board and requested by OWCP, he relied on the November 25, 2015 employing establishment's audiographic report and calculated appellant's hearing loss for schedule award purposes based on figures contained in this report. He did not provide or review the decibel losses as reported by Ms. Ruth on the February 3, 2016 audiogram diagram. The Board finds that OWCP's medical adviser's report is not in keeping with the medical requirements listed above as he did not review an actual audiogram which was conducted on properly calibrated equipment.¹⁴

OWCP's hearing representative reviewed Ms. Ruth's February 3, 2016 audiogram diagram in his January 6, 2017 decision. However, OWCP's procedures require that medical evidence for schedule award purposes should be referred to an OWCP medical adviser for an opinion concerning the nature and percentage of impairment.¹⁵ OWCP's medical adviser is to determine the percentage of impairment based on the standards of the A.M.A., *Guides*. In this case, OWCP's medical adviser did not properly apply the standards in evaluating the audiographic data. He relied on the employing establishment's uncalibrated audiographic report rather than Ms. Ruth's calibrated and documented audiogram dated February 2, 2016 in determining appellant's permanent impairment.¹⁶ Therefore, OWCP's medical adviser did not appropriately determine appellant's permanent impairment based on the appropriate standards. OWCP's hearing representative's actions in reviewing the medical evidence are insufficient to properly determine appellant's permanent impairment for schedule award purposes in keeping with OWCP's procedures. If OWCP's medical adviser fails or neglects to provide rationale for the percentage of impairment specified, OWCP should request a clarification or supplemental report from the medical adviser.¹⁷ On remand, OWCP should request a supplemental report from OWCP's medical adviser which relies on the proper application of the standards to the appropriate audiographic evidence to determine appellant's permanent loss of hearing for schedule award purposes. Following this and any necessary further development, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for a decision.¹⁸

¹⁴ See *B.C.*, Docket No. 16-0448 (issued November 9, 2016) (finding that OWCP's medical adviser must consider the audio graphic diagram to determine complete, accurate, and internally consistent audiometric test results).

¹⁵ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6f (March 2017).

¹⁶ *Vernon Brown*, 54 ECAB 376 (2003); *L.M.*, Docket No. 14-0773 (issued August 1, 2014).

¹⁷ *Supra* note 15 at 2.808.6.f(2)(a).

¹⁸ In light of the Board's disposition of the schedule award issue, the second issue of whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a) is moot.

ORDER

IT IS HEREBY ORDERED THAT February 8 and January 6, 2017 decisions of the Office of Workers' Compensation Programs are set aside and remanded for further development consistent with this decision of the Board.¹⁹

Issued: March 12, 2018
Washington, DC

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

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

¹⁹ Colleen Duffy Kiko, Judge, participated in the original decision, but was no longer a member of the Board effective December 11, 2017.