

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

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R.B., Appellant)	
)	
and)	Docket No. 19-0257
)	Issued: August 5, 2019
DEPARTMENT OF THE NAVY, NAVAL SEA)	
SYSTEMS COMMAND, Jacksonville, FL,)	
Employer)	
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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
JANICE B. ASKIN, Judge

JURISDICTION

On November 15, 2018 appellant filed a timely appeal from an October 10, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (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 has met his burden of proof to establish greater than 52 percent binaural hearing loss, for which he previously received schedule award compensation.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.² The facts and circumstances as set forth in the Board's prior decisions and orders are incorporated herein by reference. The relevant facts are as follows.

On November 9, 2009 appellant, then a 70-year-old former supply technician, filed an occupational disease claim (Form CA-2) alleging that he had experienced increased hearing loss causally related to factors of his federal employment. OWCP assigned the claim OWCP File No. xxxxxx423.

OWCP had previously accepted appellant's January 25, 1983 occupational disease claim, assigned OWCP File No. xxxxxx735, for left-sided monaural hearing loss. By decision dated May 21, 1984, it granted him a schedule award for 18 percent monaural hearing loss in the left ear under OWCP File No. xxxxxx735. Appellant retired from employment in 1995.

By decision dated February 4, 2010, OWCP denied appellant's November 9, 2009 occupational disease claim under OWCP File No. xxxxxx423. It found that the medical evidence of record was insufficient to establish that he had sustained a diagnosed condition causally related to the accepted employment factors.

Appellant appealed to the Board. By decision dated February 4, 2011, the Board set aside the February 4, 2010 decision.³ The Board determined that the medical evidence of record established appellant's claim for binaural hearing loss and remanded the case for OWCP to determine whether he had sustained ratable permanent impairment due to his binaural hearing loss.

On May 3, 2011 OWCP advised appellant that it had accepted his claim for binaural hearing loss and bilateral tinnitus.

By decision dated July 27, 2011, OWCP granted appellant a schedule award for 39 percent binaural hearing loss, minus the 18 percent left ear monaural hearing loss previously awarded under OWCP File No. xxxxxx735. The period of the award ran for 68.64 weeks from April 24, 2011 to August 17, 2012.

Appellant appealed to the Board. By decision dated May 7, 2012, the Board affirmed the July 27, 2011 decision.⁴ The Board found that appellant had no more than 39 percent binaural hearing loss. The Board noted that OWCP had subtracted the 9.36 weeks of compensation that appellant previously received for his left monaural hearing loss from the 78 weeks owed for the 39 percent binaural hearing loss.

² Docket No. 10-1013 (issued February 4, 2011); Docket No. 12-0015 (issued May 7, 2012), *Order Denying Petition for Reconsideration* (issued January 7, 2013); *Order Dismissing Appeal*, Docket No. 13-0811 (issued July 1, 2013); Docket No. 16-1863 (issued April 3, 2017).

³ *Id.*

⁴ *Id.*

By decision dated December 10, 2014, OWCP denied appellant's claim for an additional schedule award. It found that the medical evidence of record failed to establish greater than 39 percent binaural hearing loss for which he previously received schedule award compensation.⁵

On July 18, 2016 appellant requested reconsideration. He submitted a May 18, 2016 audiologist's report in support of appellant's claim for an increased schedule award. By decision dated August 12, 2016, OWCP denied his request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

Appellant appealed to the Board. By decision dated April 3, 2017, the Board set aside the August 12, 2016 decision.⁶ The Board noted that appellant had contended that he was entitled to an increased schedule award and submitted new evidence. The Board determined that OWCP had erred in treating his claim for an increased schedule award as a request for reconsideration. The Board remanded the case for OWCP to consider whether appellant had established entitlement to an increased schedule award.

On July 11, 2017 OWCP referred appellant to Dr. John F. Ansley, a Board-certified otolaryngologist, for a second opinion evaluation.

In a report dated July 27, 2017, Dr. Ansley diagnosed work-related sensorineural hearing loss. He recommended hearing aids. Dr. Ansley obtained an audiogram on July 27, 2017 showing decibel (dB) losses at the frequency levels of 500, 1,000, 2,000, and 3,000 hertz (Hz) in the right ear of 30, 40, 54, and 70 dBs, respectively, and in the left ear of 30, 40, 70, and 80 dBs, respectively. He determined that appellant had 40 percent binaural hearing loss with an additional 3 percent impairment for tinnitus, for a total binaural hearing impairment of 43 percent.

On September 27, 2017 Dr. Jeffrey M. Israel, a Board-certified otolaryngologist serving as a district medical adviser (DMA), reviewed the audiological testing performed by Dr. Ansley. He applied OWCP's standardized procedures to his evaluation. Using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, Dr. Israel determined that appellant had 39 percent right monaural hearing loss, an additional 18 percent left monaural loss, and a binaural hearing loss of 37 percent. He noted that the 37 percent binaural hearing loss was less than the amount previously awarded for binaural hearing loss of 39 percent and, thus, concluded that appellant was not entitled to an increased award.

By decision dated October 19, 2017, OWCP denied appellant's claim for an increased schedule award.

On January 19, 2018 appellant requested reconsideration. He advised that his tinnitus had worsened. In support of his request, appellant submitted audiograms dated November 14 and 15, and December 29, 2017. He further submitted a November 27, 2017 audiogram.

Appellant additionally submitted a January 12, 2018 report from a physician assistant prepared on behalf of Cortney Van Ausdal, an audiologist. The physician assistant discussed his

⁵ By decision dated June 17, 2015, OWCP denied appellant's request for an oral hearing as untimely under 5 U.S.C. § 8124(b).

⁶ *Supra* note 2.

complaints of tinnitus bilaterally and noise exposure during the course of his federal employment. She diagnosed bilateral sensorineural hearing loss, an asymmetric word recognition score, and occupational exposure to loud noise.

On February 15, 2018 Dr. Israel reviewed the November 27, 2017 audiogram. He found that appellant had 63.75 percent right monaural hearing loss and 67.50 percent left monaural hearing loss. Dr. Israel subtracted the previously awarded 18 percent left monaural hearing loss to find 49.5 percent left monaural hearing loss. He applied the formula for determining binaural hearing loss using the 49.5 left monaural hearing loss and the 63.74 percent right monaural hearing loss to find 51.9 percent binaural hearing loss. Dr. Israel subtracted the 39 percent previous award for binaural loss to find an additional 12.9 percent hearing loss. He opined that the results of testing revealed hearing loss “due at least in part to noise-induced work-related acoustic trauma. It appears that the audiometric test results are valid and representative of this claimant’s hearing sensitivity.”

By decision dated April 23, 2018, OWCP vacated the October 19, 2017 decision and found that appellant was entitled to an additional 13 percent binaural hearing loss.

By decision dated May 1, 2018, OWCP granted appellant a schedule award for an additional 13 percent binaural hearing loss. The period of the award ran for 26 weeks from November 27, 2017 to May 27, 2018.

On July 16, 2018 appellant requested reconsideration. He contended that he was entitled to a schedule award for the period from August 2012 to the present. Appellant resubmitted the November 27, 2017 audiogram.

By decision dated October 10, 2018, OWCP denied modification of its May 1, 2018 decision.

LEGAL PRECEDENT

The schedule award provisions of FECA,⁷ and its implementing federal regulation,⁸ 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 loss of a member shall be determined. The method used in making such a 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 A.M.A., *Guides*, published in 2009.⁹ The Board has approved the use by

⁷ *Supra* note 2.

⁸ 20 C.F.R. § 10.404.

⁹ For decisions issued after May 1, 2009 the sixth edition of the A.M.A., *Guides* is used. A.M.A., *Guides*, (6th ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6 (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

OWCP of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.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 Hz, the losses at each frequency are added up and averaged.¹¹ 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.¹² The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.¹³ 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.¹⁴ The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.¹⁵ The policy of OWCP is to round the calculated percentage of impairment to the nearest whole number.¹⁶ OWCP's 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 .50.¹⁷

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.¹⁸

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish greater than 52 percent binaural hearing loss, for which he previously received schedule award compensation.

On prior appeal, by decision dated May 7, 2012, the Board affirmed OWCP's July 27, 2011 decision, finding that appellant had not established greater than 39 percent binaural hearing loss for which he previously received a schedule award. The Board's review of the medical evidence submitted prior to the July 27, 2011 decision is *res judicata* absent any further review by OWCP under section 8128 of FECA.¹⁹

¹⁰ *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

¹¹ See Section 11.2, Hearing and Tinnitus, A.M.A., *Guides* 248-51 (6th ed. 2009).

¹² *Id.* at 250.

¹³ *Id.* at 250-51.

¹⁴ *Id.* at 251.

¹⁵ See *B.E.*, Docket No. 18-1785 (issued April 1, 2019).

¹⁶ *M.H.*, Docket No. 18-1417 (issued February 13, 2019).

¹⁷ *Id.*; *C.D.*, Docket No. 18-0251 (issued August 1, 2018).

¹⁸ A.M.A., *Guides* 249.

¹⁹ See *B.W.*, Docket No. 18-1415 (issued March 8, 2019).

Subsequently, OWCP further developed the evidence by referring appellant to Dr. Ansley, who determined that he had 43 percent binaural hearing loss.

On September 27, 2017 Dr. Israel, serving as a DMA, reviewed the audiogram obtained by Dr. Ansley and found that appellant had 37 percent binaural hearing loss, which was less than the previously awarded 39 percent.

Appellant requested reconsideration and submitted audiograms dated November 14 and 15, and December 4, 2017.²⁰ He subsequently submitted a November 27, 2017 audiogram and January 12, 2018 report from a physician assistant prepared for Ms. Van Ausdal, an audiologist.

Dr. Israel reviewed the November 27, 2017 audiogram. Testing for the right ear at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz revealed decibel losses of 70, 55, 70, and 75, respectively. These decibels were totaled at 270 and were divided by 4 to obtain an average hearing loss at those cycles of 67.5 decibels. The average of 67.5 decibels was then reduced by 25 decibels (the first 25 decibels were discounted as discussed above) to equal 42.5, which was then multiplied by 1.5 to equal 63.75 percent hearing loss for the right ear.

Testing for the left ear at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz revealed decibel losses of 65, 55, 75, and 85, respectively. These decibels were totaled at 280 and divided by 4 to obtain the average hearing loss at those cycles of 70 decibels. The average of 70 was then reduced by 25 decibels to equal 45, which was multiplied by 1.5 to equal 67.5 percent hearing loss for the left ear. Dr. Israel subtracted the previously awarded 18 percent monaural loss from the current 67.5 percent monaural loss to find a left monaural loss of 49.5 percent. He determined the binaural loss by multiplying the lesser left-sided monaural loss of 49.5 by 5, adding the right-sided hearing loss of 63.75, and dividing the total by 6, to find 51.9 percent binaural loss. Dr. Israel subtracted the previously awarded 39 percent binaural impairment to find an additional 12.9 percent binaural hearing loss, which OWCP rounded up to equal 13 percent.²¹

The Board finds that there is no current medical evidence of record supporting ratable hearing loss greater than 52 percent binaural hearing loss previously awarded. OWCP paid appellant schedule award compensation for the appropriate number of weeks, commencing with the dates of MMI.²² Appellant has the burden of proof to submit evidence of additional hearing

²⁰ These audiograms do not constitute probative medical evidence of hearing loss as they have not been certified by a physician as accurate. *See J.O.*, Docket No. 17-1618 (issued June 14, 2018).

²¹ 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 3.700.4b(2)(b) (January 2010); *see also R.H.*, Docket No. 17-0434 (issued March 12, 2018).

²² *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. A binaural hearing loss of 52 percent yields 104 weeks of compensation, or 104 multiplied by .52. Appellant received 9.36 weeks for the 18 percent monaural loss, 68.64 weeks for the 39 percent binaural loss, after subtracting the prior monaural award, and an additional 26 weeks for the additional 13 percent impairment, a total of 104 weeks.

loss under OWCP's standardized procedures for rating hearing impairment.²³ He has not submitted such evidence in support of his claim.

On appeal appellant contends that his hearing loss continues to worsen. The Board has found, however, that there is no evidence of record establishing greater than the 52 percent binaural hearing loss previously awarded.

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 52 percent binaural hearing loss, for which he previously received schedule award compensation.

ORDER

IT IS HEREBY ORDERED THAT the October 10, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 5, 2019
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

²³ *R.H.*, Docket No. 18-1721 (issued March 25, 2019); *J.W.*, Docket No. 17-1339 (issued August 21, 2018).