

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

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**R.F., Appellant**

**and**

**DEPARTMENT OF THE ARMY, CHEMICAL  
MATERIALS AGENCY, Tooele, UT, Employer**

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**Docket No. 18-0810  
Issued: February 27, 2019**

*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 March 6, 2018 appellant filed a timely appeal from a November 8, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (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 more than 29 percent binaural hearing loss, for which he previously received a schedule award.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

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

On May 18, 2015 appellant, then a 68-year-old retired diesel generator mechanic, filed an occupational disease claim (Form CA-2) for employment-related bilateral hearing loss. He indicated that he first became aware of his claimed condition in June 1975, and first realized it was related to his federal employment in July 1984. Appellant had retired, effective April 3, 2007.<sup>3</sup> By decision dated April 19, 2017, OWCP accepted his occupational disease claim for bilateral sensorineural hearing loss and bilateral tinnitus.

On April 25, 2017 appellant filed a claim for a schedule award (Form CA-7).

In an October 23, 2015 report, Dr. Stewart E. Barlow, a Board-certified otolaryngologist and OWCP referral physician, diagnosed bilateral sensorineural hearing loss and tinnitus, which he attributed to appellant's federal employment. Based on the results of an October 23, 2015 audiogram, he found 20.9 percent permanent binaural hearing impairment.<sup>4</sup> Dr. Barlow also found an additional one percent impairment due to tinnitus, for a total of 21.9 percent permanent binaural hearing impairment pursuant to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).<sup>5</sup>

A March 10, 2016 audiogram noted losses at the frequencies of 500, 1,000, 2,000, and 3,000 Hz. The right ear losses were recorded as 45, 30, 50, and 85 dBs. The left ear losses were recorded as 40, 25, 30, and 60 dBs.<sup>6</sup>

In an April 19, 2017 report, Dr. Jeffrey M. Israel, a Board-certified otolaryngologist and district medical adviser (DMA), noted that the results of the most recent audiogram, dated March 10, 2016, were valid and representative of appellant's hearing sensitivity. Based on this study, he calculated 41.25 percent right monaural loss and 20.625 left monaural loss, which

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<sup>2</sup> Docket No. 16-1398 (issued December 19, 2016).

<sup>3</sup> By decision dated November 2, 2015, OWCP denied appellant's claim, finding that it was untimely pursuant to 5 U.S.C. § 8122. On March 19, 2016 appellant requested reconsideration of the November 2, 2015 decision. By decision dated April 28, 2016, OWCP denied his March 19, 2016 request for reconsideration. Appellant appealed to the Board. By decision dated December 19, 2016, the Board found that OWCP had improperly denied his request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a). The Board noted that appellant had submitted employing establishment hearing conservation records, which the Board determined were relevant and pertinent to the timeliness issue. Therefore, the Board set aside the November 3, 2015 decision and remanded the case to OWCP for consideration of the merits followed by a *de novo* decision.

<sup>4</sup> Appellant's October 23, 2015 audiogram noted losses at the frequencies of 500, 1,000, 2,000, and 3,000 Hertz (Hz). The right ear losses were recorded as 50, 35, 45, and 80 decibels (dBs). The left ear losses were recorded as 35, 20, 30, and 60 dBs.

<sup>5</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

represented 24.1 percent permanent binaural loss. With respect to appellant's tinnitus, Dr. Israel noted that a recent tinnitus handicap inventory revealed a score of 82, which represented 5 percent impairment for tinnitus. Therefore, appellant's combined permanent binaural hearing loss was 29.1 percent. Dr. Israel found that he had reached maximum medical improvement (MMI) as of March 10, 2016, which was the date of his latest audiogram.

By decision dated November 8, 2017, OWCP granted appellant a schedule award for 29 percent permanent binaural hearing loss. The award covered a 58-week period from March 10, 2016 to April 19, 2017.

### **LEGAL PRECEDENT**

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.<sup>7</sup> 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. The implementing regulations have adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.<sup>8</sup> Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides*.<sup>9</sup>

Using the frequencies of 500, 1,000, 2,000, and 3,000 Hz, the losses at each frequency are added up and averaged.<sup>10</sup> 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.<sup>11</sup> The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.<sup>12</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, and then added to the greater loss and the total is divided by six to arrive at the amount of the binaural hearing loss.<sup>13</sup>

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<sup>7</sup> For complete loss of hearing of one ear, an employee shall receive 52 weeks' compensation. 5 U.S.C. § 8107(c)(13). For complete loss of hearing of both ears, an employee shall receive 200 weeks' compensation. *Id.*

<sup>8</sup> 20 C.F.R. § 10.404.

<sup>9</sup> 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 2.808.6a (March 2017).

<sup>10</sup> See Section 11.2, Hearing and Tinnitus, A.M.A., *Guides* 248-51 (6<sup>th</sup> ed. 2009).

<sup>11</sup> *Id.* at 250.

<sup>12</sup> *Id.* at 250-51.

<sup>13</sup> *Id.* at 251.

Regarding tinnitus, the A.M.A., *Guides* provides that tinnitus is not a disease, but rather a symptom that may be the result of disease or injury.<sup>14</sup> 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 a measurable binaural hearing impairment.<sup>15</sup>

### ANALYSIS

The Board finds that appellant has not met his burden of proof to establish more than 29 percent binaural hearing loss, for which he previously received a schedule award.

In an April 19, 2017 narrative report, Dr. Israel, the DMA, noted that based on the March 10, 2016 audiogram performed on behalf of the second opinion specialist, Dr. Barlow, appellant's right ear hearing losses at 500, 1,000, 2,000, and 3,000 Hz were 45, 30, 50, and 85 dBs, which totaled 210 dBs. His left ear losses were 40, 25, 30, and 60 dBs, which totaled 155 dBs. The right ear hearing loss resulted in an average loss of 52.5 ( $210 \div 4$ ) dBs, and the left ear loss averaged 38.75 ( $155 \div 4$ ) dBs. After subtracting the 25 dB fence, the right ear loss was 27.5, and when multiplied by 1.5, represented 41.25 percent monaural loss. Applying the same formula to the left ear ( $38.75 - 25 = 13.75 \times 1.5$ ) resulted in 20.625 percent monaural loss. The DMA then applied the appropriate formula to convert the left and right monaural losses to a binaural loss of 24.1 percent.<sup>16</sup> He then added the maximum 5 percent impairment for tinnitus for a total, permanent binaural hearing loss of 29.1 percent, which OWCP properly rounded down to 29 percent.<sup>17</sup> The Board finds that there is no current medical evidence of record supporting that appellant has a greater hearing loss than previously awarded.

On appeal appellant challenges the period of the schedule award, noting that it "did not match up with his injury date." As noted, OWCP found 29 percent binaural hearing loss and properly calculated that he was entitled to 58 weeks of compensation.<sup>18</sup> Schedule awards begin on the date of MMI, unless circumstances show a later date should be used.<sup>19</sup> The question of when MMI has been reached is a factual one that depends upon the medical findings in the record.<sup>20</sup> In the absence of evidence to the contrary, the date of MMI is usually considered to be the date of

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<sup>14</sup> See A.M.A., *Guides* 249 (6<sup>th</sup> ed. 2009).

<sup>15</sup> *Id.*; see also *R.H.*, Docket No. 10-2139 (issued July 13, 2011).

<sup>16</sup> Dr. Israel multiplied the lesser loss of 20.63 percent monaural hearing loss for the left ear by 5, added the 41.25 percent right ear monaural hearing loss, and divided the total by 6.

<sup>17</sup> *Supra* note 9, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3b (January 2010) (results should be rounded down for figures less than .5 and up for .5 and over).

<sup>18</sup> See *supra* note 7 ( $0.29 \times 200$  weeks' compensation = 58 weeks).

<sup>19</sup> *Supra* note 9, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.7b (March 2017).

<sup>20</sup> *L.H.*, 58 ECAB 561, 563 (2007).

the evaluation that is accepted as definitive by OWCP.<sup>21</sup> In this instance, OWCP based the schedule award on the results of appellant's March 10, 2016 audiogram, and therefore, properly found that he reached MMI by that date. Accordingly, the 58-week period of the schedule award commenced on March 10, 2016.<sup>22</sup>

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 meet his burden of proof to establish greater than 29 percent binaural hearing loss, for which he previously received a schedule award.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the November 8, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 27, 2019  
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

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<sup>21</sup> See *supra* note 17 at Chapter 3.700.3a(1)(c).

<sup>22</sup> See *supra* note 19.