

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

J.M., Appellant

and

**DEPARTMENT OF THE ARMY, ANNISTON
ARMY DEPOT, Anniston, AL, Employer**

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**Docket No. 18-1469
Issued: March 1, 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

ALEC J. KOROMILAS, Alternate Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 23, 2018 appellant filed a timely appeal from a January 25, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees' Compensation Act² (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 15 percent monaural right ear hearing loss, for which he previously received a schedule award.

¹ Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from January 25, 2018, the date of OWCP's last decision, was July 24, 2018. Because using July 27, 2018, the date the appeal was received by the Clerk of the Appellate Boards, would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is July 23, 2018, rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On June 22, 2017 appellant, then a 66-year-old heavy mobile equipment mechanic, filed an occupational disease claim (Form CA-2) alleging that he suffered from hearing loss due to exposure to loud noise during his federal employment. He noted that he first became aware of his condition and realized that it resulted from his federal employment on February 15, 2017. Appellant did not stop work.

OWCP received copies of various audiograms administered by the employing establishment from December 19, 1995 to January 12, 2016. It also received a detailed work history at the employing establishment and the military. From 1974 to 1994 appellant worked as an electronic fire controller and from 1994 to 2017 he worked as a heavy mobile mechanic.

On August 31, 2017 OWCP referred appellant, along with a statement of accepted facts (SOAF) and a copy of the medical record, to Dr. Dennis G. Pappas, Jr., a Board-certified otolaryngologist, for a second opinion evaluation. In a September 25, 2017 report, Dr. Pappas reviewed appellant's history of noise exposure at work and provided examination findings. He performed an otologic evaluation and audiometric testing was obtained on his behalf. Testing at the frequency levels of 500, 1,000, 2,000, and 3,000 Hertz (Hz) revealed the following: right ear 20, 15, 40, and 65 decibels (dBs); and left ear 80, 80, 70, and 75 dBs. Dr. Pappas diagnosed bilateral sensorineural hearing loss and bilateral tinnitus. He opined that appellant's asymmetry on the left with poor discrimination would not be due work-related noise exposure and, alternatively, that the progression of hearing loss on appellant's right side was consistent with work-related noise damage. Dr. Pappas determined that appellant had 76.88 percent hearing impairment on the left, 15 percent hearing loss impairment on the right, and 25.3 percent binaural hearing impairment.

Dr. Pappas also completed an otologic evaluation form. In response to the question of whether appellant's workplace noise exposure was sufficient as to intensity and duration as to have caused the loss in question, he answered "right side yes" and "left side no." Dr. Pappas also marked boxes indicating that appellant's sensorineural hearing loss on the right was "due" to workplace noise exposure, but appellant's sensorineural hearing loss on the left was "not due" to workplace noise exposure. He recommended a trial of amplification for the right ear.

On October 16, 2017 Dr. Charles Pettit, an otolaryngologist and OWCP medical adviser, reviewed appellant's case record, including Dr. Pappas' September 25, 2017 report and the audiometric testing. He calculated appellant's impairment rating and concluded that, in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),³ appellant had 15.75 percent monaural hearing impairment in the right ear, 77 percent monaural hearing impairment in the left ear, and 26 percent binaural hearing impairment. Dr. Pettit noted a date of maximum medical improvement (MMI) of September 25, 2017, the date of Dr. Pappas's second opinion examination and report. He did not recommend hearing aids.

³ A.M.A., *Guides* (6th ed. 2009).

On October 17, 2017 OWCP accepted appellant's claim for bilateral sensorineural hearing loss and bilateral tinnitus.

On October 23 and November 6, 2017 appellant filed a claim for a schedule award (Form CA-7).

By letter dated November 16, 2017, OWCP proposed to rescind the acceptance of appellant's claim for left ear hearing loss and tinnitus based on the September 25, 2017 report of Dr. Pappas. It advised appellant that the case record would be held open for 30 days for the submission of additional evidence.

OWCP received a December 16, 2017 audiometric testing and audiogram, which showed that appellant had moderate-to-moderately-severe sensorineural bilateral hearing loss.

By decision dated January 10, 2018, OWCP rescinded the acceptance of appellant's claim for left ear hearing loss and tinnitus. By separate decision, it amended his claim for acceptance of right ear hearing loss and tinnitus.

On January 19, 2018 Dr. Pettit again reviewed appellant's schedule award claim. He reviewed appellant's history, including the SOAF, and noted that appellant had worked in a noisy environment as a heavy equipment and tank mechanic since 1994. Dr. Pettit reported that appellant had severe hearing loss in the left ear and very poor speech discrimination. He noted that appellant's left ear hearing loss was not work related. Dr. Pettit indicated that appellant had fairly good hearing in his right ear in the low-mid range (500 to 1,000 Hz, but that it fell off rapidly in the higher frequencies. He reported that appellant had 15 percent monaural hearing loss in the right ear.

On January 25, 2018 OWCP granted appellant a schedule award for 15 percent monaural right ear hearing loss. The award ran for 7.6 weeks from September 25 to November 18, 2017. OWCP noted that the percentage of permanent impairment was based on the reports of Dr. Pappas dated September 25, 2017 and Dr. Pettit dated January 19, 2018.

LEGAL PRECEDENT

A claimant seeking compensation under FECA⁴ has the burden of proof to establish the essential elements of his or her claim.⁵ With respect to a schedule award, it is the claimant's burden of proof to establish permanent impairment of the scheduled member or function of the body as a result of an employment injury.⁶

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. FECA, however, does not specify the manner in which the percentage of loss of a member shall be determined. The method

⁴ *Supra* note 2.

⁵ *John W. Montoya*, 54 ECAB 306 (2003).

⁶ *Edward Spohr*, 54 ECAB 806, 810 (2003); *Tammy L. Meehan*, 53 ECAB 229 (2001).

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 as a standard for evaluation of schedule losses and the Board has concurred in such adoption.⁷ For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2009.⁸

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.⁹ Using the frequencies of 500, 1,000, 2,000, and 3,000 cps, the losses at each frequency are added up and averaged. 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.¹⁰ The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss. The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.¹¹

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish more than 15 percent monaural right ear hearing loss, for which he previously received a schedule award.

OWCP's medical adviser, Dr. Pettit, reviewed the report of Dr. Pappas, to whom OWCP referred appellant for an otologic examination and audiological evaluation. Dr. Pappas determined that appellant sustained right ear hearing loss due to his exposure to noise in the workplace. Based on Dr. Pappas's evaluation, Dr. Pettit concluded that appellant had 15 percent monaural right ear hearing loss. The Board finds that Dr. Pettit properly applied OWCP's standardized procedures to Dr. Pappas's September 25, 2017 audiogram, which recorded frequency levels at the 500, 1,000, 2,000, and 3,000 Hz levels and revealed decibel losses of 20, 15, 40, and 65 respectively in the right ear for a total decibel loss of 140 on the right. Dr. Pettit then followed the established procedures and divided this total by 4, which resulted in an average loss of 35 dBs and subtracted the fence of 25 dBs to equal 10 dBs. He then multiplied this amount by the established factor of 1.5 to result in 15 percent monaural hearing loss for the right ear. The report, therefore, properly established that appellant was entitled to a schedule award for 15 percent monaural right ear hearing loss.¹²

The Board finds that there is no current medical evidence of record supporting a ratable hearing loss greater than the 15 percent monaural hearing loss previously awarded. It is appellant's

⁷ 20 C.F.R. § 10.404 (1999); *see also Jacqueline S. Harris*, 54 ECAB 139 (2002).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.806.6.6a (March 2017); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

⁹ *R.D.*, 59 ECAB 127 (2007); *Bernard Babcock, Jr.*, 52 ECAB 143 (2000); *see also* 20 C.F.R. § 10.404.

¹⁰ *Id.*

¹¹ *E.S.*, 59 ECAB 249 (2007); *Reynaldo R. Lichtenberger*, 52 ECAB 462 (2001).

¹² *See J.W.*, Docket No. 17-1339 (issued August 21, 2018).

burden of proof to submit evidence of additional hearing loss under OWCP's standardized procedures for rating hearing impairment.¹³ Appellant has failed to submit such evidence in support of his claim.

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 more than 15 percent monaural right ear hearing loss, for which he previously received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the January 25, 2018 merit decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 1, 2019
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

¹³ *Id.*