

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish greater than 13.4 percent binaural hearing loss, for which he previously received a schedule award; and (2) whether OWCP used the proper pay rate in calculating appellant's schedule award.

FACTUAL HISTORY

On April 25, 2018 appellant, then a 70-year-old boiler plant operator, filed an occupational disease claim (Form CA-2) alleging that he developed hearing loss due to factors of his federal employment including working around high pressure boilers, generators, and mechanical equipment. He first became aware of his condition and its relationship to his employment on April 16, 2018. On the reverse of the claim form, appellant's supervisor indicated that appellant had retired on April 30, 2018.

On September 18, 2018 OWCP referred appellant, a statement of accepted facts (SOAF), and an otologic evaluation questionnaire to Dr. Charles B. Beasley, a Board-certified otolaryngologist, for a second opinion evaluation. The SOAF indicated that from March 2006 until his retirement on April 30, 2018 appellant worked around high pressure boilers with eight hours per day of noise exposure and that hearing protection was provided.

In his October 3, 2018 report, Dr. Beasley reviewed the SOAF and completed the questionnaire. He diagnosed bilateral high frequency hearing loss and attributed this loss of hearing to noise exposure during appellant's federal employment as a boiler plant operator. Dr. Beasley also diagnosed constant bilateral tinnitus due to appellant's employment-related noise exposure. He reviewed appellant's audiogram which demonstrated losses of 20, 35, 50, and 60 decibels (dBs) on the left and 10, 25, 45, and 50 dBs on the right at 500, 1,000, 2,000, and 3,000 hertz (Hz), respectively.

On October 22, 2018 appellant filed a claim for a schedule award (Form CA-7). On the reverse of the form, the employing establishment listed his date-of-injury pay rate as \$38,798.00 per year and noted that he stopped work on April 30, 2018.

By decision dated October 30, 2018, OWCP accepted appellant's claim for bilateral sensorineural hearing loss and bilateral tinnitus.

On October 30, 2018 OWCP referred the medical evidence to its district medical adviser (DMA), Dr. Jeffrey M. Israel, a Board-certified otolaryngologist. Utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment (A.M.A., Guides)*³ The DMA reviewed the October 3, 2018 audiogram on November 1, 2018 and found that appellant had a right monaural loss of 11.25 percent, and a left monaural loss of 24.375 percent for a binaural loss of 13.4 percent. He determined that appellant reached maximum medical improvement (MMI) on October 3, 2018 the date of the most recent audiogram examination.

³ A.M.A., *Guides* (6th ed. 2009).

In a schedule award memorandum dated December 18, 2018, OWCP found that appellant's binaural loss of 13.4 percent afforded him 26 weeks of compensation, more than the combined amount of his individual hearing losses of 5.72 weeks for the right ear and 12.48 weeks for the left ear. It utilized his weekly pay rate at the time of his retirement of \$746.12 based on his annual salary of \$38,798.00. OWCP found that appellant reached MMI on October 3, 2018.

By decision dated December 21, 2018, OWCP granted appellant a schedule award for 13.4 percent binaural loss of hearing. It calculated the period of the award from October 3, 2018 through April 2, 2019 and that his effective date of pay rate was April 30, 2018 and that he was entitled to the augmented 75 percent compensation rate of his weekly pay rate of \$746.12 or \$559.50⁴ per week for a continuing payment every four weeks of \$2,238.36.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provisions of FECA⁵ and its implementing regulations⁶ 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 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

A claimant seeking compensation under FECA has the burden of proof to establish the essential elements of his or her claim.⁹ With respect to a schedule award, it is the claimant's burden of proof to establish permanent impairment of a scheduled member or function of the body as a result of his or her employment injury.¹⁰ A claimant may seek an increased schedule award if the evidence establishes that he or she sustained an increased impairment causally related to an

⁴ The Board notes that this appears to be a typographical error in the calculation noted in the December 21, 2018 decision. The correct weekly compensation rate is \$559.59. This does not affect the monthly compensation rate listed in the decision as \$2,238.36.

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404.

⁷ *Id.* at § 10.404; *T.O.*, Docket No. 18-0659 (issued August 8, 2019); *Jacqueline S. Harris*, 54 ECAB 139 (2002).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

⁹ *T.O.*, *supra* note 7; *John W. Montoya*, 54 ECAB 306 (2003).

¹⁰ *T.O.*, *id.*; *Edward Spohr*, 54 ECAB 806, 810 (2003); *Tammy L. Meehan*, 53 ECAB 229 (2001).

employment injury.¹¹ The medical evidence must include a detailed description of the permanent impairment.¹²

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.¹³ Using the frequencies of 500, 1,000, 2,000, and 3,000 Hz, 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.¹⁴ The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.¹⁵ 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.¹⁶ The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.¹⁷

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. 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.¹⁸

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to a DMA for an opinion concerning the nature and percentage of permanent impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified.¹⁹

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish greater than 13.4 percent binaural loss of hearing, for which he previously received a schedule award.

OWCP properly referred appellant to Dr. Beasley for a second opinion examination relative to his hearing loss. Dr. Beasley's October 3, 2018 report related appellant's audiogram

¹¹ *T.O., id., Rose V. Ford*, 55 ECAB 449 (2004).

¹² *T.O., id.; Vanessa Young*, 55 ECAB 575 (2004).

¹³ *T.O., id.; R.D.*, 59 ECAB 127 (2007); *Bernard Babcock, Jr.*, 52 ECAB 143 (2000); *see also* 20 C.F.R. § 10.404.

¹⁴ A.M.A., *Guides* 250 (6th ed. 2009).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *T.O., supra* note 7; *E.S.*, 59 ECAB 249 (2007); *Reynaldo R. Lichtenberger*, 52 ECAB 462 (2001).

¹⁸ A.M.A., *Guides* 249.

¹⁹ *Supra* note 7 at Chapter 2.808.6(f).

findings and concluded that appellant's binaural hearing loss was due to his workplace noise exposure.

On November 1, 2018 a DMA reviewed Dr. Beasley's report and found testing for the right ear at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz revealed dB losses of 10, 25, 45, and 50, respectively. These dBs were totaled at 130 and were divided by 4 to obtain an average hearing loss at those cycles of 32.5 dBs. The average of 32.5 dBs was then reduced by 25 dBs (the first 25 dBs were discounted as discussed above) to equal 7.5, which was then multiplied by 1.5 to equal 11.25 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 dB losses of 20, 35, 50, and 60, respectively. These dBs were totaled at 165 and divided by 4 to obtain the average hearing loss at those cycles of 41.25 dBs. The average of 41.25 was then reduced by 25 dBs to equal 16.25, which was multiplied by 1.5 to equal 24.375 percent hearing loss for the left ear. Dr. Israel determined the binaural loss by multiplying the lesser right-sided monaural loss of 11.25 by 5, adding the left-sided hearing loss of 24.375, and dividing the total by 6, to find 13.4 percent binaural loss.

The Board finds that there is no current medical evidence of record supporting ratable hearing loss greater than the 13.4 percent binaural hearing loss previously awarded. It is appellant's burden of proof to submit evidence of additional hearing loss under OWCP's standardized procedures for rating hearing impairment.²⁰ He has not submitted 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.

LEGAL PRECEDENT -- ISSUE 2

Section 8107 of FECA provides that schedule award compensation for permanent impairment of a scheduled member shall be based on the employee's monthly pay.²¹ Such compensation is to be based on the pay rate as determined under section 8101(4) which defines monthly pay as "[t]he monthly pay at the time of injury, or the monthly pay at the time disability begins, or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater."²²

²⁰ *R.H.*, Docket No. 18-1721 (issued March 25, 2019); *J.W.*, Docket No. 17-1339 (issued August 21, 2018); *J.B.*, Docket No. 15-1474 (issued March 4, 2016).

²¹ 5 U.S.C. § 8107(a).

²² *Id.* at § 8101(4).

The Board has held that where an injury is sustained over a period of time the date of injury is the date of last exposure to those work factors causing injury.²³ Applying this principle to schedule award claims, the Board has held that the date of injury is the date of the last exposure which adversely affects the impairment because every exposure which has an adverse effect (an aggravation) constitutes an injury.²⁴ In a case where a claimant continues to be exposed to injurious work factors and the medical evidence documents continued worsening of the claimed condition, OWCP selects the date of last exposure to injurious work factors as the date of injury.²⁵

ANALYSIS -- ISSUE 2

The Board finds that the case not in posture for a decision in regarding to appellant's pay rate for schedule award purposes.

Appellant retired from the employing establishment effective April 30, 2018 and initially filed a schedule award claim on October 22, 2018 based on an occupational disease claim. He received a schedule award on December 21, 2018, for 13.4 percent binaural loss of hearing for which he received compensation from October 3, 2018 through April 2, 2019 based on his weekly pay rate of \$746.12. On appeal appellant claims that his schedule award compensation was paid at an improper pay rate. He alleges that due to previously accepted injuries he was working in a light-duty position and receiving wage-loss compensation for loss of wage-earning capacity from OWCP on April 30, 2018 the date that OWCP used to calculate his pay rate. Appellant asserts that his hearing loss arose from noise exposure in the position of boiler plant operator, not his light-duty position of secretary on April 30, 2018 such that his pay rate should be based on his date of last exposure as a boiler plant operator.

OWCP utilized appellant's weekly pay rate at the time of his retirement on April 30, 2018 of \$746.12 based on his annual salary of \$38,798.00. It found that he reached MMI on October 3, 2018. Dividing the \$38,798.00 figure by 52 weeks to convert to weekly pay received on April 30, 2018 yields \$746.12, the figure that OWCP found to be appellant's weekly pay rate. The record does not contain discussion of the date of his last exposure to hazardous noise or what his pay rate was at that time.²⁶

It is well established that proceedings under FECA are not adversarial in nature and that, while the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. OWCP has an obligation to see that justice is done.²⁷ In a case where OWCP "proceeds to develop the evidence and to procure evidence, it must

²³ *D.A.*, Docket No. 18-1105 (issued January 10, 2019); *J.S.*, Docket No. 17-1277 (issued April 20, 2018); *Sherron A. Roberts*, 47 ECAB 617 (1996).

²⁴ *D.A.*, *id.*; *Barbara A. Dunnivant*, 48 ECAB 517 (1997).

²⁵ *M.P.*, Docket No. 17-1736 (issued February 14, 2018); *K.G.*, Docket No. 15-1476 (issued May 6, 2016); *G.L.*, Docket No. 12-1795 (issued September 24, 2013).

²⁶ *Id.*

²⁷ *M.P.*, *supra* note 25; *John J. Carlone*, 41 ECAB 354, 358-60 (1989).

do so in a fair and impartial manner.”²⁸ Under FECA, although it is the burden of an employee to establish his or her claim, OWCP also has a responsibility in the development of the factual evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other government source.²⁹

On remand, in order to ensure a comprehensive and well-reasoned consideration of appellant’s pay rate for paying schedule award compensation, OWCP should ensure that his case record is complete with regard to the issue of date of last exposure to hazardous noise and the corresponding pay rate. After carrying out such development, it shall issue a *de novo* decision regarding whether he received schedule award compensation at a proper pay rate.³⁰

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish greater than 13.4 percent binaural loss of hearing, for which he previously received a schedule award. The Board further finds the case not in posture for a decision in regards to appellant’s pay rate for schedule award purposes.

²⁸ *M.P., id.*; *Walter A. Fundinger, Jr.*, 37 ECAB 200, 204 (1985).

²⁹ *L.G.*, Docket No. 17-0699 (issued August 8, 2018); *Willie A. Dean*, 40 ECAB 1208, 1212 (1989); *Willie James Clark*, 39 ECAB 1311, 1318-19 (1988).

³⁰ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the December 21, 2018 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further action consistent with this decision of the Board.

Issued: November 15, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board