

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

_____)	
J.P., Appellant)	
)	
and)	Docket No. 19-0501
)	Issued: October 18, 2019
DEPARTMENT OF LABOR, MINE SAFETY & HEALTH ADMINISTRATION,)	
Norton, VA, Employer)	
_____)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 8, 2019 appellant filed a timely appeal from a December 3, 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 a date of maximum medical improvement (MMI) prior to August 6, 2018.

FACTUAL HISTORY

On June 21, 2018 appellant, then a 61-year-old coal mine safety and health inspector, filed an occupational disease claim (Form CA-2) alleging that he developed hearing loss due to exposure to machinery noise while in the performance of duty. He noted that he first became aware of his condition, and its relationship to his federal employment, on September 4, 2007. On

¹ 5 U.S.C. § 8101 *et seq.*

the reverse side of the claim form the employing establishment indicated that appellant was last exposed to conditions alleged to have caused his disease or illness on June 7, 2018.

OWCP received a series of employing establishment audiogram reports dating from June 26, 2007 through June 8, 2017.

In a letter dated July 18, 2018, OWCP referred appellant to Dr. Zaven H. Jabourian, an otolaryngologist, for a second opinion evaluation to determine whether appellant sustained a ratable hearing loss causally related to factors of his federal employment.

In a report dated August 6, 2018, Dr. Jabourian reviewed the statement of accepted facts (SOAF) and appellant's medical history. He related that appellant's hearing loss was causally related to the factors of his federal employment. Utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),² Dr. Jabourian reviewed an August 6, 2018 audiogram, performed at his request, and noted pure tone averages (PTA) for 500, 1,000, 2,000, and 3,000 Hertz (Hz). He related that the audiogram revealed decibel (dB) losses of 15, 20, 30, and 55 respectively for the right ear. These dB losses were totaled at 120 and divided by 4 to determine an average loss at those cycles of 30 dBs. The average of 30 dBs was then reduced by the first 25 dBs to equal 5 and multiplied by 1.5 to reach a 7.5 percent monaural impairment for the right ear. Appellant's left ear dB losses of 20, 20, 35, and 55 were totaled at 130 dBs, the average of 35 dB was then reduced by 25 dB and multiplied 1.5 to total an 11.25 percent monaural impairment for the left ear. Dr. Jabourian then determined the binaural loss by multiplying the lesser loss by 5, adding the greater loss, and divided the total by six to total 8.125. He also indicated that appellant had a 1 percent binaural impairment due to tinnitus, and concluded that appellant had a 9.125 percent binaural hearing impairment rating. Dr. Jabourian related that appellant's date of maximum medical improvement (MMI) was August 6, 2018.

On August 28, 2018 OWCP accepted appellant's claim for binaural sensorineural hearing loss.

On September 4, 2018 appellant filed a claim for a schedule award (Form CA-7).

On September 4, 2018 Dr. Jeffrey M. Israel, a Board-certified otolaryngologist acting as an OWCP district medical adviser (DMA), reviewed appellant's medical record and SOAF. He agreed that appellant had a noise-induced sensorineural hearing loss due to his employment-related noise exposure and determined that appellant had reached MMI on August 6, 2018, the date of his most recent audiogram. Dr. Israel further indicated that appellant had a right monaural hearing loss of 7.5 percent, a left monaural hearing loss of 11.25 percent, and calculated binaural loss of 8.125 percent. He concurred with Dr. Jabourian that appellant was entitled to a 1 percent binaural award for tinnitus in addition to the calculated binaural loss, which totaled 9.125 percent.

By decision dated December 3, 2018, OWCP granted appellant a schedule award for 9 percent binaural hearing loss. It determined that the date of maximum medical improvement was August 6, 2018, the date of Dr. Jabourian's findings, including the audiogram. The schedule award ran for the period August 6 to December 9, 2018 for a total of 18 weeks of compensation.

² A.M.A., *Guides* (6th ed. 2009).

LEGAL PRECEDENT

It is well established that the period covered by a schedule award commences on the date that the employee reaches MMI from the residuals of the employment injury. The Board has defined MMI as meaning that the physical condition of the injured member of the body has stabilized and will not improve further. The question of when MMI has been reached is a factual one that depends upon the medical findings in the record. The determination of such date is to be made in each case upon the basis of the medical evidence in that case.³ The date of MMI is usually considered to be the date of the medical examination that determined the extent of the impairment.⁴

The Board has also noted a reluctance to find a date of MMI, which is retroactive to the award, as retroactive awards often result in payment of less compensation benefits. The Board, therefore, requires persuasive proof of MMI in the selection of a retroactive date of MMI.⁵ The determination of whether MMI has been reached is based on the probative medical evidence of record and is usually considered to be the date of the evaluation by the attending physician, which is accepted as definitive by OWCP.⁶

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish a date of MMI prior to August 6, 2018.

In its December 3, 2018 decision, OWCP granted appellant a schedule award for nine percent binaural hearing loss. It determined a period of award from August 6 to December 9, 2018, based on the date of Dr. Jabourian's findings, which included his most recent audiogram of August 6, 2018. On appeal appellant does not contest the finding that he was entitled to a schedule award for a nine percent binaural hearing loss,⁷ but asserts that the period of award should be paid retroactively from the date of a prior hearing evaluation on May 14, 2018, or the date he filed the claim, June 21, 2018.

Based on the evidence of record, the Board finds that there is no indication that OWCP improperly utilized August 6, 2018 as the date of MMI for appellant's schedule award and, furthermore, it correctly determined that the date of the award started August 6, 2018.⁸ Dr. Jabourian determined appellant's date of MMI to be August 6, 2018, the date of his most recent audiogram, and Dr. Israel, serving as the DMA, concurred with Dr. Jabourian's MMI date

³ *C.R.*, Docket No. 17-1872 (issued March 8, 2018); *Peter C. Belkind*, 56 ECAB 580 (2005); *Marie J. Born*, 27 ECAB 623 (1976).

⁴ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3 (January 2010).

⁵ *R.M.*, Docket No. 18-1313 (issued April 11, 2019); *J.H.*, Docket No. 14-1584 (issued October 5, 2016).

⁶ *R.M.*, *id.*; *Mark A. Holloway*, 55 ECAB 321, 325 (2004).

⁷ While appellant's binaural hearing loss totaled 9.125 percent, the Board has noted that percentages should not be rounded until the final percent for award purpose is obtained, and fractions should be rounded down from .49 and up from .50. *See R.B.*, Docket No. 19-0257 (issued August 5, 2019).

⁸ *S.H.*, Docket No. 15-0809 (issued October 19, 2015); *L.M.*, Docket No. 09-0690 (issued December 29, 2009).

designation.⁹ The period covered by a schedule award commences on the date that the employee reaches MMI from the residuals of the employment injury.¹⁰ The Board has held that the date of MMI is based on the probative medical evidence of record and is usually considered to be the date of the evaluation, which is accepted as definitive by OWCP.¹¹ As both physicians concurred that date to be August 6, 2018, OWCP properly determined that appellant's schedule award commenced August 6, 2018. Appellant has not presented any persuasive evidence establishing that he reached MMI prior to August 6, 2018.

Appellant may request a schedule award or an 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 a date of MMI prior to August 6, 2018.

⁹ The Board is reluctant to find a retroactive date of MMI absent persuasive proof. *E.L.*, Docket No. 13-0943 (issued November 8, 2013).

¹⁰ *Supra* note 3.

¹¹ *Supra* note 6.

ORDER

IT IS HEREBY ORDERED THAT the December 3, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 18, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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