

compensation; and (2) whether OWCP properly denied appellant's request for a review of the written record before an OWCP hearing representative as untimely filed pursuant to 5 U.S.C. § 8124(b).

FACTUAL HISTORY

On January 7, 2016 appellant, then a 60-year-old painting worker, filed an occupational disease claim (Form CA-2) alleging hearing loss due to factors of his federal employment on or about May 1, 2013.³ After developing the factual and medical evidence of record, OWCP accepted his claim for binaural sensorineural hearing loss.

On September 27, 2016 appellant filed a claim for a schedule award (Form CA-7). By decision dated November 30, 2016, OWCP granted a schedule award for 55 percent permanent binaural hearing loss. The award ran for 110 weeks from May 11, 2016 to June 29, 2018.

An August 20, 2018 audiogram demonstrated testing at the frequencies of 500, 1,000, 2,000, and 3,000 Hertz (Hz), which revealed the following: right ear -50, 55, 70, and 70 decibels (dBs), respectively; and left ear -60, 60, 75, and 75 dBs, respectively.

On August 23, 2018 Dr. Jeffrey M. Israel, a Board-certified otolaryngologist acting as a district medical adviser (DMA), reviewed the August 20, 2018 audiogram and related that the test findings were suggestive of a sensorineural hearing loss due, at least in part, to noise-induced work-related acoustic trauma. He opined that the audiometric test results were representative of appellant's hearing sensitivity. Utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),⁴ the DMA calculated that appellant had 54.375 percent right monaural hearing loss and 63.75 percent left monaural hearing loss for a total binaural hearing loss of 55.9 percent. He noted that appellant had previously received an award of 54.7 percent for binaural hearing loss. The DMA determined that 55.9 percent minus 54.7 percent was equal to 1.2 percent, the adjusted award. He reported that appellant had reached maximum medical improvement (MMI) as of the date of his latest audiogram.

In a September 17, 2018 report, Mary Ann Gieger, a hearing instrument specialist, noted that on August 20, 2018 appellant underwent an audiogram which revealed 58 percent pure-tone average for the right ear and 65 percent pure-tone average for the left ear. The report also included the results of appellant's August 20, 2018 audiogram, which Ms. Gieger signed.

OWCP referred the case back to its DMA to consider Ms. Gieger's September 17, 2018 report. In a September 19, 2018 supplemental report, the DMA indicated that the August 20, 2018 audiogram was the same one he evaluated in his prior report. He reiterated his previous finding of 55.9 percent binaural hearing loss, with an August 20, 2018 date of MMI.

³ The employing establishment provided occupational noise exposure data covering the period 2003 through 2013. It also controverted the claim arguing that appellant's hearing loss was not likely caused by his employment exposure.

⁴ A.M.A., *Guides* (6th ed. 2009).

By decision dated September 24, 2018, OWCP granted appellant a schedule award for an additional one percent permanent binaural hearing loss, for a total binaural hearing loss of 56 percent. The additional one percent award covered a two-week period from August 20 to September 2, 2018.

On January 10, 2019 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

By decision dated January 25, 2019, an OWCP hearing representative determined that appellant was not entitled to a review of the written record as a matter of right because his request was untimely filed. He also denied a discretionary hearing finding that the contested issue could equally well be addressed by appellant requesting reconsideration and providing new evidence or argument to establish that he was entitled to a greater schedule award for his binaural hearing loss.

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 for loss or loss of use of scheduled members or functions of the body. FECA, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. The method used in making such determination is a matter which rests in the discretion of OWCP. For consistent results and to ensure equal justice under the law, the Board has authorized the use of a single set of tables so that there may be a 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*.⁷ Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).⁸ The Board has approved OWCP's use 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.⁹

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.¹⁰ 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 decibels is deducted because, as the A.M.A., *Guides* points out, losses below 25 dB result in no impairment in the ability to hear

⁵ 5 U.S.C. §§ 8101-8193, 8107.

⁶ 20 C.F.R. § 10.404.

⁷ *Id.*

⁸ A.M.A., *Guides* (6th ed. 2009); 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 2.808.5a (March 2017).

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

¹⁰ *A.G.*, Docket No. 17-1778 (issued December 18, 2018); *E.S.*, 59 ECAB 249 (2007); *Reynaldo R. Lichtenberger*, 52 ECAB 462 (2001).

everyday speech under everyday conditions.¹¹ The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss. 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.¹²

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish greater than 56 percent binaural hearing loss, for which he previously received schedule award compensation.

On August 23, 2018 a DMA reviewed the August 20, 2018 audiogram and opined that appellant's hearing loss was due, at least in part, to his workplace noise exposure. Testing for the right ear at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz revealed decibel losses of 50, 55, 70, and 70, which totaled 245 dBs. Appellant's left ear hearing losses were 60, 60, 75, and 75, which totaled 270. The right ear hearing loss resulted in an average loss of 61.25 ($245 \div 4$) dBs, and the left ear loss averaged 67.5 ($270 \div 4$) dBs. After subtracting the 25 dB fence, the right ear loss was 36.25, which was then multiplied by 1.5 to equal 54.38 percent hearing loss for the right ear. Applying the same formula to the left ear ($67.5 - 25 = 42.5 \times 1.5$), resulted in 63.75 dBs. The DMA then multiplied the 54.38 percent monaural hearing loss for the right ear by 5, added the 63.75 percent left ear monaural hearing loss, divided the total by 6 as directed by the A.M.A., *Guides*, resulting in 55.9 percent binaural hearing loss.¹³ The Board finds that the DMA properly calculated the percentage of impairment for appellant's binaural hearing loss in accordance with the A.M.A., *Guides*.¹⁴ OWCP rounded-up the rating to the nearest whole number (56 percent), and reduced the current total permanent impairment by the prior binaural hearing loss award (55 percent).¹⁵

The Board finds that there is no current medical evidence of record supporting that appellant has a ratable hearing loss greater than the 56 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 than that previously awarded under OWCP's standardized procedures for rating hearing loss.¹⁶ He has not submitted such evidence in support of his claim.

¹¹ A.M.A., *Guides* 250 (6th ed. 2009).

¹² *Id.* at 251.

¹³ *R.F.*, Docket No. 18-0810 (issued February 27, 2019); *W.C.*, Docket No. 18-0290 (issued July 13, 2018).

¹⁴ *A.G.*, *supra* note 10.

¹⁵ The Board notes OWCP's policy to round the calculated percentage of impairment to the nearest whole number. *See V.M.*, Docket No. 18-1800 (issued April 23, 2019); *J.H.*, Docket No. 08-2432 (issued June 15, 2009); *Robert E. Cullison*, 55 ECAB 570 (2004). *See also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3(b) (January 2010).

¹⁶ *J.W.*, Docket No. 17-1339 (issued August 21, 2018); *J.B.*, Docket No. 15-1474 (issued March 4, 2016).

On appeal appellant alleges that he was entitled to schedule awards for 58 percent hearing loss for the right ear and 60 percent hearing loss for the left ear. However, as explained above, the DMA properly calculated that appellant had a total binaural hearing loss of 56 percent in accordance with the A.M.A., *Guides*.

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.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of FECA provides: “Before review under section 8128(a) of this title [relating to reconsideration], a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his [or her] claim before a representative of the Secretary.”¹⁷

Section 10.615 of Title 20 of the Code of Federal Regulations provides, “A hearing is a review of an adverse decision by a hearing representative. Initially, the claimant can choose between two formats: an oral hearing or a review of the written record.”¹⁸ The hearing request must be sent within 30 days (as determined by postmark or other carrier’s date marking) of the date of the decision for which the hearing is sought.¹⁹ However, OWCP has discretion to grant or deny a request that is made after this 30-day period.²⁰ In such a case, it will determine whether to grant a discretionary hearing and, if not, will so advise the claimant with reasons.²¹

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant’s January 10, 2019 request for a review of the written record before an OWCP hearing representative as untimely filed pursuant to 5 U.S.C. § 8124(b).

Appellant had 30 days from OWCP’s September 24, 2018 merit decision to request a review of the written record before a representative of OWCP’s Branch of Hearings and Review. As appellant’s hearing request was dated January 10, 2019, more than 30 days after OWCP’s September 24, 2018 decision, it was untimely filed and he was, therefore, not entitled to a review

¹⁷ 5 U.S.C. § 8124(b)(1).

¹⁸ 20 C.F.R. § 10.615.

¹⁹ *Id.* at § 10.616(a).

²⁰ *See T.L.*, Docket No. 19-0028 (issued April 26, 2019); *G.W.*, Docket No. 10-0782 (issued April 23, 2010); *James Smith*, 53 ECAB 188, 191-92 (2001).

²¹ *James Smith, id.*

of the written record as a matter of right.²² Section 8124(b)(1) is unequivocal on the time limitation for requesting a hearing.²³

The Board further finds that OWCP properly exercised its discretion in denying appellant's request for a review of the written record by determining that the issue in the case could equally well be addressed by requesting reconsideration and submitting new evidence or argument relevant to the issue of his schedule award.²⁴ The Board has held that the only limitation on OWCP's authority is reasonableness, and an abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.²⁵ The Board finds that the evidence of record does not indicate that OWCP abused its discretion in its denial of appellant's untimely request for a review of the written record.

Accordingly, the Board finds that OWCP properly denied appellant's January 10, 2019 request for a review of the written record as untimely filed pursuant to 5 U.S.C. § 8124(b).²⁶

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish greater than 56 percent binaural hearing loss, for which he previously received schedule award compensation. The Board also finds that OWCP properly denied appellant's request for a review of the written record before an OWCP hearing representative as untimely filed under 5 U.S.C. § 8124(b).

²² Under OWCP's regulations and procedures, the timeliness of a request for a hearing is determined on the basis of the postmark of the envelope containing the request. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4a (October 2011); *see also G.S.*, Docket No. 18-0388 (issued July 19, 2018).

²³ 5 U.S.C. § 8124(b)(1); *see M.K.*, Docket No. 19-0428 (issued July 15, 2019); *R.H.*, Docket No. 18-1602 (issued February 22, 2019); *William F. Osborne*, 46 ECAB 198 (1994).

²⁴ *M.K.*, *id.*; *M.H.*, Docket No. 15-0774 (issued June 19, 2015).

²⁵ *Id.*; *Teresa M. Valle*, 57 ECAB 542 (2006).

²⁶ *Id.*; *T.L.*, Docket No. 19-0028 (issued April 26, 2019); *R.P.*, Docket No. 16-0554 (issued May 17, 2016).

ORDER

IT IS HEREBY ORDERED THAT the January 25, 2019 and September 24, 2018 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 16, 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