

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

A.I., Appellant	)	
	)	
and	)	<b>Docket No. 21-0248</b>
	)	<b>Issued: April 19, 2023</b>
DEPARTMENT OF DEFENSE, NATIONAL	)	
SECURITY AGENCY, Fort Meade, MD,	)	
Employer	)	
	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
JANICE B. ASKIN, Judge

**JURISDICTION**

On December 8, 2020 appellant filed a timely appeal from an August 5, 2020 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.

**ISSUES**

The issues are: (1) whether appellant has met his burden of proof to establish greater than four percent monaural hearing loss in the right ear, for which he previously received a schedule award; and (2) whether OWCP properly determined appellant's pay rate for schedule award purposes.

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

## **FACTUAL HISTORY**

On September 14, 2018 appellant, then a 63-year-old linguist and analyst, filed an occupational disease claim (Form CA-2) alleging that he developed progressive hearing loss due to factors of his federal employment. He noted that he first became aware of his condition and its relation to his federal employment on April 2, 1986. Appellant noted that April 2, 1986 represents the baseline from when his hearing began to decline and thereafter, he underwent several hearing tests which revealed progressive hearing loss. On the reverse of the claim form, an employing establishment supervisor indicated that he had retired on December 31, 2018.

In an undated response to OWCP's November 9, 2018 hearing loss questionnaire, appellant asserted that from May 1986 through May 2015 he used audio headsets and worked in proximity to high-decibel telecommunications equipment and servers. He indicated that his last exposure to a high-decibel work environment related to his federal employment was in May 2015. Appellant further noted that he first became aware of the progressive nature of his hearing loss on July 13, 2018 when he underwent hearing testing at the employing establishment's medical facility.

On March 20, 2019 OWCP referred appellant, a statement of accepted facts (SOAF), and an otologic evaluation questionnaire to Dr. Douglas McCorkle, a Board-certified otolaryngologist, for a second opinion evaluation. The SOAF indicated that appellant's last exposure to a high-decibel work environment related to federal employment was in May 2015.

In his April 15, 2019 report, Dr. McCorkle reviewed the SOAF and completed the evaluation questionnaire. He noted that appellant was exposed to noise eight hours per day until May 2015. As of May 2015 appellant continued to be employed as an independent contractor for the employing establishment with no ongoing noise exposure. Dr. McCorkle diagnosed bilateral hearing loss, without tinnitus, due to noise exposure during appellant's federal employment. He reviewed the audiogram and noted that it demonstrated losses of 15, 20, 15, and 45 decibels (dBs) on the left and 10, 25, 25, and 50 dBs on the right at 500, 1,000, 2,000, and 3,000 hertz (Hz), respectively.

By decision dated May 7, 2019, OWCP accepted appellant's claim for bilateral sensorineural hearing loss.

Thereafter, OWCP referred the medical record and a SOAF to its district medical adviser (DMA), Dr. Charles Pettit, a Board-certified otolaryngologist, for schedule award purposes. Utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),<sup>2</sup> the DMA reviewed the April 15, 2019 audiogram on May 21, 2019 and found that appellant had a right monaural loss of 4 percent,<sup>3</sup> and a left monaural loss of 0.00 percent for a binaural loss of 0.625 percent. He determined that appellant reached maximum medical improvement (MMI) on April 15, 2019, the date of the most recent audiogram

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<sup>2</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

<sup>3</sup> The policy of OWCP is to round the calculated percentage of impairment to the nearest whole number. Results should be rounded down for figures less than .5 and up for .5 and over. 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).

examination. Dr. Pettit further noted that appellant had not been exposed to excess noise since May 2015.

On July 3, 2019 appellant filed a claim for compensation (Form CA-7) for a schedule award. On the reverse side of the form, the employing establishment listed his date-of-injury pay rate as \$28,139.00 per year and \$164,200.00 per year when he stopped work and noted that he retired on December 31, 2018. Thereafter, OWCP received a notification of personnel action (Standard Form SF-50) dated December 31, 2018 noting an adjusted basic pay rate of \$164,200.00 per year.

In a schedule award memorandum dated July 30, 2020, OWCP found that payment of right ear hearing loss was more advantageous to appellant, as the 4 percent rating for the right ear resulted in 2.08 weeks of compensation, while a 0.625 percent binaural rating resulted in only 2.00 weeks of compensation. It utilized his weekly pay rate at the time of his retirement of \$3,157.69 based on an annual salary of \$164,200.00. OWCP found that appellant reached MMI on April 15, 2019.

By decision dated August 5, 2020, OWCP granted appellant a schedule award for four percent hearing loss of the right ear.<sup>4</sup> It calculated the period of the award from April 15 through 29, 2019 and that the effective date of his pay rate was December 30, 2018. OWCP further determined that appellant was entitled to the maximum compensation rate of \$1,998.64 per week for total compensation for the period covered of \$4,157.17. Finally, it noted that payment of his award would end when he had been paid for the last day in the period of the award.

### **LEGAL PRECEDENT -- ISSUE 1**

The schedule award provisions of FECA<sup>5</sup> and its implementing regulations<sup>6</sup> 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

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<sup>4</sup> *Id.*

<sup>5</sup> 5 U.S.C. § 8107.

<sup>6</sup> 20 C.F.R. § 10.404.

concurrent in such adoption.<sup>7</sup> For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2009.<sup>8</sup>

A claimant seeking compensation under FECA has the burden of proof to establish the essential elements of his or her claim.<sup>9</sup> 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.<sup>10</sup> A claimant may seek an increased schedule award if the evidence establishes that he or she sustained an increased impairment causally related to an employment injury.<sup>11</sup> The medical evidence must include a detailed description of the permanent impairment.<sup>12</sup>

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.<sup>13</sup> Using the frequencies of 500, 1,000, 2,000, and 3,000 Hz, the losses at each frequency are 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.<sup>14</sup> The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.<sup>15</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, then added to the greater loss and the total is divided by six to arrive at the amount of the binaural hearing loss.<sup>16</sup> The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.<sup>17</sup>

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

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<sup>7</sup> *Id.*; *T.O.*, Docket No. 18-0659 (issued August 8, 2019); *Jacqueline S. Harris*, 54 ECAB 139 (2002).

<sup>8</sup> 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).

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

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

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

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

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

<sup>14</sup> A.M.A., *Guides* 250 (6<sup>th</sup> ed. 2009).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

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

impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified.<sup>18</sup>

### ANALYSIS -- ISSUE 1

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

OWCP properly referred appellant to Dr. McCorkle for a second opinion examination relative to his hearing loss. Dr. McCorkle's April 15, 2019 report related his audiogram findings and concluded that appellant's monaural hearing loss of the right ear was due to his workplace noise exposure.

On May 21, 2019 Dr. Pettit, a DMA, reviewed Dr. McCorkle's report and found testing for the right ear at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz revealed losses of 10, 25, 25, and 50 dBs, respectively. These dBs were totaled at 110 and were divided by 4 to obtain an average hearing loss at those cycles of 27.5 dBs. The average of 27.5 dBs was then reduced by 25 dBs (the first 25 dBs were discounted as discussed above) to equal 2.5, which was then multiplied by 1.5 to equal 3.75 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 losses of 15, 20, 15, and 45 dBs respectively on the left. These dBs were totaled at 95 and were divided by 4 to obtain an average hearing loss at those cycles of 23.5 dBs. The average of 23.5 dBs was then reduced by 25 dBs (the first 25 dBs were discounted as discussed above) to equal less than zero, which was then multiplied by 1.5 to equal zero percent hearing loss for the left ear.

Dr. Pettit determined the binaural loss by multiplying the lesser left-sided monaural loss of zero by 5, adding the right-sided hearing loss of 3.75, and dividing the total by 6, to find 0.625 percent binaural loss.

In a schedule award memorandum dated July 30, 2020, OWCP found that payment of right ear hearing loss was more advantageous to appellant, as the 4 percent rating for the right ear resulted in 2.08 weeks of compensation, while a 0.625 percent binaural rating resulted in only 2.00 weeks of compensation.

The Board finds that there is no current medical evidence of record supporting ratable hearing loss greater than the four percent monaural hearing loss of the right ear previously awarded. It is appellant's burden of proof to submit evidence of additional hearing loss under

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<sup>18</sup> *Supra* note 8 at Chapter 2.808.6(f).

OWCP's standardized procedures for rating hearing impairment.<sup>19</sup> He has not submitted such evidence in support of his claim.

The Board notes that on appeal, appellant asserts that he is entitled to ongoing payments annually beyond the 2.08 weeks of compensation he was awarded. Section 8107 of FECA<sup>20</sup> provides that a claimant is entitled to up to 52 weeks of compensation for 100 percent loss of hearing in one ear. As four percent of 52 weeks equates to a total of 2.08 weeks, appellant has not established entitlement to any additional payments.

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 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.<sup>21</sup> 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."<sup>22</sup>

Section 8112 of FECA provides that the monthly rate of compensation for disability, including augmented compensation for eligible dependents, may not be more than 75 percent of the monthly pay of the maximum rate of pay for a GS-15 employee.<sup>23</sup> The only situation in which the maximum compensation rate may be exceeded is if the employee's disability was a result of an assault which occurs during an assassination or attempted assassination of a federal official described under section 351(a) or 1751(a) of Title 18, and was sustained in the performance of duty.<sup>24</sup> OWCP's implementing regulation provides that the maximum in effect during the period of entitlement is compared to the claimant's weekly compensation rate, and that the allowable compensation rate for total or partial disability may not exceed 75 percent of the basic monthly pay of the highest step of grade 15 of the General Schedule.<sup>25</sup> OWCP's procedures provide that the maximum compensation rates for disability compensation also apply to schedule award

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<sup>19</sup> *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).

<sup>20</sup> 5 U.S.C. § 8107(c).

<sup>21</sup> *Id.* at § 8107(a).

<sup>22</sup> *Id.* at § 8101(4).

<sup>23</sup> *Id.* at § 8112(a).

<sup>24</sup> *Id.* at § 8112(b).

<sup>25</sup> 20 C.F.R. § 10.406(a). *See also* Federal (FECA) Procedure Manual, *supra* note 8 at Chapter 2.901.14 and Exhibit 2 (Maximum Compensation Rates) (February 2013). Exhibit 2, associated with Chapter 2.901.14, delineates figures for maximum compensation rates to be paid during various periods.

compensation.<sup>26</sup> The computerized compensation management application is utilized to automatically calculate the maximum compensation rate when payments are entered.<sup>27</sup>

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.<sup>28</sup> 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.<sup>29</sup> 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.<sup>30</sup>

### ANALYSIS -- ISSUE 2

The Board finds that OWCP improperly determined appellant's pay rate for schedule award purposes.

In calculating appellant's schedule award, OWCP utilized that the effective pay rate date of December 31, 2018. However, appellant consistently related, and the SOAF and report of Dr. McCorkle reiterated, that his date of last exposure to hazardous noise was May 2015. While the employing establishment noted appellant's retirement date of December 31, 2018, it did not provide any information as to whether this was also the date of last exposure to hazardous noise.

As noted, where an injury is sustained over a period of time, as in this case, the date of injury is generally the date of last exposure to the employment factors causing the injury.<sup>31</sup> 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.<sup>32</sup> In a case where OWCP "proceeds to develop the evidence and to procure evidence, it must do so in a fair and impartial manner."<sup>33</sup> 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

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<sup>26</sup> See *id.* See also Federal (FECA) Procedure Manual, *supra* note 8 at Chapter 2.808.7g (February 2013); *G.J.*, Docket No. 18-1292 (issued March 13, 2019).

<sup>27</sup> See Federal (FECA) Procedure Manual, *supra* note 8 at Chapter 2.901.14e (February 2013).

<sup>28</sup> *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).

<sup>29</sup> *D.A.*, *id.*; *Barbara A. Dunnavant*, 48 ECAB 517 (1997).

<sup>30</sup> *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).

<sup>31</sup> *Id.*

<sup>32</sup> *M.P.*, *supra* note 30; *John J. Carlone*, 41 ECAB 354, 358-60 (1989).

<sup>33</sup> *M.P.*, *id.*; *Walter A. Fundinger, Jr.*, 37 ECAB 200, 204 (1985).

evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other government source.<sup>34</sup>

On remand, in order to ensure a comprehensive and well-reasoned consideration of appellant's pay rate for paying schedule award compensation, OWCP shall confer with the employing establishment to determine the 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.<sup>35</sup>

### **CONCLUSION**

The Board finds that appellant has not met his burden of proof to establish greater than 4 percent monaural loss of hearing in the right ear, for which he previously received a schedule award. The Board further finds the case not in posture for a decision in regard to his pay rate for schedule award purposes.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the August 5, 2020 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: April 19, 2023  
Washington, DC

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

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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<sup>34</sup> *R.R.*, Docket No. 19-0750 (issued November 15, 2019); *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).

<sup>35</sup> *Id.*