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<b>M.H., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 25-0434</b>
	)	<b>Issued: May 8, 2025</b>
<b>DEPARTMENT OF HOMELAND SECURITY,</b>	)	
<b>U.S. CUSTOMS AND BORDER PROTECTION,</b>	)	
<b>OFFICE OF BORDER PATROL, Edinburg, TX,</b>	)	
<b>Employer</b>	)	
	)	

*Case Submitted on the Record*

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

On March 27, 2025, appellant filed a timely appeal from a November 15, 2024<sup>1</sup> merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

<sup>3</sup> The Board notes that following the November 15, 2024 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

## **ISSUES**

The issues are: (1) whether appellant has met his burden of proof to establish greater than 15 percent binaural hearing loss, for which he previously received a schedule award; and (2) whether OWCP properly determined appellant's pay rate for schedule award purposes.

## **FACTUAL HISTORY**

On February 23, 2024, appellant, then a 50-year-old border patrol agent/firearms instructor, filed an occupational disease claim (Form CA-2) alleging that he developed bilateral hearing loss and tinnitus due to factors of his federal employment. He noted that he first became aware of his hearing loss on April 1, 2018, and realized its relationship to his federal employment on November 18, 2022.

Appellant provided an undated separate statement wherein he described his history of noise exposure at work, which included frequent exposure to agents utilizing various firearms including handguns and rifles; and loud noises from semi-trucks and other vehicular traffic. He reported that, around April 2018, he began to have difficulty hearing and also experienced a ringing sensation in his ears. Appellant underwent an ear examination in November 2022 during which he learned that he had hearing loss and tinnitus. He was initially employed by the employing establishment on July 27, 2010.

On March 20, 2024, appellant filed a claim for compensation (Form CA-7) for a schedule award. On the reverse side of the claim form, the employing establishment listed his base pay as \$85,605.00 per year effective April 1, 2018; noted the date of injury; indicated that he received additional pay for a remote worksite; and further indicated that he did not work a 40-hour per week schedule. It also noted that appellant had not lost time and that the claim was "pending premium pay (4-week wait)." The employing establishment also indicated that appellant worked during the 11 months prior to the claimed injury.

On April 10, 2024, OWCP referred appellant, along with the medical record, a statement of accepted facts (SOAF), and a series of questions, to Dr. Andreas Kaden, a Board-certified otolaryngologist, for an audiogram and second opinion examination.

In a May 13, 2024 report, Dr. Kaden reviewed the SOAF, history of injury, and the medical evidence of record. He indicated that there was no significant variation from the SOAF. Dr. Kaden diagnosed bilateral sensorineural hearing loss and tinnitus from appellant's federal employment-related noise exposure. He obtained audiology testing on that date, which revealed the following decibel (dB) losses at 500, 1,000, 2,000, and 3,000 Hertz (Hz): 25, 25, 40, and 55 for the right ear and 30, 25, 30, and 45 for the left ear, respectively. Utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),<sup>4</sup> Dr. Kaden applied OWCP's standard for evaluating hearing loss to the May 13, 2024 audiogram and determined that appellant had 16.88 percent right monaural hearing loss and 11.25 percent left monaural hearing loss, and 12.19 percent binaural hearing loss. He completed a tinnitus handicap inventory (THI) and rated the tinnitus diagnosis at three percent based on a 38/100 score.

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<sup>4</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

Dr. Kaden concluded that appellant reached maximum medical improvement (MMI) on May 13, 2024 and recommended hearing aids.

On September 25, 2024, OWCP accepted appellant's claim for bilateral sensorineural hearing loss and bilateral tinnitus.

On October 7, 2024, Dr. Herbert White, Jr., Board-certified in occupational medicine and serving as an OWCP district medical adviser (DMA), reviewed Dr. Kaden's May 13, 2024 report. He referred to the sixth edition of the A.M.A., *Guides*,<sup>5</sup> and applied OWCP's standard for evaluating hearing loss to the May 13, 2024 audiogram, and determined that appellant had 16.875 percent right monaural hearing loss and 11.25 percent left monaural hearing loss, and 12.19 percent binaural hearing loss. Dr. White further noted a tinnitus award of three percent. He reported appellant's right ear hearing loss of 25, 25, 40, and 55 dBs at 500, 1,000, 2,000, and 3,000 Hz, respectively, which totaled 145, and divided by 4, to find an average of 32.55 dBs. After subtracting the 25 dB fence, Dr. White multiplied the remaining balance by 1.5 to calculate 16.875 percent right ear monaural hearing loss. For the left ear, he added appellant's hearing loss of 30, 25, 30, and 45 dBs at 500, 1,000, 2,000, and 3,000 Hz, respectively, which totaled 130, and divided by 4 to find an average of 32.5 dBs. After subtracting the 25 dB fence, Dr. White multiplied the remaining balance by 1.5 to calculate 11.25 percent left ear monaural hearing loss. He then calculated 12.19 percent binaural hearing loss by multiplying the left ear loss of 11.25 percent by 5, adding the 16.875 percent right ear loss, and dividing this sum by 6 to reach 12.19. Dr. White then added the 3 percent tinnitus impairment to reach a total binaural hearing impairment of 15.19 percent. He concurred with Dr. Kaden's calculations. Dr. White determined that appellant had reached MMI on May 13, 2024, the date of Dr. Kaden's examination.

On November 15, 2024, OWCP listed appellant's provisional pay rate as of May 13, 2024, the date of the audiogram, as \$85,605.00 divided by 52, or \$1,646.25 per week. It found that premium pay was not applicable. OWCP indicated that it had relied upon the March 20, 2024 Form CA-7 in determining the rate of pay.

By decision dated November 15, 2024, OWCP granted appellant a schedule award for 15 percent binaural loss of hearing. It calculated the period of the award from May 13 through December 8, 2024 (30 weeks) and found an effective date of rate of pay of May 13, 2024. OWCP determined that appellant was entitled to the augmented rate of 75 percent (or 3/4) of his weekly pay rate of \$1,646.25, resulting in \$1,234.69 in compensation per week, for an initial net payment of \$26,653.63 from May 13 through November 2, 2024, and continuing payments every four weeks of \$4,938.75.

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

The schedule award provisions of FECA<sup>6</sup> and its implementing regulations<sup>7</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

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<sup>5</sup> *Id.*

<sup>6</sup> 5 U.S.C. § 8107.

<sup>7</sup> 20 C.F.R. § 10.404.

specify the manner in which the percentage of loss of a member shall be determined. The method used in making such a 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.<sup>8</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>9</sup>

A claimant seeking compensation under FECA has the burden of proof to establish the essential elements of his or her claim.<sup>10</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>11</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>12</sup> The medical evidence must include a detailed description of the permanent impairment.<sup>13</sup>

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.<sup>14</sup> 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.<sup>15</sup> The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.<sup>16</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>17</sup> The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.<sup>18</sup>

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<sup>8</sup> *Id.* at § 10.404; *R.R.*, Docket No. 19-0750 (issued November 15, 2019); *T.O.*, Docket No. 18-0659 (issued August 8, 2019); *Jacqueline S. Harris*, 54 ECAB 139 (2002).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

<sup>10</sup> *R.R.*, *supra* note 8; *John W. Montoya*, 54 ECAB 306 (2003).

<sup>11</sup> *R.R.*, *id.*; *Edward Spohr*, 54 ECAB 806, 810 (2003); *Tammy L. Meehan*, 53 ECAB 229 (2001).

<sup>12</sup> *R.R.*, *id.*; *Rose V. Ford*, 55 ECAB 449 (2004).

<sup>13</sup> *R.R.*, *id.*; *Vanessa Young*, 55 ECAB 575 (2004).

<sup>14</sup> *R.R.*, *id.*; *R.D.*, 59 ECAB 127 (2007); *Bernard Babcock, Jr.*, 52 ECAB 143 (2000); *see also* 20 C.F.R. § 10.404.

<sup>15</sup> A.M.A., *Guides* 250.

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

<sup>17</sup> *Id.*

<sup>18</sup> *R.R.*, *supra* note 8; *E.S.*, 59 ECAB 249 (2007); *Reynaldo R. Lichtenberger*, 52 ECAB 462 (2001).

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.<sup>19</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 impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified.<sup>20</sup>

### **ANALYSIS -- ISSUE 1**

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

OWCP properly referred appellant to Dr. Kaden for a second opinion examination to determine his entitlement to a schedule award for his hearing loss.<sup>21</sup> In his May 13, 2024 report, Dr. Kaden reviewed appellant's audiogram findings and concluded that his binaural hearing loss and tinnitus were due to his workplace noise exposure. On October 7, 2024, Dr. White, serving as an OWCP DMA, reviewed Dr. Kaden's report and concurred with his findings and conclusions.

The Board finds that Dr. White properly reviewed Dr. Kaden's report and applied the standardized procedures to the May 13, 2024 audiogram report to determine that appellant had 12.19 percent binaural hearing loss. Following the rating protocols, Dr. White also allotted an additional 3 percent for tinnitus based on the completed THI questionnaire yielding a score of 38, Grade 3 handicap listed as moderate tinnitus, for a total permanent impairment rating of 15.19 percent binaural hearing loss.

The Board finds that Dr. White's report accurately summarized the relevant medical evidence, provided detailed findings on examination, and reached conclusions, which comported with his findings and the appropriate provisions of the A.M.A., *Guides*.<sup>22</sup> Utilizing the reports of Dr. Kaden, Dr. White properly applied the standards for rating hearing loss under the A.M.A., *Guides* to the May 13, 2024 audiogram and correctly found that appellant had 15.19 percent

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<sup>19</sup> A.M.A., *Guides* 249.

<sup>20</sup> *Supra* note 9 at Chapter 2.808.6(f).

<sup>21</sup> *See* A.M.A., *Guides* 249; *see also* H.W., Docket No. 20-0924 (issued January 26, 2021).

<sup>22</sup> *See* A.R., Docket No. 25-0129 (issued March 3, 2025); J.M., Docket No. 18-1387 (issued February 1, 2019).

binaural hearing loss.<sup>23</sup> The medical reports establish that appellant has 15 percent binaural hearing loss.<sup>24</sup>

The Board, therefore, finds that appellant has not met his burden of proof to establish greater than 15 percent binaural hearing loss, for which he previously received a schedule award.<sup>25</sup>

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**

Under FECA, monetary compensation for disability or impairment due to an employment injury is paid as a percentage of the pay rate.<sup>26</sup> Section 8101(4) provides that monthly pay means the 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>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>

OWCP's procedures provide that, if the employee did not stop work on the date of injury or immediately afterwards, defined as the next day, the record should indicate the pay rate for the

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<sup>23</sup> *R.L.*, Docket No. 23-0479 (issued August 8, 2023).

<sup>24</sup> *See F.T.*, Docket No. 16-1236 (issued March 12, 2018). 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 0.5 and up for 0.5 and over. OWCP's DMA did not apply this policy in this case; however, OWCP properly found 30 weeks of compensation, the amount owed to appellant for 15 percent permanent impairment due to hearing loss. 5 U.S.C. § 8107(c)(13); *supra* note 9 at Chapter 3.700.4b. (January 2010); *see also R.M.*, Docket No. 18-0752 (issued December 6, 2019); *V.M.*, Docket No. 18-1800 (issued April 23, 2019); *J.H.*, Docket No. 08-24329; *Robert E. Cullison*, 55 ECAB 570 (2004).

<sup>25</sup> *A.G.*, Docket No. 22-0582 (issued October 4, 2022).

<sup>26</sup> *Supra* note 2 at §§ 8105-8107.

<sup>27</sup> *Id.* at § 8101(4). *K.B.*, Docket No. 13-0569 (issued June 17, 2013).

<sup>28</sup> *S.G.*, Docket No. 24-0225 (issued April 10, 2024); *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> *S.G.*, *id.*; *D.A.*, *id.*; *Barbara A. Dunnivant*, 48 ECAB 517 (1997).

<sup>30</sup> *See A.I.*, Docket No. 21-0248 (issued April 19, 2023); *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).

date of injury and the date disability began. The greater of the two should be used in computing compensation, and if they are the same, the pay rate should be effective on the date disability began.<sup>31</sup>

Where an employee has a recurrence of disability more than six months after resuming regular, full-time employment with the employing establishment, under section 8101(4) of FECA, the employee is entitled to have his or her compensation increased based on his pay at the time of this first recurrence of disability.<sup>32</sup>

In computing pay rate, section 8114(e) provides for the inclusion of certain premium pay received and, where the evidence indicates additional amounts received in Sunday premium or night differential pay fluctuated or may have fluctuated, OWCP determines the amount of additional pay received during the one-year period prior to injury.<sup>33</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that this case is not in posture for decision as to whether OWCP properly calculated appellant's pay rate for schedule award purposes.

As noted above, OWCP's procedures provide that the pay rate date for schedule awards, if there is no prior disability, is the date of injury. Appellant has not received wage-loss compensation from OWCP for any period of disability due to his accepted employment injury. Consequently, OWCP properly determined that his pay rate date for schedule award purposes is May 13, 2024.<sup>34</sup>

In calculating appellant's schedule award pay rate, the employing establishment noted on the March 20, 2024 CA-7 claim form that appellant's annual salary as of April 1, 2018 was \$85,605.00, which equaled a weekly pay rate of \$1,646.25. However, the employing establishment further noted that appellant received additional pay for a remote worksite; that he did not work a 40-hour per week schedule; that he had not lost time; and that the claim was "pending premium pay (4-week wait)." OWCP never obtained clarification from the employing establishment regarding appellant's premium pay.<sup>35</sup> As OWCP failed to obtain clarification from the employing establishment regarding the information on appellant's CA-7 form, which may result in an increased schedule award pay rate, the Board finds that the case must be remanded to OWCP for further development on this issue, to be followed by a *de novo* decision.

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<sup>31</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.9005a(3) (September 2011).

<sup>32</sup> *Supra* note 2 at § 8101(4); *J.S.*, *supra* note 28; *see Jon L. Hoagland*, 57 ECAB 635 (2006).

<sup>33</sup> 5 U.S.C. § 8114(e); *G.H.*, Docket No. 19-0770 (issued March 5, 2020); *Lottie M. Williams*, 56 ECAB 302 (2005).

<sup>34</sup> *Supra* note 31; *see also L.B.*, Docket No. 25-0165 (issued January 21, 2025); *E.F.*, Docket No. 23-0505 (issued October 11, 2024).

<sup>35</sup> *C.B.*, Docket No. 24-0757 (issued August 30, 2024); *N.P.*, Docket No. 23-0258 (issued August 11, 2023).

### **CONCLUSION**

The Board finds that appellant has not met his burden of proof to establish greater than 15 percent binaural hearing loss, for which he previously received a schedule award. The Board further finds that the case is not in posture for decision as to whether OWCP properly calculated appellant's pay rate for schedule award purposes.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the November 15, 2024 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: May 8, 2025  
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