

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

D.D., Appellant

and

**DEPARTMENT OF THE ARMY, JOINT
MUNITIONS & LETHALITY COMMAND,
Tooele, UT, Employer**

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**Docket No. 15-193
Issued: May 11, 2015**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 4, 2014 appellant filed a timely appeal from an October 7, 2014 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.²

ISSUE

The issue is whether appellant established that he sustained more than a four percent binaural hearing loss, for which he received a schedule award.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the issuance of the October 7, 2014 OWCP decision, appellant submitted new evidence. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c)(1).

On appeal, appellant contends that OWCP's decision is erroneous because it failed to explain the weekly pay rate used to determine his schedule award, how being paid four percent for binaural hearing loss was greater than using an eight percent monaural hearing impairment, and why he did not receive an award for tinnitus and hearing aids.

FACTUAL HISTORY

On March 18, 2014 appellant, then a 50-year-old fire chief, filed an occupational disease claim (Form CA-2) alleging that he sustained bilateral hearing loss due to exposure to high noise levels while in the performance of his federal duties. He retired on April 3, 2014.

In a March 26, 2014 letter, OWCP notified appellant of the deficiencies of his claim and afforded him 30 days to submit additional evidence and respond to its inquiries.

Appellant submitted a position description and audiograms from the employing establishment's hearing conservation program dated June 7, 1980 through June 10, 2013.

In a July 11, 2014 report, Molly LeRoy, an audiologist, indicated that appellant's hearing seemed to be progressively deteriorating and that he had to ask people to repeat themselves quite often because he was not hearing them well. Appellant reported that he had been exposed to occupational noise. Ms. LeRoy diagnosed high frequency noise-induced hearing loss in both ears and recommended binaural hearing aids on the basis that appellant's hearing loss impacted him on a daily basis and affected his social interactions.

OWCP referred appellant and a statement of accepted facts to Dr. Craig Anderson, a Board-certified otolaryngologist, for a second opinion evaluation. Dr. Anderson performed an otologic evaluation of appellant on July 11, 2014 and audiometric testing was obtained on his behalf. Testing at the frequency levels of 500, 1,000, 2,000, and 3,000 cycles per second revealed the following: right ear 5, 20, 20, and 65 decibels; left ear 10, 10, 15, and 75 decibels. Dr. Anderson determined that appellant sustained bilateral high frequency hearing loss due to his exposure to noise in the workplace. He recommended hearing aid amplification.

On August 27, 2014 an OWCP medical adviser, Dr. Morley Slutsky, a Board-certified occupational medicine specialist, reviewed Dr. Anderson's report and the audiometric testing of July 11, 2014. He concluded that, in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*), appellant had a 3.75 percent monaural hearing impairment in the left ear, a 3.75 percent monaural hearing impairment in the right ear, and a 3.8 percent binaural hearing impairment. Dr. Slutsky recommended hearing aids and noted that the date of maximum medical improvement was July 11, 2014, the date of Dr. Anderson's second opinion examination and report.

By decision dated September 10, 2014, OWCP accepted that appellant sustained binaural hearing loss due to noise exposure. It further found that he was entitled to hearing aids and explained that all such requests must be submitted by medical providers who must be enrolled with OWCP's central bill processing contractor, affiliated computer services (ACS), and that authorization must be requested through ACS on a durable medical equipment form.

On September 20, 2014 appellant filed a claim for a schedule award.

By decision dated October 7, 2014, OWCP granted a schedule award for four percent binaural hearing loss impairment, entitling appellant to 8 weeks, or 56 days, of compensation. The period of the award ran from July 11 to September 4, 2014. In a pay rate memorandum, OWCP indicated that he retired from his fire chief position effective April 3, 2014 at Grade 12, Step 5, which had a base pay rate of \$78,762.00 per year, equaling a weekly pay rate of \$1,514.65.³ It explained that it had rounded Dr. Slutsky's 3.8 percent impairment rating up to 4 percent in accordance with FECA policy, which paid claims for a schedule award in whole percentages. OWCP further indicated that appellant's left and right monaural hearing impairment was rated at 3.75 percent, so they were rounded up to 4 percent and added together for a total of 8 percent, which equated to 29.12 award days or 4.16 weeks. It explained that the schedule award was being paid at four percent binaural hearing impairment because it provided him with a greater number of award days than using an eight percent monaural hearing impairment.

LEGAL PRECEDENT

The schedule award provision of FECA⁴ and its implementing regulations 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 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 for evaluating schedule losses and the Board has concurred in such adoption.⁵

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*. Using the frequencies of 500, 1,000, 2,000, and 3,000 cycles per second, 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 decibels result in no impairment in the ability to hear everyday speech under everyday conditions. 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, then added to the greater loss and the total is divided by six to arrive at the amount of the binaural hearing loss. The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.⁶

³ OWCP calculated weekly appellant's pay rate by dividing his yearly salary of \$78,762.00 by 52 weeks, equaling \$1,514.65 per week.

⁴ *Supra* note 1.

⁵ *See R.D.*, 59 ECAB 127 (2007); *Bernard Babcock, Jr.*, 52 ECAB 143 (2000).

⁶ *See E.S.*, 59 ECAB 249 (2007); *Donald Stockstad*, 53 ECAB 301 (2002), *petition for recon. granted (modifying prior decision)*, Docket No. 01-1570 (issued August 13, 2002).

ANALYSIS

An OWCP medical adviser, Dr. Slutsky, reviewed the report of Dr. Anderson, to whom OWCP referred appellant for an otologic examination and audiological evaluation. Dr. Anderson determined that appellant sustained bilateral high frequency hearing loss due to his exposure to noise in the workplace. Dr. Slutsky concluded that appellant had a 3.8 percent binaural hearing impairment. He properly applied OWCP's standardized procedures to Dr. Anderson's July 11, 2014 audiogram which recorded frequency levels at the 500, 1,000, 2,000, and 3,000 cycles per second levels and revealed decibel losses of 5, 20, 20, and 65 respectively in the right ear for a total decibel loss of 110 on the right. Dr. Slutsky then followed established procedures and divided this total by 4 which resulted in an average loss of 27.5 decibels and subtracted the fence of 25 decibels to equal 2.5 decibels. He then multiplied this by the established factor of 1.5 to result in a 3.75 percent monaural hearing loss for the right ear. Dr. Slutsky then properly followed the same procedure on the left, noting that the test results for the left ear at the frequencies of 500, 1,000, 2,000, and 3,000 cycles per second revealed decibel losses of 10, 10, 15, and 75 decibels respectively, for a total of 110 decibels. He divided this by 4, for an average hearing loss of 27.5 decibels, subtracted the fence of 25 decibels to equal 2.5 decibels, and multiplied this by the established factor of 1.5, for a 3.75 percent monaural hearing loss for the left ear. Dr. Slutsky then multiplied the 3.75 percent right ear hearing loss by 5, added the 3.75 percent left ear hearing loss, and divided the total by 6, for a total of 3.8 percent binaural hearing loss. The report therefore established that appellant was entitled to a schedule award for a four percent binaural hearing impairment.⁷

A schedule award provides for payment of compensation for a specific number of weeks as prescribed by the statute.⁸ With regard to appellant's contention that he was entitled to a schedule award for greater than a 4 percent binaural hearing loss, section 8107(c)(13)(b) provides that for a 100 percent loss of hearing of both ears, a claimant is entitled to 200 weeks' compensation.⁹ As appellant sustained four percent binaural hearing loss, he is entitled to eight weeks compensation, which is what OWCP awarded.¹⁰ He is entitled to no more under FECA.

On appeal, appellant contends that OWCP's decision is erroneous because it failed to explain the weekly pay rate used to determine his schedule award and how being paid four percent for binaural hearing loss was greater than using an eight percent monaural hearing impairment. In a pay rate memorandum, OWCP indicated that he retired from his fire chief position effective April 3, 2014 at Grade 12, Step 5, which had a base pay rate of \$78,762.00 per year, equaling a weekly pay rate of \$1,514.65.¹¹ In its October 7, 2014 decision, it explained that the schedule award was being paid at four percent binaural hearing impairment because it provided appellant with 8 weeks, or 56 days, of compensation, which was a greater number of

⁷ See *S.G.*, 58 ECAB 383 (2007).

⁸ 5 U.S.C. § 8107.

⁹ *Id.* at § 8107(c)(13)(b).

¹⁰ OWCP correctly calculated that four percent of 200 weeks equals 8 weeks.

¹¹ See *supra* note 3.

award days than the 4.16 weeks or 29.12 days of compensation that he would have received using an eight percent monaural hearing impairment.

Section 8107 of FECA provides that compensation for a schedule award shall be based on the employee's monthly pay.¹² For all claims under FECA, compensation is to be based on the pay rate as determined under section 8101(4), which defines monthly pay as 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.¹³ The Board has held that rate of pay for schedule award purposes is the highest rate which satisfies the terms of section 8101(4).¹⁴

Where an injury is sustained over a period of time, as in this case, the date of injury is the date of last exposure to the employment factors causing the injury.¹⁵ In determining the amount of compensation payable under the schedule award, OWCP properly used the pay rate of \$1,514.65 per week, which was the rate in effect on April 3, 2014, the date of appellant's retirement and last exposure to hazardous noise.

Appellant further contends on appeal that OWCP's decision failed to explain why he did not receive an award for tinnitus and hearing aids. OWCP has not accepted tinnitus in this case and the Board finds that appellant's argument is irrelevant to the issue on appeal. In its September 10, 2014 decision, it accepted that appellant sustained bilateral hearing loss due to noise exposure and found that he was entitled to hearing aids. OWCP explained that all such requests must be submitted by medical providers who must be enrolled with OWCP's central bill processing contractor, ACS, and that authorization must be requested through ACS on a durable medical equipment form. Thus, the Board finds that appellant's argument is moot as the September 10, 2014 decision was favorable to him as it relates to entitlement to hearing aids.

Appellant may request a schedule award or increased schedule award 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 established that he sustained more than a four percent binaural hearing loss, for which he received a schedule award.

¹² *Supra* note 8.

¹³ *Id.* at § 8101(4).

¹⁴ See *Robert A. Flint*, 57 ECAB 369 (2006); *Reynaldo R. Lichtenberger*, 52 ECAB 462 (2001); *Charles P. Mulholland*, 48 ECAB 604 (1997). See also *R.C.*, Docket No. 14-502 (issued July 2, 2014).

¹⁵ See *Barbara A. Dunnivant*, 48 ECAB 517, 519 (1997); *Sherron A. Roberts*, 47 ECAB 617, 619 (1996). See also *R.C.*, *supra* note 14.

ORDER

IT IS HEREBY ORDERED THAT the October 7, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 11, 2015
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board