

FACTUAL HISTORY

On June 4, 2010 appellant, then a 56-year-old supervisory air interdiction agent, filed an occupational disease claim (Form CA-2) alleging that he developed hearing loss and ringing in his ears as a result of employment-related noise exposure. He noted that he was exposed to noise from servicing airplanes and flying helicopters.

In an undated narrative statement, appellant described his employment duties stating that he flew government service fixed-wing airplanes and helicopters which were flown with open windows and no doors. He attributed the high levels of noise exposure from his federal employment to the wind, rotator transmissions, rotator helicopter blades and tail rotor systems. Appellant reported that he was exposed to employment-related noise from 1988 to the present, four to five hours a day, five days a week. Despite the use of earplugs and aviator helmets, he stated that his hearing loss progressively worsened and that he developed ringing in his ears.

In support of his claim, appellant submitted a history of audiograms dated October 3, 1988 to April 15, 2010.

By letter dated August 9, 2010, the employing establishment stated that appellant had been exposed to very high levels of noise throughout his federal career including exposure to helicopter rotor transmissions and noise from flying aircrafts with no doors.

OWCP referred appellant, together with a statement of accepted facts, to Dr. Gregory S. Rowin, a Board-certified otolaryngologist, for a second opinion evaluation. An audiogram was completed on October 26, 2010 which revealed the following decibel (dBA) losses at 500, 1000, 2000 and 3000 hertz (Hz): 20, 20, 35 and 35 for the right ear and 20, 20, 30 and 50 for the left ear. Speech reception thresholds were 25 dBA on the left and right, while auditory discrimination scores were 96 percent on the right and 92 percent on the left. Dr. Rowin diagnosed high frequency sensorineural hearing loss. He opined that the hearing loss was due to appellant's workplace noise exposure and recommended hearing aids. Applying the standard provided by the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*² (A.M.A., *Guides*) to the October 26, 2010 audiometric data, Dr. Rowin calculated that appellant sustained 3.75 percent monaural hearing impairment in the right ear and 7.5 percent monaural hearing impairment in the left ear. He calculated a binaural hearing impairment of 4.375 percent. On the form report, Dr. Rowin added five percent impairment for tinnitus, for a total of 9.3 percent binaural hearing impairment (4.375 percent + 5 percent for tinnitus). He listed October 26, 2010 as the date of maximum medical improvement.

On December 8, 2010 OWCP's medical adviser reviewed Dr. Rowin's October 26, 2010 otologic examination report and agreed that appellant's bilateral high frequency sensorineural hearing loss was due to occupational noise exposure. He applied the audiometric data to OWCP's standard for evaluating hearing loss under the sixth edition of the A.M.A., *Guides* and determined that appellant sustained five percent binaural hearing loss. The medical adviser averaged appellant's left ear hearing levels of 20, 20, 30 and 50 dB at 500, 1000, 2000 and 3000 Hz, which totaled 30. He then subtracted a 25 dBA fence and multiplied the balance of 5 by 1.5

² A.M.A., *Guides* (6th ed. 2009).

to find 7.5 percent left ear monaural hearing loss which he rounded up to 8 percent. The medical adviser then averaged appellant's right ear hearing levels of 20, 20, 35 and 35 dBA at 500, 1000, 2000 and 3000 Hz, which totaled 27.5. After subtracting out a 25 dBA fence, he multiplied the remaining 2.5 balance by 1.5 to calculate a 3.75 percent right ear monaural hearing loss which he rounded up to 4 percent. The medical adviser then calculated five percent binaural hearing loss by multiplying the lesser right ear loss of four percent by five, adding the greater eight percent left ear loss and dividing this sum by six. He did not list any impairment due to tinnitus. The medical adviser concluded that hearing aids were authorized and the date of maximum medical improvement was October 26, 2010.

By decision dated December 10, 2010, OWCP accepted appellant's claim for bilateral hearing loss.

On May 26, 2011 appellant filed a claim for compensation (Form CA-7) for a schedule award.³

By decision dated June 14, 2011, OWCP granted appellant a schedule award for five percent binaural hearing loss. The award covered a period of 10 weeks from October 26, 2010 to January 3, 2011.⁴

On August 22, 2011 appellant requested review of the written record. The appeal was postmarked on August 22, 2011.

By decision dated September 23, 2011, the Branch of Hearings and Review denied appellant's request for review of the written record finding that his request was not made within 30 days of the June 14, 2011 OWCP decision. The Branch of Hearings and Review further determined that the issue in the case could equally well be addressed by requesting reconsideration from OWCP and submitting evidence not previously considered which establishes that he sustained a greater percentage of impairment than what was previously awarded.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA⁵ 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

³ Appellant did not list any dependents in section 5 of the Form CA-7.

⁴ The Board notes that appellant was awarded \$14,462.07 based on his weekly pay rate of \$2,169.31 multiplied by a compensation rate of 66 2/3 percent. Following the June 14, 2011 award of compensation, appellant informed OWCP that he inadvertently left out his wife as a dependent under section 5 of the Form CA-7 and that his compensation rate should be 75 percent rather than 66 2/3 percent. OWCP recalculated his award based on a 75 percent compensation rate and found that his award amounted to \$16,269.83. This amount was subtracted from the \$14,462.07 award appellant had already received and he was paid the remaining sum of \$1,807.46.

⁵ 5 U.S.C. §§ 8101-8193.

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* (6th ed. 2009), has been adopted by OWCP for evaluating schedule losses and the Board has concurred in such adoption.⁶

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 Hz, the losses at each frequency are added up and averaged. Then, the fence of 25 dBA is deducted because, as the A.M.A., *Guides* points out, losses below 25 dBA result in no impairment in the ability to hear everyday speech under everyday conditions.⁷ 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.⁸

Regarding tinnitus, the A.M.A., *Guides* provide that tinnitus is not a disease but rather a symptom that may be the result of disease or injury.⁹ The A.M.A., *Guides* state that if tinnitus interferes with Activities of Daily Living (ADLs), 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.¹⁰

ANALYSIS -- ISSUE 1

The issue is whether appellant has more than a five percent binaural hearing loss.¹¹

OWCP referred appellant, together with a statement of accepted facts, to Dr. Gregory S. Rowin, a Board-certified otolaryngologist, for a second opinion evaluation. An audiogram was completed on October 26, 2010 which revealed the following dBA losses at 500, 1000, 2000 and 3000 Hz: 20, 20, 35 and 35 for the right ear and 20, 20, 30 and 50 for the left ear. Auditory discrimination scores were 96 percent on the right and 92 percent on the left. Dr. Rowin diagnosed high frequency sensorineural hearing loss. He opined that the hearing loss was due to appellant's workplace noise exposure and recommended hearing aids. Applying the October 26, 2010 audiometric data, Dr. Rowin calculated that appellant sustained 3.75 percent monaural

⁶ See *R.D.*, 59 ECAB 127 (2007); *Bernard Babcock, Jr.*, 52 ECAB 143 (2000).

⁷ See A.M.A., *Guides* 250.

⁸ 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).

⁹ See A.M.A., *Guides* 249.

¹⁰ *Id.* See also *R.H.*, Docket No. 10-2139 (issued July 13, 2011); *Robert E. Cullison*, 55 ECAB 570 (2004).

¹¹ While Dr. Rowin recommended hearing aids and the district medical adviser stated that hearing aids should be authorized, the record does not reflect whether OWCP authorized the purchase of hearing aids.

hearing impairment in the right ear and 7.5 percent monaural hearing impairment in the left ear. He calculated a binaural hearing impairment of 4.375 percent. On the form report, Dr. Rowin added five percent impairment for tinnitus, for a total of 9.3 percent binaural hearing impairment (4.375 percent + 5 percent for tinnitus). He listed October 26, 2010 as the date of maximum medical improvement.

The Board notes that Dr. Rowin did not provide a proper impairment rating in accordance with the A.M.A., *Guides*. Regarding tinnitus, the A.M.A., *Guides* states, tinnitus in the presence of unilateral or bilateral hearing impairment may impair speech discrimination. Therefore, add up to five percent for tinnitus in the presence of measurable hearing loss if the tinnitus impacts the ability to perform activities of daily living.¹² Although Dr. Rowin included five percent impairment for tinnitus, he did not diagnose tinnitus or describe how this condition impacted appellant's activities of daily living.¹³ Further, appellant's discrimination scores of 96 percent in the right ear and 92 percent in the left ear do not demonstrate a substantial impairment of his speech discrimination.¹⁴ As the record does not contain evidence that he developed tinnitus which impacted the activities of his daily living, he is not entitled to an additional schedule award for this condition.¹⁵

OWCP properly referred the medical evidence to OWCP's medical adviser, for a rating of permanent impairment in accordance with the A.M.A., *Guides*.¹⁶

In a December 8, 2010 report, OWCP's medical adviser applied the findings of the October 26, 2010 audiogram to calculate five percent binaural hearing loss. In accordance with the A.M.A., *Guides*, he averaged appellant's hearing levels of 20, 20, 30 and 50 dBA in the left ear and 20, 20, 35 and 35 dBA in the right ear at Hz levels of 500, 1,000, 2,000 and 3,000, respectively, to find average hearing levels of 30 on the left and 27.5 on the right.¹⁷ The medical adviser then subtracted a 25 dBA fence and multiplied the remaining balance, of 5 on the left and 2.5 on the right, by 1.5 to calculate 7.5 percent left ear monaural loss (rounded up to 8 percent) and 3.75 percent right ear monaural loss (rounded up to 4 percent). Using the A.M.A., *Guides*, he calculated five percent binaural hearing loss by multiplying the lesser right ear monaural loss of four percent by five, adding the greater eight percent left ear loss and dividing this sum by six.¹⁸ The Board finds that the medical adviser properly applied the A.M.A., *Guides* in calculating that appellant sustained five percent binaural hearing loss.

¹² *Supra* note 9.

¹³ *R.G.*, Docket No. 11-19 (issued August 3, 2011); *J.P.*, Docket No. 09-1520 (issued March 1, 2010).

¹⁴ *Id.* See also *S.G.*, 58 ECAB 383 (2007).

¹⁵ See *R.D.*, Docket No. 07-379 (issued October 2, 2007).

¹⁶ See *Hildred I. Lloyd*, 42 ECAB 944 (1991).

¹⁷ *Supra* note 12.

¹⁸ *Supra* note 7.

It is well established that, when the examining physician does not provide an estimate of impairment conforming to the A.M.A., *Guides*, OWCP may rely on the impairment rating provided by a medical adviser.¹⁹ As OWCP's medical adviser properly applied the A.M.A., *Guides* in calculating appellant's impairment rating, OWCP correctly relied on his opinion to find that appellant sustained five percent binaural hearing loss.²⁰ The Board finds that there is no evidence of greater impairment.

Appellant argues that this figure should have been adjusted to reflect the impact of tinnitus (ringing in the ears) on his hearing loss. As previously noted, while Dr. Rowin included impairment for this condition, he provided no opinion, rationalized or otherwise, specifically addressing the impact of tinnitus on appellant's activities of daily living and therefore neither OWCP's medical adviser nor OWCP were required to factor in the impact of tinnitus on appellant's hearing loss.²¹ Accordingly, the Board finds that appellant has not established tinnitus as compensable.²²

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.

LEGAL PRECEDENT -- ISSUE 2

A claimant for compensation not satisfied with a decision by OWCP is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary.²³ According to 20 C.F.R. § 10.615, a claimant shall be afforded a choice of an oral hearing or a review of the written record.²⁴ The regulations provide that a request for a hearing or review of the written record must be made within 30 days as determined by the postmark or other carrier's date marking, of the date of the decision.²⁵ A claimant is not entitled to a hearing or a review of the written record as a matter of right if the request is not made within 30 days of the date of the OWCP decision.²⁶ OWCP has discretion, however, to grant or deny a request that is made after this 30-day period.²⁷ In such a case, it will

¹⁹ *J.Q.*, Docket No. 06-2152 (issued March 5, 2008).

²⁰ *See Linda Beale*, 57 ECAB 429 (2006).

²¹ *See Juan A. Trevino*, 54 ECAB 356, 358 (2003).

²² *Supra* note 9; *see also R.G.*, Docket 11-19 (issued August 3, 2011); *R.D.*, Docket No. 07-379 (issued October 2, 2007).

²³ 5 U.S.C. § 8124(b)(1).

²⁴ 20 C.F.R. § 10.615.

²⁵ *Id.* at § 10.616(a).

²⁶ *See James Smith*, 53 ECAB 188 (2001).

²⁷ *Herbert C. Holley*, 33 ECAB 140 (1981).

determine whether to grant a discretionary hearing and, if not, will so advise the claimant with reasons.²⁸

ANALYSIS -- ISSUE 2

In the present case, appellant requested review of the written record on August 22, 2011 and OWCP found that the reconsideration request was postmarked on that same date. His request was made more than 30 days after the date of issuance of OWCP's prior decision dated June 14, 2011. Therefore, OWCP properly found in its September 23, 2011 decision that appellant was not entitled to an oral hearing or examination of the written record as a matter of right because his request for review of the written record was not made within 30 days of its June 14, 2011 decision.²⁹

OWCP, however, has the discretionary authority to grant a hearing if the request was not timely filed. In its September 23, 2011 decision, it considered the issue involved and properly exercised its discretion when it denied appellant's request for review of the written record and determined that he could equally well address the issue of whether he sustained a greater percentage of impairment than what was previously awarded by requesting reconsideration and submitting new evidence. The Board has held that the only limitation on OWCP's authority is reasonableness. 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.³⁰ In the present case, OWCP did not abuse its discretion in denying a discretionary review of the written record and properly denied appellant's request under section 8124 of FECA.³¹

Appellant may submit additional evidence, together with a written request for reconsideration, to OWCP within one year of the Board's merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.606 and 10.607.

CONCLUSION

The Board finds that appellant did not establish that he sustained greater than five percent binaural hearing loss for which he received a schedule award. The Board also finds that OWCP properly denied appellant's request for review of the written record as untimely.

²⁸ *Id.*

²⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602 (May 1991).

³⁰ *Teresa M. Valle*, 57 ECAB 542 (2006); *Daniel J. Perea*, 42 ECAB 214 (1990).

³¹ *See D.F.*, Docket No. 11-42 (issued August 1, 2011); *Hubert Jones, Jr.*, 57 ECAB 467 (2006).

ORDER

IT IS HEREBY ORDERED THAT the September 23 and June 14, 2011 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 7, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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