

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

S.G., Appellant)	
)	
and)	Docket No. 24-0225
)	Issued: April 10, 2024
DEPARTMENT OF JUSTICE, FEDERAL)	
BUREAU OF INVESTIGATION,)	
Washington, DC, 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
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 2, 2024 appellant filed a timely appeal from a December 20, 2023 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

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the December 20, 2023 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 five percent binaural hearing loss, for which he previously received a schedule award; and (2) whether OWCP properly determined appellant's schedule award pay rate.

FACTUAL HISTORY

On January 11, 2023 appellant, then a 52-year-old police officer, filed an occupational disease claim (Form CA-2) alleging that he developed binaural hearing loss due to factors of his federal employment. He explained that he performed firearms qualifications and training as an instructor at indoor and outdoor ranges, searched trucks with loud exhaust, responded to fire alarms, and rode all-terrain vehicles with loud exhaust. Appellant first became aware of his condition on December 30, 2022, and its relationship to his federal employment on January 1, 2023. He did not stop work.

On August 2, 2023 OWCP referred appellant, a statement of accepted facts (SOAF), and an otologic evaluation questionnaire to Dr. Joedy Daristotle, a Board-certified otolaryngologist, for a second opinion evaluation.

In his August 8, 2023 report, Dr. Daristotle reviewed the SOAF and completed the questionnaire. He diagnosed sensorineural hearing loss which he attributed to excessive noise exposure in appellant's federal civilian employment. Dr. Daristotle also diagnosed tinnitus due to appellant's employment-related noise exposure, noting a tinnitus handicap inventory score of 40. He recommended yearly audiograms, hearing protection, and binaural amplification.

Dr. Daristotle also reviewed appellant's August 2, 2023 audiogram which demonstrated losses of 5, 15, 30, and 60 decibels (dBs) on the right and 5, 15, 45, and 60 dBs on the left at 500, 1,000, 2,000, and 3,000 Hertz (Hz), respectively. For the right ear, he found that appellant had a pure tone average (PTA) of 27.5 and calculated a 3.75 percent monaural impairment. For the left ear, Dr. Daristotle found 31.3 PTA and calculated 9.45 percent monaural impairment. He also calculated a binaural hearing impairment of 4.8 percent and 3 percent tinnitus impairment, for a total binaural hearing impairment of 7.8 percent. Dr. Daristotle opined that appellant reached maximum medical improvement on August 8, 2023, and recommended hearing aids.

On October 9, 2023 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 appellant's base pay as \$71,636.00 per year, for a 40-hour per week schedule, with no additional pay type listed. Under section 14 remarks, it noted that the claim was under development and that appellant worked "SDN [Sunday and Night] and Holiday." The employing establishment also indicated that appellant worked 11 months prior to the claimed injury.

In a memorandum dated October 10, 2023, appellant indicated that despite what the Form CA-7 reflected, he worked weekends, which would entitle him to premium pay.

By decision dated November 20, 2023, OWCP accepted appellant's claim for noise-induced bilateral hearing loss and bilateral tinnitus.

OWCP referred the medical evidence to its district medical adviser (DMA), Dr. Jeffrey M. Israel, a Board-certified otolaryngologist. In a report dated November 29, 2023, the DMA referred to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),³ and referencing the August 2, 2023 audiogram, found that appellant had a right monaural loss of 3.75 percent, and a left monaural loss of 9.375 percent for a binaural loss of 4.7 percent. He also found that the Tinnitus Handicap Inventory score of 40 translated to a tinnitus impairment award score of three percent. The DMA added the 3 percent tinnitus award to the 4.7 percent binaural impairment score to yield a total impairment score of 7.7 percent. He determined that appellant reached maximum medical improvement (MMI) on August 2, 2023, the date of the most recent audiogram examination. The DMA also noted that he agreed with Dr. Daristotle's rounding technique. He also suggested that appellant have yearly audiograms, noise protection for the ears, and authorization for hearing aids for hearing loss and tinnitus masking.

The case record contains a December 13, 2023 memorandum of telephone call (Form CA-110), wherein OWCP contacted the employing establishment inquiring as to whether appellant received Sunday and Holiday premium pay. No response was received.

By decision dated December 20, 2023, OWCP granted appellant a schedule award for five percent binaural loss of hearing. It calculated the period of the award from August 2 through October 10, 2023 (10 weeks), that his effective date of pay rate was December 30, 2022, and that he was entitled to the augmented 75 percent compensation rate of his weekly pay rate of \$1,377.62 resulting in \$1,033.37 compensation rate per week, for a total of \$10,332.15. The attached schedule award payment memorandum indicated that the weekly base pay rate was \$1,377.62 (\$71,636.00 annual) and that the date of injury of December 30, 2022 was used as appellant has continuing exposure with no disability.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provisions of FECA⁴ and its implementing regulations⁵ 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 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

³ A.M.A., *Guides* (6th ed. 2009).

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

concurrent with such adoption.⁶ For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2009.⁷

A claimant seeking compensation under FECA has the burden of proof to establish the essential elements of his or her claim.⁸ 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.⁹ 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.¹⁰ The medical evidence must include a detailed description of the permanent impairment.¹¹

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.¹² 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.¹³ The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.¹⁴ 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.¹⁵ The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.¹⁶

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

⁶ *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).

⁷ 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).

⁸ *R.R.*, *supra* note 6; *John W. Montoya*, 54 ECAB 306 (2003).

⁹ *R.R.*, *id.*; *Edward Spohr*, 54 ECAB 806, 810 (2003); *Tammy L. Meehan*, 53 ECAB 229 (2001).

¹⁰ *R.R.*, *id.*; *Rose V. Ford*, 55 ECAB 449 (2004).

¹¹ *R.R.*, *id.*; *Vanessa Young*, 55 ECAB 575 (2004).

¹² *R.R.*, *id.*; *R.D.*, 59 ECAB 127 (2007); *Bernard Babcock, Jr.*, 52 ECAB 143 (2000); *see also* 20 C.F.R. § 10.404.

¹³ A.M.A., *Guides* 250 (6th ed. 2009).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *R.R.*, *supra* note 6; *E.S.*, 59 ECAB 249 (2007); *Reynaldo R. Lichtenberger*, 52 ECAB 462 (2001).

emotional well-being, up to five percent may be added to a measurable binaural hearing impairment.¹⁷

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.¹⁸

ANALYSIS -- ISSUE 1

The Board finds that the evidence of record establishes that appellant is entitled to a schedule award for eight percent binaural hearing loss with tinnitus.

OWCP properly referred appellant to Dr. Daristotle for a second opinion examination to determine his entitlement to a schedule award for his hearing loss.¹⁹ In his August 2, 2023 report, Dr. Daristotle reviewed appellant's audiogram findings and concluded that appellant's binaural hearing loss and tinnitus were due to his workplace noise exposure. On November 29, 2023 Dr. Israel, serving as an OWCP DMA, reviewed Dr. Daristotle's report and concurred with his findings and conclusions.

The Board finds that Dr. Israel properly reviewed Dr. Daristotle's report and applied the standardized procedures to the August 2, 2023 audiogram report to determine that appellant had 4.7 percent, properly rounded up to five percent binaural hearing loss.²⁰

The Board further notes that Drs. Daristotle and Israel also both indicated that appellant's tinnitus interfered with his activities of daily living (ADL) and allowed an additional three percent for his bilateral tinnitus, for a total binaural hearing loss of eight percent, with tinnitus. As noted above, the A.M.A., *Guides* provide that, if tinnitus interferes with ADLs, such as sleep, reading, enjoyment of quiet recreation, and emotional well-being, up to five percent may be added to a measurable binaural hearing impairment.²¹

However, OWCP did not include appellant's degree of impairment for his accepted bilateral tinnitus in the December 29, 2023 schedule award. The Board finds that appellant is entitled to a schedule award for eight percent binaural hearing loss.

¹⁷ A.M.A., *Guides* 249.

¹⁸ *Supra* note 7 at Chapter 2.808.6(f).

¹⁹ See A.M.A., *Guides* 249; see also *H.W.*, Docket No. 20-0924 (issued January 26, 2021).

²⁰ OWCP's policy 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).

²¹ *Supra* note 17.

Upon return of the case record, OWCP shall issue an additional schedule award for three percent binaural hearing loss.

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.²² 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."²³

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.²⁴ 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.²⁵ 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.²⁶

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.²⁷

ANALYSIS -- ISSUE 2

The Board finds that this case is not in posture for decision.

In determining the appropriate rate of pay for schedule award purposes, OWCP must determine the greater pay rate based on the date of injury, date of disability, or the date on which

²² 5 U.S.C. § 8107(a).

²³ *Id.* at § 8101(4).

²⁴ *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).

²⁵ *D.A.*, *id.*; *Barbara A. Dunnavant*, 48 ECAB 517 (1997).

²⁶ *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).

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

disability recurred.²⁸ In this case, OWCP selected the date of injury of December 30, 2022 as appellant had no disability but continuing exposure.

The employing establishment noted on the claim form that appellant's pay rate was \$71,636.00 annually. OWCP found that his pay rate as of December 30, 2022 was based on a salary of \$71,636.00 (weekly rate of \$1,377.62). Additionally, appellant had no dates of subsequent disability that would entitle him to a recurrent pay rate. Thus, the Board finds that OWCP properly determined that December 30, 2022 was the date of injury, and that his pay rate on December 30, 2022 was the greater pay rate.

In calculating appellant's pay rate, OWCP based the pay rate on his annual pay of \$71,636.00 effective December 30, 2022. On the CA-7 form, the employing establishment did not list any additional pay type but noted that the claim was still under development and that appellant worked "SDN [Sunday and Night] and Holiday." Appellant indicated that he worked weekends and was entitled to premium pay. OWCP, however, never obtained clarification from the employing establishment regarding the conflicting information regarding appellant's pay rate.²⁹ On appeal appellant argued that he is entitled to premium pay. As OWCP failed to obtain clarification from the employing establishment regarding the conflicting information on appellant's CA-7 form which may indicate entitlement to premium pay greater than his base pay rate in calculation of his schedule award, the case must be remanded to OWCP for resolution of this discrepancy, to be followed by a *de novo* decision regarding this issue.

CONCLUSION

The Board finds that appellant has an eight percent permanent impairment due to binaural hearing loss and tinnitus. The Board further finds that the case is not in posture for decision as to whether OWCP properly calculated appellant's schedule award pay rate.

²⁸ 5 U.S.C. § 8101(4).

²⁹ *N.P.*, Docket No. 23-0258 (issued August 11, 2023).

ORDER

IT IS HEREBY ORDERED THAT the December 20, 2023 decision of the Office of Workers' Compensation Programs is affirmed in part as modified, and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: April 10, 2024
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board