

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

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O.M., Appellant )

and )

DEPARTMENT OF HOMELAND SECURITY, )  
CUSTOMS & BORDER PROTECTION, )  
San Antonio, TX, Employer )

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**Docket No. 13-232  
Issued: April 23, 2013**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

PATRICIA HOWARD FITZGERALD, Judge  
ALEC J. KOROMILAS, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On November 8, 2012 appellant filed a timely appeal from the September 7, 2012 Office of Workers' Compensation Programs' (OWCP) decision. 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.

**ISSUE**

The issue is whether appellant met his burden of proof to establish that he sustained greater than 17 percent bilateral hearing loss, for which he received a schedule award.

**FACTUAL HISTORY**

On April 16, 2011 appellant, then a 57-year-old customs and border protection second-line supervisor chief, filed an occupational disease claim alleging that he sustained permanent

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

hearing loss that he attributed to his employment.<sup>2</sup> He stated that he first became aware of his condition and realized that it was caused or aggravated by his employment on September 5, 2001. Appellant did not stop work. In a May 24, 2011 letter, the employing establishment concurred with appellant's assertions of noise exposure since 1987. It noted that he had noise exposure at firing ranges, airports, seaports and import lots. In a November 19, 2009 report, Dr. Ronaldo Factoriza, a Board-certified internist, noted appellant's complaints of right ear pain. He diagnosed right otitis media and otitis externa.

In a decision dated June 21, 2011, OWCP denied appellant's claim. It found that he had not established fact of injury.

On March 24, 2012 appellant requested reconsideration. He noted that Dr. Factoriza had referred him to a specialist to evaluate his hearing loss.<sup>3</sup>

By letter dated May 3, 2012, OWCP referred appellant for a second opinion, along with a statement of accepted facts, a set of questions and the medical record to Dr. Gary S. Rowin, a Board-certified otolaryngologist.<sup>4</sup>

In a report dated May 31, 2012, Dr. Rowin noted appellant's history of injury and treatment. He explained that appellant was seen for evaluation of his hearing regarding slowly worsening hearing over the last five years and working around loud noises in his work. Dr. Rowin advised that appellant's ears appeared normal, the temporal membranes were intact, and external auditory canals were within normal limits. He opined that appellant had bilateral high frequency neurosensory hearing loss down a four tone average of about 35 decibels with good speech discrimination. Dr. Rowin advised that appellant had sensorineural loss in excess of what would normally be based on presbycusis. He opined that the workplace noise exposure caused the loss in question. Dr. Rowin opined that appellant had mild-to-moderate neurosensory hearing loss that was more likely than not, secondary to the loud noise exposure. He recommended ear protection and binaural hearing aids. Audiometric testing was performed for Dr. Rowin and was completed on May 31, 2012. It revealed hearing levels of 35, 35, 30 and 35 decibels in the right ear and 30, 30, 35 and 35 decibels in the left ear at hertz (Hz) levels of 500, 1,000, 2,000 and 3,000, respectively. Dr. Rowin calculated that appellant sustained 13.125 percent monaural hearing impairment in the right ear and 11.25 percent monaural hearing impairment in the left ear. He calculated binaural hearing impairment and added five percent impairment for tinnitus, indicating that tinnitus impacted activities of daily living, and found that appellant sustained a total of 16.56 percent binaural hearing impairment. Dr. Rowin noted a maximum medical improvement date of May 31, 2012.

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<sup>2</sup> Appellant's original claim was initially denied as being untimely filed; however, OWCP vacated the decision denying the claim on June 30, 2000 and accepted his claim for bilateral sensorineural hearing loss.

<sup>3</sup> Although appellant stated that he was providing a report and audiological results from the specialist, no corresponding report or test results are in the record before the Board.

<sup>4</sup> In a statement of accepted facts, OWCP indicated that appellant was exposed to severe noise pollution to include exposure to noise from vehicles, tractor trailers, commercial and private aircrafts, trains and commercial vehicles.

On June 15, 2012 OWCP referred Dr. Rowin's report to an OWCP medical adviser for an impairment rating in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). In a June 18, 2012 report, the medical adviser determined that, based upon Dr. Rowin's medical report and the A.M.A., *Guides*, appellant had a total of 17 percent binaural hearing loss based on 12 percent for loss of hearing and 5 percent for tinnitus. He indicated that he concurred with Dr. Rowin's findings and explained that 17 percent was Dr. Rowin's finding of 16.5 percent rounded up to the nearest whole number. The medical adviser noted that the May 31, 2012 audiogram was the most current and met all of OWCP's standards. He opined that the noise exposure on the job was sufficient to be a contributing factor to appellant's hearing loss and recommended the authorization of hearing aids.

By decision dated July 24, 2012, OWCP vacated the June 21, 2011 decision, which denied appellant's claim. In a separate decision of the same date, it accepted his claim for bilateral hearing loss. On July 30, 2012 appellant filed a claim for a schedule award.

By decision dated September 7, 2012, OWCP granted appellant a schedule award for 17 percent binaural hearing loss which covered 34 weeks from May 31, 2012 to January 23, 2013.

### **LEGAL PRECEDENT**

The schedule award provision of FECA<sup>5</sup> provides compensation to employees sustaining permanent loss or loss of use, of specified members 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 a determination is a matter which results 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.<sup>6</sup>

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.<sup>7</sup> Using the frequencies of 500, 1,000, 2,000 and 3,000 Hz, the losses at each frequency are added up and averaged.<sup>8</sup> The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.<sup>9</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

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<sup>5</sup> 5 U.S.C. §§ 8101-8193.

<sup>6</sup> See 20 C.F.R. § 10.404; *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

<sup>7</sup> A.M.A., *Guides* 250.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

binaural hearing loss.<sup>10</sup> The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.<sup>11</sup>

Regarding tinnitus, the A.M.A., *Guides* provide that tinnitus is not a disease but rather a symptom that may be the result of a disease or injury.<sup>12</sup> The A.M.A., *Guides* state that, 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>13</sup>

### ANALYSIS

To determine the nature and extent of appellant's hearing loss, OWCP referred appellant to Dr. Rowin, a Board-certified otolaryngologist, for a second opinion evaluation. Dr. Rowin diagnosed bilateral sensorineural hearing loss due to appellant's employment-related noise exposure. He attached a May 31, 2012 audiogram showing hearing levels of 35, 35, 30 and 35 decibels in the right ear and 30, 30, 35 and 35 decibels in the left ear at Hz levels of 500, 1,000, 2,000 and 3,000, respectively. After indicating that appellant had tinnitus that interfered with activities of daily living, Dr. Rowin calculated a 16.56 percent binaural hearing loss, based on 13.125 percent right ear and 11.25 percent left ear monaural hearing loss and 5 percent hearing loss for tinnitus. He indicated a maximum medical improvement date of May 31, 2012.

OWCP properly referred the medical evidence to an OWCP medical adviser for a rating of permanent impairment in accordance with the A.M.A., *Guides*.<sup>14</sup> In a June 18, 2012 report, the medical adviser applied the findings of the May 31, 2012 audiogram to calculate 17 percent binaural hearing loss. In accordance with page 247 of the A.M.A., *Guides*, he averaged appellant's hearing levels of 30, 30, 35 and 35 decibels in the left ear and 35, 35, 30 and 35 decibels in the right ear at Hz levels of 500, 1,000, 2,000 and 3,000, respectively, to find average hearing levels of 32.5 on the left and 33.75 on the right.<sup>15</sup> The medical adviser then subtracted a 25-decibel fence<sup>16</sup> and multiplied the remaining balance, of 7.5 on the left and 8.75 on the right, by 1.5 to calculate 11.25 percent left ear monaural loss and 13.125 percent right ear monaural loss.<sup>17</sup> Using page 250 of the A.M.A., *Guides*, he calculated binaural hearing loss by multiplying

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<sup>10</sup> *Id.*

<sup>11</sup> *Donald E. Stockstad*, 53 ECAB 301 (2002); *petition for recon., granted (modifying prior decision)*, Docket No. 01-1570 (issued August 13, 2002); *Reynaldo R. Lichtenberger*, 52 ECAB 462 (2001).

<sup>12</sup> *See A.M.A., Guides* 249.

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

<sup>14</sup> *See Hildred I. Lloyd*, 42 ECAB 944 (1991).

<sup>15</sup> A.M.A., *Guides* 247.

<sup>16</sup> The A.M.A., *Guides* provide that, when the average of the hearing levels at 500, 1,000, 2,000 and 3,000 Hz is 25 decibels or less, the ability to hear everyday sounds under everyday listening conditions is not impaired. The subtraction of the 25-decibel fence represents this finding. *Id.* at 250.

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

the lesser right ear monaural loss of 11.25 percent by 5, adding the greater 13.125 percent left ear loss and dividing this sum by 6.<sup>18</sup> The medical adviser arrived at 11.5 percent which he rounded to which he added 5 percent for tinnitus as recommended by Dr. Rowin, to equal 16.5 percent which he rounded to 17 percent binaural hearing impairment.<sup>19</sup> The Board finds that the medical adviser properly applied the A.M.A., *Guides* in calculating that appellant sustained 17 percent binaural hearing loss.

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 17 percent binaural hearing loss.<sup>20</sup> The Board finds that there is no evidence of greater impairment.

On appeal, appellant contends that he should have received compensation for 100 percent impairment. However, as explained, under OWCP's standardized formula, he only has 17 percent binaural hearing impairment. The medical evidence before the Board does not support any greater percentage of impairment.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **CONCLUSION**

The Board finds that appellant has not met his burden of proof to establish that he sustained greater than 17 percent bilateral hearing loss, for which he received a schedule award.

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<sup>18</sup> *Id.* at 250.

<sup>19</sup> Impairment percentages are rounded to the nearest whole point. Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3b (June 2003).

<sup>20</sup> See *Linda Beale*, 57 ECAB 429 (2006).

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 7, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 23, 2013  
Washington, DC

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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

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