

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

L.E., Appellant

and

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

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**Docket No. 13-859
Issued: August 16, 2013**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 26, 2013 appellant filed a timely appeal from the January 25, 2013 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.

ISSUE

The issue is whether appellant met his burden of proof to establish that he sustained more than 57 percent bilateral hearing loss, for which he received a schedule award.

FACTUAL HISTORY

On April 10, 2012 appellant, then a 42-year-old customs and border protection officer, filed an occupational disease claim for hearing loss that he attributed to factors of his

¹5 U.S.C. § 8101 *et seq.*

employment. He first became aware of his condition on October 19, 2011 and realized that it was caused or aggravated by his employment on November 12, 2011. Appellant did not stop work.

On May 21, 2012 appellant requested a schedule award. He submitted a March 21, 2012 report and audiogram from Dr. Rafael Arredondo, a Board-certified otolaryngologist. The audiogram noted hearing levels of 70, 70, 65 and 65 decibels in the right ear and 40, 45, 40 and 40 decibels in the left ear at hertz (Hz) levels of 500, 1,000, 2,000 and 3,000 respectively. Audiograms of October 19 and November 21, 2011 showed lower levels of hearing loss.

By letter dated September 6, 2012, OWCP preferred appellant for a second opinion, together with a statement of accepted facts, to Dr. Gregory S. Rowin, a Board-certified otolaryngologist.²

In a report dated October 2, 2012, Dr. Rowin reviewed appellant's history of noise exposure and medical treatment. He explained that appellant was seen for evaluation of his hearing, which slowly worsened over the past 15 years. Appellant worked around loud noises in the course of his employment and was encouraged to wear ear protection. On examination, the audiological test revealed bilateral neurosensory hearing loss down to a four tone average of about 70 decibels, a little worse in the right ear, but with fair good speech discrimination. Appellant's ears appeared normal, the tympanic membranes were intact and external auditory canals were within normal limits. Dr. Rowin opined that appellant had bilateral neurosensory hearing loss down to a four tone average of about 35 decibels with good speech discrimination. He noted that appellant had sensorineural hearing loss in excess of what would normally result from presbycusis. Dr. Rowin opined that the workplace noise exposure caused the hearing loss. For the left ear, there was moderate-to-severe sensorineural hearing loss and, for the right ear, severe-to-profound sensorineural hearing loss from loud noise exposure. Dr. Rowin recommended ear protection and binaural hearing aids. He advised that an audiological evaluation was performed to include audio and tympanograms.³ The audiometric testing of October 2, 2012 revealed hearing levels of 75, 70, 80 and 85 decibels in the right ear and 50, 50, 60 and 65 decibels in the left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 Hz respectively. Auditory discrimination scores were 72 percent in the right ear and 80 percent in the left ear. Dr. Rowin calculated that appellant sustained 78.75 percent monaural hearing impairment in the right ear and 46.87 percent monaural hearing impairment in the left ear. He calculated binaural hearing impairment and added five percent impairment for tinnitus that impacted the ability to perform activities of daily living. Dr. Rowin concluded that appellant had a total of 57.1 percent binaural hearing impairment. He noted a maximum medical improvement date of October 2, 2012.

On October 18, 2012 OWCP referred the medical record to an OWCP medical adviser for an impairment rating in accordance with the American Medical Association, *Guides to the*

² In a statement of accepted facts, OWCP indicated that appellant was exposed to noise from gas and diesel engines, trains and a train air horn. The sources provided noise levels of unknown decibels and appellant was exposed to such noise for eight hours per day, five days a week.

³ The audiologist indicated that the audiometer was calibrated on October 13, 2011.

Evaluation of Permanent Impairment, (A.M.A., *Guides*) (6th ed. 2008). In an October 18, 2012 report, Dr. Ronald H. Blum noted appellant's history and reviewed Dr. Rowin's report. He agreed that appellant reached maximum medical improvement on October 2, 2012. Under the A.M.A., *Guides*, the medical adviser noted a binaural hearing loss of 52.2 percent to which he added 5 percent for tinnitus, yielding a total 57.2 percent. He opined that the noise exposure on the job was sufficient to be a contributing cause of appellant's hearing loss and recommended hearing aids.

By decision dated October 25, 2012, OWCP accepted appellant's claim for bilateral hearing loss and tinnitus.

By decision dated January 25, 2013, OWCP granted appellant a schedule award for 57 percent binaural hearing loss. The period of the award ran from October 2, 2012 to December 8, 2014.

LEGAL PRECEDENT

The schedule award provision of FECA provides compensation to employees sustaining permanent loss or loss of use, of specified members of the body.⁴ 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.⁵

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.⁶ 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.⁷ The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.⁸ 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.⁹ The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.¹⁰

⁴5 U.S.C. § 8107.

⁵See 20 C.F.R. § 10.404; *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

⁶A.M.A., *Guides* at 250.

⁷*Id.*

⁸*Id.*

⁹*Id.*

¹⁰*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).

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.¹¹ It 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.¹²

ANALYSIS

OWCP referred appellant to Dr. Rowin, a Board-certified otolaryngologist, for a second opinion evaluation. Dr. Rowin examined appellant, obtained audiological testing and determined that appellant sustained a 57 percent binaural hearing impairment. Under the A.M.A., *Guides* Dr. Rowin noted maximum medical improvement on October 2, 2012 and recommended hearing protection. OWCP properly referred the medical evidence to an OWCP medical adviser for review.

In his October 18, 2012 report, Dr. Blum concurred with the findings and conclusion of Dr. Rowin.¹³ He applied the A.M.A., *Guides* to the October 2, 2012 audiogram to rate 57 percent binaural hearing loss. In accordance with page 247 of the A.M.A., *Guides*, the medical adviser averaged appellant's hearing levels of 75, 70, 80 and 85 decibels in the right ear and 50, 50, 60 and 65 decibels in the left ear at Hz levels of 500, 1,000, 2,000 and 3,000, to find average hearing levels of 56.25 on the left and 77.5 on the right.¹⁴ The medical adviser subtracted a 25-decibel fence,¹⁵ and multiplied the remaining balance, of 31.25 on the left and 52.5 on the right, by 1.5 to rate a 46.875 percent left ear monaural loss and 78.75 percent right ear monaural loss.¹⁶ He rated 57 percent binaural hearing loss by multiplying the lesser left ear monaural loss of 46.875 percent by 5, adding the greater loss, 78.75 percent for the right ear and dividing this sum by 6.¹⁷ This yielded 52.2 percent rounded down to 52 percent,¹⁸ to which 5 percent for tinnitus was added. Dr. Blum arrived at 57 percent total impairment. The Board finds that the medical adviser properly applied the A.M.A., *Guides* in calculating that appellant sustained 57 percent binaural hearing loss.

¹¹ See A.M.A., *Guides* 249.

¹² *Id.* R.H., Docket No. 10-2139 (issued July 13, 2011); see also *Robert E. Cullison*, 55 ECAB 570 (2004).

¹³ See *Hildred I. Lloyd*, 42 ECAB 944 (1991).

¹⁴ A.M.A., *Guides* at 247.

¹⁵ The A.M.A., *Guides* provides 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.

¹⁶ *Id.*

¹⁷ *Id.* at 250.

¹⁸ Impairment percentages are rounded to the nearest whole point. Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3b (January 2010).

Both Dr. Rowin and Dr. Blum properly applied the A.M.A., *Guidesto* note appellant's impairment. OWCP relied upon their opinions to find that appellant sustained 57 percent binaural hearing loss.¹⁹ The Board finds that there is no evidence of greater impairment.²⁰

Appellant may request a 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 met his burden of proof to establish that he sustained greater than 57percent bilateral hearing loss, for which he received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the January 25, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 16, 2013
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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

¹⁹See *Linda Beale*, 57 ECAB 429 (2006).

²⁰ The Board notes that the audiogram performed for Dr. Arredondo did not conform to OWCP standards on testing reliability and calibration. *Seesupra* note 18, Chapter 3.700.4(b)(2) (January 2010).