

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

R.L., Appellant

and

**DEPARTMENT OF JUSTICE, U.S. MARSHALS
SERVICE, Las Vegas, NV, Employer**

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**Docket No. 14-155
Issued: May 9, 2014**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 28, 2013 appellant filed a timely appeal from the May 30, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP), which awarded schedule compensation. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case. The Board also has jurisdiction to review OWCP's June 18, 2013 merit decision denying modification and OWCP's October 4, 2013 nonmerit decision denying appellant's reconsideration request.

ISSUES

The issues are: (1) whether appellant had more than a 17 percent binaural hearing loss through February 1, 2012; and (2) whether OWCP properly denied appellant's August 15, 2013 reconsideration request.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On January 25, 2010 appellant, a 49-year-old deputy U.S. Marshal, filed an occupational disease claim alleging that the ringing in his ears and significant hearing loss were a result of his exposure to hazardous noise at the firing range. OWCP accepted his claim for bilateral sensorineural hearing loss.

Dr. Ashley Sikand, a Board-certified otolaryngologist, related appellant's history and evaluated his hearing. The otologic examination was normal. Audiometric testing obtained on February 1, 2012 revealed symmetric high-frequency sensorineural hearing loss. Dr. Sikand diagnosed noise-induced hearing loss with secondary tinnitus.

An OWCP medical consultant reviewed appellant's records, including earlier audiograms. It was his opinion that the condition found on Dr. Sikand's evaluation was aggravated by conditions of federal employment. Hearing thresholds at 500, 1,000, 2,000 and 3,000 hertz (Hz) were 15, 25, 30 and 75 decibels (dB) on the right and 15, 25, 30 and 60 dB on the left. The medical consultant calculated that appellant had a 12 percent binaural hearing loss under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (6th ed. 2009). As appellant's tinnitus was severe and impacted on quality of life, the medical consultant added 5 percent for a total binaural hearing impairment of 17 percent.

On May 30, 2013 OWCP issued a schedule award for a 17 percent binaural hearing loss.

Appellant requested reconsideration. He considered the rating to be insufficient and asked for a review of all information from 1995 to the present. Appellant submitted the results of an audiometric evaluation obtained on April 24, 2013, which he noted showed a profound loss and severe tinnitus.

OWCP reviewed the merits of appellant's case on June 18, 2013 and denied modification of its prior decision. It found that his lay opinion had no probative value and that he had submitted no report from an otolaryngologist addressing any defect in the report of OWCP medical consultant. OWCP noted that, as appellant continued to be exposed to gunfire at work, he could file a claim for an additional schedule award based on additional exposure to the same work factors. "This constitutes a new claim and should be handled as such."

On August 15, 2013 appellant again requested reconsideration. OWCP received this request on August 23, 2013. Referencing OWCP's guidance concerning a new claim, appellant submitted copies of audiograms and examinations from February 1, 2012 to May 9, 2013 as "new evidence of continuing injury."

In a decision dated October 4, 2013, OWCP denied appellant's request. It found the medical documentation repetitious. OWCP also found that new evidence regarding tinnitus was irrelevant or immaterial.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA² and its implementing regulations,³ 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. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁴ As of May 1, 2009, it uses the sixth edition of the A.M.A., *Guides* to calculate schedule awards.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 Hz, the losses at each frequency are added up and averaged. Then, a fence of 25 dB is deducted because, as the A.M.A., *Guides* points out, losses below 25 dB result in no change in the ability to hear everyday sounds under everyday listening 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 binaural hearing loss.⁶ The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.⁷

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.⁸

ANALYSIS -- ISSUE 1

Dr. Sikand, the otolaryngologist, obtained audiometric testing on February 1, 2012. Hearing thresholds at 500, 1,000, 2,000 and 3,000 Hz were 15, 25, 30 and 75 dB on the right, for an average of 36.25. Deducting the fence of 25 dB leaves 11.25. Multiplying by a factor of 1.5 gives a monaural hearing loss of 17 percent on the right.

² 5.U.S.C. § 8107.

³ 20 C.F.R. § 10.404.

⁴ *Id.* at § 10.404(a).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (February 2013); Federal (FECA) Procedure Manual Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

⁶ A.M.A., *Guides* 250-51.

⁷ *J.H.*, Docket No. 08-2432 (issued June 15, 2009); *J.B.*, Docket No. 08-1735 (issued January 27, 2009).

⁸ A.M.A., *Guides* 249.

Hearing thresholds at those same frequencies were 15, 25, 30 and 60 dB on the left, for an average of 32.5. Deducting the fence of 25 dB leaves 7.5. Multiplying by a factor of 1.5 gives a monaural hearing loss of 11 percent on the left.

Multiplying the lesser loss by 5 (11 percent x 5 = 55), adding the greater loss (55 + 17 = 72) and dividing the total by 6 gives a binaural hearing loss of 12 percent (72 / 6 = 12).

Finding that tinnitus interfered with appellant's activities of daily living, OWCP awarded an additional five percent, which is the maximum additional impairment permissible for tinnitus under the A.M.A., *Guides*.

An OWCP medical consultant reviewed Dr. Sikand's report and found appellant to have a 17 percent binaural hearing impairment. Accordingly, the Board finds that appellant has no more than a 17 percent binaural hearing loss through February 1, 2012. The Board will therefore affirm OWCP's May 30, 2013 schedule award decision.

Appellant felt that the schedule award he received for hearing loss and tinnitus was insufficient, but the evaluation of permanent impairment is a medical issue determined by a qualified physician and the application of procedures set forth in the sixth edition of the A.M.A., *Guides*. Dr. Sikand is a Board-certified otolaryngologist, who reviewed appellant's previous audiograms. It was the most recent audiogram, obtained on February 1, 2013, that best reflected his current condition. As OWCP indicated, later evaluations reflecting continuing exposure to hazardous noise showed no error in the May 30, 2013 schedule award. Those evaluations may be addressed by filing a Form CA-7 claim for a schedule award based on additional hearing loss after February 1, 2013. As that is a separate issue, the Board will affirm OWCP's June 18, 2013 decision to deny modification of the May 30, 2013 schedule award.

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

OWCP may review an award for or against payment of compensation at any time on its own motion or upon application.⁹ An employee (or representative) seeking reconsideration should send the request for reconsideration to the address as instructed by OWCP in the final decision. The request for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.¹⁰

⁹ 5 U.S.C. § 8128(a).

¹⁰ 20 C.F.R. § 10.606.

A request for reconsideration must be received by OWCP within one year of the date of OWCP decision for which review is sought.¹¹ A timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.¹²

ANALYSIS -- ISSUE 2

OWCP received appellant's August 15, 2013 reconsideration request within one year of the most recent merit decision on June 28, 2013. Appellant's request was therefore timely. The question for determination is whether that request met at least one of the standards for obtaining a merit review of his case.

Appellant's request did not show that OWCP erroneously applied or interpreted a specific point of law. He did not identify a specific point of law or show that OWCP erroneously applied or interpreted it. Appellant did not advance a relevant legal argument not previously considered by OWCP. He simply indicated that he was attempting to follow OWCP's guidance on submitting a new claim for additional exposure. A claimant may be entitled to a merit review by submitting evidence that constitutes relevant and pertinent new evidence not previously considered by OWCP, but audiograms and examinations from February 1 to May 9, 2013 are not relevant and pertinent to the May 30, 2013 schedule award, which awarded compensation for appellant's hearing loss through February 1, 2012.

The Board finds that appellant's August 15, 2013 reconsideration request did not meet any of the standards for obtaining a merit review of his case. The Board will therefore affirm OWCP's October 4, 2013 decision to deny that request.

CONCLUSION

The Board finds that appellant has no more than a 17 percent binaural hearing loss through February 1, 2012. The Board further finds that OWCP properly denied his August 15, 2013 reconsideration request.

¹¹ *Id.* at § 10.607(a).

¹² *Id.* at § 10.608.

ORDER

IT IS HEREBY ORDERED THAT the October 4, June 18 and May 30, 2013 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 9, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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