

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

A.R., Appellant

and

**DEPARTMENT OF JUSTICE, DRUG
ENFORCEMENT ADMINISTRATION,
Laredo, TX, Employer**

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**Docket No. 15-1607
Issued: November 9, 2015**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 21, 2015 appellant filed a timely appeal from a February 20, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.³

¹ The Board notes that, during the pendency of this appeal, OWCP issued a September 17, 2015 decision denying appellant's claim for a schedule award. This decision, however, is null and void as the Board and OWCP may not simultaneously have jurisdiction over the same issue. See 20 C.F.R. § 501.2(c)(3); see also *Terry L. Smith*, 51 ECAB 182 (1999); *Arlonia B. Taylor*, 44 ECAB 591 (1993); *Russell E. Lerman*, 43 ECAB 770 (1992); *Douglas E. Billings*, 41 ECAB 880 (1990).

² 5 U.S.C. § 8101 *et seq.*

³ Appellant submitted new evidence on appeal. However, the Board cannot consider evidence that was not before OWCP at the time of its final decision. See 20 C.F.R. § 501.2(c)(1).

ISSUE

The issue is whether appellant has met his burden of proof to establish that he is entitled to a schedule award for his employment-related hearing loss.

FACTUAL HISTORY

On April 23, 2014 appellant, then a 54-year-old supervisory special agent/resident in charge, filed an occupational disease claim (Form CA-2) alleging that he sustained hearing loss due to exposure to noise at work and that he first became aware of his condition and realized that it was caused or aggravated by his employment beginning May 21, 2004. The employing establishment noted that he last had exposure to conditions alleged to have caused his condition on March 28, 2014.

By letter dated May 1, 2014, OWCP informed appellant of the type of evidence needed to support his claim and requested that he submit such evidence within 30 days.

OWCP then received a May 14, 2014 statement from appellant in which he described his employment history as a drug enforcement agent, his training with side arms and law enforcement training. Appellant indicated that this entailed exposure to the noise of several thousands of rounds of weapons fire. He indicated that despite wearing the required double protection hearing devices he felt that his hearing loss was caused by his prolonged noise exposure during his mandatory shooting qualifications with his issued firearm.

OWCP also received records pertaining to noise exposure and annual audiograms obtained through an employing establishment hearing conservation program.

On December 22, 2014 OWCP referred appellant, together with a statement of accepted facts to Dr. William Carl Smith, a Board-certified otolaryngologist, for a second opinion evaluation regarding the nature, extent and relationship of appellant's hearing loss to his federal employment.

In a January 21, 2015 report, Dr. Smith noted that the purpose of his examination was to determine if appellant had hearing loss secondary to noise exposure during his federal employment. He noted reviewing available medical records and examined appellant. Dr. Smith advised that the external canals of the ears were open and normal, bilaterally; the tympanic membranes were intact and normal, bilaterally; and the mastoids were normal, bilaterally. He noted that audiometric testing was performed on his behalf on that date. Dr. Smith advised that tympanograms and reflexes were normal and in excess of what would be normally predicated on the basis of presbycusis. He determined that the workplace exposure was of sufficient intensity and duration to have caused the bilateral sensorineural hearing loss. Dr. Smith diagnosed bilateral high-frequency sensorineural hearing loss which was due to appellant's noise exposure in the course of his federal employment. He recommended a trial of hearing aids. Dr. Smith

attached a copy of the January 21, 2015 audiogram and a certificate of acoustic impedance/admittance meter calibration.⁴

On February 12, 2015 an OWCP medical adviser reviewed the otologic and audiologic testing performed on appellant by Dr. Smith and applied OWCP's standardized procedures to his evaluation. He determined that maximum medical improvement was achieved on January 21, 2015. The medical adviser noted the pure tone audiometry of January 21, 2015 was used as it was the most recent and met all of OWCP's standards. He explained that the noise exposure on the job was deemed sufficient to implicate it as a contributing factor to appellant's hearing loss. The medical adviser utilized the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (A.M.A., *Guides*) and determined that appellant had zero percent hearing loss. He also recommended authorizing hearing aids.

By decision dated February 20, 2015, OWCP accepted appellant's claim for hearing loss due to his employment-related hearing exposure. However, it determined that his hearing loss was not severe enough to be considered ratable and determined that he was not entitled to schedule award compensation for hearing loss. OWCP further determined that the medical evidence established that appellant was entitled to medical benefits for the effects of his injury and that he would benefit from hearing aids, if recommended by his physician.

LEGAL PRECEDENT

The schedule award provision of FECA⁵ and its implementing regulations⁶ 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 to all claimants, good administrative practice necessitates 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 the implementing regulations as the appropriate standard for evaluating schedule losses.⁷

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 cps second, the losses at each frequency are added up and averaged. Then, the fence of 25 decibels is deducted because, as the A.M.A., *Guides* points out, losses below 25 decibels result in no impairment in the ability to hear everyday speech under everyday conditions.⁸ The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss. The binaural loss is

⁴ Testing for the right ear at the frequency levels of 500, 1,000, 2,000, and 3,000 cycles per second (cps) revealed decibel losses of 15, 15, 15, and 50 respectively. Testing for the left ear at the frequency levels of 500, 1,000, 2,000, and 3,000 cps revealed decibel losses of 20, 15, 15, and 45 respectively.

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404.

⁷ *Id*

⁸ See A.M.A., *Guides* 250.

determined by calculating the loss in each ear using the formula for monaural loss; the lesser loss is multiplied by five and 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.⁹

ANALYSIS

The Board finds that the evidence of record is insufficient to establish that appellant is entitled to a schedule award for his employment-related hearing loss.

On February 12, 2015 an OWCP medical adviser reviewed the otologic and audiologic testing performed on appellant by Dr. Smith, a Board-certified otolaryngologist, and properly applied OWCP's standardized procedures to this evaluation. Testing for the right ear at the frequency levels of 500, 1,000, 2,000, and 3,000 cps revealed decibel losses of 15, 15, 15, and 50 respectively. These decibel losses were totaled at 95 decibels and were divided by 4 to obtain the average hearing loss of 23.75 decibels. This average loss was then reduced by 25 decibels (25 decibels being discounted as discussed above) to equal a negative figure. Testing for the left ear at the frequency levels of 500, 1,000, 2,000, and 3,000 cps revealed decibel losses of 20, 15, 15, and 45 respectively. These decibel losses total 95 decibels and when divided by 4 result in an average hearing loss of 23.75 decibels. This average loss when reduced by 25 decibels (25 decibels being discounted as discussed above) equals a negative figure. The medical adviser properly concluded that the calculations showed that appellant did not have a ratable hearing loss under the relevant standards of the A.M.A., *Guides*.

Because these averages are below the fence of 25 decibels, appellant is deemed to have no impairment in his ability to hear everyday sounds under everyday listening conditions.¹⁰ This does not mean that he has no hearing loss. It means that the extent or degree of loss is not sufficient to show a practical impairment in hearing according to the A.M.A., *Guides*. The A.M.A., *Guides* set a threshold for impairment and appellant's occupational hearing loss did not cross that threshold. Thus the OWCP medical adviser applied the proper standards to the January 21, 2015 audiogram. Appellant's hearing loss was not ratable. For this reason, the Board finds that OWCP properly denied a schedule award for his nonratable hearing loss.

The Board finds that there is no current medical evidence of record supporting that appellant has a ratable hearing loss under OWCP's standardized procedures for rating hearing impairment.

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.

⁹ *E.S.*, 59 ECAB 249 (2007); *Reynaldo R. Lichtenberger*, 52 ECAB 462 (2001).

¹⁰ *See L.F.*, Docket No. 10-2115 (issued June 3, 2011).

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he is entitled to a schedule award for his employment-related hearing loss.

ORDER

IT IS HEREBY ORDERED THAT the February 20, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 9, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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

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