

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

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**B.C., Appellant**

**and**

**DEPARTMENT OF HOMELAND SECURITY,  
OFFICE OF PROFESSIONAL  
RESPONSIBILITY, El Paso, TX, Employer**

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**Docket No. 16-0448  
Issued: November 9, 2016**

*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  
COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On January 11, 2016 appellant filed a timely appeal of an October 28, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 to consider the merits of the case.

**ISSUE**

The issue is whether appellant has met his burden of proof to establish a ratable hearing loss warranting him to a schedule award.

**FACTUAL HISTORY**

On March 4, 2015 appellant, then a 52-year-old special agent, filed an occupational disease claim (Form CA-2) alleging that on February 10, 2015 he first became aware of his

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

hearing loss. He related this condition to his employment on that date and attributed it to his job duties of inspecting commercial aircraft, container ships, cars, and trucks. Appellant submitted an audiogram dated February 10, 2015.

OWCP referred appellant for a second opinion examination with Dr. William Carl Smith, a Board-certified otolaryngologist, on March 19, 2015. In a report dated April 6, 2016, Dr. Smith reviewed the statement of accepted facts (SOAF) and noted appellant's employment-related noise exposure, which he found sufficient to have caused sensorineural hearing loss. He found that appellant's current audiological findings were not reliable, but demonstrated a bilateral hearing loss. Dr. Smith noted that appellant was retested several times, but was consistently able to respond to speech at a lower level than he indicated that he could hear the pure tones. He recommended that appellant be retested.

On May 11, 2015 OWCP referred appellant for an additional second opinion evaluation with Dr. John D. Edwards, a Board-certified otolaryngologist. In a report dated May 27, 2015, Dr. Edwards reviewed the SOAF and noted that appellant was exposed to loud noises in ships and armored personnel carriers prior to his employment-related noise exposures. He opined that appellant's workplace noise exposure was sufficient to cause sensorineural hearing loss. Dr. Edwards diagnosed bilateral sensorineural hearing loss moderate mid to high frequency due to his noise exposure. He concluded that appellant's hearing loss was due to his work-related noise exposure. Dr. Edwards recommended hearing aid amplification. Appellant's audiogram dated May 27, 2015 demonstrated testing at 500, 1,000, 2,000, and 3,000 hertz (Hz). On the right at those frequencies, he demonstrated losses of 30, 20, 20, and 35 decibels (dBs) of air conduction. On the left appellant demonstrated losses of 15, 15, 15, and 40 dB's, respectively. In his evaluation of this audiogram, Dr. Edwards provided appellant's dB losses as 30, 20, 20, and 30 on the right.

OWCP's medical adviser reviewed Dr. Edwards' report and found that appellant had reached maximum medical improvement on May 27, 2015. He concluded that appellant's hearing loss was related to noise exposure in the performance of his job duties and recommended authorizing hearing aids. OWCP's medical adviser applied the hearing loss formula from the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).<sup>2</sup> He added dB losses on the right listed in Dr. Edwards' report, which he related as: 30, 20, 20, and 30 to reach 100 and averaged this sum to reach 25. OWCP's medical adviser then subtracted the fence of 25 as directed by the A.M.A., *Guides* to reach 0 and multiplied this amount by 1.5 to reach a monaural loss on the right of 0 percent. He followed the same procedure with the audiographic results of appellant's left ear to reach a sum of 85, an average of 21.25, and after deducting the fence of 25, 0 percent monaural hearing loss.

On June 16, 2015 OWCP accepted appellant's claim for bilateral hearing loss.

Appellant filed a claim for compensation (Form CA-7) requesting a schedule award on June 23, 2015. By decision dated July 7, 2015, OWCP denied his claim for a schedule award, finding that the medical evidence of record had not established a ratable hearing loss under the A.M.A., *Guides*.

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<sup>2</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

Appellant requested reconsideration of OWCP's July 7, 2015 decision alleging that Dr. Edwards had informed him that he did have hearing loss, but that he did not perform hearing impairment ratings. Appellant contended that Dr. Edwards found that he had zero percent impairment due to hearing loss and that he was being penalized on this basis.

By decision dated October 28, 2015, OWCP denied modification of its July 24, 2015 decision, finding that, although appellant's claim was accepted for bilateral hearing loss, the medical evidence of record did not establish a ratable impairment under the A.M.A., *Guides*. It noted that he had not submitted medical evidence establishing greater impairment of his hearing. OWCP explained how appellant's impairment was calculated.

### **LEGAL PRECEDENT**

The schedule award provision of FECA<sup>3</sup> and its implementing regulations<sup>4</sup> set forth the number of weeks of compensation payable to employees sustaining permanent impairment for loss of use of scheduled members or functions 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 determination is a matter which rests in the 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. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.<sup>5</sup>

OWCP's procedures set forth requirements for the medical evidence used in evaluating hearing loss. These include that the employee undergo both audiometric and otologic examination; that the audiometric testing be performed by an appropriately certified audiologist; that the otologic examination be performed by an otolaryngologist certified or eligible for certification by the American Academy of Otolaryngology and that the audiometric and otologic examination be performed by different individuals as a method of evaluating the reliability of the findings. Further, all audiological equipment authorized for testing meet the calibration protocol contained in the accreditation manual of the American Speech and Hearing Association; that the audiometric test results include both bone and pure tone air conduction thresholds, speech reception thresholds, and monaural discrimination scores. The otolaryngologist's report is to include: date and hour of examination; date and hour of employee's last exposure to loud noise; a rationalized medical opinion regarding the relation of the hearing loss to the employment-related noise exposure; and a statement of the reliability of the tests.<sup>6</sup> The physician should be

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<sup>3</sup> 5 U.S.C. § 8107.

<sup>4</sup> 20 C.F.R. § 10.404.

<sup>5</sup> Effective May 1, 2009, OWCP began using the sixth edition of the A.M.A., *Guides*. A.M.A., *Guides*, (6<sup>th</sup> ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.5a (February 2013); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

<sup>6</sup> See *I.J.*, 59 ECAB 408 (2008); see also *Victor J. Woodhams*, 41 ECAB 345 (1989).

instructed to conduct additional tests of retests in those cases where the initial tests were inadequate or there is reason to believe that the claimant is malingering.<sup>7</sup>

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 cycles per second, the losses at each frequency are added up and averaged. Then, the fence of 25 dB is deducted because, as the A.M.A., *Guides* points out, losses below 25 dB result in no impairment in the ability to hear everyday speech under everyday conditions.<sup>8</sup> 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 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.<sup>9</sup> The Board has also noted OWCP's policy to round the calculated percentage of impairment to the nearest whole number.<sup>10</sup>

### ANALYSIS

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

Dr. Edwards submitted a medical report and an audiogram dated May 27, 2015 evaluating appellant's hearing loss for schedule award purposes. He found that appellant's workplace exposure was sufficient to have caused his sensorineural hearing loss. Dr. Edward provided audiometric test results. For the frequencies of 500, 1,000, 2,000, and 3,000 cycles per second, the May 27, 2015 audiological diagram and audiological report demonstrate levels in the left ear of 15, 15, 15, and 40 decibels. For the right ear, the May 27, 2015 audiological diagram revealed for the frequencies of 500, 1,000, 2,000, and 3,000 cycles per second losses of 30, 20, 20, and 35 decibels of air conduction. The audiological report recorded in the right ear levels at the same frequencies, respectively, 30, 20, 20, and 30 rather than 35 dBs.

OWCP's medical adviser applied the A.M.A., *Guides* to the medical report submitted from Dr. Edwards, which conformed to the applicable criteria. The losses at the frequencies of 500, 1,000, 2,000, and 3,000 cycles per second were added and averaged and the fence of 25 decibels was deducted.<sup>11</sup> The remaining amount was multiplied by 1.5 to arrive at the percentage of monaural hearing loss. For levels recorded in the left ear of 15, 15, 15, and 40 dBs, the above formula derived zero percent monaural hearing loss.

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<sup>7</sup> *Luis M. Vallanueva*, 54 ECAB 666 (2003); *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.8(a) (September 1996).

<sup>8</sup> *See* A.M.A., *Guides* 250.

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

<sup>10</sup> *J.H.*, Docket No. 08-2432 (issued June 15, 2009); *Robert E. Cullison*, 55 ECAB 570 (2004). *See supra* note 5 at Chapter 3.700.4(b)(2)(b) (January 2010).

<sup>11</sup> *J.H.*, *id.*; *Robert E. Cullison*, *id.* *See* Federal (FECA) Procedure Manual, *id.*

OWCP's medical adviser then applied the A.M.A., *Guides* to the findings in appellant's right ear as detailed in audiological report submitted by Dr. Edwards. As noted above, this report listed appellant's hearing at the applicable frequencies as 30, 20, 20, and 30 dBs. OWCP's medical adviser did not address or reference the discrepancy with regard to findings of the audiological diagram, which listed appellant's hearing at the applicable frequencies as 30, 20, 20, and 35 dBs. Application of the A.M.A., *Guides* to these variant findings in the right ear results in a possibility of a ratable hearing loss for schedule award purposes. On remand OWCP should request clarification of appellant's hearing loss on the right from Dr. Edwards based on a complete, accurate, and internally consistent audiometric test results. After this and such other development as OWCP deems necessary, it should issue an appropriate merit decision.

### **CONCLUSION**

The Board finds that the case is not in posture for a decision as to the extent of appellant's hearing loss for schedule award purposes.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the October 28, 2015 decision of the Office of Workers' Compensation Programs is set aside and remanded.

Issued: November 9, 2016  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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