

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

F.S., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
U.S. CUSTOMS & BORDER PROTECTION,)
Laredo, TX, Employer)

Docket No. 17-1400
Issued: November 1, 2017

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 12, 2017 appellant, filed a timely appeal from a January 20, 2017 merit 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 the claim.

ISSUE

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

FACTUAL HISTORY

On June 14, 2016 appellant, then a 49-year-old customs and border patrol supervisor, filed an occupational disease claim (Form CA-2) alleging that exposure to vehicle engine,

¹ 5 U.S.C. § 8101 *et seq.*

generator, and mobile track x-ray units in confined areas on or before June 2, 2016 caused bilateral sensorineural hearing loss. He used earplugs and earmuffs. Appellant did not stop work.

Appellant submitted annual employing establishment audiograms obtained as part of a hearing conservation program. A March 17, 2011 employing establishment audiogram demonstrated decibel losses at the frequency levels of 500, 1,000, 2,000, and 3,000 hertz (Hz) in the right ear of 10, 0, 0, and 35, respectively. Testing at the same frequency levels for the left ear revealed decibel losses of 15, 5, 10, and 25, respectively.

In a May 24, 2011 report, Dr. F. Rosenberg, an osteopathic physician consulting to the employing establishment, noted that a recent audiogram was abnormal, indicating moderate bilateral hearing loss.

An October 18, 2012 employing establishment audiogram demonstrated decibel losses at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz in the right ear of 5, 10, 0, and 30, respectively. Testing at the same frequency levels for the left ear revealed decibel losses of 5, 0, 10, and 25, respectively.

Appellant also submitted two audiograms from Dr. Celina T. Oliveira-Montoya, an attending Doctor of Audiology. A February 16, 2014 audiogram showed decibel losses at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz in the right ear of 25, 25, 25, and 40, respectively. Testing at the same frequency levels for the left ear revealed decibel losses of 20, 20, 20, and 30, respectively. A June 2, 2016 audiogram demonstrated decibel losses at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz in the right ear of 25, 20, 20, and 40, respectively. Testing at the same frequency levels for the left ear revealed decibel losses of 25, 20, 20, and 40, respectively. Dr. Oliveira-Montoya did not indicate when appellant was last exposed to hazardous noise prior to the audiograms.

The employing establishment submitted a June 14, 2016 letter confirming appellant's account of daily exposure to "loud noises deriving from tractor trailer traffic, tractor cabs, motors, transmissions screeching, brake screeching, forklift noises, loud bangs at the dock," buses, and private vehicles while performing his inspection duties. Appellant provided a July 5, 2016 statement listing hazardous noise exposures while employed as an agent with the employing establishment beginning in June 1997. In addition to noise from vehicles and equipment, he noted exposure to firearms noise during periodic requalification training.

On November 28, 2016 OWCP obtained a second opinion from Dr. Paul W. Loeffler, a Board-certified otolaryngologist, who reviewed the medical record and statement of accepted facts. A November 28, 2016 audiogram performed for Dr. Loeffler showed decibel losses at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz in the right ear of 10, 15, 20, and 50, respectively. Testing at the same frequency levels for the left ear revealed decibel losses of 20, 20, 20, and 30, respectively. Tympanometry was within normal limits. Dr. Loeffler noted appellant's complaints of bilateral tinnitus interfering with sleep. He diagnosed bilateral sensorineural hearing loss attributable to occupational noise exposure and recommended hearing aids.

On December 21, 2016 OWCP accepted bilateral sensorineural hearing loss, causally related to appellant's hazardous noise exposure at work.

On December 21, 2016 OWCP requested that a district medical adviser (DMA) review the record and a statement of accepted facts to determine whether appellant sustained ratable hearing loss in either ear, according to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).² On January 1, 2017 the DMA opined that appellant attained maximum medical improvement (MMI) as of November 28, 2016, the date of Dr. Loeffler's audiogram. He totaled the 500, 1,000, 2,000, and 3,000 Hz decibel losses for the right ear of 10, 15, 20, and 50 decibels to equal 95. For the left ear, the DMA added the decibel losses of 20, 20, 20, and 30, respectively, totaling 90 decibels. For the right ear, he averaged the losses to determine that appellant had an average hearing loss of 23.75 decibels. The DMA then subtracted the fence of 25 decibels and multiplied the balance by 1.5, resulting in zero percent right ear monaural hearing loss. For the left ear, he added the decibel losses and divided by four to obtain an average loss of 22.5 decibels. After subtracting a fence of 25 decibels, the DMA multiplied the remaining balance by 1.5 to calculate zero percent left ear monaural hearing loss. He, therefore, opined that appellant had zero percent binaural hearing loss and noted that he was not entitled to five percent award for tinnitus, as an award for tinnitus could not be added to zero percent hearing loss. The DMA recommended bilateral hearing aids.

On January 9, 2017 appellant claimed a schedule award (Form CA-7).

By decision dated January 20, 2017, OWCP denied appellant's schedule award claim, finding that the medical evidence of record did not establish ratable hearing loss. It accorded Dr. Loeffler the weight of the medical evidence.

LEGAL PRECEDENT

The schedule award provision of FECA and its implementing regulations 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.³ 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 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.⁴

² 6th ed. 2009.

³ 5 U.S.C. § 8107; 20 C.F.R. § 10.404.

⁴ See *id.*; *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.⁵ 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.⁶ Using the frequencies of 500, 1,000, 2,000, and 3,000 cycles per second (cps) 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

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.¹¹

ANALYSIS

The Board finds that appellant has not established ratable hearing loss warranting a schedule award.

Appellant submitted a June 2, 2016 audiogram from Dr. Oliveira-Montoya, an attending Doctor of Audiology. Testing at 500, 1,000, 2,000, and 3,000 Hz in the right ear revealed decibel losses of 25, 20, 20, and 40, respectively totaling 105 decibels. Testing at 500, 1,000, 2,000, and 3,000 Hz in the left ear revealed decibel losses of 25, 20, 20, and 40, respectively, totaling 105 decibels. However, as Dr. Oliveira-Montoya did not indicate when appellant was last exposed to hazardous noise prior to the audiogram, the results are of diminished reliability.¹²

⁵ A.M.A., *Guides*, (6th ed. 2008) 250. See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013).

⁶ *R.M.*, Docket No. 15-0062 (issued June 11, 2015); see *I.J.*, 59 ECAB 408 (2008); see also *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *P.D.*, Docket No. 15-1173 (issued September 2, 2015); *C.C.*, Docket No. 11-731 (issued October 11, 2011).

¹¹ A.M.A., *Guides* 249 (6th ed. 2009).

¹² *R.M.*, *supra* note 6. An audiologist is not included among the list of healthcare professionals recognized as a "physician" under 5 U.S.C. § 8101(2) and thus cannot be considered to be a qualified physician. *Leon Thomas*, 52 ECAB 202 (2001); see also *Thomas Lee Cox*, 54 ECAB 509 (2003).

OWCP obtained a second opinion from Dr. Loeffler, a Board-certified otolaryngologist, who obtained an audiogram on November 28, 2016 which recorded frequency levels at the 500, 1,000, 2,000, and 3,000 Hz and revealed decibel losses of 10, 15, 20, and 50, respectively in the right ear for a total decibel loss of 95. On the left, test results at the frequencies of 500, 1,000, 2,000, and 3,000 Hz revealed decibel losses of 20, 20, 20, and 30 decibels, respectively, for a total of 90 decibels.

FECA procedures relating to the evaluation of schedule awards provide that the file should be routed to OWCP's DMA for an opinion concerning the nature and percent of impairment.¹³

On January 1, 2017 the DMA utilized the decibel losses found by Dr. Loeffler with regard to hearing loss as found on the November 28, 2016 audiogram. He determined that appellant had reached MMI as of the date of this audiogram. The DMA found that he had zero percent binaural hearing loss. He properly applied OWCP standardized procedures to Dr. Loeffler's audiogram which recorded frequency levels at the 500, 1,000, 2,000, and 3,000 Hz and revealed decibel losses of 10, 15, 20, and 50, respectively in the right ear for a total decibel loss of 95. The DMA then followed established procedures and divided this total by four which resulted in an average loss of 23.75 decibels and subtracted the fence of 25 decibels to equal zero decibels. He then multiplied this by the established factor of 1.5 to result in zero percent monaural hearing loss for the right ear. The DMA then properly followed the same procedure on the left, noting that the test results at the frequencies of 500, 1,000, 2,000, and 3,000 Hz revealed decibel losses of 20, 20, 20, and 30 decibels, respectively, for a total of 90 decibels. He divided this by four, for an average hearing loss of 22.5 decibels, subtracted the fence of 25 decibels to equal zero decibels, and multiplied this by the established factor of 1.5, for zero percent monaural hearing loss for the left ear. The DMA found that appellant had no ratable hearing loss, and noted correctly that appellant was not entitled to a schedule award for tinnitus as he had no ratable hearing loss.¹⁴

Thus, the Board finds that the DMA applied the proper standards to the November 28, 2016 audiogram, finding zero percent binaural hearing loss. Appellant has not submitted any medical report establishing a percentage of hearing loss which would refute the opinion of Dr. Loeffler and the DMA. He has, therefore, failed to meet his burden of proof to establish a permanent, ratable hearing loss.

On appeal appellant contends that he sustained ratable hearing loss due to the accepted exposures. As explained above, the medical evidence of record does not establish ratable

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6e (February 2013).

¹⁴ A.M.A., *Guides* 249 (6th ed. 2009).

hearing loss. Appellant has not submitted any probative medical evidence establishing that he is entitled to a schedule award.¹⁵

Appellant may request a schedule award or increased schedule award at any time 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 established ratable hearing loss, warranting a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 20, 2017 is affirmed.

Issued: November 1, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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

¹⁵ The Board notes that evidence from appellant's audiologist is not a basis for a schedule award as it was not from a physician or certified by a physician. *See supra* note 11. *See also Joshua A. Holmes*, 42 ECAB 231, 236 (1990) (OWCP does not have to review audiograms not certified by a physician and it is the claimant's burden to submit a properly certified audiogram for review if he objects to the audiogram selected by OWCP for determining the degree of hearing loss).