

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

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<b>L.R., Appellant</b>	)	
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<b>and</b>	)	<b>Docket No. 18-0823</b>
	)	<b>Issued: December 9, 2019</b>
<b>DEPARTMENT OF HOMELAND SECURITY,</b>	)	
<b>CUSTOMS &amp; BORDER PROTECTION,</b>	)	
<b>McAllen, TX, Employer</b>	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
CHRISTOPHER J. GODFREY, Chief Judge  
JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On March 9, 2018 appellant filed a timely appeal from a February 1, 2018 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 over the merits of this case.

**ISSUE**

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

**FACTUAL HISTORY**

On August 9, 2017 appellant, then a 43-year-old border patrol agent, filed an occupational disease claim (Form CA-2) alleging permanent hearing loss due to noise exposure at work. He

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

first became aware of his hearing loss on March 15, 2010 and its relationship to his federal employment on February 17, 2016. Appellant did not stop work and continued to be exposed to noise. OWCP undertook development of the claim by sending August 18, 2017 letters to appellant and the employing establishment requesting information necessary to establish the claim. Both parties responded.

Following receipt of the requested information, on October 19, 2017 OWCP referred appellant, together with a SOAF,<sup>2</sup> to Dr. John R. Austin, a Board-certified otolaryngologist, for an otologic examination and an audiological evaluation. Audiometric testing was performed for Dr. Austin on November 29, 2017. Testing at the frequency levels of 500, 1,000, 2,000, and 3,000 Hertz (Hz) revealed the following: right ear 20, 15, 15, and 15 decibels (dBs), respectively; left ear 20, 20, 20, and 20 dBs, respectively.

In a December 5, 2017 report, Dr. Austin noted examining appellant on November 29, 2017 and referenced appellant's exposure to workplace noise. He noted that appellant complained of both hearing loss and tinnitus. Examination of the ears revealed normal canals and drums, normal drum motility, left external auditory canal was clear, tympanic membrane intact, well-aerated middle ear, right external auditory canal clear, and tympanic membrane intact. Dr. Austin diagnosed bilateral sensorineural hearing loss. He noted that appellant's sensorineural hearing loss was at least in part due to his workplace noise exposure. Dr. Austin noted appellant's hearing loss pattern was consistent with noise exposure. He recommended increased use of ear protection. Dr. Austin opined that appellant had zero percent monaural hearing loss in the left ear and zero percent monaural hearing loss in the right ear.

On January 19, 2018 OWCP accepted appellant's claim for "bilateral sensorineural hearing loss" due to work-related noise exposure.

On January 31, 2018 an OWCP district medical adviser (DMA) reviewed Dr. Austin's report and the audiometric test of November 29, 2017 to assess the percentage of hearing loss for schedule award purposes. He concluded that, in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,<sup>3</sup> (A.M.A., *Guides*), appellant had zero percent monaural hearing loss in each ear and zero percent binaural hearing loss. The DMA determined that appellant's hearing loss was not sufficiently severe to be ratable for purposes of a schedule award after applying OWCP's standards for evaluating hearing loss to the results of the November 29, 2017 audiogram. He recommended yearly audiograms, and noise protection for his ears.

By decision dated February 1, 2018, OWCP found that appellant had established employment-related hearing loss, but further found that the hearing loss was not sufficiently severe to be considered ratable for purposes of a schedule award.

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<sup>2</sup> In an October 5, 2017 statement of accepted facts (SOAF), OWCP noted appellant's noise exposure history at work. It noted that he continued to be exposed to loud noises on a daily basis.

<sup>3</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

## LEGAL PRECEDENT

The schedule award provision of FECA<sup>4</sup> and its implementing regulation<sup>5</sup> 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 regulation as the appropriate standard for evaluating schedule losses.<sup>6</sup>

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.<sup>7</sup> Using the frequencies of 500, 1,000, 2,000, and 3,000 Hz, 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. The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss. 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.<sup>8</sup> The Board has concurred in OWCP’s adoption of this standard for evaluating hearing loss.<sup>9</sup>

OWCP’s procedures provide that, after obtaining all necessary medical evidence, the file should be routed to the DMA for an opinion concerning the nature and percentage of permanent impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of permanent impairment specified.<sup>10</sup> OWCP may follow the advice of its DMA or consultant where he or she has properly utilized the A.M.A., *Guides*.<sup>11</sup>

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<sup>4</sup> 5 U.S.C. § 8107.

<sup>5</sup> 20 C.F.R. § 10.404 (1999).

<sup>6</sup> *Id.* See also *Jacqueline S. Harris*, 54 ECAB 139 (2002).

<sup>7</sup> A.M.A., *Guides* 250 (6<sup>th</sup> ed. 2009).

<sup>8</sup> *Id.*

<sup>9</sup> *Donald E. Stockstad*, 53 ECAB 301 (2002), *petition for recon. granted (modifying prior decision)*, Docket No. 01-1570 (issued August 13, 2002).

<sup>10</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(f) (March 2017).

<sup>11</sup> See *Ronald J. Pavlik*, 33 ECAB 1596 (1982).

## ANALYSIS

The Board finds appellant has not met his burden of proof to establish a ratable hearing loss warranting a schedule award.

OWCP properly referred appellant to Dr. Austin for an examination relative to his hearing loss claim. Dr. Austin's November 29, 2017 examination found that his hearing loss was due to his workplace noise exposure.

On January 31, 2018 an OWCP DMA reviewed Dr. Austin's report and found that the hearing loss was not ratable for schedule award purposes. He applied the standardized procedures to the November 29, 2017 audiogram performed for Dr. Austin to determine if appellant's hearing loss was ratable for schedule award purposes.

The DMA noted that testing for the right ear at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz revealed dB losses of 20, 15, 15, and 15, respectively. These dBs were totaled at 65 and were divided by 4 to obtain an average hearing loss at those cycles of 16 dBs. The average of 16 dBs was then reduced by 25 dBs (the first 25 dBs were discounted as discussed above) to equal zero percent hearing loss for the right ear.

The DMA noted that testing for the left ear at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz revealed dB losses of 20, 20, 20, and 20, respectively. These dBs were totaled at 80 and were divided by 4 to obtain the average hearing loss at those cycles of 20 dBs. The average of 20 dBs was then reduced by 25 dBs (again, the first 25 dBs were discounted) to zero which was multiplied by the established factor of 1.5 to compute zero percent hearing loss for the left ear. Thus, the DMA concluded that appellant did not have a permanent impairment of his hearing that warranted a schedule award. Consequently, he concluded that appellant did not have a ratable hearing loss under OWCP's standardized procedures.

On appeal appellant indicates that prior to his employment with the Federal Government he did not have hearing loss. He noted that he had been exposed to loud noises from boats, quarterly firearms, all-terrain vehicles, helicopters, bus engines, and sirens. Appellant asserted that the second opinion physician, Dr. Austin, determined that he had hearing loss and he believed he was entitled to a schedule award. As found, the evidence of record does not establish that appellant has a ratable impairment based on his accepted hearing loss under OWCP's standardized procedures. Although appellant has an employment-related hearing loss, it is not significant enough to be ratable for schedule award purposes.<sup>12</sup>

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.

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<sup>12</sup> See *L.H.*, Docket No. 18-0696 (issued November 28, 2018); *G.G.*, Docket No. 18-0566 (issued October 2, 2018); *D.G.*, Docket No. 16-1486 (issued December 16, 2016).

**CONCLUSION**

The Board finds that appellant has not met his burden of proof to establish a ratable hearing loss warranting a schedule award.

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 1, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 9, 2019  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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