

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

D.L., Appellant	)	
	)	
and	)	Docket No. 19-0987
	)	Issued: October 23, 2019
DEPARTMENT OF THE ARMY, U.S. ARMY	)	
CORPS OF ENGINEERS, Portland, OR,	)	
Employer	)	
	)	

*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  
JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On April 4, 2019 appellant filed a timely appeal from a January 18, 2019 merit decision and a March 22, 2019 nonmerit 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.<sup>2</sup>

**ISSUES**

The issues are: (1) whether appellant has met his burden of proof to establish greater than 10 percent binaural hearing loss, for which he previously received schedule award compensation;

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

<sup>2</sup> The Board notes that, following the March 22, 2019 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

and (2) whether OWCP properly denied appellant's request for an oral hearing before an OWCP hearing representative as untimely filed under 5 U.S.C. § 8124(b).

### **FACTUAL HISTORY**

On March 27, 2018 appellant, then a 60-year-old production machinery mechanic, filed an occupational disease claim (Form CA-2) alleging that he developed hearing loss and tinnitus causally related to factors of his federal employment. He indicated that he first became aware of his condition and its relationship to factors of his federal employment on December 20, 2010.

OWCP received an employing establishment summary listing of appellant's audiogram testing results from March 1, 1999 through February 16, 2017.

On August 8, 2018 OWCP referred appellant for a second opinion evaluation with Dr. Harold Kim, a Board-certified otolaryngologist. In his August 21, 2018 report, Dr. Kim examined appellant due to his history of hearing loss with tinnitus, and calculated a permanent impairment rating. He obtained an August 21, 2018 audiogram, which indicated that testing of the right ear at frequency levels of 500, 1,000, 2,000, and 3,000 Hertz (Hz) revealed decibel (dB) losses of 25, 30, 25, and 55, respectively. Pursuant to the standardized procedures, Dr. Kim totaled these dB losses at 135 and divided by 4 to obtain an average hearing loss at those cycles of 33.75 dBs. The average of 33.75 dBs was then reduced by 25 dBs (the first 25 dBs were discounted as discussed below) to equal 8.75, which was then multiplied by 1.5 to equal 13.125 percent hearing loss for the right ear. Testing for the left ear at frequency levels of 500, 1,000, 2,000, and 3,000 Hz revealed dB losses of 20, 20, 35, and 50, respectively. These dBs were totaled at 125 and were divided by 4 to obtain the average hearing loss at those cycles of 31.25 dBs, and then reduced by 25 dBs to equal 6.25 which was then multiplied by 1.5 to equal 9.375 percent hearing loss for the left ear. To determine appellant's binaural hearing loss, the lesser loss of 9.375 was multiplied by 5 to total 46.875, the greater loss of 13.125 was then added to total 60, and was then divided by 6 to determine the binaural loss of 10 percent. Dr. Kim concluded that, pursuant to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),<sup>3</sup> appellant had 10 percent binaural hearing loss.

By decision dated September 24, 2018, OWCP accepted appellant's claim for "noise effects on inner ear, bilateral and bilateral tinnitus."

On September 27, 2018 Dr. Jeffrey M. Israel, a Board-certified otolaryngologist serving as an OWCP district medical adviser (DMA), reviewed appellant's medical record and a statement of accepted facts (SOAF). He indicated that the earliest audiogram on record was dated March 1999 and that the latest audiogram on record was dated August 21, 2018. Dr. Israel concurred with Dr. Kim's assessment of 10 percent binaural hearing loss. He determined the date of maximum medical improvement was August 21, 2018, the date of appellant's last audiogram. Dr. Israel also noted that, while Dr. Kim related that appellant was bothered by constant ringing in the ears, there was no discussion of tinnitus in the records other than that and no suggested tinnitus impairment score. He indicated that a tinnitus handicap inventory would be useful.

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

By decision dated October 24, 2018, OWCP accepted appellant's claim for binaural sensorineural hearing loss and tinnitus.

On November 13, 2018 appellant filed a claim for a schedule award (Form CA-7).

By decision dated January 18, 2019, OWCP granted appellant a schedule award for 10 percent binaural hearing loss. The award ran from August 22, 2018 to January 8, 2019, for a total of 140 days of compensation.

On February 27, 2019 appellant requested a telephonic oral hearing before an OWCP hearing representative.

By decision dated March 22, 2019, OWCP's hearing representative determined that appellant was not entitled to an oral hearing as a matter of right because his request was untimely filed. The hearing representative also denied a discretionary hearing, finding that the contested issue could equally well be addressed by appellant requesting reconsideration and providing new evidence or argument to establish that he had a greater percentage of permanent impairment than awarded.

### **LEGAL PRECEDENT -- ISSUE 1**

The schedule award provisions of FECA<sup>4</sup> and its implementing regulations<sup>5</sup> set forth the number of weeks of compensation payable to employees sustaining permanent impairment for loss or 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*. For decisions issued after May 1, 2009, OWCP began using the sixth edition of the A.M.A., *Guides*.<sup>6</sup> The Board has approved OWCP's use of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.<sup>7</sup>

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.<sup>8</sup> Using the frequencies of 500, 1,000, 2,000, and 3,000 Hz, the losses at each

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<sup>4</sup> 5 U.S.C. §§ 8101-8193, 8107.

<sup>5</sup> 20 C.F.R. § 10.404.

<sup>6</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6a (March 2017); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

<sup>7</sup> *R.H.*, Docket No. 18-1721 (issued March 25, 2019); *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

<sup>8</sup> *R.B.*, Docket No. 19-0257 (issued August 5, 2019); *A.G.*, Docket No. 17-1778 (issued December 18, 2018); *E.S.*, 59 ECAB 249 (2007); *Reynaldo R. Lichtenberger*, 52 ECAB 462 (2001).

frequency are added up and averaged. Then, the fence of 25 dBs is deducted because, as the A.M.A., *Guides* points out, losses below 25 dBs result in no impairment in the ability to hear everyday speech under everyday conditions.<sup>9</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.<sup>10</sup>

Regarding tinnitus, the A.M.A., *Guides* provides that tinnitus is not a disease, but rather a symptom that may be the result of disease or injury.<sup>11</sup> If tinnitus interferes with activities of daily living, including sleep, reading, and other tasks requiring concentration, up to five percent may be added to a measurable binaural hearing impairment.<sup>12</sup>

### **ANALYSIS -- ISSUE 1**

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

OWCP properly referred appellant to Dr. Kim for a second opinion examination relative to his hearing loss.<sup>13</sup> On September 27, 2018 Dr. Israel, serving as OWCP's DMA, reviewed Dr. Kim's report and concurred with his findings and conclusions. Both Dr. Kim and Dr. Israel properly applied the standardized procedures to the August 21, 2018 audiogram performed for Dr. Kim to determine that appellant had a 10 percent binaural hearing loss.

However, the Board finds that the case is not in posture for decision as OWCP did not properly develop whether appellant was entitled to an additional schedule award for his accepted tinnitus. As noted above, the A.M.A., *Guides* provides that, "if tinnitus interferes with activities of daily living, such as sleep, reading, enjoyment of quiet recreation, and emotional wellbeing, up to five percent may be added to a measurable binaural hearing impairment"<sup>14</sup>

It is well established that proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter.<sup>15</sup> While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence and to see that justice is done.<sup>16</sup> Once OWCP undertook development of the evidence it had a duty to secure an

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<sup>9</sup> A.M.A., *Guides* at 250 (6<sup>th</sup> ed. 2009).

<sup>10</sup> *Id.*

<sup>11</sup> *See id.* at 249 (6<sup>th</sup> ed. 2009).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Supra* note 12.

<sup>15</sup> *T.O.*, Docket No. 18-0659 (issued August 8, 2019).

<sup>16</sup> *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *Jimmy A. Hammons*, 51 ECAB 219 (1999); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

appropriate report addressing the relevant issues.<sup>17</sup> OWCP accepted the claim for tinnitus, but Dr. Israel noted that the record did not provide documentation of a tinnitus impairment score. Dr. Israel recommended that a tinnitus handicap inventory be prepared. However, it did not obtain any further documentation relative to appellant's tinnitus. Since OWCP did not obtain the necessary evidence to determine appellant's entitlement to an additional award for tinnitus, the case will be remanded to OWCP to obtain the necessary documentation. Following this and any necessary further development, it shall issue a *de novo* decision relative to the extent and degree of appellant's hearing impairment.<sup>18</sup>

### CONCLUSION

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

**IT IS HEREBY ORDERED THAT** the March 22 and January 18, 2019 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: October 23, 2019  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

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<sup>17</sup> *Peter C. Belkind*, 56ECAB 580 (2005); *Ayanle A. Hashi*, 56ECAB 234 (2004).

<sup>18</sup> In light of the Board's disposition of issue 1, issue 2 is rendered moot.