



## **FACTUAL HISTORY**

On November 13, 2018 appellant, then a 73-year-old maintenance mechanic, filed an occupational disease claim (Form CA-2) alleging that he developed binaural hearing loss as a result of noise exposure at work. He indicated that he developed left ear hearing loss due to prolonged exposure to noise in the left ear and right ear hearing loss as a result of a 1996 explosion at work. Appellant reported that he first became aware of this condition and its relationship to his federal employment on July 17, 2003. On the reverse side of the claim form, the employing establishment indicated that he retired in 2005.

Appellant submitted employing establishment hearing conservation records and audiometric testing results dated from October 5, 1995 to September 10, 1996.

OWCP referred appellant, a statement of accepted facts (SOAF), and an otologic evaluation questionnaire for a second opinion evaluation with Dr. Edward Treyve, a Board-certified otolaryngologist, in order to determine the extent and degree of appellant's hearing loss and its relationship to his work-related noise exposure. In an April 11, 2019 report, Dr. Treyve noted that he had reviewed the SOAF, performed an audiological evaluation, and completed OWCP's evaluation questionnaire. He recounted that appellant complained of slow progression of hearing loss in his left ear and of sudden hearing loss in his right ear while at work in 1995. Dr. Treyve discussed appellant's medical records, including prior audiological tests, and noted that from December 1991 to September 1996 he had mild high-frequency hearing loss in the left ear. He indicated that in 1991 appellant's right ear hearing loss was normal, but the 1996 audiogram revealed a severe flat sensorineural right ear hearing loss. Dr. Treyve reported that physical examination of his ears revealed normal ear canals and tympanic membranes. He reviewed appellant's audiogram, which demonstrated at 500, 1,000, 2,000, and 3,000 Hertz (Hz) losses of 40, 50, 55, and 65 decibels (dBs) on the left, respectively and 100, 100, 100, and 100 dBs on the right, respectively. The audiogram was performed by an audiologist who documented timely calibration of testing equipment.

Dr. Treyve diagnosed binaural sensorineural hearing loss. He attributed appellant's left ear hearing loss to noise exposure at work, but reported that appellant's right ear hearing loss was not related to occupational exposure and "more likely than not was related to sudden sensorineural hearing loss of viral origin." In response to OWCP's questions, Dr. Treyve indicated that appellant had noise-induced hearing loss in his left ear in excess of what would be predicted on the basis of presbycusis alone. He further explained that "early in [appellant's] employment, he more likely than not had mild high-frequency loss in the right ear, similar to levels in the left ear, but then sustained a sudden sensorineural hearing loss of viral causes." Dr. Treyve reported that appellant's workplace exposure was of sufficient intensity and duration to have contributed to hearing loss in appellant's left ear and "perhaps the right ear prior to his sudden hearing loss, but that cannot be documented." He concluded that according to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*),<sup>2</sup>

---

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

appellant had 41.3 percent monaural hearing loss in the left ear, 100 percent monaural hearing loss in the right ear, and 51.04 percent binaural hearing loss.

By decision dated May 10, 2019, OWCP accepted appellant's claim for left ear sensorineural hearing loss.

On May 10, 2019 OWCP also forwarded the medical record and SOAF to a district medical adviser (DMA) for calculation of appellant's percentage of permanent hearing impairment and assignment of the date of maximum medical improvement (MMI). In a May 14, 2019 report, the DMA reviewed the history of injury, including the available audiological tests. He indicated that he agreed with Dr. Treyve that appellant's left ear hearing loss pattern was suggestive of hearing loss due to noise-induced work-related acoustic trauma. The DMA also reported that he "tend[ed] to favor" Dr. Treyve's comment that appellant's right ear hearing loss "may be due" to a viral cause or at least an idiopathic hearing loss. He noted that he could not know for sure. The DMA reviewed the otologic and audiological testing performed on behalf of Dr. Treyve and applied OWCP's standardized procedures to his evaluation, utilizing the A.M.A., *Guides*. He calculated that the average threshold of the four frequencies of the left ear was 52.5, which, minus the threshold fence of 25 dBs, resulted in a remaining percentage of 27.5. This figure was multiplied by 1.5 to arrive at a total loss of 41.25 percent of the left ear monaural hearing loss. The binaural hearing loss was calculated by multiplying the 41.25 hearing loss of the left ear by 5, resulting in 206.23, then adding the greater loss of 100 and dividing the total by 6, resulting in 51.04 percent binaural hearing loss. The DMA recommended authorization for hearing aids. He determined that MMI occurred on April 11, 2019 the date of the most recent audiogram.

On June 3, 2019 appellant filed a claim for a schedule award (Form CA-7).

On August 21, 2019 OWCP requested clarification from Dr. Treyve regarding whether or not appellant had tinnitus and, if so, whether the tinnitus would be considered work related. In an August 23, 2019 report, Dr. Treyve noted that he evaluated appellant on April 11, 2019 and that appellant described bilateral tinnitus. He opined that the tinnitus in the left ear was no longer considered a problem by appellant wearing amplification.

By decision dated August 23, 2019, OWCP granted appellant a schedule award for 41 percent monaural hearing loss of the left ear. The period of the award was for 31.32 weeks to run during the period April 11 to September 7, 2019. OWCP also determined that appellant was not entitled to a schedule award for his right ear as his right ear hearing loss was not accepted as causally related to his employment. It found that the weight of the medical opinion evidence rested with Dr. Treyve's April 11, 2019 second-opinion report and the May 14, 2019 DMA report.

On September 10, 2019 appellant requested reconsideration. In an August 30, 2019 statement, he alleged that his right ear was also damaged while working at the employing establishment. Appellant requested that his schedule award be amended to 51.1 percent binaural hearing loss as calculated by OWCP's second-opinion examiner.

Appellant submitted an examination record dated September 10, 1996 by the employing establishment health unit, which noted that he complained of loss of hearing when empty fuel tanks

were being taken apart and made a loud whistling sound. He also provided audiological evaluations dated August 19 and September 30, 1996.

By decision dated September 17, 2019, OWCP denied appellant's request for reconsideration of the merits of the claim under 5 U.S.C. § 8128(a). It found that the evidence submitted was repetitious and cumulative of evidence that was previously considered.

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

An employee seeking benefits under FECA<sup>3</sup> has the burden of proof to establish the essential elements of his or her claim, including that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation of FECA,<sup>4</sup> that an injury was sustained in the performance of duty as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.<sup>5</sup> These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.<sup>6</sup>

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.<sup>7</sup>

Causal relationship is a medical issue, and the medical evidence required to establish causal relationship is rationalized medical opinion evidence.<sup>8</sup> The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and specific employment factors identified by the employee.<sup>9</sup>

---

<sup>3</sup> *Supra* note 1.

<sup>4</sup> *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

<sup>5</sup> *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

<sup>6</sup> *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

<sup>7</sup> *S.C.*, Docket No. 18-1242 (issued March 13, 2019); *R.H.*, 59 ECAB 382 (2008).

<sup>8</sup> *A.M.*, Docket No. 18-1748 (issued April 24, 2019); *T.H.*, 59 ECAB 388, 393 (2008); *Robert G. Morris*, 48 ECAB 238 (1996).

<sup>9</sup> *M.V.*, Docket No. 18-0884 (issued December 28, 2018); *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

## ANALYSIS -- ISSUE 1

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

OWCP determined that appellant did not sustain right ear hearing loss due to his federal employment based on the April 11, 2019 report of Dr. Treyve, OWCP's second-opinion examiner. The Board finds, however, that Dr. Treyve's second opinion report requires further clarification to determine whether appellant sustained right ear hearing loss due to noise exposure in the performance of duty.

Dr. Treyve indicated that appellant's hearing loss was in excess of what would be predicted on the basis of presbycusis alone. While he attributed appellant's left ear hearing loss to noise exposure at work, he opined that appellant's right ear hearing loss was more likely from viral origins. Dr. Treyve further explained that early in appellant's employment, he "more likely than not" had mild high-frequency loss in the right ear, similar to levels in the left ear. Accordingly, the Board finds that Dr. Treyve's report is internally inconsistent as he concluded that appellant's right ear hearing loss was of viral origin, but he also reported that earlier in appellant's career, his right ear hearing loss was similar to the hearing loss in his left ear, which was related to occupational noise exposure.<sup>10</sup> Furthermore, an employee is not required to prove a significant contribution of factors of employment to a condition for the purpose of establishing causal relationship.<sup>11</sup> If work-related exposures caused, aggravated, or accelerated appellant's condition, it is compensable.<sup>12</sup> The Board finds, therefore, that Dr. Treyve must clarify whether appellant's occupational noise exposure, in any way, caused, contributed to, or aggravated appellant's right ear hearing loss.

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.<sup>13</sup> While the claimant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.<sup>14</sup> Once OWCP undertakes development of the record, it has the responsibility to do so in a manner that will resolve the relevant issues in the case.<sup>15</sup> Accordingly, as OWCP undertook development of the evidence by referring appellant to a second opinion physician, it has a duty to secure an appropriate report addressing the relevant issues.<sup>16</sup> As Dr. Treyve failed to provide a rationalized

---

<sup>10</sup> See *C.C.*, Docket No. 18-1229 (issued March 8, 2019); see also *C.T.*, Docket No. 16-1641 (issued March 2, 2017).

<sup>11</sup> *C.H.*, Docket No. 19-1315 (issued March 16, 2020); *J.L.*, Docket No. 17-0782 (issued August 7, 2017); *H.C.*, Docket No. 16-0740 (issued June 22, 2016).

<sup>12</sup> See *M.N.*, Docket No. 17-1729 (issued June 22, 2018); *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

<sup>13</sup> *M.T.*, Docket No. 19-0373 (issued August 22, 2019); *B.A.*, Docket No. 17-1360 (issued January 10, 2018).

<sup>14</sup> *S.S.*, Docket No. 18-0397 (issued January 15, 2019); *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

<sup>15</sup> *T.C.*, Docket No. 17-1906 (issued January 10, 2018).

<sup>16</sup> *B.W.*, Docket No. 19-0965 (issued December 3, 2019); *Peter C. Belkind*, 56 ECAB 580 (2005).

medical explanation to support his conclusion regarding causal relationship, the case will be remanded to OWCP to obtain clarification from Dr. Treyve that properly resolves the relevant issue.<sup>17</sup> If Dr. Treyve is unavailable or unwilling to provide a supplemental opinion, OWCP shall refer appellant, together with a SOAF and a list of specific questions, to a second opinion physician in the appropriate field of medicine to resolve the issue.<sup>18</sup> After such further development as OWCP deems necessary, it shall issue a *de novo* decision regarding the issue of whether appellant's workplace noise exposure caused, contributed to, or aggravated the right ear hearing loss condition.

### **LEGAL PRECEDENT -- ISSUE 2**

The schedule award provision of FECA<sup>19</sup> and its implementing regulations<sup>20</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. FECA, however, does not specify the manner in which the percentage of loss of a member shall be determined. For consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants and the Board has concurred in such adoption.<sup>21</sup> As of May 1, 2009, the sixth edition of the A.M.A., *Guides*, published in 2009, is used to calculate schedule awards.<sup>22</sup>

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.<sup>23</sup> 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 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>24</sup> The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.<sup>25</sup> 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

---

<sup>17</sup> See *M.N.*, *supra* note 12; *Ayanle A. Hashi*, 56 ECAB 234 (2004) (when OWCP refers a claimant for a second opinion evaluation and the report does not adequately address the relevant issues, OWCP should secure an appropriate report on the relevant issues).

<sup>18</sup> See *F.K.*, Docket No. 19-1804 (issued April 27, 2020); *T.S.*, Docket No. 18-1702 (issued October 4, 2019).

<sup>19</sup> 5 U.S.C. § 8107.

<sup>20</sup> 20 C.F.R. § 10.404.

<sup>21</sup> *Id.* at § 10.404 (a); see also *Jacqueline S. Harris*, 54 ECAB 139 (2002).

<sup>22</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

<sup>23</sup> *R.D.*, 59 ECAB 127 (2007); *Bernard Babcock, Jr.*, 52 ECAB 143 (2000); see also *supra* note 4.

<sup>24</sup> See A.M.A., *Guides* 250 (6<sup>th</sup> ed. 2009).

<sup>25</sup> *Id.*, *C.D.*, Docket No. 18-0251 (issued August 1, 2018).

binaural hearing loss.<sup>26</sup> The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.<sup>27</sup> The policy of OWCP is to round the calculated percentage of impairment to the nearest whole number.<sup>28</sup> OWCP's procedures provide that percentages should not be rounded until the final percent for award purposes is obtained. Fractions should be rounded down from .49 and up from .50.<sup>29</sup>

### ANALYSIS -- ISSUE 2

The Board finds that appellant has not met his burden of proof to establish more than 41 percent monaural hearing loss in his left ear, for which he previously received a schedule award.

OWCP accepted appellant's occupational disease claim for left ear monaural hearing loss and subsequently granted him a schedule award for 41 percent permanent monaural hearing loss of the left ear, based upon the April 11, 2019 report of Dr. Treyve, as reviewed by the DMA. The DMA applied OWCP's standardized procedures to Dr. Treyve's April 11, 2019 audiogram, which recorded frequency levels at the 500, 1,000, 2,000, and 3,000 Hz and revealed decibel losses of 40, 50, 55, and 65 dBs, respectively, in the left ear for total hearing loss of 210 dBs in the left ear. He then followed the established procedures and divided these totals by 4, which resulted in an average loss of 52.5 dBs and subtracted the fence of 25 dBs to equal 27.5 dBs in the left ear. The DMA then multiplied this amount by the established factor of 1.5 to result in 41.25 percent monaural loss for the left ear. The report, therefore, properly established that, after rounding,<sup>30</sup> appellant was entitled to a schedule award for 41 percent left ear hearing loss.<sup>31</sup>

The Board finds that there is no current medical evidence of record supporting a ratable hearing loss greater than the 41 percent monaural hearing loss in the left ear, as previously awarded.<sup>32</sup>

On appeal appellant contends that he also suffered from right ear hearing loss due to noise exposure at work and requests that his schedule award be amended to 51.1 percent binaural hearing loss as calculated by Dr. Treyve. As found above, he has not met his burden of proof to establish greater than 41 percent monaural hearing loss of the left ear. The Board notes, however, that due to the outcome in issue 1, the issue of binaural hearing loss cannot presently be addressed by the Board in the present appeal.

---

<sup>26</sup> *Id.*

<sup>27</sup> *J.W.*, Docket No. 17-1339 (issued August 21, 2018); *J.H.*, Docket No. 08-2432 (issued June 15, 2009); *J.B.*, Docket No. 08-1735 (issued January 27, 2009); *E.S.*, 59 ECAB 249 (2007); *Reynaldo R. Lichtenberger*, 52 ECAB 462 (2001).

<sup>28</sup> *P.L.*, Docket No. 17-0355 (issued June 27, 2018).

<sup>29</sup> *C.D.*, *supra* note 25; *supra* note 22 at Chapter 3.700.4 (January 2010).

<sup>30</sup> *Id.*

<sup>31</sup> *See V.M.*, Docket No. 18-1800 (issued April 23, 2019).

<sup>32</sup> *See J.M.*, Docket No. 18-1469 (issued March 1, 2019).

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 the case is not in posture for decision regarding whether appellant has met his burden of proof to establish a right ear hearing loss in the performance of duty, as alleged. The Board also finds that appellant has not met his burden of proof to establish more than 41 percent monaural hearing loss in his left ear, for which he previously received a schedule award.<sup>33</sup>

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 17 and August 23, 2019 decisions of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded to OWCP for further proceedings consistent with this opinion of the Board.

Issued: June 8, 2020  
Washington, DC

Christopher J. Godfrey, 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

---

<sup>33</sup> In view of the Board's disposition regarding the merits of the case pertaining to appellant's right ear hearing loss, the third issue of whether OWCP properly denied appellant's reconsideration request under section 8128(a) is moot.