

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

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C.D., Appellant	)	
	)	
and	)	<b>Docket No. 20-0790</b>
	)	<b>Issued: November 13, 2020</b>
<b>DEPARTMENT OF JUSTICE, FEDERAL</b>	)	
<b>BUREAU OF INVESTIGATION, Houston, TX,</b>	)	
<b>Employer</b>	)	
_____	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

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

**JURISDICTION**

On February 26, 2020 appellant filed a timely appeal from a September 12, 2019 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 for schedule award purposes.

**FACTUAL HISTORY**

On December 19, 2018 appellant, then a 43-year-old special agent, filed an occupational disease claim (Form CA-2) alleging that he developed hearing loss due to factors of his federal employment including his time as a firearms and Special Weapons and Tactics (SWAT) instructor.

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

He noted that he first became aware of his condition and realized it was caused or aggravated by his federal employment on December 19, 2018. Appellant did not stop work.

In a statement attached to the Form CA-2, appellant asserted that his hearing loss was directly related to firearms, tactical training, and operations while on official duty with the employing establishment starting in November 2003. During his employment: he participated in firearms training for 160 hours; he was a primary firearms instructor from 2013 to 2019 for 8 hours a day, 8 days a year; a firearms instructor for SWAT from 2017 to 2018, 8 hours a day, 5 days a month; a SWAT team member from 2005 to 2018, 8 hours a day, 5 days a month; a SWAT breacher from 2008 to 2010, 8 hours a day, 12 days a year; a SWAT sniper from 2015 to 2018, 8 hours a day, 14 days a year; and attended agent firearms training every quarter from 2004 to the present, 4 days a year, 8 hours a day.

In a development letter dated December 21, 2018, OWCP requested that the employing establishment provide additional information regarding appellant's exposure to noise due to factors of his federal employment, including comments from a knowledgeable supervisor regarding the accuracy of his statements. It afforded 30 days to respond.

OWCP received audiograms from the employing establishment dated April 4, 2005 through March 25, 2016. It also received a position description for a special agent.

In an undated firearms statement, A.C., an employing establishment human resource specialist, indicated that appellant attended new agent's training class from November 2003 through March 2004 and was exposed to noise from a .38 caliber revolver, .45 caliber submachine gun, 12-gauge shotgun, .30 caliber rifle, and a federal gas gun. Appellant fired approximately 5,500 rounds of ammunition during training. From November 2003 to the present time, he participated in firearms training and fired at least 18,750 rounds of ammunition during this period. A.C. further noted that mandatory firearms training for special agents occurred eight times annually with four sessions held outdoors and four sessions held indoors. The actual firing on the range consisted of approximately five hours per outdoor session and one hour per indoor session. A total of 1,040 rounds were fired during the sessions from 1989 to 1992 and 1,250 rounds per session from 1993 to the present. A.C. advised that since 1974 the use of ear guard headsets has been mandatory.

Appellant submitted audiograms from Susan Hyman, an audiologist, dated January 2 to July 2, 2018, which revealed mild constructive hearing loss in the left ear and normal hearing in the right ear.

On January 3, 2019 appellant filed a claim for a schedule award (Form CA-7).<sup>2</sup>

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<sup>2</sup> On March 21, 2019 appellant was treated by Dr. Christian A. Corbitt, a Board-certified otolaryngologist, for hearing loss and chronic sinus headaches. He diagnosed Eustachian tube dysfunction, otalgia left, turbinate hypertrophy, postnasal drip, left ear tinnitus aurium, headache, nasal congestion, and asymmetrical hearing loss of the left ear. A magnetic resonance imaging (MRI) scan of the brain dated March 11, 2019, revealed no acute intracranial abnormality, bilateral uncomplicated mastoiditis, and mild mucosal thickening. A computerized tomography scan of the maxillofacial region dated March 21, 2019 revealed chronic rhinosinusitis and bilateral inferior turbinate hypertrophy.

In an audiometric examination dated March 28, 2019, Brooke Johnson, a registered nurse for the employing establishment, recorded audiometric findings at the frequency levels of 500, 1,000, 2,000, and 3,000 Hertz (Hz) of losses for the right ear of 15, 25, 10, and 10 decibels (dBs) and for the left ear of 25, 20, 25, 25, and 25 dBs, respectively. In a letter dated April 19, 2019, the employing establishment informed appellant that the results of his last audiometric test performed on March 28, 2019 indicated that his left ear had sustained a standard threshold shift in hearing ability. It explained its responsibility to inform him of the hearing loss and to provide him with effective hearing conservation methods such as personal protective equipment.

On May 17, 2019 OWCP referred appellant, along with a statement of accepted facts (SOAF) and the medical record, to Dr. Donna L. Breen, a Board-certified otolaryngologist serving as a second opinion physician, regarding the nature, extent, and causal relationship of his hearing loss.

In her June 21, 2019 otologic evaluation report, Dr. Breen reviewed the SOAF, history of injury, and the medical evidence of record. Testing at the frequencies of 500, 1,000, 2,000, and 3,000 Hz revealed losses at 10, 15, 15, and 10 dBs for the right ear and 15, 15, 20, and 25 dBs for the left ear, respectively. Dr. Breen discussed appellant's hearing loss and opined that the industrial noise exposure was the primary factor causing his condition. She advised that appellant had high frequency hearing loss in the left ear. Dr. Breen noted that the findings show more decline in high frequency range at 3,000 to 6,000 Hz in the left ear. She indicated that appellant had tubes placed in his ears as a child and currently has a wood working hobby, but wears protective ear muffs. Dr. Breen noted examination findings of normal canals and eardrums. Appellant reported chronic high-pitched ringing in his left ear, however, this did not interfere with his daily activities. Dr. Breen diagnosed left-sided high-frequency sensorineural hearing loss and tinnitus due to noise exposure encountered in appellant's federal civilian employment. She recommended three percent impairment for tinnitus. Dr. Breen recommended continued hearing protection when exposed to gunfire.

On August 23, 2019 OWCP referred the medical record and SOAF to Dr. Jeffrey Israel, an OWCP district medical adviser (DMA) and Board-certified otolaryngologist, to determine the extent of appellant's hearing loss and permanent impairment due to his employment-related noise exposure. On August 26, 2019 Dr. Israel reviewed Dr. Breen's examination report and agreed that appellant's sensorineural hearing loss was due, at least in part, to noise-induced work-related acoustic trauma. He applied the audiometric data to OWCP's standard for evaluating hearing loss under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*)<sup>3</sup> and determined that appellant sustained a right monaural loss of zero percent, a left monaural loss of zero percent and a binaural hearing loss of zero percent. Dr. Israel averaged appellant's right ear hearing levels of 10, 15, 15, and 10 dBs at 500, 1,000, 2,000, and 3,000 Hz, respectively, by adding the hearing loss at those four levels then dividing the sum by four, which equaled 12.5. After subtracting out a 25 dB fence, he multiplied the remaining zero balance by 1.5 to calculate a zero percent right ear monaural hearing loss. Dr. Israel then averaged appellant's left ear hearing levels of 15, 15, 20 and 25 dBs at 500, 1,000, 2,000, and 3,000 Hz, respectively, by adding the hearing loss at those four levels then dividing the sum by four, which equaled 18.75. After subtracting out a 25 dB fence, he multiplied the

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<sup>3</sup> (6<sup>th</sup> ed. 2009).

remaining five balance by 1.5 to calculate a zero percent left ear monaural hearing loss. Dr. Israel then calculated zero percent binaural hearing loss by multiplying the right ear loss of zero percent by five, adding the zero percent left ear loss, and dividing this sum by six. He recommended yearly audiograms, use of noise protection, and authorization for left side hearing aid with tinnitus masking capability. Dr. Israel disagreed with Dr. Breen's three percent tinnitus award and opined that a tinnitus award cannot be rendered when there is a zero percent binaural hearing impairment. He determined that appellant had reached maximum medical improvement (MMI) on June 11, 2019, the date of the latest audiogram in the records and the one used by the Dr. Breen to determine the current hearing impairment.

By decision dated September 11, 2019, OWCP accepted appellant's claim for sensorineural hearing loss, unilateral, left ear with unrestricted hearing on the contralateral side and tinnitus of the left ear.

By decision dated September 12, 2019, OWCP denied appellant's schedule award claim, finding that the evidence of record was insufficient to establish that his accepted hearing loss condition was severe enough to be considered ratable and as such, no tinnitus award could be rendered.

### **LEGAL PRECEDENT**

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 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 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 sixth edition of the A.M.A., *Guides*<sup>6</sup> has been adopted by OWCP for evaluating schedule losses and the Board has concurred in such adoption.<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 Hz, the losses at each frequency are averaged.<sup>8</sup> 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

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<sup>4</sup> 5 U.S.C. § 8107.

<sup>5</sup> 20 C.F.R. § 10.404.

<sup>6</sup> 5 U.S.C. § 8107.

<sup>7</sup> *V.M.*, Docket No. 18-1800 (issued April 23, 2019); *see J.W.*, Docket No. 17-1339 (issued August 21, 2018).

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

<sup>9</sup> *Id.*; *C.D.*, Docket No. 18-0251 (issued August 1, 2018).

percentage of monaural hearing loss.<sup>10</sup> The binaural loss of hearing 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>11</sup> The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.<sup>12</sup>

### ANALYSIS

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

OWCP properly referred appellant to Dr. Breen for a second opinion examination to evaluate his hearing loss. In her June 21, 2019 report, Dr. Breen discussed appellant's work history and opined that the industrial noise exposure was the primary factor causing his condition. Dr. Breen diagnosed left-sided high frequency sensorineural hearing loss and left-sided tinnitus caused by the noise exposure in his workplace.

In its September 11, 2019 decision, OWCP accepted the claim for sensorineural hearing loss, unilateral, left ear with unrestricted hearing on the contralateral side and tinnitus of the left ear.

On August 26, 2019 the DMA reviewed Dr. Breen's report and determined that appellant had zero percent monaural hearing loss in each ear. Dr. Israel related that testing at the frequencies of 500, 1,000, 2,000, and 3,000 Hz revealed losses at 10, 15, 15, and 10 dBs for the right ear, respectively; and 15, 15, 20, and 25 dBs for the left ear, respectively. He added appellant's right ear hearing levels and divided by four, which totaled 12.5. The decibel losses for the left ear were totaled at 75 and divided by 4 to obtain an average hearing loss of 18.75. After subtracting the 25 decibel fence, both the right and left ear losses were reduced to zero. When multiplied by 1.5, the resulting monaural hearing loss in each ear was zero percent. The Board finds that the DMA properly concluded that appellant did not have ratable permanent impairment of his hearing warranting a schedule award. Although appellant has accepted employment-related hearing loss, it is not sufficiently severe to be ratable for schedule award purposes.<sup>13</sup>

The Board has held that, in the absence of ratable hearing loss, a schedule award for tinnitus is not allowable pursuant to the A.M.A., *Guides*.<sup>14</sup> Accordingly, as appellant does not have ratable hearing loss, the Board finds that he is not entitled to a schedule award for tinnitus.

On appeal appellant asserts that he sustained permanent and measureable hearing loss and should be compensated for that loss. As explained above, OWCP accepted that appellant sustained sensorineural hearing loss in the left ear. It evaluates industrial hearing loss in accordance with

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

<sup>11</sup> *Id.*

<sup>12</sup> *V.M., supra* note 7.

<sup>13</sup> *W.T.*, Docket No. 17-1723 (issued March 20, 2018); *E.D.*, Docket No. 11-0174 (issued July 26, 2011).

<sup>14</sup> *Id.*

the A.M.A., *Guides* and, when applied to appellant's audiogram findings, his hearing loss was not ratable.<sup>15</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.

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 12, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 13, 2020  
Washington, DC

Alec J. Koromilas, 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>15</sup> *Supra* note 8.