

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

P.H., Appellant)	
)	
and)	Docket No. 20-0633
)	Issued: October 20, 2020
DEPARTMENT OF HOMELAND SECURITY,)	
CUSTOMS & BORDER PATROL, El Paso, TX,)	
Employer)	
)	

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
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On January 29, 2020 appellant filed a timely appeal from a January 15, 2020 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 this case.

ISSUE

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

FACTUAL HISTORY

On September 19, 2018 appellant, then a 51-year-old border patrol agent, filed an occupational disease claim (Form CA-2) alleging that he developed hearing loss due to factors of his federal employment. He noted that he first became aware of his condition and realized that it

¹ 5 U.S.C. § 8101 *et seq.*

was caused or aggravated by his federal employment on September 19, 2018. Appellant explained that he was exposed to hazardous noise levels over his 26 years of federal service. He did not stop work.

OWCP received a position description for a supervisory border patrol agent.

In an undated statement, appellant provided a review of his employment history and noted that from September 6, 1992 to January 20, 1993 he had been employed as a border patrol agent trainee and was exposed to noise levels of 145 to 160 decibels (dBs) while undergoing 73 hours of firearms classroom and life fire instruction. He wore muff-style hearing protectors. From January 20, 1993 to August 1, 1998 appellant worked as a border patrol agent and was exposed to noise levels up to 84 dBs from vehicular traffic during 10-hour days on the job. From August 2, 1998 to November 6, 1999 he worked as a senior patrol agent and from November 7, 1999 to February 10, 2001 he worked as a supervisor border patrol agent at a checkpoint on a highway and was exposed to noise levels up to 84 dBs from vehicular traffic during a 10-hour day. From February 11, 2001 to September 29, 2018, he worked as an assistant patrol agent in charge, field operations supervisor, patrol agent in charge, special operations supervisor and watch commander and reported no exposure to hazardous noise.

In a development letter dated September 24, 2018, OWCP informed appellant that he submitted no evidence to establish that he actually experienced the employment factors alleged to have caused his injury. It provided a questionnaire for his completion. In a separate development letter of even date, 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 both parties 30 days to respond.

On October 5, 2018 OWCP referred appellant, along with a statement of accepted facts (SOAF) and the medical record, to Dr. Edward M. Goldman, a Board-certified otolaryngologist serving as a second opinion physician, regarding the nature, extent, and causal relationship of his hearing loss.

In his October 22, 2018 report, Dr. Goldman 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 Hertz (Hz) revealed losses at 10, 5, 15, and 15 dBs for the right ear; and 15, 5, 10, and 20 dBs for the left ear, respectively. Dr. Goldman discussed appellant's hearing loss and opined that the industrial noise exposure was the primary factor causing his condition. He indicated that appellant's left ear hearing is slightly worse than the right ear possibly due to being a right handed shooter. Dr. Goldman indicated that his asymmetric hearing loss and elevated contralateral acoustic reflexes indicate referral for medical examination and retrocochlear pathology examination. He diagnosed bilateral sensory neural hearing loss and bilateral tinnitus.

By decision dated February 13, 2019, OWCP accepted appellant's claim for bilateral sensorineural hearing loss and bilateral tinnitus.

On April 11, 2019 appellant filed a claim for a schedule award (Form CA-7).

On April 25, 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 April 29, 2019 Dr. Israel reviewed Dr. Goldman'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*) 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, 5, 15, and 15 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 11.25. After subtracting the 25 dB fence, he multiplied the remaining zero balance by 1.5 to calculate zero percent right ear monaural hearing loss. Dr. Israel then averaged appellant's left ear hearing levels of 15, 5, 10, and 20 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 the 25 dB fence, he multiplied the remaining five balance by 1.5 to calculate 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 hearing aids. Dr. Israel determined that appellant had reached maximum medical improvement (MMI) on October 16, 2018, the date of Dr. Goldman's examination.

By decision dated January 15, 2020, 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.

LEGAL PRECEDENT

The schedule award provisions of FECA² and its implementing regulations³ 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*⁴ has been adopted by OWCP for evaluating schedule losses and the Board has concurred in such adoption.⁵

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404.

⁴ *Supra* note 2.

⁵ *V.M.*, Docket No. 18-1800 (issued April 23, 2019); *see J.W.*, Docket No. 17-1339 (issued August 21, 2018).

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.⁶ 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.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 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.⁹ The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.¹⁰

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. Goldman for a second opinion examination to evaluate his hearing loss. In his October 22, 2018 report, Dr. Goldman discussed appellant's hearing loss and opined that the industrial noise exposure was the primary factor causing his condition. He recommended bilateral hearing aid fitting to treat appellant's condition. Dr. Goldman diagnosed bilateral sensory neural hearing loss and bilateral tinnitus caused by the noise exposure in his workplace.

In its February 13, 2019 decision, OWCP accepted the claim for bilateral sensorineural hearing loss and bilateral tinnitus and informed appellant that his case had been forward to Dr. Israel, the DMA, for OWCP to assess his percentage of permanent employment-related hearing loss.

On April 29, 2019 Dr. Israel, the DMA, reviewed Dr. Goldman's report and determined that appellant had zero percent monaural hearing loss in each ear. He related that testing at the frequencies of 500, 1,000, 2,000, and 3,000 Hz revealed losses at 10, 5, 15, and 15 dBs for the right ear, respectively; and 15, 5, 10, and 20 dBs for the left ear, respectively. Dr. Israel averaged appellant's right ear hearing levels and added four, which totaled 11.25. The decibel losses for the left ear were totaled at 50 and divided by 4 to obtain an average hearing loss of 12.5. After subtracting the 25 dB 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 Dr. Israel, the DMA, properly concluded that appellant did not have ratable permanent impairment of his hearing warranting a schedule award. Although appellant has accepted

⁶ A.M.A., *Guides* 250.

⁷ *Id.*; *C.D.*, Docket No. 18-0251 (issued August 1, 2018).

⁸ *Id.*

⁹ *Id.*

¹⁰ *V.M.*, Docket No. 18-1800 (issued April 23, 2019).

employment-related hearing loss, it is not sufficiently severe to be ratable for schedule award purposes.¹¹

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*.¹² Accordingly, as appellant does not have ratable hearing loss, the Board finds that he is not entitled to a schedule award for tinnitus.

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 January 15, 2020 decision of the Office of Workers' Compensation Programs is affirmed

Issued: October 20, 2020
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

¹¹ *B.E., id.; W.T.*, Docket No. 17-1723 (issued March 20, 2018); *E.D.*, Docket No. 11-0174 (issued July 26, 2011).

¹² *Id.*