

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

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<b>B.S., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 20-0206</b>
	)	<b>Issued: September 23, 2020</b>
<b>DEPARTMENT OF THE ARMY, CORPUS</b>	)	
<b>CHRISTI ARMY DEPOT, Corpus Christi, TX,</b>	)	
<b>Employer</b>	)	
_____	)	

*Appearances:*  
Glenda Turner, for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

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

**JURISDICTION**

On November 4, 2019 appellant, through her representative, filed a timely appeal from an August 23, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## ISSUE

The issue is whether appellant has met her burden of proof to establish greater than 26 percent binaural hearing loss, for which she previously received a schedule award.

## FACTUAL HISTORY

On April 19, 2018 appellant, then a 71-year-old pneumatic systems mechanic, filed an occupational disease claim (Form CA-2) alleging that she developed binaural hearing loss with tinnitus due to factors of her federal employment, including working in a helicopter repair facility and being exposed to loud noise in excess of 120 decibels (dBs). She noted that she first became aware of her hearing loss and first realized that it was caused or aggravated by her federal employment on May 17, 2017. On the reverse side of the claim form, the employing establishment indicated that appellant had retired on December 29, 2017.

In a report dated May 17, 2017, Dr. Claude A. McLelland, a Board-certified otolaryngologist, noted that appellant was seen for follow up regarding her sensorineural hearing loss and chronic otitis externa, with dermatitis of the meatus, concha and external tragus of the right ear. He related that an audiogram had been performed that day which revealed a bilateral mild-to-moderate high frequency hearing loss, and which indicated that she would be an ideal candidate for hearing aids. An audiogram report dated May 17, 2017 was attached.

On May 22, 2018 OWCP referred appellant to Dr. Paul Loeffler, a Board-certified otolaryngologist, for a second opinion evaluation. In a July 10, 2018 report, Dr. Loeffler, noted her history of injury and medical treatment. At his request a July 10, 2018 audiogram was performed which reflected that at the frequency levels of 500, 1,000, 2,000, and 3,000 Hertz (Hz), right ear dB losses of 35, 35, 40, and 50, and left ear dB losses of 35, 35, 45, and 50, respectively. Dr. Loeffler noted appellant's examination findings and diagnosed binaural hearing loss and tinnitus. He noted that her tinnitus occurred as background noise in the day and woke her at night. Dr. Loeffler opined that appellant's conditions were due to her federal employment. He applied the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)<sup>3</sup> and calculated a ratable impairment in hearing in both ears. Dr. Loeffler found 23 percent permanent impairment due to binaural hearing loss and an additional 3 percent permanent impairment for moderate tinnitus in both ears. He indicated that maximum medical improvement (MMI) was reached as of the date of his examination.

On July 19, 2018 OWCP accepted the claim for binaural hearing loss. It noted that the medical evidence established that appellant would benefit from hearing aids.

On July 19, 2018 OWCP forwarded Dr. Loeffler's report to Dr. Jeffrey Israel, a Board-certified otolaryngologist serving as a district medical adviser (DMA), for an opinion as to whether an impairment rating was appropriate, and whether appellant had reached MMI.

In a July 20, 2018 response, the DMA opined that appellant suffered binaural hearing loss due to federal noise exposure. He utilized the July 10, 2018 audiogram to determine the degree of

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

hearing loss. The DMA determined that appellant had a right monaural loss of 22.5 percent, a left monaural loss of 24.375 percent, and a binaural loss of 22.8 percent. Regarding tinnitus, he found an additional 3 percent impairment, which resulted in a total impairment 25.8 percent for binaural hearing loss. The DMA concurred with Dr. Loeffler's recommendation for hearing aids. He determined that appellant reached MMI on December 10, 2018 the date of the most recent audiogram examination.

On July 25, 2018 appellant filed a claim for a schedule award (Form CA-7).

By decision dated February 20, 2019, OWCP granted appellant a schedule award for 26 percent binaural hearing loss.<sup>4</sup> The period of the award ran for 26 weeks for the period July 10, 2018 through July 8, 2019.

On March 6, 2019 appellant requested a hearing before a representative of OWCP's Branch of Hearings and Review, which was held on July 9, 2019. Appellant's representative argued that additional impairment for the tinnitus should have been awarded based on the severity of symptoms.

In a July 9, 2019 report, Dr. Loeffler noted that appellant's audiogram of even date was unchanged from the initial study. He provided a copy of a July 9, 2019 audiogram and explained that the only treatment for tinnitus was masking.

By decision dated August 23, 2019, an OWCP hearing representative affirmed the February 20, 2019 OWCP decision.

### **LEGAL PRECEDENT**

The schedule award provisions of FECA<sup>5</sup> and its implementing regulations<sup>6</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. 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 A.M.A., *Guides* has been adopted by OWCP as a standard for evaluation of schedule losses and the Board has concurred in such adoption.<sup>7</sup> For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*.<sup>8</sup>

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<sup>4</sup> The amount of impairment was noted as 25.8 percent and was rounded up to 26 percent.

<sup>5</sup> *Supra* note 2.

<sup>6</sup> 20 C.F.R. § 10.404.

<sup>7</sup> *Id.*; *T.O.*, Docket No. 18-0659 (issued August 8, 2019); *Jacqueline S. Harris*, 54 ECAB 139 (2002).

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *id.* at Chapter 3.700.2 and Exhibit 1 (January 2010).

For hearing loss claims the Board requires that the employee undergo both audiometric and otologic examination, that the audiometric testing precede the otologic examination, and that the audiometric testing be performed by an appropriately certified audiologist. The Board has explained that all audiological equipment authorized for testing meet the calibration protocol contained in the accreditation manual of the American Speech and Hearing Association. The audiometric test results must include both bone conduction and pure tone air conduction thresholds, speech reception thresholds and monaural discrimination scores, and the otolaryngologist's report must include: date and hour of examination, date and hour of employee's last exposure to loud noise, and a statement of the reliability of the tests.<sup>9</sup>

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.<sup>10</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 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>11</sup> The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.<sup>12</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 binaural hearing loss.<sup>13</sup> The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.<sup>14</sup>

The A.M.A., *Guides* provides that if tinnitus interferes with activities of daily living, including sleep, reading (and other tasks requiring concentration), enjoyment of quiet recreation, and emotional well-being, up to five percent may be added to a measurable binaural hearing impairment.<sup>15</sup>

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to a 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 impairment specified.<sup>16</sup>

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<sup>9</sup> *W.G.*, Docket No. 17-1090 (issued March 12, 2018).

<sup>10</sup> *T.O.*, *supra* note 7; *R.D.*, 59 ECAB 127 (2007); *Bernard Babcock, Jr.*, 52 ECAB 143 (2000); *see also* 20 C.F.R. § 10.404.

<sup>11</sup> A.M.A., *Guides* 250 (6<sup>th</sup> ed. 2009).

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

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

<sup>14</sup> *T.O.*, *supra* note 7; *E.S.*, 59 ECAB 249 (2007); *Reynaldo R. Lichtenberger*, 52 ECAB 462 (2001).

<sup>15</sup> A.M.A., *Guides* 249.

<sup>16</sup> *See supra* note 8 at Chapter 2.808.6(f).

## ANALYSIS

The Board finds that appellant has not met her burden of proof to establish greater than 26 percent binaural hearing loss, for which she previously received a schedule award.

Initially, OWCP received a report from Dr. McLelland dated May 17, 2017. Dr. McLelland diagnosed mild-to-moderate sensorineural hearing loss and submitted an audiogram dated May 17, 2017. However, he did not provide a rating of appellant's hearing loss. Therefore, Dr. McLelland's report is insufficient to establish her hearing loss claim.

OWCP thereafter properly referred appellant to Dr. Loeffler for a second opinion examination.<sup>17</sup> Dr. Loeffler's July 10, 2018 second opinion report set forth her audiogram findings and opined that her binaural hearing loss was due to her workplace noise exposure. He determined that appellant had 23 percent binaural hearing loss and an additional 3 percent for moderate tinnitus in both ears for a total impairment of 26 percent.

On July 20, 2018 the DMA reviewed Dr. Loeffler's report and the July 10, 2018 audiogram and indicated that testing at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz revealed dB losses of 35, 35, 40, and 50 for the right ear and dB losses of 35, 35, 45, and 50 for the left ear, respectively. Following the rating protocols, the DMA calculated a total impairment of 25.8 percent which was then rounded up to 26 percent binaural hearing impairment.<sup>18</sup> The Board finds that he properly evaluated appellant's binaural hearing loss.

Appellant's representative argued that additional impairment for the tinnitus should have been awarded based on the severity of the symptoms. Dr. Loeffler found a tinnitus impairment rating of three percent, which corresponded with the description of a moderate impairment, where the tinnitus may be noticed even in the presence of background noise, although daily activities can still be performed. The DMA reviewed Dr. Loeffler's findings and concurred with his rating of three percent for tinnitus. There is no evidence of record establishing a higher level of permanent impairment for tinnitus.

The Board therefore finds that appellant has not met his burden of proof to establish that she has more than 26 percent binaural hearing loss, for which she received a schedule award.

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.

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<sup>17</sup> See *E.E.*, Docket No. 19-1763 (issued March 24, 2020); *J.G.*, Docket No. 12-1469 (issued January 11, 2013).

<sup>18</sup> The policy of OWCP is to round the calculated percentage of impairment to the nearest whole number. Results should be rounded down for figures less than 0.5 and up for 0.5 and over. See *R.M.*, Docket No. 18-0752 (issued December 6, 2019); *V.M.*, Docket No. 18-1800 (issued April 23, 2019); *J.H.*, Docket No. 08-24329; *Robert E. Cullison*, 55 ECAB 570 (2004). See also *supra* note 8 at Chapter 3.700.3(b) (January 2010).

**CONCLUSION**

The Board finds that appellant has not met her burden of proof to establish greater than 26 percent binaural hearing loss, for which she previously received a schedule award.

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 23, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 23, 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