

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

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<b>J.R., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 20-1364</b>
	)	<b>Issued: June 24, 2021</b>
<b>DEPARTMENT OF HOMELAND SECURITY,</b>	)	
<b>CUSTOMS &amp; BORDER PROTECTION,</b>	)	
<b>El Paso, TX, Employer</b>	)	
_____	)	

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

*Case Submitted on the Record*

**ORDER REMANDING CASE**

Before:  
ALEC J. KOROMILAS, Chief Judge  
JANICE B. ASKIN, Judge  
PATRICIA H. FITZGERALD, Alternate Judge

On July 3, 2020 appellant filed a timely appeal from a June 29, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). The Clerk of the Appellate Boards assigned Docket No. 20-1364.

On March 26, 2018 appellant, then a 52-year-old border patrol agent, filed an occupational disease claim (Form CA-2) for hearing loss, which he first realized was caused by his federal employment on July 1, 1996. He attributed his hearing loss to workplace noise exposure on a daily basis from loud machines including aircraft engines, tractor trailer engines, and gunfire.

On May 31, 2018 OWCP referred appellant, along with a statement of accepted facts (SOAF), for an otologic second opinion evaluation including audiometric testing with Dr. William Smith, a Board-certified otolaryngologist. In a June 26, 2018 report, Dr. Smith noted that he did not have hearing data from the beginning of appellant's federal employment and that appellant's noise exposure was significant as to intensity and duration. He diagnosed binaural high frequency sensorineural hearing loss and tinnitus. Dr. Smith opined that appellant's hearing loss was consistent with noise exposure and in excess of that expected by presbycusis. He noted that the hearing loss was worse in the left ear because appellant fired long weapons right-handed and that the tinnitus was consistent with the amount of hearing loss present. Dr. Smith explained the tinnitus was difficult to mask and lead to disturbed sleep and interference with activities of daily living. He reviewed June 26, 2018 audiometric test results and determined that appellant had 7.5

percent monaural hearing impairment, 4 percent for tinnitus, and 4.5 percent binaural hearing impairment.

On July 20, 2018 OWCP accepted appellant's claim for binaural sensorineural hearing loss.

On July 31, 2018 Dr. Stephen Maturo, a Board-certified otolaryngologist serving as an OWCP district medical adviser (DMA), reviewed Dr. Smith's report. He advised that only one audiogram was provided and there was insufficient documentation to support that the hearing loss was due to occupational noise exposure. The DMA explained that there was no sound data demonstrating that appellant's occupation subjected him to noise levels of a frequency and intensity that could cause noise-induced hearing loss. He also noted that there was no audiogram at the time of appellant's employment, which showed any changes during the course of employment. The DMA found that appellant had zero hearing impairment due to occupational exposure and that he had reached maximum medical improvement (MMI) on June 26, 2018.

On August 1, 2018 appellant filed a Form CA-7 claim for a schedule award.

In a February 12, 2019 SOAF, OWCP noted that the claim had been accepted for "sensorineural hearing loss, binaural." It also noted that appellant's noise exposure consisted of loud tractor-trailer engines, mufflers, and brakes, loading dock equipment, train horn air compressors, drills, aircraft engines, and firing range gunfire.

On February 12, 2019 OWCP requested clarification from the DMA and provided him with a May 17, 2017 audiogram. In a February 19, 2019 report, Dr. Maturo reviewed the May 17, 2017 audiogram and explained that on the right side, appellant's hearing was worse in 2017 than in 2018 in all frequencies. He further explained that on the left side, appellant's hearing was 5 to 10 decibels worse in 2018 than in 2017 in the higher frequencies. The DMA noted that there were no hearing tests available from the beginning of appellant's federal employment and advised that there was insufficient evidence to support a diagnosis of occupational noise-induced hearing loss. He opined that "one would not expect hearing in one ear to get better if noise exposure caused hearing loss." Additionally, the DMA noted that a 10 decibel change in one ear would not be expected in only one year of noise exposure.

On April 1, 2019 OWCP declared a conflict in the medical opinions. It found that Dr. Smith, the second opinion physician, opined that appellant had a 4.5 percent binaural hearing loss due to occupational noise exposure and recommended hearing aids, while Dr. Maturo, the DMA, opined that there was insufficient information to conclude that appellant's hearing loss was due to occupational noise exposure.

On August 15, 2019 OWCP referred appellant to Dr. Paul Loeffler, a Board-certified otolaryngologist, to resolve the conflict in the medical opinions. In a September 3, 2019 report, Dr. Loeffler diagnosed sensorineural hearing loss and tinnitus in both ears. He noted that the ringing was present all the time, worsened when it was quiet, and that appellant had to have background noise to go to sleep and "sometimes that does not help." Dr. Loeffler recommended hearing protection, yearly audiometric testing, and hearing aids. He noted that appellant indicated that in 1996 he was exposed to fireworks while on duty and that his federal employment started in 1993.

On December 10, 2019 OWCP requested clarification from the impartial medical examiner and that he complete a Form CA-51. In a September 3, 2019 form report, Dr. Loeffler provided an impairment rating based on the results of a September 3, 2019 audiological evaluation. He calculated 20.94 percent binaural hearing impairment and recommended hearing aids.

By decision dated June 29, 2020, OWCP granted a schedule award for 20.94 percent binaural hearing loss. The period of the award ran for 42 weeks from September 3, 2019 through June 22, 2020. OWCP indicated that it relied upon the report of Dr. Loeffler, the “referee examiner.”

The Board finds that the case is not in posture for decision regarding appellant’s entitlement to a schedule award. OWCP improperly declared a conflict in the medical opinions between its DMA and the second opinion physician, as neither physician was appellant’s treating physician.<sup>1</sup> Absent a true conflict in medical opinion, Dr. Loeffler’s opinion cannot be afforded determinative weight as an impartial medical evaluation. The Board thus finds that Dr. Loeffler actually served as an OWCP referral physician rather than an impartial medical specialist.<sup>2</sup>

Dr. Loeffler’s report requires clarification. OWCP requested that he comment on the findings of Dr. Smith and any points of disagreement. This is especially important as Dr. Smith found four percent impairment for tinnitus, Dr. Loeffler also found that appellant had tinnitus; however, he did not provide an impairment rating for tinnitus.

The Board finds that OWCP did not properly develop appellant’s schedule award claim with regard to whether his diagnosed tinnitus warranted an increased impairment rating. 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 well-being, up to five percent may be added to a measurable binaural hearing impairment.<sup>3</sup>

It is well established that proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter.<sup>4</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>5</sup> When OWCP undertakes to develop the evidence it has an obligation to seek clarification from its physician upon receiving a report that did not adequately address the issues that OWCP sought to develop.<sup>6</sup>

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<sup>1</sup> See 5 U.S.C. § 8123(a); 20 C.F.R. § 10.321(b); *S.G.*, 58 ECAB 383, 387 (2007) (a conflict may only exist between an employee’s physician and a physician designated or approved by OWCP); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.11a (September 2010).

<sup>2</sup> See *R.H.*, Docket No. 17-1477 (issued March 14, 2018) (finding that, due to the lack of a conflict in the medical evidence at the time of the referral to the putative impartial medical specialist, the physician actually served as an OWCP referral physician rather than an impartial medical specialist).

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

<sup>4</sup> *Y.D.*, Docket No. 19-1200 (issued April 6, 2020); *Vanessa Young*, 56 ECAB 575 (2004).

<sup>5</sup> *E.S.*, Docket No. 18-1312 (issued April 3, 2020).

<sup>6</sup> *S.C.*, Docket No. 17-1587 (issued January 2, 2019); *E.B.*, Docket No. 17-0795 (issued January 18, 2018).

The issue before second opinion physician, Dr. Loeffler was the determination of permanent functional loss of hearing under the sixth edition A.M.A., *Guides*. As the presence or absence of tinnitus can impact the percentage of permanent impairment under the A.M.A., *Guides*, there is medical evidence of record from Dr. Smith indicating a diagnosis of tinnitus that was not referenced or addressed by Dr. Loeffler, the Board finds that the claim was not properly developed.<sup>7</sup>

Thus, the Board will remand the case to OWCP to obtain a supplemental report from Dr. Loeffler for an opinion as to whether appellant has tinnitus and whether it entitles him to a greater schedule award. Following this and any other development deemed necessary, OWCP shall issue a *de novo* schedule award decision.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 29, 2020 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this order.

Issued: June 24, 2021  
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

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<sup>7</sup> 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. *See C.H.*, Docket No. 19-1315 (issued March 16, 2020); *Ayanle A. Hashi*, 56 ECAB 234 (2004).