

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

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| S.S., Appellant |) | |
| |) | |
| and |) | Docket No. 20-1352 |
| |) | Issued: March 31, 2021 |
| DEPARTMENT OF JUSTICE, DRUG |) | |
| ENFORCEMENT AGENCY, Los Angeles, CA, |) | |
| 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
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 22, 2020 appellant filed a timely appeal from an April 14, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

¹ The Board notes that appellant submitted additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has met his burden of proof to establish ratable hearing loss for schedule award purposes.

FACTUAL HISTORY

On August 6, 2019 appellant, then a 56-year-old special agent, filed an occupational disease claim alleging that he had developed hearing loss due to noise exposure as a result of his federal employment. He asserted that special agents are always exposed to hearing loss due to the nature of the job. Appellant noted that he first became aware of his hearing loss and its relationship to his federal employment on October 18, 2018. He retired from the employing establishment on November 20, 2018.

In a September 23, 2019 development letter, OWCP advised appellant of the deficiencies of his claim. It requested additional factual and medical evidence from appellant, and provided a questionnaire for his completion. By separate development letter of even date, OWCP requested that the employing establishment provide comments from a knowledgeable supervisor regarding appellant's exposure to noise. It afforded both parties 30 days to respond.

OWCP received the results from audiograms performed by the employing establishment as part of a hearing conservation program dated July 30, 2003 through September 21, 2018.

On October 19, 2019 appellant completed the hearing loss development questionnaire and listed his noise exposures including driving a government car, shooting various firearms, and exposure to noise on airport tarmacs and to airplanes during takeoff. On November 25, 2019 OWCP referred appellant, a statement of accepted facts (SOAF), and his medical records to Dr. Jennifer H. MacEwan, a Board-certified otolaryngologist, for a second opinion evaluation.

In an otologic evaluation form report dated December 18, 2019, Dr. MacEwan noted that she had performed a physical examination and reviewed appellant's medical records and SOAF, and indicated that there was no significant variation in the SOAF. She reviewed an audiogram conducted by an audiologist on the same date, which she found demonstrated losses of 10, 5, 10, and 15 decibels (dBs) on the right and 10, 10, 5, and 25 dBs on the left at 500, 1,000, 2,000, and 3,000 hertz (Hz), respectively. Utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),³ Dr. MacEwan calculated appellant's total monaural hearing loss for his right ear by adding his right ear dB losses to a total of 40 and then dividing by 4 to obtain the average hearing loss of 10 dBs. This average loss was then reduced by 25 dBs to equal -15, which was multiplied by the established factor of 1.5 to compute a -22.5 percent monaural hearing loss in the right ear. Dr. MacEwan calculated appellant's total monaural hearing loss for his left ear by adding his left ear dB losses to a total of 50 and then dividing by 4 to obtain the average hearing loss of 12.5 dBs. This average loss was then reduced by 25 dBs to equal -12.5, which was multiplied by the established factor of 1.5 to compute a -18.75 percent monaural hearing loss in the left ear. She further noted that appellant had one percent permanent impairment due to tinnitus as a result of his work-related noise

³ A.M.A., *Guides*, 6th ed. (2009).

exposure. Dr. MacEwan diagnosed binaural sensorineural hearing loss and tinnitus. She opined that appellant's sensorineural hearing loss and tinnitus was due to his noise exposure encountered in his federal employment.

By decision dated December 27, 2019, OWCP accepted appellant's claim for bilateral tinnitus and bilateral sensorineural hearing loss.

On January 17, 2020 appellant filed a schedule award claim (Form CA-7).

On January 31, 2020 OWCP referred appellant's medical records and SOAF to Dr. Jeffrey M. Israel, a Board-certified otolaryngologist serving as 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 February 3, 2020 report, Dr. Israel indicated that he reviewed appellant's SOAF and medical records, including Dr. MacEwan's December 18, 2019 report. He determined that appellant had reached MMI on December 18, 2019, the date of the most recent audiogram which was used by Dr. MacEwan to calculate his hearing impairment. Dr. Israel reviewed appellant's December 18, 2019 audiogram and found zero percent monaural hearing loss in the right ear and zero percent monaural hearing loss in the left ear. He indicated that he agreed with Dr. MacEwan's calculations of appellant's monaural hearing loss in both ears. Dr. Israel further found that appellant was not entitled to a schedule award for tinnitus as there was no ratable hearing impairment.

By decision dated April 14, 2020, OWCP denied appellant's schedule award claim, finding that his hearing loss was not sufficiently severe to demonstrate ratable impairment, and he was, therefore, not entitled to schedule award compensation.

LEGAL PRECEDENT

The schedule award provisions of FECA⁴ and its implementing regulations⁵ 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. However, FECA does not specify the manner in which the percentage of loss 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.⁶ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁷

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

⁶ *Id.* at § 10.404(a).

⁷ 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).

A claimant seeking compensation under FECA has the burden of proof to establish the essential elements of his or her claim.⁸ With respect to a schedule award, it is the claimant's burden of proof to establish permanent impairment of a scheduled member or function of the body as a result of his or her employment injury.⁹ The medical evidence must include a detailed description of the permanent impairment.¹⁰

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.¹¹ 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* point out, losses below 25 dBs result in no impairment in the ability to hear everyday speech under everyday conditions. The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss. 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 binaural hearing loss. The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.¹²

ANALYSIS

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

In a December 18, 2019 report, second opinion physician, Dr. MacEwan, noted binaural sensorineural hearing loss with tinnitus due to noise exposure encountered in appellant's federal employment. An audiogram she obtained at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz, respectively revealed dB losses in the right ear of 10, 5, 10, and 15 dBs respectively, and of 10, 10, 5, and 25 dBs for the left ear, respectively.

OWCP's DMA, Dr. Israel, on February 3, 2020, reviewed Dr. MacEwan's report and audiometric findings, properly applied OWCP's standardized procedures, and concurred with Dr. MacEwan in finding that appellant had no monaural or binaural hearing loss. He totaled the dB losses to equal 50 on the left and 40 on the right. These values, when divided by four, resulted in average hearing loss of 12.5 on the left and 10 on the right, which when reduced by the 25 dBs fence, resulted in zero percent loss.

⁸ *B.B.*, Docket No. 19-1491 (issued February 3, 2020); *John W. Montoya*, 54 ECAB 306 (2003).

⁹ *R.R.*, Docket No. 19-0750 (issued November 15, 2019); *Edward Spohr*, 54 ECAB 806, 810 (2003); *Tammy L. Meehan*, 53 ECAB 229 (2001).

¹⁰ *B.B.*, *supra* note 8; *Vanessa Young*, 55 ECAB 575 (2004).

¹¹ A.M.A., *Guides* 250.

¹² *J.E.*, Docket No. 19-1325 (issued December 13, 2019); *E.C.*, Docket No. 19-1007 (issued November 8, 2019).

Although appellant has an employment-related hearing loss, it is not significant enough to be ratable for schedule award purposes.¹³ The Board finds, therefore, that, as the December 18, 2019 audiogram did not demonstrate that appellant's hearing loss was ratable, he is not entitled to a schedule award for his accepted hearing loss condition. Both the DMA and Dr. MacEwan found appellant had no ratable impairment for hearing loss.

While Dr. MacEwan found that appellant had one percent permanent impairment due to tinnitus, 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*.¹⁴ Accordingly, as appellant does not have ratable hearing loss, the Board finds that he is not entitled to a schedule award for tinnitus. There is no other evidence of record establishing a ratable hearing loss.

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.

¹³ *A.M.*, Docket No. 20-1041 (issued December 7, 2020); *K.P.*, Docket No. 20-0349 (issued July 1, 2020); *Reynaldo R. Lichtenberger*, 52 ECAB 462 (2001).

¹⁴ *C.D.*, Docket No. 20-0790 (issued November 13, 2020); *W.T.*, Docket No. 17-1723 (issued March 20, 2018); *E.D.*, Docket No. 11-0174 (issued July 26, 2011).

ORDER

IT IS HEREBY ORDERED THAT the April 14, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 31, 2021
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board