

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

R.P., Appellant)

and)

DEPARTMENT OF DEFENSE, DEFENSE)
 COMMISSARY AGENCY, JOINT BASE)
 PEARL HARBOR-HICKAM, , Honolulu, HI,)
 Employer)

**Docket No. 20-1217
 Issued: May 7, 2021**

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 May 13, 2020 appellant filed a timely appeal from an April 23, 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.²

ISSUE

The issue is whether appellant has met his burden of proof to establish greater than two percent left monaural hearing loss for which he previously received a schedule award.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the April 23, 2020 decision, OWCP received additional evidence. 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 evidence for the first time on appeal. *Id.*

FACTUAL HISTORY

On November 26, 2019 appellant, then a 62-year-old meat cutter, filed an occupational disease claim (Form CA-2) alleging that he sustained binaural hearing loss due to factors of his federal employment, including noise. He noted that he first became aware of the condition and realized its relation to his federal employment on January 1, 2010. On the reverse side of the claim form the employing establishment indicated that appellant was last exposed to the conditions alleged to have caused his hearing loss on December 5, 2019.

In an undated letter, appellant related that from September 1980 to the present he worked as a meat cutter for the Federal Government and was exposed to noise from a band saw, a hamburger grinder, and refrigerator fans for eight hours a day. He indicated that he was provided with earplugs.

On January 30, 2020 OWCP referred appellant to Dr. Ronald Peroff, a Board-certified otolaryngologist, for a second opinion evaluation. In a March 2, 2020 report, Dr. Peroff noted appellant's physical examination findings and indicated that he had reviewed audiograms dated April 17, 2019 and February 25, 2020. He reviewed appellant's February 25, 2020 audiogram by Dr. Howard Tamashiro, an audiologist, which 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, 15, 10, and 20 decibels (dBs) and for the left ear of 10, 20, 20, and 55 dBs, respectively.

Using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),³ Dr. Peroff calculated appellant's right ear monaural hearing impairment by averaging appellant's right ear hearing losses of 15, 15, 10, and 20 dBs at 500, 1,000, 2,000, and 3,000 Hz, respectively, which totaled 15. 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. Peroff calculated appellant's left ear monaural hearing impairment by averaging appellant's left ear hearing losses of 10, 20, 20, and 55 dBs at 500, 1,000, 2,000, and 3,000 Hz, respectively, which totaled 26.25. After subtracting out a 25 dB fence, he multiplied the remaining 1.25 balance by 1.5 to calculate 1.9 percent left ear monaural hearing loss. Dr. Peroff calculated appellant's binaural hearing impairment by multiplying appellant's right ear monaural hearing loss of 0 by 5, adding appellant's left ear monaural hearing loss of 1.9, and dividing by six to equal .32. In a tinnitus handicap inventory, appellant indicated that because of his tinnitus it was difficult for him to concentrate and hear people, and he related that his tinnitus interfered with his everyday activities. Appellant scored a 78 on the tinnitus handicap inventory, which Dr. Peroff indicated was catastrophic and equaled 5 percent impairment.

Dr. Peroff diagnosed noise-induced sensorineural hearing loss with tinnitus and he indicated that appellant's sensorineural hearing loss and tinnitus were in part or fully due to appellant's federal employment noise exposure. He recommended amplification. Dr. Peroff opined that appellant's federal workplace noise exposure was sufficient in intensity and duration to have caused his hearing loss.

By decision dated April 3, 2020, OWCP accepted appellant's claim for the condition of bilateral noise effects on the inner ear.

³ A.M.A., *Guides* (6th ed. 2009).

On April 10, 2020 Dr. Jeffrey Israel, a Board-certified otolaryngologist serving as OWCP's district medical adviser (DMA), indicated that he reviewed appellant's SOAF and medical records. He stated that appellant's audiograms from April 17, 2019 and February 25, 2020 revealed left ear hearing loss at 3,000 Hz, which suggested sensorineural hearing loss at least in part due to noise-induced work-related acoustic trauma. Dr. Israel opined that appellant's MMI was on February 25, 2020, the date of his last audiogram. He applied the audiometric data to OWCP's standard for evaluating hearing loss under the A.M.A., *Guides*, and he indicated that he agreed with Dr. Peroff's calculations of appellant's right ear monaural hearing loss and left ear monaural hearing loss of 0 percent and 1.9 percent, respectively, and provided his calculations. Dr. Israel stated that he disagreed with Dr. Peroff's binaural hearing loss calculation because appellant's five percent tinnitus rating could not be added to his zero percent binaural rating.

On April 14, 2020 appellant filed a schedule award claim (Form CA-7).

By decision dated April 23, 2020, OWCP granted appellant a schedule award for two percent left monaural hearing loss. The award ran for 1.04 weeks for the period February 25 to March 3, 2020.

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. 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.⁶ For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*.⁷

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

⁴ *Supra* note 2.

⁵ 20 C.F.R. § 10.404.

⁶ *Id.*; *T.O.*, Docket No. 18-0659 (issued August 8, 2019); *Jacqueline S. Harris*, 54 ECAB 139 (2002).

⁷ 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).

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.⁸

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.⁹ Using the frequencies of 500, 1,000, 2,000, and 3,000 Hz, the losses at each frequency are 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.¹⁰ The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.¹¹ 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.¹² The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.¹³ The policy of OWCP is to round the calculated percentage of impairment to the nearest whole number.¹⁴ OWCP's procedures provide that percentages should not be rounded until the final percent for award purposes is obtained. Fractions should be rounded down from .49 and up from .50.¹⁵

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.¹⁶

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.¹⁷

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish greater than two percent left monaural hearing loss, for which he previously received a schedule award.

⁸ *W.G.*, Docket No. 17-1090 (issued March 12, 2018).

⁹ *T.O.*, *supra* note 6; *R.D.*, 59 ECAB 127 (2007); *Bernard Babcock, Jr.*, 52 ECAB 143 (2000); *see also* 20 C.F.R. § 10.404.

¹⁰ *Supra* note 3 at 250.

¹¹ *Id.*

¹² *Id.*

¹³ *T.O.*, *supra* note 6; *E.S.*, 59 ECAB 249 (2007); *Reynaldo R. Lichtenberger*, 52 ECAB 462 (2001).

¹⁴ *H.R.*, Docket No. 19-0860 (October 17, 2019).

¹⁵ *Id.*; Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4 (January 2010).

¹⁶ A.M.A., *Guides* 249.

¹⁷ *See supra* note 7 at Chapter 2.808.6(f).

OWCP referred appellant to Dr. Peroff for a second opinion examination.¹⁸ Dr. Peroff's March 2, 2020 second opinion report set forth his physical examination findings, and he opined that appellant's hearing loss was due, partly or fully, to his workplace noise exposure. He reviewed appellant's February 25, 2020 audiogram conducted by Dr. Tamashiro, an audiologist, which recorded audiometric findings at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz of right ear dBs losses of 15, 15, 10, and 20 and of left ear dBs losses of 10, 20, 20, and 55, respectively. Using the A.M.A., *Guides*, Dr. Peroff calculated that appellant's right ear monaural hearing impairment by averaging appellant's right ear hearing losses of 15, 15, 10, and 20 dBs at 500, 1,000, 2,000, and 3,000 Hz, respectively, which totaled 15. After subtracting out a 25 dB fence, he multiplied the remaining 0 balance by 1.5 to calculate a zero percent right ear monaural hearing loss. Dr. Peroff calculated that appellant's left ear monaural hearing impairment by averaging appellant's right ear hearing losses of 10, 20, 20, and 55 dBs at 500, 1,000, 2,000, and 3,000 Hz, respectively, which totaled 26.25. After subtracting out a 25 dB fence, he multiplied the remaining 1.25 balance by 1.5 to calculate 1.9 percent left ear monaural hearing loss. Dr. Peroff indicated that appellant scored a 78 on a tinnitus handicap inventory, which he indicated was catastrophic and equaled 5 percent impairment. He calculated appellant's binaural hearing impairment by multiplying appellant's right ear monaural hearing loss of zero by five, adding appellant's left ear monaural hearing loss of 1.9, and dividing by 6 to equal .32, and then added appellant's 5 percent loss for tinnitus.

In reviewing Dr. Peroff's calculations, the DMA, Dr. Israel, indicated that he agreed with his calculations of appellant's right ear monaural hearing loss and left ear monaural hearing loss calculations of 0 percent and 1.9 percent, respectively, and he provided his calculations. He stated that he disagreed with Dr. Peroff's binaural hearing loss calculation because appellant's five percent tinnitus rating could not be added to his zero percent binaural rating.

The Board finds that Dr. Israel properly evaluated appellant's hearing loss. As previously noted, the A.M.A., *Guides* provides that up to five percent may be added to a measurable binaural hearing impairment.¹⁹ However, the Board has held that tinnitus may not be added to an impairment rating for hearing loss under the sixth edition of the A.M.A., *Guides* unless such hearing loss is ratable.²⁰ Appellant did not have ratable binaural hearing loss. OWCP's procedures round the calculated percentage of impairment to the nearest whole number, with fractions rounded down from .49.²¹ As such, the Board therefore finds that Dr. Israel was correct in calculating that appellant's binaural hearing loss of .3 should be rounded to zero. As appellant had no ratable binaural loss, no tinnitus impairment could be added.

The Board, therefore, finds that appellant has not met his burden of proof to establish greater than two percent left monaural hearing loss for which he previously received a schedule award.

¹⁸ See *E.E.*, Docket No. 19-1763 (issued March 24, 2020); *J.G.*, Docket No. 12-1469 (issued January 11, 2013).

¹⁹ See *supra* note 16.

²⁰ *G.T.*, Docket No.19-1705 (issued April 16, 2020).

²¹ *Supra* notes 14 and 15.

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.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish greater than two percent left-sided monaural hearing loss, for which he previously received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the April 23, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 7, 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