

FACTUAL HISTORY

On December 10, 2020 appellant, then a 59-year-old nuclear mechanical inspector supervisor, filed an occupational disease claim (Form CA-2) alleging that he developed bilateral hearing loss due to factors of his federal employment, including exposure to occupational noise inspecting nuclear work. He noted that he first became aware of his condition and realized it was caused or aggravated by his federal employment on May 5, 2018. Appellant did not stop work.

In support of his claim, appellant submitted hearing conservation data, including a reference audiogram dated November 28, 2018 and an audiogram dated October 15, 2020. He also submitted an audiometric evaluation dated December 10, 2020.

In a development letter dated December 17, 2020, OWCP informed appellant of the deficiencies of his claim and advised him of the type of factual and medical evidence necessary to establish his claim and attached a questionnaire for his completion. In a separate development letter of even date, it requested that the employing establishment provide additional information regarding his exposure to noise due to factors of his federal employment, including comments from a knowledgeable supervisor regarding the accuracy of his statements. OWCP afforded both parties 30 days to respond.

OWCP thereafter received a November 28, 2018 report by Jason Willard Danford, Au.D, an audiologist, who indicated that appellant reported intermittent ringing in his ears, which he attributed to exposure to machinery and power tools at shipyards. Dr. Danford conducted audiometric testing, which revealed mild sloping-to-severe sensorineural hearing loss from 3,000 to 8,000 Hertz (Hz) in both ears.

Appellant, in a December 23, 2020 response to OWCP's questionnaire, indicated that he worked for the employing establishment as a pipefitter from 1989 to 1994 and as a utility repairer and operator from 1995 to 2004. Throughout that time, he was exposed to noise from pneumatic grinders, chop saws, hammers, ship motors engines, alarms, and large pumps. From 2004 and ongoing, appellant worked as a nuclear mechanical inspector and was exposed to noise from pneumatic grinders, hammers, ship alarms, motors, engines, and facility ventilation. In connection with each position, he utilized foam earplugs. In a separate response of even date, appellant asserted that he did not engage in any hobbies outside work that involved loud noise.

In a letter dated February 18, 2021, the employing establishment outlined the results of its investigation into appellant's claim, including a summary of his work history since February 1, 1990 and the available exposure level readings for equipment and processes, which could have been present in his work environment.

OWCP also received appellant's application for federal employment dated November 23, 1998, hearing conservation data and audiograms dated between October 19, 1990 through October 17, 2020, and job descriptions for pipefitter and nuclear mechanical inspector supervisor.

On March 30, 2021 OWCP referred appellant, along with a statement of accepted facts (SOAF) and the medical record, to Dr. Edward Trevye, a Board-certified otolaryngologist, serving

as a second opinion physician, regarding the nature, extent, and causal relationship of appellant's hearing loss.

In an April 29, 2021 report, Dr. Trevey reviewed the SOAF, history of injury, and the medical evidence of record. He indicated that there was no significant variation from the SOAF and no other relevant history or condition related to appellant's hearing loss. Testing at the frequencies of 500, 1,000, 2,000, and 3,000 Hz revealed losses at 5, 10, 15, and 30 decibels (dBs) for the right ear, respectively, and 0, 10, 10, and 30 dBs for the left ear, respectively. Dr. Trevey noted that the ears, tympanic membranes, and canals were normal. He diagnosed bilateral sensorineural hearing loss, which was "more probably than not" due to noise encountered in appellant's federal employment. Dr. Trevey noted that the exposures described by appellant were of sufficient intensity and duration to have caused his hearing loss.

In a letter date May 21, 2021, 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.

By decision dated June 14, 2021, OWCP accepted appellant's claim for bilateral sensorineural hearing loss.

OWCP thereafter received a May 22, 2021 report by Dr. Israel, who reviewed Dr. Trevey's examination report and concurred that the April 29, 2021 audiogram revealed normal hearing through 2,000 Hz bilaterally, followed by a drop at the 6,000 Hz level to 95 dB on the left and 85 dB on the right. Dr. Israel opined that those patterns were suggestive of sensorineural hearing loss 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*,² (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 5, 10, 15, and 30 dBs at 500, 1,000, 2,000, and 3,000 Hz, respectively, by adding the hearing loss at those 4 levels then dividing the sum by 4, which equaled 15. After subtracting the 25 dB fence, he multiplied the remaining 0 balance by 1.5 to calculate zero percent right ear monaural hearing loss. Dr. Israel then averaged appellant's left ear hearing levels 0, 10, 10, and 30 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 opined that he concurred with Dr. Trevey's calculations. Dr. Israel recommended yearly audiograms, use of noise protection, and hearing aids for hearing loss and tinnitus masking. He also determined that appellant had reached maximum medical improvement (MMI) on April 29, 2021, the date of the most recent audiogram and Dr. Trevey's examination.

² A.M.A., *Guides* (6th ed. 2009).

On July 2, 2021 appellant filed a claim for compensation (Form CA-7) for a schedule award.

By decision dated July 13, 2021, 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.

On August 17, 2021 appellant requested reconsideration of OWCP's July 13, 2021 decision.

By decision dated September 2, 2021, OWCP denied reconsideration of the merits of appellant's claim.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provisions of FECA³ and its implementing regulations⁴ 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*⁵ has been adopted by OWCP for evaluating schedule losses and the Board has concurred in such adoption.⁶

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.⁷ Using the frequencies of 500, 1,000, 2,000, and 3,000 Hz, the losses at each frequency are averaged.⁸ 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.⁹ The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.¹⁰ 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

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404.

⁵ *Supra* note 2.

⁶ *V.M.*, Docket No. 18-1800 (issued April 23, 2019); *see J.W.*, Docket No. 17-1339 (issued August 21, 2018).

⁷ *Supra* note 2.

⁸ *Id.* at 250.

⁹ *Id.*; *C.D.*, Docket No. 18-0251 (issued August 1, 2018).

¹⁰ *Id.*

hearing loss.¹¹ The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.¹²

ANALYSIS -- ISSUE 1

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. Trevye for a second opinion examination to evaluate his hearing loss. In his April 29, 2021 report, Dr. Trevye diagnosed bilateral sensorineural hearing loss. He opined that the sensorineural hearing loss was more probably than not due to noise exposure encountered in appellant's federal employment.

In its June 14, 2021 decision, OWCP accepted the claim for bilateral sensorineural hearing loss and informed appellant that it had forwarded his case to a DMA to assess his percentage of permanent employment-related hearing loss.

The DMA, Dr. Jeffrey Israel, in a report dated May 22, 2021, reviewed Dr. Trevye'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 5, 10, 15, and 30 decibels (dBs) for the right ear, respectively, and 0, 10, 10, and 30 dBs for the left ear, respectively. Dr. Israel noted that the ears, tympanic membranes, and canals were normal. The decibel losses for the right ear were totaled at 60 and divided by 4 to obtain an average hearing loss of 15. 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-decibel 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. Accordingly, the Board finds that the DMA properly concluded that appellant did not have ratable permanent impairment of his hearing warranting a schedule award. Although he has accepted employment-related hearing loss, it is not sufficiently severe to be ratable for schedule award purposes.¹³

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.

¹¹ *Id.*

¹² *H.M.*, Docket No. 21-0378 (issued August 23, 2021); *V.M.*, *supra* note 6.

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

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against compensation at any time on his own motion or on application.¹⁴

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument that: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.¹⁵

A request for reconsideration must also be received by OWCP within one year of the date of OWCP's decision for which review is sought.¹⁶ If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.¹⁷ If the request is timely but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.¹⁸

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

Appellant did not show that OWCP erroneously applied or interpreted a specific point of law and did not advance a relevant legal argument not previously considered by OWCP. Therefore, it properly determined that his request did not warrant a review of the merits of the claim based on the first and second requirements of section 10.606(b)(3).¹⁹

Appellant also did not submit any relevant and pertinent new evidence. Therefore, he is not entitled to a merit review based on the third requirement under 20 C.F.R. § 10.606(b)(3).²⁰ Consequently, OWCP properly determined that appellant's request did not warrant a review of the merits of the claim based on the third requirement of section 10.606(b)(3).

As appellant has not met any of the regulatory requirements under 20 C.F.R. § 10.606(b)(3), pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

¹⁴ 5 U.S.C. § 8128(a).

¹⁵ 20 C.F.R. § 10.606(b)(3).

¹⁶ *Id.* at § 10.607(a).

¹⁷ *Id.* at § 10.608(a).

¹⁸ *Id.* at § 10.608(b).

¹⁹ *See M.C.*, Docket No. 18-1278 (issued March 7, 2019); *see also S.M.*, Docket No. 17-1899 (issued August 3, 2018).

²⁰ *See T.W.*, Docket No. 18-0821 (issued January 13, 2020).

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish a ratable hearing loss for schedule award purposes. The Board further finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the September 2 and July 13, 2021 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 9, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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