United States Department of Labor
Employees' Compensation Appeals Board

A.G., Appellant	)	
and	)	**Docket No. 22-0582**
	)	**Issued: October 4, 2022**
DEPARTMENT OFJUSTICE, U.S. MARSHALS SERVICE, Minneapolis, MN, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On March 10, 2022 appellant filed a timely appeal from a March 3, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant has met his burden of proof to establish greater than 32 percent binaural hearing loss, for which he previously received schedule award compensation.

[1] 5 U.S.C. § 8101 *et seq*.

FACTUAL HISTORY

This case has previously been before the Board.[2] The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On June 1, 2009 appellant, then a 65-year-old retired U.S. Marshal, filed an occupational disease claim (Form CA-2) alleging that he sustained binaural hearing loss due to exposure to loud noise in the performance of duty with the employing establishment. He noted that he first became aware of his claimed condition in the mid 1980's and realized its relation to his federal employment on October 27, 2006.[3] On July 1, 2009 OWCP accepted appellant's claim for binaural sensorineural hearing loss.

By decision dated November 9, 2009, OWCP granted appellant a schedule award for 17 percent binaural hearing loss. It determined that he had reached maximum medical impairment (MMI) on December 19, 2008. The award ran for 34 weeks for the period December 19, 2008 through April 11, 2009.

By letter dated October 27, 2015, appellant requested an additional schedule award.

In a development letter dated December 18, 2015, OWCP explained that appellant needed to complete a claim for compensation (Form CA-7) for an additional schedule award. It also requested that he submit a medical report from his physician providing a detailed description of binaural hearing loss and date of MMI. Pursuant to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[4]

On September 27, 2016 appellant filed a Form CA-7 and requested an additional schedule award.

In a development letter dated October 14, 2016, OWCP requested that appellant provide additional medical evidence including a medical report which contained a detailed description of his permanent impairment.

In a November 7, 2016 response, appellant explained that he had retired from the employing establishment and that his hearing loss had gradually increased.

In a November 7, 2016 report, Dr. Paul C. Frake, an otolaryngologist, noted that appellant was seen for evaluation of his hearing loss. He examined appellant and reviewed audiometric findings from November 7, 2016, which he compared with the findings from a December 2008 audiogram. Dr. Frake noted that the difference in testing revealed a 5 to 10 decibel (dB) worsening

[2] Docket No. 17-1778 (issued December 18, 2018).

[3] OWCP assigned the present claim OWCP File No. xxxxxx964. Appellant has a prior claim under OWCP File No. xxxxxx908 in which OWCP accepted binaural sensorineural loss causally related to his noise exposure as a special agent with the Federal Bureau of Investigation. Appellant's claims have not been administratively combined.

[4] A.M.A., *Guides* (6th ed. 2009).

at 1,000 Hertz (Hz) in both ears, as well as a 30 dB worsening at 2,000 Hz in both ears. He diagnosed sensorineural hearing loss and recommended hearing aid amplification.

On April 18, 2017 OWCP referred appellant, together with a statement of accepted facts (SOAF) to Dr. Inell Rosario, a Board-certified otolaryngologist, for a second opinion evaluation.

In a May 23, 2017 report, Dr. Rosario noted appellant's history of injury and found no indication of an acoustic neuroma or Meniere's disease. She related the results of an audiometric examination at the frequency levels of 500, 1,000, 2,000, and 3,000 cycles per second (cps), which revealed hearing losses of right ear 25, 25, 55, and 75 dBs and left ear 30, 30, 55, and 80 dBs, respectively. Dr. Rosario determined that appellant had a 30 percent monaural impairment of the right ear and a 35.62 percent monaural impairment of the left ear, which resulted in a 30.93 percent binaural hearing impairment. She added 1 percent for slight tinnitus, which was only heard in a quiet environment and very easily masked, for a total of 31.93 percent binaural hearing impairment. Dr. Rosario opined that appellant's increasing hearing loss was more than would be expected by presbycusis and that his workplace exposure was sufficient in intensity and duration to have caused the loss. She explained that he had no loss prior to his noise exposure, that he had minimal social noise exposure and that he had a negative family history of hearing loss. Dr. Rosario recommended hearing aids.

On July 23, 2017 the district medical adviser (DMA), Dr. Jeffrey M. Israel, a Board-certified otolaryngologist, reviewed the otologic and audiologic testing performed by Dr. Rosario and advised that he concurred with her findings. He determined that appellant had a 31.9 percent binaural hearing loss (which included 1 percent for mild tinnitus). Dr. Israel noted that appellant previously had received an award of 17 percent and that the current impairment of 31.9 percent, minus the previously award of 17 percent, was equal to an additional award of 14.9 percent. He advised that MMI was reached on May 23, 2017 the date of the audiogram performed by Dr. Rosario, recommended yearly audiograms and noise protection and hearing aids.

By decision dated August 3, 2017, OWCP granted appellant a schedule award for an additional 15 percent impairment for binaural hearing loss, for a total of 32 percent. The award for 30 weeks of compensation ran for the period May 23 through July 22, 2017.

On August 16, 2017 appellant filed a timely appeal from the August 3, 2017 OWCP merit decision.

By decision dated December 18, 2018, the Board affirmed the August 3, 2017 OWCP decision, finding that appellant had not established greater than 32 percent binaural hearing loss, for which he previously received schedule award compensation.

On January 28, 2021 appellant filed a Form CA-7 and requested an additional schedule award.

In a development letter dated February 3, 2021, OWCP requested that appellant submit a medical report from his physician, which contained a detailed description of findings which would entitle him to an additional award for binaural hearing loss. It afforded him 30 days to respond.

OWCP received an incomplete after visit summary dated February 18, 2021 from Dr. Neil Brown, a Board-certified otolaryngologist. Dr. Brown related appellant's exposure to helicopter rotors, firearms, and car sirens.

A February 18, 2021 audiogram conducted by an audiologist revealed hearing losses of 25, 25, 60, and 75 dBs on the right and 20, 25, 60, and 75 dBs on the left at 500, 1,000, 2,000, and 3,000 Hz, respectively.

On March 26 and April 7, 2021 OWCP referred the medical record and SOAF to the DMA, Dr. Israel, to determine the extent of appellant's hearing loss and permanent impairment due to his accepted binaural sensorineural hearing loss.[5]

On June 10, 2021 OWCP requested that Dr. Israel, the DMA, review Dr. Brown's February 18, 2021 report.

In a June 16, 2021 report, Dr. Israel noted that on July 23, 2017 he had previously found an additional binaural hearing loss impairment of 14.9 percent, following a prior award of 17 percent binaural hearing loss. He reviewed appellant's February 18, 2021 audiogram and noted that its patterns were suggestive of noise induced work-related acoustic trauma. Dr. Israel found that appellant had a right monaural loss of 31.875 percent and a left monaural loss of 30 percent, resulting in a binaural loss of 30.3 percent. The DMA explained that this was similar to the July 23, 2017 calculation of 30.9 precent binaural hearing loss, plus 1 percent for tinnitus, for a total of 31.9 percent. Dr. Israel noted that there was no discussion in the new records regarding appellant's tinnitus. He advised that MMI was the date of the February 18, 2021 audiogram.

On July 28, 2021 OWCP requested clarification from the DMA.

In a July 29, 2021 supplemental report, Dr. Israel noted that appellant should complete a Tinnitus Handicap Inventory (THI) questionnaire, after which he could provide a comparison between the older and newer calculations and an updated current rating.

On August 17, 2021 OWCP received appellant's completed THI questionnaire. It forwarded the THI questionnaire to the DMA and requested a supplemental opinion regarding appellant's hearing loss.

In a February 9, 2022 report, Dr. Israel applied the audiometric data to OWCP standard for evaluating hearing loss. He averaged appellant's right ear hearing levels of 25, 25, 60, and 75 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 46.25. After subtracting the 25 dB fence and multiplying by 1.5, Dr. Israel found 31.875 percent monaural hearing loss for the right ear. He averaged appellant's left ear hearing levels of 20, 25, 60 and 75 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 45. After subtracting the 25 dB fence and multiplying by 1.5, Dr. Israel found

[5] In an April 7, 2021 report, Dr. Israel noted that Dr. Brown's report was illegible and requested a legible copy. By letter dated April 20, 2021, OWCP notified appellant that the report from Dr. Brown was illegible. It received a legible copy of Dr. Brown's February 18, 2021 report on May 25, 2021.

a 30 percent left ear monaural hearing loss. He then calculated 30.3 percent binaural hearing loss by multiplying the left ear loss of 30 percent by five, adding the 31.88 percent right ear loss, and dividing by six. Dr. Israel recommended a 1 percent tinnitus award and determined that appellant had a total binaural hearing loss of 31.3 percent. He noted that appellant had reached MMI on February 18, 2021 the date of the latest audiogram. Dr. Israel recommended yearly audiograms, use of noise protection, and bilateral hearing aids.

On February 24, 2022 OWCP requested that the DMA clarify whether the percentage of impairment included the prior award or was in addition to the prior schedule award.

In a February 26, 2022 report, Dr. Israel explained that appellant previously received an award of 15 percent binaural loss on August 3, 2017 which was in addition to the award for 17 percent binaural hearing loss he had received on August 13, 2009. The prior awards included a one percent award for tinnitus. Appellant had therefore received prior awards for 32 percent binaural hearing loss. The DMA advised that as the prior awards totaled 32 percent and this was greater than the current impairment rating of 31.3 percent, no additional schedule award was indicated.

By decision dated March 3, 2022, OWCP denied appellant's claim for an additional schedule award.

LEGAL PRECEDENT

The schedule award provisions of FECA[6] and its implementing regulations[7] 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.[8] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[9]

A claimant seeking compensation under FECA has the burden of proof to establish the essential elements of his or her claim.[10] With respect to a schedule award, it is the claimant's

[6] 5 U.S.C. § 8107.

[7] 20 C.F.R. § 10.404.

[8] *Id*. at § 10.404(a); *see R.J*., Docket No. 21-0781 (issued February 24, 2022); *see also Jacqueline S. Harris*, 54 ECAB 139 (2002).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *id*. at Chapter 3.700.2 and Exhibit 1 (January 2010).

[10] *D.H.*, Docket No. 20-0198 (issued July 9, 2020); *John W. Montoya*, 54 ECAB 306 (2003).

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.[11]

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.[12] 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* 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 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 binaural hearing loss.[13] The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.[14]

Regarding tinnitus, the A.M.A., *Guides* provides that tinnitus is not a disease, but rather a symptom that may be the result of disease or injury.[15] If tinnitus interferes with activities of daily living, including sleep, reading, and other tasks requiring concentration, up to five percent may be added to a measurable binaural hearing impairment.[16]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish greater than 32 percent binaural hearing loss, for which he previously received schedule award compensation.

On February 9, 2022 the DMA reviewed Dr. Brown's February 18, 2021 audiometric report and indicated that testing at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz revealed dB losses of 25, 25, 60, and 75 for the right ear and dB losses of 20, 25, 60, and 75 for the left ear, respectively. Following the rating protocols, he properly calculated a total binaural hearing loss of 30.3 percent. The DMA also allotted 1 percent for tinnitus based on the completed THI questionnaire, for a total impairment of 31.3 percent for binaural hearing loss.

The Board finds that the DMA accurately summarized the relevant medical evidence, provided detailed findings on examination, and reached conclusions which comported with his findings and the appropriate provisions of the A.M.A., *Guides*.[17] The DMA's report therefore carries the weight of the medical evidence and establishes that appellant has 31.3 percent binaural

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

[12] A.M.A., *Guides* 250.

[13] *Id*.

[14] *G.T.*, Docket No. 19-1705 (issued April 16, 2020); *E.S.*, 59 ECAB 249 (2007); *Reynaldo R. Lichtenberger*, 52 ECAB 462 (2001).

[15] *See* A.M.A., *Guides* 249.

[16] *Id*.

[17] *See J.M.*, Docket No. 18-1387 (issued February 1, 2019).

hearing loss which, in accordance with OWCP policy, is rounded down 31 percent.[18] As the prior award of 32 percent was greater than the current impairment rating of 31 percent, no additional schedule award was warranted.

The Board therefore finds that appellant has not met his burden of proof to establish greater than 32 percent binaural hearing loss, for which he previously received schedule award compensation.

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 permanent impairment.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish greater than 32 percent binaural hearing loss, for which he previously received schedule award compensation.

[18] *See F.T.*, Docket No. 16-1236 (issued March 12, 2018). 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. *Supra* note 9 at Chapter 3.700.4b. (January 2010); *see also 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).

ORDER

IT IS HEREBY ORDERED THAT the March 3, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 4, 2022
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board