

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

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<b>J.S., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 22-0274</b>
	)	<b>Issued: September 13, 2022</b>
<b>DEPARTMENT OF JUSTICE, FEDERAL</b>	)	
<b>BUREAU OF INVESTIGATION, Fort Dix, NJ,</b>	)	
<b>Employer</b>	)	
_____	)	

*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, Deputy Chief Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On December 13, 2021 appellant filed a timely appeal from September 30 and November 3, 2021 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether appellant has met his burden of proof to establish ratable hearing loss warranting a schedule award; and (2) whether OWCP abused its discretion by denying authorization for binaural hearing aids.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On April 11, 2021 appellant, then a 51-year-old special agent, filed an occupational disease claim (Form CA-2) alleging that he developed binaural hearing loss due to factors of his federal employment, including exposure to hazardous noise from using firearms on a daily basis. He noted that he first became aware of his condition and realized its relation to factors of his federal employment on March 23, 2021. Appellant did not stop work.

In a statement received by OWCP on April 11, 2021, appellant explained that he had been exposed to loud noise from 2005 onward, during weekly firearms training, which included the use of noise flash diversionary devices (“flash bangs”).

Appellant submitted a February 7, 2018 industrial hygiene report advising him that an audiogram demonstrated hearing “not within limits” bilaterally, left worse than right. A March 23, 2021 letter from the employing establishment’s hearing conservation program noted that one or more of appellant’s audiograms demonstrated some hearing loss, with a standard threshold shift in one or both ears.<sup>2</sup>

The employing establishment provided industrial hygiene surveys of its firing ranges, which established that, during firearm qualifications, participants were exposed to noise levels from 80.9 to 151.3 decibels (dBs).

In an April 14, 2021 letter, the employing establishment confirmed that appellant’s position required the use of firearms.

In a development letter dated April 16, 2021, OWCP informed appellant of the deficiencies of his claim. It advised him of the evidence necessary to establish his claim and provided a questionnaire. In a second development letter dated April 16, 2021, OWCP requested comments from a knowledgeable supervisor regarding appellant’s occupational noise exposure. It afforded both parties 30 days to submit the requested evidence.

Appellant provided a May 5, 2021 response to OWCP’s development questionnaire. Prior to his federal employment, he served as a police officer from January 1994 through July 2002, with exposure to hazardous noise during semiannual firearms qualification and training. Appellant alleged exposure to hazardous noise at the employing establishment from February 2003 onward as an enforcement squad member and firearms instructor.<sup>3</sup> He also participated in recreational firearms shooting one to three times per year, during which he used multiple forms of hearing protection.

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<sup>2</sup> OWCP received April 6, 2015, February 6, 2018, and November 23, 2020 audiograms demonstrating nonratable hearing loss.

<sup>3</sup> Appellant provided a list of the dates of firearms qualification and training from October 17, 2012 through April 28, 2021.

In a May 12, 2021 letter, L.R., a supervisory special agent, confirmed that appellant's statements were accurate.<sup>4</sup>

On July 30, 2021 OWCP referred appellant, along with a statement of accepted facts (SOAF) and the medical record to Dr. Walter G. Zemel, a Board-certified otolaryngologist serving as second opinion physician, regarding the nature and extent of his hearing loss, and whether there was any causal relationship between his diagnosed hearing loss and his accepted employment exposure.

In an August 19, 2021 report, Dr. Zemel reviewed the SOAF, history of injury, and medical evidence of record. Audiometric testing obtained on August 17, 2021 at the frequencies of 500, 1,000, 2,000, and 3,000 Hertz (Hz) revealed losses at 0, 5, 20, and 20 dBs for the right ear, respectively; and 0, 10, 20, and 25 dBs for the left ear, respectively. Dr. Zemel administered a tinnitus handicap inventory with a score of 2. He diagnosed bilateral high frequency sensorineural hearing loss and tinnitus. Dr. Zemel opined that appellant's sensorineural hearing loss and tinnitus were due to noise exposure encountered in his federal employment. He noted that hearing aids were not recommended.

On September 23, 2021 OWCP referred the medical record and SOAF to Dr. Jeffrey M. 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 appellant's employment-related noise exposure.

By decision dated September 30, 2021, OWCP accepted appellant's claim for binaural sensorineural hearing loss. However, it denied authorization of binaural hearing aids as the medical evidence established that he did not require them.

On September 30, 2021 Dr. Israel reviewed Dr. Zemel's report and 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*,<sup>5</sup> (A.M.A., *Guides*) and determined that appellant sustained right monaural loss of zero percent, a left monaural loss of zero percent, and a binaural hearing loss of zero percent. He noted that a tinnitus award of five percent could not be given as there was no ratable binaural hearing loss. Dr. Israel averaged appellant's right ear hearing levels of 0, 5, 20 and 20 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 of 45 by 4, which equaled 11.25. After subtracting the 25 dB fence, he multiplied the remaining 0 balance by 1.5 for a result of zero percent right monaural loss. For the left ear, Dr. Israel averaged hearing levels of 0, 10, 20, and 25 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 of 55 by 4 for a result of 13.75. After subtracting the 25 dB fence, he multiplied the remaining 0 balance by 1.5 for a result of zero percent left monaural hearing loss. Dr. Israel then calculated zero percent binaural hearing loss by multiplying

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<sup>4</sup> The employing establishment provided a summary of industrial hygiene audiograms obtained from May 6, 2002 through November 23, 2020, which demonstrated nonratable bilateral hearing loss.

<sup>5</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

the right ear loss of zero percent by five, adding the zero percent left ear loss, and dividing this sum by six. He recommended yearly audiograms, use of hearing protection, and authorization for hearing aids for both ears if appellant so desired as he was a borderline candidate. Dr. Israel noted that there was no applicable award for tinnitus as there was zero percent binaural hearing impairment. He determined that appellant had reached maximum medical improvement (MMI) on August 17, 2021 the date of audiometric examination with Dr. Zemel.

On October 10, 2021 appellant filed a claim for compensation (Form CA-7) for a schedule award.

By decision dated November 3, 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.

### **LEGAL PRECEDENT -- ISSUE 1**

The schedule award provisions of FECA<sup>6</sup> and its implementing regulations<sup>7</sup> 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*<sup>8</sup> has been adopted by OWCP for evaluating schedule losses and the Board has concurred in such adoption.<sup>9</sup>

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*. Using the frequencies of 500, 1,000, 2,000, and 3,000 Hz, the losses at each frequency are averaged.<sup>10</sup> 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.<sup>11</sup> The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.<sup>12</sup> 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

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<sup>6</sup> 5 U.S.C. § 8107.

<sup>7</sup> 20 C.F.R. § 10.404.

<sup>8</sup> *Supra* note 5.

<sup>9</sup> *J.R.*, Docket No. 21-0909 (issued January 14, 2022); *H.M.*, Docket No. 21-0378 (issued August 23, 2021); *V.M.*, Docket No. 18-1800 (issued April 23, 2019); *J.W.*, Docket No. 17-1339 (issued August 21, 2018).

<sup>10</sup> A.M.A., *Guides* 250.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

binaural hearing loss.<sup>13</sup> The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.<sup>14</sup>

### ANALYSIS -- ISSUE 1

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

OWCP properly referred appellant to Dr. Zemel for a second opinion examination to evaluate appellant's hearing loss. In his August 19, 2021 report, Dr. Zemel reviewed audiometric testing at the frequencies of 500, 1,000, 2,000, and 3,000 Hz, revealing losses at zero, 5, 20, and 20 dBs for the right ear, respectively; and zero, 10, 20, and 25 dBs for the left ear, respectively. He diagnosed mild-to-moderate high-frequency bilateral sensorineural hearing loss with grade 1 bilateral tinnitus. Dr. Zemel opined that appellant's sensorineural hearing loss and tinnitus were due to noise exposure encountered in his federal employment. By decision dated September 30, 2021, OWCP accepted appellant's claim for binaural sensorineural hearing loss and forwarded appellant's case to a DMA to assess his percentage of permanent employment-related hearing loss.

On September 30, 2021 Dr. Israel reviewed Dr. Zemel's examination report 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. He noted that a tinnitus award of five percent could not be given as there was no ratable binaural hearing loss. Dr. Israel averaged appellant's right ear hearing levels of 0, 5, 20, and 20 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 of 45 by 4, which equaled 11.25. 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 of 0, 10, 20, and 25 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 of 55 by four, which equaled 13.75. After subtracting the 25 dB fence, he multiplied the remaining 0 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.

The Board finds that the DMA properly concluded that appellant did not have ratable hearing loss warranting a schedule award. Although appellant has accepted employment-related hearing loss, it is insufficiently severe to be ratable for schedule award purposes.<sup>15</sup> The Board has held that, in the absence of ratable hearing loss, a schedule award for tinnitus is not allowable

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<sup>13</sup> *Id.*

<sup>14</sup> *V.M.*, *supra* note 9.

<sup>15</sup> *J.R.*, *supra* note 9; *see W.T.*, Docket No. 17-1723 (issued March 20, 2018); *E.D.*, Docket No. 11-0174 (issued July 26, 2011).

pursuant to the A.M.A., *Guides*.<sup>16</sup> Accordingly, as appellant does not have ratable hearing loss, the Board finds that he is not entitled to a schedule award for tinnitus.

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.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8103(a) of FECA provides that the United States shall furnish to an employee who is injured while in the performance of duty the services, appliances, and supplies prescribed or recommended by a qualified physician, which the Secretary of Labor considers likely to cure, give relief, reduces the degree, or the period of any disability, or aid in lessening the amount of any monthly compensation.<sup>17</sup> OWCP must therefore exercise discretion in determining whether the particular service, appliance, or supply is likely to affect the purposes specified in FECA.<sup>18</sup>

Following medical evaluation of a claim, if the hearing loss is determined to be nonratable for schedule award purposes, other benefits such as hearing aids may still be payable if any employment-related hearing loss exists.<sup>19</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that OWCP abused its discretion by denying appellant's request for binaural hearing aids.<sup>20</sup>

Dr. Israel's September 23, 2021 report recommended binaural hearing aids. The Board has held and OWCP's procedures provide that, following medical evaluation of a claim, if the hearing loss is determined to be nonratable for schedule award purposes, other benefits such as hearing aids may still be provided.<sup>21</sup>

Dr. Israel, as the DMA, recommended bilateral amplification based in part on appellant's occupational noise exposure. The Board therefore finds that OWCP abused its discretion in

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<sup>16</sup> *Id.*

<sup>17</sup> See *B.C.*, Docket No. 20-0566 (issued March 8, 2022); *R.P.*, Docket No. 17-0428 (issued April 19, 2018); *J.W.*, Docket No. 16-0231 (issued March 10, 2016); *Joshua A. Holmes*, 42 ECAB 231, 236 (1990).

<sup>18</sup> 5 U.S.C. § 8103.

<sup>19</sup> *R.B.*, Docket No. 19-1466 (issued April 9, 2020); *J.M.*, Docket No. 16-0526 (issued May 13, 2016); see *F.D.*, Docket No. 10-1175 (issued January 4, 2011).

<sup>20</sup> See *J.W.*, *supra* note 17; *R.N.*, Docket No. 13-284 (issued July 3, 2013).

<sup>21</sup> See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Services and Supplies*, Chapter 3.4003d(2) (October 1995); *J.W.*, *supra* note 17; *Raymond VanNett*, 44 ECAB 480 (1993).

denying appellant's request for binaural hearing aids. Upon return of the case record, OWCP shall authorize binaural hearing aids.

**CONCLUSION**

The Board finds that appellant has not met his burden of proof to establish ratable hearing loss warranting a schedule award. The Board further finds that OWCP abused its discretion by denying binaural hearing aids.

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 30, 2021 decision of the Office of Workers' Compensation Programs is reversed, in part with regard to the denial of hearing aids; the case is remanded for further proceedings consistent with this decision of the Board. The November 3, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 13, 2022  
Washington, DC

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

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

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