

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

C.L., Appellant	)	
	)	
and	)	<b>Docket No. 23-0235</b>
	)	<b>Issued: December 13, 2023</b>
DEPARTMENT OF HOMELAND SECURITY,	)	
U.S. CUSTOMS & BORDER PROTECTION,	)	
U.S. BORDER PATROL, El Paso, TX, 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 December 5, 2022 appellant filed a timely appeal from a July 27, 2022 merit decision 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.<sup>2</sup>

**ISSUE**

The issue is whether appellant has met his burden of proof to establish ratable hearing loss, warranting a schedule award.

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

<sup>2</sup> The Board notes that following the July 27, 2022 merit decision, OWCP received additional evidence. 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.*

## **FACTUAL HISTORY**

On February 28, 2022 appellant, then a 48-year-old border patrol agent, filed an occupational disease claim (Form CA-2) alleging that he developed bilateral hearing loss and ringing in the ears due to factors of his federal employment. He indicated that he was exposed to a defective distraction device, which detonated during a tactical training exercise. Appellant noted that he first became aware of his condition and realized its relation to his federal employment on October 26, 2003. He did not stop work.

On October 26, 2003 the employing establishment executed an authorization for examination and/or treatment (Form CA-16) authorizing appellant to seek medical care related to minor loss of hearing in both ears.

In support of his claim, appellant submitted January 21, 2021, and January 24, 2022 audiometric evaluations by Beatrix Talamantes, a registered nurse.

In a March 4, 2022 statement, appellant indicated that he had worked for the employing establishment since 1996 and conducted firearms qualifications with his duty pistol, M-4 carbine, 12-gauge shotgun, and the M-14 rifle. In November 2000, he became a member of a special response team and tactical unit. During the preparation and selection for these units, appellant related that he was exposed to high volumes of gunfire and explosions caused by distraction devices and crowd management grenades. He noted that he was also exposed to hundreds of detonations in and outside of structures during instructor certifications. On October 26, 2003 appellant deployed a defective aerial distraction device that detonated its full load in the chamber of a 12-gauge shotgun while the chamber was near his face. Despite wearing two levels of hearing protection, he experienced temporary blindness and hearing loss in both ears. Appellant further noted that, while testing shotgun components in 2012, an overload buckshot shell destroyed the shotgun and blew his hearing protection from his ears, which worsened his hearing loss and the ringing in his ears. In the following years, he was exposed to gunfire and explosions during training and proficiency testing while using hearing protection and during operational deployments while not using hearing protection.

In a development letter dated March 4, 2022, OWCP informed appellant of the deficiencies of his claim, 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 an October 28, 2003 audiometric evaluation by Stephanie Salcido, an audiologist.

In undated responses to OWCP's questionnaires, appellant reiterated his history of occupational noise exposure, and the employing establishment confirmed the accuracy of his statements.

On April 28, 2022 OWCP referred appellant, along with a statement of accepted facts (SOAF) and the medical record, to Dr. Benjamin J. Westbrook, a Board-certified otolaryngologist,

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

In a June 21, 2022 report, Dr. Westbrook 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. Dr. Westbrook noted that the ears, tympanic membranes, and canals were normal. He diagnosed bilateral moderate noise-induced sensorineural hearing loss and bilateral tinnitus, which he opined were due to noise exposure encountered in appellant's federal employment. Dr. Westbrook reviewed an audiogram conducted by an audiologist on that date, which demonstrated losses of 15, 15, 15, and 35 decibels (dBs) for the right ear, and 15, 10, 5, and 30 dBs for the left ear at the frequencies of 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*),<sup>3</sup> he calculated that appellant had a monaural loss of zero percent in each ear for a binaural loss of zero percent. Dr. Westbrook completed a tinnitus handicap inventory (THI) and rated the tinnitus diagnosis at three percent. He arrived at a total binaural hearing impairment rating of zero percent.

On June 22, 2022 OWCP accepted appellant's claim for bilateral noise effects on inner ear, bilateral tinnitus, and bilateral sensorineural hearing loss.

On June 30, 2022 appellant filed a claim for compensation (Form CA-7) for a schedule award.

In a letter dated July 14, 2022, OWCP referred the medical record and SOAF to Dr. Jeffrey M. Israel, a Board-certified otolaryngologist serving as an OWCP district medical adviser (DMA), to determine the extent of appellant's hearing loss and permanent impairment due to his employment-related noise exposure.

In a July 20, 2022 report, Dr. Israel reviewed the evidence of record, applied the audiometric data to OWCP's standard for evaluating hearing loss under the sixth edition of the A.M.A., *Guides* to Dr. Westbrook's report, and determined that appellant sustained right monaural loss of zero percent, left monaural loss of zero percent, and binaural hearing loss of zero percent. He noted that a tinnitus award of three percent could not be given as there was no ratable binaural hearing loss. Dr. Israel averaged appellant's right ear hearing levels of 15, 15, 15, and 35 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 20. After subtracting the 25 dB fence, he multiplied the remaining 0 balance by 1.5 to calculate 0 percent right ear monaural hearing loss. Dr. Israel then averaged appellant's left ear hearing levels 15, 10, 5, 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 15. After subtracting the 25 dB fence, he multiplied the remaining five balance by 1.5 to calculate 0 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. Westbrook's calculations. Dr. Israel recommended yearly audiograms, use of noise protection, and hearing aids for hearing loss and tinnitus masking. He also determined that

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<sup>3</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

appellant had reached maximum medical improvement (MMI) on June 17, 2022, the date of the most recent audiogram and Dr. Westbrook's examination.

By decision dated July 27, 2022, 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**

The schedule award provisions of FECA<sup>4</sup> and its implementing regulations<sup>5</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., *Guide*<sup>6</sup> has been adopted by OWCP for evaluating schedule losses and the Board has concurred in such adoption.<sup>7</sup>

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.<sup>8</sup> Using the frequencies of 500, 1,000, 2,000, and 3,000 Hz, the losses at each frequency are averaged.<sup>9</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>10</sup> The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.<sup>11</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 binaural hearing loss.<sup>12</sup> The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.<sup>13</sup>

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<sup>4</sup> 5 U.S.C. § 8107.

<sup>5</sup> 20 C.F.R. § 10.404

<sup>6</sup> *Supra* note 3.

<sup>7</sup> *J.S.*, Docket No. 22-0274 (issued September 13, 2022); *V.M.*, Docket No. 18-1800 (issued April 23, 2019); *see J.W.*, Docket No. 17-1339 (issued August 21, 2018).

<sup>8</sup> *Supra* note 3.

<sup>9</sup> *Id.* at 250.

<sup>10</sup> *Id.*; *W.W.*, Docket No. 21-0545 (issued June 21, 2023); *C.D.*, Docket No. 18-0251 (issued August 1, 2018).

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

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

<sup>13</sup> *R.C.*, Docket No. 23-0334 (issued July 19, 2023); *H.M.*, Docket No. 21-0378 (issued August 23, 2021); *V.M.*, *supra* note 7.

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.<sup>14</sup> 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.<sup>15</sup>

### ANALYSIS

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

OWCP referred appellant to Dr. Westbrook for a second opinion examination to evaluate his hearing loss. In his June 17, 2022 report, Dr. Westbrook diagnosed bilateral moderate noise-induced sensorineural hearing loss and bilateral tinnitus. He opined that the conditions were due to noise exposure encountered in appellant's federal employment.

In its June 14, 2021 decision, OWCP accepted the claim for bilateral noise effects on inner ear, bilateral tinnitus, and bilateral sensorineural hearing loss. On July 14, 2022 it forwarded appellant's case to a DMA to assess his percentage of permanent employment-related hearing loss.

The DMA, Dr. Jeffrey Israel, in a report dated July 20, 2022, reviewed Dr. Westbrook'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 15, 15, 15, and 35 dBs for the right ear, respectively, and 15, 10, 5, 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 80 and divided by 4 to obtain an average hearing loss of 20. The decibel losses for the left ear were totaled at 60 and divided by 4 to obtain an average hearing loss of 15. 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.

The Board finds that the DMA, Dr. Israel, 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>16</sup>

The Board further finds that the DMA correctly explained 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.<sup>17</sup> Accordingly, as appellant does not have ratable hearing loss, the Board finds that he is not entitled to a schedule award for tinnitus.

The Board notes that appellant submitted audiometric evaluations by Ms. Salcido, an audiologist, and Ms. Talamantes, a registered nurse. These reports have no probative medical

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<sup>14</sup> A.M.A., *Guides* 249.

<sup>15</sup> *Id.*

<sup>16</sup> *J.R.*, Docket No. 21-0909 (issued January 14, 2022); *see W.T.*, Docket No. 17-1723 (issued March 20, 2018); *E.D.*, Docket No. 11-0174 (issued July 26, 2011).

<sup>17</sup> *R.C.*, Docket No. 23-0334 (issued July 19, 2023); *D.S.*, Docket No. 23-0048 (issued May 23, 2023); *J.S.*, Docket No. 22-0274 (issued September 13, 2022).

value, however, because audiologists and nurses are not considered physicians as defined under FECA.<sup>18</sup>

As the medical evidence of record is insufficient to establish ratable hearing loss, warranting a schedule award, the Board finds that appellant has not met his burden of proof.

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 a ratable hearing loss warranting a schedule award.<sup>19</sup>

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<sup>18</sup> Section 8101(2) of FECA provides that physician “includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law.” 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t). *See M.M.*, Docket No. 23-0651 (issued October 18, 2023) (a registered nurse is not considered a physician as defined under FECA); *M.P.*, Docket No. 13-1790 (issued December 17, 2013) (an audiologist is not considered a physician under FECA, and the audiologist’s opinion regarding the medical cause of a claimant’s hearing loss is of no probative medical value). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013); *C.S.*, Docket No. 20-1354 (issued January 29, 2021); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA).

<sup>19</sup> The Board notes that the employing establishment executed a Form CA-16. A completed Form CA-16 authorization may constitute a contract for payment of medical expenses to a medical facility or physician, when properly executed. The form creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim. *See* 20 C.F.R. § 10.300(c); *S.G.*, Docket No. 23-0552 (issued August 28, 2023); *J.G.*, Docket No. 17-1062 (issued February 13, 2018); *Tracy P. Spillane*, 54 ECAB 608 (2003).

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 27, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 13, 2023  
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