United States Department of Labor
Employees' Compensation Appeals Board

H.C., Appellant	)	
and	)	**Docket No. 21-1187**
	)	**Issued: February 8, 2023**
DEPARTMENT OF HOMELAND SECURITY, U.S. CUSTOMS & BORDER PROTECTION, WESLACO BORDER PATROL STATION, Weslaco, 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 July 30, 2021 appellant filed a timely appeal from a July 2, 2021 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 this case.

ISSUE

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

FACTUAL HISTORY

On January 11, 2021 appellant, then a 55-year-old border patrol agent, filed an occupational disease claim (Form CA-2) alleging that he developed hearing loss due to factors of

[1] 5 U.S.C. § 8101 *et seq.*

his federal employment. He noted that he first became aware of his condition and realized its relation to his federal employment on December 22, 2020. Appellant explained that he was an instructor in firearms, driving, and all-terrain vehicle (ATV) operation, which placed him in close proximity to high-frequency engine noise, sirens, gun shots, and air brakes. He did not stop work.

In support of his claim, appellant submitted results of an audiogram dated January 29, 1999 and a report of audiometric testing dated December 22, 2020 by providers whose signatures are illegible. He also submitted a report of audiometric testing dated January 6, 2021 by Tom Marino, a hearing instrument specialist.

In a development letter dated January 21, 2021, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence necessary to establish his claim and provided a questionnaire for his completion. In a separate development letter of even date, OWCP requested that the employing establishment provide additional information regarding appellant's exposure to noise due to factors of his federal employment, including comments from a knowledgeable supervisor regarding the accuracy of his statements. It afforded both parties 30 days to respond.

In response to the development letter, appellant submitted an undated statement, detailing his employment history. He noted that he began his career as a border patrol agent on December 1, 1999 and was required to participate in firearms training on a daily basis for six to eight weeks, where he was exposed to noise from pistols, rifles, and shotguns. In 2003, appellant joined a special response team and was certified as an instructor in several areas including firearms, range safety, ATV operation, and several Less-Lethal Devices. He ran courses to certify ATV riders and also rode ATVs several months per year without hearing protection in order to perform his normal duties. As a Less-Lethal Device instructor, appellant was exposed to flash-bang diversionary devices, 40-millimeter launcher systems, and nonlethal shotguns. He indicated that hearing protection was provided only during certification, but not during operational use. In March 2010, appellant became a senior patrol agent, which exposed him to ongoing ATV noise. In October 2015, he transferred to the border patrol academy, where he continued his duties as a driving, ATV, and firearms instructor, which involved exposure to high-pitched siren noise several times per day during trainings. Appellant also utilized an earpiece for radio communications during his entire career. He indicated that his hearing had deteriorated over the length of his career, but was most noticeable from 2005 to the present when he was exposed to repeated gun fire as a firearms instructor.

In an undated response to the development letter, J.A., an employing establishment supervisor, indicated that he concurred that appellant was continuously exposed to various noise levels while in the performance of duty, including at the firearms range and while using an earpiece for radio transmissions. He further noted that appellant continued to be exposed to various levels of noise in the performance of duty on a daily basis.

In a February 4, 2021 report, Dr. Charles Theivagt, a Board-certified otolaryngologist, indicated that he evaluated appellant for complaints of hearing loss, which appellant attributed to loud noise exposure from firearms and sirens while working as a border patrol agent. He performed a physical examination and diagnosed noise-induced moderate sensorineural hearing loss. Accompanying Dr. Theivagt's report was an audiogram dated February 4, 2021 which revealed a down-sloping mild-to-moderate bilateral, symmetric sensorineural hearing loss.

Dr. Theivagt also noted that appellant's hearing loss at 4,000 hertz (Hz) was indicative of a noise-induced hearing loss which would likely be caused by accumulative repeated exposure to loud noises, including firearms and sirens. He recommended bilateral hearing aids.

On April 12, 2021 OWCP referred appellant, along with a statement of accepted facts (SOAF) and the medical record, to Dr. Paul Loeffler, a Board-certified otolaryngologist, for a second opinion regarding the nature, extent, and causal relationship of his hearing loss.

In a May 12, 2021 report, Dr. Loeffler reviewed the SOAF, history of injury, and the medical evidence of record. Testing at the frequencies of 500, 1,000, 2,000, and 3,000 Hz revealed losses at 20, 20, 20, and 25 decibels (dBs) for the right ear, respectively, and 30, 25, 20, and 25 dBs for the left ear, respectively. Dr. Loeffler noted that the ears, tympanic membranes, and canals were normal. He diagnosed bilateral sensorineural hearing loss and tinnitus and opined that appellant's sensorineural hearing loss was due to noise exposure encountered in his federal employment.

By decision dated June 23, 2021, OWCP accepted appellant's claim for bilateral sensorineural hearing loss and tinnitus.

On June 23, 2021 OWCP referred the medical record and SOAF to Dr. Jeffrey Israel, a Board-certified otolaryngologist acting 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.

On June 29, 2021 Dr. Israel reviewed Dr. Loeffler's May 12, 2021 examination report and audiogram, which he found revealed mild bilateral hearing loss at 250 Hz. He noted that the left ear then rose to normal at 2,000 Hz, followed by a drop to a 4,000 Hz acoustic notch at 45 dB with recovery to 15 dB at 8,000 Hz. The right ear rose to normal at 2,000 Hz followed by a drop to a 4,000 Hz acoustic notch at 35 dB with recovery to a 25 dB plateau from 6,000 to 8,000 Hz. Dr. Israel opined that those patterns are 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. In doing so, Dr. Israel averaged appellant's right ear hearing levels of 20, 20, 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 by 4, which equaled 21.25. 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 30, 25, 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 by 4, which equaled 25. 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 concurred with Dr. Loeffler's calculations and noted that a tinnitus award of one percent could not be given as there was "no binaural hearing impairment loss." Dr. Israel recommended yearly

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

audiograms and use of noise protection. He authorized hearing aids and determined that appellant reached maximum medical improvement (MMI) on May 12, 2021, the date of the most recent audiogram and Dr. Loeffler's examination.

On July 1, 2021 appellant filed a claim for compensation (Form CA-7) for a schedule award.

By decision dated July 2, 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

The schedule award provisions of FECA[3] and its implementing regulations[4] 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

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

On June 29, 2021 Dr. Israel, the DMA, reviewed Dr. Loeffler's report and determined that appellant had zero percent monaural hearing loss in each ear. Dr. Israel related that testing at the frequencies of 500, 1,000, 2,000, and 3,000 Hz revealed losses at 20, 20, 20, and 25 dBs for the right ear, respectively, and 30, 25, 20, and 25 dBs for the left ear, respectively. The decibel losses for the right ear were totaled at 85 and divided by 4 to obtain an average hearing loss of 21.25. The decibel losses for the left ear were totaled at 100 and divided by 4 to obtain an average hearing loss of 25. After subtracting the 25 dB 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 appellant has accepted employment-related hearing loss, it is not sufficiently severe to be ratable for schedule award purposes.[13]

The Board has held that, in the absence of ratable hearing loss, a schedule award for tinnitus is not allowable pursuant to the A.M.A., *Guides*.[14] 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.

CONCLUSION

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

[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).

[14] *Id*.

ORDER

IT IS HEREBY ORDERED THAT the July 2, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 8, 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