

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

R.C., Appellant)	
)	
and)	Docket No. 23-0334
)	Issued: July 19, 2023
DEPARTMENT OF HOMELAND SECURITY,)	
CUSTOMS & BORDER PROTECTION,)	
Brownsville, TX, Employer)	
)	

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
JANICE B. ASKIN, Judge

JURISDICTION

On January 5, 2023 appellant filed a timely appeal from a November 18, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (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 June 29, 2022 appellant, then a 44-year-old customs and border protection officer, filed an occupational disease claim (Form CA-2) alleging that he developed hearing loss due to factors

¹ 5 U.S.C. § 8101 *et seq.*

of his federal employment, including exposure to large air conditioning (AC) units running at an immigration holding facility, which he worked in for three years. He noted that he first became aware of his condition and realized its relation to his federal employment on June 14, 2022.

OWCP received evidence regarding appellant's exposure to hazardous noise. In a narrative statement, appellant reiterated his history of injury and described his exposure to loud noise at work from 2003-2022. He detailed his duties of inspecting passenger buses with large engines, as well as large machinery, private aircraft, and trains. For the preceding three years, appellant noted his exposure to loud noise from large AC units and officers having to yell in order to communicate with each other due to the noise. In another narrative statement, he further indicated that he did not have a previous history of hearing problems or exposure to loud noises through any hobbies. The employing establishment submitted a separate statement, indicating his duty locations and exposure to noise, as well as a period of exposure and protection provided.

An unsigned audiometric report dated April 21, 2003 indicated normal hearing results in both ears.

On July 7, 2022 OWCP referred appellant, along with a statement of accepted facts (SOAF) and the medical record to Dr. Gregory S. Rowin, an otolaryngologist, serving as second opinion physician, regarding the nature and extent of appellant's hearing loss, and whether there was any causal relationship between his diagnosed hearing loss and his accepted employment exposure.

OWCP received noise monitoring reports dated July 6, 2004 from the employing establishment. The reports indicated that noise exposures at each location were below the eight-hour, 85 dbA action level set by the Occupational Safety and Health Administration (OSHA).

In a September 8, 2022 report, Dr. Rowin reviewed the SOAF, appellant's history of injury, and medical evidence of record. Audiometric testing obtained on September 9, 2022 at the frequencies of 500, 1,000, 2,000, and 3,000 Hertz (Hz) revealed losses at 20, 20, 5, and 20 decibels (dBs) for the right ear, respectively; and 20, 15, 5, and 20 dBs for the left ear, respectively. Dr. Rowin diagnosed appellant with mild-to-severe sensorineural hearing loss and tinnitus, and opined that appellant's sensorineural hearing loss and tinnitus were due to noise exposure encountered in his federal employment.

By decision dated September 20, 2022, OWCP accepted appellant's claim for binaural sensorineural hearing loss and noted that the medical evidence of record established that he would benefit from hearing aids.

On October 19, 2022 appellant filed a claim for compensation (Form CA-7) for a schedule award.

On October 28, 2022 OWCP referred the medical record and SOAF to Dr. Jeffrey 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 appellant's employment-related noise exposure. On November 3, 2022 Dr. Israel reviewed Dr. Rowin'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,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. He noted that a tinnitus award of one percent could not be given as there was no binaural hearing loss. Dr. Israel averaged appellant's right ear hearing levels of 20, 20, 5, 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 65 by 4, which equaled 16.25. 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 20, 15, 20, 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 of 85 by 4 for a result of 21.25. 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 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 noise protection, and authorization for hearing aids for hearing loss if appellant was interested. Dr. Israel determined that appellant had reached maximum medical improvement (MMI) on September 9, 2022, the date of audiometric examination with Dr. Rowin.

By decision dated November 18, 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 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*. Using the frequencies of 500, 1,000, 2,000, and 3,000 Hz, the losses at each

² A.M.A., *Guides* (6th ed. 2009).

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404.

⁵ *Supra* note 2.

⁶ *J.S.*, Docket No. 22-0274 (issued September 13, 2022); *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).

frequency are averaged.⁷ 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.⁸ The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.⁹ 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.¹⁰ The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.¹¹

ANALYSIS

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. Rowin for a second opinion examination to evaluate appellant's hearing loss. In his September 9, 2022 report, Dr. Rowin reviewed audiometric testing at the frequencies of 500, 1,000, 2,000, and 3,000 Hz, revealing losses at 20, 20, 5, and 20 dBs for the right ear, respectively, and 20, 15, 5, and 20 dBs for the left ear, respectively. He diagnosed appellant with mild-to-severe sensorineural hearing loss and tinnitus, opining that appellant's sensorineural hearing loss and tinnitus were due to noise exposure encountered in appellant's federal employment. By decision dated September 20, 2022, 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 November 3, 2022 Dr. Israel, the DMA reviewed Dr. Rowin's 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 one percent could not be given as there was no binaural hearing loss. Dr. Israel averaged appellant's right ear hearing levels of 20, 20, 5, 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 65 by 4, which equaled 16.25. 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 20, 15, 20, and 30 dBs¹² 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 85 by 4 for a result of 21.25. After subtracting the 25 dB fence, he

⁷ A.M.A., *Guides* 250.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *V.M.*, *supra* note 6.

¹² The Board notes that Dr. Israel's notation of 20 dBs at 2,000 Hz and 30 dBs at 3,000 Hz of the left ear, appears to be a typographical error, as the audiologist reported hearing levels for the same ear of 5 dBs at 2,000 Hz and 20 dBs at 3,000 Hz. This amounts to harmless error, as the hearing impairment calculation still remains at zero percent of the left ear.

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 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.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.

¹³ *J.S.*, *supra* note 6; *see 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 November 18, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 19, 2023
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board