

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

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<b>W.W., Appellant</b> )	)	
<b>and</b> )	)	<b>Docket No. 21-0545</b>
<b>DEPARTMENT OF THE AIR FORCE,</b> )	)	<b>Issued: June 21, 2023</b>
<b>RANDOLPH AIR FORCE BASE, Randolph, TX,</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  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On February 22, 2021 appellant filed a timely appeal from a December 7, 2020 merit decision and a February 4, 2021 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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<sup>1</sup> The Board notes that, following the December 7, 2020 decision, OWCP received additional evidence. However, 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.*

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## **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 properly denied appellant's request for an oral hearing pursuant to 5 U.S.C. § 8124(b) as untimely filed.

## **FACTUAL HISTORY**

On May 8, 2015 appellant, then a 52-year-old painter supervisor, filed an occupational disease claim (Form CA-2) alleging that his bilateral hearing loss, tinnitus, and headaches had increased due to factors of his federal employment, including exposure to loud noises at work. He noted that he first became aware of his condition and realized its relation to his federal employment on May 6, 2015. Appellant did not stop work.

Appellant also submitted a position description of his duties as a painter supervisor.

OWCP received annual audiograms dated June 20, 2001 to October 17, 2007 which noted exposure to routine noise, as well as steady and impulse noise exposure. An October 17, 2007 audiogram found a permanent significant threshold shift (STS) and recommended that his baseline be reestablished.<sup>3</sup>

Appellant submitted medical evidence in support of his claim.<sup>4</sup>

On October 26, 2015 OWCP referred appellant, the case record, along with a statement of accepted facts (SOAF), and an otologic evaluation questionnaire to Dr. Kenneth Walker, a Board-certified otolaryngologist serving as a second opinion physician, regarding the nature, extent, and causal relationship of his hearing loss.

In his November 19, 2015 narrative medical report, Dr. Walker reviewed the SOAF and completed the questionnaire. He observed that appellant's audiograms showed bilateral, noise-induced, sensorineural hearing loss and opined that his hearing loss was due, at least in part, to noise exposure during his federal employment. Dr. Walker recommended hearing conservation measures, annual audiograms and a hearing aid evaluation. An audiogram dated November 17, 2015 revealed losses at 500, 1,000, 2,000, and 3,000 Hertz (Hz) of 10, 10, 15, and 50 decibels (dBs) for the left ear and 15, 10, 25, and 25 dBs, respectively for the right ear.

By decision dated December 10, 2015, OWCP accepted appellant's claim for bilateral sensorineural hearing loss due to his employment-related noise exposure.

On January 19, 2016 OWCP referred the medical records and SOAF to Dr. Jeffrey Israel, a Board-certified otolaryngologist serving as a district medical adviser (DMA), for calculation of appellant's percentage of hearing loss.

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<sup>3</sup> The employing establishment also provided an October 22, 2007 memorandum in which it acknowledged a positive permanent STS, indicating that appellant had sustained hearing loss when compared to his previous baseline.

<sup>4</sup> Appellant also submitted an undated decision from the Department of Veterans Affairs (DVA) that found he had 20 percent bilateral hearing loss, effective January 2, 2013.

In his January 22, 2016 report, Dr. Israel reviewed the SOAF, history of injury and the medical evidence of record, agreeing with Dr. Walker's diagnosis of a work-related neurosensory hearing loss. Testing at the frequencies of 500, 1,000, 2,000, and 3,000 Hz revealed losses at 10, 10, 15, and 50 dBs for the left ear, respectively; and 15, 15, 15, and 30 dBs for the left ear.<sup>5</sup> Dr. Israel applied the audiometric data to OWCP's standard for evaluation hearing loss under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,<sup>6</sup> (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 indicated that appellant had significant tinnitus, but noted that he did not see a tinnitus handicap inventory, and therefore could not calculate a tinnitus percentage loss. Dr. Israel opined that appellant was a candidate for hearing aids as the amplification of sound may help mask his tinnitus.

By decision dated January 27, 2016, 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.

On February 12, 2016 appellant requested reconsideration of OWCP's January 27, 2016 decision.

By decision dated February 22, 2016, OWCP denied appellant's request for reconsideration as he failed to identify the grounds for his request or submit any evidence in support of his request.

On February 25, 2020 appellant filed a claim for a schedule award (Form CA-7).

OWCP, by development letter dated March 9, 2020, requested that Dr. Williamson submit a report which addressed whether appellant had reached maximum medical improvement (MMI) and, if so, to evaluate his permanent hearing impairment in accordance with standards of the sixth edition of the A.M.A., *Guides*. It afforded him 30 days to submit the necessary evidence.

In medical reports dated April 10, 2012 to July 11, 2016, Dr. Mara Moncrief, a Board-certified audiologist, and Dr. Walker continued to treat appellant for his hearing loss symptoms. They performed hearing assessments, and diagnosed bilateral noise effects on the inner ear, bilateral tinnitus and dizziness.

In a March 17, 2020 medical note, Dr. Williamson indicated that he had treated appellant for tinnitus in March 2015, and that he had since been receiving treatment from Dr. Walker.

On October 15, 2020 OWCP referred appellant to Dr. Jeffrey Kunkes, a Board-certified otolaryngologist, for a second opinion evaluation.

In his November 19, 2020 report, Dr. Kunkes reviewed appellant's history of employment, and agreed that workplace noise exposure at the employing establishment was sufficient to cause his hearing loss. He noted evidence of severe tinnitus that constantly interfered with appellant's ability to sleep and his hearing acuity. Dr. Kunkes diagnosed sensorineural hearing loss due to

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<sup>5</sup> The record does not contain Dr. Israel's calculations for appellant's right ear hearing loss.

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

work-related noise exposure and vertigo. He reviewed a November 13, 2020 audiogram conducted by Dr. Kelly Calkins, a Board-certified audiologist, and applied the audiometric data to OWCP's standard for evaluating hearing loss under the sixth edition of the 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. Dr. Kunkes averaged appellant's right ear hearing levels of 10, 5, 10, and 30 dBs at 500, 1,000, 2,000, and 3,000 Hz, respectively, which totaled 14. After subtracting out a 25 dB fence, he multiplied the remaining zero balance by 1.5 to calculate a zero percent right ear monaural hearing loss. Dr. Kunkes then averaged appellant's left ear hearing levels of 10, 10, 10, and 60 at 500, 1,000, 2,000, and 3,000 Hz, respectively, which totaled 22. After subtracting out a 25 dB fence, he multiplied the remaining zero balance by 1.5 to calculate a zero percent left ear monaural hearing loss. Dr. Kunkes 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 acknowledged that appellant was due four percent tinnitus award based on its impact on his activities of daily living (ADL) but determined a zero percent binaural hearing impairment. Dr. Kunkes recommended hearing aids to treat appellant's condition.

On December 4, 2020 Dr. Israel reviewed Dr. Kunkes' findings, indicating that appellant reached MMI on November 13, 2020, the date of his latest audiogram. He agreed with Dr. Kunkes' assessment that appellant had zero percent binaural hearing loss and his allowance of an additional four percent attributable to the tinnitus impairment chart. Dr. Israel explained, however, that a tinnitus award could not be rendered as there was a zero percent binaural hearing loss score.

By decision dated December 7, 2020, 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.

On an appeal request form dated January 7, 2021, appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated February 4, 2021, OWCP's Branch of Hearings and Review denied appellant's hearing request. It found that the request was untimely filed, as it was dated January 7, 2021, more than 30 days after its December 7, 2020 merit decision. After exercising its discretion, OWCP further found that the issue in the case could equally well be addressed through the reconsideration process.

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

The schedule award provisions of FECA<sup>7</sup> and its implementing regulations<sup>8</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 of 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

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<sup>7</sup> *Supra* note 2.

<sup>8</sup> 20 C.F.R. § 10.404.

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 A.M.A., *Guides* has been adopted by OWCP as a standard for evaluation of schedule losses and the Board has concurred in such adoption.<sup>9</sup> For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*.<sup>10</sup>

For hearing loss claims, the Board requires that the employee undergo both audiometric and otologic examination, that the audiometric testing precede the otologic examination, and that audiometric testing be performed by an appropriately certified audiologist. The Board has explained that all audiological equipment authorized for testing meet the calibration protocol contained in the accreditation manual of the American Speech and Hearing Association. The audiometric test results must include both bone conduction and pure-tone air conduction thresholds, speech reception thresholds and monaural discrimination scores, and the otolaryngologist's report must include: date and hour of examination, date and hour of employee's last exposure to loud noise, and a statement of the reliability of the tests.<sup>11</sup>

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.<sup>12</sup> 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.<sup>13</sup> The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.<sup>14</sup> The binaural loss 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>15</sup> The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.<sup>16</sup>

The policy of OWCP is to round up the calculated percentage of impairment to the nearest whole number.<sup>17</sup> OWCP's procedures provide that percentages should not be rounded until the

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<sup>9</sup> *Id.*; *T.O.*, Docket No. 18-0659 (issued August 8, 2019); *Jacqueline S. Harris*, 54 ECAB 139 (2002).

<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *id.* at Chapter 3.700.2 and Exhibit 1 (January 2010).

<sup>11</sup> *W.G.*, Docket No. 17-1090 (issued March 12, 2018).

<sup>12</sup> *T.O.*, *supra* note 9; *R.D.*, 59 ECAB 127 (2007); *Bernard Babcock, Jr.*, 52 ECAB 143 (2000); *see also* 20 C.F.R. § 10.404.

<sup>13</sup> *Supra* note 6 at 250.

<sup>14</sup> *Id.*

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

<sup>16</sup> *T.O.*, *supra* note 9; *E.S.*, 59 ECAB 249 (2007); *Reynaldo R. Lichtenberger*, 52 ECAB 462 (2001).

<sup>17</sup> *H.R.*, Docket No. 19-0860 (October 17, 2019).

final percent for award purposes is obtained. Fractions should be rounded down from .49 and up from .50.<sup>18</sup>

The A.M.A., *Guides* provides that if tinnitus interferes with activities of daily living, including sleep, reading (and other tasks requiring concentration), enjoyment of quiet recreation, and emotional well-being, up to five percent may be added to a measurable binaural hearing impairment.<sup>19</sup>

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to a DMA for an opinion concerning the nature and percentage of permanent impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified.<sup>20</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. Kunkes for a second opinion examination. Dr. Kunkes' November 19, 2020 second opinion report set forth his physical examination findings, and he opined that appellant's hearing loss was due to his workplace noise exposure. He reviewed appellant's November 13, 2020 audiogram conducted by Dr. Calkins, an audiologist, which recorded audiometric findings at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz of right ear dBs losses of 10, 5, 10, and 30 and of left ear dBs losses of 10, 10, 10, and 60, respectively. Using the A.M.A., *Guides*, Dr. Kunkes calculated appellant's right ear monaural hearing impairment by averaging appellant's right ear hearing losses of 10, 5, 10, and 30 dBs at 500, 1,000, 2,000, and 3,000 Hz, respectively, which totaled 13.75. After subtracting out a 25 dB fence, he multiplied the remaining zero balance by 1.5 to calculate a zero percent right ear monaural hearing loss. Dr. Kunkes calculated appellant's left ear monaural hearing impairment by averaging appellant's left ear hearing losses of 10, 10, 10, and 60 dBs at 500, 1,000, 2,000, and 3,000 Hz, respectively, which totaled 22.5. After subtracting out a 25 dB fence, he multiplied the remaining zero percent balance by 1.5 to calculate zero percent left ear monaural hearing loss. Dr. Kunkes allowed four percent for tinnitus based on a tinnitus handicap inventory. He determined that appellant had zero percent monaural hearing loss in each ear and zero percent binaural hearing loss.<sup>21</sup>

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<sup>18</sup> *Id.*; Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4 (January 2010).

<sup>19</sup> A.M.A., *Guides* 249.

<sup>20</sup> *See supra* note 10 at Chapter 2.808.6(f).

<sup>21</sup> *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3(b) (January 2010) (results should be rounded down for figures less than .5 and up for .5 and over). Dr. Kunkes, in averaging appellant's dB losses, rounded the right ear total of 13.75 to 14 and the left ear total of 22.5 to 22, respectively, prior to obtaining the final hearing loss percentage. However, OWCP procedures provide that, in calculating a binaural loss, percentages should not be rounded until the final percent for award purposes is obtained. *Id.* at 3.700.4(b)(2)(b) (January 2010). This was harmless error as rounding of the final binaural percentage yields zero percent permanent binaural impairment under both calculations.

On December 4, 2020 Dr. Israel, the DMA, reviewed Dr. Kunkes' report and concurred that appellant had zero percent monaural hearing loss in each ear. Testing at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz revealed losses of 10, 5, 10, and 30 dBs, respectively, for the right ear, and 10, 10, 10, and 60 dBs, respectively, for the left ear. The DMA totaled the dB losses to 55 on the right and 90 on the left. These values, when divided by four, resulted in an average hearing loss of 13.75 on the right and 22.5 on the left, which when reduced by the 25 dB fence, were reduced to zero. When multiplied by 1.5, the resulting monaural loss in each ear was zero percent. The DMA, therefore, found a total of zero percent binaural hearing loss.

The Board finds that the DMA properly concluded that appellant did not have permanent impairment of his hearing warranting a schedule award.<sup>22</sup> Although appellant has accepted employment-related hearing loss, it is not sufficiently severe to be ratable for schedule award purposes.<sup>23</sup>

The Board notes that, while Dr. Kunkes found four percent hearing loss due to tinnitus, the DMA properly explained that because appellant's hearing loss was not ratable, he was not entitled to a schedule award for tinnitus. The A.M.A., *Guides* provide that, if tinnitus interferes with ADLs including sleep, reading (and other tasks requiring concentration), enjoyment of quiet recreation and emotional well-being, up to five percent may be added to a measurable binaural hearing loss.<sup>24</sup> A schedule award for tinnitus, however, is not payable unless the medical evidence establishes that the condition caused or contributed to a ratable hearing loss.<sup>25</sup> As such, the Board has held that, in the absence of ratable hearing loss, a schedule award for tinnitus is not appropriate.<sup>26</sup> Accordingly the Board finds that appellant is not entitled to a schedule award for tinnitus.<sup>27</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.<sup>28</sup>

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 8124(b)(1) of FECA provides that a claimant for compensation not satisfied with a decision of the Secretary is entitled, on request made within 30 days after the date of the issuance

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<sup>22</sup> *B.E.*, Docket No. 18-1785 (issued April 1, 2019).

<sup>23</sup> *W.T.*, Docket No. 17-1723 (issued March 20, 2018); *E.D.*, Docket No. 11-0174 (issued July 26, 2011).

<sup>24</sup> *Supra* note 19.

<sup>25</sup> *J.G.*, Docket No. 19-0891 (issued October 1, 2019).

<sup>26</sup> *Id.* See also *D.G.*, Docket No. 16-1486 (issued December 16, 2016).

<sup>27</sup> *G.G.*, Docket No. 18-0566 (issued October 2, 2018).

<sup>28</sup> *L.H.*, Docket No. 18-0696 (issued November 28, 2018).

of the decision, to a hearing on his [or her] claim before a representative of the Secretary.<sup>29</sup> Section 10.615 of OWCP's federal regulations, implementing this section of FECA, provides that a claimant who requests a hearing can choose between two formats, either an oral hearing or a review of the written record by an OWCP hearing representative.<sup>30</sup> As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.<sup>31</sup> The date of filing is fixed by postmark or other carrier's date marking.<sup>32</sup>

### ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant's request for an oral hearing as untimely filed pursuant to 5 U.S.C. § 8124.

OWCP's regulations provide that the request for an oral hearing must be made within 30 days of the date of the decision for which a review is sought.<sup>33</sup> On an appeal request form dated January 7, 2021, appellant requested an oral hearing regarding OWCP's December 7, 2020 denial decision. As the request form was dated more than 30 days after the issuance of the December 7, 2020 decision, the Board finds that appellant's request for a hearing was not timely filed. Therefore, OWCP properly found in its February 4, 2021 decision that appellant was not entitled to an oral hearing as a matter of right because his request was not made within 30 days of its December 7, 2020 decision.<sup>34</sup>

Although appellant's January 7, 2021 request for a hearing was untimely, OWCP has the discretionary authority to grant the request and it must exercise such discretion.<sup>35</sup> The Board finds that OWCP properly exercised its discretion in the February 7, 2021 decision by determining that the issue in the case could be equally well addressed by a request for reconsideration before OWCP along with the submission of new evidence relevant to the issue at hand.

The Board has held that the only limitation on OWCP's authority is reasonableness. An abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.<sup>36</sup> The Board finds that OWCP did not abuse its discretion by denying

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<sup>29</sup> 5 U.S.C. § 8124(b)(1).

<sup>30</sup> 20 C.F.R. § 10.615.

<sup>31</sup> *T.A.*, Docket No. 18-0431 (issued November 7, 2018); *Ella M. Garner*, 36 ECAB 238, 241-42 (1984).

<sup>32</sup> 20 C.F.R. § 10.616(a).

<sup>33</sup> *Id.*

<sup>34</sup> *B.H.*, Docket No. 20-0777 (issued October 21, 2020); *R.W.*, Docket No. 13-0044 (issued February 22, 2013); *A.L.*, Docket No. 09-1851 (issued March 9, 2010); *F.W.*, Docket No. 08-0722 (issued August 7, 2008).

<sup>35</sup> *R.H.*, Docket No. 19-1488 (issued February 20, 2020).

<sup>36</sup> *Id.*



appellant's request for an oral hearing and thus it properly denied his oral hearing request as untimely filed pursuant to 5 U.S.C. § 8124(b).<sup>37</sup>

**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 properly denied appellant's request for an oral hearing as untimely filed pursuant to 5 U.S.C. § 8124.

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 7, 2020 and February 4, 2021 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 21, 2023  
Washington, DC

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

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

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

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<sup>37</sup> See *J.O.*, Docket No. 17-0789 (issued May 15, 2018).