

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

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**D.B., Appellant** )

**and** )

**DEPARTMENT OF HOMELAND SECURITY,** )  
**TRANSPORTATION SECURITY** )  
**ADMINISTRATION, FEDERAL AIR** )  
**MARSHAL SERVICE, Atlanta, GA, Employer** )  
\_\_\_\_\_ )

**Docket No. 21-1374**  
**Issued: March 22, 2023**

*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 August 26, 2021 appellant filed a timely appeal from a March 3, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> Pursuant to the Federal Employees'

<sup>1</sup> Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from March 3, 2021, the date of OWCP's last decision, was August 30, 2021. Because using September 13, 2021, the date the appeal was received by the Clerk of the Appellate Boards, would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is August 26, 2021, rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

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.<sup>3</sup>

### **ISSUE**

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

### **FACTUAL HISTORY**

On August 13, 2020 appellant, then a 51-year-old federal air marshal, filed an occupational disease claim (Form CA-2) alleging that he developed bilateral hearing loss and tinnitus due to factors of his federal employment, including exposure to jet engine noise and firearms. He noted that he first became aware of his condition and realized its relation to his federal employment on January 20, 2010. Appellant did not stop work.

In an undated statement, appellant related that he had worked for the employing establishment as a federal air marshal since April 2002. He noted that his job duties involved routine and frequent exposure to jet engine noise in terminals and aircraft staging areas, on jet ramps, and while flying aboard aircraft. Appellant asserted that he did not use hearing protection during these exposures. He further related that he was required to attend mandatory scheduled firearms trainings for two eight-hour days quarterly per year. Appellant indicated that he believed his hearing loss and tinnitus were also the result of prolonged exposure noise from shooting his assigned agency firearm, shotgun, and assault rifle while deployed on a visible intermodal prevention and response (VIPR) team.

In further support of his claim, appellant submitted results of audiograms dated from November 3, 2011 through December 5, 2019.

Dr. Jonathan M. Szenics, an occupational medicine specialist, in a note dated December 13, 2019, advised appellant that the results of his recent hearing tests were abnormal and had changed from his most recent baseline audiogram. He related that hearing loss was suspected and that there may have been a standard threshold shift (STS). Dr. Szenics recommended a repeat audiogram in 30 days.

In a narrative report dated July 28, 2020, Aimee Kaitenbach, Au.D., an audiologist, noted that appellant had a bilateral mild-to-moderate high-frequency sensorineural hearing loss and tinnitus due to occupational noise exposure. She recommended amplification devices with

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

<sup>3</sup> The Board notes that following the March 3, 2021 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.*

masking capabilities. OWCP thereafter received audiological data of even date signed by Ms. Kaitenbach.

In a development letter dated August 27, 2020, OWCP informed appellant of the deficiencies of his claim and 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, 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 audiograms dated October 30, 2007 and October 2, 2008.

In an April 3, 2020 report, Dr. David Sack, a Board-certified physician in occupational medicine providing consultation to the employing establishment, indicated that he reviewed appellant's medical and claim documentation. He opined that the patterns on the audiograms were consistent with noise-induced hearing loss.

OWCP also received a job position description, appellant's application for federal employment, and a shooting range noise exposure report for the employing establishment's Atlanta field office.

On December 18, 2020 OWCP referred appellant, along with a statement of accepted facts (SOAF) and the medical record, to Dr. Jeffrey Kunkes, a Board-certified otolaryngologist serving as a second opinion physician, to provide an opinion regarding the nature, extent, and causal relationship of appellant's hearing loss.

In a January 19, 2021 report, Dr. Kunkes 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 his hearing loss. Dr. Kunkes noted that workplace exposure was sufficient to cause hearing loss. Testing at the frequencies of 500, 1,000, 2,000, and 3,000 hertz (Hz) revealed losses at 15, 10, 10, and 20 decibels (dBs) for the right ear, respectively, and 20, 10, 20, and 25 dBs for the left ear, respectively. Dr. Kunkes noted that the ears, tympanic membranes, and canals were normal. He diagnosed bilateral sensorineural hearing loss and mild tinnitus due to noise exposure encountered in appellant's federal employment.

By decision dated February 4, 2021, OWCP accepted appellant's claim for bilateral sensorineural hearing loss.

OWCP referred the medical record and SOAF to Dr. Jeffrey 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 his employment-related noise exposure.

On February 16, 2021 Dr. Israel reviewed Dr. Kunkes' January 19, 2021 report and agreed that the January 15, 2021 audiogram revealed symmetric patterns in both ears with essentially normal hearing through 3,000 Hz, followed by a drop at the 6,000 Hz level at 50 dB. He opined that those patterns were suggestive of sensorineural hearing loss due at least in part to noise-induced work-related acoustic trauma. Dr. Israel 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>4</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 averaged his right ear hearing levels of 15, 10, 10, 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 by 4, which equaled 13.75. After subtracting the 25 dB fence, Dr. Israel multiplied the remaining 0 balance by 1.5 to calculate zero percent right ear monaural hearing loss. He then averaged appellant's left ear hearing levels 20, 10, 20, 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 four, which equaled 18.75. After subtracting the 25 dB fence, Dr. Israel multiplied the remaining 5 balance by 1.5 to calculate zero percent left ear monaural hearing loss. He 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. Dr. Israel concurred with Dr. Kunkes' calculations and noted that a tinnitus award of two percent could not be given as there was "no binaural hearing impairment loss." He recommended yearly audiograms and use of noise protection devices. Dr. Israel determined that appellant had reached maximum medical improvement (MMI) on January 15, 2021, the date of the most recent audiogram and Dr. Kunkes' examination.

On February 26, 2021 appellant filed a claim for compensation (Form CA-7) for a schedule award.

By decision dated March 3, 2021, OWCP denied appellant's schedule award claim, finding that the evidence of record was insufficient to establish that his accepted hearing loss was severe enough to be considered ratable permanent impairment under the A.M.A., *Guides*.

### **LEGAL PRECEDENT**

The schedule award provisions of FECA<sup>5</sup> and its implementing regulations<sup>6</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>7</sup> has been adopted by OWCP for evaluating schedule losses and the Board has concurred in such adoption.<sup>8</sup>

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<sup>4</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

<sup>5</sup> 5 U.S.C. § 8107.

<sup>6</sup> 20 C.F.R. § 10.404.

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

<sup>8</sup> *V.M.*, Docket No. 18-1800 (issued April 23, 2019); *see J.W.*, Docket No. 17-1339 (issued August 21, 2018).

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.<sup>9</sup> 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 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

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 to evaluate his hearing loss. In his January 19, 2021 report, Dr. Kunkes diagnosed bilateral sensorineural hearing loss and mild tinnitus. He opined that the sensorineural hearing loss was due to noise exposure encountered in his federal employment.

In its February 4, 2021 decision, OWCP accepted the claim for bilateral sensorineural hearing loss and forwarded the claim to a DMA to assess his percentage of permanent hearing impairment.

On February 16, 2021 the DMA reviewed Dr. Kunkes' 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 15, 10, 10, and 20 decibels (dBs) for the right ear, respectively, and 20, 10, 20, and 25 dBs for the left ear, respectively. The decibel losses for the right ear were totaled at 55 and divided by 4 to obtain an average hearing loss of 13.75. The decibel losses for the left ear were totaled at 75 and divided by 4 to obtain an average hearing loss of 18.75. 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. 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

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<sup>9</sup> *Supra* note 2.

<sup>10</sup> *Id.* at 250.

<sup>11</sup> *Id.*; *C.D.*, Docket No. 18-0251 (issued August 1, 2018).

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

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

<sup>14</sup> *H.M.*, Docket No. 21-0378 (issued August 23, 2021); *V.M.*, *supra* note 8.

appellant has accepted employment-related hearing loss, it is not sufficiently 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 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.

### **CONCLUSION**

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

### **ORDER**

**IT IS HEREBY ORDERED THAT** the March 3, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 22, 2023  
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

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

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