

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

_____)
D.S., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
CUSTOMS AND BORDER PROTECTION, AIR)
AND MARINE OPERATIONS, Jacksonville, FL,)
Employer)
_____)

**Docket No. 22-1005
Issued: March 30, 2023**

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 June 22, 2022 appellant filed a timely appeal from a December 23, 2021 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.

_____)
¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On December 29, 2020 appellant, then a 56-year-old customs and border protection interdiction employee, filed an occupational disease claim (Form CA-2) alleging that he developed hearing loss due to factors of his federal employment including extended time at firearms ranges, operating aircraft, and working in the proximity of airport and hangar environments. He noted that he first became aware of his condition on December 1, 1999 and realized its relation to factors of his federal employment on November 13, 2020.

On March 3, 2021 OWCP referred appellant for a second opinion examination.

In a second opinion report dated March 15, 2021, Dr. Randall Riegler, a Board-certified otolaryngologist, reviewed audiometric testing to determine appellant's degree of hearing loss. Audiometric testing at the frequencies of 500, 1,000, 2,000, and 3,000 Hertz (Hz) revealed losses at 20, 20, 10, and 15 decibels (dBs) for the right ear, respectively; and 15, 15, 15, and 15 for the left ear, respectively. Dr. Riegler diagnosed tinnitus, normal hearing of the right ear, and mild sensorineural loss of the left ear at 4,000 Hz. He opined that appellant's sensorineural hearing loss and tinnitus were due in part or all to his federal employment duties.

By decision dated April 30, 2021, OWCP accepted appellant's claim for left monaural sensorineural hearing loss, unrestricted right-side hearing loss, and tinnitus.

On November 17, 2021 OWCP referred the medical record and statement of accepted facts (SOAF) to Dr. Jeffrey Israel, an OWCP district medical adviser and Board-certified otolaryngologist, to determine the extent of appellant's hearing loss and permanent impairment due to his employment-related noise exposure. On November 22, 2021 Dr. Israel reviewed the audiometric testing and Dr. Riegler'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* (A.M.A., *Guides*).² He determined that appellant had a right monaural loss of zero percent, a left monaural loss of zero percent, and a binaural hearing loss of zero percent. Dr. Israel noted that a tinnitus award of three percent could not be given, as there was no ratable hearing loss. He explained that the March 15, 2021 report and audiometric testing demonstrated normal hearing bilaterally with the exception of a left-side acoustic notch at 4,000 Hz of 30 dBs.

Dr. Israel averaged appellant's right ear hearing levels of 20, 20, 10, and 15 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 16.25. 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 of 15, 15, 15, and 15 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 0 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

² A.M.A., *Guides* (6th ed. 2009).

ear loss, and dividing this sum by six. He determined that appellant had reached maximum medical improvement (MMI) on March 15, 2021, the date of the audiometric examination with Dr. Riegler.

By decision dated December 23, 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 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 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

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404.

⁵ *Supra* note 2.

⁶ *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).

⁷ A.M.A., *Guides* 250.

⁸ *Id.*; *H.M.*, *supra* note 6; *C.D.*, Docket No. 18-0251 (issued August 1, 2018).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *V.M.*, *supra* note 6.

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. Riegler for a second opinion examination to evaluate appellant's hearing loss. In his March 15, 2021 report, Dr. Riegler reviewed audiometric testing to determine appellant's degree of hearing loss. Audiometric testing at the frequencies of 500, 1,000, 2,000, and 3,000 Hz revealed losses at 20, 20, 10, and 15 dBs for the right ear, respectively, and 15, 15, 15, and 15 for the left ear, respectively. Dr. Riegler diagnosed tinnitus, normal hearing of the right ear, and mild sensorineural loss of the left ear at 4,000 Hz. He indicated that the sensorineural hearing loss and tinnitus were due in part or all to appellant's federal employment duties.

By decision dated April 30, 2021, OWCP accepted appellant's claim for left ear monaural sensorineural hearing loss, right ear unrestricted hearing loss, and bilateral tinnitus. It thereafter forwarded his case to a DMA to assess his percentage of permanent employment-related hearing loss.

On November 22, 2021 Dr. Israel reviewed the audiometric testing and Dr. Riegler's report. He applied the audiometric data to OWCP's standard for evaluating hearing loss under the sixth edition of the A.M.A., *Guides*. Dr. Israel determined that appellant had 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 three percent could not be given, as there was no ratable hearing loss. Dr. Israel explained that the March 15, 2021 report and audiometric testing demonstrated normal hearing binaurally with the exception of a left-side acoustic notch at 4,000 Hz of 30 dBs. He averaged appellant's right ear hearing levels of 20, 20, 10, and 15 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 16.25. After subtracting the 25 dB fence, Dr. Israel multiplied the remaining 0 balance by 1.5 to calculate 0 percent right ear monaural hearing loss. He then averaged appellant's left ear hearing levels of 15, 15, 15, and 15 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, Dr. Israel multiplied the remaining 0 balance by 1.5 to calculate 0 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.

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.¹²

¹² See *W.T.*, Docket No. 17-1723 (issued March 20, 2018); *E.D.*, Docket No. 11-0174 (issued July 26, 2011).

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*.¹³ 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 December 23, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 30, 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

¹³ *Id.*