

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

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<b>J.M., Appellant</b> )	)	
<b>and</b> )	)	<b>Docket No. 22-1173</b>
<b>DEPARTMENT OF HOMELAND SECURITY,</b> )	)	<b>Issued: November 20, 2023</b>
<b>U.S. CUSTOMS AND BORDER PROTECTION,</b> )	)	
<b>Brownsville, TX, 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  
JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On August 6, 2022 appellant filed a timely appeal from a February 24, 2022 merit decision and a July 15, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**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 reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

**FACTUAL HISTORY**

On July 24, 2021 appellant, then a 45-year-old customs and border protection officer, filed an occupational disease claim (Form CA-2) alleging that he sustained hearing loss in both ears due

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

to factors of his federal employment. He indicated that he first became aware of his condition and first realized that it was caused or aggravated by his federal employment on July 24, 2021. Appellant did not stop work.

In an undated statement, appellant indicated that from 2005 through 2010, he was stationed at the San Francisco International and Oakland International Airports, where he was exposed to occupational noise from baggage conveyor belts and jet engines. From 2010 through 2011, he was stationed at the Progreso Port of Entry, where he was exposed to occupational noise from vehicle engine noise and honking horns as he inspected vehicles. Appellant further indicated that from 2011 through 2021, he was stationed at the employing establishment, where he performed inspections and was exposed to occupational noise from running vehicles, passenger bus engines, seaport machinery, private aircrafts, train engines, and freight truck air brakes.

In a development letter dated July 27, 2021, 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 attached 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.

On October 4, 2021 OWCP referred appellant, along with a statement of accepted facts (SOAF) and the medical record, to Dr. Matthew Steehler, a Board-certified otolaryngologist, serving as a second opinion physician, regarding the nature, extent, and causal relationship of appellant's hearing loss.

In a November 22, 2021 report, Dr. Steehler reviewed the SOAF, history of injury, and the medical evidence of record. He discussed appellant's complaints of difficulty hearing and bilateral tinnitus and his history of noise exposure on the job. Dr. Steehler noted that the ears, tympanic membranes, and canals were normal. He diagnosed bilateral sensorineural hearing loss and bilateral tinnitus due to noise encountered in appellant's federal employment. Audiometric testing obtained on that date at the frequencies of 500, 1,000, 2,000, and 3,000 Hertz (Hz) revealed losses at 25, 20, 15, and 15 decibels (dBs) for the right ear, respectively, and losses of 25, 20, 25, and 25 dBs for the left ear, respectively. Utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),<sup>2</sup> Dr. Steehler calculated that appellant had a monaural loss of zero percent in each ear for a binaural loss of zero percent. He completed a tinnitus handicap inventory (THI) and rated the tinnitus diagnosis at one percent permanent impairment to arrive at a total binaural hearing impairment rating of one percent.

On December 8, 2021 OWCP accepted appellant's claim for bilateral sensorineural hearing loss and bilateral tinnitus.

On January 9, 2022 appellant filed a claim for compensation (Form CA-7) for a schedule award.

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<sup>2</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

On January 14, 2020 OWCP referred a copy of the medical record and SOAF to Dr. Jeffrey M. Israel, a Board-certified otolaryngologist serving as a district medical adviser (DMA), for calculation of appellant's percentage of permanent hearing impairment and assignment of the date of maximum medical improvement (MMI).

In a January 21, 2022 report, Dr. Israel noted that he reviewed the SOAF and medical record, including Dr. Steehler's November 22, 2021 report. He reviewed appellant's November 22, 2021 audiogram and concurred with Dr. Steehler's assessment of zero percent monaural loss in each ear. Dr. Israel noted that the November 22, 2021 THI corresponded to a one percent tinnitus impairment. However, he opined that, under the sixth edition of the A.M.A., *Guides*, a tinnitus award could not be given when there was zero percent binaural hearing impairment. As such, Dr. Israel found that the total binaural loss was zero percent. He recommended yearly audiograms and use of noise protection and recommended against authorization for hearing aids, though he noted that appellant was a borderline candidate for a left-sided hearing aid. Dr. Israel determined that appellant had reached MMI on November 22, 2021, the date of the most recent audiogram and Dr. Steehler's examination.

By decision dated February 24, 2022, OWCP denied appellant's schedule award claim, finding that his hearing loss was not sufficiently severe to demonstrate ratable impairment. It further found that his hearing loss was not sufficiently severe for it to authorize hearing aids.

On June 29, 2022 appellant requested reconsideration of OWCP's February 24, 2022 decision. In support of his request, he submitted audiometric testing data obtained by a provider with an illegible signature on October 20, 2003. Testing at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz revealed losses for the right ear of 0, 5, 5, and 5 dBs and for the left ear of 0, 10, 10, and 15 dBs, respectively.

By decision dated July 15, 2022, OWCP denied reconsideration of the merits of appellant's claim, pursuant to 5 U.S.C. § 8128(a).

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

The schedule award provisions of FECA<sup>3</sup> and its implementing regulations<sup>4</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

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<sup>3</sup> 5 U.S.C. § 8107.

<sup>4</sup> 20 C.F.R. § 10.404

A.M.A., *Guides*<sup>5</sup> has been adopted by OWCP for evaluating schedule losses and the Board has concurred in such adoption.<sup>6</sup>

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.<sup>7</sup> Using the frequencies of 500, 1,000, 2,000, and 3,000 Hz, the losses at each frequency are averaged.<sup>8</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>9</sup> The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.<sup>10</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>11</sup> The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.<sup>12</sup>

Regarding tinnitus, the A.M.A., *Guides* provides that tinnitus is not a disease, but rather a symptom that may be the result of disease or injury.<sup>13</sup> If tinnitus interferes with activities of daily living, including sleep, reading, and other tasks requiring concentration, up to five percent may be added to a measurable binaural hearing impairment.<sup>14</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 referred appellant to Dr. Steehler for a second opinion examination to evaluate his hearing loss. In his November 22, 2021 report, Dr. Steehler diagnosed bilateral sensorineural hearing loss and tinnitus due to noise exposure related to his federal employment. He calculated that appellant had a monaural loss of zero percent in each ear for a binaural loss of zero percent. Dr. Steehler then rated his tinnitus at one percent permanent impairment to arrive at a total binaural hearing impairment of one percent.

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<sup>5</sup> *Supra* note 2.

<sup>6</sup> *H.M.*, Docket No. 21-0378 (issued August 23, 2021); *V.M.*, Docket No. 18-1800 (issued April 23, 2019); *see J.W.*, Docket No. 17-1339 (issued August 21, 2018).

<sup>7</sup> A.M.A., *Guides* 250.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*; *H.M.*, *supra* note 6; *C.D.*, Docket No. 18-0251 (issued August 1, 2018).

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

<sup>11</sup> *Id.*

<sup>12</sup> *S.M.*, Docket No. 21-0648 (issued May 4, 2023); *V.M.*, *supra* note 6.

<sup>13</sup> *See* A.M.A., *Guides* 249.

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

In a January 21, 2022 report, Dr. Israel, serving as a DMA, reviewed Dr. Steehler's report and determined that appellant had zero percent monaural hearing loss in each ear. He noted that the November 22, 2021 testing revealed losses of 25, 20, 15, and 15 dBs on the right and 25, 20, 25, and 25 dBs on the left at 500, 1,000, 2,000, and 3,000 Hertz (Hz), respectively. Dr. Israel totaled the dB losses to 75 on the right and 95 on the left. These values, when divided by four, resulted in an average hearing loss of 18.75 on the right and 23.75 on the left, which when reduced by the 25 dB fence, were reduced to zero. When multiplied by 1.5, the resulting monaural hearing loss in each ear was zero percent. Dr. Israel then calculated zero percent binaural hearing loss by multiplying the right ear hearing loss of zero percent by five, adding the zero percent left ear loss, and dividing this sum by six.

While Dr. Steehler added a one percent impairment rating based on appellant's tinnitus, Dr. Israel correctly explained that tinnitus may not be added to an impairment rating for hearing loss under the sixth edition of the A.M.A., *Guides* unless such binaural hearing loss is ratable.<sup>15</sup> Accordingly, as appellant does not have a ratable hearing loss, the Board finds that he is not entitled to a schedule award for the established tinnitus.

The Board finds that Dr. Israel properly concluded that appellant did not have a ratable permanent impairment of his hearing warranting a schedule award. Although OWCP has accepted employment-related hearing loss, it is not sufficiently severe to be ratable for schedule award purposes.<sup>16</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 8128(a) of FECA does not entitle a claimant the review of an OWCP decision as a matter of right.<sup>17</sup> OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.<sup>18</sup> One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.<sup>19</sup>

A timely request for reconsideration, including all supporting documents, must set forth arguments, and contain evidence that either: (1) shows that OWCP erroneously applied or

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<sup>15</sup> *M.S.*, Docket No. 22-0458 (issued May 3, 2023); *E.G.*, Docket No. 21-0165 (issued April 5, 2022); *K.P.*, Docket No. 20-0349 (issued July 1, 2020).

<sup>16</sup> *Id.*; *W.T.*, Docket No. 17-1723 (issued March 20, 2018); *E.D.*, Docket No. 11-0174 (issued July 26, 2011).

<sup>17</sup> 5 U.S.C. § 8128(a).

<sup>18</sup> 20 C.F.R. § 10.607.

<sup>19</sup> *Id.* at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (September 2020). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>20</sup> When a timely request for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.<sup>21</sup>

### ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

Appellant has not alleged or demonstrated that OWCP erroneously applied or interpreted a specific point of law. Moreover, he has not advanced a relevant legal argument not previously considered. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).<sup>22</sup>

In support of his request for reconsideration, appellant submitted audiometric findings obtained by a provider with an illegible signature on October 20, 2003. Although this evidence is new, the underlying issue on reconsideration is whether appellant has met his burden of proof to establish a ratable hearing loss for schedule award purposes. Audiograms that are not reviewed or certified by a physician cannot be the basis of an impairment determination under the A.M.A., *Guides*.<sup>23</sup> The Board has held that reports that are unsigned or bear an illegible signature lack proper identification and cannot be considered probative medical evidence as the author cannot be identified as a physician.<sup>24</sup> Therefore, the October 20, 2003 audiometric findings do not constitute relevant and pertinent new evidence. Thus, appellant is not entitled to further review of the merits of his claim based on the third requirement under 20 C.F.R. § 10.606(b)(3).<sup>25</sup>

The Board, therefore, finds that appellant has not met any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

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<sup>20</sup> *Id.* at § 10.606(b)(3); *see L.F.*, Docket No. 20-1371 (issued March 12, 2021); *B.R.*, Docket No. 19-0372 (issued February 20, 2020).

<sup>21</sup> *Id.* at § 10.608.

<sup>22</sup> *See O.A.*, Docket No. 22-1350 (issued May 24, 2023); *C.B.*, Docket No. 18-1108 (issued January 22, 2019).

<sup>23</sup> *R.J.*, Docket No. 17-0674 (issued December 14, 2017); *E.S.*, Docket No. 11-1724 (issued March 27, 2012).

<sup>24</sup> *T.U.*, Docket No. 19-1636 (issued October 29, 2020); *R.L.*, Docket No. 20-0284 (issued June 30, 2020); *M.A.*, Docket No. 19-1551 (issued April 30, 2020); *T.O.*, Docket No. 19-1291 (issued December 11, 2019); *Merton J. Sills*, 39 ECAB 572, 575 (1988).

<sup>25</sup> *Supra* note 20.

**CONCLUSION**

The Board finds that appellant has not met his burden of proof to establish ratable hearing loss for schedule award purposes. The Board further finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 24 and July 15, 2022 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 20, 2023  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board