

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

A.R., Appellant	)	
	)	
and	)	<b>Docket No. 23-0338</b>
	)	<b>Issued: November 28, 2023</b>
DEPARTMENT OF JUSTICE, FEDERAL	)	
BUREAU OF INVESTIGATION, Houston, 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  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On January 6, 2023 appellant filed a timely appeal from an October 5, 2022 merit 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.<sup>2</sup>

**ISSUE**

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

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

<sup>2</sup> The Board notes that, following the October 5, 2022 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.*

## **FACTUAL HISTORY**

On February 7, 2022 appellant, then a 47-year-old criminal investigator, filed an occupational disease claim (Form CA-2) alleging that he developed hearing loss due to factors of his federal employment, including firearm qualification training, and skill building events requiring the use of firearms. He noted that he first became aware of the condition on February 1, 2022, and realized its relation to factors of his federal employment on February 4, 2022.

OWCP received an informational document from the employing establishment outlining the noise exposure from firearms at work. All monitored employees were exposed to impulse noises above the 140 decibel (dB) ceiling set by the Occupational Safety and Health Administration.

OWCP also received an undated position description detailing the major duties of appellant's position as a special agent, including skill in use of firearms. An employing establishment audiometric employee hearing summary dated July 12, 2018 was also received.

In a development letter dated February 9, 2022, OWCP informed appellant that additional factual and medical evidence was necessary to establish his claim. It indicated that the evidence provided was insufficient to establish that he actually experienced the employment factors alleged to have caused injury. A questionnaire was provided to appellant to substantiate the factual elements of his claim. Appellant was also requested to provide all medical reports pertaining to hearing loss, including preemployment examination and all audiograms. OWCP afforded him 30 days to respond. In a separate development letter of even date, it requested that the employing establishment provide additional information regarding appellant's claim.

In a completed development questionnaire received on February 14, 2022, appellant provided his employment history and indicated his last date of exposure to hazardous noise was February 1, 2022, which was also the date he first noticed ringing in his ears and related the hearing loss to work exposure due to a firearms session. He further indicated no previous hearing problems and that he did not have any hobbies which involved exposure to loud noise.

On August 4, 2022 OWCP referred appellant, along with a statement of accepted facts (SOAF) and the medical record to Dr. George T. Brown, a Board-certified otolaryngologist, serving as second opinion physician, regarding the nature and extent of his hearing loss, and whether there was any causal relationship between his diagnosed condition and his accepted employment exposure.

In an August 24, 2022 report, Dr. Brown reviewed the SOAF, history of injury, and medical evidence of record. Audiometric testing obtained on August 22, 2022 at the frequencies of 500, 1,000, 2,000, and 3,000 Hertz (Hz) revealed losses at 15, 15, 20, and 20 decibels (dBs) for the right ear, respectively; and 10, 15, 20, and 20 dBs for the left ear, respectively. Dr. Brown diagnosed tinnitus causally related to factors of his federal employment. He noted that appellant's condition was related to his federal employment, as the date of onset was post-firearms exposures. However, in response to the question of whether appellant's sensorineural hearing loss was in part related to his federal employment, Dr. Brown responded that appellant had "[n]o hearing loss to assign!" (Emphasis in the original.)

By decision dated August 30, 2022, OWCP accepted appellant's claim for bilateral tinnitus and noted that the medical evidence of record established that he did not require hearing aids and thus they were not authorized.

On August 30, 2022 OWCP referred the medical record and SOAF to Dr. Jeffrey M. 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. In a September 2, 2022 report, Dr. Israel reviewed Dr. Brown'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*,<sup>3</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 noted that a tinnitus award of four percent could not be awarded as there was no binaural hearing loss. Dr. Israel averaged appellant's right ear hearing levels of 15, 15, 20, 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 70 by 4, which equaled 17.5. After subtracting the 25 dB fence, he multiplied the remaining zero balance by 1.5 for a result of zero percent right monaural loss. For the left ear, Dr. Israel averaged hearing levels of 10, 15, 20, 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 for a result of 16.25. 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 and tinnitus masking. Dr. Israel determined that appellant had reached maximum medical improvement (MMI) on August 22, 2022, the date of audiometric examination with Dr. Brown.

By decision dated October 5, 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. It found that he was entitled to medical benefits due to his injury, including hearing aids if recommended by his physician.

### **LEGAL PRECEDENT**

The schedule award provisions of FECA<sup>4</sup> and its implementing regulations<sup>5</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> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

<sup>4</sup> 5 U.S.C. § 8107.

<sup>5</sup> 20 C.F.R. § 10.404.

A.M.A., *Guides*<sup>6</sup> has been adopted by OWCP for evaluating schedule losses and the Board has concurred in such adoption.<sup>7</sup>

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.<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>

### ANALYSIS

The Board finds that this case is not in posture for decision.

In his August 24, 2022 report, Dr. Brown reviewed audiometric testing at the frequencies of 500, 1,000, 2,000, and 3,000 Hz, revealing losses at 15, 15, 20 and 20 dBs for the right ear, respectively, and 10, 15, 20, and 20 dBs for the left ear, respectively. He diagnosed appellant with tinnitus and related that appellant's tinnitus was in part caused by noise exposure in appellant's federal employment, as the date of onset was post-firearm exposure. However, in response to the question of whether appellant's sensorineural hearing loss was in part due to his federal employment, Dr. Brown indicated that there was "[n]o hearing loss to assign!" (Emphasis in the original.) It is well established that, proceedings under FECA are not adversarial in nature and, while appellant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.<sup>13</sup> OWCP has an obligation to see that justice is done in a manner that will resolve the relevant issues in this case.<sup>14</sup>

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<sup>6</sup> *Supra* note 2.

<sup>7</sup> *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).

<sup>8</sup> A.M.A., *Guides* 250.

<sup>9</sup> *Id.*

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

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

<sup>12</sup> *V.M.*, *supra* note 7.

<sup>13</sup> *See D.N.*, Docket No. 21-0591 (issued September 27, 2021); *M.G.*, Docket No. 18-1310 (issued April 16, 2019); *Walter A. Fundinger, Jr.*, 37 ECAB 200, 204 (1985).

<sup>14</sup> *See D.N., id.*; *L.T.*, Docket No. 18-1405 (issued April 8, 2019); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

In the absence of ratable hearing loss, a schedule award for tinnitus is not allowable pursuant to the A.M.A., *Guides*.<sup>15</sup> As Dr. Brown's opinion with regard to hearing loss is unclear, the case must be remanded for OWCP to request that he provide a supplemental opinion regarding whether appellant's hearing loss is causally related to factors of his federal employment. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

**CONCLUSION**

The Board finds that this case is not in posture for decision.

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 5, 2022 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: November 28, 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> *T.B.*, Docket No. 23-0303 (issued August 11, 2023); *W.T.*, Docket No. 17-1723 (issued March 20, 2018); *E.D.*, Docket No. 11-0174 (issued July 26, 2011).