

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

_____)	
W.L., Appellant)	
)	
and)	Docket No. 22-0967
)	Issued: October 23, 2023
DEPARTMENT OF THE NAVY, MARINE)	
CORPS AIR STATION, Cherry Point, NC,)	
Employer,)	
_____)	

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
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 12, 2022 appellant filed a timely appeal from a December 29, 2021 merit decision and a June 6, 2022 nonmerit 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.

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish greater than four percent binaural hearing loss for which he previously received 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).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On June 1, 2021 appellant, then a 65-year-old performance assessment representative, filed an occupational disease claim (Form CA-2) alleging that he sustained hearing loss in both ears due to factors of his federal employment. He noted that he had previously worked in shops for 20 years and noticed difficulty hearing when he began working in an office setting in October 2007. Appellant noted that he first became aware of his condition on October 1, 2007, and realized its relation to his federal employment on April 1, 2021. He did not stop work. In a statement dated June 1, 2021, appellant noted that from 1991 through 2007 he was exposed to occupational noise from power tools, planers, joiners, table saws, drill presses, chain saws, and aircraft working in the carpentry field.

OWCP received results of audiometric testing from the employing establishment dated January 20, 1983 through April 21, 2021.

On September 15, 2021 OWCP referred appellant, along with a statement of accepted facts (SOAF) and the medical record, to Dr. Charles B. Beasley, a Board-certified otolaryngologist, for a second opinion evaluation.

In a report dated September 29, 2021, Dr. Beasley reviewed the medical record and SOAF, performed a physical examination, and completed OWCP's evaluation questionnaire. He diagnosed bilateral sensorineural hearing loss, which he opined was due to noise exposure related to appellant's federal employment. Dr. Beasley further reviewed an audiogram conducted by an audiologist on his behalf dated September 29, 2021, which demonstrated losses of 15, 10, 20 and 50 decibels (dBs) on the right and 15, 10, 30, and 55 dBs on the left at the frequencies of 500, 1,000, 2,000, and 3,000 Hertz (Hz), respectively. Utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),² he calculated that appellant sustained a right monaural loss of zero percent, a left monaural loss of 3.75 percent, and a binaural hearing loss of .625 percent. Dr. Beasley provided a three percent impairment rating for moderate tinnitus noticeable even with background or environmental noise. He recommended that appellant continue using noise protection and undergo a hearing aid evaluation and annual audiograms.

On November 23, 2021 OWCP accepted the claim for bilateral sensorineural hearing loss and tinnitus. It further authorized hearing aids.

On November 24, 2021 appellant filed a claim for compensation (Form CA-7) for a schedule award.

On November 26, 2021 OWCP referred the medical record and SOAF to Dr. Jeffrey Israel, a Board-certified otolaryngologist serving as an OWCP district medical adviser (DMA), to determine the extent of appellant's hearing loss and permanent impairment due to his employment-related noise exposure. On December 3, 2021 Dr. Israel reviewed Dr. Beasley's report and agreed that appellant's sensorineural hearing loss was due, at least in part, to noise-induced work-related acoustic trauma. He applied the audiometric data to OWCP's standard for evaluating hearing loss

² A.M.A., *Guides* (6th ed. 2009).

under the A.M.A., *Guides* and determined that he sustained a right monaural loss of zero percent, a left monaural loss of 3.75 percent, and a binaural hearing loss of .6 percent. Dr. Israel averaged appellant's right ear hearing levels of 15, 10, 20, and 50 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 23.75. After subtracting the 25 dB fence and multiplying by 1.5, he found zero percent monaural hearing loss for the right ear. Dr. Israel then averaged appellant's left ear hearing levels of 15, 10, 30, and 55 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 27.5. After subtracting out a 25 dB fence, he multiplied the remaining 2.5 balance by 1.5 to calculate a 3.75 percent left ear monaural hearing loss. Dr. Israel then calculated .6 percent binaural hearing loss by multiplying the right ear loss of zero percent by five, adding the 3.75 percent left ear loss, and dividing this sum by six. He concurred with Dr. Beasley's recommendation for three percent tinnitus award noting its impact on appellant's activities of daily living. Dr. Israel added 3 percent to the .6 percent binaural loss, for a total award of 3.6 percent. He noted that appellant had reached maximum medical improvement (MMI) on September 29, 2021, the date of the latest audiogram in the record, which was used by the Dr. Beasley to determine the current hearing impairment. Dr. Israel recommended yearly audiograms, use of noise protection, and authorization for bilateral hearing aids.

A December 13, 2021 hearing conservation data form recorded audiometric findings obtained by Michelle Cooley, an audiologist, at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz of losses for the right ear of 15, 10, 25, and 45 dBs and for the left ear of 15, 15, 25, and 45 dBs. An accompanying note indicated that the foregoing was appellant's "Final Hearing Test" as he was to retire effective December 31, 2021.

By decision dated December 29, 2021, OWCP granted appellant a schedule award for four percent binaural hearing loss. The award ran for eight weeks from September 29 through November 23, 2021, and was based on the September 29, 2021 report of Dr. Beasley, and the December 3, 2021 DMA report of Dr. Israel.

On March 8, 2022 appellant requested reconsideration of OWCP's December 29, 2021 decision. In support thereof, he resubmitted the December 13, 2021 hearing conservation data form from the audiologist.

By decision dated June 6, 2022, OWCP denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT -- ISSUE 1

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

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404

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

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.¹³ 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.¹⁴

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish greater than four percent binaural hearing loss, for which he previously received a schedule award.

OWCP referred appellant to Dr. Beasley for a second opinion examination to evaluate his hearing loss. In his September 29, 2021 report, Dr. Beasley discussed his work history and opined that industrial noise exposure was the primary factor causing his condition. He diagnosed bilateral

⁵ *Supra* note 2.

⁶ *D.S.*, Docket No. 23-0048 (issued May 23, 2023); *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.*

⁹ *Id.*; *S.L.*, Docket No. 23-0241 (issued May 17, 2023); *C.D.*, Docket No. 18-0251 (issued August 1, 2018).

¹⁰ *Id.*

¹¹ *Id.*

¹² *H.M.*, Docket No. 21-0378 (issued August 23, 2021); *V.M.*, *supra* note 6.

¹³ *See* A.M.A., *Guides* 249.

¹⁴ *Id.*

sensorineural hearing loss and bilateral tinnitus caused by the noise exposure in appellant's workplace.

On December 3, 2021 the DMA, Dr. Israel, reviewed Dr. Beasley's report and indicated that testing at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz revealed dB losses of 15, 10, 25, and 55 for the right ear and dB losses of 15, 15, 25, 45 for the left ear, respectively. He calculated 3.75 percent monaural loss for the left ear, no loss for the right ear, and .6 percent binaural hearing loss and concurred with Dr. Beasley's recommendation for 3 percent tinnitus award noting its impact on appellant's activities of daily living.¹⁵ Following the rating protocols, the DMA properly calculated a total binaural hearing loss of 3.6 percent.

The Board finds that the DMA, Dr. Israel, accurately summarized the relevant medical evidence, provided detailed findings on examination, and reached conclusions, which comported with his findings, and with the appropriate provisions of the A.M.A., *Guides*.¹⁶ The DMA's report therefore carries the weight of the medical evidence and establishes that appellant has 3.6 percent binaural hearing loss which, in accordance with OWCP's policy, is properly rounded up to 4 percent.¹⁷

The record contains the employing establishment's audiometric findings obtained by an audiologist on December 13, 2021, representative of appellant's "Final Hearing Test," which were not reviewed or certified by a physician. However, audiograms that are not reviewed or certified by a physician cannot form the basis of an impairment determination under the A.M.A., *Guides*.¹⁸

The Board therefore finds that appellant has not met his burden of proof to establish greater than four percent binaural hearing loss, for which he previously received a schedule award.¹⁹

¹⁵ OWCP procedures provide that, in calculating a binaural loss, percentages should not be rounded until the final percent for award purposes is obtained. Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4b(2)(b) (January 2010).

¹⁶ See *J.M.*, Docket No. 18-1387 (issued February 1, 2019).

¹⁷ See *R.J.*, Docket No. 21-0781 (issued February 24, 2022); *F.T.*, Docket No. 16-1236 (issued March 12, 2018). The policy of OWCP is to round the calculated percentage of impairment to the nearest whole number. Results should be rounded down for figures less than 0.5 and up for 0.5 and over. *Id.* at Chapter 3.700.4b (January 2010). See also *R.M.*, Docket No. 18-0752 (issued December 6, 2019); *V.M.*, *supra* note 6; *J.H.*, Docket No. 08-24329; *Robert E. Cullison*, 55 ECAB 570 (2004).

¹⁸ *R.J.*, Docket No. 17-0674 (issued December 14, 2017); *E.S.*, Docket No. 11-1724 (issued March 27, 2012).

¹⁹ FECA provides that a claimant is entitled to 52 weeks of compensation for 100 percent loss of hearing in one ear and 200 weeks of compensation for 100 percent hearing loss in both ears. 5 U.S.C. § 8107(c)(3). As 4 percent binaural hearing loss yielded 8 weeks of compensation, and 7 percent monaural loss on the left side, or 3.75 left monaural hearing loss plus 3 percent for tinnitus, yielded 3.64 weeks of compensation, OWCP properly granted appellant a schedule award for 4 percent binaural hearing loss with tinnitus. See *A.L.*, Docket No. 21-1233 (issued January 31, 2022).

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.²⁰ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.²¹ 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.²²

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 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.²³ 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.²⁴

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).²⁵

In support of his request for reconsideration, appellant resubmitted the audiometric findings of appellant's "Final Hearing Test" dated December 13, 2021. This evidence, however, is duplicative of evidence previously submitted. The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already of record does not

²⁰ 5 U.S.C. § 8128(a).

²¹ 20 C.F.R. § 10.607.

²² *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.

²³ *Id.* at § 10.606(b)(3); *see L.E.*, Docket No. 22-0004 (issued April 14, 2023); *L.F.*, Docket No. 20-1371 (issued March 12, 2021); *B.R.*, Docket No. 19-0372 (issued February 20, 2020).

²⁴ *Id.* at § 10.608.

²⁵ *L.E.*, *supra* note 23; *C.B.*, Docket No. 18-1108 (issued January 22, 2019).

constitute a basis for reopening a claim.²⁶ 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).²⁷

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.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish greater than four percent binaural hearing loss, for which he previously received a schedule award. 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 December 29, 2021 and June 6, 2022 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 23, 2023
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

²⁶ See *A.D.*, Docket No. 23-0148 (issued May 22, 2023); *D.B.*, Docket No. 22-1241 (issued April 27, 2023); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

²⁷ See *W.B.*, Docket No. 22-0985 (issued March 27, 2023); *Y.L.*, Docket No. 20-1025 (issued November 25, 2020); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).