

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

T.M., Appellant)	
)	
and)	Docket No. 23-0462
)	Issued: October 11, 2023
DEPARTMENT OF THE NAVY, MARINE)	
CORPS LOGISTICS BASE, Albany, GA,)	
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
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On February 13, 2023 appellant filed a timely appeal from a September 13, 2022 merit decision and January 20 and February 3, 2023 nonmerit decisions 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 34 percent binaural hearing loss, for which he previously received schedule award compensation; 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 October 27, 2008 appellant, then a 54-year-old heavy mobile equipment mechanic,² filed an occupational disease claim (Form CA-2) alleging that he sustained hearing loss due to factors of his federal employment, including exposure to excessive loud noise from cranes, trucks, pumps and turbines for fourteen and a half years at the employing establishment. He noted that he first became aware of his claimed condition and realized its relation to his federal employment on October 6, 2008. On January 7, 2010 OWCP accepted appellant's claim for binaural sensorineural hearing loss.

On January 13, 2010 OWCP granted appellant a schedule award for eight percent left monaural work-related hearing loss. It determined that he had reached maximum medical improvement (MMI) on December 16, 2009. The period of the award ran for 4.16 weeks from December 16, 2009 through January 14, 2010.

On May 18, 2012 appellant filed a claim for compensation (Form CA-7) for an additional schedule award.

By decision dated August 31, 2012, OWCP granted appellant a schedule award for four percent binaural work-related hearing loss. The period of the award ran for eight weeks from February 10 through April 5, 2012.

On September 12, 2012 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

By decision dated November 2, 2012, OWCP's hearing representative found that OWCP did not properly calculate appellant's additional schedule award and remanded the case for OWCP to issue a *de novo* schedule award finding that appellant sustained 12 percent binaural work-related hearing loss.

By *de novo* decision dated November 14, 2012, OWCP granted appellant a schedule award for 12 percent binaural work-related hearing loss. The period of the award ran for 24 weeks from April 6 through June 27, 2012.³

On August 19, 2021 appellant filed a Form CA-7 for an additional schedule award.

On November 2, 2021 OWCP district medical adviser (DMA), Dr. Jeffrey M. Israel, a Board-certified otolaryngologist, reviewed appellant's history of noise exposure, and indicated that audiograms over the years showed a progression of sensorineural hearing loss in both ears. He discussed the findings of the most recent audiogram dated August 5, 2021 and opined that appellant's patterns were suggestive of a sensorineural hearing loss due, at least in part, to noise-induced work-related acoustic trauma. Utilizing the sixth edition of the American Medical

² The evidence of record reflects that appellant was terminated for cause on December 13, 2004.

³ OWCP noted that appellant was owed 24 weeks of schedule award compensation for 12 percent binaural hearing loss. It indicated that he previously received 4.16 weeks of schedule award compensation for eight percent monaural hearing loss and eight weeks of schedule award compensation for four percent binaural hearing loss, for a total of 12.18 weeks of compensation. OWCP subtracted 12.18 from 24 for a total of 11.84 weeks of compensation.

Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),⁴ the DMA determined that appellant had 56.25 percent right monaural hearing loss and 22.5 percent left monaural hearing loss, which translated to 28 percent binaural hearing loss.

In a January 26, 2022 supplemental report, Dr. Israel indicated that appellant's tinnitus hearing inventory (THI) form yielded a score of 92, which translated to an additional 5 percent, for a total of 33 percent permanent impairment for binaural hearing loss. He noted that, as appellant was previously awarded 12 percent binaural hearing loss, he was owed an additional award of 21 percent binaural hearing loss.

On a February 18, 2022 OWCP referred appellant, along with the case file, and a statement of accepted facts, to Dr. Kenneth Walker, a Board-certified otolaryngologist, for a second opinion evaluation. In an April 19, 2022 report, Dr. Walker noted appellant's complaints of hearing loss and tinnitus and history of long-term noise exposure at work. Audiometric testing obtained that date at the frequencies of 500, 1,000, 2,000, and 3,000 Hertz (Hz) revealed losses at 30, 45, 50, and 60 decibels (dBs) for the right ear, respectively, and 25, 40, 50, and 60 dBs for the left ear, respectively. Dr. Walker diagnosed bilateral noise effects on inner ear and bilateral tinnitus, and opined that appellant's hearing loss was due, at least in part, to noise exposure during his federal employment. He applied the audiometric data to OWCP's standards for evaluating hearing loss under the A.M.A., *Guides* and determined that appellant sustained a right monaural loss of 32 percent, a left monaural loss of 28 percent, and a binaural hearing loss of 29 percent. Dr. Walker also noted an applicable award of 5 percent for tinnitus for a total of 34 percent binaural hearing loss. He recommended the use of hearing aids and determined that the date of MMI was unknown.

In a supplemental report dated May 26, 2022, Dr. Walker indicated that he had reviewed the January 26, 2022 DMA report. He explained that the difference in impairment rating was because his rating was based on the hearing evaluation obtained at his office on that date.

On June 17, 2022 OWCP requested that Dr. Israel, serving as the DMA, review Dr. Walker's April 19 and May 26, 2022 reports and clarify his previous reports. In a June 22, 2022 report, Dr. Israel applied the audiometric data from the April 19, 2022 audiogram and averaged appellant's right ear hearing levels of 30, 45, 50, and 60 dBs at 500, 1,000, 2,000, and 3,000 Hz, respectively, which equaled 46. After subtracting the 25 dB fence, he multiplied the remaining 21 balance by 1.5 for a result of 32 percent right monaural loss. For the left ear, Dr. Israel averaged hearing levels of 25, 40, 50, and 60 at 500, 1,000, 2,000, and 3,000 Hz, respectively, for a result of 44. After subtracting the 25 dB fence, he multiplied the remaining 19 balance by 1.5 for a result of 28 percent left monaural hearing loss. Dr. Israel then calculated 29 percent binaural hearing loss by multiplying the left ear loss of 28 percent by five, adding the 32 percent right ear loss, and dividing this sum by six. He also noted an applicable award of 5 percent for tinnitus for a total of 34 percent binaural hearing loss. Dr. Israel further indicated that appellant was previously awarded 12 percent permanent impairment for binaural hearing loss, which translated to an additional schedule award of 22 percent binaural hearing loss. He advised that the date of MMI was April 19, 2022.

On July 20, 2022 OWCP requested further clarification from Dr. Israel.

⁴ A.M.A., *Guides* (6th ed. 2009).

In a July 28, 2022 report, Dr. Israel noted that his previous reports dated November 2, 2021, January 26 and June 22, 2022. He indicated that he was recently informed that appellant had received previous schedule awards of 8 percent left monaural hearing loss, which translated to 1 percent binaural hearing loss on December 16, 2009 4 percent binaural hearing loss on August 31, 2012 and 12 percent binaural hearing loss on November 14, 2012. Dr. Israel explained that all these awards needed to be considered together to determine the additional award that was due. He indicated that the initial one percent award was part of the second four percent award, which left an additional three percent award that was due. Dr. Israel further noted that the next award of 12 percent had the additional award due of 3 percent, which yielded an additional 9 percent additional award due. He subtracted the 9 percent from 34 percent and determined that 25 percent was the additional award due.

By decision dated September 13, 2022, OWCP granted appellant a schedule award for an additional 25 percent binaural work-related hearing loss.⁵ It determined that he had reached MMI on April 19, 2022. The award ran for 50 weeks for the period April 19, 2022 through April 3, 2023.

On January 6, 2023 appellant requested reconsideration.

Appellant submitted audiometric testing dated August 5, 2021, Dr. Israel's reports dated November 2, 2021 and January 26, 2022, lumbar and cervical diagnostic testing dated February 11, 2022, Dr. Walker's April 19, 2022 report and audiometric testing, and a tinnitus handicap inventory dated December 22, 2021.

By decision dated January 20, 2023, 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 FECA⁶ and its implementing regulations⁷ 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 of loss of a member shall be determined. For consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants and the Board has concurred in such adoption.⁸ As of May 1, 2009, the sixth edition of the A.M.A., *Guides*, published in 2009, is used to calculate schedule awards.⁹

⁵ OWCP noted that it rounded 24.5 percent to 25 percent.

⁶ 5 U.S.C. § 8107.

⁷ 20 C.F.R. § 10.404.

⁸ *Id.* at § 10.404 (a); *see also T.T.*, Docket No. 18-1622 (issued May 14, 2019); *Jacqueline S. Harris*, 54 ECAB 139 (2002).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *see also id.* at Chapter 3.700.2 and Exhibit 1 (January 2010).

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.¹⁰ Using the frequencies of 500, 1,000, 2,000, and 3,000 Hz, the losses at each frequency are averaged.¹¹ 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.¹² The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.¹³ 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.¹⁴ The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.¹⁵

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.¹⁶ 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.¹⁷

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish greater than 34 percent binaural hearing loss, for which he previously received schedule award compensation.

In June 22 and July 28, 2022 reports, Dr. Israel, the DMA, reviewed Dr. Walker's April 19, 2022 audiometric report and indicated that testing at 500, 1,000, 2,000, and 3,000 Hz revealed dB losses of 30, 45, 50, and 60 for the right ear and 25, 40, 50, and 60 for the left ear. Following the rating protocols, he properly calculated a total binaural hearing loss of 29 percent. Dr. Israel also noted an additional 5 percent for tinnitus based on the completed THI questionnaire, for a total impairment of 34 percent for binaural hearing loss.

The Board finds that Dr. Israel accurately summarized the relevant medical evidence, provided detailed findings on examination, and reached conclusions, which comported with his findings and the appropriate provisions of the A.M.A., *Guides*.¹⁸ Dr. Israel's report, therefore,

¹⁰ A.M.A., *Guides* 250-51.

¹¹ *Id.* at 250.

¹² *Id.*; *C.D.*, Docket No. 18-0251 (issued August 1, 2018).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *H.M.*, Docket No. 21-0378 (issued August 23, 2021); *V.M.*, Docket No. 18-1800 (issued April 23, 2019).

¹⁶ *See* A.M.A., *Guides* 249.

¹⁷ *Id.*

¹⁸ *See* *A.G.*, Docket No. 22-0582 (issued October 4, 2022); *see also* *J.M.*, Docket No. 18-1387 (issued February 1, 2019).

carries the weight of the medical evidence and establishes that appellant has 33.75 percent binaural hearing loss, which in accordance with OWCP policy, is rounded up to 34 percent.¹⁹

As the medical evidence of record is insufficient to establish greater than 34 percent binaural hearing loss, for which he previously received schedule award compensation, the Board finds that appellant has not met his burden of proof.

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 vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against compensation at any time on his or her own motion or on application.²⁰

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or argument that: (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.²¹

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.²² If it chooses to grant reconsideration, it reopens and reviews the case on its merits.²³ If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.²⁴

¹⁹ See *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. *Supra* note 9 at Chapter 3.700.4b (January 2010); see also *R.M.*, Docket No. 18-0752 (issued December 6, 2019); *V.M.*, Docket No. 18-1800 (issued April 23, 2019); *Robert E. Cullison*, 55 ECAB 570 (2004).

²⁰ 5 U.S.C. § 8128(a); see *D.G.*, Docket No. 20-1203 (issued April 28, 2021); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); see also *V.P.*, Docket No. 17-1287 (issued October 10, 2017); *D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

²¹ 20 C.F.R. § 10.606(b)(3); see *P.M.*, Docket No. 20-0780 (issued November 24, 2020); *J.W.*, Docket No. 19-1795 (issued March 13, 2010); see also *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

²² *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. 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. *Supra* note 9 at 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 § 10.608(a); see *F.V.*, Docket No. 18-0230 (issued May 8, 2020); *M.S.*, 59 ECAB 231 (2007).

²⁴ *Id.* at § 10.608(b); see *B.S.*, Docket No. 20-0927 (issued January 29, 2021); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

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).

Preliminarily, the Board finds that OWCP did not receive additional evidence of permanent impairment with appellant's January 6, 2023 request for reconsideration. The Board will, therefore, consider this a reconsideration request as opposed to a claim for an additional schedule award.²⁵

Appellant has not alleged or demonstrated that OWCP erroneously applied or interpreted a specific point of law. Moreover, he did not advance a relevant legal argument not previously considered by OWCP. 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).²⁶

In support of his reconsideration request, appellant submitted lumbar and cervical diagnostic testing dated February 11, 2022. None of these reports, however, provided an impairment rating based upon the sixth edition of the A.M.A., *Guides*. The Board finds, therefore, that this evidence is irrelevant to the underlying issue of whether appellant has established greater than 34 percent binaural hearing loss.²⁷ In addition, the additional audiometric testing reports, Dr. Israel's November 2, 2021 and January 26, 2022 reports, and Dr. Walker's April 19, 2022 report were previously submitted to the record and reviewed. The Board has held that the submission of evidence, which duplicates or is substantially similar to evidence already in the case record does not constitute a basis for reopening a case.²⁸ Therefore, for the above reasons, appellant is not entitled to further review of the merits of his claim based on the third above-noted requirement under 20 C.F.R. § 10.606(b)(3).²⁹

The Board finds, therefore, that OWCP properly determined that appellant was not entitled to further review of the merits of his claim pursuant to any of the three requirements under 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 34 percent binaural hearing loss, for which he previously received schedule award compensation. The Board further finds that OWCP properly denied his request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

²⁵ See *B.P.*, Docket No. 22-0553 (issued October 21, 2022); *P.D.*, Docket No. 18-0962 (issued September 18, 2019).

²⁶ 20 C.F.R. § 10.606(b)(3); *G.K.*, Docket No. 20-1026 (issued December 11, 2020); *D.T.*, Docket No. 20-0456 (issued September 1, 2020).

²⁷ See *L.W.*, Docket No. 21-0942 (issued May 11, 2022); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

²⁸ *D.H.*, Docket No. 22-0875 (issued December 5, 2022); *S.W.*, Docket No. 18-1261 (issued February 22, 2019); *E.M.*, Docket No. 09-??39 (issued March 3, 2009).

²⁹ 20 C.F.R. § 10.606(b)(3); *D.J.*, Docket No. 21-0371 (issued November 24, 2021).

ORDER

IT IS HEREBY ORDERED THAT the September 13, 2022 merit decision February 3 and January 20, 2023 nonmerit decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 11, 2023
Washington, DC

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

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board