

FACTUAL HISTORY

On April 6, 2022 appellant, then a 63-year-old deputy waterfront safety superintendent, filed an occupational disease claim (Form CA-2) alleging that he developed bilateral hearing loss due to factors of his federal employment, including exposure to occupational noise working as boilermaker and pipefitter in machine and shipfitter shops. He noted that he first became aware of his condition and realized it was caused or aggravated by his federal employment on June 1, 1995. Appellant retired from the employing establishment on June 29, 2013.

In support of his claim, appellant submitted hearing conservation data, including a reference audiogram dated June 1, 1984, and audiograms covering the period October 4, 1979 through September 9, 2021.

In a development letter dated April 26, 2022, OWCP informed appellant of the deficiencies of his claim. It 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 May 2, 2022 OWCP referred appellant, along with a statement of accepted facts (SOAF) and the medical record, to Dr. Julie A. Gustafson, a Board-certified otolaryngologist, serving as a second opinion physician, to determine the nature, extent, and causal relationship of appellant's hearing loss.

In a June 3, 2022 report, Dr. Gustafson reviewed the SOAF, and the medical evidence of record. She indicated that there was no significant variation from the SOAF, and no other relevant history or condition related to appellant's hearing loss. A June 2, 2022 audiogram showed testing at the frequencies of 500, 1,000, 2,000, and 3,000 Hertz (Hz) revealed losses at 10, 20, 20, and 20 decibels (dBs) for the right ear, respectively, and 15, 15, 20, and 30 dBs for the left ear, respectively. Dr. Gustafson noted that appellant's ears, tympanic membranes, and canals were normal. She diagnosed bilateral sensorineural hearing loss, tinnitus, and bilateral noise-induced hearing loss. Dr. Gustafson concluded that appellant's work exposures were of sufficient intensity to have caused his hearing loss.

By decision dated July 18, 2022, OWCP denied appellant's claim finding that it was untimely filed.

On August 18, 2022 appellant requested reconsideration and asserted that his immediate supervisor was aware of his injury.

Thereafter, OWCP received a statement dated February 20, 2023 from G.J., appellant's supervisor from 1992 to 1997 who acknowledged receiving notification of appellant's hearing loss.

On March 1, 2023 the employing establishment informed OWCP that it was unable to verify G.J., as an employee or former employee as his name did not appear in a search.

By decision dated March 3, 2023, OWCP denied modification of its prior decision. It found that appellant failed to submit evidence to establish that his claim had been timely filed.

In a letter dated March 10, 2023, the employing establishment informed OWCP that after further research that it was able to confirm that G.J. had been the General Foreman of the Boilermakers in appellant's shop. It also confirmed that appellant had been part of the Hearing Surveillance Program.

On March 15, 2023 appellant requested reconsideration of the March 3, 2023 decision asserting that the employing establishment had been aware of his hearing loss based on the letter from G.J.

By decision dated March 22, 2023, OWCP found the evidence sufficient to warrant modification of the March 3, 2023 decision. In a separate decision of even date, it accepted that appellant's claim for bilateral sensorineural hearing loss, tinnitus, and bilateral noise-induced hearing loss were due to workplace exposure. The decision indicated that appellant would benefit from hearing aids and advised him of how to proceed if he wished to request authorization.

In a letter dated April 6, 2023, 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 report dated April 11, 2023, Dr. Israel reviewed Dr. Gustafson's examination report and concurred that the June 2, 2022 audiogram revealed no hearing loss. Dr. Israel opined that appellant's patterns were suggestive of sensorineural hearing loss 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 under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,² (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. Dr. Israel averaged appellant's right ear hearing levels of 10, 20, 20, and 20 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 17.5. After subtracting the 25 dB fence, he multiplied the remaining 0 balance by 1.5 to calculate zero percent right ear monaural hearing loss. Dr. Israel then averaged appellant's left ear hearing levels 15, 15, 20, and 30 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 20.0. After subtracting the 25 dB fence, he multiplied the remaining 0 balance by 1.5 to calculate zero 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 ear loss, and dividing this sum by six. He opined that he concurred with Dr. Gustafson's calculations. Dr. Israel recommended yearly audiograms, use of noise protection, and hearing aids for hearing loss. He also determined that appellant had reached maximum medical improvement (MMI) on June 2, 2022, the date of the most recent audiogram and Dr. Gustafson's examination.

² A.M.A., *Guides* (6th ed. 2009).

By decision dated May 2, 2023, 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.

On May 23, 2023 appellant requested reconsideration of OWCP's May 2, 2023 decision.

By decision dated May 25, 2023, OWCP denied appellant's request for reconsideration of the merits of his claim.

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 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

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404

⁵ *Supra* note 2.

⁶ *T.B.*, Docket No. 23-0303 (issued August 11, 2023); *W.R.*, Docket No. 22-0051 (issued August 9, 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).

⁷ *Supra* note 2.

⁸ *Id.* at 250.

⁹ *Id.*

¹⁰ *Id.*

hearing loss.¹¹ The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.¹²

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish a ratable hearing loss for schedule award purposes.

OWCP properly referred appellant to Dr. Gustafson for a second opinion examination to evaluate his hearing loss. In her June 3, 2022 report, Dr. Gustafson diagnosed bilateral sensorineural hearing loss, tinnitus, and bilateral noise-induced hearing loss. She opined that appellant's federal employment noise exposure contributed to his hearing loss.

The DMA, Dr. Jeffrey Israel, in a report dated May 22, 2021, reviewed Dr. Gustafson's report and determined that appellant had zero percent monaural hearing loss in each ear. He related that testing at the frequencies of 500, 1,000, 2,000, and 3,000 Hz revealed losses at 10, 20, 20, and 20 decibels (dBs) for the right ear, respectively, and 15, 15, 20, and 30 dBs for the left ear, respectively. Dr. Israel noted that the ears, tympanic membranes, and canals were normal. The decibel losses for the right ear were totaled at 70 and divided by 4 to obtain an average hearing loss of 17.5. The decibel losses for the left ear were totaled at 80 and divided by 4 to obtain an average hearing loss of 20. After subtracting the 25-decibel fence, both the right and left ear losses were reduced to zero. When multiplied by 1.5, the resulting monaural hearing loss in each ear was zero percent.

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.¹³ Accordingly, as appellant does not have ratable hearing loss, the Board finds that he is not entitled to a schedule award.

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.

¹¹ *Id.*

¹² *T.B.*, *supra* note 6; *J.S.*, Docket No. 22-0274 (issued September 13, 2022); *V.M.*, *supra* note 6.

¹³ *T.B.*, *supra* note 6; *J.S.*, *id.*; *J.R.*, *supra* note 6; *see W.T.*, Docket No. 17-1723 (issued March 20, 2018); *E.D.*, Docket No. 11-0174 (issued July 26, 2011).

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 own motion or on application.¹⁴

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (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.¹⁵

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.¹⁶ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.¹⁷ 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.¹⁸

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 did not show that OWCP erroneously applied or interpreted a specific point of law and did not advance a relevant legal argument not previously considered by OWCP. Therefore, it properly determined that his request did not warrant a review of the merits of the claim based on the first and second requirements of section 10.606(b)(3).¹⁹

¹⁴ 5 U.S.C. § 8128(a).

¹⁵ 20 C.F.R. § 10.606(b)(3).

¹⁶ *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. 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.

¹⁷ *Id.* at § 10.608(a); *see also W.R.*, *supra* note 6; *F.V.*, Docket No. 18-0239 (issued May 8, 2020); *M.S.*, 59 ECAB 231 (2007).

¹⁸ *Id.* at § 10.608(b); *Y.K.*, Docket No. 18-1167 (issued April 2, 2020); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹⁹ *See M.C.*, Docket No. 18-1278 (issued March 7, 2019); *see also S.M.*, Docket No. 17-1899 (issued August 3, 2018).

Appellant also did not submit any relevant and pertinent new evidence. Therefore, he is not entitled to a merit review based on the third requirement under 20 C.F.R. § 10.606(b)(3).²⁰ Consequently, OWCP properly determined that appellant's request did not warrant a review of the merits of the claim based on the third requirement of section 10.606(b)(3).

As appellant has not met any of the regulatory 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 a 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 May 2 and 25, 2023 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 19, 2024
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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

²⁰ See *T.W.*, Docket No. 18-0821 (issued January 13, 2020).