

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On June 19, 2001 appellant, then a 51-year-old special agent/criminal investigator, filed an occupational disease claim (Form CA-2) alleging that he developed binaural hearing loss due to factors of his federal employment, including exposure to loud noise during firearms qualifications. He attributed his hearing loss to a lack of ear protection from noise when qualifying with his service weapon at the shooting range. Appellant noted that he first became aware of his condition and realized its relation to his federal employment on July 21, 2000. The employing establishment noted on the claim form that appellant had retired on December 30, 2000.

Appellant submitted a July 21, 2000 audiogram.

In a development letter dated December 6, 2001, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence needed to establish his claim. In a separate letter of even date, OWCP requested factual evidence from the employing establishment, including a description of any sources of noise exposure, the decibel and frequency level at the site, the duration of exposure, and all audiograms. It afforded both parties 30 days to submit the requested information.

On February 26, 2002 OWCP referred appellant, along with a statement of accepted facts (SOAF), and the medical record to Dr. Stuart Gherini, a Board-certified otolaryngologist serving as a second opinion physician, regarding the nature and extent of appellant's hearing loss and whether there was any causal relationship between appellant's diagnosed hearing loss and his accepted employment exposure.

In a report dated March 13, 2002, Dr. Gherini noted his review of the SOAF, history of injury, and medical evidence of record. Audiometric testing obtained on March 13, 2002 at the frequencies of 500, 1,000, 2,000, and 3,000 Hertz (Hz) revealed losses at 10, 5, 10, and 50 decibels (dBs) for the right ear, respectively; and 5, 0, 30, and 55 dBs for the left ear, respectively. Dr. Gherini diagnosed binaurally moderately severe, noise-induced, high frequency sensorineural hearing loss and binaural tinnitus. He opined that appellant's binaural sensorineural hearing loss was probably due to noise exposure encountered in his federal employment and that his binaural tinnitus was secondary to the sensorineural hearing loss. Dr. Gherini found however that appellant's binaural hearing loss was not ratable.

By decision dated April 18, 2002, OWCP accepted appellant's claim for binaural sensorineural hearing loss and tinnitus.

On May 16, 2002 OWCP referred the medical record and SOAF to Dr. David N. Schindler, 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.

On June 6, 2002 Dr. Schindler reviewed Dr. Gherini's report and concluded that appellant had a zero percent binaural neurosensory loss, zero percent right monaural loss, and a zero percent left monaural loss. He opined that hearing aids were not indicated.

By decision dated June 24, 2002, OWCP denied appellant's schedule award claim as he had no ratable hearing loss.

On July 5, 2002 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A hearing before an OWCP hearing representative was held on January 28, 2003.

In a report dated July 12, 2002, Dr. Brian E. Schindler, a DMA and Board-certified otolaryngologist, reviewed Dr. Gherini's report, and concluded that appellant had zero percent binaural neurosensory loss, zero percent right monaural loss, and a zero percent left monaural loss.

By decision dated March 24, 2003, OWCP's hearing representative affirmed the June 24, 2002 decision.

On October 6, 2003 appellant requested reconsideration. By decision dated October 15, 2003, OWCP denied his request for reconsideration of the merits of his claim.

A July 12, 2007 memorandum of telephone call (Form CA-110) indicated that appellant contacted OWCP and requested referral for additional audiometric testing.

On August 14, 2007 OWCP referred appellant, along with a SOAF and the medical record to Dr. David Kiener, a Board-certified otolaryngologist serving as a second opinion physician, regarding the nature and extent of appellant's hearing loss and the extent of his hearing loss and its relationship to his federal employment.

In his report dated September 10, 2007, Dr. Kiener reviewed appellant's history of employment, and agreed that workplace noise exposure at the employing establishment was sufficient to cause his hearing loss. He diagnosed binaural sensorineural hearing loss and binaural tinnitus due to work-related noise exposure. Dr. Kiener recommended hearing aids to treat appellant's condition. He also submitted an audiogram dated September 10, 2007.

In a November 14, 2007 report, Dr. Brian Schindler reviewed the medical evidence including Dr. Kiener's September 10, 2007 report and attached audiogram. He attributed the worsening of appellant's hearing to presbycusis due to the lack of any federal employment noise exposure since 2000.

By decision dated January 2, 2008, OWCP denied appellant's schedule award claim finding that his progressive hearing loss and tinnitus conditions were not causally related to the accepted work-related noise exposure, which would have ceased on December 31, 2000.

Audiometric testing was performed on April 13, 2018.

On January 12 and June 9, 2022 appellant filed a claim for compensation (Form CA-7) for a schedule award.

In a July 21, 2022 audiogram, Charles T. Sanders, Au.D., an audiologist, related that appellant reported a decreased ability to understand speech over the past few years, and denied tinnitus, otalgia, vertigo, or history of middle ear pathology. Appellant reported working as a

border patrol agent from 1975 to 2001 which required weapons training without hearing protection for many years. Dr. Sanders conducted audiometric testing, which revealed profound mixed hearing loss in the right ear and mild-to-severe sensorineural hearing loss in the left ear. He related that appellant's July 21, 2022 audiogram reflected hearing loss at 500, 1000, 2000, and 3000 Hz for the right ear of 35, 45, 60, and 75 db. For the left ear he related losses of 40, 55, 75, and 70 dBs. Dr. Sanders opined that appellant had a binaural "disability" of 44.7 percent.

On September 14, 2022 OWCP referred the medical record and SOAF to Dr. Jeffrey M. Israel, a 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 September 28, 2022, Dr. Israel reviewed the SOAF, history of injury and the medical evidence of record. He applied the audiometric data from Dr. Sanders to OWCP's standard for evaluation of 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 43.125 percent, a left monaural loss of 52.5 percent and a binaural hearing loss of 44.7 percent. Dr. Israel found July 21, 2022, the date of Dr. Sander's audiogram, to be the date of maximum medical improvement (MMI). He noted that Dr. Sanders made no mention of tinnitus in his report. Dr. Israel recommended hearing aids.

On November 18, 2022 OWCP referred appellant for additional audiometric and a second opinion examination by Dr. Barry C. Baron, a Board-certified otolaryngologist. A February 2, 2023 audiogram noted losses at the frequencies of 500, 1,000, 2,000, and 3,000 Hz. The right ear losses were recorded as 40, 45, 60, and 75 dBs; the left ear losses were recorded as 45, 55, 75, and 70 dBs'. In his February 3, 2023 report, Dr. Baron diagnosed appellant with binaural sensorineural hearing loss. He checked the box indicating his belief that binaural sensorineural hearing loss was due to noise exposure encountered within appellant's employment. In the audiological evaluation section of Dr. Baron's report, the monaural hearing impairment for the right ear was calculated as 45.0 percent, and the left ear hearing loss was calculated as 54.4 percent. Appellant's binaural hearing impairment was calculated as 46.6 percent. Dr. Baron found the date of MMI to be February 2, 2023. He recommended hearing aids.

On February 8, 2023 OWCP again referred the medical record and SOAF to Dr. Israel, OWCP's DMA, to determine the extent of appellant's hearing loss and permanent impairment due to his employment-related noise exposure. In a report dated February 10, 2023, Dr. Israel advised that he was unable to provide a supplemental report because no MMI audiogram had been provided for his review.

On June 9, 2023 OWCP referred the medical record and SOAF to Dr. Stephen Maturo, a DMA and Board-certified otolaryngologist, to determine the extent of appellant's hearing loss and permanent impairment due to his employment-related noise exposure.

On June 29, 2023 Dr. Maturo reviewed Dr. Baron's report and noted that appellant had retired in 2000. He related that an updated impairment rating based on appellant's current hearing

² A.M.A., *Guides* (6th ed. 2009)

loss was not consistent with appellant's occupational noise exposure. Dr. Maturo explained that appellant had been retired for over 20 years and occupational noise exposure did not progress once the noise exposure was removed. He concluded that appellant's worsening hearing loss was not related to his occupational noise exposure. Dr. Maturo opined that appellant's impairment rating should be based on records provided from 2002 as he retired in 2000. He determined that appellant had zero percent right monaural hearing loss, zero percent left monaural hearing loss, and zero percent binaural hearing loss. He recommended hearing aids.

By decision dated July 28, 2023, OWCP denied appellant's schedule award claim, finding that the evidence of record was insufficient to establish that he sustained a ratable hearing impairment because the progressive worsening of his hearing loss and tinnitus condition was not causally related to the accepted work-related noise exposure.

LEGAL PRECEDENT

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.⁵

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.⁶ 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.⁷ The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.⁸ 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 *Supra* note 2.

⁵ *T.B.*, Docket No. 23-0303 (issued August 11, 2023); *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).

⁶ A.M.A., *Guides* 250.

⁷ *Id.*

⁸ *Id.*

hearing loss.⁹ The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.¹⁰

ANALYSIS

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

OWCP referred appellant for a second opinion evaluation with Dr. Baron, who obtained audiometric data on February 2, 2023. In his February 3, 2023 report, Dr. Baron determined that appellant sustained work-related binaural hearing loss and calculated binaural hearing impairment of 46.6 percent, with monaural impairments of 54.4 percent on the left, and 45.0 percent on the right under the sixth edition of the A.M.A., *Guides*.

OWCP's DMA, Dr. Maturo, disagreed with Dr. Baron, noting that occupational hearing loss does not progress once a person is removed from the source of noise. He concluded that based on appellant's 2002 audiogram, he had no ratable hearing loss. As previously noted, a DMA's opinion that hearing loss due to hazardous noise exposure does not progress after noise exposure ceases must be supported by medical rationale.¹¹ The Board finds, however, that the DMA merely concluded that hearing loss does not progress after exposure to hazardous noise ends. The DMA did not offer a rationalized medical opinion explaining why appellant's hearing loss progression was not compensable, given the factual and medical evidence of record.¹²

When a DMA fails or neglects to provide rationale for a percentage of impairment specified, OWCP should request a clarification or supplemental report from the DMA.¹³ The Board finds that OWCP failed to request a clarification or supplemental report containing necessary rationalization from the DMA as to whether appellant had a progression of sensorineural hearing loss after 2000 due to his accepted employment-related hearing loss based upon the medical evidence of record including the report of Dr. Baron.

On remand OWCP shall request a supplemental report from the DMA, Dr. Maturo, which addresses, with the necessary medical rationale, whether appellant sustained a progression of hearing loss due to the accepted employment injury. Following this and such further development as deemed necessary, OWCP shall issue a *de novo* decision.

⁹ *Id.*

¹⁰ *T.B.*, *supra* note 5; *J.S.*, Docket No. 22-0274 (issued September 13, 2022); *D.R.*, Docket No. 20-1570 (issued April 14, 2021); *V.M.*, Docket No. 18-1800 (issued April 23, 2019).

¹¹ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010); *R.B.*, Docket No. 19-1466 (issued April 9, 2020); *W.H.*, Docket No. 13-1470 (issued January 6, 2014); *see also E.C.*, Docket No. 19-1007 (issued November 8, 2019; *Adelbert E Buzzell*, 34 ECAB 96 (1982).

¹² *Id.*

¹³ *Supra* note 11 at Chapter 2.808.6.f(2)(a).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the July 28, 2023 decision of the Office of Workers' Compensation Programs is set aside and this case is remanded for further proceedings consistent with this decision of the Board.

Issued: March 6, 2024
Washington, DC

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

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

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