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

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| **A.R., Appellant** | ) | |
| **and** | ) | **Docket No. 25-0129** |
| | ) | **Issued: March 3, 2025** |
| **DEPARTMENT OF HOMELAND SECURITY, U.S. CUSTOMS AND BORDER PROTECTION, U.S. BORDER PATROL, EL CENTRO SECTOR, Imperial, CA, 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
JANICE B. ASKIN, Judge

### ***JURISDICTION***

On November 21, 2024, appellant filed a timely appeal from an October 29, 2024 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

### ***ISSUE***

The issue is whether appellant has met his burden of proof to establish greater than 17 percent binaural hearing loss, for which he previously received a schedule award.

[1] 5 U.S.C. § 8101 *et seq.*

## ***FACTUAL HISTORY***

On December 20, 2023, appellant, then a 65-year-old retired border patrol agent, 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 hazardous noise throughout his 29 years of service from required weapons qualifications trainings and loud noise from gun ranges without being provided adequate protection. He noted that he first became aware of his hearing loss and realized its relationship to his federal employment on December 4, 2023.

Appellant provided a separate statement dated January 9, 2024, wherein he described his history of noise exposure at work since September 1986, which included exposure to weapons trainings, revolvers, shotguns, rifles, handguns, M4's, and explosives ammunitions during the span of his 29-year career. He reported that he retired from federal service on September 30, 2015, and was last exposed to hazardous employment-related gun range noise that year. Appellant reported that around November 2022, he began to have difficulty hearing, and also experienced a ringing sensation in his ear causing him to seek an evaluation with Dr. Anton Kushnaryov a Board-certified otolaryngologist, on October 3, 2023. This resulted in subsequent audiograms, which revealed hearing impairment.[2] Appellant reported no outside hobbies or activities that would expose him to loud noises.

On January 12, 2024, appellant filed a claim for compensation (Form CA-7) for a schedule award.

On March 13, 2024, OWCP referred appellant, along with the medical record, and a statement of accepted facts (SOAF), and a series of questions, to Dr. Jennifer MacEwan, a Board-certified otolaryngologist, for an audiogram and second opinion examination.

In a March 29, 2024 report, Dr. MacEwan reviewed the SOAF, history of injury, and the medical evidence of record. She indicated that there was no significant variation from the SOAF. Dr. MacEwan obtained audiology testing on that date, which revealed the following decibel (dB) losses at 500, 1,000, 2,000, and 3,000 Hertz (Hz): 15, 10, 25, and 35 for the right ear and 20, 10, 25, and 40 for the left ear. Utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),[3] she applied OWCP's standard for evaluating hearing loss to the March 29, 2024 audiogram, and determined that appellant had zero percent right monaural hearing loss and zero percent left monaural hearing loss, and two percent binaural hearing loss for mild tinnitus. Dr. MacEwan noted that appellant's hearing was normal at the start of his federal employment, which resulted in bilateral sensorineural hearing loss from his federal employment-related noise exposure. She reported that appellant complained of tinnitus when leaving work after significant noise exposure. Appellant explained that he was unsure when his bilateral nonpulsatile tinnitus started and usually only experiences tinnitus when it is quiet. Dr. MacEwan diagnosed bilateral sensorineural hearing loss and tinnitus causally related to noise exposure at work. She completed a tinnitus handicap inventory (THI) and rated the tinnitus

[2] The record contains audiograms dated December 4, 2023, and January 10, 2024 by Dr. Kushnaryov.

[3] A.M.A., *Guides* (6th ed. 2009).

diagnosis at two percent based on a 28/100 score. Dr. MacEwan concluded that appellant reached maximum medical improvement (MMI) on March 29, 2024.

On April 25, 2024, Dr. Jeffrey M. Israel, a Board-certified otolaryngologist serving as an OWCP district medical adviser (DMA), reviewed Dr. MacEwan's March 29, 2024 report. He referred to the sixth edition of the A.M.A., *Guides*,[4] and applied OWCP's standard for evaluating hearing loss to the March 29, 2024 audiogram, and determined that appellant had zero percent right monaural hearing loss and zero percent left monaural hearing loss, noting that a tinnitus award of two percent could not be given as there was no ratable binaural hearing loss. Dr. Israel reported appellant's right ear hearing loss of 15, 10, 25, and 35 dBs at 500, 1,000, 2,000, and 3,000 Hz, respectively, which totaled 85, and divided by 4, to find an average of 21.25 dBs. After subtracting the 25 dB fence, he multiplied the remaining 0 balance by 1.5 to calculate zero percent right ear monaural hearing loss. For the left ear, Dr. Israel added appellant's hearing loss of 20, 10, 25, and 40 dBs at 500, 1,000, 2,000, and 3,000 Hz, respectively, which totaled 95, and divided by 4 to find an average of 23.75 dBs. 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. MacEwan's calculations, other than her rating for two percent binaural hearing loss for tinnitus. Dr. Israel noted that a tinnitus award cannot be rendered when there is zero percent binaural hearing impairment as stipulated on page 249 of the A.M.A., *Guides*.[5] He recommended yearly audiograms, use of noise protection, and hearing aids for hearing loss tinnitus. Dr. Israel determined that appellant had reached MMI on March 29, 2024, the date of the most recent audiogram and Dr. MacEwan's examination.

On May 22, 2024, OWCP requested Dr. MacEwan review Dr. Israel's April 25, 2024 report to determine if she agreed with his assessment.

By decision dated May 22, 2024, OWCP accepted appellant's claim for bilateral sensorineural hearing loss and bilateral tinnitus.

In a May 29, 2024 report, Dr. MacEwan noted his review of Dr. Israel's April 25, 2024 report and agreed with his assessment of zero percent binaural hearing loss.

By decision dated June 28, 2024, 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 July 26, 2024, appellant requested reconsideration.

In support thereof, appellant submitted a July 24, 2024 audiogram, wherein Dr. Kushnaryov reported that testing revealed mild-to-severe mid-to-high frequency sloping, and sensorineural loss of auditory sensitivity with excellent speech discrimination. The audiogram

[4] *Id.*

[5] *Id.* at 249.

testing at frequency levels of 500, 1,000, 2,000, and 3,000 Hz revealed dB losses of 25, 30, 40, and 45 for the right ear and dB losses of 25, 25, 40, and 50 for the left ear, respectively.

On August 7, 2024, OWCP requested that Dr. Israel, the DMA, review Dr. MacEwan's March 29 and May 29, 2024 reports to determine if he agreed with her assessment. It also requested he review the updated July 24, 2024 audiogram to determine if it changed his opinion on permanent impairment of appellant's hearing.

In an August 13, 2024 report, Dr. Israel noted review of Dr. MacEwan's March 29 and May 29, 2024 reports, as well as Dr. Kushnaryov's July 24, 2024 audiogram. When reviewing the July 24, 2024 audiogram, he noted that it was not clear how appellant's hearing could have dropped so significantly in just four months when compared to the March 29, 2024 audiogram. Utilizing the sixth edition of the A.M.A., *Guides*,[6] Dr. Israel applied OWCP's standard for evaluating hearing loss to the newly updated July 24, 2024 audiogram, and determined that appellant had 15 percent right monaural hearing loss and 15 percent left monaural hearing loss, and 17 percent binaural hearing loss for mild tinnitus. He reported appellant's right ear hearing loss of 25, 30, 40, and 45 dBs at 500, 1,000, 2,000, and 3,000 Hz, respectively, which totaled 140, and divided by 4, to find an average of 35 dBs. After subtracting the 25 dB fence, Dr. Isarel multiplied the remaining 0 balance by 1.5 to calculate 15 percent right ear monaural hearing loss. For the left ear, he added appellant's hearing loss of 25, 25, 40, and 50 dBs at 500, 1,000, 2,000, and 3,000 Hz, respectively, which totaled 140, and divided by 4 to find an average of 35 dBs. After subtracting the 25 dB fence, Dr. Israel multiplied the remaining 0 balance by 1.5 to calculate 15 percent left ear monaural hearing loss. He then calculated the binaural hearing loss by multiplying the right ear loss of 15 percent by five, adding the 15 percent left ear loss, and dividing this sum by six, which resulted in 15 percent binaural hearing loss. Dr. Israel arrived at a total of 17 percent binaural hearing loss after adding an additional two percent impairment for tinnitus due to mild symptoms based on the THI score.

On September 12, 2024, OWCP requested that Dr. Israel provide a supplemental report clarifying his opinion regarding comments made pertaining to the drop in appellant's hearing when comparing recent audiograms.

In a follow-up September 17, 2024 report, Dr. Israel clarified that his April 25, 2024 report calculated zero percent binaural hearing impairment, which negated a two percent tinnitus award, whereas his August 13, 2024 report provided for 17 percent total hearing impairment for which two percent was included due to tinnitus. He further explained that the first impairment rating was based on a March 29, 2024 audiogram, while appellant's second impairment rating for 17 percent binaural hearing loss was based on a subsequent July 24, 2024 audiogram, which demonstrated a drop in hearing. Dr. Israel noted that both audiograms and calculations were good, and the drop in hearing could be nothing more than continued sensorineural hearing loss due to long-standing acoustic trauma.

By decision dated October 28, 2024, OWCP vacated its June 28, 2024 decision and approved appellant's claim for a schedule award for hearing loss impairment.

[6] *Id.*

By decision dated October 29, 2024, OWCP granted appellant a schedule award for 17 percent binaural hearing loss with tinnitus. The award ran for 34 weeks, for the period July 24, 2024 through March 18, 2025, and was based on the impairment ratings of Drs. Kushnaryov and Israel.

## ***LEGAL PRECEDENT***

The schedule award provisions of FECA,[7] and its implementing federal regulations,[8] 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 a determination is a matter, which rests in the 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. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*, published in 2009.[9] The Board has approved the use by OWCP of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.[10]

A claimant seeking compensation under FECA has the burden of proof to establish the essential elements of his or her claim.[11] With respect to a schedule award, it is the claimant's burden of proof to establish permanent impairment of a scheduled member or function of the body as a result of his or her employment injury.[12]

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 cycles per second, the losses at each frequency are added up and averaged. 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.[13] The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss. The binaural loss 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

[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404.

[9] For decisions issued after May 1, 2009, the sixth edition of the A.M.A., *Guides* is used. A.M.A., *Guides* (6th ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *see also id.* at Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

[10] *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

[11] *D.H.*, Docket No. 20-0198 (issued July 9, 2020); *John W. Montoya*, 54 ECAB 306 (2003).

[12] *R.R.*, Docket No. 19-0750 (issued November 15, 2019); *Edward Spohr*, 54 ECAB 806, 810 (2003); *Tammy L. Meehan*, 53 ECAB 229 (2001).

[13] *See* A.M.A., *Guides* 250.

binaural hearing loss. The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.[14]

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.[15] If tinnitus interferes with activities of daily living, including sleep, reading (and other tasks requiring concentration), enjoyment of quiet recreation and emotional well-being, up to five percent may be added to a measurable binaural hearing impairment.[16]

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to OWCP's medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified.[17] It may follow the advice of its medical adviser or consultant where he or she has properly utilized the A.M.A., *Guides*.[18]

## ***ANALYSIS***

The Board finds that appellant has not met his burden of proof to establish greater than 17 percent binaural hearing loss, for which he previously received a schedule award.

In reports dated April 25, August 13, and September 17, 2024, Dr. Israel, serving as the DMA, reviewed Dr. MacEwan's March 29 and May 29, 2024 reports as well as Dr. Kushnaryov's July 24, 2024 audiogram. Utilizing the findings from the most recent July 24, 2024 audiogram, he indicated that testing at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz revealed losses of 25, 30, 40, and 45 dBs at 500, 1,000, 2,000, and 3,000 Hz, respectively, which totaled 140, and divided by 4, to find an average of 35 dBs. After subtracting the 25 dB fence, Dr. Israel multiplied the remaining 0 balance by 1.5 to calculate 15 percent right ear monaural hearing loss. For the left ear, he added appellant's hearing loss of 25, 25, 40, and 50 dBs at 500, 1,000, 2,000, and 3,000 Hz, respectively, which totaled 140, and divided by 4 to find an average of 35 dBs. After subtracting the 25 dB fence, Dr. Israel multiplied the remaining 0 balance by 1.5 to calculate 15 percent left ear monaural hearing loss. He then calculated the binaural hearing loss by multiplying the right ear loss of 15 percent by five, adding the 15 percent left ear loss, and dividing this sum by six, which resulted in 15 percent binaural hearing loss. Following the rating protocols, Dr. Israel also allotted an additional two percent for tinnitus based on the completed THI questionnaire yielding a score of 28, Grade 2 handicap listed as mild tinnitus, for a total permanent impairment rating of 17 percent binaural hearing loss.

[14] *See E.S.*, 59 ECAB 249 (2007); *Donald Stockstad*, 53 ECAB 301 (2002), *petition for recon. granted* (modifying prior decision), Docket No. 01-1570 (issued August 13, 2002).

[15] *See* A.M.A., *Guides* 249.

[16] *Id*. *R.H.*, Docket No. 10-2139 (issued July 13, 2011); *see also Robert E. Cullison*, 55 ECAB 570 (2004).

[17] *See D.J.*, Docket No. 19-0352 (issued July 24, 2020).

[18] *See Ronald J. Pavlik*, 33 ECAB 1596 (1982).

The Board finds that Dr. Israel's reports 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*.[19] Utilizing the reports of Dr. MacEwan and Dr. Kushnaryov, Dr. Israel properly applied the standards for rating hearing loss under the A.M.A., *Guides* to the March 29 and July 24, 2024 audiograms and correctly found that appellant had 17 percent binaural hearing loss.[20] The medical reports establish that appellant has 17 percent binaural hearing loss.[21]

The Board, therefore, finds that appellant has not met his burden of proof to establish greater than 17 percent binaural hearing loss, for which he previously received a schedule award.[22]

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.

## ***CONCLUSION***

The Board finds that appellant has not met his burden of proof to establish greater than 17 percent binaural hearing loss, for which he previously received a schedule award.

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

[20] *R.L.*, Docket No. 23-0479 (issued August 8, 2023).

[21] *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); *J.H.*, Docket No. 08-24329; *Robert E. Cullison*, 55 ECAB 570 (2004).

[22] *A.G.*, Docket No, 22-0582 (issued October 4, 2022).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the October 29, 2024 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 3, 2025
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board