

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

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<p><b>R.L., Appellant</b></p> <p>and</p> <p><b>DEPARTMENT OF HOMELAND SECURITY, U.S. CUSTOMS AND BORDER PROTECTION, U.S. BORDER PATROL, Pharr, TX, Employer</b></p>	)	<b>Docket No. 25-0834</b>
	)	<b>Issued: November 26, 2025</b>
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*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 August 14, 2025 appellant filed a timely appeal from a July 17, 2025 merit decision and a July 31, 2025 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

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<sup>1</sup> The Board notes that, during the pendency of this appeal, OWCP issued an August 19, 2025 decision, which denied modification of the July 17, 2025 schedule award decision. The Board concludes that OWCP's August 19, 2025 decision is null and void as the Board and OWCP may not simultaneously exercise jurisdiction over the same underlying issue in a case on appeal. 20 C.F.R. §§ 501.2(c)(3), 10.626; *see A.B.*, Docket No. 21-1170 (issued August 28, 2023); *J.W.*, Docket No. 19-1688, n.1 (issued March 18, 2020); *Order Remanding Case*, *J.A.*, Docket No. 19-0981, n.2 (issued December 30, 2019); *Russell E. Lerman*, 43 ECAB 770 (1992); *Douglas E. Billings*, 41 ECAB 880 (1990).

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that, following the July 31, 2025 decision, OWCP received additional evidence. The Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

## **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).

## **FACTUAL HISTORY**

On December 26, 2024 appellant, then a 57-year-old former customs and border protection officer, filed an occupational disease claim (Form CA-2) alleging that he developed binaural hearing loss and binaural tinnitus causally related to factors of his federal employment. He noted that he first became aware of his condition on December 15, 2015, and realized its relationship to his federal employment on November 7, 2024. The employing establishment indicated that appellant had stopped work on August 3, 2009.

Appellant provided a narrative statement received on December 26, 2024. He explained that he had been exposed to hazardous noise at work from firearms training, quarterly firearms requalification, vehicle engines, and barking K-9 unit dogs.

In support of his claim, appellant submitted a June 20, 2002 employing establishment audiogram performed as part of a hearing conservation program, which revealed decibel (dB) losses at 500, 1,000, 2,000, and 3,000 Hertz (Hz).

On January 16, 2025 OWCP referred appellant, together with the case record, a statement of accepted facts (SOAF), and a series of questions to Dr. Andreas Kaden, a Board-certified otolaryngologist, for an audiogram and second opinion evaluation.

In a report dated April 14, 2025, Dr. Kaden reviewed an audiogram obtained that day which revealed the following dB losses at 500, 1,000, 2,000, and 3,000 Hz: 25, 25, 20, and 30 for the right ear, and 30, 25, 25, and 30 for the left ear, respectively. He completed a tinnitus handicap inventory (THI) worksheet with a score of 50. Dr. Kaden diagnosed binaural sensorineural hearing loss and binaural tinnitus. He opined that these conditions were caused by hazardous noise exposure in the course of appellant's federal employment. In an April 14, 2025 worksheet, Dr. Kaden applied OWCP's standard for evaluating hearing loss to the April 14, 2025 audiogram and determined that appellant had 3.75 percent monaural hearing impairment on the left, or .63 percent binaural hearing impairment, with an additional 3 percent impairment due to tinnitus, to equal a 3.63 percent binaural hearing loss. He concluded that appellant reached maximum medical improvement (MMI) on April 14, 2025. Hearing aids were recommended.

By decision dated April 22, 2025, OWCP accepted the claim for binaural sensorineural hearing loss and binaural tinnitus.

On April 22, 2025 OWCP referred the case record, along with a SOAF, to Dr. Jeffrey M. Israel, a Board-certified otolaryngologist serving as an OWCP district medical adviser (DMA), to determine whether the accepted conditions resulted in permanent impairment.

On April 23, 2025 appellant filed a claim for compensation (Form CA-7) for a schedule award.

In an April 29, 2025 report, Dr. Israel reviewed the SOAF and the medical records, including Dr. Kaden's April 14, 2025 report and audiogram. He noted that testing at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz revealed dB losses of 25, 25, 20, and 30 for the right ear and dB losses of 30, 25, 25, and 30 for the left ear, respectively. Dr. Israel opined that the pattern of appellant's hearing loss was suggestive of sensorineural hearing loss "due at least in part to noise-induced work-related acoustic trauma." He applied OWCP's standardized procedures to his evaluation. Referencing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),<sup>4</sup> Dr. Israel totaled the losses for the right ear at 100 dBs and then divided by 4 to obtain the average hearing loss of 0 dBs, to equal 0 percent monaural hearing loss. For the left ear, he totaled the losses at 110 dBs. After subtracting the 25 dB fence, Dr. Israel multiplied the balance of 2.5 percent by 1.5 to equal 3.75 percent left ear monaural hearing loss. He multiplied the lesser right ear loss of zero percent by 5, added the 3.75 percent left ear loss, and divided this sum by 6 to find .6 percent binaural hearing loss. Dr. Israel found an additional three percent impairment due to tinnitus, which he added to the binaural hearing loss, for a total award of 3.6 percent. He opined that appellant reached MMI on April 14, 2025. Dr. Israel recommended authorization for hearing aids.

In a development letter dated June 24, 2025, OWCP requested that the employing establishment provide the date on which appellant was last exposed to hazardous noise in the performance of duty and his pay rate on that date. On June 27, 2025 the employing establishment responded that appellant was last exposed to hazardous noise no later than October 25, 2009, the date he resigned, at which time his annual salary at GS-13, Step 5 was \$91,123.00, or \$1,752.37 a week.

By decision dated July 17, 2025, OWCP granted appellant a schedule award for 4 percent binaural hearing loss, based on an effective pay rate of \$1,752.37 a week as of October 25, 2009. The period of the award ran for eight weeks from April 14 through August 8, 2025.

On July 24, 2025 appellant requested reconsideration. He contended that constant tinnitus had degraded his sleep, concentration, and emotional health, and would remain a lifelong condition. Appellant submitted excerpts from medical literature regarding tinnitus. Additionally, he contended that the schedule award incorrectly utilized a 2009 pay rate and should have been based on a 2025 pay rate, for which he provided a salary table.

By decision dated July 31, 2025, OWCP denied appellant's request for reconsideration of the merits of the claim, pursuant to 5 U.S.C. § 8128(a).

### **LEGAL PRECEDENT -- ISSUE 1**

The schedule award provisions of FECA<sup>5</sup> and its implementing federal regulation,<sup>6</sup> 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 way 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.

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<sup>4</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

<sup>5</sup> *Supra* note 1.

<sup>6</sup> 20 C.F.R. § 10.404.

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.<sup>7</sup> 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.<sup>8</sup>

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 added up and averaged.<sup>9</sup> Then, the fence of 25 dBs is deducted because, as the A.M.A., *Guides* points out, losses below 25 decibels result in no impairment in the ability to hear everyday speech under everyday conditions.<sup>10</sup> The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.<sup>11</sup> 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 binaural hearing loss.<sup>12</sup> The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.<sup>13</sup>

The A.M.A., *Guides* provide that 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 measurable binaural hearing impairment.<sup>14</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant has not established greater than four percent binaural hearing loss, for which he previously received a schedule award.

OWCP referred appellant to Dr. Kaden for a second opinion examination to evaluate his hearing loss. In an April 14, 2025 report, Dr. Kaden determined that appellant had 3.5 percent hearing loss in the left ear, converted to a .63 percent binaural hearing loss. He added three percent

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<sup>7</sup> For decisions issued after May 1, 2009, the sixth edition of the A.M.A., *Guides* is used. A.M.A., *Guides*, (6<sup>th</sup> ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

<sup>8</sup> *J.M.*, Docket No. 24-0833 (issued March 20, 2024); *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

<sup>9</sup> *See* Section 11.2, Hearing and Tinnitus, A.M.A., *Guides* 248-51 (6<sup>th</sup> ed. 2009).

<sup>10</sup> *Id.* at 250.

<sup>11</sup> *Id.* at 250-51.

<sup>12</sup> *Id.* at 251.

<sup>13</sup> *See D.R.*, Docket No. 20-1570 (issued April 14, 2021); *B.E.*, Docket No. 18-1785 (issued April 1, 2019).

<sup>14</sup> A.M.A., *Guides* 249.

binaural hearing impairment due to tinnitus, based on a THI questionnaire score of 50, to equal a 3.63 percent binaural hearing loss.

On April 29, 2025 Dr. Israel, serving as the DMA, reviewed Dr. Kaden's April 14, 2025 report. Dr. Israel noted that testing at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz revealed dB losses of 25, 25, 20, and 30 for the right ear and dB losses of 30, 25, 25, and 30 for the left ear, respectively. The losses for the right ear were totaled at 100 dBs and then divided by 4 to obtain the average hearing loss of 0 dBs. The losses for the left ear were totaled at 110 dBs and then divided by 4 to obtain the average hearing loss of 27.5 dBs. After subtracting the 25 dB fence, both the right ear and left ear were multiplied by 1.5 respectively to find 0 percent right ear monaural hearing loss and 3.75 percent left ear monaural hearing loss. Multiplying the lesser right ear loss of 0 percent by 5, adding the 3.75 percent left ear loss, and dividing this sum by 6 resulted in .6 percent binaural hearing loss.<sup>15</sup> Following the rating protocols, Dr. Israel reviewed Dr. Kaden's calculations and concurred with his finding of an additional 3 percent impairment for tinnitus, for a total binaural hearing loss of 3.6 percent.

The Board finds that Dr. Kaden's April 14, 2025 report and audiogram 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*.<sup>16</sup> Utilizing this report, Dr. Israel properly applied the standards for rating hearing loss under the A.M.A., *Guides* to the April 14, 2025 audiogram and found that appellant had .6 percent binaural hearing loss, with an additional 3 percent impairment due to bilateral tinnitus. The medical reports of Drs. Kaden and Israel constitute the weight of the medical evidence and establish that appellant has 3.6 percent binaural hearing loss which, in accordance with OWCP policy, is rounded up to 4 percent.<sup>17</sup>

As the medical evidence of record is insufficient to establish greater than the four percent binaural hearing loss previously awarded, 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.

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<sup>15</sup> *R.B.*, Docket No. 25-0532 (issued June 6, 2025); *C.G.*, Docket No. 23-0916 (issued March 11, 2024); *A.L.*, Docket No. 21-1233 (issued January 31, 2022).

<sup>16</sup> See *R.B.*, *id.*; *C.G.*, *id.*; *J.M.*, Docket No. 18-1387 (issued February 1, 2019).

<sup>17</sup> See *R.B.*, *id.*; *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 6 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).

## **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.<sup>18</sup>

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.<sup>19</sup>

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.<sup>20</sup> If it chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>21</sup> 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.<sup>22</sup>

## **ANALYSIS -- ISSUE 2**

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

With his request for reconsideration, appellant provided a statement wherein he alleged that his schedule award should be paid at a 2025 pay rate. The Board finds that this is a new and relevant legal argument regarding the underlying issue of whether OWCP properly determined appellant's pay rate for schedule award purposes. As appellant has met the criteria for a merit review under the second above-noted requirement of 20 C.F.R. § 10.606(b)(3), the Board finds that OWCP improperly denied appellant's request for reconsideration.<sup>23</sup> The Board shall, therefore, remand the case for a merit review regarding the pay rate issue, followed by an appropriate decision.

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<sup>18</sup> 5 U.S.C. § 8128(a); *see M.S.*, Docket No. 19-1001 (issued December 9, 2019); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *W.C.*, 59 ECAB 372 (2008).

<sup>19</sup> 20 C.F.R. § 10.606(b)(3); *see L.D.*, *id.*; *see also K.L.*, Docket No. 17-1479 (issued December 20, 2017); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

<sup>20</sup> *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. 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.

<sup>21</sup> *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

<sup>22</sup> *Id.* at § 10.608(b); *M.S.*, Docket No. 19-0291 (issued June 21, 2019); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

<sup>23</sup> *Supra* note 19; *see also L.C.*, Docket No. 23-0986 (issued December 8, 2023).

**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 improperly 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 July 17, 2025 merit decision of the Office of Workers' Compensation Programs is affirmed. The July 31, 2025 decision of the Office of Workers' Compensation Programs is reversed, and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: November 26, 2025  
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