

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

S.M., Appellant	)	
	)	
and	)	<b>Docket No. 21-0648</b>
	)	<b>Issued: May 4, 2023</b>
<b>DEPARTMENT OF JUSTICE, FEDERAL</b>	)	
<b>BUREAU OF INVESTIGATION, Providence, RI,</b>	)	
<b>Employer</b>	)	
	)	

*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 March 20, 2021 appellant filed a timely appeal from a March 10, 2021 merit 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.

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<sup>1</sup> The Board notes that, following the March 10, 2021 decision, OWCP received additional evidence. However, 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.*

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

## ISSUE

The issue is whether appellant has met his burden of proof to establish ratable hearing loss, warranting a schedule award.

## FACTUAL HISTORY

On September 16, 2020 appellant, then a 55-year-old criminal investigator, filed an occupational disease claim (Form CA-2) alleging that he developed hearing loss due to factors of his federal employment, including the use of firearms. He indicated that he first became aware of his condition and of its relation to his federal employment on March 21, 2019. Appellant explained that he was undergoing a physical examination conducted by the employing establishment on March 21, 2019 when he was informed of his hearing loss. He did not stop work.

Appellant submitted a March 21, 2019 report wherein Dr. Richard Brody, Board-certified in occupational medicine, checked a box to indicate that appellant's examination returned abnormal findings. Dr. Brody noted mild high-frequency hearing loss. In an audiogram history/report, he observed that appellant's current occupational noise exposure consisted of 20 hours per week of impulse noise from gun shots. Dr. Brody noted that a March 21, 2019 audiogram revealed decibel (dB) losses at 500, 1,000, 2,000, and 3,000 Hertz (Hz) of 5, 10, 25, and 20, respectively, for the right ear and 0, 0, 10, and 15, respectively, for the left ear.

Appellant submitted an undated statement detailing his prior service with the United States Army. He explained that he was required to undergo a medical screening prior to his hiring at the employing establishment and that he was hired without a medical waiver, indicating that his hearing was in normal range upon his offer of employment. Appellant recounted his history of employment with the employing establishment and firearms training and qualifications, where he was certified to fire various sniper rifles and other weapons in addition to his normal firearm qualifications. He noted that he always wore hearing protection provided by the employing establishment when firing his weapons. Appellant further explained that his hearing equipment would shift on many occasions while performing Special Weapons and Tactics (SWAT) team maneuvers, such as firing his weapon while moving, leaping obstacles during live fire training, crawling, breaching barriers, physical altercations, deploying flash bang grenades and numerous other strenuous activities. He recounted several instances in which he would experience ringing in his ears, headaches and temporary losses of hearing. Appellant's sniper training also required him to fire many rounds over long periods of time on a monthly basis. He noted that this training also caused him to experience headaches and earaches. Appellant never sought medical treatment during these times as he never considered that the effects of his training would be permanent. He indicated that on several occasions he was informed that he was showing signs of hearing loss during his physical examinations. Appellant thereafter left the SWAT team in January 2003 and noted that his hearing loss persisted and grew worse. After attending his March 21, 2019 fitness for duty examination, he learned that his physical examination was showing mild-to-moderate hearing loss numbers.

Appellant also submitted a position description of his duties as a special agent.

By development letter dated September 29, 2020, 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 provided a questionnaire for his completion. In a separate development letter of even date, OWCP requested that the employing establishment provide additional information regarding appellant's exposure to noise due to factors of his federal employment, including comments from a knowledgeable supervisor regarding the accuracy of his statements. It afforded both parties 30 days to respond.

Appellant submitted audiogram results dated April 8, 2009 to March 2, 2016.

In response to OWCP's questionnaire, appellant submitted an October 5, 2020 statement in which he detailed his history of employment and noise exposure at each job. He indicated that he did not have any previous hearing issues and that he had no hobbies outside of work that would have contributed to his condition.

In an October 6, 2020 statement, R.C., a supervisory special agent, reviewed appellant's Form CA-2 and acknowledged the statements he provided on his claim form.

On January 11, 2021 OWCP referred appellant, along with the case record, a statement of accepted facts (SOAF) and an otologic evaluation questionnaire, to Dr. Jeffrey Byer, a Board-certified otolaryngologist serving as a second opinion physician, regarding the nature, extent, and causal relationship of his hearing loss.

In his February 18, 2021 report, Dr. Byer reviewed the SOAF and appellant's employment history. He opined that appellant sustained work-related bilateral sensorineural hearing loss and bilateral tinnitus. Dr. Byer recommended that appellant undergo a brain magnetic resonance imaging (MRI) scan and receive acoustic protection and hearing aids. An updated audiogram dated February 18, 2021 revealed dB losses at 500, 1,000, 2,000, and 3,000 Hz of 15, 15, 30, and 30, respectively, for the right ear and 10, 10, 15, and 20, respectively, for the left ear. Dr. Byer calculated zero percent hearing impairment of the left ear, 0.75 percent hearing impairment of the right ear, using a tinnitus impairment chart to allow for a three percent tinnitus impairment in each ear. He found a total of zero percent binaural hearing impairment. Dr. Byer diagnosed bilateral sensorineural hearing loss, right greater than left.

On February 25, 2021 OWCP referred the medical record and SOAF to Dr. Jeffrey Israel, a Board-certified otolaryngologist serving as a district medical adviser (DMA), for calculation of appellant's percentage of hearing loss.

On March 3, 2021 Dr. Israel reviewed the medical evidence, including Dr. Byer's report, the February 18, 2021 audiogram, and the SOAF. He concluded that, in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),<sup>3</sup> appellant had zero percent monaural hearing loss in each ear and zero percent binaural hearing loss. Dr. Israel disagreed with Dr. Byer's calculations, noting that negative numbers could not be computed for monaural or bilateral hearing loss as zero is the lowest calculation that could be recognized. He further disagreed with Dr. Byer's three percent tinnitus

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<sup>3</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

rating, noting that a tinnitus award cannot be rendered when there is a zero percent binaural hearing loss. Dr. Israel recommended yearly audiograms, noise protection for appellant's ears, a hearing aid for his right ear and tinnitus masking bilaterally. He determined that appellant reached maximum medical improvement (MMI) on February 18, 2021, the date of the latest audiogram in the records and sued by Dr. Byer to determine the current hearing impairment.

By decision dated March 10, 2021, OWCP accepted appellant's claim for sensorineural hearing loss, left ear, sensorineural hearing loss, right ear, and bilateral tinnitus. In a separate decision of even date, it 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 for schedule award purposes.

### **LEGAL PRECEDENT**

The schedule award provisions of FECA<sup>4</sup> and its implementing regulations<sup>5</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 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*<sup>6</sup> has been adopted by OWCP for evaluating schedule losses and the Board has concurred in such adoption.<sup>7</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 averaged.<sup>8</sup> 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.<sup>9</sup> The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.<sup>10</sup> 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

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<sup>4</sup> 5 U.S.C. § 8107.

<sup>5</sup> 20 C.F.R. § 10.404.

<sup>6</sup> *Supra* note 3.

<sup>7</sup> *P.H.*, Docket No. 20-0633 (issued October 20, 2020); *V.M.*, Docket No. 18-1800 (issued April 23, 2019).

<sup>8</sup> *Supra* note 3 at 250.

<sup>9</sup> *Id.*; *C.D.*, Docket No. 18-0251 (issued August 1, 2018).

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

hearing loss.<sup>11</sup> The Board has concurred in OWCPs' adoption of this standard for evaluating hearing loss.<sup>12</sup>

### ANALYSIS

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

OWCP properly referred appellant to Dr. Byer for a second opinion examination to evaluate his hearing loss. In his February 18, 2021 report, Dr. Byer noted appellant's audiogram findings and concluded that his binaural sensorineural hearing loss was due to his workplace noise exposures. He determined that appellant had zero percent hearing impairment of the left ear, 0.75 percent hearing impairment of the right ear, allowing a three percent tinnitus impairment rating and zero percent binaural hearing loss.

On March 3, 2021 the DMA reviewed Dr. Byer's report and concurred that appellant had zero percent monaural hearing loss in each ear. Testing at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz revealed losses of 15, 15, 30, 30 dBs, respectively, for the right ear, and 10, 10, 15, and 20 dBs, respectively, for the left ear. The DMA totaled the dB losses to 90 on the right and 55 on the left. These values, when divided by four, resulted in an average hearing loss of 22.5 on the right and 13.75 on the left, which when reduced by the 25 dB fence, were reduced to zero. When multiplied by 1.5, the resulting monaural loss in each ear was zero percent. The DMA, therefore, found a total of zero percent binaural hearing loss.

The Board finds that the DMA properly concluded that appellant did not have ratable permanent impairment of his hearing warranting a schedule award.<sup>13</sup> Although appellant has accepted employment-related hearing loss, it is not sufficiently severe to be ratable for schedule award purposes.<sup>14</sup>

The Board notes that, while Dr. Byer found three percent hearing loss in each ear due to tinnitus, the DMA properly explained that because appellant's hearing loss was not ratable, he was not entitled to a schedule award for tinnitus. The A.M.A., *Guides* provide that, if tinnitus interferes with activities of daily living (ADLs), 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 loss.<sup>15</sup> A schedule award for tinnitus, however, is not payable unless the medical evidence establishes that the condition caused or contributed to a ratable hearing loss.<sup>16</sup> As such, the Board has held that, in the absence of ratable hearing loss, a

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<sup>11</sup> *Id.*

<sup>12</sup> *V.M.*, *supra* note 7.

<sup>13</sup> *B.E.*, Docket No. 18-1785 (issued April 1, 2019).

<sup>14</sup> *W.T.*, Docket No. 17-1723 (issued March 20, 2018); *E.D.*, Docket No. 11-0174 (issued July 26, 2011).

<sup>15</sup> *Id.* See also *Robert E. Cullison*, 55 ECAB 570 (2004).

<sup>16</sup> *J.G.*, Docket No. 19-0891 (issued October 1, 2019).

schedule award for tinnitus is not appropriate.<sup>17</sup> Accordingly, the Board finds that appellant is not entitled to a schedule award for tinnitus.<sup>18</sup>

As the medical evidence of record is insufficient to establish ratable hearing loss under OWCP's standardized procedures, the Board finds that appellant has not met his burden of proof.<sup>19</sup>

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 ratable hearing loss, warranting a schedule award.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the March 10, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 4, 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

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<sup>17</sup> *Id.* See also *D.G.*, Docket No. 16-1486 (issued December 16, 2016).

<sup>18</sup> *G.G.*, Docket No. 18-0566 (issued October 2, 2018).

<sup>19</sup> *L.H.*, Docket No. 18-0696 (issued November 28, 2018).