

FACTUAL HISTORY

On November 30, 2012 appellant, then a 56-year-old border patrol firearms instructor, filed an occupational disease claim alleging a permanent hearing loss due to factors of his federal employment. He first became aware of his condition and realized that it was caused or aggravated by his employment on October 8, 2010. Appellant did not stop work.

OWCP received employment records that included hearing tests and audiogram results. It also received a December 19, 2012 audiogram from a private audiologist which showed hearing levels of 25, 30, 35 and 35 decibels for the right ear and 25, 30, 30 and 45 decibels for the left ear at the frequencies of 500, 1,000, 2,000 and 3,000 hertz (Hz). A physician did not sign the report. Appellant provided a statement in which he noted that he was exposed to loud noise created by different types of firearms. He was a firearms instructor who, every quarter, spent three weeks being exposed to loud noise from firearms for eight hours a day. Appellant noted that, in 2008, he was certified as an "Armorer" which contributed to his ear afflictions, loss of hearing and ringing in his ears which kept him awake at night.

By letter dated April 12, 2013, OWCP referred appellant for a second opinion evaluation, together with a statement of accepted facts, a set of questions and the medical record, to Dr. Ronald Blumenfeld, a Board-certified otolaryngologist.² In a May 1, 2013 report, Dr. Blumenfeld noted findings on examination and noted that appellant's audiogram that day was similar to an audiogram from December 19, 2012, but completely different from tests obtained on April 29, 2009 and July 22, 2010. Appellant had a sensorineural loss in excess of what would normally be expected on the basis of presbycusis. Dr. Blumenfeld opined that the accepted workplace noise exposure from firing weapons was sufficient as to intensity and duration to have caused the loss in question. He diagnosed sensorineural hearing loss and tinnitus. Dr. Blumenfeld advised that the tinnitus was constant day and night and affected appellant's sleep patterns and daily activities, altering his quality of life. The audiometric testing completed on May 1, 2013 revealed hearing levels of 25, 25, 25 and 25 decibels in the right ear and 20, 20, 25 and 30 decibels in the left ear at levels of 500, 1,000, 2,000 and 3,000 Hz, respectively. Auditory discrimination scores were 100 percent in both ears. Dr. Blumenfeld utilized the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (6th ed. 2009) (*hereinafter*, A.M.A., *Guides*) to find that appellant sustained zero percent hearing impairment. He added five percent impairment for tinnitus and found that appellant sustained a total five percent hearing impairment. Dr. Blumenfeld advised that appellant did not presently need hearing aids, but would need them in the future. He noted a maximum medical improvement date of May 1, 2013.

In a May 15, 2013 report, Dr. Ronald H. Blum, an OWCP medical adviser, reviewed Dr. Blumenfeld's medical report and the A.M.A., *Guides*. He determined that appellant sustained zero percent binaural hearing loss. Dr. Blum advised that maximum medical improvement was reached on May 1, 2013. He noted that Dr. Blumenfeld described bilateral tinnitus which was present all the time that interfered with sleep and daytime activities that

² In a statement of accepted facts, OWCP indicated that appellant was exposed to noise pollution to include exposure to 120 hours of noise from firearms due to his work as an instructor or 480 hours annually.

affected appellant's quality of life. Dr. Blum explained that, because appellant did not have any ratable binaural hearing loss, an impairment rating based on tinnitus was not appropriate. He concurred that workplace noise exposure was sufficient to be a contributing factor to appellant's hearing loss. Dr. Blum noted that hearing aids were not authorized.

By decision dated May 17, 2013, OWCP accepted appellant's claim for bilateral sensorineural hearing. On June 7, 2013 appellant filed a Form CA-7 claim for a schedule award.

By decision dated June 17, 2013, OWCP denied appellant's claim for a schedule award. It found that the medical evidence failed to establish a ratable impairment for hearing loss.

On July 29, 2013 appellant requested reconsideration. He noted that he recently discovered that tinnitus was attributed to the discharging of firearms. OWCP also received documentation pertaining to exposure to tuberculosis and an article on tuberculosis.

In an August 26, 2013 decision, OWCP denied appellant's request for reconsideration without a review of the merits. It found that the evidence was not sufficient to warrant a merit review.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA³ provides compensation to employees sustaining permanent loss or loss of use, of specified members 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 results 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 A.M.A., *Guides* has been adopted by OWCP for evaluating schedule losses and the Board has concurred in such adoption.⁴

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.⁵ 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.⁶ The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.⁷ 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

³ 5 U.S.C. § 8107.

⁴ See 20 C.F.R. § 10.404; *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

⁵ A.M.A., *Guides* 250.

⁶ *Id.*

⁷ *Id.*

divided by six to arrive at the amount of the binaural hearing loss.⁸ The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.⁹

ANALYSIS -- ISSUE 1

Appellant filed a claim for hearing loss in the performance of duty. On April 12, 2013 OWCP referred him to Dr. Blumenfeld, a Board-certified otolaryngologist, for a second opinion evaluation. Dr. Blumenfeld diagnosed sensorineural hearing loss and tinnitus due to appellant's employment-related noise exposure. He examined appellant and tested his hearing. Dr. Blumenfeld attached a May 1, 2013 audiogram showing hearing levels of 25, 25, 25 and 25 decibels in the right ear and 20, 20, 25 and 30 decibels in the left ear at Hz levels of 500, 1,000, 2,000 and 3,000 respectively. He rated a five percent hearing loss for tinnitus. Dr. Blumenfeld indicated a maximum medical improvement date of May 1, 2013.

OWCP properly referred the medical evidence to its medical adviser, for a rating of permanent impairment in accordance with the A.M.A., *Guides*.¹⁰ In a May 15, 2013 report, Dr. Blum applied the findings of the May 1, 2013 audiogram to calculate a nonratable hearing loss. In accordance with page 247 of the A.M.A., *Guides*, he averaged appellant's hearing levels of 25, 25, 25 and 25 decibels in the right ear and 20, 20, 25 and 30 decibels in the left ear at Hz levels of 500, 1,000, 2,000 and 3,000, respectively, to find average hearing levels of 25 percent on the right and 23.75 on the right.¹¹ Dr. Blum then subtracted a 25-decibel fence¹² and multiplied the remaining balance, by 1.5 to find zero percent monaural impairment for each ear.¹³ Regarding Dr. Blumenfeld's determination that appellant had a ratable impairment due to tinnitus, he referred to section 11.2b of the A.M.A., *Guides* which states that, if tinnitus interferes with activities of daily living, up to five percent may be added to a measurable binaural hearing impairment.¹⁴ Dr. Blum opined that this was inapplicable since appellant did not have measurable hearing impairment.

As OWCP's medical adviser properly applied the A.M.A., *Guides* in calculating appellant's impairment rating, OWCP correctly relied on his opinion to find that appellant's hearing loss is nonratable for schedule award purposes.¹⁵ Furthermore, as there was no ratable

⁸ *Id.*

⁹ *Donald E. Stockstad*, 53 ECAB 301 (2002); *petition for recon., granted (modifying prior decision)*, Docket No. 01-1570 (issued August 13, 2002); *Reynaldo R. Lichtenberger*, 52 ECAB 462 (2001).

¹⁰ *See Hildred I. Lloyd*, 42 ECAB 944 (1991).

¹¹ A.M.A., *Guides* 247.

¹² The A.M.A., *Guides* provides that when the average of the hearing levels at 500, 1,000, 2,000 and 3,000 Hz is 25 decibels or less, the ability to hear everyday sounds under everyday listening conditions is not impaired. The subtraction of the 25-decibel fence represents this finding. *Id.* at 250.

¹³ *Id.*

¹⁴ *Id.* at 349.

¹⁵ *See Linda Beale*, 57 ECAB 429 (2006).

hearing impairment, appellant was not eligible for the additional rating for tinnitus.¹⁶ The Board finds that there is no evidence of greater impairment.¹⁷

On appeal, appellant submitted additional evidence. The Board cannot consider this evidence as its review is limited to the evidence of record which was before OWCP at the time of its final decision.¹⁸ Appellant disagreed with the schedule award decision and noted that his tinnitus is due to exposure to firearms. As stated, no schedule award is payable for tinnitus in the absence of a ratable hearing loss.

Appellant may request a schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of FECA,¹⁹ OWCP may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provide that a claimant may obtain review of the merits if the written application for reconsideration, including all supporting documents, sets forth arguments and contains evidence that:

“(1) Shows that OWCP erroneously applied or interpreted a specific point of law;
or

“(2) Advances a relevant legal argument not previously considered by OWCP; or

“(3) Constitutes relevant and pertinent new evidence not previously considered by OWCP.”²⁰

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by OWCP without review of the merits of the claim.²¹

¹⁶ See *Juan A. Trevino*, 54 ECAB 358 (2003) (the Board found that, as appellant’s hearing loss was not ratable, he was not entitled to the additional award for tinnitus).

¹⁷ Although the record contains a December 19, 2012 audiogram from an audiologist, this does not constitute probative medical evidence as it was not certified by a physician as accurate. See *R.B.*, Docket No. 10-1512 (issued March 24, 2011); *Joshua A. Holmes*, 42 ECAB 231 (1990) (OWCP does not have to review audiograms not certified by a physician and it is the claimant’s burden to submit a properly certified audiogram for review if he objects to the audiogram selected by OWCP for determining the degree of hearing loss). See also 5 U.S.C. § 8101(2) (defines the term “physician”).

¹⁸ 20 C.F.R. § 501.2(c); see *Steven S. Saleh*, 55 ECAB 169 (2003).

¹⁹ 5 U.S.C. § 8128(a).

²⁰ 20 C.F.R. § 10.606(b).

²¹ *Id.* at § 10.608(b).

ANALYSIS -- ISSUE 2

Appellant disagreed with the denial of his claim for a schedule award and timely requested reconsideration on July 29, 2013. The underlying issue on reconsideration is medical in nature, whether he had a measurable scheduled impairment for hearing loss.

On reconsideration, appellant argued that he recently learned that tinnitus was attributed to the discharging of firearms. He also provided documentation pertaining to tuberculosis. The underlying issue on reconsideration is medical in nature. OWCP denied the claim because the medical evidence did not support that appellant had a ratable hearing loss pursuant to its applicable standards. The Board notes that he did not argue that there was a legal error by OWCP or advance a relevant legal argument not previously considered. Furthermore, appellant did not submit medical evidence supporting that his accepted hearing loss is ratable under OWCP's standards. The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.²²

Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP or submit new and relevant evidence not previously considered. As he did not meet any of the necessary regulatory requirements, he is not entitled to further merit review.

CONCLUSION

The Board finds that appellant has not established entitlement to a schedule award due to his accepted hearing loss. The Board also finds that OWCP properly refused to reopen his case for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

²² *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

ORDER

IT IS HEREBY ORDERED THAT the August 26 and June 17, 2013 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 25, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board