United States Department of Labor
Employees' Compensation Appeals Board

B.E., Appellant	)	
and	)	**Docket No. 18-1785**
	)	**Issued: April 1, 2019**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, College Park, GA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 24, 2018 appellant filed a timely appeal from an August 1, 2018 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 ratable hearing loss, warranting a schedule award.

FACTUAL HISTORY

On January 29, 2018 appellant, then a 49-year-old federal air marshal, filed an occupational disease claim (Form CA-2) for hearing loss. He identified June 16, 2004 as the date he first became

[1] 5 U.S.C. § 8101 *et seq.*

aware of his condition, and also when he first realized it was related to factors of his federal employment. Appellant claimed the hearing loss was a result of prolonged exposure to jet noise as an air marshal and firearm noise as a firearms instructor. He estimated that the jet noise routinely reached between 100 to 140 decibels (dBs). The employing establishment indicated that appellant continued to work, and that the last/most recent date of noise exposure was January 28, 2018.

Appellant initially submitted no documentation in support of his claim.

By development letter dated February 5, 2018, OWCP noted deficiencies with respect to both the factual and medical evidence. In regards to the medical evidence, it explained that the claim required a physician's opinion explaining how the employment activities caused, contributed to, or aggravated appellant's medical condition. With regard to the factual evidence, OWCP attached a questionnaire requesting that appellant describe in detail the employment-related noise exposure he believed contributed to his condition and the circumstances in which he was exposed to noise both within and outside of his current federal employment. It afforded him 30 days to submit the requested factual information and medical evidence.

By separate letter of February 5, 2018, OWCP issued a development letter to the employing establishment requesting that a knowledgeable supervisor provide information on the employee's noise exposure. It requested information about the work locations and the sources, decibel levels, frequencies, and duration of the noise to which appellant had been exposed.

Appellant submitted documents from the clinic of Dr. N. Hadley Heindel III, a Board-certified otolaryngologist. In an audiogram performed September 18, 2017, hearing losses were noted at the frequencies of 500, 1,000, 2,000, and 3,000 Hertz (Hz). The left ear losses were recorded as 5, 10, 30, and 50 dBs; the right ear losses were recorded as 0, 10, 5, and 15 dBs. In a follow-up audiogram taken December 21, 2017, the left ear hearing losses at the same frequencies were recorded as 5, 10, 15, and 35 dBs, and the right ear losses were recorded as 0, 10, 10, and 15 dBs. In Dr. Heindel's February 21, 2018 report, he assessed appellant with asymmetric sensorineural hearing loss, although he noted an improvement between the audiograms of September 18 and December 21, 2017. His opinion was that appellant's hearing loss was "undoubtedly" due to appellant's federal employment.

The employing establishment provided appellant's annual audiograms from the years 2004, 2008, and 2012 through 2017.

After obtaining information from both appellant and the employing establishment regarding his occupational noise exposure, OWCP prepared an April 13, 2018 statement of accepted facts (SOAF). It noted that appellant worked as an air marshal/firearms instructor since 2002 and had been exposed to jet engine noises of 100 to 140 dBs two to four times per day, four to five days per week. Appellant's continued exposure to aircraft engine noise consisted, but was not limited to, directly flying onboard commercial aircraft where the decibel levels consisted of 75 to 85 decibels 4 to 12 hours a day and four to five days a week. OWCP also accepted that his employment duties required him to drive, park, wait, and stand in the airport jet ramp areas while being exposed to aircraft engine noises that consistently reach and exceed 100 to 140 dBs. Also noted was appellant's prolonged exposure to firearm noise from his assigned agency firearm. The noise factor was between and in excess of 100 to 140 dBs during firearms training, which he was required to attend or instruct two days a week for eight hours a day each week.

OWCP referred appellant for additional audiometric testing and a second opinion examination by Dr. Jeffrey Kunkes, a Board-certified otolaryngologist. A June 13, 2018 audiogram noted losses at the frequencies of 500, 1,000, 2,000, and 3,000 Hz. The left ear losses were recorded as 15, 15, 20, and 25 dBs; the right ear losses were recorded as 10, 10, 10, and 20 dBs. In his June 13, 2018 report, Dr. Kunkes noted that appellant had "overall normal hearing," with the exception of mild left ear losses at the 6,000 to 8,000 frequency range. He checked the box indicating his belief that these mild left ear hearing losses were due to noise exposure encountered within appellant's employment.

On July 19, 2018 OWCP accepted the claim for sensorineural hearing loss of the left ear. It further advised appellant that the record established that he did not require hearing aids. Lastly, OWCP indicated that the case had been forwarded to its district medical adviser (DMA) to determine whether appellant had permanent, employment-related hearing impairment.

In a report dated July 19, 2018, Dr. Jeffrey M. Israel, a Board-certified otolaryngologist serving as a DMA, noted that appellant had served in the Federal Government between 1994 and the present, first as a correctional office/firearms instructor before becoming an air marshal. He reviewed the SOAF and noted the types of noise and length of exposure. Based on the findings from the second opinion report by Dr. Kunkes, Dr. Israel determined that appellant did not have ratable hearing loss based on the June 13, 2018 audiogram. Specifically, he determined that the monaural hearing loss of the left ear was zero percent, and thus was not ratable under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.[2] Dr. Israel concluded his report by suggesting authorization for hearing aids, and that appellant undergo yearly audiograms and utilize noise protection for his ears.

On July 24, 2018 appellant filed a claim for a schedule award (Form CA-7).

By decision dated August 1, 2018, OWCP denied appellant's claim for a schedule award. It explained that under the A.M.A., *Guides*, appellant's hearing loss was not sufficiently severe to be considered ratable for purposes of a schedule award.

LEGAL PRECEDENT

Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.[3] FECA, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule

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

[3] For complete loss of hearing of one ear, an employee shall receive 52 weeks' compensation. 5 U.S.C. § 8107(c)(13). For complete loss of hearing of both ears, an employee shall receive 200 weeks' compensation. *Id.*

losses.[4] Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).[5]

Using the frequencies of 500, 1,000, 2,000 and 3,000 Hz, the losses at each frequency are added up and 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 is determined by calculating the loss in each ear using the formula for monaural loss; the lesser loss is multiplied by five, and then added to the greater loss and the total is divided by six to arrive at the amount of the binaural hearing loss.[9]

ANALYSIS

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

In a July 20, 2018 report, Dr. Israel rated permanent hearing loss based on Dr. Kunkes' June 13, 2018 audiogram findings. This audiogram revealed that appellant's left ear hearing losses at 500, 1,000, 2,000, and 3,000 Hz were 15, 15, 20 and 25 dBs, which totaled 75 dBs. Appellant's right ear losses at the same frequencies were 10, 10, 10, and 20 dBs, which totaled 50 dBs. The left ear hearing loss resulted in an average loss of 18.75 (75 ÷ 4) dBs; the right ear hearing loss resulted in an average loss of 12.5 (50 ÷ 4) dBs. After subtracting the 25 dB fence, the left and right ear losses were reduced to negative numbers (-6.25 and -12.5, respectively). When multiplied by 1.5, the resulting monaural loss in each ear was zero percent. Dr. Israel further noted June 13, 2018 audiogram results also showed zero percent binaural hearing loss.

The Board finds that there is no current medical evidence of record supporting that appellant has ratable hearing loss under OWCP's standardized procedures for rating hearing impairment. Although appellant has an employment-related hearing loss, it is not sufficiently severe to be ratable for schedule award purposes.[10] As the June 13, 2018 audiogram did not demonstrate that appellant's hearing loss was ratable, he is not entitled to a schedule award.

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[4] 20 C.F.R. § 10.404.

[5] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6a (March 2017).

[6] *See* Section 11.2, Hearing and Tinnitus, A.M.A., *Guides* 248-51 (6th ed. 2009).

[7] *Id.* at 250.

[8] *Id.* at 250-51.

[9] *Id.* at 251.

[10] *See R.S.*, Docket No. 18-1524 (issued February 5, 2019); *G.G.*, Docket No. 18-0566 (issued October 2, 2018); *D.G.*, Docket No. 16-1486 (issued December 16, 2016).

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 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 August 1, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 1, 2019
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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