

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

R.K., Appellant)	
)	
and)	Docket No. 20-1003
)	Issued: April 8, 2021
DEPARTMENT OF THE NAVY, PEARL)	
HARBOR NAVAL SHIPYARD &)	
INTERMEDIATE MAINTENANCE FACILITY,)	
Pearl Harbor, HI, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 9, 2020 appellant filed a timely appeal from a November 5, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (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 more than 12 percent binaural hearing loss, for which he previously received a schedule award.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On August 20, 2018 appellant, then a 65-year-old assistant project superintendent, filed an occupational disease claim (Form CA-2) alleging that he suffered binaural hearing loss and tinnitus due to factors of his federal employment. He noted that he first became aware of his condition and realized its relation to his federal employment on July 31, 2018. Appellant indicated that he had progressive hearing loss due to significant threshold shifts and required hearing aids. He noted that he had a prior claim under OWCP File No. xxxxxx750, accepted for binaural hearing loss.² The employing establishment advised that appellant was last exposed to hazardous noise on January 12, 2018.

Appellant submitted employing establishment hearing conservation records and audiometric testing results dated May 3, 1985 to July 31, 2018.

On October 30, 2018 OWCP accepted the claim for binaural sensorineural hearing loss.

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

On December 14, 2018 OWCP referred appellant along with a statement of accepted facts (SOAF) and copy of the medical record to Dr. Ronald P. Peroff, Board-certified in otolaryngology, for a second opinion evaluation to determine the nature and extent of appellant's employment-related conditions.³

In a January 22, 2019 report, Dr. Peroff reviewed appellant's January 21, 2019 audiometric testing results using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁴ He calculated 6.6 percent binaural hearing loss, and 4 percent loss for tinnitus. Dr. Peroff opined that appellant's hearing loss was due to noise exposure in his federal employment and recommended hearing aids.

On February 22, 2019 OWCP referred the SOAF and medical records to Dr. Jeffrey M. Israel, a Board-certified otolaryngologist serving as a district medical adviser (DMA), to determine the extent of appellant's hearing loss and permanent impairment due to his employment-related noise exposure.

In a February 28, 2019 report, Dr. Israel reviewed the January 22, 2019 report from Dr. Peroff. He applied the audiometric data to OWCP's standard for evaluation of hearing loss under the sixth edition of the A.M.A., *Guides* to the findings from the January 21, 2019 audiogram and determined that appellant sustained a right monaural hearing loss of 3.75 percent, a left

² In OWCP File No. xxxxxx750, OWCP accepted appellant's July 1, 2001 occupational disease claim (Form CA-2) for binaural hearing loss. On December 6, 2001 it granted him a schedule award for 12 percent binaural hearing loss. OWCP File No. xxxxxx750 has been administratively combined with OWCP File No. xxxxxx515, with the latter serving as the master file.

³ On December 13, 2018 OWCP referred appellant to Marylee Ruth, an audiologist, who provided audiometric test results dated January 21, 2019.

⁴ A.M.A., *Guides* (6th ed. 2009).

monaural hearing loss of 20.625 percent, a binaural hearing loss of 6.6 percent, and 4 percent impairment for tinnitus, for a total binaural hearing loss of 10.6 percent. The DMA added appellant's right ear hearing loss of 15, 20, 35, and 40 decibels (dBs) at 500, 1,000, 2,000, and 3,000 Hertz (Hz.) respectively, which totaled 110, and divided by 4, which resulted in an average of 27.5, subtracted the 25 dBs fence, and multiplied the 2.5 balance by 1.5, to calculate 3.75 percent right ear monaural hearing loss. He then added appellant's left ear hearing loss of 15, 30, 50, and 60 dBs at 500, 1,000, 2,000, and 3,000 Hz, respectively, and which totaled 155, and divided by 4, which resulted in an average of 38.75, subtracted the 25 dBs fence, and multiplied the remaining 13.75 balance by 1.5, to calculate 20.625 left ear monaural hearing loss. The DMA then calculated the binaural hearing loss by multiplying the lesser right ear loss of 3.75 percent by 5, adding the greater 20.63 percent left ear loss, and dividing this sum by 6, which resulted in 6.6 binaural hearing loss. He added 4 percent for tinnitus and opined that appellant had 10.6 percent total binaural hearing loss. The DMA agreed with Dr. Peroff's recommendation for hearing aids.

On April 5, 2019 OWCP requested clarification from the DMA as to whether appellant's hearing had improved since 2003 and whether his tinnitus was caused by employment exposure to hazardous noise levels.

In an April 13, 2019 report, the DMA confirmed that appellant's hearing had improved since his 12 percent binaural hearing loss schedule award in 2003. He also confirmed that appellant's tinnitus was caused by work-related noise exposure.

By decision dated April 22, 2019, OWCP denied appellant's claim for an increased schedule award. It explained that he had previously received a schedule award for 12 percent binaural hearing loss under claim OWCP File No. xxxxxx750, and the medical evidence did not support an increase in the impairment compensation previously awarded. OWCP noted that appellant's claim was open for hearing aids and was accepted for tinnitus.

On May 21, 2019 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, which was held on September 10, 2019. He argued that he had progressive sensorineural hearing loss and requested that his hearing loss be prorated based on his current pay rate and hearing aids be awarded.

By decision dated November 5, 2019, OWCP's hearing representative affirmed the April 22, 2019 decision.

LEGAL PRECEDENT

The schedule award provisions of FECA⁵ and its implementing regulations⁶ 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

⁵ *Supra* note 1.

⁶ 20 C.F.R. § 10.404.

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*⁷ has been adopted by OWCP for evaluating schedule losses and the Board has concurred in such adoption.⁸ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁹

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.¹⁰ 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.¹¹ The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.¹² 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 hearing loss.¹³ 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, up to five percent may be added to a measurable binaural hearing impairment.¹⁶

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish more than 12 percent binaural hearing loss, for which he previously received a schedule award.

⁷ *Supra* note 4.

⁸ See *J.C.*, Docket No. 20-0322 (issued July 8, 2020); *V.M.*, Docket No. 18-1800 (issued April 23, 2019); *J.W.*, Docket No. 17-1339 (issued August 21, 2018).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *id.* at Chapter 3.700.2 and Exhibit 1 (January 2010).

¹⁰ A.M.A., *Guides* 250.

¹¹ *Id.*; *C.D.*, Docket No. 18-0251 (issued August 1, 2018).

¹² *Id.*

¹³ *Id.*

¹⁴ *V.M.*, *supra* note 8.

¹⁵ See A.M.A., *Guides* 249.

¹⁶ *Id.*

OWCP had previously granted appellant a schedule award for 12 percent binaural hearing loss under claim OWCP File No. xxxxxx750. On November 7, 2018 appellant filed a claim for an additional schedule award.

OWCP referred appellant for a second opinion examination with Dr. Peroff who calculated a 6.6 percent binaural hearing loss, and 4 percent impairment for tinnitus, for a total of 10.6 permanent impairment due to binaural hearing loss. Dr. Israel, the DMA, reviewed and concurred with Dr. Peroff's January 22, 2019 report.

Dr. Israel properly applied OWCP's standardized procedures to the audiometric test results which recorded frequency levels at 500, 1,000, 2,000, and 3,000 Hz and revealed decibel losses of 15, 20, 35, and 40 dBs, respectively, in the right ear for a total hearing loss of 110 dBs in the right ear. The DMA followed the established procedures and averaged the four Hz levels, which resulted in a loss of 27.5 dBs. He properly subtracted the fence of 25 dBs which resulted in 2.5 dBs. The DMA then multiplied this amount by the established factor of 1.5 to calculate 3.75 percent monaural loss for the right ear.

Regarding the left ear, the audiometric test results recorded frequency levels at 500, 1,000, 2,000, and 3,000 Hz and revealed decibel losses of 15, 20, 50, and 60 dBs, respectively, for a total hearing loss of 155 dBs in the left ear. The DMA properly followed the established procedures and divided this total by 4, which resulted in an average loss of 38.75 dBs, subtracted the fence of 25 dBs, to equal 13.75 dBs, and multiplied this amount by the established factor of 1.5, which resulted in 20.625 percent monaural hearing loss for the left ear.

The DMA properly applied the formula for binaural hearing loss by multiplying the lesser right ear loss of 3.75 percent by five, adding the greater 20.63 percent left ear loss, and dividing this sum by six to arrive at a 6.6 binaural hearing loss. He added 4 percent for tinnitus and calculated that appellant had a 10.6 percent total binaural hearing loss. The DMA, therefore, concluded that appellant had 10.6 percent binaural hearing loss, which would be rounded up to 11 percent in keeping with OWCP's policy.¹⁷

As Dr. Peroff and Dr. Israel both found 10.6, which would be rounded up to 11 percent binaural hearing loss in accordance with OWCP's policy, the Board finds that there is no current medical evidence of record supporting a ratable hearing loss greater than the 12 percent previously awarded.¹⁸

The Board notes that OWCP in its April 22, 2019 decision indicated that appellant's claim was accepted for tinnitus, which was included in the impairment ratings by Dr. Peroff and Dr. Israel. OWCP also noted that appellant's claim remained open for hearing aids.

¹⁷ 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 .5 and up for .5 and over. *See H.W.*, Docket No. 20-0924 (issued January 26, 2021); *J.H.*, Docket No. 08-2432 (issued June 15, 2009); *Robert E. Cullison*, 55 ECAB 570 (2004).

¹⁸ *See B.C.*, Docket No. 19-1863 (issued June 8, 2020); *J.M.*, Docket No. 18-1469 (issued March 1, 2019).

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 more than 12 percent binaural hearing loss, for which he previously received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the November 5, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 8, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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