

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

R.L., Appellant)	
)	
and)	Docket No. 23-0479
)	Issued: August 8, 2023
)	
DEPARTMENT OF JUSTICE, U.S. MARSHALS)	
SERVICE, DISTRICT OF NEVADA,)	
Las Vegas, NV, Employer)	
)	

Appearances:
Stephanie Leet, Esq., for the appellant¹
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 February 21, 2023 appellant, through counsel, filed a timely appeal from a January 17, 2023 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has met his burden of proof to establish greater than 45 percent binaural hearing loss, for which he previously received schedule award compensation.

FACTUAL HISTORY

On June 21, 2016 appellant, then a 55-year-old retired Deputy U.S. Marshal,³ filed an occupational disease claim (Form CA-2) alleging that he sustained profound sensorineural hearing loss and continuous ringing sounds in each ear, and deafness resulting from continuous noise exposure due to factors of his federal employment including his work as a firearms instructor.⁴ He noted that he first became aware of his conditions on January 25, 2010 and realized the relationship to his federal employment on February 1, 2012. OWCP accepted the claim for binaural sensorineural hearing loss.

On May 19, 2014 appellant filed a claim for compensation (Form CA-7) for a schedule award.

A July 10, 2015 audiogram revealed that testing at the frequency levels of 500, 1,000, 2,000, and 3,000 Hertz (Hz) revealed decibel (dBs) losses of 45, 40, 45, and 75 for the right ear and dBs losses of 55, 50, 45, and 70 for the left ear, respectively.

By decision dated April 18, 2017, OWCP granted appellant an additional schedule award for 23 percent binaural sensorineural hearing loss, for a total impairment rating of 40 percent binaural hearing loss. The period of the award ran for 322 days from July 10, 2015 through May 26, 2016, and was based on the July 10, 2015 and April 13, 2016 opinions of Dr. Vincent Nalbhone, a Board-certified otolaryngologist, serving as a second opinion physician, and November 30, 2015 and May 7, 2016 opinion of Dr. Morley Slutsky, a Board-certified occupational medicine physician serving as a district medical adviser (DMA).

On July 14, 2017 appellant requested reconsideration.

On July 24, 2017 Dr. Jeffrey M. Israel, a Board-certified otolaryngologist serving as an OWCP DMA, reviewed a statement of accepted facts (SOAF) and the case record, including a May 10, 2017 audiogram. He concluded that, in accordance with the sixth edition of the American

³ A December 31, 2015 notification of personnel action, (Standard Form (SF)-50, indicated that appellant retired from the employing establishment effective that day.

⁴ OWCP assigned the claim, OWCP File No. xxxxxx076. Appellant also has prior claims before OWCP. On January 25, 2010 he filed an occupational disease claim under OWCP File No. xxxxxx093. OWCP accepted that claim for binaural sensorineural hearing loss. In a May 30, 2013 decision, it granted appellant a schedule award for 17 percent binaural hearing loss with tinnitus. OWCP subsequently denied modification of the May 30, 2013 decision. Appellant appealed OWCP's decision to the Board and the Board issued a decision affirming OWCP's modification decision. On June 10, 2011 he filed an occupational disease claim for tinnitus under OWCP File No. xxxxxx029, which was denied by OWCP. OWCP has not administratively combined these claims with the current file, OWCP File No. xxxxxx076.

Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),⁵ appellant had 67.5 percent monaural hearing loss in the right ear and 69.375 monaural hearing loss in the left ear, resulting in 67.8 percent binaural hearing loss. Dr. Israel deducted the 40 percent binaural hearing loss which appellant had previously received from the 67.8 percent binaural hearing impairment rating and determined that he was entitled to an additional schedule award of 27.8 percent for binaural hearing loss.

By decision dated July 28, 2017, OWCP vacated the April 18, 2017 decision, finding that appellant was entitled to an additional schedule award based on the July 24, 2017 opinion of its DMA, Dr. Israel. In a separate decision also dated July 28, 2017, it granted appellant a schedule award for a total 68 percent binaural sensorineural hearing loss, noting that he was previously paid compensation for 40 percent binaural sensorineural hearing loss. The period of the award ran for 56 weeks from May 27, 2016 through June 22, 2017.

On August 24, 2017 appellant requested reconsideration. In support of the request, he submitted medical evidence.

Appellant also submitted a May 10, 2017 audiogram performed by Dr. Carrie Paige-Unkel, a licensed audiologist.

Dr. Israel, the DMA, reviewed the case file again on November 21, 2017 including a January 28, 2010 annual audiogram by the employing establishment. He determined that appellant had zero percent monaural hearing loss in each ear and zero percent binaural hearing loss based on the sixth edition of the A.M.A., *Guides*.

By decision dated November 22, 2017, OWCP denied modification of the July 28, 2017 decision, finding that the November 21, 2017 opinion of Dr. Israel, the DMA, represented the weight of the medical opinion evidence and established that appellant had no more than the 68 percent binaural hearing loss for which he was previously awarded.

On July 24, 2018 appellant requested reconsideration. In support of the request, he submitted a July 5, 2018 audiogram.

On September 28, 2018 Dr. Israel reviewed the July 5, 2018 audiogram and opined that appellant had 100 percent monaural hearing loss in each ear and 100 percent binaural hearing loss. He concluded that appellant was entitled to an additional schedule award for 32 percent binaural hearing loss, noting that appellant had previously received a schedule award for 68 percent binaural hearing loss. The DMA determined that he reached MMI on July 5, 2018.

By decision dated October 16, 2018, OWCP vacated its November 22, 2017 decision, finding that the September 28, 2018 opinion of Dr. Israel, the DMA, represented the weight of the medical opinion evidence and established that appellant had 100 percent binaural hearing loss. By separate decision dated October 16, 2018, it granted appellant an increased schedule award for 32 percent binaural sensorineural hearing loss for a total impairment rating of 100 percent, noting that

⁵ A.M.A., *Guides* (6th ed. 2009).

he had previously received schedule award compensation for 68 percent binaural hearing loss. The period of the award ran for 64 weeks from July 5, 2018 through September 25, 2019.

On October 29, 2018 appellant requested reconsideration. In an accompanying letter dated October 22, 2018, he contended that the medical evidence of record established that he was entitled to an additional award for tinnitus.

On July 23, 2019 OWCP requested that Dr. Israel determine whether appellant was entitled to an additional schedule award that included impairment due to tinnitus. It noted that appellant previously received a schedule award for 17.2 percent binaural hearing loss that included 12.2 percent binaural hearing loss and 5 percent impairment for tinnitus, rounded to 17 percent. OWCP further noted that he subsequently received a schedule award for an additional 23.3 or 23 percent binaural hearing loss, for a total of 40.3 or 40 percent binaural hearing loss.

On July 27, 2019 Dr. Israel opined that appellant had 45.3 percent binaural hearing loss. He explained that an award for 5 percent impairment due to tinnitus should have been added to the 40.3 percent binaural hearing impairment rating.

On August 29, 2019 OWCP requested that Dr. Slutsky review the audiograms and DMA reports and provide an opinion as to whether noise-induced hearing loss stopped when hazardous noise-induced exposure stopped and whether the July 10, 2015 audiogram was the closest audiogram to appellant's last known workplace exposure that met OWCP's impairment validity criteria.

In a September 11, 2019 report, Dr. Slutsky noted that the July 10, 2015 audiogram was the closest valid audiogram to appellant's last workplace noise exposure. He related that noise-induced hearing loss stopped when the workplace hazardous noise exposure stopped. The DMA further related that the May 10, 2017 audiogram did not meet OWCP's validity criteria for use in impairment rating calculations. He advised that there was no objective evidence to rate tinnitus. The DMA reviewed the July 10, 2015 audiogram. Utilizing the sixth edition of the A.M.A., *Guides*, he calculated 39 percent monaural hearing loss in the right ear and 45 percent monaural hearing loss in the left ear and 40.3 percent binaural hearing loss. The DMA advised, however, that it was unclear as to whether appellant had any permanent impairment due to tinnitus.

On December 5, 2019 OWCP referred appellant, along with SOAF, the case record, and a series of questions, Dr. Sean Palacios, a Board-certified otolaryngologist, for a second opinion evaluation and examination to determine whether he had employment-related tinnitus and if so, provide details regarding the impact of tinnitus on his activities of daily living (ADLs) and a hearing loss impairment rating due to the condition.

In a report dated January 8, 2020, Dr. Palacios reported his examination findings and found that appellant had severe-to-profound sensorineural hearing loss, most likely secondary to extreme loud noise exposure to gun fire during his federal career. He recommended a cochlear implant. In a January 21, 2020 report, Dr. Palacios found that appellant had tinnitus as a result of his federal employment, but advised that he was unable to respond to OWCP's question regarding whether the diagnosed condition caused or contributed to his hearing loss.

On February 11, 2021 OWCP referred appellant to Dr. David J. Kiener, a Board-certified otolaryngologist, for a second opinion evaluation to determine the nature and extent of his tinnitus and whether he was entitled to an additional schedule award.

In a March 23, 2021 report, Dr. Kiener provided examination findings and reviewed audiograms dated March 9, 1995 to July 5, 2018. He diagnosed noise-induced binaural neurosensory hearing loss and tinnitus due to appellant's federal employment. Dr. Kiener reviewed a March 16, 2021 audiogram performed on his behalf and determined that appellant had 86.25 percent monaural hearing loss in each ear and 5 percent permanent impairment for tinnitus, resulting in 91.3 percent binaural hearing loss based on the sixth edition of the A.M.A., *Guides*.

On June 6, 2021 Dr. Slutsky reviewed the medical record, including Dr. Kiener's March 23, 2021 findings. Based on the July 10, 2015 audiogram, he reiterated his prior calculations and again found that appellant had 39 percent monaural hearing loss in the right ear and 45 percent monaural hearing loss in the left ear and 40.3 percent binaural hearing loss. The DMA also determined that appellant had an additional five percent impairment for tinnitus. He concluded that appellant had 45.3 percent binaural hearing loss. The DMA restated his opinion that appellant's noise-induced loss stopped when his noise-induced workplace exposure ceased on December 31, 2015. He disagreed with Dr. Kiener's use of the March 16, 2021 audiogram to calculate appellant's hearing impairment, noting that his hearing loss progression from July 10, 2015 did not reflect employment-related noise-induced damage.

By decision dated July 28, 2021, OWCP vacated the October 16, 2018 decision. It found that appellant had 45 percent binaural hearing loss based on the opinion of Dr. Slutsky, the DMA.⁶ In a July 29, 2021 decision, OWCP granted him a schedule award for an additional 28 percent binaural sensorineural hearing loss for a total impairment rating of 45 percent (40 percent binaural sensorineural hearing loss + 5 percent for tinnitus = 45 percent binaural hearing loss). The period of the award ran for 56 weeks from July 10, 2015 through August 4, 2016.

On July 28, 2022 appellant, through counsel, requested reconsideration. In support of the request, counsel submitted audiograms dated February 16 and 19, July 5, 2018, and November 22, 2019.

Additionally, counsel submitted a July 6, 2022 report by Dr. Neil Allen, Board-certified in internal medicine and neurology. Dr. Allen reviewed a February 19, 2018 audiogram which reflected testing at frequency levels of 500, 1,000, 2,000, and 3,000 Hz which revealed the following: right ear 75, 75, 85, and 100 dBs, respectively, left ear 80, 80, 95, and 105 dBs, respectively. Utilizing the sixth edition of the A.M.A., *Guides*, he found that appellant had monaural hearing impairment of 89.4 percent in both ears or 94.4 percent binaural hearing impairment.

⁶ See *A.G.*, Docket No. 22-0582 (issued October 4, 2022); *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. Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, 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); *J.H.*, Docket No. 08-24329; *Robert E. Cullison*, 55 ECAB 570 (2004).

By decision dated August 1, 2022, OWCP denied modification of the July 29, 2021 decision, finding that the medical evidence submitted by appellant was insufficient to establish greater than the 45 percent binaural hearing loss for which he had previously received an award. It specifically related that the DMA correctly explained that noise-related hearing loss stops when exposure to hazardous noise ceases. OWCP related that as appellant's exposure to hazardous noise stopped on December 31, 2015, the most accurate audiogram for determination of hearing loss was the July 10, 2015 audiogram.

OWCP subsequently received an August 10, 2022 addendum report from Dr. Allen. Dr. Allen noted Dr. Slutsky's opinion that the progression of appellant's hearing loss was unrelated to his occupational exposure. He indicated, however, that, while it was possible for sensorineural hearing loss to stabilize after an individual was removed from the insulting environment, it was also possible that the condition could progress as in appellant's case. Dr. Allen maintained that this progression was supported by diagnostic studies of record. He opined within a degree of medical certainty that, in the absence of noise exposure to any/all other insulting factors/environments, the occupational exposure appellant experienced over the course of his 15-year employment as a U.S. Marshal led to progressive and substantial hearing loss as described in his initial report. Dr. Allen noted that the sixth edition of the A.M.A., *Guides* did not provide direction regarding the preferred studies to be used in rating hearing loss, *i.e.*, the closest in proximity to an injury or most recent to the date of rating. He contended that Dr. Slutsky's use of studies closest in proximity to the date of injury was based on his opinion and not on the A.M.A., *Guides*. Additionally, Dr. Allen indicated that his choice was inconsistent with FECA transmittal No. 17-02 which states that "rated impairment should reflect the total loss for the scheduled member at the time of the rating examination." He further indicated that "[t]here were no provisions for apportionment under FECA and that an impairment assessment should include both work-related impairment as well as, nonindustrial impairment of the same scheduled member." Dr. Allen noted that, at the time of his impairment evaluation he used the most recent study available, the February 2018 study, which was in accordance with OWCP's procedures. He related that, while the 2015 study provided findings plotted on a graph, these findings had not been interpreted and provided a numeric value.

On October 19, 2022 appellant, through counsel, requested reconsideration of the August 1, 2022 decision.

By decision dated January 17, 2023, OWCP denied modification of the August 1, 2022 decision. It again found that noise-induced hearing loss stops as soon as the workplace hazardous noise exposure stops.

LEGAL PRECEDENT

The schedule award provision of FECA,⁷ and its implementing federal regulations,⁸ 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,

⁷ *Supra* note 2.

⁸ 20 C.F.R. § 10.404.

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 rests in the 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. 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 2009.⁹ 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.¹⁰

For hearing loss claims, the Board requires that the employee undergo both audiometric and otologic examination, that the audiometric testing precede the otologic examination, and that the audiometric testing be performed by an appropriately certified audiologist. The Board has explained that all audiological equipment authorized for testing meet the calibration protocol contained in the accreditation manual of the American Speech and Hearing Association. The audiometric test results must include both bone conduction and pure tone air conduction thresholds, speech reception thresholds and monaural discrimination scores, and the otolaryngologist's report must include: date and hour of examination; date and hour of employee's last exposure to loud noise; and a statement of the reliability of the tests.¹¹

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.¹² Using the frequencies of 500, 1,000, 2,000, and 3,000 Hz, the losses at each frequency are averaged. 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.¹³ The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.¹⁴ 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.¹⁵ The Board has concurred in OWCPs' adoption of this standard for evaluating hearing loss.¹⁶

The A.M.A., *Guides* provides that if tinnitus interferes with activities of daily living, including sleep, reading (and other tasks requiring concentration), enjoyment of quiet recreation,

⁹ For decisions issued after May 1, 2009 the sixth edition of the A.M.A., *Guides* is used. A.M.A., *Guides*, (6th ed. 2009); *supra* note 6 at Chapter 2.808.5.a. (March 2017); *see also id.* at Chapter 3.700.2, Exhibit 1 (January 2010).

¹⁰ *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

¹¹ *See E.E.*, Docket No. 19-1763 (issued March 24, 2020); *J.G.*, Docket No. 12-1469 (issued January 11, 2013).

¹² A.M.A., *Guides* 250.

¹³ *Id.*; *C.D.*, Docket No. 18-0251 (issued August 1, 2018).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *See D.R.*, Docket No. 20-1570 (issued April 14, 2021); *V.M.*, Docket No. 18-1800 (issued April 23, 2019).

and emotional well-being, up to five percent may be added to a measurable binaural hearing impairment.¹⁷

The Board has long recognized that, if a claimant's employment-related hearing loss worsens in the future, he or she may apply for an additional schedule award for any increased permanent impairment. The Board has recognized that a claimant may be entitled to an award for an increased hearing loss, even after exposure to hazardous noise has ceased, if causal relationship is supported by the medical evidence of record.¹⁸

ANALYSIS

The Board finds that the case is not in posture for decision.

OWCP referred appellant to Dr. Kiener for a second opinion examination to evaluate his hearing loss. In his March 23, 2021 report, Dr. Kiener reviewed a March 16, 2021 audiogram and calculated a 91.3 percent binaural hearing loss with tinnitus.

On June 6, 2021 Dr. Slutsky, the DMA, reviewed Dr. Kiener's March 23, 2021 report. He reviewed a July 10, 2015 audiogram and calculated a total binaural hearing loss of 45 percent with tinnitus. Dr. Slutsky explained that he did not utilize the March 16, 2021 audiogram, which Dr. Kiener utilized to determine his 91.3 percent binaural hearing impairment rating because appellant's hearing loss progression commencing July 10, 2015 was not related to his accepted employment-related noise exposure. The DMA found that his hearing loss stopped when his noise-related exposure stopped on December 31, 2015. The Board has long cautioned against an OWCP medical adviser providing a blanket, unrationalized statement that hearing loss does not progress following the cessation of hazardous noise exposure.¹⁹ The Board has recognized that a claimant may be entitled to a schedule award for hearing loss, even after exposure to hazardous noise has ceased, if causal relationship is supported by the medical evidence of record.²⁰ The Board finds that Dr. Slutsky's opinion was insufficiently rationalized.

It is well established that proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares the responsibility in the development of the evidence to see that justice is done.²¹ Once OWCP undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.²² When a DMA

¹⁷ A.M.A., *Guides* 249.

¹⁸ *J.O.*, Docket No. 08-0735 (issued September 10, 2008); *Paul Fierstein*, 51 ECAB 381 (2000).

¹⁹ *E.C.*, Docket No. 19-1007 (issued November 8, 2019); *Adelbert E. Buzzell*, 34 ECAB 96 (1982).

²⁰ *D.G.*, Docket No. 15-0702 (issued August 27, 2015).

²¹ *K.T.*, Docket No. 19-1436 (issued February 21, 2020); *Jimmy A. Hammons*, 51 ECAB 219 (1999); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

²² *See M.B.*, Docket No. 21-0060 (issued March 17, 2022); *D.S.*, Docket No. 19-0292 (issued June 21, 2019).

fails or neglects to provide rationale for a percentage of impairment specified, OWCP should request a clarification or supplemental report from the DMA.²³

On remand OWCP shall request a supplemental report from the DMA, Dr. Slutsky, which addresses, with sufficient medical rationale, as to why his opinion differs from Drs. Israel and Kiener. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.”

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the January 17, 2023 decision of the Office of Workers’ Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 8, 2023
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

²³ See *R.B.*, Docket No. 19-1466 (issued April 9, 2020).