United States Department of Labor
Employees' Compensation Appeals Board

M.L., Appellant	)	
and	)	**Docket No. 24-0717**
	)	**Issued: August 2, 2024**
DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, Chicago, IL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On June 25, 2024 appellant filed a timely appeal from a February 9, 2024 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 a ratable hearing loss, warranting a schedule award.

FACTUAL HISTORY

On July 22, 2016 appellant, then a 53-year-old special agent, filed a traumatic injury claim (Form CA-1) alleging that on June 24, 2016 he developed hearing loss, labyrinthitis, and residual

[1] 5 U.S.C. § 8101 *et seq*.

vertigo after being in the vicinity where plastic explosives were being detonated while in the performance of duty. He did not immediately stop work.

In a discharge summary dated June 26, 2016, Dr. Chantale Stephens Archer, a Board-certified internist, treated appellant for vertigo and noted that he was admitted overnight for observation. She diagnosed vertigo.

On June 29, 2016 Dr. Ojash Bhagwakar, a Board-certified internist, treated appellant for dizziness and vertigo. He diagnosed acute vertigo improving and cerumen impaction.

Dr. David Wolraich, a Board-certified otolaryngologist, treated appellant on July 12 and August 23, 2016 for vertigo and dizziness commencing two weeks prior. Appellant reported that on June 24, 2016 he was at an employing establishment shooting range when plastic explosives were detonated. He diagnosed tinnitus, dizziness, and sudden sensorineural hearing loss on the left side. In a note dated November 21, 2016, Dr. Wolraich diagnosed left sensorineural hearing loss, tinnitus, and vertigo, and recommended that appellant not participate in shooting range activities for two months.

An audiogram was performed on July 13, 2016 by Brienne Honan, an audiologist, which revealed asymmetric left-sided sensorineural hearing loss.

A magnetic resonance imaging (MRI) scan of the internal auditory canals dated July 15, 2016 was unremarkable.

On August 18, 2023 appellant filed a claim for compensation (Form CA-7) for a schedule award.

OWCP received additional evidence. Appellant submitted an audiogram from Jill Barron, an audiologist, dated May 24, 2022, which revealed bilateral sensorineural hearing loss. Heather Harris, an audiologist, reported on July 27, 2022 that cool caloric testing revealed 54 percent weakness on the left side caused by labyrinthitis. She further noted bilateral hearing loss due to noise exposure.

By decision dated August 23, 2023, OWCP accepted appellant's claim for bilateral sensorineural hearing loss, labyrinthitis of the left ear, tinnitus of the left ear, and bilateral benign paroxysmal vertigo.

On September 11, 2023 OWCP referred appellant, along with the medical record, a statement of accepted facts (SOAF), and a series of questions, to Dr. Mark A. Williams, a Board-certified otolaryngologist serving as a second opinion physician, regarding the nature, extent, and causal relationship of his hearing loss.

In his October 9, 2023 otologic evaluation report, Dr. Williams reviewed the SOAF, history of injury, and the medical evidence of record. Testing at the frequencies of 500, 1,000, 2,000, and 3,000 Hertz (Hz) revealed losses at 10, 10, 5, and 0 decibels (dBs) for the right ear and 5, 10, 0, and 5 dBs for the left ear, respectively. Dr. Williams discussed appellant's hearing loss

and opined that the industrial noise exposure was the primary factor causing his condition. He advised that appellant had sensorineural hearing loss in both ears. Dr. Williams noted that the ear canals and drums are clean and patent, the tympanic membranes are clear and intact, and the tympanic membranes are mobile with normal middle ear function on tympanometry. He noted symptoms consistent with Meniere's Disease, benign paroxysmal positional vertigo, and central vestibular dysfunction. Appellant reported left greater than right non-pulsatile tinnitus that did not impact activities of daily living. Dr. Williams noted no other occupational or recreational noise exposures. He diagnosed vertigo, noise-induced hearing loss, and bilateral tinnitus with the sensorineural hearing loss seen as in part or all due to noise exposure in appellant's federal civilian employment. Dr. Williams noted appellant was able to perform all activities of daily living but may require assistance with complex activities and may require visual fixation. Pursuant to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*)[2] he calculated five percent whole person impairment for vestibular disorders. Dr. Williams noted noise-induced hearing loss in both ears but because appellant's hearing thresholds at 500 to 3,000 Hz were normal bilaterally. He had no hearing loss impairment rating. Dr. Williams noted appellant's tinnitus handicap index inventory was six indicating only a slight handicap. He noted that because appellant had no impairment rating for hearing loss there was no impairment rating for tinnitus. Dr. Williams indicated that appellant's examination and diagnostic findings supported the presence of peripheral and central vestibular pathologies. He recommended continued hearing protection when exposed to gunfire.

On October 20, 2023 OWCP referred the medical record and SOAF to Dr. Jeffrey M. Israel, an OWCP district medical adviser (DMA) and Board-certified otolaryngologist, to determine the extent of appellant's hearing loss and permanent impairment due to his employment-related noise exposure. On October 27, 2023 Dr. Israel reviewed Dr. Williams' examination report and agreed that appellant's sensorineural hearing loss was due, at least in part, to noise-induced work-related acoustic trauma. He applied the audiometric data to OWCP's standard for evaluating hearing loss under the A.M.A., *Guides* and determined that appellant sustained a right monaural loss of zero percent, a left monaural loss of zero percent, and a binaural hearing loss of zero percent. Dr. Israel averaged appellant's right ear hearing levels of 10, 10, 5, and 0 dBs at 500, 1,000, 2,000, and 3,000 Hz, respectively, by adding the hearing loss at those four levels then dividing the sum by four, which equaled 6.25. After subtracting out a 25 dB fence, he multiplied the remaining zero balance by 1.5 to calculate a zero percent right ear monaural hearing loss. Dr. Israel then averaged appellant's left ear hearing levels of 5, 10, 0, and 5 dBs at 500, 1,000, 2,000, and 3,000 Hz, respectively, by adding the hearing loss at those four levels then dividing the sum by four, which equaled five. After subtracting out a 25 dB fence, he multiplied the remaining zero balance by 1.5 to calculate a zero percent left ear monaural hearing loss. Dr. Israel then calculated zero percent binaural hearing loss by multiplying the right ear loss of zero percent by five, adding the zero percent left ear loss, and dividing this sum by six. He recommended yearly audiograms and use of noise protection. Dr. Israel noted that a tinnitus handicap inventory was prepared yielding a one percent score which could not be rendered due to a zero percent hearing impairment score. He determined that appellant had reached maximum medical improvement

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

(MMI) on October 9, 2023, the date of the latest audiogram in the records and the one used by Dr. Williams to determine the current hearing impairment.

In a development letter dated November 14, 2023, OWCP requested that appellant submit a narrative medical report from his physician, Dr. Elise C. Denneny, a Board-certified otolaryngologist, which contains a detailed description of findings, diagnoses, and provides a rating of impairment "that explains how your balance affects your lower extremities" with reference to the A.M.A. *Guides*, 6th edition. It also recommended that Dr. Denneny review Dr. Williams' report and outline any difference of opinion.

OWCP received additional evidence, including several otolaryngologist journal articles regarding blast shock waves.

In a note dated November 12, 2023, Dr. Denneny noted that appellant suffered acoustic trauma in 2014 with subsequent vestibulopathy characterized by persistent dizziness and imbalance. She noted that testing showed 54 percent unilateral weakness. Dr. Denneny opined that in evaluating appellant's history, test results, and physical examination, he was Class II with 25 percent disability. In a report dated November 28, 2023, she noted a history of injury, and reviewed the medical evidence of record, including Dr. Williams' October 9, 2023 report. Dr. Denneny noted that appellant continued to experience disequilibrium, numbness around the eyes, peripheral distortion, and spatial distal mentation. MRI scans showed no lesion cerebellopontine angle. Dr. Denneny noted that tinnitus was constant and vestibular examination showed increased hips sway with eyes closed. She referenced the A.M.A., *Guides*, page 258 that revealed a Class II history where symptoms and signs of vestibular disequilibrium were consistent with objective findings, activities of daily living could not be performed without assistance except for simple activities, abnormal Romberg, and increased hip sway with eyes closed. Dr. Denneny noted Class III diagnostic objective findings with abnormal caloric response demonstrating 54 percent vestibular hypofunction. She opined that based on examination and evaluation appellant had 30 percent whole person impairment.

In an undated statement, appellant indicated that tinnitus was a nuisance and he heard it constantly even in the presence of environmental or background noise. He reported learning to cope with the condition and noted that it did not interfere with his sleep because he used a white noise machine at night. Appellant reported significant balance issues and visual distortions causing him to feel sick, lethargic and nauseous.

On December 11, 2023 OWCP requested a supplemental report from Dr. Williams. It recommended that Dr. Williams review Dr. Denneny's November 12 and 28, 2023 reports, which found 54 percent unilateral weakness and Class II 25 percent disability and outline any difference of opinion.

In a supplemental report dated January 30, 2024, Dr. Williams provided a vestibular impairment rating with history as the key factor. He noted that appellant reported no impairment of activities of daily living, for a Class 1, with a default impairment rating of five percent. Dr. Williams noted that on physical examination appellant had a normal gait, positive Fakuda test, and 54 percent unilateral caloric weakness. He indicated that in the absence of central nervous

system signs or abnormal sway there was no elevated rating within the class and therefore appellant would have five percent impairment for vestibular disorders pursuant to the A.M.A., *Guides*.

By decision dated February 9, 2024, OWCP 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 and as such, no tinnitus award could be rendered.

LEGAL PRECEDENT

The schedule award provisions of FECA[3] and its implementing regulations[4] 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. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[5] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[6]

A claimant seeking compensation under FECA has the burden of proof to establish the essential elements of his or her claim.[7] With respect to a schedule award, it is the claimant's burden of proof to establish permanent impairment of a scheduled member or function of the body as a result of his or her employment injury.[8]

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.[9] 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* point out, losses below 25 dBs result in no impairment in the ability to hear everyday speech under everyday conditions. The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss. 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

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404.

[5] *Id.* at § 10.404(a); *see also Jacqueline S. Harris*, 54 ECAB 139 (2002).

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *id.* at Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[7] *D.H.*, Docket No. 20-0198 (issued July 9, 2020); *John W. Montoya*, 54 ECAB 306 (2003).

[8] *R.R.*, Docket No. 19-0750 (issued November 15, 2019); *Edward Spohr*, 54 ECAB 806, 810 (2003); *Tammy L. Meehan*, 53 ECAB 229 (2001).

[9] A.M.A., *Guides* 250.

added to the greater loss, and the total is divided by six to arrive at the amount of binaural hearing loss.[10] The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.[11]

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.[12] 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.[13]

ANALYSIS

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

OWCP accepted that appellant developed bilateral sensorineural hearing loss, labyrinthitis, left ear, tinnitus, left ear, and bilateral benign paroxysmal vertigo in the performance of duty. It further developed his claim and referred him to Dr. Williams who, in a report dated October 9, 2023, diagnosed bilateral noise-induced hearing loss. Dr. Williams noted that appellant's thresholds at 500 to 3,000 Hz were normal bilaterally, therefore, there was no hearing loss impairment rating. He noted appellant's tinnitus handicap inventory score was six indicating only a slight handicap. Dr. Williams explained that appellant did not have ratable hearing loss and he would not be entitled to an impairment rating for tinnitus. He calculated five percent whole person impairment for vestibular disorders. On October 27, 2023 OWCP's DMA, Dr. Israel, reviewed Dr. Williams' October 9, 2023 report and determined that appellant sustained a right monaural loss of zero percent, a left monaural loss of zero percent, and a binaural hearing loss of zero percent. Dr. Israel noted that a tinnitus handicap inventory was prepared yielding a one percent score; however, without ratable hearing loss appellant would not be entitled to an award for tinnitus.

On November 12 and 28, 2023 appellant was evaluated by his treating physician, Dr. Denneny, at OWCP's request. Dr. Denneny noted that appellant continued to have disequilibrium, numbness around the eyes, peripheral distortion, and spatial distal mentation. She noted that appellant's tinnitus was constant and vestibular examination showed increased hips sway with eyes closed. Pursuant to the A.M.A., *Guides*, page 258, Dr. Denneny found Class II history with symptoms and signs of vestibular disequilibrium consistent with objective findings, activities of daily living could not be performed without assistance except for simple activities, abnormal Romberg, and increased hip sway with eyes closed. She noted Class III diagnostic objective findings with abnormal caloric response demonstrating 54 percent vestibular hypofunction. Dr. Denneny opined that based on examination and evaluation appellant had 30 percent whole person impairment.

[10] *Id*.

[11] *G.T.*, Docket No. 19-1705 (issued April 16, 2020); *E.S.*, 59 ECAB 249 (2007); *Reynaldo R. Lichtenberger*, 52 ECAB 462 (2001).

[12] *See* A.M.A., *Guides* 249.

[13] *Id*.

In a January 30, 2024 report, Dr. Williams reviewed Dr. Denneny's November 12 and 28, 2023 reports. He indicated that in the absence of central nervous system signs or abnormal sway there is no elevated rating within the class and therefore appellant would have five percent whole person impairment for vestibular disorders pursuant to the A.M.A., *Guides*. Dr. Williams provided an impairment rating based on new medical reports from Dr. Denneny and an application of the sixth edition of the A.M.A., *Guides*, finding again that appellant had five percent whole person impairment for vestibular disorders.

As Dr. Williams provided an impairment rating based on his review of Dr. Denneny's November 12 and 28, 2023 reports using the sixth edition of the A.M.A., *Guides*, pursuant to its procedures, OWCP should have routed the case record, including the additional reports from Dr. Denneny, to a DMA for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified, if any.[14] As this was not done, the case must be remanded for referral to a DMA.[15]

On remand, OWCP shall further develop the medical evidence of record by obtaining an opinion from a DMA regarding the nature and extent of appellant's permanent impairment, if any, for his accepted conditions. Following this and other such further development as deemed necessary, it shall issue a *de novo* decision regarding appellant's schedule award claim.

CONCLUSION

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

[14] *L.S.*, Docket No. 19-0092 (issued June 12, 2019); *N.I.*, Docket No. 16-1027 (issued January 11, 2017); *Tommy R. Martin*, 56 ECAB 273 (2005); *supra* note 6 at Chapter 2.808.6(f) (March 2017). (If the claimant's physician provides an impairment report the case should be referred to the DMA for review.)

[15] *L.S.*, *id.*; *R.H.*, Docket No. 17-1017 (issued December 4, 2018).

ORDER

IT IS HEREBY ORDERED THAT the February 9, 2024 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 2, 2024
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board