

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

R.B., Appellant)	
)	
and)	Docket No. 24-0600
)	Issued: June 21, 2024
DEPARTMENT OF THE NAVY, NAVAL SEA)	
SYSTEMS COMMAND, Jacksonville, FL,)	
Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 7, 2024 appellant filed a timely appeal from a February 5, 2024 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 greater than 59 percent binaural hearing loss, for which he previously received schedule award compensation.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.² The facts and circumstances as set forth in the Board's prior decisions and orders are incorporated herein by reference. The relevant facts are as follows.

On November 9, 2009 appellant, then a 70-year-old former supply technician, filed an occupational disease claim (Form CA-2) alleging that he had experienced increased hearing loss casually related to factors of his federal employment. OWCP assigned OWCP File No. xxxxxx423.

OWCP had previously accepted appellant's January 25, 1983 occupational disease claim for left-sided monaural hearing loss. It assigned OWCP File No. xxxxxx735. By decision dated May 21, 1984, OWCP granted appellant a schedule award for 18 percent monaural hearing loss in the left ear under OWCP File No. xxxxxx735. Appellant retired from employment in 1995.

By decision dated February 4, 2010, OWCP denied appellant's occupational disease claim. It found that the medical evidence was insufficient to establish that he had sustained a diagnosed condition causally related to the accepted employment factors.

Appellant appealed to the Board. By decision dated February 4, 2011, the Board set aside the February 4, 2010 decision.³ The Board determined that the medical evidence established appellant's claim for binaural hearing loss. The Board remanded the case for OWCP to determine whether he had sustained a ratable permanent impairment due to his binaural hearing loss.

On May 3, 2011 OWCP advised appellant that it had accepted his claim for bilateral sensorineural hearing loss and bilateral tinnitus.

By decision dated July 27, 2011, OWCP granted appellant a schedule award for 39 percent bilateral hearing loss, minus the 18 percent left monaural loss previously awarded under OWCP File No. xxxxxx735. The period of the award ran for 68.64 weeks, from April 24, 2011 to August 17, 2012.

Appellant appealed to the Board. By decision dated May 7, 2012, the Board affirmed the July 27, 2011 decision.⁴

² Docket No. 10-1013 (issued February 4, 2011); Docket No. 12-0015 (issued May 7, 2012), *Order Denying Petition for Reconsideration* (issued January 7, 2013); *Order Dismissing Appeal*, Docket No. 13-0811 (issued July 1, 2013); Docket No. 16-1863 (issued April 3, 2017); Docket No. 19-0257 (issued August 5, 2019).

³ *Supra* note 2.

⁴ *Supra* note 2. As noted, on January 7, 2013, the Board denied appellant's petition for reconsideration. *Order Denying Petition for Reconsideration*, Docket No. 12-0015 (issued January 7, 2013). In an order dated July 1, 2013, the Board dismissed appellant's appeal as there was no final adverse decision over which it had jurisdiction. *Order Dismissing Appeal*, Docket No. 13-811 (issued July 1, 2013).

By decision dated December 10, 2014, OWCP denied appellant's claim for an additional schedule award. It found that the medical evidence failed to establish greater than 39 percent binaural hearing loss for which he previously received schedule award compensation.⁵

On July 18, 2016 appellant requested reconsideration. He submitted a May 18, 2016 audiologist's report. By decision dated August 12, 2016, OWCP denied appellant's request for reconsideration as it was untimely and failed to demonstrate clear evidence of error.

Appellant appealed to the Board. By decision dated April 3, 2017, the Board set aside the August 12, 2016 decision.⁶ It noted that appellant had contended that he was entitled to an increased schedule award and submitted new evidence. The Board determined OWCP had erred in treating his claim for an increased schedule award as a request for reconsideration. The Board remanded the case for OWCP to consider whether appellant had established entitlement to an increased schedule award.

On July 11, 2017 OWCP referred appellant to Dr. John F. Ansley, a Board-certified otolaryngologist, for a second opinion evaluation.

In a report dated July 27, 2017, Dr. Ansley diagnosed sensorineural hearing loss causally related to noise exposure in the course of appellant's federal employment, providing as a rationale his exposure to loud noises. He recommended hearing aids. Dr. Ansley obtained an audiogram on July 27, 2017 and determined that appellant had 40 percent binaural hearing loss with an additional 3 percent impairment for tinnitus, for a total binaural hearing impairment of 43 percent.

On September 27, 2017 Dr. Jeffrey M. Israel, a Board-certified otolaryngologist serving as a district medical adviser (DMA) reviewed the audiological testing performed by Dr. Ansley. Referencing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,⁷ he determined that appellant had 39 percent right monaural hearing loss, an additional 18 percent left monaural loss, and a binaural hearing loss of 37 percent. Dr. Israel advised that as the 37 percent binaural hearing loss was less than the previously awarded for binaural hearing loss of 39 percent, appellant was not entitled to an additional award.

By decision dated October 19, 2017, OWCP denied appellant's claim for an increased schedule award.

On January 19, 2018 appellant requested reconsideration. He maintained that his tinnitus had worsened. In support of his request, appellant submitted audiograms dated November 14 and 15, 2017 and December 29, 2017. He further submitted a November 27, 2017 audiogram.

Appellant additionally submitted a January 12, 2018 report from a physician assistant prepared on behalf of Cortney Van Ausdal, an audiologist. She discussed his complaints of tinnitus

⁵ By decision dated June 17, 2015, OWCP denied appellant's request for an oral hearing as untimely under 5 U.S.C. § 8124(b).

⁶ Docket No. 16-1863 (issued April 3, 2017).

⁷ A.M.A., *Guides* (6th ed 2009).

bilaterally and noise exposure during the course of his federal employment. The physician assistant diagnosed bilateral sensorineural hearing loss, an asymmetric word recognition score, and occupational exposure to loud noise.

On February 15, 2018 Dr. Israel reviewed the November 27, 2017 audiogram. He found that appellant had 63.75 percent right monaural hearing loss and 67.75 percent left monaural hearing loss, noting that he had previously received an award for 18 percent left monaural loss. Dr. Israel further determined that he had 51.9 percent binaural loss minus the previously awarded 39 percent, for an additional 12.9 percent hearing loss.

By decision dated April 23, 2018, OWCP vacated the October 19, 2017 decision and found that appellant was entitled to an additional 13 percent award for bilateral sensorineural hearing loss.

By decision dated May 1, 2018, OWCP granted appellant a schedule award for an additional 13 percent binaural hearing loss, for a total binaural loss of 52 percent. The period of the award ran for 26 weeks from November 27, 2017 to May 27, 2018.

On July 11, 2018 appellant requested reconsideration. He contended that he was entitled to a schedule award from August 2012 to the present. Appellant resubmitted the November 27, 2017 audiogram.

By decision dated October 10, 2018, OWCP denied modification of its May 1, 2018 decision.

Appellant appealed to the Board. By decision dated August 5, 2019, the Board affirmed the October 10, 2018 decision.⁸

On November 27, 2019 appellant requested reconsideration. By decision dated December 19, 2019, OWCP denied his request for merit review of his claim under 5 U.S.C. § 8128(a). On January 15, 2021 appellant again requested reconsideration. He asserted that his hearing loss had worsened. By decision dated January 27, 2021, OWCP denied his request for reconsideration as it was untimely and failed to demonstrate clear evidence of error.

On April 14, 2023 appellant filed a claim for compensation (Form CA-7) for an increased schedule award. He submitted a March 30, 2022 audiogram from an audiologist, who found that he had profound hearing loss due to his employment.

On June 8, 2023 OWCP referred appellant to Dr. John F. Ansley, a Board-certified otolaryngologist, for a second opinion evaluation.

In a report dated August 8, 2023, Dr. Ansley diagnosed sensorineural hearing loss and tinnitus due to noise exposure encountered during appellant's federal employment. He explained that appellant's long history of exposure to noise had worsened his hearing and tinnitus and recommended hearing aids. Dr. Ansley obtained an audiogram on August 8, 2023 showing decibel

⁸ Docket No. 19-0257 (issued August 5, 2019).

(dBs losses at the frequency levels of 500, 1,000, 2,000, and 3,000 Hertz (Hz) in the right ear of 35, 50, 75, and 80 dBs respectively, and in the left ear of 40, 50, 80, and 90 dBs, respectively. He determined that appellant had 53.75 percent binaural hearing loss with an additional 5 percent impairment for tinnitus, for a total binaural hearing impairment of 58.75 percent.

On September 21, 2023 Dr. Israel, the DMA, reviewed the audiological testing performed by Dr. Ansley. He applied OWCP's standardized procedures to his evaluation. Using the sixth edition of the A.M.A., *Guides*, Dr. Israel determined that appellant had 52.5 percent right monaural hearing loss, 60 percent left monaural loss, and binaural hearing loss of 53.8 percent. In reaching his impairment rating, he totaled the dBs losses for the right ear at 240 and then divided by 4 to obtain the average hearing loss of 60 dBs. Dr. Israel totaled the dB losses for the left ear at 260 and then divided by 4 to obtain the average hearing loss of 65 db. After subtracting the 25 dBs fence, he multiplied both the right ear and left ear by 1.5 respectively to find 52.5 percent right ear monaural hearing loss and 60 percent left ear monaural hearing loss. Dr. Israel multiplied the lesser right ear loss of 52.5 percent by 5, added the 60 percent left ear loss, and divided this sum by 6 to find 53.8 percent binaural hearing loss. He found an additional five percent impairment due to tinnitus, which he added to the binaural hearing loss, for a total award of 58.8 percent. Dr. Israel subtracted 51.9 percent, the prior award, and concluded that appellant had an additional 6.9 percent impairment.

By decision dated February 5, 2024, OWCP granted appellant an additional schedule award for 7 percent binaural hearing loss, for a total impairment due to binaural hearing loss and tinnitus of 59 percent. The period of the award ran for 14 weeks from August 8 to November 13, 2023. OWCP advised that it had calculated the number of weeks for both monaural hearing loss and binaural hearing loss and indicated that it had used binaural hearing loss as it was more advantageous for appellant.

LEGAL PRECEDENT

The schedule award provisions of FECA,⁹ and its implementing federal regulation,¹⁰ 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 way 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 2009.¹¹ The Board has approved the use by OWCP of the A.M.A.,

⁹ *Supra* note 1.

¹⁰ 20 C.F.R. § 10.404.

¹¹ 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); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

Guides for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.¹²

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 added up and averaged.¹³ Then, the fence of 25 dBs is deducted because, as the A.M.A., *Guides* points out, losses below 25 decibels result in no impairment in the ability to hear everyday speech under everyday conditions.¹⁴ The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.¹⁵ 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 divided by six to arrive at the amount of the binaural hearing loss.¹⁶ The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.¹⁷

The A.M.A., *Guides* provide that if tinnitus interferes with activities of daily living, including sleep, reading, and other tasks requiring concentration, enjoyment of quiet recreation and emotional well-being, up to five percent may be added to measurable binaural hearing impairment.¹⁸

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.¹⁹

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish greater than 59 percent binaural hearing loss, for which he previously received schedule award compensation.

OWCP referred appellant to Dr. Ansley, who determined that appellant had 58.75 percent permanent impairment due to binaural hearing loss and tinnitus.

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

¹³ See Section 11.2, Hearing and Tinnitus, A.M.A., *Guides* 248-51 (6th ed. 2009).

¹⁴ *Id.* at 250.

¹⁵ *Id.* at 250-51.

¹⁶ *Id.* at 251.

¹⁷ See *D.R.*, Docket No. 20-1570 (issued April 14, 2021); *B.E.*, Docket No. 18-1785 (issued April 1, 2019).

¹⁸ A.M.A., *Guides* 249.

¹⁹ *J.M.*, Docket No. 24-0083 (issued March 20, 2024); *J.O.*, Docket No. 08-0735 (issued September 10, 2008); *Paul Fierstein*, 51 ECAB 381 (2000).

On September 21, 2023 Dr. Israel, serving as the DMA, reviewed Dr. Ansley's August 8, 2023 audiometric report and indicated that testing at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz revealed dBs losses of 35, 50, 75, and 80 the right ear and dB losses of 40, 50, 80, and 90 for the left ear, respectively. The dBs losses for the right ear were totaled at 240 and then divided by 4 to obtain the average hearing loss of 60 dBs. The dBs losses for the left ear were totaled at 260 and then divided by 4 to obtain the average hearing loss of 65 dBs. After subtracting the 25 dB fence, both the right ear and left ear were multiplied by 1.5 respectively to find 52.5 percent right ear monaural hearing loss and 60 percent left ear monaural hearing loss. Multiplying the lesser right ear loss of 52.5 percent by 5, adding the 60 percent left ear loss, and dividing this sum by 6 resulted in 53.8 percent binaural hearing loss.²⁰ Following the rating protocols, Dr. Israel concurred with Dr. Ansley's calculations finding total binaural hearing loss of 52.5 percent and also concurred with his finding of an additional 5 percent for tinnitus, for a total permanent impairment rating of 58.8 percent.

The Board finds that Dr. Ansley's August 8, 2023 report and audiogram accurately summarized the relevant medical evidence, provided detailed findings on examination, and reached conclusions which comported with his findings and the appropriate provisions of the A.M.A., *Guides*.²¹ Utilizing this report, Dr. Israel properly applied the standards for rating hearing loss under the A.M.A., *Guides* to the August 8, 2023 audiogram and found that appellant had 58.8 percent binaural impairment due to hearing loss and tinnitus. The medical reports establish that appellant has 58.8 percent binaural hearing loss which, in accordance with OWCP policy, is rounded up to 59 percent.²²

The Board, therefore, finds that appellant has not met his burden of proof to establish greater than 59 percent binaural hearing loss, for which he previously received schedule award compensation.

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 permanent impairment.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish greater than 59 percent binaural hearing loss, for which he received schedule award compensation.

²⁰ *C.G.*, Docket No. 23-0916 (issued March 11, 2024); *A.L.*, Docket No. 21-1233 (issued January 31, 2022).

²¹ *See C.G., id.*; *J.M.*, Docket No. 18-1387 (issued February 1, 2019).

²² *See 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. *Supra* note 12 at 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).

ORDER

IT IS HEREBY ORDERED THAT the February 5, 2024 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 21, 2024
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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