

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

N.Y., Appellant	)	
	)	
and	)	<b>Docket No. 25-0052</b>
	)	<b>Issued: November 12, 2024</b>
<b>DEPARTMENT OF HOMELAND SECURITY,</b>	)	
<b>U.S. IMMIGRATION AND CUSTOMS</b>	)	
<b>ENFORCEMENT, West Valley City, UT,</b>	)	
<b>Employer</b>	)	
	)	

*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  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On October 21, 2024 appellant filed a timely appeal from an August 21, 2024 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (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 April 12, 2024 appellant, then a retired 41-year-old general inspection, investigation, and compliance officer, filed an occupational disease claim (Form CA-2) alleging that he developed hearing loss and aggravation of tinnitus in both ears due to factors of his federal

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

employment. He indicated that he was involved in two shootings where he was not wearing hearing protection, one of which occurred in May 2021, and involved a rifle being fired in close proximity to the left side of his head. Appellant noted that he first became aware of his condition on May 20, 2021 and realized its relation to his federal employment on April 11, 2024. He retired on February 10, 2024.

In support of his claim, appellant submitted an employing establishment position description for a deportation officer.

In a development letter dated April 16, 2024, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence necessary to establish his claim and attached a questionnaire for his completion. OWCP afforded appellant 60 days to respond. In a separate development letter of even date, it requested that the employing establishment provide additional information regarding his exposure to noise due to factors of his federal employment, including comments from a knowledgeable supervisor regarding the accuracy of his statements. OWCP afforded the employing establishment 30 days to respond.

OWCP thereafter received a rating decision dated March 16, 2006, by the Department of Veterans Affairs (DVA) finding that appellant was 10 percent disabled due to tinnitus, effective December 2, 2005. The decision also found that he had a service-connected hearing loss in the left ear with no disability rating, and no service-connected hearing loss in his right ear.

In an April 15, 2024 medical report, Dr. Stephanie Plunkett, Board-certified in family medicine, noted that appellant related complaints of hearing loss and tinnitus, which he indicated were aggravated during an incident at work in May 2021 when his partner fired a rifle next to his left ear during an arrest. She performed an examination and diagnosed other abnormal auditory perceptions of the left ear (tinnitus) and conductive hearing loss, unspecified. Dr. Plunkett opined that appellant's hearing loss and tinnitus were caused by his exposure to close proximity explosive gunfire.

In an April 30, 2024 response to OWCP's development letter, appellant described his history of noise exposure with the military from 2000 through 2012 and with the employing establishment from 2012 to 2024. He reported that the majority of his noise exposure with the employing establishment was due to idling airplane engines, firearms training, and two instances of unexpected shootings which occurred during field operations.

On June 20, 2024 OWCP referred appellant, along with the medical record, a statement of accepted facts (SOAF), and a series of questions, to Dr. Stewart Barlow, a Board-certified otolaryngologist, for an audiogram and second opinion examination to determine the nature, extent, and causal relationship of appellant's hearing loss.

In a July 30, 2024 report, Dr. Barlow reviewed the SOAF, history of injury, and the medical evidence of record. He indicated that there was no significant variation from the SOAF, and no other relevant history or condition related to appellant's hearing loss. Dr. Barlow noted that the ears, tympanic membranes, and canals were normal. He diagnosed binaural sensorineural hearing loss and bilateral tinnitus, left greater than right, which he opined were due to noise exposure encountered in appellant's federal employment. Dr. Barlow reviewed an audiogram conducted by an audiologist on that date, which demonstrated losses of 15, 15, 15, and 10 decibels (dBs) for the right ear, and 15, 20, 25, and 40 dBs for the left ear at the frequencies of 500, 1,000, 2,000, and

3,000 Hertz (Hz), respectively. Utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*),<sup>2</sup> he calculated that appellant had a monaural loss of zero percent in each ear for a binaural loss of zero percent. Dr. Barlow completed a tinnitus handicap inventory (THI) and rated the tinnitus diagnosis at four percent. He arrived at a total binaural hearing impairment rating of four percent.

On August 1, 2024 OWCP accepted appellant's claim for bilateral tinnitus and bilateral sensorineural hearing loss.

On August 14, 2024 appellant filed a claim for compensation (Form CA-7) for a schedule award.

In an August 20, 2024 report, Dr. Jeffrey M. Israel, a Board-certified otolaryngologist serving as an OWCP district medical adviser (DMA), reviewed the evidence of record, and applied OWCP's standard for evaluating hearing loss under the sixth edition of the A.M.A., *Guides*<sup>3</sup> to Dr. Barlow's July 30, 2024 report and the audiology findings. He determined that appellant sustained right monaural loss of zero percent, left monaural loss of zero percent, and binaural hearing loss of zero percent, noting that a tinnitus award of four percent could not be given as there was no ratable binaural hearing loss. Dr. Israel averaged appellant's right ear hearing levels of 15, 15, 15, and 10 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 4, which equaled 13.75. After subtracting the 25 dB fence, he multiplied the remaining 0 balance by 1.5 to calculate zero percent right ear monaural hearing loss. Dr. Israel then averaged appellant's left ear hearing levels of 15, 20, 25, and 40 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 4, which equaled 25. After subtracting the 25 dB fence, he multiplied the remaining 0 balance by 1.5 to calculate 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 5, adding the zero percent left ear loss, and dividing this sum by 6, which equaled zero percent. He opined that he concurred with Dr. Barlow's calculations, other than his rating for four percent binaural hearing loss for tinnitus. Dr. Israel noted that a tinnitus award cannot be rendered when there is a zero percent binaural hearing impairment as stipulated on page 249 of the A.M.A., *Guides*. He recommended yearly audiograms, use of noise protection, and hearing aids for hearing loss with integrated masking for tinnitus. Dr. Israel determined that appellant had reached maximum medical improvement (MMI) on July 30, 2024, the date of the most recent audiogram and Dr. Barlow's examination.

By decision dated August 21, 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.

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<sup>2</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

<sup>3</sup> *Id.*

## LEGAL PRECEDENT

The schedule award provisions of FECA<sup>4</sup> and its implementing regulations<sup>5</sup> 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 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*<sup>6</sup> has been adopted by OWCP for evaluating schedule losses and the Board has concurred in such adoption.<sup>7</sup>

A claimant seeking compensation under FECA has the burden of proof to establish the essential elements of his or her claim.<sup>8</sup> 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.<sup>9</sup>

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.<sup>10</sup> Using the frequencies of 500, 1,000, 2,000, and 3,000 Hz, the losses at each frequency are averaged.<sup>11</sup> 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.<sup>12</sup> The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.<sup>13</sup> 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

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<sup>4</sup> 5 U.S.C. § 8107.

<sup>5</sup> 20 C.F.R. § 10.404

<sup>6</sup> *Supra* note 2.

<sup>7</sup> *J.S.*, Docket No. 22-0274 (issued September 13, 2022); *V.M.*, Docket No. 18-1800 (issued April 23, 2019); *see J.W.*, Docket No. 17-1339 (issued August 21, 2018).

<sup>8</sup> *D.H.*, Docket No. 20-0198 (issued July 9, 2020); *John W. Montoya*, 54 ECAB 306 (2003).

<sup>9</sup> *R.R.*, Docket No. 19-0750 (issued November 15, 2019); *Edward Spohr*, 54 ECAB 806, 810 (2003); *Tammy L. Meehan*, 53 ECAB 229 (2001).

<sup>10</sup> *Supra* note 2.

<sup>11</sup> *Id.* at 250.

<sup>12</sup> *Id.*; *W.W.*, Docket No. 21-0545 (issued June 21, 2023); *C.D.*, Docket No. 18-0251 (issued August 1, 2018).

<sup>13</sup> *Id.*

binaural hearing loss.<sup>14</sup> The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.<sup>15</sup>

Regarding tinnitus, the A.M.A., *Guides* provide that tinnitus is not a disease, but rather a symptom that may be the result of disease or injury.<sup>16</sup> 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.<sup>17</sup>

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to OWCP's medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified.<sup>18</sup> It may follow the advice of its medical adviser or consultant where he or she has properly utilized the A.M.A., *Guides*.<sup>19</sup>

### ANALYSIS

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

OWCP referred appellant to Dr. Barlow for a second opinion examination to evaluate his hearing loss. In his July 30, 2024 report, Dr. Barlow diagnosed bilateral sensorineural hearing loss and bilateral tinnitus, left greater than right. He opined that the conditions were due to noise exposure encountered in appellant's federal employment. Dr. Barlow determined that appellant sustained a right monaural loss of zero percent, a left monaural loss of zero percent, and a binaural hearing loss of four percent for tinnitus.

In its August 1, 2024 decision, OWCP accepted the claim for bilateral sensorineural hearing loss and bilateral tinnitus. It forwarded appellant's case to Dr. Israel, OWCP's DMA, to assess his percentage of permanent employment-related hearing loss.

The DMA, Dr. Israel, in a report dated August 17, 2024, reviewed Dr. Barlow's report, and determined that appellant had zero percent monaural hearing loss in each ear. He related that testing at the frequencies of 500, 1,000, 2,000, and 3,000 Hz revealed losses at 15, 15, 15, and 10 dBs for the right ear, respectively, and 15, 20, 25, and 40 dBs for the left ear, respectively. The decibel losses for the right ear were totaled at 55 and divided by 4 to obtain an average hearing loss of 13.75. The decibel losses for the left ear were totaled at 100 and divided by 4 to obtain an

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<sup>14</sup> *Id.*

<sup>15</sup> *R.C.*, Docket No. 23-0334 (issued July 19, 2023); *H.M.*, Docket No. 21-0378 (issued August 23, 2021); *V.M.*, *supra* note 7; *E.S.*, 59 ECAB 249 (2007); *Donald Stockstad*, 53 ECAB 301 (2002), *petition for recon. granted* (modifying prior decision), Docket No. 01-1570 (issued August 13, 2002).

<sup>16</sup> *Supra* note 2 at 249.

<sup>17</sup> *Id.*; *R.H.*, Docket No. 10-2139 (issued July 13, 2011); *see also Robert E. Cullison*, 55 ECAB 570 (2004).

<sup>18</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5.a (March 2017); *D.J.*, Docket No. 19-0352 (issued July 24, 2020).

<sup>19</sup> *See Ronald J. Pavlik*, 33 ECAB 1596 (1982).

average hearing loss of 25. After subtracting the 25-decibel fence, both the right and left ear losses were reduced to zero. When multiplied by 1.5, the resulting monaural hearing loss in each ear was zero percent.

The Board finds that the DMA, Dr. Israel, properly concluded that appellant did not have ratable hearing loss warranting a schedule award.<sup>20</sup> Although he has accepted employment-related hearing loss, it is insufficiently severe to be ratable for schedule award purposes.<sup>21</sup>

The Board further finds that the DMA correctly explained that tinnitus may not be added to an impairment rating for hearing loss under the sixth edition of the A.M.A., *Guides* unless such hearing loss is ratable.<sup>22</sup> Accordingly, as appellant does not have ratable hearing loss, the Board finds that he is not entitled to a schedule award for tinnitus.<sup>23</sup>

As the medical evidence of record is insufficient to establish ratable hearing loss, warranting a schedule award, the Board finds that appellant has not met his burden of proof.

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 a ratable hearing loss warranting a schedule award.

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<sup>20</sup> *T.B.*, Docket No. 23-0303 (issued August 11, 2023).

<sup>21</sup> *J.R.*, Docket No. 21-0909 (issued January 14, 2022); *see W.T.*, Docket No. 17-1723 (issued March 20, 2018); *E.D.*, Docket No. 11-0174 (issued July 26, 2011).

<sup>22</sup> *R.C.*, Docket No. 23-0334 (issued July 19, 2023); *D.S.*, Docket No. 23-0048 (issued May 23, 2023); *J.S.*, Docket No. 22-0274 (issued September 13, 2022).

<sup>23</sup> *P.C.*, Docket No. 23-1152 (issued January 19, 2024).

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 21, 2024 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 12, 2024  
Washington, DC

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

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

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