United States Department of Labor
Employees' Compensation Appeals Board

A.O., Appellant	)	
and	)	**Docket No. 11-1360**
	)	**Issued: May 18, 2012**
DEPARTMENT OF THE ARMY, CPAC-ARMY ARMOR CENTER, Fort Knox, KY, Employer	)	

Appearances:
Benjamin J. Humphries, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 16, 2011 appellant, through his attorney, filed a timely appeal from a March 8, 2011 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 the case.

ISSUE

The issue is whether appellant has established that his bilateral hearing loss was causally related to factors of his federal employment.

FACTUAL HISTORY

On February 15, 2009 appellant, then a 79-year-old retired locomotive engineer, filed a notice of occupational disease, alleging that he sustained hearing loss causally related to factors of his federal employment. He indicated that he first became aware that his hearing loss was

[1] 5 U.S.C. § 8101 *et seq.*

caused by his federal employment on November 7, 2008. Appellant retired on November 12, 1976.

Along with the claim, appellant submitted a November 7, 2008 audiogram which reported severe to profound mid-to-high frequency bilateral hearing loss. The audiogram did not contain calibration information. The signature on the audiogram was illegible.

In a supplemental sworn statement dated February 6, 2009, appellant explained that he was born without any hearing disability, and had no hearing disabilities until he started working at Fort Knox. He alleged that his hearing aid specialist had suggested to him that his hearing loss might have been caused by his employment at Fort Knox. Appellant further stated that, while serving as a locomotive engineer and brakeman, he was required to be either on or around the vicinity of the locomotive almost eight hours per day, five days per week and that the locomotives were extremely loud. He also noted that he was not given ear protection.

By letter dated April 30, 2009, OWCP requested that appellant submit evidence to demonstrate that his supervisor had actual knowledge of the alleged hearing loss within 30 days of the date of injury. It also requested that he submit audiogram evidence to establish his hearing loss.

On May 29, 2009 appellant submitted a sworn affidavit, in which he reiterated his work and medical history and also noted that his supervisors had knowledge of his hearing loss. He alleged that the employing establishment conducted hearing tests annually, and even though the hearing test results were not provided to him, he was told after each test that his hearing was worsening.

On July 8, 2009 the district medical adviser (DMA) concluded that the July 8, 2009 audiogram showed a mid- and high-frequency hearing loss, which was consistent with noise-induced hearing loss. However, she also qualified her opinion by noting that, because the audiologic testing was done more than 30 years after appellant's retirement, causal relationship could not be determined with any degree of certainty.

OWCP denied appellant's claim in a July 14, 2009 decision on the grounds that it was untimely filed.

Appellant disagreed with the decision and requested a review of the written record on July 21, 2009. In an October 23, 2009 decision, the hearing representative affirmed the July 14, 2009 OWCP decision.

On July 13, 2010 appellant's representative requested reconsideration before OWCP.

Appellant submitted an additional affidavit, dated August 19, 2010, in which he stated that his hearing loss occurred during his employment in the transportation and locomotive department between the years of 1952 to 1976, as a result of the high noise exposure in employment and that he was never provided any type of hearing protection.

On August 30, 2010 OWCP referred appellant's case along with a statement of accepted facts to a second opinion physician, Dr. Andrew S. Mickler, a Board-certified otolaryngologist.

Dr. Mickler's September 17, 2010 medical report diagnosed appellant with sensorineural hearing loss, but opined that the hearing loss was not due to the noise in his federal employment. He stated the following as the basis for his conclusion: "when one looks at the bone conduction scores, there is no noise notch noted. Without a noise notch, there is no diagnosis of a noise-induced hearing loss."

By decision dated October 18, 2010, OWCP modified its prior decision to find that appellant's claim was timely filed; however, appellant's claim remained denied as appellant had not established causal relationship between his employment factors and his hearing loss.

Appellant's representative filed another reconsideration request on January 24, 2011. Along with the request, he also sent a letter from Dr. Larry J. Hall, a Board-certified otolaryngologist, dated January 14, 2011, in which Dr. Hall concluded that appellant had a mid- and high-tone sensorineural hearing loss due to noise exposure. Dr. Hall further noted that he disagreed with Dr. Mickler's statement that "without a noise notch, there is no diagnosis of a noise-induced hearing loss." In support of his position, he explained that "in some instances, bone conduction is higher than air conduction in high-tone noise-induced hearing loss, but this in no way has to be the case, and one certainly cannot rule out noise hearing loss from this."

By decision dated March 8, 2011, OWCP found that Dr. Mickler's report constituted the weight of the medical evidence and established that appellant's hearing loss was not causally related to his federal employment.

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.[2] An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his claim. When an employee claims that he sustained an injury in the performance of duty, he must submit sufficient evidence to establish that he experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged. He must also establish that such event, incident or exposure caused an injury.[3]

Causal relationship is a medical issue,[4] and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on whether there is a causal relationship between the claimant's diagnosed condition and the established incident or factor of employment. The opinion of the physician must be based on a complete factual and medical background of the claimant,[5] must be one of reasonable medical certainty,[6]

[2] 5 U.S.C. § 8102(a); *see also F.A.*, Docket No. 11-662 (issued September 21, 2011).

[3] *John J. Carlone*, 41 ECAB 354 (1989).

[4] *Mary J. Briggs*, 37 ECAB 578 (1986).

[5] *William Nimitz, Jr.*, 30 ECAB 567 (1979).

[6] *See Morris Scanlon*, 11 ECAB 384 (1960).

and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the established incident or factor of employment.[7]

Section 8123(a) of FECA provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[8] The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination.[9]

ANALYSIS

Appellant has alleged that he developed bilateral loss of hearing due to noise exposure during his federal employment. The Board finds that the case is not in posture for decision.

There are two medical reports of record that provided opinions as to whether the noise exposure appellant experienced in his employment as a locomotive engineer caused his hearing loss.[10] Dr. Mickler's September 17, 2010 report stated that appellant's sensorineural hearing loss was not due to noise exposure in his employment. His medical rationale supporting this conclusion was "when one looks at the bone conduction scores, there is no noise notch noted. Without a noise notch, there is no diagnosis of a noise-induced hearing loss."

Dr. Hall reviewed appellant's medical records which included Dr. Mickler's medical opinion and noted in his letter dated January 14, 2011 that: "In some instances, bone conduction is higher than air conduction in high tone noise-induced hearing loss, but this in no way has to be the case and one certainly cannot rule out noise-induced hearing loss from this." Dr. Hall went on to point out that he specifically disagreed with Dr. Mickler's statement that "without a noise notch there is no diagnosis of a noise-induced hearing loss." He concluded that appellant's sensorineural hearing loss was due to noise exposure.

Both of these medical opinions were based on a detailed history of appellant's employment-related noise exposure as well as a complete medical background. They had each provided medical rationale for their conclusions on whether appellant's hearing loss was noise induced. The Board finds that the opinions are of equal weight and rationale, and that the two doctors differ in their opinion on causal relationship, a central issue in the present case.[11]

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[7] *See William E. Enright*, 31 ECAB 426, (1980).

[8] 5 U.S.C. § 8123(a); *see S.R.*, Docket No. 09-2332 (issued August 16, 2010).

[9] 20 C.F.R. § 10.321.

[10] The DMA opinion dated July 8, 2009 was based solely on an audiogram result which did not meet the Federal (FECA) Procedural Manual's evidential requirement for a hearing test as indicated above. As such, the DMA opinion has limited probative value for determining causal relationship. *See A.B.*, Docket No. 11-290 (issued September 23, 2011); *R.B.*, Docket No. 10-1512 (issued March 24, 2011).

[11] *See H.V.*, Docket No. 10-2363 (issued July 15, 2011).

When there are opposing reports of virtually equal weight and rationale, the case will be referred to an impartial medical specialist pursuant to section 8123(a) of FECA which provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination and resolve the conflict of medical evidence.[12] This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[13]

On remand, OWCP should refer appellant, a statement of accepted facts, and a list of specific questions to a Board-certified otolaryngologist to determine if appellant's loss of hearing is related to his accepted employment-related noise exposure and whether there is permanent impairment.

CONCLUSION

The Board finds that the case is not in posture for decision as there is an unresolved conflict of medical opinion evidence as to whether appellant's hearing loss was a result of his exposure to noise during his federal employment. Upon return of the case record, OWCP shall further develop the medical evidence as appropriate and issue a *de novo* decision.

[12] 5 U.S.C. §§ 8101-8193, 8123; *M.S.*, 58 ECAB 328 (2007); *B.C.*, 58 ECAB 111 (2006).

[13] *R.C.*, 58 ECAB 238 (2006).

ORDER

IT IS HEREBY ORDERED THAT the March 8, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further proceedings consistent with this opinion.

Issued: May 18, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board