United States Department of Labor
Employees' Compensation Appeals Board

H.V., Appellant	)	
and	)	**Docket No. 10-2363**
	)	**Issued: July 15, 2011**
U.S. POSTAL SERVICE, LOGISTICS & DISTRIBUTION CENTER, Kearny, NJ	)	
Employer	)	

Appearances:
Alan J. Shapiro, 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 20, 2010 appellant, through his attorney, filed a timely appeal of an Office of Workers' Compensation Programs' (OWCP) August 17, 2010 merit decision. Pursuant to the Federal Employees' Compensation Act (FECA)[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUE

The issue is whether appellant sustained an employment-related loss of hearing in his left ear.

FACTUAL HISTORY

On July 8, 2008 appellant, then a 50-year-old mail handler and equipment operator, filed an occupational disease claim alleging that he developed bilateral hearing loss due to noise

[1] 5 U.S.C. § 8101 *et seq.*

exposure in his federal employment. He first became aware of his condition on November 12, 2007 and first attributed it to his employment on November 14, 2007. In a statement dated July 7, 2008, appellant noted that he had been exposed to loud mail processing machines, worked on aircraft ramp services and drove a forklift in the performance of duty.

Dr. Laura L. Downey, a Board-certified otolaryngologist, completed a report on May 8, 2008. She stated that appellant experienced a sudden onset of sensorineural hearing loss in November 2007, but no tumors or infections were found. Appellant was treated with medication and improved from a profound left hearing loss to a severe left hearing loss. Dr. Downey stated, "[Appellant's] employment is negatively impacting his recovery. His unilateral hearing loss is aggravated by loud sounds and open areas."

In a report dated June 5, 2008, Dr. Sarita Kaza, a Board-certified otolaryngologist, stated that appellant developed a sudden left-sided hearing loss in December 2007. She noted that appellant believed that his hearing loss was due to his work environment. Appellant's concurrent conditions included diabetes, hypertension, hyperthyroidism and hyperlipidemia. Dr. Kaza found that appellant's tympanic membranes were clear and mobile without infection or effusion. She diagnosed severe right-sided sensorineural hearing loss in the left ear and mild-to-moderate sensorineural loss of hearing in the right ear. Dr. Kaza stated that the hearing loss pattern in the right ear was consistent with noise exposure. She opined that appellant had some baseline hearing loss on the left prior to the sudden hearing loss that developed in December and that the baseline loss may have been due to noise exposure.

In a letter dated August 13, 2008, OWCP requested additional factual and medical evidence from appellant who responded on September 8, 2008. On November 12, 2007 appellant had attempted to make a telephone call right after waking and realized that he could not hear with his left ear.

The employing establishment reported on September 26, 2003 that appellant's daily noise exposure was between 81.6 and 81.7 decibels and that he was exposed to a bell ringing at 95 to 105 decibels for five seconds at a time approximately 15 times a night.

OWCP referred appellant for a second opinion evaluation with Dr. Chong S. Kim, a Board-certified otolaryngologist. In a report dated November 24, 2008, Dr. Kim reviewed the statement of accepted facts and diagnosed hearing loss. He stated that appellant had a currently nonfunctioning left ear and mild-to-moderate sensorineural hearing loss in the right. Dr. Kim stated, "Given the suddenness of his hearing loss on the left side, to a reasonable medical probability, his hearing loss was not related to the noise exposure. Rather it appears that the patient had idiopathic sudden loss of hearing, which is not an uncommon condition particularly in a patient with diabetes mellitus." Dr. Kim opined that appellant's hearing loss in the right ear was due to noise-induced cochlear damage and was work related. He conducted an audiological evaluation and found that appellant on the left side at the 500, 1,000, 2,000 and 3,000 hertz had losses of 100, 95, 80 and 90 decibels respectively.

By decision dated December 11, 2008, OWCP accepted appellant's claim for sensorineural noise-induced hearing loss on the right. It did not accept his hearing loss in the left ear.[2]

In a letter dated December 5, 2009, counsel requested reconsideration of the December 11, 2008 decision, contending that appellant's claim should include the left ear hearing loss. On October 5, 2009 Dr. Downey diagnosed sensorineural hearing loss and vestibular dysfunction. She indicated with a checkmark "yes" that appellant's condition was caused or aggravated by an employment activity. Dr. Downey listed appellant's history of injury as sudden onset of hearing loss and dizziness in November 2007. On October 20, 2009 he reiterated that appellant had a history of noise exposure at work and initially presented with decreased hearing with slight dizziness. Appellant did not report a history of trauma to his ear, discharge from his ear or history of ear infections. Dr. Downey prescribed inter-tympanic steroids, but appellant did not have any useful return of his hearing. She diagnosed a severe-to-profound sensorineural hearing loss in the left ear and mild hearing loss in the right ear. Dr. Downey stated that there would be no improvement in appellant's hearing in either ear and that it was likely that there would be a further decline of hearing in the right ear. She recommended noise protection. On November 12, 2009 Dr. Downey stated that appellant had 70 percent loss of hearing on the left and 20 percent loss of hearing on the right.

Dr. Downey completed a report on May 6, 2010 and stated that appellant was exposed to a loud work environment on a daily basis. She stated that appellant's hearing was normal when his federal employment began and that he had a deterioration of hearing in his left ear as well as significant loss of hearing in the right ear. Dr. Downey stated that appellant had workplace exposure which could cause loss of hearing and no other relevant history which could explain the loss. She diagnosed sensorineural moderately severe hearing loss in the right ear and profound loss of hearing on the left. Dr. Downey stated, "The sensorineural loss is, in part, in my opinion due to noise exposure."

By decision dated August 17, 2010, OWCP reviewed appellant's claim on the merits and found that Dr. Downey's report was not based on a complete and accurate medical history. It found that Dr. Downey did not indicate that she was aware that the loss of hearing in the left ear was sudden and did not address appellant's diabetes mellitus. OWCP found that Dr. Kim's report was entitled to the weight of the medical evidence which denied modification of its prior decision finding no employment-related loss of hearing in the left ear.

[2] On November 23, 2009 OWCP granted appellant a schedule award for 13 percent impairment of his right ear. It determined that appellant's compensation should be paid at the standard rate of 66 2/3 percent of his pay. By decision dated May 4, 2010, the Branch of Hearings and Review found that appellant had no more than 13 percent impairment of his right ear for which he had received a schedule award. The hearing representative remanded the case for OWCP to calculate appellant's pay rate based on the augmented rate of 75 percent. Counsel did not request that the Board review the May 4, 2010 decision on appeal. On May 28, 2010 appellant requested reconsideration by OWCP of the schedule award for the right ear impairment. The Board will not consider this decision on appeal. *See* 20 C.F.R. § 501.3(a).

LEGAL PRECEDENT

OWCP's regulations define an occupational disease as "a condition produced by the work environment over a period longer than a single workday or shift."[3] To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The evidence required to establish causal relationship is rationalized medical opinion evidence, based upon a complete factual and medical background, showing a causal relationship between the claimed condition and identified factors. The belief of a claimant that a condition was caused or aggravated by the employment is not sufficient to establish causal relation.[4]

ANALYSIS

Appellant filed a claim for occupational disease alleging that he developed bilateral loss of hearing due to noise exposure during his federal employment. In support of his claim, he submitted a series of reports from Dr. Downey, a Board-certified otolaryngologist, beginning May 8, 2008 in which she stated that appellant experienced a sudden onset of sensorineural hearing loss in November 2007 and that no tumors or infections were found. Dr. Downey treated appellant with medication with improvement from a profound left hearing loss to a severe left hearing loss. On October 5, 2009 she again listed appellant's history of injury as sudden onset of hearing loss and dizziness in November 2007 and diagnosed sensorineural hearing loss as well as vestibular dysfunction. Dr. Downey indicated with a checkmark "yes" that appellant's condition was caused or aggravated by an employment activity. On October 20, 2009 and May 6, 2010 she stated that appellant had a history of noise exposure at work and initially presented with decreased hearing with slight dizziness. Dr. Downey noted that appellant did not report a history of trauma to his ear, discharge from his ear or history of ear infections. She diagnosed a severe-to-profound sensorineural hearing loss in the left ear and mild hearing loss in the right ear. Dr. Downey stated that appellant's hearing was normal when his federal employment began and that he had a deterioration of hearing in his left ear as well as significant loss of hearing in the right ear. She stated that appellant had workplace exposure which could cause loss of hearing and no other relevant history which could explain the loss. Dr. Downey stated, "The sensorineural loss is, in part, in my opinion due to noise exposure."

Dr. Kaza examined appellant on June 5, 2008 stated that appellant developed a sudden left-sided hearing loss in 2007. She noted that appellant believed that his hearing loss was due to his work environment. Dr. Kaza listed appellant's concurrent conditions as diabetes, hypertension, hyperthyroidism and hyperlipidemia. She diagnosed severe sensorineural hearing

[3] 20 C.F.R. § 10.5(q).

[4] *Lourdes Harris*, 45 ECAB 545, 547 (1994).

loss in the left ear and mild-to-moderate sensorineural loss of hearing in the right ear. Dr. Kaza opined that the hearing loss pattern in the right ear was consistent with noise exposure hearing loss and that appellant had some baseline hearing loss on the left prior to the sudden hearing loss that developed in December 2007 and that the baseline loss may have been due to noise exposure.

These reports provide a detailed history of appellant's concurrent conditions and employment-related noise exposure. Both Dr. Downey and Dr. Kaza opine that at least some portion of appellant's hearing loss in his left ear was due to noise exposure in the performance of his federal job duties. The Board finds that these reports are sufficiently detailed and reasoned to create a conflict with the report of Dr. Kim, OWCP's second opinion physician, who opined that profound left loss of hearing was due to an idiopathic sudden loss of hearing common in patients with diabetes mellitus rather than to his federal noise exposure.

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.[5] 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.[6]

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 his loss of hearing in the left ear is related in any degree to his accepted employment-related noise exposure and if, so, any permanent impairment resulting.

CONCLUSION

The Board finds that the case is not in posture for decision as there is an unresolved conflict of medical opinion evidence.

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

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

ORDER

IT IS HEREBY ORDERED THAT the August 17, 2010 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development consistent with this decision of the Board.

Issued: July 15, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board