United States Department of Labor
Employees' Compensation Appeals Board

L.L., Appellant	)	
and	)	**Docket No. 11-610**
	)	**Issued: October 21, 2011**
DEPARTMENT OF THE NAVY, NAVAL AIR STATION, Jacksonville, FL, Employer	)	

Appearances:
David G. Jennings, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 13, 2011 appellant filed a timely appeal from a December 15, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act (FECA)[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the case.

ISSUE

The issue is whether appellant met his burden to establish that he sustained an occupational disease in the performance of duty.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On July 15, 2010 appellant, then a retired 57-year-old sheet metal mechanic, filed an occupational disease claim alleging that he sustained noise-induced bilateral hearing loss.[2] He became aware of his condition and its relationship to his federal employment on June 10, 1990.

In a July 19, 2010 letter, OWCP informed appellant that additional evidence was needed to establish his claim and gave him 30 days to submit a statement describing the occupational exposure that led to his hearing impairment. In a separate July 19, 2010 letter, OWCP asked the employing establishment to furnish any medical records pertaining to appellant's condition, including all audiograms.

A February 2, 2010 report signed by an audiologist related that appellant had a history of noise exposure and complained of diminished hearing. An audiogram obtained February 1, 2010 exhibited the following decibel (dBA) losses for both ears at 500, 1,000, 2,000 and 3,000 Hertz (Hz): 15, 25, 30 and 45. The audiologist diagnosed bilateral sensory hearing loss.

In a statement dated March 2, 2010, appellant detailed that he worked for the employing establishment since 1976, initially as a laborer until 1984 and thereafter as a steel metal mechanic until 2008. In both capacities, he was exposed to noise produced by aircraft engines, metal cutters and shapers, chippers, grinders, riveters and various pneumatic tools for 45 hours each week. Appellant also served in the military from 1973 to 1984 and was exposed to noise generated by gunfire, percussion grenades, vehicles, pneumatic grinders, rivet guns and other machinery. He wore hearing protection during these periods.[3]

A July 23, 2010 letter from the employing establishment agreed that appellant was exposed to occupational noise, but did not specify the extent.[4] In a subsequent undated report, Dr. Karen M. Allstadt, an employing establishment physician specializing in occupational medicine, noted that appellant demonstrated mild high-frequency hearing loss in the left ear in 1991 and mild-to-moderate bilateral loss in October 2000, the latter of which was indicative of either middle ear involvement or a temporal bone injury. There was limited audiometric data available between 1976 and 200 but she noted viewing audiograms beginning in October 2000 as well as a referenced baseline from 1991, although she had no 1991 baseline sheet to review. By 2008, appellant showed mild-to-moderate bilateral high-frequency impairment.[5] Dr. Allstadt diagnosed sensorineural hearing loss and concluded that the intensity and duration of appellant's exposure was sufficient to cause his condition. She checked a box "no" on the report indicating

[2] Appellant retired effective June 28, 2008.

[3] This information was later incorporated into the September 24, 2010 statement of accepted facts.

[4] The employing establishment noted that dosimetric data suggested that a similarly-situated individual would be exposed to noise between 79 and 85 dBA based on an eight-hour time-weighted average (TWA). This data is not part of the evidence of record.

[5] Dr. Allstadt's report included an unsigned hearing history form, which ostensibly summarized appellant's audiometric data from October 2, 2000 to February 2, 2010. However, the evidence of record does not contain any corresponding audiograms.

that appellant's hearing loss was not due to workplace noise exposure. Dr. Allstadt reviewed appellant's workplace records but did not perform a clinical evaluation.

The employing establishment controverted the claim in a July 26, 2010 letter, pointing out that appellant did not furnish rationalized medical opinion evidence demonstrating a causal relationship between his federal employment and the alleged injury. It did not provide any audiograms or additional data regarding appellant's workplace noise exposure during the term of employment.

OWCP referred appellant for a second opinion examination to Dr. John S. Keebler, a Board-certified otolaryngologist. In an October 12, 2010 report, Dr. Keebler did not observe any physical abnormalities on examination and noted that the record did not contain audiograms from the employing establishment. He could not compare appellant's current test results to those at the beginning of his noise exposure. An October 12, 2010 audiogram exhibited the following dBA losses at 500, 1,000, 2,000 and 3,000 Hz: 25, 30, 30 and 50 for the right ear and 0, 15, 25 and 40 for the left ear. Dr. Keebler diagnosed mild-to-moderate bilateral sensorineural hearing impairment. As the losses were seen at higher frequencies, he opined that appellant's condition was "probably just presbycusis" and advised that appellant wore earplugs at work.

OWCP asked Dr. Keebler in a November 9, 2010 letter to clarify his opinion. In a November 18, 2010 supplemental report, Dr. Keebler specified that appellant sustained moderate hearing impairment at 4,000, 6,000 and 8,000 Hz, which was consistent with the his age. He stated that hearing loss was not greater at 4,000 Hz than 6,000 and 8,000 Hz which would be expected with noise-induced loss.

In a December 8, 2010 report, an OWCP medical adviser reviewed the October 12 and November 18, 2010 reports and disagreed with Dr. Keebler's opinion. While the record did not contain monitoring audiograms from the employing establishment, appellant was nonetheless exposed to significant acoustic trauma during the course of his federal employment. Moreover, the October 12, 2010 audiogram revealed a hearing impairment that materially exceeded what would normally be predicated on presbycusis. OWCP's medical adviser concluded that appellant sustained noise-induced hearing loss.[6]

By decision dated December 15, 2010, OWCP denied appellant's claim, finding that Dr. Keebler's reports constituted the weight of the medical evidence.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation period, that an injury was sustained in the performance of duty as alleged and that any disabilities and/or specific conditions for which compensation is claimed are causally related to

[6] OWCP's medical adviser listed October 12, 2010 at the date of maximum medical improvement, recommended hearing aids and calculated 13 percent right monaural hearing impairment.

the employment injury.[7] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[8]

Whether an employee actually sustained an injury in the performance of duty begins with an analysis of whether fact of injury has been established.[9] To establish fact of injury in an occupational disease claim, an employee must submit: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.[10]

Causal relationship is a medical issue and the evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is evidence which includes a physician's opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[11]

ANALYSIS

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

After appellant filed an occupational disease claim for bilateral hearing impairment, OWCP requested additional information from the employing establishment in a July 19, 2010 letter, specifically audiograms and other pertinent medical records. While the employing establishment responded with July 23 and 26, 2010 letters and an undated report from Dr. Allstadt, it failed to provide any audiograms. In her report, Dr. Allstadt noted viewing audiograms beginning in October 2000 as well as a referenced baseline from 1991. This audiometric evidence was not forwarded to OWCP. As a result, both the second opinion examiner, Dr. Keebler, and OWCP's medical adviser based their conclusions on a limited medical file. An employer's reluctance or refusal to submit requested evidence relating to an employee's hearing loss claim should not be an impediment to a successful prosecution of the claim.[12] In the present case, the type of information being sought, namely employing establishment audiograms, is normally within the custody of said establishment and not readily

[7] *Elaine Pendleton*, 40 ECAB 1143 (1989).

[8] *Victor J. Woodhams*, 41 ECAB 345 (1989).

[9] *See S.P.*, 59 ECAB 184, 188 (2007).

[10] *See Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *R.R.*, Docket No. 08-2010 (issued April 3, 2009).

[11] *I.J.*, 59 ECAB 408 (2008); *Woodhams*, *supra* note 8.

[12] *See Jerome J. Kubin*, Docket No. 03-1830 (issued October 1, 2003).

available to appellant. Accordingly, appellant should not be penalized for the employing establishment's failure to submit such information.[13]

The need for this evidence is important in view of the differing opinions of the physicians that either examined appellant or reviewed his records. As noted, Dr. Allstadt both supported and negated causal relationship. Dr. Keebler negated causal relationship finding that appellant's hearing loss pattern was consistent with presbycusis while OWCP's medical adviser disagreed with Dr. Keebler explaining that appellant's hearing loss was materially in excess of what would be attributed to presbycusis. As noted, both Dr. Keebler and the medical adviser did not have monitoring audiograms to help them document the type of hearing loss changes that appellant experienced during the period of his employment.

It is well established that proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While an employee has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence and has the obligation to see that justice is done.[14] On remand OWCP should again request audiograms and any pertinent information regarding appellant's occupational noise exposure from the employing establishment. In particular, OWCP should obtain the records referenced by Dr. Allstadt. Upon receipt of such information, OWCP should prepare a statement of accepted facts and develop the medical evidence by referring appellant to an appropriate Board-certified otolaryngologist for appropriate testing and a rationalized medical opinion regarding whether he sustained a hearing impairment causally related to occupational noise exposure. After conducting such further development as it may find necessary, OWCP shall issue an appropriate merit decision.[15]

CONCLUSION

The Board finds that the case is not in posture for decision and must be remanded for further development of the record.

[13] *See id.*

[14] *William J. Cantrell*, 34 ECAB 1233 (1983); *E.J.*, Docket No. 09-1481 (issued February 19, 2010).

[15] The Board notes counsel's argument on appeal that the OWCP medical adviser's opinion instead of Dr. Keebler's should have constituted the weight of the medical evidence. In light of the Board's disposition, this contention is moot.

ORDER

IT IS HEREBY ORDERED THAT the December 15, 2010 decision of the Office of Workers' Compensation Programs be set aside and the case remanded for further action consistent with this decision of the Board.

Issued: October 21, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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