



## **FACTUAL HISTORY**

On April 11, 2008 appellant, then a 60-year-old former custodian, filed an occupational disease claim alleging that he sustained hearing loss due to factors of his federal employment. He was terminated by the employing establishment on July 15, 2001.

Appellant stated that he worked for the employing establishment as a conveyor car dump operator from 1978 to 1982 where he was exposed to loud noise eight hours a day seven days a week from crushing of coal by hammer mills, from conveyor belts and from the power house when the unit went down. He was not employed from 1982 to 1986 and, from 1986 to 2000, he was self employed as a stone mason and was not exposed to noise. In 2000, appellant returned to work as a janitor for the employing establishment, where he worked in the coal handling facility and in the power house until July 15, 2001. He was exposed on a full-time basis to loud noise from boilers, motors, metal coal grinders, conveyor belts and conveyor operators that operated continuously. From 2002 to December 2006, appellant worked for Perdue, where he was exposed to a "little noise" from a machine but wore earplugs.

Appellant submitted a March 3, 2008 report from Dr. W. Andy Logan, a Board-certified otolaryngologist, who noted appellant's history of occupational noise exposure and diagnosed bilateral symmetrical mid-frequency sensorineural hearing loss. Results of a March 3, 2008 audiogram showed decibel loss of hearing of 20, 25, 50 and 60 on the left and 20, 25, 45 and 60 on the right at respective frequencies of 500, 1,000, 2,000 and 3,000 hertz (Hz).

The employing establishment controverted appellant's claim, stating that a noise survey for custodians indicated an average noise exposure of 78.57 decibel, which was below the 85 decibel action level prescribed by Occupational Health and Safety Administration.

Audiometric testing provided by the employing establishment included an August 4, 1978 audiogram reflecting decibel loss of 0, 10, 10 and 20 on the left and 15, 5, 10 and 35 on the right at the respective frequencies of 500, 1,000, 2,000 and 3,000 Hz. A May 30, 1979 audiogram showed decibel losses of 5, 5, 10 and 30 on the left and 30, 15, 15 and 40 on the right. A June 10, 1982 audiogram showed decibel losses of hearing of 5, 5, 15 and 35 on the left and 15, 15, 15 and 45 on the right. A December 4, 2000 audiogram showed decibel losses of 30, 30, 55, and 60 on the left and 25, 30, 55 and 70 on the right.

In a letter dated December 4, 2000, the employing establishment informed appellant that his audiographic testing of that date indicated a moderate loss for speech sounds and for high pitch sounds in both ears. Noting that the December 4, 2000 audiogram represented his first test in the program since 1983, it advised him to consult an audiologist for more information.

On November 3, 2008 OWCP issued a decision finding that the claim for compensation was not timely filed.

In a December 30, 2008 report, Dr. Logan stated that appellant's hearing loss pattern was consistent with hearing loss due to noise exposure. Based upon appellant's representations regarding his work-related noise exposure, Dr. Logan opined that "it [was] likely within

reasonable medical certainty that [appellant's] noise exposure at [the employing establishment] did contribute to his hearing loss.”

In a June 26, 2009 decision, OWCP's hearing representative set aside the November 3, 2008 decision and remanded the case for further development on the issue of timeliness. OWCP subsequently determined that the claim for compensation was timely filed.

OWCP referred appellant, together with a statement of accepted facts (SOAF) to Dr. Hugh M. Sims, a Board-certified otolaryngologist, for a second opinion examination and an opinion as to whether he sustained a hearing loss causally related to his federal employment. The SOAF stated that “noise surveys conducted by [the employing establishment] show that the average noise exposure is 78.57 dBA [decibels] for a time weighed average.” In an October 12, 2009 report, Dr. Sims diagnosed mild to moderate severe sensorineural hearing loss, stating that there was no significant change in audiometric results from initial employment audiograms. Results of an April 24, 2009 audiogram reflected decibel loss of 30, 45, 60 and 60 on the left and 25, 30, 50 and 70 on the right at the respective frequencies of 500, 1,000, 2,000 and 3,000 Hz. Dr. Sims concluded that workplace exposure was not considered sufficient as to intensity and/or duration to have caused the loss in question.

On October 20, 2009 OWCP issued a decision finding that a causal relationship had not been established between the claimant's hearing loss and his established work-related noise exposure.

In a decision dated January 14, 2010, OWCP's hearing representative set aside the October 20, 2009 decision and remanded the case for further development. Finding that the medical and factual evidence of record was insufficient to provide a basis for an informed decision, OWCP's hearing representative stated:

“[OWCP] is directed to direct inquiry to the employing [establishment], for specific peak dB [decibel] levels for all areas of exposure indicated by the claimant and prepare an [a]mended [s]tatement of [a]ccepted [f]acts, indicating the exact nature of the claimed noise exposure. Upon completion of the [a]mended [s]tatement of [a]ccepted [f]acts, OWCP is directed to submit such to the second opinion examiner, inquiring, if such in [anyway] alters his prior opinion expressed on October 12, 2009. Medical rationale should be expressed for any opinion rendered.”

Observing that appellant's hearing had diminished during his first period of employment with the employing establishment, OWCP's hearing representative instructed OWCP to inquire whether appellant's hearing loss was in any way causally related to noise exposure in the federal workplace.

In a February 9, 2010 letter, OWCP asked the employing establishment to provide specific peak decibel levels for all areas of exposure indicated by appellant. The record contains an undated environmental study from the employing establishment identifying areas in which he worked as a custodian and showing average decibel levels for types of work performed. The report contains no explanation as to the period of time appellant worked in each area, the duration of his exposure to noise or an indication of peak decibel levels.

In a March 10, 2010 decision, OWCP denied appellant's claim, finding that he had failed to establish that his hearing loss was work related. The claims examiner stated that it was not possible to obtain peak decibel readings and that the only available data consisted of the employing establishment's undated noise survey summary, which showed only time weighted averages. OWCP therefore relied on Dr. Sim's original report in determining that appellant's exposure to noise at work was insufficient to cause his hearing loss.

Appellant requested an oral hearing, which was held on June 10, 2010. Counsel argued that Dr. Sims's report was insufficient to show that the claimant's hearing loss was not causally related to his employment as it was not based on peak decibel levels as directed by OWCP's hearing representative.

By decision dated August 5, 2010, OWCP's hearing representative affirmed the March 10, 2010 decision. He stated:

In [a] January 14, 2010 decision, OWCP [h]earing [r]epresentative[,] James Muskett[,] [stated] that OWCP 'utilizes peak dB levels, rather than time weighted averages, in determining the extent of an employee's exposure to hazardous noise' and directed that the [employing establishment] state the claimant's exposure to peak dB levels and then amend the SOAF to reflect such and then ask Dr. Sims to provide a new rationalized medical opinion concerning causation, based on the amended SOAF. However, I have reviewed the Federal (FECA) Procedure Manual and could not find any requirement that OWCP use peak dB levels rather than TWA dBA. The [employing establishment] indicated that it did not have peak dB levels. I accordingly find that Dr. Sims's report was based on the only information available concerning dB exposure and as such, his rationalized opinion based on a complete and accurate factual and medical background is sufficient to establish that the claimant's hearing loss is not causally related to his [employing establishment] employment."

On appeal, appellant's representative argued that OWCP failed to comply with the instructions of OWCP's hearing representative's January 14, 2010 decision. Further, he contends that the evidence of record establishes that appellant sustained a hearing loss causally related to work-related noise exposure.

### **LEGAL PRECEDENT**

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that his hearing loss condition was causally related to noise exposure in his federal employment.<sup>2</sup> Neither the condition becoming apparent during a period of employment, nor the belief of the employee that the hearing loss was causally related to noise exposure in federal employment, is sufficient to establish causal relationship.<sup>3</sup>

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<sup>2</sup> *Stanley K. Takahaski*, 35 ECAB 1065 (1984).

<sup>3</sup> *See John W. Butler*, 39 ECAB 852, 858 (1988).

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden to establish his or her claim, OWCP also has a responsibility in the development of the evidence.<sup>4</sup> This is particularly true when the evidence is of the character normally obtained from the employing establishment or other government source.<sup>5</sup> 20 C.F.R. § 10.118(a) states that the employer is responsible for submitting to OWCP all relevant and probative factual and medical evidence in its possession or which it may acquire through investigation or other means.<sup>6</sup>

### ANALYSIS

The Board finds that this case is not in posture for a decision due to OWCP's failure to comply with instructions contained in the January 14, 2010 decision of the Branch of Hearings and Review. Therefore, the August 5, 2010 decision will be set aside and the case is remanded for further development.

On October 20, 2009 OWCP denied appellant's occupational disease claim on the grounds that he had failed to establish a causal relationship between established work-related noise exposure and his hearing loss. In its January 14, 2010 decision, OWCP's hearing representative vacated the October 20, 2009 decision and remanded the case to OWCP with instructions to obtain information from the employing establishment as to specific peak decibel levels for all areas of exposure alleged by the claimant. OWCP was instructed to forward an amended statement of accepted facts, indicating the exact nature of the claimed noise exposure, to the second opinion physician for review and a statement as to whether the newly obtained information altered his opinion in any way. It did not obtain information from the employing establishment as to peak decibel levels or prepare an amended SOAF for Dr. Sims' review.

In an August 5, 2010 decision, OWCP's hearing representative stated that the employing establishment had denied having information regarding peak decibel levels. She found that Dr. Sims' report was based on the only information available concerning decibel exposure. The record, however, does not support such a finding. On February 9, 2010 OWCP asked the employing establishment to provide specific peak decibel levels for all areas of exposure indicated by appellant. The employing establishment responded by providing an environmental study identifying areas in which appellant worked as a custodian and showing average decibel levels for types of work performed. The study was silent as to peak decibel levels. The employing establishment did not address whether it possessed peak decibel level information. There is no evidence of record establishing that the employing establishment does not maintain any information on peak decibel levels. On the contrary, a computation of average decibel levels would be derived from all decibel levels, indicating greater peak levels.

OWCP shares responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other

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<sup>4</sup> See *Claudia A. Dixon*, 47 ECAB 168 (1995).

<sup>5</sup> *R.E.*, 59 ECAB 323 (2008); *Willie A. Dean*, 40 ECAB 1208 (1989).

<sup>6</sup> 20 C.F.R. § 10.118(a).

government source.<sup>7</sup> In the instant case, its obligation to obtain the information required by OWCP's hearing representative in the January 14, 2010 decision was not satisfied by the production of a document that was silent on the issue. OWCP, however, failed to seek supplemental information or clarification from the employing establishment. Once it undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.<sup>8</sup>

On remand, OWCP should request information from the employing establishment as to specific peak decibel levels for all areas of exposure identified by appellant. It should also inquire as to how the employing establishment arrived at its time weighed averages. OWCP should then prepare an amended SOAF, addressing the nature of the claimed noise exposure, which it should submit to the second opinion examiner with an inquiry as to whether the newly obtained information alters appellant's prior opinion expressed on October 12, 2009.

The report of Dr. Sims' requires clarification regarding his statement that there was no significant change in audiometric results from the initial employment audiograms, particularly in light of the fact that results of an April 24, 2009 audiogram reflected significantly higher decibel losses bilaterally than those reflected in base-line audiograms.

### **CONCLUSION**

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

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<sup>7</sup> See *R.E.*, *supra* note 5.

<sup>8</sup> See *Melvin James*, 55 ECAB 406 (2004).

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 5, 2010 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: September 9, 2011  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

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