

J.H., Appellant

and

**DEPARTMENT OF HOMELAND SECURITY,
FEDERAL AIR MARSHAL SERVICE,
Egg Harbor Township, NJ, Employer**

**Docket No. 13-310
Issued: July 5, 2013**

Case Submitted on the Record

Before:
RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

On November 21, 2012 appellant filed a timely appeal from a July 12, 2012 Office of Workers' Compensation Programs' (OWCP) merit decision which denied his claim for an employment-related injury. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

The issue is whether appellant met his burden of proof to establish that he developed a monaural (left ear) loss of hearing in the performance of duty, causally related to factors of his federal employment.

² The Board notes that, following the issuance of the July 12, 2012 OWCP decision, appellant submitted new evidence. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c)(1).

On appeal, appellant contends that the second opinion physician was hostile and made derogatory remarks during the examination.

FACTUAL HISTORY

On December 13, 2011 appellant, then a 47-year-old air marshal, filed an occupational disease claim (Form CA-2) alleging that he sustained partial hearing loss in the left ear due to factors of his federal employment, such as exposure to firearms.

In a January 13, 2012 letter, OWCP informed appellant of the deficiencies of his claim and afford him 30 days to submit additional evidence and respond to its inquiries.

Appellant submitted a statement indicating that his job duties required quarterly firearms requalification. He also submitted a December 8, 2011 audiogram which revealed normal hearing in the left ear through 1,000 hertz sloping to a mild-to-moderate sensorineural hearing loss.

In an undated report, Dr. Daniel Hwang, a Board-certified otolaryngologist, diagnosed left ear moderate sensorineural hearing loss. He opined that based on appellant's past work history, there was a very high probability that he sustained left-sided hearing loss due to prolonged exposure to noise from firearms related to work. On December 8, 2011 Dr. Hwang diagnosed asymmetrical sensorineural hearing loss. In a January 9, 2012 report, he reiterated the diagnosis and opined that appellant's left ear hearing loss could be due to occupational or recreational noise exposure.

A December 21, 2011 magnetic resonance imaging scan of the brain revealed a small arachnoid cyst at the upper lateral edge of the left sylvian fissure. It showed no acute parenchymal findings.

OWCP referred appellant to Dr. Douglas McCorkle, a Board-certified otolaryngologist, for a second opinion evaluation. In a June 5, 2012 report, Dr. McCorkle reviewed a statement of accepted facts, the medical records and history and conducted a physical examination. He noted that appellant had a long history of noise exposure and did not wear ear protection. Dr. McCorkle opined that, the fact that appellant's hearing was perfect on the right side and there was no history of a specific event that led to left-sided hearing loss, the hearing loss was not employment related. He concluded that appellant had a mild, asymmetric sensorineural hearing loss in the left ear of unknown cause, unrelated to his federal employment.

By decision dated July 12, 2012, OWCP denied the claim on the finding that Dr. McCorkle negated a causal relationship between appellant's hearing loss and factors of his federal employment.

LEGAL PRECEDENT

An employee seeking benefits under FECA³ 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

³ 5 U.S.C. §§ 8101, 8193.

States” within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA and that an injury⁴ was sustained in the performance of duty. These are the essential elements of each compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁵

To establish that an injury was sustained in the performance of duty in a claim for an occupational disease claim, an employee must submit the following: (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.⁶

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical evidence. The opinion of the physician must be based on a complete factual and medical background of the employee, 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 employee.⁷

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 in medical evidence.⁸ 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.⁹

ANALYSIS

The Board finds that OWCP properly referred appellant to Dr. McCorkle, a Board-certified otolaryngologist, for a second opinion evaluation. On June 5, 2012 Dr. McCorkle found that appellant had a mild, asymmetric sensorineural hearing loss in the left ear of unknown cause and unrelated to his federal employment. He indicated that appellant had a long history of noise exposure and did not wear ear protection. Dr. McCorkle concluded, however, that the hearing

⁴ OWCP regulations define an occupational disease or illness as a condition produced by the work environment over a period longer than a single workday or shift. 20 C.F.R. § 10.5(q).

⁵ See *J.C.*, Docket No. 09-1630 (issued April 14, 2010). See also *Ellen L. Noble*, 55 ECAB 530 (2004).

⁶ *Id.* See also *Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994).

⁷ See *I.J.*, 59 ECAB 408 (2008). See also *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁸ 5 U.S.C. §§ 8101-8193, 8123(a); see *B.C.*, 58 ECAB 111 (2006).

⁹ *R.C.*, 58 ECAB 238 (2006).

loss was not employment related on the basis that appellant had perfect hearing on the right side with no history of a specific event that caused left-sided hearing loss.

In support of his claim, appellant submitted reports from Dr. Hwang, a Board-certified otolaryngologist, who diagnosed left ear moderate sensorineural hearing loss. Dr. Hwang opined that based on appellant's past work history there was a very high probability that the left-sided hearing loss was due to prolonged exposure to noise from firearms at work.

The Board finds a conflict in medical opinion between appellant's attending physician, Dr. Hwang, found a high medical probability that appellant's hearing loss was causally related to prolonged noise exposure at work. OWCP's second opinion physician, Dr. McCorkle, found the record devoid of a specific event causing left-sided hearing loss, such that it was not employment related, despite the history of noise exposure and lack of ear protection. The Board finds that the reports of Drs. Hwang and McCorkle are of equal weight and rationale thereby necessitating a referral to an impartial medical specialist for resolution.¹⁰ Under section 8123(a) of FECA, OWCP must resolve this conflict by referring appellant, together with the medical record and a statement of accepted facts, to an impartial medical specialist.¹¹ After this and such other development as OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision due to an unresolved conflict in the medical opinion evidence.

¹⁰ *Supra* note 8.

¹¹ *See D.P.*, Docket No. 10-121 (issued July 23, 2010).

ORDER

IT IS HEREBY ORDERED THAT the July 12, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: July 5, 2013
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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