

**United States Department of Labor
Employees' Compensation Appeals Board**

E.S., Appellant

and

**DEPARTMENT OF THE NAVY, NAVAL SEA
SYSTEMS COMMAND, Keyport, WA, Employer**

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**Docket No. 15-236
Issued: March 20, 2015**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 10, 2014 appellant filed a timely appeal from an October 28, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 the case.

ISSUE

The issue is whether appellant met his burden of proof to establish hearing loss due to his employment.

FACTUAL HISTORY

On April 4, 2014 appellant, then a 70-year-old retired planner and estimator, filed a claim for compensation alleging that he developed bilateral hearing loss due to his federal employment. He became aware of his hearing loss on September 1, 2012 and realized it was causally related to

¹ 5 U.S.C. § 8101 *et seq.*

his employment on the same day. Appellant retired from employing establishment on September 30, 1997.

Accompanying the claim, appellant provided responses to a hearing loss check list. He noted that he had no prior history of hearing loss and no hobbies that involve loud noise. Appellant noted that he was last exposed to hazardous noise on September 30, 1997 and that he worked around loud noise. He submitted an audiogram dated April 4, 2014, signed by an audiologist.

By letter dated April 16, 2014, OWCP advised appellant of the type of evidence needed to establish his claim. It also requested that the employing establishment address appellant's workplace noise exposure.

Appellant responded that from 1964 to 1968 he was in the navy and worked as an electronics repair technician and was exposed to noise from high frequency radar rooms and air conditioning. No hearing protection was worn. From 1969 to 1979 appellant worked for the employing establishment as an electronics mechanic and was exposed to noise from testing torpedoes. From 1979 to 1991 he worked for the employing establishment as a planning-progressor and was exposed to noise from machine shop lathes and drills. Appellant wore foam earplugs. He noted that from 1991 to 1997 he worked as a planning estimator for the employing establishment and was exposed to noise in the machine shops while checking the progress of jobs. Appellant wore foam earplugs. From 1999 to 2000 he worked as a church treasurer and since 2000, he stated that he worked as a carrier without noise exposure. Appellant indicated that he participated in a hearing conservation program while working for the employing establishment.

The employing establishment submitted medical records dated August 1, 1977 to August 30, 1992 and the employing establishment audiograms taken from the hearing conservation program from November 7, 1968 to July 15, 1985.² Also submitted was a September 17, 1997 notification which confirmed appellant's retirement on September 30, 1997.

On August 21, 2014 OWCP referred appellant to Dr. Gerald G. Randolph, a Board-certified otolaryngologist. In a September 16, 2014 report, Dr. Randolph noted examining appellant and noted appellant's exposure to noise. He diagnosed bilateral sensorineural hearing loss. Dr. Randolph advised that the external auditory canals, tympanic membranes, and drum motility were normal. There was no indication of acoustic neuroma or Meniere's disease. Dr. Randolph noted audiometric findings and advised that tympanograms were normal bilaterally. He stated that the earliest audiogram in appellant's record was dated November 7, 1968 which was essentially normal for both ears. Dr. Randolph noted that the audiogram performed in his office on September 16, 2014 revealed bilateral sensorineural hearing loss with significant hearing loss in the lower tones sloping off to more severe hearing loss in higher frequencies. He noted a slight notch at 6,000 cycles per second in the right ear, which might be suggestive of hearing loss, potentially aggravated by noise exposure. However, Dr. Randolph

² The July 15, 1985 audiogram revealed, at the frequency levels of 500, 1,000, 2,000, and 3,000, the following thresholds: left ear 15, 15, 10, and 15 decibels; right ear 10, 10, 5, and 10 decibels.

advised that the hearing loss had an audiometric configuration due to factors other than injurious noise exposure.

Audiometric testing conducted on the doctor's behalf and at the frequency levels of 500, 1,000, 2,000, and 3,000 revealed the following: right ear 35, 45, 40, and 50 decibels; left ear 45, 45, 45, and 45 decibels. Appellant reported noticing progressive hearing loss for four years. He did not have tinnitus. Dr. Randolph noted that appellant left federal employment in 1997 and his last industrial audiogram was performed on July 15, 1985 which was essentially normal and not ratable. He indicated that he had no way of knowing if appellant had significant noise-induced hearing loss at or near the time he left his federal job as the last work audiogram was essentially normal. Dr. Randolph noted hearing loss due to noise exposure occurs at the time of noise exposure and does not get worse at a later date. Therefore, it was unlikely appellant had significant hearing loss at or near the time he left his federal employment.

Dr. Randolph opined that the workplace exposure as described in the statement of accepted facts was of significant intensity and duration to have caused or aggravated hearing loss if hearing protection had not been adequately utilized. He could not specifically identify the "major cause" of appellant's hearing loss, which significantly affected his hearing in frequencies not generally aggravated by noise exposure; he added that aging was an aggravating factor. Dr. Randolph noted that appellant was a candidate for bilateral hearing aids. He stated that he had no idea if appellant would have been a candidate for hearing aids at the time he left his federal job as hearing loss due to noise exposure does not get worse at a later date. Dr. Randolph stated that he could not offer further opinion regarding the cause of appellant's hearing loss without an audiogram at or near the time he left his federal work.

On September 30, 2014 OWCP requested clarification from Dr. Randolph. It requested that he provide an unequivocal opinion as to whether appellant's measured hearing loss was due to noise exposure in the federal employment. OWCP confirmed that there were no other industrial audiograms available.

In an October 2, 2014 supplemental report, Dr. Randolph noted that in the absence of scientific data such as industrial audiograms performed at or near the time appellant left his civil service retirement in 1997 "an equivocal answer" to the question of causal relationship of appellant's hearing loss "requires speculation" and he did not like to "speculate in legal matters." However, he noted that appellant had only noticed hearing loss for approximately four years. Dr. Randolph indicated that, since appellant left his civil service employment in 1997, it was questionable as to whether he would have significant hearing loss at the time he left his civil service employment. He reasoned that hearing loss from noise exposure occurs at the time of the exposure and does not worsen over time because of past noise exposure. Dr. Randolph advised that he could not be certain whether appellant had some noise-induced hearing loss at the time he left federal employment. However, appellant's history, and the audiogram performed on him, led the doctor to conclude that his hearing loss was the result of factors other than noise exposure. Dr. Randolph did not rule out the possibility of finding some hearing loss from noise exposure at the time appellant left government employment if appropriate audiograms had been available for review.

In an October 28, 2014 decision, OWCP denied the claim finding that the medical evidence did not support that the hearing loss was causally related to workplace noise exposure. It found that Dr. Randolph's September 16 and October 2, 2014 reports did not establish hearing loss due to noise exposure from federal employment.

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 of FECA, that the injury was sustained in the performance of duty as alleged, and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury. 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.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) 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 claimant. The medical evidence required to establish causal relationship is generally rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized 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 of the claimant, 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.⁴

ANALYSIS

It is not disputed that appellant was exposed to noise for a number of years in the course of his federal employment. On October 28, 2014 OWCP denied the claim finding that the medical evidence did not support that the hearing loss was causally related to workplace noise exposure. It based its decision on the reports of the second opinion physician, Dr. Randolph, dated September 16 and October 2, 2014. The Board has carefully reviewed Dr. Randolph's reports and finds that he did not properly resolve the issue before him, specifically whether appellant's hearing loss was causally related to his employment noise exposure.

³ Gary J. Watling, 52 ECAB 357 (2001).

⁴ Solomon Polen, 51 ECAB 341 (2000).

The Board has noted that in assessing medical evidence the weight of such evidence is determined by its reliability, its probative value, its convincing quality, and the factors which enter in such an evaluation include the opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, and the care of the analysis manifested and the medical rationale expressed in support of the physician's opinion.⁵ In his September 16, 2014 report, Dr. Randolph noted that appellant left civil service employment in 1997. Appellant's last industrial audiogram was performed on July 15, 1985 and revealed essentially normal hearing. Dr. Randolph stated that he had no way of knowing whether appellant had significant noise-induced hearing loss at the time he retired. He opined that the workplace exposure as described in the statement of accepted facts would have caused or aggravated hearing loss if hearing protection had not been adequate, but he was unable to specifically identify the major cause of appellant's hearing loss.

In an October 2, 2014 supplemental report, Dr. Randolph noted that, in the absence of scientific data, such as industrial audiograms performed at or near the time appellant left his civil service retirement in 1997, an answer regarding causal relationship would be speculative and he did not like to speculate in legal matters. He found that, since appellant's last audiogram was in 1985 and as appellant left his federal work in 1997, it was questionable as to whether he had significant hearing loss at the time he left his civil service employment. However, appellant's history and the audiogram performed for him "suggest" his hearing loss was due to factors other than noise exposure after he left his federal employment. Dr. Randolph indicated that this did not rule out the possibility of some evidence of additional noise exposure at the time he left his civil service employment if appropriate audiograms were performed.

The Board finds that Dr. Randolph's reports are speculative and equivocal, noting that in the absence of audiograms performed at or near the time appellant left his federal job in 1997 an opinion on causal relationship of appellant's hearing loss would require "speculation." Dr. Randolph further advised that there was "no way that I can be certain" as to whether appellant had some degree of noise-induced hearing loss at the time he left civil service employment, but rather, he opined that the history and recent audiogram "suggest" the hearing loss was due to factors other than noise exposure. He did not provide any medical rationale other than these speculative statements to explain why such hearing loss would not be caused or aggravated by appellant's employment.⁶ Dr. Randolph's reports are insufficient to resolve the question of whether appellant's workplace noise exposure caused or contributed to his hearing loss.⁷ The Board has held that, when OWCP refers a claimant for a second opinion evaluation

⁵ See *Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1959).

⁶ Medical opinions that are speculative or equivocal in character are of diminished probative value. *D.D.*, 57 ECAB 734 (2006).

⁷ An employee is not required to prove that occupational factors are the sole cause of his claimed condition. If work-related exposures caused, aggravated, or accelerated appellant's condition, he is entitled to compensation. See *Beth P. Chaput*, 37 ECAB 158, 161 (1985); *S.S.*, Docket No. 08-2386 (issued June 5, 2008).

and the report does not adequately address the relevant issues, OWCP should secure an appropriate report on the relevant issues.⁸

Therefore, the medical evidence is insufficiently developed with regard to whether appellant's hearing loss was causally related to employment noise exposure. Proceedings under FECA are not adversarial in nature nor is OWCP a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has the obligation to see that justice is done.⁹ Once OWCP undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issue.¹⁰

The case is remanded for OWCP to refer appellant to a new second opinion physician for a detailed, reasoned medical opinion explaining whether appellant's hearing loss was caused or aggravated by workplace noise exposure. Following this and such other development as deemed necessary, OWCP shall issue a *de novo* decision.

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

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

⁸ See *Ayanle A. Hashi*, 56 ECAB 234 (2004) (when OWCP refers a claimant for a second opinion evaluation and the report does not adequately address the relevant issues, OWCP should secure an appropriate report on the relevant issues).

⁹ *John W. Butler*, 39 ECAB 852 (1988).

¹⁰ *Richard F. Williams*, 55 ECAB 343, 346 (2004).

ORDER

IT IS HEREBY ORDERED THAT the October 28, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further proceedings consistent with the decision of the Board.

Issued: March 20, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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