

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

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S.M., Appellant )

and )

TENNESSEE VALLEY AUTHORITY, )  
HARTSVILLE NUCLEAR PLANT, )  
Dixon Springs, TN, Employer )

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**Docket No. 08-1931  
Issued: February 6, 2009**

*Appearances:*

David C. Downard, Esq., for the appellant  
Office of the Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On July 3, 2008 appellant filed a timely appeal from an April 7, 2008 decision of the Office of Workers' Compensation Programs denying his occupational disease claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.2, the Board has jurisdiction over the merits of the claim.

**ISSUE**

The issue is whether appellant established that he sustained a binaural hearing loss in the performance of duty.

**FACTUAL HISTORY**

This is appellant's second appeal before the Board. By order issued November 15, 2006, the Board dismissed the appeal to allow the Office to consider new evidence in the case.<sup>1</sup> On January 27, 2005 appellant, then a retired 62-year-old ironworker, filed an occupational disease claim (Form CA-2) for binaural hearing loss due to exposure to hazardous noise from power

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<sup>1</sup> Docket No. 06-1538 (issued November 15, 2006).

tools and machinery at work from 1977 until his retirement on December 5, 1980. He first became aware of his hearing loss on an unspecified date in 1977, notified the employing establishment on March 21, 2004 but did not relate the hearing loss to his employment until January 5, 2005, when he spoke with former coworkers who also experienced hearing loss.<sup>2</sup> Appellant noted that he had not seen a physician regarding his hearing loss.

In a March 22, 2005 letter, the employing establishment stated that appellant was employed for brief intermittent periods from December 1969 until approximately December 1, 1980 and did not have an exit audiogram. The employing establishment submitted the audiometric results it obtained on August 9, 1973, August 11, 1975 and March 31, 1976. At the frequencies of 500, 1,000, 2,000 and 3,000 cycles per second (cps), the March 31, 1976 audiogram showed losses in the left ear of 10, 5, 5 and 10 decibels (dB) and in the right ear 15, 5, 5 and 15 dB. The prior two audiograms showed losses of 20 dB or less, with no monaural total over 65 dB. The employing establishment contended that these audiograms did not demonstrate a hearing loss. Although appellant was exposed to hazardous noise during his employment, the employing establishment contended that it provided appropriate hearing protection.

In an April 6, 2005 letter, the Office advised appellant of the additional factual evidence needed to establish his claim.

The Office obtained a second opinion on May 20, 2005 from Dr. Jeffrey Paffrath, a Board-certified otolaryngologist. He diagnosed a bilateral high frequency hearing loss unrelated to appellant's federal occupational noise exposure. Dr. Paffrath opined that appellant had no hearing loss as of the March 31, 1976 audiogram. Therefore, the hearing loss developed after appellant retired from federal employment.

By decision dated May 27, 2005, the Office denied appellant's claim on the grounds that causal relationship was not established.

Appellant requested an oral hearing, held October 25, 2005. By decision dated and finalized January 25, 2006, an Office hearing representative affirmed the May 27, 2005 decision.

Appellant submitted a February 3, 2006 request for reconsideration, contending he was not provided with hearing protection. The Office denied reconsideration by March 29, 2006 decision.

In January 2007, appellant requested reconsideration and submitted three coworkers' statements alleging a lack of hearing protection at the employing establishment. By decision dated February 16, 2007, the Office denied modification on the grounds that the statements were not relevant evidence.

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<sup>2</sup> Under section 5 U.S.C. § 8122(b), the time limitation begins to run when appellant became aware of causal relationship or, if he continued to be exposed to noise after awareness, the date he is no longer exposed to noise. Therefore, the three-year time limitation began to run on January 5, 2005. Appellant filed his claim on January 27, 2005, within three years of the date of realization. Therefore, his claim was timely filed.

Appellant requested reconsideration on February 12, 2008, submitting general literature about the employing establishment. In an October 29, 2007 medical report, Dr. Mitchell K. Schwaber, an attending Board-certified otolaryngologist, stated that appellant worked at the employing establishment from 1969 to approximately 2004, when he entered private sector employment. Appellant diagnosed a bilateral high frequency hearing loss that appeared related to noise exposure.

By decision dated April 7, 2008, the Office denied modification on the grounds that the evidence submitted was insufficient to establish causal relationship.

### **LEGAL PRECEDENT**

An employee seeking benefits under the Federal Employees' Compensation Act<sup>3</sup> 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 the Act; that the claim was filed within the applicable time limitation; that an injury was sustained while 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.<sup>4</sup> These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.<sup>5</sup>

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 the 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.<sup>6</sup>

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<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> *Joe D. Cameron*, 41 ECAB 153 (1989).

<sup>5</sup> *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

<sup>6</sup> *Solomon Polen*, 51 ECAB 341 (2000).

## ANALYSIS

Appellant claimed that he sustained a bilateral high frequency sensorineural hearing loss in the performance of duty on or before December 5, 1980. Dr. Schwaber, an attending Board-certified otolaryngologist, diagnosed a bilateral sensorineural hearing loss. Appellant has established the presence of the claimed condition. He has also established that his duties as an ironworker entailed prolonged exposure to hazardous noise. Appellant must establish a causal relationship between his diagnosed hearing loss and the accepted work factors.

Dr. Paffrath, a Board-certified otolaryngologist and second opinion physician, diagnosed a binaural high frequency hearing loss unrelated to federal occupational noise exposure. He explained that a March 31, 1976 employing establishment audiogram showed no hearing loss. Dr. Paffrath therefore opined that any hearing loss developed after appellant retired from federal employment. Thus, his opinion negates the claimed causal relationship.

Appellant submitted an October 29, 2007 report from Dr. Schwaber, an attending Board-certified otolaryngologist. Dr. Schwaber diagnosed a binaural high frequency hearing loss that he stated appeared related to occupational noise exposure. However, he based his opinion on an incorrect factual history. Dr. Schwaber stated that appellant worked at the employing establishment from 1969 until he entered private sector employment in 2004. Appellant worked at the employing establishment for brief intermittent periods from December 1969 to December 1980. Dr. Schwaber's opinion is of diminished probative value as it is based on an inaccurate factual history.<sup>7</sup> Therefore, it is insufficient to establish causal relationship.

The Board finds that appellant did not submit sufficient medical evidence establishing a causal relationship between hazardous noise exposure at work and the diagnosed high frequency hearing loss. Moreover, Dr. Paffrath's well-rationalized report negated causal relationship. Therefore, appellant failed to meet his burden of proof.

## CONCLUSION

The Board finds that appellant did not establish that he sustained a hearing loss in the performance of duty.

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<sup>7</sup> M.W., 57 ECAB 710 (2006).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated April 7, 2008 is affirmed.

Issued: February 6, 2009  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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