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

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| **H.L., Appellant** | ) | |
| **and** | ) | **Docket No. 09-1734** |
| | ) | **Issued: March 5, 2010** |
| **TENNESEE VALLEY AUTHORITY, NUCLEAR POWER-DECATUR, AL, Chattanooga, TN, Employer** | ) | |

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

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

### ***JURISDICTION***

On June 17, 2009 appellant filed a timely appeal from a June 9, 2009 merit decision of the Office of Workers' Compensation Programs that denied his hearing loss claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

### ***ISSUE***

The issue is whether appellant has met his burden of proof to establish he sustained hearing loss in the performance of duty.

### ***FACTUAL HISTORY***

On March 12, 2009 appellant, a 71-year-old retired supervisor, filed an occupational disease claim (Form CA-2) alleging he sustained hearing loss that he attributed to exposure to "excessive noise." He alleged that he first became aware of his hearing loss and that it was caused by his federal employment on February 13, 2009 after he underwent an audiogram. Appellant alleged "work[ing] in a loud environment for many years without proper safety

devices to protect [his] hearing." The record indicates that appellant retired from the employing establishment on November 18, 1994.

Appellant submitted evidence documenting his employment history and unsigned and uncertified sound survey data. He stated that he worked for the employing establishment briefly in 1968 and then continuously from 1971 until 1994. Appellant submitted a number of unsigned audiograms from the employing establishment dating from 1982 until 1989. He also submitted an unsigned and uncertified audiogram dated February 13, 2009.

The Office referred appellant, together with a statement of facts, to Dr. George Godwin, a Board-certified otolaryngologist, for a second opinion evaluation. In an April 27, 2009 report, Dr. Godwin diagnosed bilateral neurosensory hearing loss and, by check mark, opined that this hearing loss was not caused by noise exposure encountered at appellant's federal employment. He opined that the only historical hearing data appellant submitted, concerning the period 1982 through 1989, demonstrated his hearing was normal. Dr. Godwin noted that hearing data was not available for the last five years of appellant's federal employment. He opined that these tests demonstrated appellant worked from 1971 to 1989 without any significant hearing loss. Dr. Godwin opined that because appellant worked for 18 years with no significant hearing loss, it was reasonable to expect that from 1989 to 1994, when appellant retired, appellant would not have experienced any significant hearing loss.

By decision dated June 9, 2009, the Office denied the claim because appellant had not demonstrated that his alleged hearing loss occurred in the performance of his federal employment.[1]

## ***LEGAL PRECEDENT***

An employee seeking benefits under the Federal Employees' Compensation Act[2] has the burden of proof to establish the essential elements of his claim by the weight of the evidence,[3] including that he sustained an injury in the performance of duty and that any specific condition or disability for work for which he claims compensation is causally related to that employment injury.[4] As part of his burden, the employee must submit rationalized medical opinion evidence based on a complete factual and medical background showing causal relationship.[5] The weight of medical evidence is determined by its reliability, its probative value, its convincing quality,

[1] On appeal, appellant submitted additional medical evidence. The Board may not consider evidence for the first time on appeal, which was not before the Office at the time, it issued the final decision in the case. 20 C.F.R. § 501.2(c). *See J.T.*, 59 ECAB ___ (Docket No. 07-1898, issued January 7, 2008) (holding the Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision).

[2] 5 U.S.C. §§ 8101-8193.

[3] *J.P.*, 59 ECAB ___ (Docket No. 07-1159, issued November 15, 2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

[4] *G.T.*, 59 ECAB ___ (Docket No. 07-1345, issued April 11, 2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[5] *G.T.*, *id*.; *Nancy G. O'Meara*, 12 ECAB 67, 71 (1960).

the care of the analysis manifested and the medical rationale expressed in support of the physician's opinion.[6]

## ***ANALYSIS***

It is not disputed that appellant was exposed to work-related noise in the course of his federal employment. It is also undisputed that appellant now has a hearing loss. However, appellant has not established that his hearing loss is causally related to his employment-related noise exposure.

Appellant submitted results from audiograms conducted from 1982 until 1989. None of these audiograms established that appellant had a hearing loss. Furthermore none of these audiograms were accompanied by a physician's statement certifying their accuracy. Thus, these reports and audiograms from audiologists do not constitute probative medical evidence.[7] Appellant also submitted a February 13, 2009 audiogram, which was unsigned and uncertified and again did not constitute probative medical evidence.

The Office's second opinion physician examined appellant, reviewed the medical record and statement of accepted facts and reported the results of an April 27, 2009 audiogram. Dr. Godwin diagnosed bilateral neurosensory hearing loss. He reported that the historical hearing data appellant submitted, concerning the period 1982 through 1989, demonstrated his hearing was normal. Dr. Godwin opined that these tests demonstrated appellant worked from 1971 to 1989 without any significant hearing loss. He opined that, because appellant worked for 18 years with no significant hearing loss, it was reasonable to expect that from 1989 to 1994, until appellant retired, appellant would not have experienced any significant hearing loss. Based on his examination of appellant and review of the entire record, Dr. Godwin concluded that it was not established that appellant's hearing loss was caused by employment-related noise exposure. The Board finds that Dr. Godwin's report constitutes the weight of the medical evidence.

Appellant has provided no probative medical evidence in support of his position that his hearing loss was caused by employment-related noise exposure. The Board finds that he failed to meet his burden of proof.

## ***CONCLUSION***

The Board finds that appellant has not met his burden of proof to establish that he sustained hearing loss in the performance of duty.

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[6] *Jennifer Atkerson*, 55 ECAB 317, 319 (2004); *Naomi A. Lilly*, 10 ECAB 560, 573 (1959).

[7] *See* 5 U.S.C. § 8101(2). This subsection defines the term physician. *See Robert E. Cullison*, 55 ECAB 570 (2004) (the Office does not have to review every uncertified audiogram, which has not been prepared in connection with an examination by a medical specialist). *See also Herman L. Henson*, 40 ECAB 341 (1988) (an audiologist is not considered a physician under the Act); *Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (where the Board held that medical opinion, in general, can only be given by a qualified physician).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the June 9, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 5, 2010
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board