

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

C.S., Appellant)

and)

DEPARTMENT OF THE NAVY,)
COMMANDER FLEET FORCES CMD -)
SHIPYARD, Portsmouth, VA, Employer)

**Docket No. 10-2030
Issued: June 9, 2011**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 3, 2010 appellant filed a timely appeal from a June 28, 2010 merit decision of the Office of Workers' Compensation Programs denying his claim for compensation. Pursuant to the Federal Employees' Compensation Act¹ and 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 met his burden of proof to establish that he sustained hearing loss in the performance of duty.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 25, 2010 appellant, then a 57-year-old training instructor, filed an occupational disease claim (Form CA-2) alleging that he sustained bilateral hearing loss as a result of employment-related noise exposure. He stated that he would ask people to repeat verbal communications, could not hear warning sounds or signals from moving equipment and was unable to understand commands from the power amplifier system. Appellant first became aware of his claimed condition on November 15, 1988. He continued to work for the employing establishment until June 2009, when he retired.

By letter dated March 23, 2010, the Office requested additional factual information from both appellant and the employing establishment. Appellant was requested to provide information regarding his employment history, when he related his hearing loss to conditions of employment, and all nonoccupational exposure to noise. The Office also requested that he provide medical documentation pertaining to any prior treatment he received for ear or hearing problems. It requested that the employing establishment provide noise survey reports for each site where appellant worked, the sources and period of noise exposure for each location and whether he wore ear protection.

Appellant's detailed work history showed that he had been working for Norfolk Naval Shipyard (NNSY) in various positions from October 1979 to June 2009 when he retired. From 1969 to 1979 he worked as an automobile mechanic in both the private sector and the Federal Government.

A number of position descriptions were submitted including marine machinery mechanic supervisor (nuclear), marine machinery mechanic and quality assurance specialist. The work environment for a marine machinery mechanic supervisor included working around machinery with moving parts and objects, vibrations, elevators, electricity, sharp edges and being in close or confined spaces. Environmental factors for a marine machinery mechanic included intermittent excessive noise, constant noise and vibration.

In a June 14, 2002 audiological evaluation, Dr. S.E. Lewis, a treating audiologist for NNSY, reported that appellant had sensorineural hearing loss at 395 decibels (dB) and restricted appellant from working in areas of noise exceeding 85 dB. Hearing conservation data and audiograms were submitted from the employing establishment for the period April 29, 1987 to June 13, 2002 which evidenced appellant's hearing loss.

Appellant signed forms showing that he received hearing conservation education and training from 1989 to 2000. He also received notice of significant threshold shift reports from February 6, 1995 to March 23, 1998. The reports notified appellant that he had a change in his hearing which could be work related and permanent. Appellant was advised that it was mandatory to use some type of hearing protective device when entering a work area posted as noise hazardous or when using noise hazardous tools or equipment.

Appellant submitted a November 11, 2009 medical report from Dr. Karah M. Lanier, Board-certified in diagnostic radiology and neuroradiology, who noted a history of right-sided hearing loss greater than the left. Upon examination, Dr. Lanier found the AICA loop protruded

into the medial right internal auditory canal. She noted prominent coursing vascular structure with a lateral left pons and lateral left posterior fossa which most likely represented a venous structure of uncertain clinical significance. Dr. Lanier also reported an inflammatory sinus mucosal disease and a small left retrocerebellar probable arachnoid cyst.

In a November 24, 2009 note, Dr. L. Frederick Lassen, a Board-certified otolaryngologist, reported that appellant was last seen by him on November 4 and 17, 2009 for progressive hearing loss with bilateral, nonpulsatile tinnitus. He noted that appellant had trouble localizing sound which was worse when there was background noise. Appellant did not wear a hearing aid. Dr. Lassen noted that appellant had worked at NNSY as a marine machinist from 1975 to 2009 and was exposed to high levels of noise, including grinders, steam turbines and high frequency operating machinery. Appellant was also exposed to significant acoustic trauma in 1994 when a large metal box lid was dropped in front of him. His last industrial noise exposure was on June 19, 2009. Dr. Lassen noted that appellant engaged in hunting and shooting for sport but wore hearing protection. He also reported that appellant had military experience around aircraft maintenance in the U.S. Air Force from 1971 to 1972. Dr. Lassen noted appellant's audiogram as showing a speech reception threshold of 30 dB in the right ear and 25 dB in the left ear, a speech discrimination score of 64 percent in the right ear and 96 percent in the left ear and a slight "noise-notch" at the 4,000 to 6,000 hertz range. He opined that the audiogram was consistent with noise-induced hearing loss and believed it to be a result of appellant's workplace exposure due to the intensity and duration of noise.

A March 10, 2010 noise dosimetry summary from the employing establishment provided samples from 1990 to 2000. In an April 2, 2010 report, Dr. Robert Rogers, an employing establishment physician and certified audiologist, reviewed appellant's medical records and noted that the industrial hygiene noise data for appellant's job series indicated periodic hazardous noise exposure. He also noted that appellant's ear, nose and throat diagnosis was "[workplace] noise [-] induced hearing loss" and that appellant was notified of changes in his hearing, issued hearing protection and received hearing conservation education and training. In an April 5, 2010 report, Dr. Deborah Eichelberger, Board-certified in occupational medicine, reviewed appellant's claim file and concurred with Dr. Rogers' findings.

By letter dated April 15, 2010, the employing establishment controverted appellant's claim stating that his employment records showed that he was exposed to noise in the private sector, the military, and at the employing establishment and that no factual or medical evidence establishing causal relationship had been submitted.

By decision dated June 28, 2010, the Office denied appellant's claim finding that he did not establish that he sustained occupational noise exposure. It specifically noted that he failed to detail the sources and periods of his noise exposure related to his federal and nonfederal employment.

LEGAL PRECEDENT

When an employee claims that he sustained an injury in the performance of duty he must submit sufficient evidence to establish that he experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged. He must also establish that such event,

incident or exposure caused an injury.² Once an employee establishes that he sustained an injury in the performance of duty, he has the burden of proof to establish that any subsequent medical condition or disability for work, for which he claims compensation is causally related to the accepted injury.³

Appellant has the burden of establishing by weight of the reliable, probative and substantial evidence that his hearing loss condition was causally related to noise exposure in his federal employment.⁴ 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.⁵

Although appellant must prove the facts alleged, proceedings under the Act are not adversarial in nature, nor is the Office a disinterested arbiter. While the claimant has the burden to establish his or her claim, the Office also has a responsibility in the development of the evidence.⁶ This is particularly true when the evidence is of the character normally obtained from the employing establishment or other government source.⁷ 20 C.F.R. § 10.118(a) states: The employer is responsible for submitting to the Office all relevant and probative factual and medical evidence in its possession or which it may acquire through investigation or other means. Such evidence may be submitted at any time.

ANALYSIS

The issue is whether appellant established that he sustained an employment-related hearing loss due to noise exposure during his federal employment. The Board finds that this case is not in posture for decision and must be remanded for further development.

In order to establish a compensable injury, appellant is required to establish that his hearing loss resulted from noise exposure during his employment.⁸

Appellant submitted a Form CA-2 which alleged that he developed hearing loss in both ears as a result of employment-related noise exposure from November 15, 1988 to June 2009. A detailed work history noted the different employment positions he held along with the length of time at each position. Job descriptions were also submitted for employment positions that appellant held. The positions reflected that he worked around machinery with moving parts and

² See generally *John J. Carlone*, 41 ECAB 354 (1989); see also 5 U.S.C. § 8101(5) (injury defined); 20 C.F.R. § 10.5(q) and (ee) (1999) (occupational disease or illness and traumatic injury defined). See *Victor J. Woodhams*, 41 ECAB 345 (1989) regarding a claimant's burden of proof in an occupational disease claim.

³ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁴ *Stanley K. Takahaski*, 35 ECAB 1065 (1984).

⁵ See *John W. Butler*, 39 ECAB 852, 858 (1988).

⁶ See *Claudia A. Dixon*, 47 ECAB 168 (1995).

⁷ *R.E.*, 59 ECAB 323 (2008); *Willie A. Dean*, 40 ECAB 1208 (1989).

⁸ See *Leon Thomas*, 52 ECAB 202 (2001).

objects, vibrations, elevators, electricity sharp edges and was in close or confined spaces. Environmental factors included intermittent excessive noise, constant noise and vibration.

Although appellant did not submit a narrative statement detailing his noise exposure, he submitted physician's reports detailing his accounts of noise exposure at NNSY. Dr. Lanier's November 24, 2009 report noted that appellant was exposed to high levels of noise, including grinders, steam turbines and high frequency operating machinery. He concluded that appellant's noise-induced hearing loss was a result of his workplace exposure due to the intensity and duration of noise. Appellant also submitted position descriptions which related that his employment duties included working around machinery with an environment of intermittent excessive noise, constant noise and vibrations. It is also apparent that he was exposed to noise in the workplace as evidenced by the fact that he was given yearly audiological testing and hearing conservation education and training by his employing establishment, which noted that the change in his hearing could be work related.

A March 10, 2010 Noise Dosimetry Summary from the employing establishment provided samples from 1990 to 2000. The employing establishment also submitted a number of audiograms, hearing conservation data, and notice of significant threshold shift reports which identified a change in appellant's hearing. While the employing establishment provided some evidence regarding appellant's levels of exposure to hazardous noise during the course of his federal employment, it failed to provide levels of noise exposure past 2000 although appellant was employed from 1979 to 2009. The Office initially requested that the employing establishment provide detailed information about appellant's noise exposure in a March 23, 2010 development letter, including copies of noise level surveys for each work location, the sources and periods of noise exposure and whether he wore ear protection.

It is well established that proceedings under the Act are not adversarial in nature, nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares the responsibility in the development of the evidence to see that justice is done.⁹ Because the levels and duration of exposure to hazardous noise is the type of evidence normally obtained from the employing establishment, it has a particular responsibility to develop this evidence.¹⁰ The Office failed to obtain information about the duration and level of appellant's noise exposure during the full course of his federal employment prior to denying his claim. The Board will remand the case for the Office to obtain the dates and periods of appellant's noise exposure at the employing establishment, the specific decibel levels to which he was exposed and whether hearing protection was provided.¹¹

⁹ *Richard Kendall*, 43 ECAB 790 (1992); *Isidore J. Gennino*, 35 ECAB 442 (1983).

¹⁰ *Id.*; see also *R.B.*, Docket No. 08-1662 (issued December 18, 2008).

¹¹ See *David Rossman*, 9 ECAB 454 (1957) (where the Board remanded the case finding that the record was devoid of evidence from the employing establishment and the claimant regarding the levels and length of noise exposure and, thus, was not in posture for decision regarding the claimant's claim for hearing loss); *S.E.*, Docket No. 08-2243 (issued July 20, 2009).

Additionally, regarding the Office's finding that appellant had not established exposure to hazardous noise, the Office's procedure manual provides:

"It is generally accepted that hearing loss may result from prolonged exposure to noise levels above 85 decibels. Acoustic trauma may, however, result from decibel levels below 85 decibels if exposure is sufficiently prolonged. [The Office] therefore does not require that the claimant show exposure to injurious noise in excess of 85 decibels as a condition to approval of the claim."¹²

Consequently, regardless of the specific decibel level of exposure, the Office must consider whether the employment-related noise exposure was sufficiently prolonged to result in acoustic trauma.¹³ Such a question is medical in nature and should be resolved by a Board-certified otolaryngologist. The Office's procedure manual directs the Office to refer appellant for audiological evaluation and otological examination unless a reliable medical report is already in the record.¹⁴ Upon remand, the Office should obtain the pertinent factual evidence, prepare a statement of accepted facts and refer appellant for an otological and audiological evaluation.

Thus, the Board finds that this claim is not in posture for decision and must be remanded for further development. On remand, the Office should make additional requests to the employing establishment and make findings of fact concerning the noise level in the employing establishment and the length and period of such exposures.¹⁵ After further development as it deems appropriate, the Office shall issue an appropriate decision.

CONCLUSION

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

¹² Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.8(a) (October 1990).

¹³ *Eufrosino T. Torrado*, Docket No. 95-1208 (issued February 14, 1997).

¹⁴ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.8(a)(1) (October 1990).

¹⁵ See *David Rossman*, 9 ECAB 454 (1957) (where the Board remanded the case finding that the record was devoid of evidence from the employing establishment and the claimant regarding the levels and length of noise exposure and, thus, was not in posture for decision regarding the claimant's claim for hearing loss); *S.E.*, Docket No. 08-2243 (issued July 20, 2009).

ORDER

IT IS HEREBY ORDERED THAT the June 28, 2010 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further action consistent with this decision.

Issued: June 9, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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