

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

B.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Cincinnati, OH, Employer**

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**Docket No. 10-940
Issued: March 16, 2011**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 24, 2010 appellant filed a timely appeal from an October 15, 2009 merit decision of the Office of Workers' Compensation Programs denying her claim for compensation and a January 21, 2010 decision denying her request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish that she sustained an injury in the performance of duty; and (2) whether the Office properly denied her request for further merit review under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On May 15, 2009 appellant, then a 54-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that she sustained hearing loss as a result of employment-

related noise exposure. She first became aware of her claimed condition on February 13, 2009. Appellant did not stop work.

By letter dated May 28, 2009, the Office requested additional factual information from both appellant and the employing establishment. Appellant was requested to provide information regarding her employment history and nonoccupational exposure to noise. The Office also requested that she provide medical documentation pertaining to any prior treatment she may have 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 she wore ear protection. Neither appellant nor the employing establishment responded to the Office's request for information.

By decision dated October 15, 2009, the Office denied appellant's claim finding that she did not establish that she sustained any occupational noise exposure.

On October 21, 2009 appellant requested reconsideration and submitted a March 23, 2009 audiological evaluation. In a letter dated October 28, 2009, Marlo M. Bailey, an audiologist, reviewed appellant's audiological examination and diagnosed sloping moderate sensorineural hearing loss rising to mild in the left ear with sloping moderately severe sensorineural hearing loss in the right ear. Based on the hearing test, Dr. Bailey found appellant to be a candidate for amplification and recommended a hearing aid.

In an April 9, 2009 Form CA-9, Dr. Sabino Baluyot, a Board-certified otolaryngologist, found that appellant had moderate sensorineural hearing loss in the left ear and moderately severe sensorineural hearing loss in the right ear. He noted that appellant's bilateral hearing loss was likely related to her time spent working in noise at her employment and sustained gradual hearing loss over the years as a result.

By decision dated January 21, 2010, the Office denied appellant's request for reconsideration finding that the medical evidence was insufficient to warrant further review of the merits because she failed to factually establish the claimed occupational exposure. It found that the medical evidence received was irrelevant and/or immaterial to the factual basis on which appellant's claim was denied.

LEGAL PRECEDENT -- ISSUE 1

When an employee claims that she sustained an injury in the performance of duty she must submit sufficient evidence to establish that she experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged. She must also establish that such event, incident or exposure caused an injury.¹ Once an employee establishes that she sustained an injury in the performance of duty, she has the burden of proof to establish that, any

¹ 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.

subsequent medical condition or disability for work, for which she claims compensation is causally related to the accepted injury.²

Appellant has the burden of establishing by weight of the reliable, probative and substantial evidence that her hearing loss condition was causally related to noise exposure in her federal employment.³ 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.⁴

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.⁵ This is particularly true when the evidence is of the character normally obtained from the employing establishment or other government source.⁶ The Office's regulations provide: "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."⁷

ANALYSIS -- ISSUE 1

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

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

Appellant submitted a Form CA-2 but did not provide the Office with any factual evidence addressing the nature or extent of any exposure to employment-related noise. There is no description of loud machines, engines or construction equipment in her duties as a mail handler. Appellant claimed that she had been exposed to loud noise at work since the start of her employment. In a letter dated May 28, 2009, the Office informed appellant of detailed medical and factual evidence needed to support her claim; however, she did not respond. In a letter of the same date, the Office requested that the employer provide information relating to appellant's

² *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

³ *Stanley K. Takahaski*, 35 ECAB 1065 (1984).

⁴ *See John W. Butler*, 39 ECAB 852, 858 (1988).

⁵ *See Claudia A. Dixon*, 47 ECAB 168 (1995).

⁶ *R.E.*, 59 ECAB 323 (2008); *Willie A. Dean*, 40 ECAB 1208 (1989).

⁷ 20 C.F.R. § 10.118(a).

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

employment-related noise exposure, including the location, sources and frequency and decibel levels of noise exposure. The employing establishment did not respond.

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

The Board notes that the employing establishment did not provide any evidence regarding appellant's occupational noise duration or levels of exposure to hazardous noise during her federal employment. The employing establishment did not state that the requested information was unavailable.

The Office initially requested this information from the employing establishment in a May 28, 2009 letter. However, it failed to pursue the evidence. The levels and duration of exposure to hazardous noise is the type of evidence normally obtained by the employer. The Office has the responsibility to develop this evidence.¹⁰ On remand, the Office should request that the employing establishment submit evidence concerning any occupational noise surveys and address the length and period of appellant's exposure.¹¹ 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 a decision regarding whether appellant established that she sustained an employment-related hearing loss in the performance of duty.¹²

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).

¹² Given the disposition of the first issue as this case is not in posture for decision, the second nonmerit issue is moot.

ORDER

IT IS HEREBY ORDERED THAT the January 21, 2010 and October 15, 2009 decisions of the Office of Workers' Compensation Programs are set aside. The case is remanded for further proceedings consistent with this opinion.

Issued: March 16, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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