

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

N.A., Appellant)	
)	
and)	Docket No. 10-1768
)	Issued: March 23, 2011
DEPARTMENT OF HOMELAND SECURITY,)	
CUSTOMS & BORDER PROTECTION,)	
Brownsville, TX, Employer)	
)	

<i>Appearances:</i>	<i>Case Submitted on the Record</i>
<i>Allan J. Shapiro, Esq., for the appellant</i>	
<i>Office of Solicitor, for the Director</i>	

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 22, 2010 appellant filed a timely appeal from the May 27, 2010 merit decision of the Office of Workers' Compensation Programs which denied a schedule award. 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 the case.

ISSUE

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

FACTUAL HISTORY

On May 27 2008 appellant, then a 47-year-old supervisor, filed a claim for a hearing loss due to his federal employment. He became aware of his hearing loss on January 1, 2006 and

¹ 5 U.S.C. § 8101 *et seq.*

realized it was causally related to his employment on March 15, 2007. Appellant did not stop work.

By letter dated July 7, 2008, the Office advised appellant of the evidence needed to establish his claim. It requested that the employing establishment address his workplace noise exposure.

In a May 15, 2008 statement, appellant advised that he worked for Customs and Border Protection since 1991. While working in the cargo/import lot he was exposed to noise from engines, mufflers, squeaking brakes and air starters for eight or more hours a day for six years without hearing protection. Appellant also inspected aircraft and was exposed to noise from engines and twin props. While working at the seaport, he was exposed to engine room noise and, in the rail yards, he was exposed to squeaking brakes, metal tires rubbing against tracks and engine room noise. Appellant worked in passenger processing and was exposed to noise from loud vehicle engines approaching the booth. He noted having less noise exposure when he was promoted to supervisor. Appellant noted hearing problems in 2006 and continued to work as a supervisor. A February 22, 2007 audiogram signed by an audiologist was submitted to the record.

The employer submitted a July 21, 2008 statement from Reynaldo Gonzalez, appellant's supervisor, who confirmed exposure to hazardous noise from commercial trucks, loud mufflers, bad breaks and leaking air tanks and air starters. Mr. Gonzalez noted that the airport operations consisted of inspecting aircraft engines which were shut down but there were loud auxiliary power units not shut down and the inspection would be done without ear protection. He noted that commencing 1995, inspection of the rail cars was done with hearing protection.²

By decision dated September 19, 2008, the Office denied appellant's claim, finding that the medical evidence did not support that his hearing loss was causally related to workplace noise exposure.

On November 10, 2008 appellant requested reconsideration. He submitted audiograms dated August 22, 2007 and October 28, 2008, which revealed moderate to severe hearing loss.

In a decision dated February 5, 2009, the Office vacated the September 19, 2008 decision for further medical development.

On February 23, 2009 the Office referred appellant to Dr. Paul W. Loeffler, a Board-certified otolaryngologist, for otologic examination and audiological evaluation. It provided Dr. Loeffler with a statement of accepted facts, available exposure information, and copies of all medical reports and audiograms.

Dr. Loeffler performed an evaluation of appellant on March 23, 2009 and audiometric testing was obtained on his behalf on March 6, 2009. Testing at the frequency levels of 500,

² A January 25, 2010 statement of accepted facts noted that appellant worked at several duty stations including Brownsville airport, Port of Brownsville Seaport and Rail operations. Appellant was exposed to noise from semi tractors, annual firearms training four times a year, rail traffic, vehicle traffic, airplane jet engine noise and a ships engine room. Ear protection was provided during firearms qualification since 1990. Appellant continued to work as a supervisor at the import lot and encountered noise from heavy machinery on a daily basis.

1,000, 2,000 and 3,000 revealed the following: right ear 15, 20, 25 and 25 decibels; left ear 15, 20, 25 and 25 decibels. In a report dated March 23, 2009, Dr. Loeffler diagnosed tinnitus and mild high frequency sensorineural hearing loss. He noted that the audiometric findings established only a mild high frequency hearing loss which was not beyond what would be expected from normal presbycusis. Dr. Loeffler noted normal ear canals, tympanic membranes and speech reception. He listed the audiometric test results as valid and representative of appellant's hearing sensitivity after utilizing ascending approach and reinstruction. Dr. Loeffler opined that an otoacoustic emission test was performed and appellant passed in both ears, which suggested that he had no more than a mild hearing loss. He concluded that appellant's hearing loss was not due to his federal employment.

In an April 22, 2009 report, an Office medical adviser reviewed Dr. Loeffler's report. He stated that the audiogram of March 6, 2009 met the Office's standards. Pursuant to Dr. Loeffler's report, appellant had no binaural hearing loss. He noted that the history of noise exposure was not sufficient to be a contributing factor to appellant's hearing loss.

In a July 7, 2009 decision, the Office denied the claim finding that the medical evidence did not establish that appellant's hearing loss was causally related to workplace noise exposure.

On July 31, 2009 appellant requested reconsideration and submitted additional evidence.

In a decision dated August 27, 2009, the Office denied modification of the July 7, 2009 decision.

Appellant requested reconsideration and submitted a July 22, 2009 audiogram. An August 5, 2009 employing establishment audiogram by Dr. Fred Rosenberg, Board-certified in occupational medicine, revealed abnormal hearing loss with a new standard threshold shift. An August 24, 2009 audiogram signed by an audiologist revealed moderate to severe hearing loss. Other audiograms dated July 22 and July 31, 2009 were submitted.

The Office referred the July 21 and 31 and August 5, 2009 audiograms to an Office medical adviser. In a February 23, 2010 report, the Office medical adviser noted that there was a significant difference in the hearing tests presented by appellant and that of the consulting physician. Dr. Loeffler had an audiogram performed on his behalf on March 6, 2009 which revealed mild hearing loss compatible with presbycusis. Appellant submitted three audiograms which showed significant hearing loss. The Office medical adviser commented that the marked discrepancy in the audiograms could not be explained and recommended another hearing loss evaluation.

By letter dated March 10, 2010, the Office referred appellant to Dr. James T. Wright, Jr., a Board-certified otolaryngologist, for otologic examination and audiological evaluation. The Office provided Dr. Wright with a statement of accepted facts, available exposure information and the medical record.

Dr. Wright performed an otologic evaluation of appellant on March 31, 2010 and audiometric testing was conducted on his behalf that day. Testing at the frequency levels of 500, 1,000, 2,000 and 3,000 revealed the following: right ear 70, 70, 70 and 75 decibels; left ear 65, 65, 70 and 75 decibels. The audiogram revealed 67 percent binaural hearing loss. In a report dated March 31, 2010, Dr. Wright diagnosed bilateral symmetrical hearing loss. He noted that

physical examination of the ears revealed no abnormalities but appellant's past four audiograms were very inconsistent. The October 28, 2008 audiogram revealed hearing loss in the 25 to 30 decibel range, the March 26, 2009 audiogram revealed hearing loss in the 20 to 25 decibel range, the August 24, 2009 audiogram revealed hearing loss in the 55 to 60 decibel range and the March 31, 2010 audiogram revealed hearing loss in the 70 decibel range. The amount of variation and or progression was improbable in the absence of a medical condition or other contributing factors. Dr. Wright advised that appellant's hearing loss was not due to noise exposure in the workplace. He found that the audiometric results were not valid nor represented appellant's hearing sensitivity. Dr. Wright could not relate any sensorineural hearing loss to appellant's employment. He recommended retesting and hearing aids.

The Office referred Dr. Wright's report to an Office medical adviser. In a May 4, 2010 report, Dr. Wright noted that the audiogram of March 6, 2009 met all the Offices standards. While his report indicated a 67 percent binaural hearing loss, he addressed the four hearing tests starting on October 28, 2008 as improbable and deferred an opinion on hearing loss. The medical adviser stated that appellant's hearing loss was not due to occupational noise exposure and recommended a repeat pure tone audiometry, as Dr. Wright noted the March 31, 2010 pure tone audiometry tests were of questionable validity. The medical adviser noted that Office standards required that a schedule award for hearing loss be determined by a valid pure tone audiometry and was the responsibility of appellant to submit a physician's evaluation based on valid audiometry.

In a decision dated May 27, 2010, the Office denied modification of the July 7, 2009 decision. It found that there were no reliable test results supporting appellant's hearing loss was due to workplace noise exposure.

LEGAL PRECEDENT

An employee seeking benefits under the Act 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 timely filed within the applicable time limitation period of the Act, 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 the claimant.

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

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

The record reflects that appellant was exposed to noise since 1992 in the course of his employment. The medical evidence is insufficient, however, to establish that he sustained hearing loss causally related to his workplace noise exposure.

Appellant submitted several audiograms obtained by audiologists who recorded various levels of hearing loss. An audiologist is not a physician under the Act and is not competent to render a probative medical opinion.⁵ None of the audiograms appellant submitted were accompanied by a physician's report addressing any employment factors believed to have caused or contributed to the hearing loss. The August 5, 2009 report from Dr. Rosenberg indicated that appellant had a hearing loss but did not address the cause of the condition. This evidence does not establish appellant's claim.

On February 23, 2009 the Office referred appellant to Dr. Loeffler. On March 23, 2009 Dr. Loeffler determined that appellant's sensorineural hearing loss was not due to his noise exposure in federal employment. He diagnosed tinnitus and mild high frequency sensorineural hearing loss. Dr. Loeffler noted that the audiometric findings revealed a mild high frequency hearing loss which was not beyond that expected from normal presbycusis, the aging process. The Board notes that Dr. Loeffler listed the findings of audiometric testing as valid and representative of appellant's hearing sensitivity. Dr. Loeffler opined that an otoacoustic emission test was performed and appellant passed in both ears which suggested that he had a mild hearing loss.

The Office referred the audiograms to an Office medical adviser. In a February 23, 2010 report, the Office medical adviser noted that there was a significant difference in the tests obtained by appellant and that of Dr. Loeffler. The medical adviser noted that the marked discrepancy in the audiograms could not be explained and recommended reevaluation.

The Office referred appellant to Dr. Wright who, in a March 31, 2010 report, determined that appellant's sensorineural hearing loss was not due to the history of noise exposure. Dr. Wright diagnosed bilateral symmetrical hearing loss. He noted that the audiometric results were not valid and did not represent appellant's hearing sensitivity. Dr. Wright could not relate the sensorineural hearing loss to appellant's employment. He noted appellant's past four audiograms were very inconsistent and the amount of variation made the progression improbable

⁴ *Solomon Polen*, 51 ECAB 341 (2000).

⁵ 5 U.S.C. § 8101(2); *Henry T. Scott*, 27 ECAB 444 (1976). See *Joshua A. Holmes*, 42 ECAB 231 (1990).

in the absence of a medical condition or other contributing factors. Dr. Wright noted that physical examination of the eardrums revealed no abnormalities. An Office medical adviser reviewed Dr. Wright's report and also found no basis on which to attribute appellant's hearing loss to his employment.

The Board finds that the medical evidence does not support that appellant sustained hearing loss causally related to workplace noise exposure. Dr. Wright provided a thorough examination and a reasoned medical report explaining how the hearing loss was not due to the employment. Dr. Loeffler also found that appellant's hearing loss was not work related but was consistent with presbycusis. The Office medical advisers reviewing the claim also negated causal relationship. Appellant has not met his burden of proof to establish that his hearing loss is causally related to employment factors.

CONCLUSION

The Board finds that appellant has not established that his hearing loss was caused or aggravated by his federal employment.

ORDER

IT IS HEREBY ORDERED THAT the May 27, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 23, 2011
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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