United States Department of Labor
Employees' Compensation Appeals Board

M.H., Appellant	)	
and	)	**Docket No. 12-9**
	)	**Issued: April 10, 2012**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Las Vegas, NV, Employer	)	

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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 3, 2011 appellant filed a timely appeal from a September 15, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his occupational disease claim. Pursuant to the Federal Employees' Compensation Act[1] (FECA) 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.

FACTUAL HISTORY

On June 14, 2011 appellant, then a 49-year-old transportation security officer, filed an occupational disease claim (Form CA-2) alleging that he sustained hearing loss and developed

[1] 5 U.S.C. § 8101 *et seq.*

ringing in his ears as a result of employment-related noise exposure. He first became aware of his condition and of its relationship to his employment on April 27, 2011. Appellant notified his supervisor on June 2, 2011.

By letter dated June 30, 2011, OWCP 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. OWCP 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, whether he wore ear protection and copies of all medical examinations pertaining to hearing or ear problems, including preemployment examinations and audiograms.

By letter dated June 6 and 13, 2011, the employing establishment reported that it conducted a workplace survey of appellant's work area at McCarran International Airport, passenger checkpoint Delta. A number of areas in the checkpoint were surveyed and noise exposure data averaged at 65 decibels measured on the A-scale (dBA), with the highest level at 72 dBA. It further stated that in February 2009, a comprehensive inspection was conducted and sound levels at the Delta checkpoint were reported between 64 and 79 dBA. The employing establishment stated that the sound levels were below the exposure levels established in the Occupational Safety and Health Administration (OSHA) regulations which would require hearing monitoring programs and engineered controls to prevent employee hearing loss.

By letter dated July 10, 2011, appellant stated that he worked at McCarran International Airport as a federal security officer since October 1, 2002. He complained of loud noises from the intercom system, music, videos and airplanes for the prior few years but that his complaints were ignored by the employing establishment. On April 27, 2011 appellant experienced severe ringing in his ears, hearing loss and a migraine headache. He further stated that his physician diagnosed him with hearing loss due to his work environment and recommended that he wear ear protection at work.

By letter dated July 21, 2011, the employing establishment controverted the claim stating that TSA work areas did not exceed 85 dBA over an eight-hour weighted time average, therefore a hearing monitoring program was not in place. It further stated that it had requested medical examinations, including audiograms, from TSA Headquarters but was informed that those records were no longer available.

In support of his claim, appellant submitted a position description for a supervisory transportation security screener, job analysis tool, application for employment and medical reports pertaining to his hearing loss.

In a July 26, 2011 medical report, Dr. Mark M. Weisberg, an osteopathic physician, reported that appellant complained of hearing loss and ringing in his ears on April 27, 2011. An audiogram was submitted to the record.[2]. Dr. Weisberg diagnosed hearing loss and noted that

[2] This audiogram bore several date stamps and an illegible audiologist's signature.

appellant must use hearing protection when exposed to noise greater than 85 dBA. In a referral prescription note, he diagnosed noise-induced bilateral hearing loss.

By decision dated September 15, 2011, OWCP found that the evidence failed to establish that appellant's hearing loss was causally related to the accepted employment factors. It noted that the evidence submitted did not support that he was exposed to workplace noise levels over 85 dBA.

LEGAL PRECEDENT

An employee seeking benefits under FECA 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 FECA; 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 or specific condition for which compensation is claimed is causally related to the employment injury.[3] These are the essential elements of every compensation claim regardless of whether the claim is predicated on a traumatic injury or occupational disease.[4]

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.[5] 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.[6]

To establish a causal relationship between the condition, as well as any attendant disability claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence based on a complete factual and medical background, supporting such a causal relationship.[7] 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. This medical opinion must include an accurate history of the employee's employment injury and must explain how the condition is related to the injury. The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.[8]

[3] *Gary J. Watling*, 52 ECAB 278 (2001); *Elaine Pendleton*, 40 ECAB 1143, 1154 (1989).

[4] *Michael E. Smith*, 50 ECAB 313 (1999).

[5] *Stanley K. Takahaski*, 35 ECAB 1065 (1984).

[6] *See John W. Butler*, 39 ECAB 852, 858 (1988).

[7] *See* 20 C.F.R. § 10.110(a); *John M. Tornello*, 35 ECAB 234 (1983).

[8] *James Mack*, 43 ECAB 321 (1991).

Although appellant must prove the facts alleged, proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden to establish his or her claim, OWCP also has a responsibility in the development of the evidence.[9]

ANALYSIS

OWCP denied appellant's claim on the grounds that it lacked sufficient medical evidence to support that his bilateral hearing loss was causally related to factors of his employment as a transportation security officer. The issue is whether he 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.[10]

Appellant submitted a Form CA-2 which alleged that he developed hearing loss and ringing in both ears as a result of employment-related noise exposure. By letter dated July 10, 2011, he stated that he had worked as a TSA federal security officer since October 1, 2002 and had complained of loud noises from the intercom system, music, videos and airplanes for the last few years. In a July 26, 2011 medical report, Dr. Weisberg reported that appellant complained of hearing loss and ringing in his ears on April 27, 2011. Audiogram test results were submitted to the record. Dr. Weisberg diagnosed noise-induced bilateral hearing loss.

A June 6, 2011 noise dosimetry summary from the employing establishment provided samples of appellant's workplace at passenger checkpoint Delta. Noise exposure data averaged at 65 dBA with the highest level at 72 dBA. The employing establishment also noted that a February 2009 report at the Delta checkpoint showed sound levels to be between 64 dBA and 79 dBA. It stated that TSA headquarters no longer had records of appellant's medical examinations, including audiograms. While the employing establishment provided some evidence regarding his levels of exposure to hazardous noise during the course of his federal employment, it failed to provide levels of noise exposure prior to 2009. Appellant was employed as a transportation security officer from 2002 to 2011. OWCP initially requested that the employing establishment provide detailed information about his noise exposure in a June 30, 2011 development letter, including copies of noise level surveys for each work location, the sources and periods of noise exposure, whether he wore ear protection and any medical examinations pertaining to hearing or ear problems.

It is well established that proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares the responsibility in the development of the evidence to see that justice is done.[11]

In its September 15, 2011 decision, OWCP noted that the evidence submitted did not support that appellant was exposed to workplace noise levels over 85 dBA. Its procedure manual

[9] *See Claudia A. Dixon*, 47 ECAB 168 (1995).

[10] *C.S.*, Docket 10-2030 (issued June 9, 2011).

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

provides that it is generally accepted that hearing loss may result from prolonged exposure to noise levels above 85 dBA. Acoustic trauma may also result, however, from dBA levels below 85 dBA if exposure is sufficiently prolonged. OWCP therefore does not require that the claimant show exposure to injurious noise in excess of 85 dBA as a condition to approval of the claim.[12]

Consequently, regardless of the specific dBA level of exposure, OWCP 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. OWCP's procedure manual directs OWCP to refer appellant for audiological evaluation and otological examination unless a reliable medical report is already in the record.[14] Upon remand, OWCP should obtain the pertinent factual evidence, prepare a statement of accepted facts and refer appellant for otological and audiological evaluation. After development of the medical evidence, OWCP procedures require that the record be referred to the district medical adviser for opinion regarding the causal relationship between any hearing loss and the employment and to verify the calculation of hearing loss.[15]

After further development as it deems appropriate, OWCP shall issue an appropriate decision.

CONCLUSION

The Board finds that this case is not in posture for a decision as to whether appellant developed bilateral hearing loss in the performance of duty.

[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] *Supra* note 12.

[15] *Id.*, at Chapter 3.600.8(a)(6).

ORDER

IT IS HEREBY ORDERED THAT the September 15, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development consistent with this decision.

Issued: April 10, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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