United States Department of Labor
Employees' Compensation Appeals Board

D.A., Appellant	)	
and	)	**Docket No. 11-1291**
	)	**Issued: January 18, 2012**
TENNESSEE VALLEY AUTHORITY, YARD OPERATIONS, Chattanooga, TN, 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 April 25, 2011 appellant filed a timely appeal from a December 20, 2010 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 September 17, 2010 appellant, then a 57-year-old conveyor operator, filed an occupational disease claim (Form CA-2) alleging that he sustained hearing loss as a result of employment-related noise exposure. He first became aware of his illness and of its relationship

[1] 5 U.S.C. § 8101, *et seq.*

to his employment on January 3, 2009. Appellant was last exposed to the employment condition on January 2, 2009 when he retired. He notified his employer on September 23, 2010.

By letter dated October 1, 2010, 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 and whether appellant wore ear protection.

On November 2, 2010 appellant responded to OWCP's questionnaire noting that he was last exposed to hazardous noise on January 2, 2009, his final day of employment. He reported that he had not filed any other prior hearing loss claims or partaken in any hobbies which exposed him to loud noise.

Appellant noted that from 1973 to 1976 he was in the army and worked at the Tennessee Valley Authority (TVA) as a beltline operator from 1977 to 2009 where he was exposed to loud noise for 8 to 12 hours a day, approximately five to seven days a week. He noted that hearing protection was not issued until after 1985 at the Colbert Steam Plant.

By letter dated November 9, 2010, the employing establishment reported that appellant worked as a conveyor dumper operator from February 12, 2001 until his retirement on January 2, 2009. Noise exposures for a conveyor dumper operator ranged from 76 to 93 decibels (dBA) measured on the A-scale over a period of seven to eight hours a day. The employing establishment noted that hearing protection was provided throughout the course of appellant's employment and that occupational hearing loss was not an expected outcome of employment at TVA.

A job history summary was submitted for the period February 8, 1985 to May 3, 2010 which noted appellant's TVA appointments and department information.

Appellant submitted a history of audiograms dated February 11, 1977 to May 13, 2008. In a January 11, 2000 audiogram report, his physician reported that his right and left ear test results were normal.

In a May 9, 2006 medical examination, appellant's physician reported that he had bilateral hearing loss.

On November 22, 2010 OWCP referred appellant to Dr. Jack W. Aland, a Board-certified otolaryngologist, for a second opinion evaluation. It prepared a statement of accepted facts addressing his federal work history from 1977 to 2009. OWCP noted that the employing establishment provided no noise exposure data on appellant's positions from February 14, 1977 to February 11, 2001. It reported that he worked for TVA as a conveyor dump operator from February 12, 2001 to January 2, 2009. Noise exposure ranged from 76 to 93 dBA over a period of seven to eight hours a day and hearing protection was provided.

On December 13, 2010 appellant was examined by Dr. Aland. In his report, Dr. Aland stated that appellant's hearing was normal in both ears at the time he was initially exposed to noise from his federal employment and steadily declined over the years while working for TVA. He noted that appellant worked for TVA from 1977 to 2009 on multiple jobs which generally involved heavy equipment construction. Dr. Aland further noted that appellant worked as a laborer from 2001 to 2009 and was exposed to the noise of a jackhammer, as well as explosions for a period of time. He reported that appellant's workplace exposure was sufficient as to intensity and duration to have caused the hearing loss in question. Audiometric testing revealed auditory discrimination scores of 100 percent in the right ear and 96 percent in the left ear. Dr. Aland noted that there was no noise notch and found mild-to-moderate neurosensory hearing loss rather flat in the lower frequency and then dropping off at the highest frequency. He diagnosed bilateral neurosensory hearing loss. Dr. Aland opined that, because the pattern of the hearing loss was worse in the high frequencies in the absence of a noise notch, coupled with the mild level of hearing loss, most likely appellant's hearing loss was due to presbycusis rather than noise exposure.

By decision dated December 20, 2010, OWCP found that the evidence failed to establish that appellant's hearing loss was causally related to the accepted employment factors.

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.[2] These are the essential elements of every compensation claim regardless of whether the claim is predicated on a traumatic injury or occupational disease.[3]

In order to determine whether an employee actually sustained an injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.[4] The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.

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

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

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

[4] *Elaine Pendleton*, 40 ECAB 1143 (1989).

a causal relationship.[5] 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.[6]

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.[7] 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.[8]

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

There is no dispute that appellant was exposed to loud noise during his career at TVA. The issue is whether such exposure caused his diagnosed hearing loss. The Board finds that this case is not in posture for decision.

OWCP referred appellant to Dr. Aland, a Board-certified otolaryngologist, for a second opinion evaluation.[10] Dr. Aland diagnosed bilateral neurosensory hearing loss, noting that appellant's hearing was initially normal in both ears and steadily declined over the years while working for TVA. He acknowledged that appellant worked for TVA from 1977 to 2009 on multiple jobs which generally involved heavy equipment construction, that his employment as a laborer from 2001 to 2009 exposed him to the noise of a jackhammer as well as explosions, and that his workplace exposure was sufficient as to intensity and duration to have caused the hearing loss in question. Dr. Aland noted, however, that, because the pattern of the hearing loss was

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

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

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

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

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

[10] In support of his claim for an employment-related hearing loss, appellant submitted a history of audiograms dated February 11, 1977 to May 13, 2008. This evidence did not meet OWCP's criteria to establish an employment-related loss of hearing because the audiograms were not certified by a physician as being accurate. OWCP does not have to review every uncertified audiogram, which has not been prepared in connection with an examination by a medical specialist. *Robert E. Cullison*, 55 ECAB 570 (2004).

worse in the high frequencies in the absence of a noise notch, coupled with the mild level of hearing loss, most likely appellant's hearing loss was due to presbycusis rather than noise exposure.

Dr. Aland stated that appellant's hearing loss was "most likely" due to presbycusis rather than noise exposure. His opinion regarding the cause of appellant's hearing loss is speculative and equivocal in nature and of diminished probative value.[11] Dr. Aland failed to provide a fully-rationalized medical opinion. He agreed that the workplace exposure was sufficient as to intensity and duration to have caused appellant's hearing loss, noting that appellant was exposed to the noise of a jackhammer and explosions during his employment as a laborer from 2001 to 2009. Dr. Aland did not adequately explain why, in light of established noise exposure, appellant's hearing loss was due to presbycusis.[12] Or, to phrase the question differently, why the occupational noise exposure apparently had no effect on appellant's hearing. The Board has held that a medical opinion not fortified by rationale is of limited probative value.[13]

It is well established that proceedings under FECA are not adversarial in nature and while the claimant has the burden to establish entitlement to compensation, OWCP shares the responsibility in the development of the evidence.[14] When OWCP selects a physician for an opinion on causal relationship, it has an obligation to secure, if necessary, clarification of the physician's report and to have a proper evaluation made.[15] Because it referred appellant to a second opinion physician, it has the responsibility to obtain a report that will resolve the issue of whether his hearing loss was caused by his federal employment.[16] Because Dr. Aland's opinion is equivocal and does not provide a rationalized opinion on the cause of appellant's hearing loss, OWCP should not have relied upon his opinion as a basis for denying appellant's claim for compensation.

Accordingly, the case will be remanded to OWCP for further development of the medical evidence.[17] On remand, OWCP should ask Dr. Aland to clarify his opinion.[18] Following this and any other further development deemed necessary, OWCP shall issue an appropriate merit decision on appellant's occupational disease claim.

[11] *Michael R. Shaffer*, 55 ECAB 386 (2004).

[12] Presbycusis is defined as progressive bilaterally symmetrical perceptive hearing loss occurring with advancing age. *See* DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, 27th edition (1988).

[13] *A.D.*, 58 ECAB 149 (2006).

[14] *P.K.*, Docket No. 08-2551 (issued June 2, 2009).

[15] *Alva L. Brothers, Jr.*, 32 ECAB 812 (1981).

[16] *See Ramon K. Farrin, Jr.*, 39 ECAB 736 (1988).

[17] *S.E.*, Docket 08-2243 (issued July 20, 2009).

[18] When a medical evaluation is made at its request, OWCP has the responsibility of obtaining a proper evaluation. *Leonard Gray*, 25 ECAB 147, 151 (1974).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the December 20, 2010 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development consistent with this decision.

Issued: January 18, 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