United States Department of Labor
Employees' Compensation Appeals Board

I.H., Appellant	)	
and	)	**Docket No. 12-423**
	)	**Issued: July 10, 2012**
DEPARTMENT OF HOMELAND SECURITY, CUSTOMS & BORDER PROTECTION, El Paso, TX, Employer	)	

Appearances:
Steven E. Brown, Esq., for the appellant
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 December 1, 2011 appellant filed a timely appeal from a November 8, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 the case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he sustained a traumatic injury in the performance of duty on July 18, 2004.

FACTUAL HISTORY

This case has previously been before the Board. On August 6, 2009 the Board set aside OWCP's February 13 and September 23, 2008 merit decisions on the grounds that OWCP failed

[1] 5 U.S.C. § 8101 *et seq.*

to notify appellant's then-counsel of a July 19, 2007 referee examination with Dr. Marc T. Taylor, a Board-certified otolaryngologist. The Board thereafter found that Dr. Taylor's corresponding medical report was rendered insufficient to resolve the conflict in medical opinion and directed OWCP to refer the case to another independent medical specialist.[2] The facts of the case as set forth in the Board's prior decision are hereby incorporated by reference. Facts germane to the present appeal will be set forth as appropriate.

On July 18, 2004 appellant, then a 49-year-old immigration inspector, filed a traumatic injury claim alleging that he experienced binaural hearing loss and tinnitus during a weapons qualification course on June 22, 2004. He began his employment in 1996 and was required to participate in weapons qualification courses at least four times annually and wear hearing protection.[3]

A June 30, 2004 audiogram exhibited the following decibel (dBA) losses at frequencies of 500, 1,000, 2,000 and 3,000 Hertz (Hz): 60, 60, 55 and 60 for the right ear and 55, 60, 60 and 65 for the left ear. At the same frequency levels, an August 9, 2004 audiogram showed losses of 55, 50, 55 and 55 dBA for the right ear and 50, 55, 55 and 55 dBA for the left ear. In July 6 and August 11, 2005 reports, Dr. Gary Nanez, a Board-certified otolaryngologist, diagnosed mild sensorineural hearing loss secondary to work-related acoustic trauma.

In a December 22, 2005 second opinion examiner's report, Dr. Twana L. Sparks, an otolaryngologist, diagnosed nonindustrial functional hearing loss. Although audiometric findings obtained on December 22, 2005 exhibited dBA losses of 65, 60, 65 and 60 for the right ear and 65, 60, 75 and 80 for the left ear at 500, 1,000, 2,000 and 3,000 Hz, she commented that these results were unreliable as appellant's pure-tone averages conflicted with his bilateral 15-dBA speech reception thresholds. Further testing revealed half-word answers to spondees. Subsequent February 6 and 20, 2006 reports from audiologists showed that otoacoustic emissions and auditory brainstem responses were within normal limits.

OWCP determined that a conflict in medical opinion existed between Dr. Nanez and Dr. Sparks as to whether appellant had hearing loss as a result of his federal employment. After the Board's August 6, 2009 decision, OWCP referred the case to Dr. Richard B. Dawson, a Board-certified otolaryngologist, for a referee examination.

In a July 9, 2011 report, Dr. Dawson examined appellant and observed considerable tympanosclerosis of the eardrums. Tympanometric measurements were normal while an audiogram conducted on July 5, 2011 demonstrated dBA losses of 40, 45, 50 and 40 for the right ear and 40, 55, 50 and 50 for the left ear at 500, 1,000, 2,000 and 3,000 Hz. Dr. Dawson pointed out that the speech reception threshold scores of 35 and 40 dBA for the right and left ear, respectively, were not within 6 dBA of the corresponding pure-tone averages. Following review of the November 17, 2005 statement of accepted facts and medical file, he indicated that the December 22, 2005 audiometric results were similarly problematic and that the 2006 audiological records displayed normal auditory brainstem responses. In light of these

[2] Docket No. 09-141 (issued August 6, 2009).

[3] The foregoing information was incorporated into the November 17, 2005 statement of accepted facts.

inconsistencies, Dr. Dawson concluded that appellant did not sustain a noise-induced hearing impairment on the job.

On September 6, 2011 OWCP's medical adviser reviewed and agreed with Dr. Dawson's opinion.

Appellant submitted May 11, 2009 and May 23, 2011 progress notes from audiologists diagnosing binaural sensorineural hearing loss and subjective tinnitus. A May 23, 2011 audiogram, which was not certified by a physician, showed dBA losses of 50, 50, 60 and 60 for the right ear and 50, 55, 65 and 65 for the left ear at 500, 1,000, 2,000 and 3,000 Hz.

By decision dated November 8, 2011, OWCP denied appellant's claim, finding that the evidence did not sufficiently establish that he sustained a binaural hearing condition due to the accepted June 22, 2004 employment incident.

LEGAL PRECEDENT

An employee seeking compensation under FECA has the burden of establishing the essential elements of his claim by the weight of reliable, probative and substantial evidence,[4] including that he is an "employee" within the meaning of FECA and that he filed his claim within the applicable time limitation.[5] The employee must also establish that he sustained an injury in the performance of duty as alleged and that his disability for work, if any, was causally related to the employment injury.[6]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether fact of injury has been established. There are two components involved in establishing fact of injury. First, the employee must submit sufficient evidence to establish that he actually experienced the employment incident at the time, place and in the manner alleged. Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.[7]

Causal relationship is a medical issue and the evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is evidence which includes a physician's 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, must be one of reasonable medical certainty, and must be supported by medical

[4] *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 57 (1968).

[5] *R.C.*, 59 ECAB 427 (2008).

[6] *Id.*; *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[7] *T.H.*, 59 ECAB 388 (2008).

rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[8]

If there is a conflict in medical opinion between the employee's physician and the physician making the examination for the United States, OWCP shall appoint a third physician, known as a referee physician or impartial medical specialist, to make what is called a referee examination.[9] Where OWCP has referred appellant to a referee physician to resolve a conflict, the referee's opinion, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[10]

ANALYSIS

The case record supports that appellant participated in a weapons qualification course on June 22, 2004. After finding that a conflict in medical opinion existed concerning whether a binaural hearing impairment resulted from this accepted employment incident, OWCP referred the case to Dr. Dawson for a referee examination. Appellant thereafter provided additional medical evidence.

The Board finds that Dr. Dawson's July 9, 2011 report is entitled to special weight because his opinion on causal relationship was well rationalized and based on a proper factual and medical history. The referee physician reviewed the November 17, 2005 statement of accepted facts and medical file, conducted a thorough physical examination, and obtained an updated July 5, 2011 audiogram. Dr. Dawson observed key discrepancies, including inconsistent pure tone averages and speech reception threshold scores in multiple audiograms and findings of normal auditory brainstem responses almost two years later in 2006.[11] Based on examination findings and testing discrepancies, he concluded that appellant did not sustain an employment-related hearing condition. Dr. Dawson reported no basis on which to attribute appellant's hearing loss to the June 22, 2004 work incident.

Thereafter, appellant did not furnish sufficient medical evidence to overcome the special weight afforded to Dr. Dawson's opinion. The May 11, 2009 and May 23, 2011 progress notes as well as the May 23, 2011 audiogram cannot constitute qualified medical opinion because an audiologist is not a physician for the purposes of FECA.[12] Consequently, the Board finds that OWCP properly denied appellant's traumatic injury claim.

Appellant contends on appeal that the November 8, 2011 decision is contrary to fact and law. The Board has already addressed the deficiencies of his claim. Appellant may submit new

[8] *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

[9] *See* 5 U.S.C. § 8123(a); 20 C.F.R. § 10.321.

[10] *L.W.*, 59 ECAB 471 (2007); *James P. Roberts*, 31 ECAB 1010 (1980).

[11] *See Luis M. Villaneuva*, 54 ECAB 666 (2003) (medical evidence in which physicians comment on inconsistent audiometric testing does not establish causal relationship).

[12] *T.B.*, Docket No. 09-1504 (issued April 12, 2010). *See also Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (medical opinion, in general, can only be given by a qualified physician); 5 U.S.C. § 8101(2).

evidence or argument as part of a formal written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant did not sustain a traumatic injury in the performance of duty on July 18, 2004.

ORDER

IT IS HEREBY ORDERED THAT the November 8, 2011 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: July 10, 2012
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