United States Department of Labor
Employees' Compensation Appeals Board

H.G., Appellant	)	
and	)	**Docket No. 12-431**
	)	**Issued: July 6, 2011**
DEPARTMENT OF THE ARMY, ARMY CORPS OF ENGINGEERS, Shorterville, AL, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 19, 2011 appellant, through his attorney, filed a timely appeal from a September 16, 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 established that he sustained hearing loss causally related to factors of his federal employment.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On May 17, 2011 appellant, then a 54-year-old power plant mechanic, filed an occupational disease claim alleging hearing loss due to noise exposure in the course of his federal employment. He maintained that he was exposed to noise from "four units rated at 42 mega watts el during peak generation." Appellant did not stop work.

Appellant submitted the results of audiometric testing by the employing establishment dated 1987 to 2010. In a letter dated July 20, 2010, a nurse advised him that his most recent audiogram revealed a threshold shift. An audiogram dated August 26, 2010 revealed moderate bilateral hearing loss. On September 1, 2010 the employing establishment noted that the retest audiogram confirmed a standard threshold shift.

In an October 25, 2010 memorandum, the employing establishment related that a noise dosimetry survey revealed exposures that averaged up to 85.9 decibels (dB) over eight hours with maximum levels of up to 140.3 dB.

By letter dated July 25, 2011, the employing establishment related:

> "The power plant can be a very noisy environment at times if the generators are running and some areas are marked as being over the 85 db threshold. Employees are required to enter those areas to perform visual inspection and check equipment status on occasion, but not usually on long durations. There can be exception to this at times depending on unexpected maintenance issues."

OWCP prepared a statement of accepted facts (SOAF) that appellant was exposed to noise by "[f]our units rated at 42 megawatts during peak generation" for 8 to 10 hours a day from March 1978 to the present. It noted that he used hearing protection. On August 22, 2011 OWCP referred appellant to Dr. Phillip G. Allen, a Board-certified otolaryngologist, for a second opinion examination.

On September 8, 2011 Dr. Allen performed audiometric testing which revealed flat mild-to-moderate sensorineural hearing loss bilaterally. He diagnosed sensorineural hearing loss which was "[m]ost likely presbycusis…." Dr. Allen noted that appellant's sensorineural hearing loss was somewhat flat with no "noise notch and only mild progression from [the] baseline audio[gram]." In an accompanying form report, he related that audiograms from 2004 and 2005 showed sensorineural hearing loss with mild progression since that time. Dr. Allen asserted that audiometric findings did not show hearing loss beyond that expected based on presbycusis, noting that there was no characteristic noise notch and a mostly flat sensorineural hearing loss. Regarding whether workplace exposure was of sufficient intensity to cause the loss in question, he stated, "Possible. But at least as likely not possible." Dr. Allen concluded that the hearing loss was not due to noise exposure in the course of appellant's federal employment as he had mild-to-moderate flat sensorineural hearing loss with only mild changes the past seven years.

On September 13, 2011 OWCP's medical adviser reviewed the medical evidence and advised that hearing aids should not be authorized as Dr. Allen found that the hearing loss was not employment related.

By decision dated September 16, 2011, OWCP denied appellant's claim after finding that the medical evidence was insufficient to establish that he sustained hearing loss causally related to factors of his federal employment.

On appeal, appellant's attorney argues that Dr. Allen's report was equivocal and unsupported by medical rationale. He also argued that the form report provided by OWCP to Dr. Allen contained leading questions and that he, in reviewing the audiograms of record, did not distinguish between the different calibrations of the testing equipment.

LEGAL PRECEDENT

An employee seeking benefits under FECA[2] 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 and/or specific condition for which compensation is claimed are causally related to the employment injury.[3] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[4]

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;[5] (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition;[6] and (3) medical evidence establishing 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.[7]

ANALYSIS

Appellant filed a claim alleging that he sustained hearing loss due to noise exposure from 4 units rated at 42 mega watts in the course of his federal employment. He submitted audiograms from the employing establishment, including an August 26, 2010 audiogram showing moderate hearing loss bilaterally and a threshold shift. The employing establishment submitted a noise dosimetry survey conducted on selected employees that revealed exposures averaging up to 85.9 dB with maximum levels up to 140.3 dB. In a letter dated July 25, 2011, it indicated that some areas where appellant worked were over the 85 dB threshold.

[2] *Id*.

[3] *Tracey P. Spillane*, 54 ECAB 608 (2003); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[4] *See Ellen L. Noble*, 55 ECAB 530 (2004).

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

[6] *Marlon Vera*, 54 ECAB 834 (2003); *Roger Williams*, 52 ECAB 468 (2001).

[7] *Beverly A. Spencer*, 55 ECAB 501 (2004).

OWCP referred appellant to Dr. Allen for a second opinion examination. It prepared a SOAF indicating that he was exposed to noise in the course of his federal employment 8 to 10 hours a day from 4 units rated at 42 mega watts. OWCP did not include the noise level information provided by the employing establishment. OWCP's procedure manual provides that when possible work factors including the dB levels of noise exposure should be quantified "so the physician can correlate the exposure with medical or scientific data on causality."[8] As Dr. Allen relied upon a SOAF that did not adequately set forth appellant's noise exposure, his opinion is of diminished probative value. A medical opinion based on an inaccurate or incomplete SOAF is of diminished probative value.[9]

Additionally, Dr. Allen did not provide a fully rationalized medical opinion explaining his conclusion that appellant's hearing loss was most likely due to presbycusis rather than noise exposure. He found that the audiometric results did not show a noise notch but instead revealed mostly flat sensorineural hearing loss. In response to the question of whether appellant's workplace exposure was sufficient to cause the hearing loss, Dr. Allen responded that it was possible, but just as likely not possible. While it appears that he attributed appellant's hearing loss solely to presbycusis, his opinion was equivocal and is of diminished probative value.[10]

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.[11] Once OWCP undertook development of the evidence by referring appellant to a second opinion physician, it had the duty to secure an appropriate report addressing the relevant issues.[12] As Dr. Allen did not base his report on an accurate factual history and failed to provide a rationalized medical opinion to support his findings, the case will be remanded to OWCP for further development of the medical evidence.

On remand, OWCP should prepare an SOAF that includes appellant's exposure to noise at the employing establishment and the length and period of such exposures. It should then obtain a rationalized opinion regarding whether his hearing loss was causally related to factors of his federal employment.[13]

CONCLUSION

The Board finds that the case is not in posture for decision.

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[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statements of Accepted Facts*, Chapter 2.809.4(a)(4) (September 2009).

[9] *Id.*; *see also* Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990).

[10] *See D.D.*, 57 ECAB 734 (2006); *Michael R. Shaffer*, 55 ECAB 386 (2004).

[11] *See Vanessa Young*, 55 ECAB 575 (2004).

[12] *See Peter C. Belkind*, 56 ECAB 580 (2005); *Ayanle A. Hashi*, 56 ECAB 234 (2004).

[13] Regarding counsel's argument that the form provided to Dr. Allen for completion contained leading questions, the Board finds that the questions posed were not leading as they did not suggest an answer to the questions posed. *See C.F.*, Docket No. 10-1461 (issued March 18, 2011).

ORDER

IT IS HEREBY ORDERED THAT the September 16, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: July 6, 2011
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board