

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

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R.V., Appellant)	
)	
and)	Docket No. 12-248
)	Issued: June 6, 2012
DEPARTMENT OF THE NAVY, PUGET)	
SOUND NAVAL SHIPYARD, Bremerton, WA,)	
Employer)	
)	

Appearances: *Case Submitted on the Record*
Appellant, pro se
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 17, 2011 appellant filed a timely appeal from merit decisions of the Office of Workers' Compensation Programs (OWCP) dated May 31 and October 20, 2011 that denied his claim. Pursuant to the Federal Employees' Compensation Act¹ (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 has an employment-related hearing loss.

On appeal, appellant generally asserted that his hearing loss is employment related and that audiograms from 1974 to 1979 and 1985 to 1987 were missing.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

This case has previously been before the Board. In an April 1, 2011 decision, the Board found that appellant's claim for an employment-related hearing loss was timely filed and remanded the case for further development on whether he sustained a hearing loss and tinnitus causally related to factors of his federal employment.² The law and facts of the previous Board decision are incorporated herein by reference.

The record contains a September 1, 2009 audiogram report, signed by an audiologist. In a September 1, 2009 report, Dr. Preston A. Rice, a Board-certified otolaryngologist, noted a two-week history of tinnitus in both ears and appellant's report that he was exposed to noise while in his federal employment and in the military. He advised that the audiogram demonstrated a normal sloping to mild-to-moderate high-frequency sensorineural hearing loss.

In a December 17, 2009 letter, the employing establishment provided appellant's employment history, noting that he began work in 1973, became a management analyst in 1981 and resigned on November 1, 1987.³ Audiograms dated July 15, 1981 and July 31, 1984 were submitted. Both appellant and the employing establishment advised that he did not participate in a hearing conservation program from 1981 to 1987. The employing establishment provided a noise assessment worksheet that document from December 19, 1973 to July 16, 1981 appellant was exposed to continuous background noise at sound levels of 67 to 76 decibels and to intermittent noise using tools at levels of 80 to 97 decibels. From July 16, 1981 to November 1, 1987, appellant worked as a management analyst and was exposed to continuous background office noise, at sound levels less than 80 decibels.

Following the Board's April 1, 2011 remand, OWCP prepared a statement of accepted facts describing appellant's noise exposure. It noted that in federal employment, from July 21, 1974 to July 15, 1981, appellant was exposed to hazardous noise from planers, joiners, band saws, cut-off saws, table saws, routers, knitting machines, hand tools, disc sanders and carts. The statement of accepted facts described the sound level exposure and noted that appellant was not part of a hearing conservation program and that hearing protection (usually in the form of earplugs) was seldom used.

In April 2011, OWCP referred appellant to Dr. Stephen A. Habener, a Board-certified otolaryngologist, for a second-opinion evaluation. By report dated May 17, 2011, Dr. Habener reviewed the medical record, statement of accepted facts and appellant's employment history. He noted appellant's statement of being forced into retirement because of a severe fracture of the left leg tibia and fibula.⁴ Dr. Habener noted appellant's complaint of tinnitus and reviewed the 1981 and 1984 audiograms, advising that they showed normal threshold responses throughout the frequency range of 250 through 8,000 hertz. Both eardrums moved well on physical

² Docket No. 10-1776 (issued April 1, 2011).

³ Appellant and the employing establishment reported that from 1973 to 1974 he was a welder helper and from 1974 to 1979 worked as a pattern maker and in both positions was exposed to noise.

⁴ The record does not indicate whether this was employment related.

examination and tuning forks indicated that air conduction was greater than bone conduction. Dr. Habener submitted calibration certification and results of audiometric testing, performed by a certified audiologist. The audiogram, performed on May 17, 2011, reflected testing at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second and revealed the following right ear 20, 25, 25 and 30 decibels, left ear 20, 25, 25 and 30 decibel. Dr. Habener diagnosed tinnitus and bilateral mild sensorineural hearing loss. In answer to specific OWCP questions, he advised that appellant's audiometric findings were in excess of what would be predicted on the basis of presbycusis but that his workplace exposure was not sufficient as to intensity and duration to have caused the hearing loss. Dr. Habener noted that another relevant factor would be a history of insulin-dependent diabetes. He recommended tinnitus masking and advised that, in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*),⁵ appellant had a zero percent impairment due to hearing loss and a three to four percent impairment due to tinnitus.

By decision dated May 31, 2011, OWCP denied appellant's hearing loss claim on the grounds that the weight of medical opinion, as represented by Dr. Habener's report, did not establish that appellant's hearing loss was caused by noise exposure in his federal employment.

Appellant timely requested a review of the written record and submitted a June 27, 2011 report from Amy M. Becken, an audiologist, who saw appellant on June 22, 2011 as part of an examination for Dr. Gerald Randolph, a Board-certified otolaryngologist, who stated that appellant was exposed to noise during his federal employment from 1974 to 1987 and advised that he was having difficulty understanding speech and that a hearing test showed a mild-to-severe high-frequency sensorineural hearing loss bilaterally. Ms. Becken recommended hearing aids.

In an October 20, 2011 decision, OWCP's hearing representative affirmed the May 31, 2011 decision.

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 timely filed within the applicable time limitation period of FECA, that an 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. Regardless of whether the asserted claim involves traumatic injury or occupational disease, an employee must satisfy this burden of proof.⁶

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) a factual statement identifying employment factors alleged to have caused or contributed to the presence

⁵ A.M.A., *Guides* (6th ed. 2008).

⁶ Gary J. Watling, 52 ECAB 278 (2001).

or occurrence of the disease or condition; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The medical opinion 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.⁷

Causal relationship is a medical issue, and the medical evidence required to establish a causal relationship is rationalized medical evidence.⁸ Rationalized medical evidence is medical evidence which includes a physician's rationalized medical 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.⁹ Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.¹⁰

OWCP procedures set forth requirements for the type of medical evidence used in evaluating hearing loss. These include that the employee undergo both audiometric and otologic examination; that the audiometric testing precede the otologic examination; that the audiometric testing be performed by an appropriately certified audiologist; that the otologic examination be performed by an otolaryngologist certified or eligible for certification by the American Academy of Otolaryngology; that the audiometric and otologic examination be performed by different individuals as a method of evaluating the reliability of the findings; that all audiological equipment authorized for testing meet the calibration protocol contained in the accreditation manual of the American Speech and Hearing Association; that the audiometric test results include both bone conduction and pure-tone air conduction thresholds, speech reception thresholds and monaural discrimination scores; and that the otolaryngologist's report include: date and hour of examination, date and hour of employee's last exposure to loud noise, a rationalized medical opinion regarding the relation of the hearing loss to the employment-related noise exposure and a statement of the reliability of the tests.¹¹ A physician conducting an otologic examination should be instructed to conduct additional tests or retests in those cases where the initial tests were inadequate or there is reason to believe the claimant is malingering.¹²

⁷ *Solomon Polen*, 51 ECAB 341 (2000).

⁸ *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

⁹ *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

¹⁰ *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

¹¹ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Specific Conditions*, Chapter 3.600.8(a) (September 1995); *Luis M. Villanueva*, 54 ECAB 666 (2003).

¹² *Luis M. Villanueva*, *id.*

ANALYSIS

The Board finds that appellant has failed to establish that he sustained an employment-related hearing loss.

The audiograms dated July 15, 1981, July 31, 1984 and September 1, 2009 do not comport with OWCP's standards as they contain no certification or physician's signature. Moreover, the audiograms do not provide any opinion regarding causal relationship. Likewise, in his September 1, 2009 report, Dr. Rice merely noted a history that appellant was exposed to noise in his federal civilian employment and the military and diagnosed mild-to-moderate high-frequency sensorineural hearing loss. The Board has long held that medical evidence that does not offer any opinion explaining how an employee's employment-related condition is of diminished limited probative value on the issue of causal relationship.¹³

In a May 17, 2011 report, Dr. Habener reported his review of the medical record, statement of accepted facts, appellant's employment history and his complaint of tinnitus. He reviewed the 1981 and 1984 audiograms, advising that they showed normal threshold responses throughout the frequency range of 250 through 8,000 hertz and advised that both eardrums moved well on physical examination. Dr. Habener submitted calibration certification and results of audiometric testing performed by a certified audiologist. He diagnosed tinnitus and bilateral mild sensorineural hearing loss. In answer to specific OWCP questions, Dr. Habener advised that appellant's audiometric test results were in excess of what would be predicted on the basis of presbycusis and that his workplace noise exposure was not of sufficient intensity or duration to have caused the hearing loss. He stated that another relevant factor would be appellant's history of insulin-dependent diabetes. Dr. Habener's report did not support that exposure to noise in the workplace caused or aggravated appellant's hearing loss.

There is no other medical evidence supporting that appellant sustained hearing loss due to noise exposure at work. In a June 27, 2011 report, Ms. Becken, an audiologist, noted that appellant was exposed to noise at work and that testing showed a mild-to-severe high-frequency sensorineural hearing loss bilaterally. The Board notes that audiologists are not included among the healthcare professionals defined as a "physician" under FECA.¹⁴ Ms. Becken's opinion is of no probative medical value.¹⁵ As to appellant's assertion on appeal that certain audiograms are missing from the record he submitted no evidence to show that any such studies were completed.

¹³ *Willie M. Miller*, 53 ECAB 697 (2002).

¹⁴ Section 8102(2) of FECA defines "physician" as including "surgeons, podiatrists, dentists, clinical physiologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law." 5 U.S.C. § 8101(2); see *Leon Thomas*, 52 ECAB 202 (2001). This definition omits any mention of audiologists.

¹⁵ *Thomas O. Bouis*, 57 ECAB 602 (2006).

The Board finds that he has not met his burden of proof to establish through probative medical evidence that he sustained a hearing loss in the performance of duty.¹⁶

Appellant may submit new evidence or argument with a 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 failed to meet his burden of proof to establish that he has an employment-related hearing loss.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated October 20 and May 31, 2011 are affirmed.

Issued: June 6, 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

¹⁶ The Board notes that appellant submitted evidence with his appeal to the Board. The Board cannot consider this evidence, however, as its review of the case is limited to the evidence that was before OWCP at the time it rendered its final decision. 20 C.F.R. § 501.2(c).