United States Department of Labor
Employees' Compensation Appeals Board

A.Y., Appellant	)	
and	)	**Docket No. 12-1736**
	)	**Issued: April 18, 2013**
DEPARTMENT OF HEALTH & HUMAN SERVICES, NATIONAL INSTITUTES OF HEALTH, Bethesda, MD, 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
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On August 9, 2012 appellant filed a timely appeal from the July 9, 2012 Office of Workers' Compensation Programs' (OWCP) decision which denied his claim for hearing loss. 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 in establishing that his hearing loss is causally related to his occupational exposure to noise.

FACTUAL HISTORY

On February 28, 2012 appellant, then a 62-year-old maintenance mechanic, filed an occupational disease claim alleging that his hearing loss was caused by factors of his federal

[1] 5 U.S.C. § 8101 *et seq.*

employment. He indicated that he became aware of the disease or illness on March 5, 2010 and realized that it was caused or aggravated by his employment on April 12, 2010. Appellant did not stop work.

In an undated statement accompanying his claim, appellant indicated that he was a maintenance mechanic for the employing establishment since April 27, 2008. He stated that he was exposed to noise amounting to eight hours of exposure per day. Appellant advised that he used earplugs, did not have previous problems with his hearing, did not have hobbies with exposure to loud noise and he realized that he had a decline in hearing related to his job after his annual hearing examination on March 18, 2010.

Certain medical records accompanied the claim. They included a March 2, 2012 report from Dr. Robert Trimble, an internist, who stated that appellant was exposed to loud noise at work. Dr. Trimble diagnosed unspecified hearing loss and tinnitus and referred appellant to an otolaryngologist. Also provided were audiograms dated March 5 and 6, 2012 from Janice Nelson-Drake, an audiologist, and a report from Dr. Leslie A. Nurse, a Board-certified otolaryngologist, who determined that appellant had moderate sensorineural loss in the right ear in the high frequencies (6 kilowatts (k) to 8k Hertz (Hz)) and his hearing was borderline normal for speech and for tones from 250 to 4,000 Hz. Dr. Nurse further noted that word recognition was 92 percent at 50 decibels (dB) hearing loss. For the left ear, the audiologist determined that appellant had borderline normal hearing for speech and tones except for a moderate "notched" (sensorineural) loss at 4k Hz. She further noted that word recognition was 92 percent at 50 dBk hearing loss and diagnosed bilateral high frequency hearing loss, left tinnitus. In a March 6, 2012 report, Dr. Nurse noted that the history of workplace noise exposure and diagnosed bilateral high frequency hearing loss and left tinnitus. OWCP also received treatment notes and an otoscopic examination from March 18, 2010 from Dr. Mary E. Gorman, a Board-certified otolaryngologist, who noted that he was seen for left-sided tinnitus and diagnosed sensorineural hearing loss, asymmetric.

By letters dated March 12, 2012, OWCP requested factual information from appellant and the employing establishment. The employing establishment was asked to provide employment records as well as a copy of all medical examinations pertaining to hearing or ear problems, including preemployment examination and all audiograms.

On March 22, 2012 appellant submitted responses which included that the average number of hours of noise exposure was six hours a day. He described his prior employment and noise exposure.

In a March 29, 2012 letter, Mallory Crane, a compensation specialist with the employing establishment, noted that appellant's supervisor did not have any additional information pertaining to appellant's claim. The employing establishment also provided noise surveys dated January 23, March 9 and 15, 2012. A March 15, 2012 noise level survey indicated that the elevated noise levels in mechanical rooms B2A42 and the Penthouse exceeded 85 dB in select locations and were high enough to cause noise-induced hearing loss if exposed to the source for an extended period of time. It further noted that the elevated dB noise levels within the basement mechanical room B2A83 were below 85 dB but above 80 dB. The employing establishment indicated that hearing protection was required in locations where the noise levels exceeded

85 dB. In areas below 85 dB, hearing protection was not required, but recommended. Diagrams of the work areas were enclosed.

On April 16, 2012 OWCP referred appellant to Dr. Stephen Bane, a Board-certified otolaryngologist, for a second opinion. In a May 2, 2012 report, Dr. Bane described appellant's history and examined appellant. He stated that there was mention of an audiogram in a note from April 15, 2010 but the actual audiogram was not available. Dr. Bane explained that there was an audiogram from March 18, 2010 which was consistent with the current audiogram. He noted that appellant began his employment in 2008 but there was no audiogram from the beginning of his employment. Dr. Bane noted that appellant did not have a sensorineural loss in excess of what would normally be predicated on the basis of presbycusis. He explained that appellant worked in a loud noise environment but his hearing was not consistent with noise exposure. Dr. Bane determined that appellant had a normal examination and diagnosed sensorineural hearing loss consistent with age. He explained that appellant had moderate loss at 4,000 Hz on the left consistent with presbycusis loss rather than noise exposure. Dr. Bane advised that the frequencies above 4,000 Hz were intact, which argued against noise exposure hearing loss. He recommended hearing protection and yearly audiograms. In a May 2, 2012 report, Dr. Bane indicated that the audiometer was calibrated on February 7, 2012. A May 2, 2012 audiogram taken on behalf of him reflected that testing at 500, 1,000, 2,000 and 3,000 Hz showed the following dB losses: 15, 35, 25 and 20 in the right ear and 15, 30, 30 and 25 in the left ear.

By decision dated July 9, 2012, OWCP denied appellant's claim on the grounds that the medical evidence was insufficient to show that his hearing loss was causally related to noise exposure at his federal employment.

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

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 or occurrence of the disease or condition; and (3) medical evidence establishing that 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

[2] *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[3] *Victor J. Woodhams*, 41 ECAB 345 (1989).

condition is causally related to the employment factors identified by the claimant. The medical evidence required to establish causal relationship, generally, is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized 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.[4]

ANALYSIS

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

After appellant filed an occupational disease claim for bilateral hearing impairment, OWCP requested additional information from the employing establishment in a March 12, 2012 letter, specifically audiograms and other pertinent medical records. While the employing establishment responded with noise surveys, it did not provide any audiograms.

Additionally, in his May 2, 2012 report, Dr. Bane, the second opinion physician, noted viewing audiograms. He indicated that there was a note about an April 15, 2010 audiogram, but no audiogram. Dr. Bane advised that the March 18, 2010 audiogram was consistent with his current audiogram. He opined that there was no audiogram for the beginning of appellant's employment in 2008. The Board finds that, as a result, the second opinion examiner, Dr. Bane, based his conclusions on a limited medical file. An employer's reluctance or refusal to submit requested evidence relating to an employee's hearing loss claim should not be an impediment to a successful prosecution of the claim.[5] In the present case, the type of information being sought, namely employing establishment audiograms, is normally within the custody of said establishment and not readily available to appellant, who should not be penalized for the employing establishment's failure to submit such information.[6]

The need for this evidence is important in view of the differing opinions of Dr. Bane, the second opinion physician, and Dr. Nurse, the treating physician, that examined appellant or reviewed his records. As noted, appellant's physicians, Dr. Nurse and Dr. Gorman opined that appellant had bilateral sensorineural hearing loss and tinnitus. Dr. Bane determined that the hearing loss was consistent with age. As noted, the physicians did not have any earlier audiograms to help them document the type of hearing loss changes that appellant may have experienced during the period of his employment.

It is well established that proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While an employee has the burden to establish entitlement

[4] *Id.*

[5] *See J.K.*, Docket No. 03-1830 (issued October 1, 2003).

[6] *See id.*

to compensation, OWCP shares responsibility in the development of the evidence and has the obligation to see that justice is done.[7] On remand it should again request audiograms and any pertinent information regarding appellant's occupational noise exposure from the employing establishment. OWCP should obtain any audiograms the employing establishment might have for appellant, including any audiogram from the commencement of his employment in 2008 as well as any April 15, 2010 audiogram consistent with that referenced by Dr. Bane. Upon receipt of such information, it should prepare a statement of accepted facts and develop the medical evidence by referring him to an appropriate Board-certified otolaryngologist for appropriate testing and a rationalized medical opinion regarding whether he sustained a hearing impairment causally related to occupational noise exposure. After conducting such further development as it may find necessary, OWCP shall issue an appropriate merit decision.

On appeal, appellant contends that he did not have hearing loss or tinnitus problems in his family history or before he started working for the employing establishment. However, in light of the Board's disposition, it is premature to address these arguments at this time.

CONCLUSION

The Board finds that this case is not in posture for decision and must be remanded for further development of the record.

[7] *William J. Cantrell*, 34 ECAB 1233 (1983); *E.J.*, Docket No. 09-1481 (issued February 19, 2010).

ORDER

IT IS HEREBY ORDERED THAT the July 9, 2012 decision of the Office of Workers' Compensation Programs is set aside and remanded for further action consistent with this decision of the Board.

Issued: April 18, 2013
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board