United States Department of Labor
Employees' Compensation Appeals Board

A.S., Appellant	)	
and	)	**Docket No. 12-1941**
	)	**Issued: April 10, 2013**
DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Houston, TX, Employer	)	

Appearances:
Kimberlee Gee, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 21, 2012 appellant, through counsel, filed a timely appeal from an April 2, 2012 decision of the Office of Workers' Compensation Programs (OWCP) denying his traumatic injury 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 left ear hearing loss causally related to an accepted June 16, 2011 employment incident.

FACTUAL HISTORY

On June 16, 2011 appellant, then a 42-year-old air traffic control specialist, filed a traumatic injury claim alleging that on that date he sustained resonating left ear pain due to a loud high-pitched tone that came through the loud speaker and headset.

[1] 5 U.S.C. § 8101 *et seq.*

By letter dated June 21, 2011, OWCP informed appellant of the medical and factual evidence required to support his claim. Appellant was given 30 days to provide the information.

Appellant submitted a June 16, 2011 Texas Workers' Compensation Work Status report from Dr. Zebulon Lynn Bowman, a Board-certified ophthalmologist, diagnosed an unspecified hearing loss. Dr. Bowman stated that appellant indicated that the injury occurred when "a painful loud tone rang out from the communication equipment" into his left ear.

In a June 24, 2011 report, Dr. Bowman opined that appellant was exposed "to a potentially toxic amount of noise wavelength energy on June 16, 2011." He noted ramifications of the exposure could result in "potential acute and long-term hearing deficiencies."

On August 19 and 23, 2011 OWCP referred appellant for a second opinion evaluation to Dr. Larry P. Conrad, a Board-certified otolaryngologist. In an August 29, 2011 report, Dr. Conrad found that appellant had no hearing loss. He opined that the noise exposure was of insufficient intensity and duration to cause any hearing loss.

By decision dated September 8, 2011, OWCP denied appellant's claim on the grounds that causal relationship had not been established.

On October 8, 2011 appellant requested an oral hearing before an OWCP hearing representative. A telephonic hearing was held on February 3, 2012.

Following the hearing, appellant submitted medical and factual evidence. In a December 11, 2011 statement, John J. Solonski, Jr., a supervisor, related that appellant sought medical treatment from Dr. Bowman following the June 16, 2011 incident when he experienced a sharp tone in his ear. Mr. Solonski related that Dr. Bowman informed him that appellant had sustained a work-related hearing injury and that the physician was referring appellant to a specialist for further treatment.

In a March 15, 2012 report, Robert Kabakjian, a physician's assistant, diagnosed a noise-induced hearing loss. Appellant was first seen on June 28, 2011 with complaints of otalgia, tinnitus and decreased hearing due to exposure to "loud noise exposure from a high frequency signal passing through his headset" at work. Mr. Kabakjian reported that an audiologic examination revealed left ear hearing loss and that appellant was treated for cochlear edema caused by the employment-related loud noise exposure. He opined that appellant's hearing loss was caused by the June 16, 2011 employment incident.

In a March 19, 2012 report, Dr. Franklin M. Douglis, a treating Board-certified otolaryngologist, stated that appellant's acute hearing loss was due to the June 16, 2011 noise exposure. He related that appellant was first seen for complaints of decreased hearing, tinnitus and otalgia as a result of exposure to the June 16, 2011 high-pitched tone that came through the headset. An audiological examination performed on June 28, 2011 revealed left ear hearing loss and appellant was treated for the neurological damage caused by the noise exposure. Dr. Douglis reported that a follow-up audiological examination showed improvement. He stated that appellant sustained an acute hearing loss due to the noise exposure on June 16, 2011.

By decision dated April 2, 2012, an OWCP hearing representative affirmed the denial of appellant's claim on the grounds that causal relationship had not been established.

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 determine whether a federal employee has sustained a traumatic injury in the performance of duty it must first be determined whether a fact of injury has been established.[5] First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged.[6] Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.[7]

The claimant has the burden of establishing by the weight of reliable, probative and substantial evidence that the condition for which compensation is sought is causally related to a specific employment incident or to specific conditions of employment.[8] An award of compensation may not be based on appellant's belief of causal relationship. 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 a causal relationship.[9]

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.[10] Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on whether there is a causal relationship between the employee's diagnosed condition and the compensable employment factors.[11] The opinion of the physician must be based on a complete

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[2] 5 U.S.C. § 8101 *et seq.*

[3] *C.S.*, Docket No. 08-1585 (issued March 3, 2009); *Bonnie A. Contreras*, 57 ECAB 364 (2006).

[4] *S.P.*, 59 ECAB 184 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

[5] *B.F.*, Docket No. 09-60 (issued March 17, 2009); *Bonnie A. Contreras*, *supra* note 3.

[6] *D.B.*, 58 ECAB 464 (2007); *David Apgar*, 57 ECAB 137 (2005).

[7] *C.B.*, Docket No. 08-1583 (issued December 9, 2008); *D.G.*, 59 ECAB 734 (2008); *Bonnie A. Contreras*, *supra* note 3.

[8] *Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006); *Katherine J. Friday*, 47 ECAB 591 (1996).

[9] *P.K.*, Docket No. 08-2551 (issued June 2, 2009); *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

[10] *Y.J.*, Docket No. 08-1167 (issued October 7, 2008); *A.D.*, 58 ECAB 149 (2006); *D'Wayne Avila*, 57 ECAB 642 (2006).

[11] *J.J.*, Docket No. 09-27 (issued February 10, 2009); *Michael S. Mina*, 57 ECAB 379 (2006)

factual and medical background of the employee, 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 employee.[12]

Section 8123(a) of FECA provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[13] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.[14]

ANALYSIS

Appellant filed a claim alleging left ear hearing loss due to exposure to a high-pitched tone on June 16, 2011. OWCP denied his claim on the grounds that he had not established a hearing loss causally related to the accepted June 16, 2011 employment incident. The Board finds that the case is not in posture for a decision.

Appellant submitted medical evidence from Drs. Bowman and Douglis and Mr. Kabakjian, a physician's assistant. The physicians attributed appellant's hearing loss to the noise exposure on June 16, 2011. The record also contains a second opinion physician's report from Dr. Conrad who negated any hearing loss causally related to the June 16, 2011 employment incident.

Dr. Bowman's June 16 and 24, 2011 reports diagnosed a hearing loss due to exposure to a loud tone in appellant's left ear. In a March 19, 2012 report, Dr. Douglis stated that appellant's acute left ear hearing loss was directly attributable to the June 16, 2011 noise exposure. Dr. Conrad opined that the noise exposure on June 16, 2011 was insufficient to cause any hearing loss in the left ear.

The medical opinions of record were based on an accurate history of appellant's June 16, 2011 incident as well as a complete medical background. Drs. Bowman, Conrad and Douglis each provided medical rationale for their stated conclusions on whether appellant's left hearing loss was noise induced. The Board finds that the opinions of Drs. Bowman and Douglis supporting an employment relationship are of equal weight and rationale with the report of Dr. Conrad.

Section 8123 of FECA provides that, if there is a disagreement between the physician making the examination for the United States and the employee's physician, OWCP shall appoint a third physician who shall make an examination.[15]

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[12] *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

[13] 5 U.S.C. § 8123(a); *see T.C.*, Docket No. 08-2112 (issued June 12, 2009).

[14] *J.J.*, *supra* note 11; *William C. Bush*, 40 ECAB 1064 (1989).

[15] 5 U.S.C. § 8123(a)*; see also M.S.*, 58 ECAB 328 (2007)*; Charles S. Hamilton*, 52 ECAB 110 (2000); *Leonard M. Burger*, 51 ECAB 369 (2000); *Shirley L. Steib*, 46 ECAB 39 (1994).

The case will be remanded for appellant to be referred to an impartial medical specialist to resolve the conflict in the medical opinion. On remand, OWCP should refer appellant, a statement of accepted facts, and a list of specific questions to a Board-certified otolaryngologist to determine if he sustained injury related to the accepted June 16, 2011 noise exposure and whether there any permanent impairment. Upon return of the case record, OWCP shall further develop the medical evidence as appropriate and issue a *de novo* decision.

CONCLUSION

The Board finds that the case is not in posture for decision due to a conflict of medical opinion as to whether appellant sustained injury as a result of the accepted June 16, 2011 employment incident.

ORDER

IT IS HEREBY ORDERED THAT the April 2, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further proceedings consistent with this decision.

Issued: April 10, 2013
Washington, DC

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

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

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