United States Department of Labor
Employees' Compensation Appeals Board

J.G., Appellant **and** **DEPARTMENT OF HOMELAND SECURITY, CUSTOMS & BORDER PROTECTION, Laredo, TX, Employer**	)))))))))	**Docket No. 12-1469** **Issued: January 11, 2013**

Appearances:
Appellant, pro se
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 June 27, 2012 appellant filed a timely appeal from the January 26, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP), which denied his hearing loss 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 sustained a hearing loss in the performance of duty.

FACTUAL HISTORY

On October 25, 2010 appellant, a 59-year-old chief customs and border protection officer, filed an occupational disease claim alleging that his hearing loss was a result of his federal employment. He explained that he worked at the employing establishment for about 38

[1] 5 U.S.C. § 8101 *et seq.*

years and had spent about 80 to 85 percent of that time in the cargo environment, working among heavy-duty 18-wheel tractors. For years appellant was also in charge of the firing range.

On November 16, 2010 Dr. Enrique T. Garcia, a Board-certified otolaryngologist, conducted an essentially normal examination of appellant and diagnosed, from an audiogram obtained that day, a bilateral high-frequency sensorineural hearing loss "suspect acoustic trauma, severe with good discrimination." The tester judged the consistency good and reliability acceptable.[2]

Dr. William Carl Smith, a Board-certified otolaryngologist and OWCP referral physician, examined appellant on February 23, 2011. He found that the workplace exposures were sufficient as to intensity and duration to cause a sensorineural hearing loss. However, appellant's responses on the audiogram obtained that date were unreliable:

> "I cannot make a diagnosis today because during today's audiological evaluation the claimant had to be reinstructed several times due to the inconsistent responses. The claimant was asked repeatedly to respond by pressing the button when he heard the beeps even if the beeps were very soft, barely there or as if they were very far away. Speech reception threshold testing was performed and the claimant was able to respond to speech at a level well below the level that he claimed to hear the tones. Correctly identifying speech is a much more complicated task than responding to pure tones and thus the claimant should not be able to respond to speech at a lower level. Further testing also revealed hearing is better than reported."

OWCP's medical adviser reviewed the record and selected the audiogram obtained for Dr. Smith, as it was the most recent reflection of appellant's hearing, it met all of OWCP's standards,[3] and it was an integral part of Dr. Smith's evaluation. Dr. Smith, however, had found the audiogram inconsistent and unreliable. The medical adviser noted that it was appellant's

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[2] Neither Dr. Garcia nor the tester certified that at the time of examination the equipment used for testing met the standards for accreditation of an audiological facility by the American Speech-Language-Hearing Association (ASHA).

[3] The audiological evaluation and the otological examination are to be performed by different individuals as a method of evaluating the reliability of the findings through independent observations. If possible, the two consultations should occur on the same day. The usual information sent to consultants should be forwarded to both the audiologist and otolaryngologist. The audiological testing is to be performed by persons possessing certification in audiology from ASHA or State licensure as an audiologist. The audiological testing should precede the visit to the otolaryngologist since the latter should have the audiological findings at the time of the examination. The audiological examination should be conducted in accordance with OWCP requirements. The medical examination should be performed by an otolaryngologist certified (or eligible for certification) by the American Board of Otolaryngology. The physician 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. Audiological equipment used for testing must meet the calibration protocol embodied in the Professional Services Board Manual of ASHA. Each audiologist or physician who conducts hearing tests must certify that at the time of examination the equipment used for testing met the standards for accreditation of an audiological facility by ASHA (ANSI S 3.6 (1969) and 3.1 (1977), respectively). Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.8.a (September 1994).

responsibility to present valid audiometry and a physician's valid evaluation. "A probative schedule award cannot be determined by an evaluation that is of questionable validity."

Appellant returned to Dr. Smith on May 24, 2011 for retesting and further evaluation. Dr. Smith's audiometric responses continued to be unreliable. He refused to sit still to complete auditory brainstem response (ABR) testing. Distortion-product otoacoustic emissions (DPOAEs) were consistent with normal or near-normal cochlear function for the left ear. This was not consistent with his behavioral audiogram. Dr. Smith concluded: "It is at least as likely as not that the claimant has normal hearing." He explained that speech reception thresholds and word recognition scores were consistent with normal hearing. ABR testing was terminated because appellant could not remain still to continue a latency intensity search. Further, appellant's behavioral audiogram improved each time he was tested.

A second OWCP medical adviser reviewed the record. He concluded that no schedule award for binaural hearing loss could be made on the basis of the ABR testing. It could be made only from the results of a valid behavioral audiogram endorsed as such by an otolaryngologist.

In a January 26, 2012 decision, OWCP denied appellant's occupational disease claim. It found that he had not met his burden to provide medical evidence establishing a diagnosed condition causally related to the established work factors.

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of his duty.[4] An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim. When an employee claims that he or she sustained an injury in the performance of duty, he or she must submit sufficient evidence to establish that he or she experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged. He or she must also establish that such event, incident or exposure caused an injury.[5]

Causal relationship is a medical issue[6] and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the claimant,[7] must be one of reasonable medical certainty[8] and must be supported by medical rationale explaining the

[4] 5 U.S.C. § 8102(a).

[5] *John J. Carlone*, 41 ECAB 354 (1989).

[6] *Mary J. Briggs*, 37 ECAB 578 (1986).

[7] *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

[8] *See Morris Scanlon*, 11 ECAB 384, 385 (1960).

nature of the relationship between the diagnosed condition and the established incident or factor of employment.[9]

ANALYSIS

To support his hearing loss claim, appellant submitted an evaluation by Dr. Garcia, an otolaryngologist, who diagnosed a bilateral high-frequency sensorineural hearing loss. The audiogram obtained that date gave no indication that it was performed by a certified audiologist.[10] The audiogram also lacked complete calibration data.[11] OWCP referred appellant to Dr. Smith, another otolaryngologist, for proper testing.

Appellant's responses on the audiogram obtained for Dr. Smith were inconsistent and unreliable. Dr. Smith explained that he could not make a diagnosis. When the reliability of audiometric tests is poor, OWCP should instruct the referral physician to perform appropriate tests to determine the reason for testing inconsistency.[12]

Appellant returned to Dr. Smith for retesting, but his responses on the audiogram remained unreliable. ABR testing was attempted, but it was terminated because appellant could not sit still. DPOAEs were nonetheless consistent with normal or near-normal cochlear function in the left ear. Speech reception thresholds and word recognition scores were also consistent with normal hearing. Dr. Smith concluded that it was at least as likely as not that appellant had normal hearing.[13]

OWCP has fulfilled its obligation to develop the medical evidence.[14] Appellant's inconsistent responses twice prevented a Board-certified otolaryngologist from diagnosing a hearing loss. Indeed, some findings were judged consistent with normal hearing.

The Board therefore finds that appellant has not met his burden to establish that he sustained a hearing loss in the performance of duty. Without a firm diagnosis based on a reliable audiogram, there are no grounds for approving appellant's occupational injury claim.[15] The Board will affirm OWCP's January 26, 2012 decision.

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[9] *See William E. Enright*, 31 ECAB 426, 430 (1980).

[10] *Luther C. Boyce*, Docket No. 93-2025 (issued January 19, 1995).

[11] *Neil M. Taylor*, Docket No. 03-1671 (issued September 3, 2003).

[12] *M.S.*, Docket No. 07-1465 (issued November 20, 2007).

[13] *See Chester G. Christenson*, 29 ECAB 35 (1977) (where an OWCP referral otolaryngologist could not determined the extent of the claimant's hearing loss because of inconsistent responses and lack of cooperation and attention during testing, and where a second referral otolaryngologist questioned whether there was any hearing loss because the audiogram he obtained was also not reliable, the Board found that the claimant had not met his burden to establish that the condition upon which he predicated his claim was causally related to his federal employment).

[14] *Louise Ladnier*, 37 ECAB 296 (1986).

[15] *See A.H.*, Docket No. 12-811 (issued August 13, 2012) (physician did not provide a firm diagnosis of the claimant's injury).

CONCLUSION

The Board finds that appellant has not met his burden to establish that he sustained a hearing loss in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the January 26, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 11, 2013
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