

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

T.J., Appellant

and

**DEPARTMENT OF THE NAVY, NORFOLK
NAVY SHIPYARD, Portsmouth, VA, Employer**

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**Docket No. 14-314
Issued: April 24, 2014**

Appearances:

*David G. Jennings, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On November 20, 2013 appellant, through his attorney, filed a timely appeal from the June 20, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 established that he sustained hearing loss causally related to factors of his federal employment.

FACTUAL HISTORY

On August 5, 2011 appellant, then a 64-year-old structural shipfitter, filed an occupational disease claim (Form CA-2) alleging that he had hearing loss as a result of high

¹ 5 U.S.C. § 8101 *et seq.*

levels of noise in his federal employment.² He first became aware of his condition and of its relationship to his employment on January 1, 1978. Appellant notified his supervisor on August 5, 2011. He did not submit evidence in support of his claim and explained that he had not filed a claim within 30 days of realizing the condition was related to his federal employment because he did not know he could file a claim for hearing loss. Appellant's supervisor noted that appellant had retired on April 30, 2010.

On May 4, 2012 OWCP requested additional factual and medical evidence from appellant. It also requested that the employing establishment respond to its inquiries regarding appellant's duties and facts surrounding the claimed injury. In response, appellant submitted a signed statement of certification, but did not complete the questionnaire containing OWCP's inquiries.

OWCP prepared a statement of accepted facts, questions for a second opinion otolaryngologist, and an outline for otologic evaluation, but did not send appellant to an otolaryngologist for evaluation.

By decision dated September 21, 2012, OWCP denied appellant's claim. It found that he had not established that the alleged work factors occurred as described. OWCP accepted that appellant had filed a timely claim.

On October 9, 2012 appellant, through his attorney, requested that OWCP reconsider the case.

With his request for reconsideration, appellant submitted a response to OWCP's inquiries. He worked at the employing establishment from 1974 through April 2010. Appellant also worked in nonfederal employment as a shipfitter at Newport News Shipbuilding and Drydock from 1966 through 1974 and worked self-employed at H&J Hauling as the owner from 1987 through the present. He noted that at the employing establishment and at Newport News Shipbuilding and Drydock, he was exposed to noises from various pneumatic tools, chipping, grinding, gouging and machinery from 8 to 12 hours per day. Appellant stated that he had been provided with earplugs upon employment at both establishments. He noted that he had no hobbies involving exposure to loud noise and had last been exposed to it in April 2010. Appellant stated that he had first noticed his hearing loss in 1978 and related his hearing loss to his federal employment in the same year, explaining that it could not have been caused by anything other than noise at work.

Appellant also submitted an audiometric report from Salisha Elder-Christensen, an audiologist, dated May 5, 2011. The report contained the results of an auricular tone audiometry test performed on the same date and speech reception thresholds. Audiologist Elder-Christensen noted that appellant's otoscopy revealed clear ear canals, and that there was a good match between the pure tone audiometry and speech reception thresholds. She diagnosed appellant with bilateral mild to severe hearing loss.

² This case has previously been before the Board. On July 8, 2013 appellant filed an appeal of the decision of OWCP dated September 21, 2012. The case was assigned Docket No. 13-1695. On October 25, 2013 the Board dismissed this appeal as untimely filed.

By decision dated June 20, 2013, OWCP reviewed the merits of appellant's claim and affirmed its prior decision. It accepted that he had established the factual component of fact of injury, but that his claim remained denied because he had not established that he had an employment injury related to duties of his federal employment.

LEGAL PRECEDENT

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.³ Once an employee establishes that he or she sustained an injury in the performance of duty, he or she has the burden of proof to establish that any subsequent medical condition or disability for work, for which he or she claims compensation is causally related to the accepted injury.⁴

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that his hearing loss condition was causally related to noise exposure in his federal employment.⁵ Neither the condition becoming apparent during a period of employment, nor the belief of the employee that the hearing loss was causally related to noise exposure in federal employment, is sufficient to establish causal relationship.⁶

The schedule award provision of FECA⁷ and its implementing regulations⁸ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants.⁹ The A.M.A., *Guides* have been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.¹⁰

³ See generally *John J. Carlone*, 41 ECAB 354 (1989); see also 5 U.S.C. § 8101(5) (injury defined); 20 C.F.R. § 10.5(q) and (ee) (1999) (occupational disease or illness and traumatic injury defined). See *Victor J. Woodhams*, 41 ECAB 345 (1989) (regarding a claimant's burden of proof in an occupational disease claim).

⁴ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁵ *Stanley K. Takahaski*, 35 ECAB 1065 (1984).

⁶ See *John W. Butler*, 39 ECAB 852, 858 (1988).

⁷ 5 U.S.C. § 8107.

⁸ 20 C.F.R. § 10.404.

⁹ See *D.K.*, Docket No. 10-174 (issued July 2, 2010); *Michael S. Mina*, 57 ECAB 379, 385 (2006).

¹⁰ *Supra* note 8; see *F.D.*, Docket No. 09-1346 (issued July 19, 2010).

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.¹¹ Using the frequencies of 500, 1,000, 2,000 and 3,000 hertz, the losses at each frequency are added up and averaged. Then, the fence of 25 decibels is deducted because, as the A.M.A., *Guides* point out, losses below 25 decibels result in no impairment in the ability to hear everyday speech under everyday conditions. The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss. The binaural loss is determined by calculating the loss in each ear using the formula for monaural loss; the lesser loss is multiplied by five, then added to the greater loss and the total is divided by six to arrive at the amount of binaural hearing loss. The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.¹²

ANALYSIS

In its June 20, 2013 decision, OWCP found that the evidence of record established that appellant was exposed to hazardous noise in his employment and that the claim was timely filed. It denied his claim on the grounds that he had not established the medical component of fact of injury. The Board finds that appellant has not submitted sufficient evidence to establish that he sustained hearing loss related to factors of his federal employment.¹³

In support of his claim, appellant submitted the audiometric report from Audiologist Elder-Christensen dated May 5, 2011. This report did not establish the reliability of the audiometric evaluation and was not accompanied by an otologic examination report discussing the cause of appellant's hearing loss. The Board has recognized OWCP requirements regarding audiometric and otologic examination.¹⁴ OWCP requires that the employee undergo both audiometric and otologic examination; that the audiometric testing be performed by an otolaryngologist certified or eligible for certification by the American Academy of Otolaryngology and that the audiometric and otologic examination be performed by different individuals as a method of evaluating the reliability of the findings. OWCP procedures require that all audiological equipment authorized for testing meet the calibration protocol contained in the accreditation manual of the American Speech and Hearing Association and that audiometric test results include both bone conduction and pure tone air conduction thresholds, speech reception thresholds and monaural discrimination scores. The otolaryngologist's report must include the date and hour of examination, the date and hour of the employee's last exposure to loud noise, a rationalized medical opinion regarding the relationship of the hearing loss to employment-related noise exposure and a statement of the reliability of the tests.¹⁵

¹¹ See A.M.A., *Guides* 250 (6th ed. 2009).

¹² *J.H.*, Docket No. 08-2432 (issued June 15, 2009); *J.B.*, Docket No. 08-1735 (issued January 27, 2009).

¹³ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(c) (February 2013).

¹⁴ See *J.H.*, 59 ECAB 377 (2008).

¹⁵ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.8(a) (September 1994).

The audiometric report that appellant submitted to the record lacked the indicia necessary to establish proper calibration protocol and did not meet the standards for audiometric and otologic evaluation. It was not certified by a physician, the otologic and audiometric examinations were not performed by two different individuals; it lacked monaural discrimination scores, the hour of appellant's examination, and the date and hour of appellant's last exposure to loud noise. The report did not contain any opinion on the relationship of appellant's hearing loss to employment-related noise exposure. It was therefore insufficient, in and of itself, to require further development of the claim. As this report was the only evidence submitted in support of appellant's claim, OWCP was not required to further develop the claim.

Thus, the Board finds that appellant has not established the medical component of fact of injury, that of a diagnosis of a medical condition related to appellant's federal employment. The question remains as to whether his occupational exposure caused an injury.¹⁶ As appellant has not submitted sufficient evidence to support a *prima facie* claim, he has not met his burden of proof.

On appeal, appellant's attorney argued that OWCP should have further developed the case record. For the reasons stated above, the Board finds that appellant did not meet his burden of proof such to require OWCP to further develop the medical evidence.

CONCLUSION

The Board finds that appellant has not established that he sustained hearing loss in the performance of duty.

¹⁶ See *Bobby R. Sadler*, Docket No. 05-1327 (issued September 23, 2005).

ORDER

IT IS HEREBY ORDERED THAT the June 20, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 24, 2014
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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