

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

M.H., Appellant

and

**DEPARTMENT OF THE AIR FORCE, TINKER
AIR FORCE BASE, OK, Employer**

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**Docket No. 14-1570
Issued: December 10, 2014**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 2, 2014 appellant filed a timely appeal from a January 9, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her occupational disease 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 her burden of proof to establish that she sustained hearing loss in the performance of duty.

FACTUAL HISTORY

This case was previously before the Board. By decision dated September 5, 2012,² the Board found that OWCP failed to properly develop the claim as it did not secure adequate

¹ 5 U.S.C. § 8101 *et seq.*

² Docket No. 12-733 (issued September 5, 2012).

workplace evidence regarding appellant's duration and levels of exposure to hazardous noise from the employing establishment. The Board further found that Dr. Gregg S. Govett, a Board-certified otolaryngologist, the second opinion physician, was not provided with an accurate and complete statement of accepted facts (SOAF) as the factual evidence was incomplete as to specific levels and duration of noise exposure during appellant's federal employment. The case was remanded for OWCP to request that the employing establishment submit additional information about appellant's noise level exposure, including copies of noise surveys, and specific decibel levels for each work location. OWCP was instructed to refer the case record and amended SOAF to Dr. Govett for clarification on his opinion. The findings of fact as set forth in the prior decision are hereby incorporated by reference.

By letters dated September 7, October 10, 2012 and February 4, 2013, OWCP requested that the employing establishment provide copies of noise surveys and specific decibel levels for each of appellant's work areas. Additional audiograms and hearing conservation data was submitted dated June 25, 1969 to March 7, 2000.

In support of her claim, appellant submitted occupational noise exposure charts and a description of the various positions she held when working at the employing establishment, which detailed the noise to which she was exposed.

In a September 11, 2013 OWCP memorandum, the senior claims examiner noted that several attempts had been made to obtain noise surveys and decibel levels from the employing establishment to no avail. The SOAF was amended based on the evidence in the file.

The October 7, 2013 amended SOAF detailed the various positions appellant held while working for the employing establishment from December 1969 to January 1, 2011 when she retired. Appellant worked as a trainee, electroplater, testing equipment operator, instrument mechanic, electronics mechanic, and pneudraulic systems mechanic. The work history reflected that she worked around machinery with moving parts and objects. Appellant was exposed to noise from plating vats machines, rectifiers, shop noises, mechanical and electrical control systems, air craft engines, and fuel controls. She participated in the hearing conservation program and wore ear protection. Appellant retired on January 1, 2011.

OWCP referred appellant, the amended SOAF and case file to Dr. Govett, a Board-certified otolaryngologist, for another second opinion evaluation on November 19, 2013.

A November 19, 2013 audiogram revealed the following decibel (dB) losses at 500, 1,000, 2,000, and 3,000, hertz: 50, 45, 65, and 70 for the right ear and 70, 68, 80, and 80 for the left ear. Speech discrimination thresholds were 20 dB bilaterally and the auditory discrimination score was 96 percent for the right ear and 92 percent for the left ear. Dr. Govett reported that appellant's November 19, 2013 audiogram was unreliable. He opined that she did not have organic hearing loss as there were discrepancies between the pure-tone audiometry (PTA) measurements and the speech reception threshold (SRT). Dr. Govett answered yes when asked if the workplace exposure as described was sufficient as to intensity and duration to have caused the hearing loss in question. However, he opined that the sensorineural hearing loss was not due to appellant's workplace noise exposure because of the unreliable audiogram. Dr. Govett recommended auditory brainstem response (ABR) testing. He concluded that, in accordance

with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, appellant had 73.13 percent monaural hearing loss for the left ear and 48.25 percent monaural hearing loss for the right ear with binaural hearing loss ratable at 52.81 percent.

On December 26, 2013 OWCP referred the case file along with Dr. Govett's report to a district medical adviser (DMA) to determine the extent of appellant's permanent partial impairment and date of maximum medical improvement.

In a December 30, 2013 report, the DMA reported that Dr. Govett considered the November 19, 2013 PTA as unreliable because of a significant difference between the pure tone measurements and speech threshold. He further noted that Dr. Govett did not consider appellant's possible hearing loss as job related. The DMA stated that he was unable to determine a probative hearing loss schedule award due to the invalid PTA.

By decision dated January 9, 2014, OWCP denied appellant's hearing loss claim on the grounds that the medical evidence did not support that her hearing loss was causally related to workplace noise exposure.

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 filed within the applicable time limitation; that an injury was sustained while in the performance of duty as alleged and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.³ These are the essential elements of every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.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

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;⁷ (2) a factual statement identifying employment factors alleged to have caused or contributed to the

³ *Gary J. Watling*, 52 ECAB 278 (2001); *Elaine Pendleton*, 40 ECAB 1143, 1154 (1989).

⁴ *Michael E. Smith*, 50 ECAB 313 (1999).

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

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

⁷ *Michael R. Shaffer*, 55 ECAB 386 (2004).

presence or occurrence of the disease or condition;⁸ and (3) medical evidence establishing 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 condition is causally related to the employment factors identified by the claimant.⁹

The medical evidence required to establish causal relationship generally is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable certainty and must be supported by medial rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.¹⁰

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden to establish his or her claim, OWCP also has a responsibility in the development of the evidence.¹¹

ANALYSIS

The issue is whether appellant established that she sustained employment-related hearing loss due to noise exposure during her federal employment. The Board finds that this case is not in posture for a decision because the second opinion physician did not resolve the issues related to the cause and extent of her hearing loss.

On remand, OWCP properly referred appellant and an amended SOAF facts to Dr. Govett for a second opinion evaluation.¹²

The Board finds, however, that Dr. Govett's report is not sufficient on the issues of causal relationship and degree of hearing loss. Dr. Govett reported that appellant's November 19, 2013 audiogram was unreliable because there were discrepancies between the PTA and SRT measurements. While he answered "yes" when asked if the workplace exposure was sufficient as to intensity and duration to have caused the loss in question, he opined that the sensorineural hearing loss was not due to appellant's workplace noise exposure because of the unreliable audiogram. Dr. Govett's opinion regarding the cause of her hearing loss is equivocal in nature

⁸ *Marlon Vera*, 54 ECAB 834 (2003); *Roger Williams*, 52 ECAB 468 (2001).

⁹ *Beverly A. Spencer*, 55 ECAB 501 (2004).

¹⁰ *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 465 (2005).

¹¹ *See Claudia A. Dixon*, 47 ECAB 168 (1995).

¹² The Board notes that the employing establishment did not respond to OWCP's requests to obtain noise surveys and specific decibel levels for each of appellant's work areas. The record establishes that appellant worked around machinery with moving parts and objects and was exposed to occupational noise.

OWCP procedure manual provides that it is generally accepted that hearing loss may result from prolonged exposure to noise levels above 85 decibels. Acoustic trauma may, however, result from levels below 85 decibels if exposure is sufficiently prolonged. OWCP, therefore, does not request the claimant show exposure to injurious noise in excess of 85 decibels as a condition to approval of the claim. Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.8(a) (October 1990).

and, thus, of little probative value.¹³ He failed to explain why the established occupational noise exposure apparently had no effect on appellant's hearing.¹⁴

The Board also finds that Dr. Govett did not provide an accurate assessment of appellant's hearing impairment.¹⁵ Dr. Govett's brief responses as contained on the outline for otologic evaluation do not adequately set forth his reasons for concluding that the November 19, 2013 audiogram was unreliable due to discrepancies between the PTA and SRT measurements. Further, he recommended ABR testing.

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.¹⁶ Once OWCP undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.¹⁷

The Board finds that this case is not in posture for a decision as Dr. Govett did not adequately address the issue of causation. On remand, OWCP should refer appellant to an appropriate second opinion physician for ABR and audiometric testing as recommended and an opinion on causal relationship. The Board also notes that OWCP has not received requested noise surveys from the employing establishment to establish exposure to specific decibels of noise. On remand, OWCP should attempt to obtain this information pursuant to Chapter 2.800.7(b)(4) June 2011 of the Federal (FECA) Procedure Manual. Following this and such further development as OWCP deems necessary, an appropriate decision should be issued.

¹³ *D.F.*, Docket No. 09-1080 (issued December 7, 2009); *Michael R. Shaffer*, 55 ECAB 386 (2004).

¹⁴ *M.H.*, Docket No. 120733 (issued September 5, 2012).

¹⁵ 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). See *supra* note 12 at Chapter 3.600.8.a (September 1994).

¹⁶ See *L.L.*, Docket No. 10-16 (issued October 1, 2010); *Phillip L. Barnes*, 55 ECAB 426 (2004); *Horace L. Fuller*, 53 ECAB 775, 777 (2002); *James P. Bailey*, 53 ECAB 484, 496 (2002); *William J. Cantrell*, 34 ECAB 1223 (1983).

¹⁷ *Richard F. Williams*, 55 ECAB 343, 346 (2004).

CONCLUSION

The Board finds that this case is not in posture for a decision regarding whether appellant established that she sustained an employment-related hearing loss in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the January 9, 2014 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further proceedings consistent with this opinion.

Issued: December 10, 2014
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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