United States Department of Labor
Employees' Compensation Appeals Board

J.F., Appellant	)	
and	)	**Docket No. 13-1814**
	)	**Issued: January 27, 2014**
DEPARTMENT OF THE NAVY, SHIPBUILDING, CONVERSION & REPAIR, Pascagula, MS, Employer	)	

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 30, 2013 appellant filed a timely appeal of a May 30, 2013 decision of the Office of Workers' Compensation Programs (OWCP) denying his occupational disease 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 a hearing loss causally related to factors of his federal employment.

On appeal appellant contends that OWCP erred in relying upon the second opinion physician's finding that his hearing loss was not causally related to his federal employment.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 15, 2013 appellant, then a 55-year-old quality assurance specialist, filed an occupational disease claim alleging that on February 1, 2013 he first became aware of his hearing loss, which he attributed to his federal work duties over the past nine years.

Appellant submitted the results of audiograms dated January 6, 2004 and February 1, 2013. The February 1, 2013 audiogram showed decibel levels at 500, 1,000, 2,000 and 3,000 hertz (Hz): right ear, 10, 25, 60 and 65 decibels and for the left ear, 5, 15, 55 and 60 decibels. The January 6, 2004 reference audiogram obtained findings at 500, 1,000, 2,000 and 3,000 Hz of 5, 15, 55 and 60 decibels for the right ear and 5, 10, 60 and 65 decibels for the left ear.

By letter dated February 28, 2013, OWCP informed appellant that the evidence of record was insufficient to establish his claim. Appellant was advised as to the medical and factual evidence required to support his claim and given 30 days to provide such information.

On March 1, 2013 an OWCP medical adviser reviewed the audiograms of record and noted that there had been a material change in appellant's hearing from the 2004 audiogram to the 2013 audiogram.

An April 3, 2013 statement of accepted facts listed that appellant was exposed to loud noise at the employing establishment generated by drills, bells, machinery, horns, alarms and various tests with a variable exposure per day as a quality assurance specialist from 2003 to the present and by fire alarm bells for approximately 10 seconds for a six-month period from 1993 to 2003 as a procurement technician, from 1992 to 1993 as a procurement clerk and 1986 to 1992 as a secretary. Appellant used earplugs in his job as a quality assurance specialist. He reported noise exposure during military service from weapons firing qualification as an administrative specialist from 1979 to 1981 and 1982 to 1983 and from 1978 to 1979 in basic/advance training.

On April 4, 2013 appellant was referred for a second opinion evaluation to Dr. John S. Keebler, a Board-certified otolaryngologist, for an opinion regarding his claimed hearing loss.

In an April 30, 2013 report, Dr. Keebler diagnosed sensorineural hearing loss. He found, however, that the hearing loss was not due to appellant's federal employment because, as of 2004, appellant already had severe sensorineural losses based on the audiologic reports. Dr. Keebler stated that appellant had significant noise exposure while in the army that probably caused the losses. He opined that appellant's federal employment noise exposure was insufficient to cause the loss in question as his hearing losses were first noted in 2004, which was just one year after beginning federal employment. Dr. Keebler concluded that it was doubtful that the federal employment was the cause of appellant's hearing loss as the level of exposure would not cause a sudden or rapid decrease in hearing.

In a May 23, 2013 report, Dr. Eric Puestow, a medical adviser, reviewed Dr. Keebler's report. He concluded that appellant's hearing loss was not employment related as the first employment audiogram available in 2004 demonstrated severe bilateral sensorineural hearing loss. Dr. Puestow concluded that a schedule award was not indicated.

By decision dated May 30, 2013, OWCP denied appellant's claim, finding that the medical evidence was insufficient to establish a causal relationship between his hearing loss and employment-related noise exposure.

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 establish that an injury was sustained in the performance of duty in a claim for occupational disease, an employee must submit: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.[5]

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.[6] 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.[7] The opinion of the physician must be based on a complete 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.[8]

It is well established that proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.[9] While appellant has the burden to establish entitlement to

[2] *Id.*

[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] *D.U.*, Docket No. 10-144 (issued July 27, 2010); *R.H.*, 59 ECAB 382 (2008); *Roy L. Humphrey*, 57 ECAB 238 (2005); *Donald W. Wenzel*, 56 ECAB 390 (2005).

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

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

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

[9] *R.B.*, Docket No. 08-1662 (issued December 18, 2008); *A.A.*, 59 ECAB 726 (2008); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Vanessa Young*, 55 ECAB 575 (2004).

compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.[10] When OWCP undertakes to develop the medical aspects of a case, it must exercise extreme care in seeing that its administrative processes are impartially and fairly conducted.[11]

ANALYSIS

The Board finds that the case is not in posture for a decision as to whether appellant sustained an occupational hearing loss. The case must be remanded to OWCP for further development as the Board finds Dr. Keebler's opinion to be of diminished value as it was based on an inaccurate factual background.

In finding that appellant's exposure to noise during his employment was insufficient to establish a causal relationship to his hearing loss, Dr. Keebler only referred to the employment period from 2003 to the present, whereas appellant worked in federal employment from 1986 to 2003. He attributed appellant's hearing loss to prior military exposure as though appellant had only started his federal employment with the employing establishment in 2003. The basis for Dr. Keebler's information regarding appellant's federal employment as beginning in 2003 is not evident from the record. The statement of accepted facts noted that appellant's employment with the employing establishment began in 1986 and listed exposure to fire alarms.

Dr. Keebler failed to address appellant's noise exposure working for the Federal Government in the Navy from 1986 through the present. The statement of accepted facts provided descriptions of appellant's positions and noise exposure during this time; however, the physician did not consider any noise exposure prior to 2003 when finding that appellant's history was insufficient to establish that his noise-induced hearing loss was causally related to his federal employment.

To assure that the report of a medical specialist is based upon a proper factual background, OWCP provides information through the preparation of a statement of accepted facts. When a second opinion physician does not use the statement of accepted facts as the framework in forming his opinion, the probative value of the opinion is diminished or negated altogether.[12] As Dr. Keebler did not adequately address the history of noise exposure in the statement of accepted facts, he misstated that appellant's employment-related exposure was only from 2003 and failed to address appellant's employment exposure prior to 2003.

It is well established that proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares the responsibility in the development of the evidence to see that justice is done.[13] As OWCP undertook development of the evidence by referring appellant to a

[10] *D.N.*, 59 ECAB 576 (2008); *Richard E. Simpson*, 55 ECAB 490 (2004).

[11] *See P.K.*, Docket No. 08-2551 (issued June 2, 2009); *Peter C. Belkind*, 56 ECAB 580 (2005).

[12] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990).

[13] *Richard Kendall*, 43 ECAB 790 (1992); *Isidore J. Gennino*, 35 ECAB 442 (1983).

second opinion physician, it has the duty to secure an appropriate report addressing the relevant issues.[14] Because Dr. Keebler did not base his report on an accurate factual history and failed to provide a rationalized medical opinion to support his findings, the case will be remanded to OWCP for further development of the medical evidence.

CONCLUSION

The Board finds that the case is not in posture for decision as to whether appellant sustained an occupational hearing loss.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 30, 2013 is set aside and the case remanded for further proceedings consistent with the above opinion.

Issued: January 27, 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

[14] When OWCP refers a claimant for a second opinion evaluation and the report does not adequately address the relevant issues, OWCP should secure an appropriate report on the relevant issues. *Ayanle A. Hashi*, 56 ECAB 234 (2004). *See also Mirna Cruz*, Docket No. 06-183 (issued April 5, 2006) (where the Board found that the second opinion physician's medical report was of little probative value and could not constitute a basis for denying the claim because it was not based on the statement of accepted facts. The Board remanded the case to OWCP).