

FACTUAL HISTORY

On October 7, 2013 appellant, then a 59-year-old customs and border patrol supervisor, filed an occupational disease claim, alleging that he sustained hearing loss in the performance of duty. He first became aware of his condition and its relation to his federal employment on August 28, 2013. Appellant did not stop work.

On November 20, 2013 OWCP advised appellant that the evidence submitted was insufficient to establish that he actually experienced the employment factors alleged to have caused the injury. It requested that he provide additional information including: whether he previously filed a claim for hearing loss; all hobbies that involved exposure to loud noise; an estimate of how many hours a year he engaged in such hobbies; any past problems with hearing loss and his employment history with details regarding his exposure to loud noise. By letter dated November 20, 2013, OWCP also requested appellant's employing establishment to provide information including: comments from his supervisor; the job sites where noise exposure occurred; the source of the exposure, decibel and frequency level for each job site and the type of ear protection used.

In a November 29, 2013 response, appellant noted that he rode motorcycles as a hobby. He rode for two hours at least 10 Sundays a year, for a total of 60 hours in the past three years. Appellant did not use hearing protection while riding. He also specified that he did not have a hearing problem prior to being informed by a Federal Occupational Health Center. Appellant served in the military from 1972 to 1974, where he was exposed to M-16 firearm noise during basic training five hours a day for five days with earplug protection. From 1974 to 1985, he worked for the Puerto Rico police. Appellant was exposed to firearm noise two days a year for eight hours each day with earmuff protection. From 1987 to the present, he served as an inspector for the employing establishment. Appellant worked on airport tarmacs, where he was exposed to heavy continuous noise five days a week for at least five hours a day without any hearing protection. He also noted that for 15 years during his tenure with the employing establishment he worked as a firearms instructor. Appellant worked two or three eight-hour shifts every three months. He stated that for the first 10 years he only used earmuffs, but the remaining five years both earplugs and earmuffs were required.

In an October 17, 2013 report, Dr. Mark McDowall, an audiologist, diagnosed mild high frequency sensorineural hearing loss bilaterally. The audiogram tested decibel losses at 500, 1,000, 2,000 and 3,000 hertz and recorded losses of 20, 15, 25 and 35 in the left ear. Testing at the same levels for the right ear recorded decibel losses of 30, 20, 25 and 40. Appellant also submitted audiogram reports dated April, 15 1999, November 16, 2000, August 2, 2010, August 9, 2011 and August 28, 2013.

In response to OWCP's questionnaire, appellant's supervisor stated that he agreed with appellant's assertions with respect to his occupational exposure occurring after August 2004, when he became his immediate supervisor. Appellant worked at Mayaguez Port of Entry, which included a seaport and airport. His supervisor stated that appellant was exposed to high levels of noise, from trucks, other loud machinery and aviation sources. Appellant's supervisor advised that appellant made quarterly trips to the gun range where he was exposed to firearm noise. He

noted that employees were required to wear earmuffs and plugs for the inner ear at the gun range, but stated that there were periods when only earmuffs were required.

By decision dated December 23, 2013, OWCP denied appellant's claim. It found the evidence was insufficient to establish that the occupational exposure occurred as he described. Further, the medical evidence failed to contain a diagnosis from a qualified physician. OWCP noted that appellant and the employing establishment did not provide a full description of his employment and hobby history as required to obtain a complete factual background.

Following OWCP's decision, appellant submitted an October 31, 2013 audiogram signed by Dr. Nancy Sahakian, Board-certified in family and occupational medicine. The report noted that there was a significant change from his 2005 baseline audiogram. On January 22, 2013 appellant submitted a request for reconsideration and a letter stating that he would send additional information.

By decision dated March 28, 2014, OWCP denied appellant's request for reconsideration without further merit review.

LEGAL PRECEDENT ISSUE 1

An employee seeking benefits under FECA has the burden to establish 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 timely filed within the applicable time limitation, that an injury was sustained in the performance of duty as alleged and that any disabilities and/or specific conditions 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 upon a traumatic injury or an occupational disease.⁴

Whether an employee actually sustained an injury in the performance of duty begins with an analysis of whether fact of injury has been established. To establish an occupational disease claim, 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

An employee's statement that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.⁶ Moreover, an injury does not have to be confirmed by eyewitnesses.

³ *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁴ *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁵ *R.H.*, 59 ECAB 382 (2008); *Ernest St. Pierre*, 51 ECAB 623 (2000).

⁶ *Gregory J. Reser*, 57 ECAB 277 (2005).

Causal relationship is a medical issue and the evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is generally required to establish causal relationship. The opinion of the physician must be based on a complete factual and medical background, 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 claimant.⁷ The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.⁸

ANALYSIS ISSUE 1

The Board finds that this case is not in posture for decision.

In its December 23, 2013 decision, OWCP found that appellant provided insufficient detail of his noise exposure history to establish a complete factual background for his claim. It also found that the employing establishment's statement was insufficient to establish the factual aspect of the claim. The Board notes that appellant provided a statement in response to OWCP's request in which he addressed his exposure to noise from all sources. While OWCP found his description insufficiently detailed with regard to sources of noise outside of his federal employment, the record clearly supports that he was exposed to noise when he worked on an airplane tarmac and occasionally on a gun range. The employing establishment generally supported appellant's depiction of his workplace noise exposure. It did not contest any part of his statement. There is no persuasive evidence which refutes that appellant had noise exposure at work.⁹ The Board finds that he has sufficiently established his exposure to noise at work.

OWCP denied the claim, in part, on the failure of the employing establishment to provide sufficient description of appellant's employment history. The Board has held that 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, particularly when such evidence is of the character normally obtained from the employing establishment or other government source.¹⁰ The Board will remand the case to OWCP for further development of the factual and medical evidence. OWCP should obtain any further factual evidence needed from the employing establishment, as well as any further clarification from appellant. Thereafter, it should prepare a statement of accepted facts that lists his history of noise exposure. OWCP should then refer appellant to an appropriate Board-certified specialist to obtain a rationalized medical opinion regarding whether he sustained

⁷ *I.J.*, 59 ECAB 408 (2008); *supra* note 4.

⁸ *James Mack*, 43 ECAB 321 (1991).

⁹ *See supra* note 6 (an employee's statement regarding the occurrence of an employment incident will stand unless refuted by strong or persuasive evidence).

¹⁰ *Robert A. Redmond*, 40 ECAB 796, 800 (1989).

a hearing loss causally related to factors of his federal employment.¹¹ Following this and any other further development as deemed necessary, OWCP shall issue a *de novo* decision on appellant's claim.

Given the Board's holding with respect to the first issue presented, the second issue related to the denial of appellant's request for reconsideration is moot.

CONCLUSION

The Board finds that this case is not in posture for decision

ORDER

IT IS HEREBY ORDERED THAT the March 28, 2014 and December 23, 2013 decisions of the Office of Workers' Compensation Programs are set aside. The case is remanded for further action in conformance with this decision.

Issued: October 8, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

¹¹ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.8(a) (September 1995) (provides that, unless the case file already contains a reliable medical report which fully meets OWCP requirements. OWCP will refer the claimant for audiological evaluation and ontological examination which addresses the relationship of any hearing loss to the employment and the degree of any permanent impairment).