

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

M.L., Appellant

and

**DEPARTMENT OF HOMELAND SECURITY,
CUSTOMS & BORDER PROTECTION,
Dallas, TX, Employer**

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**Docket No. 14-1208
Issued: September 29, 2014**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 30, 2014 appellant filed a timely appeal from a January 10, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP) denying an 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 established that he sustained a hearing loss in the performance of duty.

On appeal, counsel asserts that OWCP's January 10, 2014 decision is "contrary to law and fact."

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On June 29, 2012 appellant, then a 57-year-old special agent, filed an occupational disease claim (Form CA-2) alleging that he sustained a bilateral hearing loss due to exposure to firearm and jet engine noise at work. He first realized he had a hearing loss and that it could be related to his federal employment on July 25, 2011. The employing establishment noted that appellant first reported the hearing loss to his supervisor on June 29, 2012.²

In a September 6, 2012 letter, OWCP advised appellant of the type of evidence needed to establish his claim, including a complete history of occupational and nonoccupational noise exposure, describing the sources of hazardous noise and the duration of his exposures. It afforded him 30 days to submit such evidence.

In response, appellant submitted weapons qualification logs dated from September 9, 1991 to November 28, 2011, internet literature on noise exposure, employing establishment literature regarding a hearing loss awareness program and annual employing establishment audiograms dated from January 23, 1996 to October 1, 2012 showing a progressive bilateral high frequency hearing loss.

By decision dated December 12, 2012, OWCP denied the claim on the grounds that fact of injury was not established. It found that appellant's claim was timely filed and that he submitted medical evidence. However, appellant did not provide factual evidence establishing the type and duration of his occupational exposure to hazardous noise.

In a November 15, 2013 letter, counsel requested reconsideration, asserting that appellant's description of noise exposure was sufficient to establish fact of injury. He submitted October 31, 2013 examination and audiogram reports from Dr. Courtney A. Noell, an attending Board-certified otolaryngologist, diagnosing a bilateral sensorineural hearing loss and tinnitus. Dr. Noell opined that appellant's condition "could likely have been affected by his noise exposure as he was frequently on the tarmac with airplanes powered up without hearing protection."

By decision dated January 10, 2014, OWCP denied modification on the grounds that the new evidence submitted failed to establish fact of injury. It found that, while Dr. Noell repeated appellant's account of exposure to firearm and jet engine noise, appellant did not submit factual evidence verifying the type and duration of 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 and/or specific condition for which compensation is claimed are causally related to the

² The record indicates that appellant retired from the employing establishment in June 2012.

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

An occupational disease is defined as a condition produced by the work environment over a period longer than a single workday or shift.⁵ 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; (2) factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that 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.⁶

ANALYSIS

Appellant claimed that he sustained a bilateral hearing loss in the performance of duty on or before July 25, 2011 due to hazardous noise from firearms and aircraft engines. OWCP denied the claim on the grounds that fact of injury was not established as he did not submit a position description, industrial hygiene surveys or other factual evidence documenting the type and duration of his occupational exposure to hazardous noise.

Appellant submitted firearms qualification logs dated from September 9, 1991 to November 28, 2011. These logs do not indicate the type of firearms to which he was exposed, the type and duration of the exposures, or whether he was wearing hearing protection. The logs are therefore insufficient to establish fact of injury.⁷ The Board notes that, in her October 31, 2013 report, Dr. Noell indicated that appellant's frequent exposure to aircraft engines could have affected his hearing. However, appellant has not established that he was exposed to aircraft engine noise.

OWCP advised appellant by September 6, 2012 letter of the importance of providing a detailed description and corroborating evidence of the exposures alleged to have caused or contributed to the claimed hearing loss. However, appellant did not submit such evidence. Therefore, OWCP's January 10, 2014 decision denying his claim is proper under the law and facts of this case.

On appeal, counsel asserts that OWCP's January 10, 2014 decision is "contrary to law and fact." As stated above, appellant did not submit factual evidence establishing that he was

³ *Joe D. Cameron*, 41 ECAB 153 (1989).

⁴ *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

⁵ 20 C.F.R. § 10.5(q).

⁶ *Solomon Polen*, 51 ECAB 341 (2000).

⁷ *Joe D. Cameron*, *supra* note 3.

exposed to hazardous noise in the performance of duty. Therefore, OWCP properly found that he did not establish fact of injury.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has failed to establish that he sustained a hearing loss in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the January 10, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 29, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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