

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

E.M., Appellant

and

**TENNESSEE VALLEY AUTHORITY,
SEQUOYAH NUCLEAR PLANT,
Soddy Daisy, TN, Employer**

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**Docket No. 15-1388
Issued: December 23, 2015**

Appearances:
Robert K. Bruce, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 8, 2015 appellant, through counsel, filed a timely appeal from an April 29, 2015 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 has established a hearing loss in the performance of duty.

FACTUAL HISTORY

On March 5, 2013 appellant, then a 60-year-old former boilermaker, filed an occupational disease claim (Form CA-2) alleging that he sustained a hearing loss in the performance of duty on or before January 1, 2000. He explained that he first became aware that

¹ 5 U.S.C. § 8101 *et seq.*

his hearing loss was work related on February 12, 2013 when he reviewed a January 17, 2013 report from Dr. William A. Logan II, an attending Board-certified otolaryngologist. The employing establishment asserted that appellant was last exposed to work factors alleged to have caused the claimed hearing loss on November 21, 1991.

In an April 8, 2013 letter, OWCP advised appellant of the additional evidence needed to establish his claim, including that he provided timely notice of the claimed hearing loss. Appellant also needed to submit corroboration of hazardous noise exposure at work and medical evidence supporting that a ratable hearing loss resulted from that exposure.

In response, appellant submitted his statement noting exposure to noise from gun fire while in military service from 1971 to 1973. He worked as a contract boilermaker at the Widows Creek fossil fuel plant for intermittent 30- to 150-day periods from July 24, 1979 to November 21, 1991. Appellant described exposure to hazardous noise from boilers, fans, pumps, grinders, pneumatic tools, and hammering on metal. He “wore earplugs when available. During this time, appellant also worked for “various power plants and paper mills for contractors,” and was exposed to construction noise from 1982 to 1983 in the private sector.

In a January 17, 2013 report, Dr. Logan noted appellant’s account of decreased hearing “for years.” Appellant related a history of occupational noise exposure, noting that he used “ear protection when it was offered at work.” Dr. Logan obtained an audiogram showing decibel (dB) losses at the frequency levels of 500, 1,000, 2,000, and 3,000 hertz (Hz) in the right ear of 20, 30, 35, and 55, respectively. Testing at the same frequency levels for the left ear revealed dB losses of 10, 15, 20, and 35 respectively. Dr. Logan opined that the audiogram demonstrated “a bilateral sloping mild[-]to[-]moderate sensorineural hearing loss with an additional conductive component in the right ear of 5 to 20 [dBs].” He diagnosed a bilateral sensorineural hearing loss with an additional conductive component on the right.

On May 15, 2013 OWCP requested that appellant provide a detailed history of his federal and nonfederal employment, sources of hazardous noise, duration of exposure, and use of hearing protection. It also requested that the employing establishment provide a history of his hazardous noise exposure.

In response, appellant provided a list of his contract positions as a boilermaker. He worked intermittently at six different employing establishment power plants from July 24, 1979 to November 21, 1991, for a total of two years and seven months.² Appellant also performed nonfederal contract work at employing establishment power plants through October 6, 2008. During this period, he also worked as a contractor for private-sector construction companies. The employing establishment provided industrial hygiene data showing that appellant worked in areas with ambient noise from 65 to 94 dBs for boilers, scrubbers, turbines, pulverizers, grinders,

² Appellant was federally employed for the following periods: July 24 to August 8, 1979; April 16 to May 18, 1984; August 2 to November 16, 1984; September 10 to November 27, 1985; February 24 to July 3, 1986; October 30, 1987 to July 8, 1988; September 28 to December 12, 1988; January 18 to March 17, 1989, February 28 to May 3, 1990; June 13 to 28, 1990; August 6 to November 2, 1990; February 11 to March 20, 1991; April 8 to May 3, 1991; and October 2 to November 21, 1991.

cutters, and welding tools. Appellant was provided earplugs in most, but not all of his workstations.

Appellant submitted employing establishment audiograms obtained through a hearing conservation program. The July 24, 1979 preemployment audiogram showed dB losses at the frequency levels of 500, 1,000, 2,000 and 3,000 Hz in the right ear of 20, 10, 0, and 20, respectively. At 4,000 and 6,000 Hz, appellant had 10 and 20 dB losses respectively. Testing at the same frequency levels for the left ear revealed dB losses of 25, 15, 0, and 15 respectively, with dB losses at 4,000 and 6,000 Hz of 15 dB. At the stated frequencies, a September 27, 1988 audiogram, showed dB losses of 10, 5, 5, and 15 dB on the right and 5, 5, 5, and 10 dB on the left. In a November 2, 1990 employing establishment termination medical interview, appellant did not indicate that he had a hearing loss.

The employing establishment provided an April 17, 2013 report from treating physician Dr. Whitney R. Maudlin, a doctor of audiology, who asserted that a delayed or latent hearing loss was medically impossible.

An OWCP medical adviser reviewed the record on July 18, 2013, and opined that the 1979 and 1988 employing establishment audiograms showed fluctuations at 2,000 and 6,000 Hz, inconsistent with noise-induced hearing loss.

By decision dated July 31, 2013, OWCP denied appellant's claim as it was not timely filed within three years of his last exposure to hazardous noise on November 21, 1991. It further found that there was no evidence that appellant's supervisors had actual knowledge of an occupationally-related hearing loss within 30 days of November 21, 1991.

Appellant disagreed and on August 8, 2013 requested a telephone oral hearing which was conducted by an OWCP hearing representative on January 16, 2014. At the hearing, counsel contended that his claim was timely filed as he did not learn that his hearing loss was employment related until he reviewed Dr. Logan's January 17, 2013 report. In a February 27, 2014 letter, counsel also contended that the employing establishment failed to consider appellant's additional noise exposure in the performance of duty after the September 27, 1988 audiogram.

By decision dated April 2, 2014, an OWCP hearing representative set aside the July 31, 2013 decision. She found that appellant's claim was timely filed under the three-year time limitation of FECA,³ as he did not learn that his hearing loss could be occupationally related until reviewing Dr. Logan's January 17, 2013 report in February 2013. The hearing representative remanded the case to refer appellant, the case record, and a statement of accepted facts to an otolaryngologist for an audiologic evaluation and reasoned opinion regarding any causal relationship between appellant's intermittent noise exposure during federal employment from July 25, 1979 to November 21, 1991 and the diagnosed hearing loss.

On remand of the case, OWCP obtained a second opinion from Dr. Joseph A. Motto, a Board-certified otolaryngologist. Dr. Motto obtained an audiogram on May 29, 2014 showing

³ 5 U.S.C. § 8122.

dB losses at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz in the right ear of 30, 35, 55, and 70, respectively, with dB losses at 4,000, 6,000, and 8,000 Hz of 80, 80, and 85 dB. Testing at 500, 1,000, 2,000 and 3,000 Hz in the left ear revealed dB losses of 30, 40, 45, and 70 respectively. In a May 31, 2014 report, Dr. Motto diagnosed a mild-to-severe bilateral sensorineural hearing loss. He opined that during “brief employment” at the employing establishment, appellant’s expected age-related hearing loss in the right ear exceeded expected thresholds at 6,000 Hz, and that the May 29, 2014 audiogram showed a greater deficit at 8,000 than 6,000 Hz, suggesting that appellant’s hearing loss on the right was unrelated to noise exposure. Dr. Motto stated that appellant’s occupational noise exposure was insufficient to cause or contribute to his hearing loss. He opined that the May 29, 2014 audiogram showed a “metabolic component to hearing loss plus some noise exposure” which “happened after” appellant worked at the employing establishment.

By decision dated July 9, 2014, OWCP denied appellant’s claim on the grounds that causal relationship was not established. It accepted that he was exposed to hazardous noise at the employing establishment as alleged. However, the weight of the medical evidence rested with Dr. Motto, who opined that this noise exposure did not cause or contribute to appellant’s hearing loss.

In a July 17, 2014 letter, counsel requested an oral hearing, held February 11, 2015. At the hearing, he contended that Dr. Motto could not reasonably conclude that appellant’s established noise exposure during federal employment did not contribute in any way to the diagnosed hearing loss.⁴ Counsel submitted additional medical evidence.

In a January 2, 2014 letter, Dr. Logan opined that appellant’s sensorineural hearing loss was “consistent with cumulative exposure to loud noise. [Appellant’s] exposure at [the employing establishment] more likely than not did contribute to his sensorineural hearing loss.” He opined that according to unspecified portions of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*) appellant had a 5.6 percent sensorineural hearing loss in the right ear and zero percent hearing loss in the left ear. Dr. Logan explained that, with inclusion of a conductive component, appellant had a total 15 percent hearing loss on the right, and 2.8 percent binaural hearing loss.⁵

By decision dated April 29, 2015, an OWCP hearing representative affirmed the July 9, 2014 decision, finding that causal relationship was not established. She found that Dr. Motto’s opinion was sufficient to establish that appellant’s exposure while in federal employment was insufficient to cause or contribute to the diagnosed hearing loss. In contrast, Dr. Logan provided no rationale supporting his opinion that exposure to hazardous noise during federal employment caused or contributed to appellant’s hearing loss.

⁴ The employing establishment submitted comments to the hearing transcript on March 13, 2015, contending that appellant was not actually exposed to hazardous noise as he was issued earplugs that would have reduced his exposure to permissible levels. Counsel responded to these comments by March 26, 2015 letter, arguing that the medical evidence established that occupational exposure to hazardous noise contributed to the diagnosed hearing loss.

⁵ Dr. Logan did not cite to specific tables or grading schemes of the A.M.A., *Guides* or provide his calculations.

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 employment injury.⁶ 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.⁷

An occupational disease is defined as a condition produced by the work environment over a period longer than a single workday or shift.⁸ 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.⁹

The medical evidence required to establish causal relationship is generally rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician’s rationalized opinion on the issue of whether there is a causal relationship between the claimant’s diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, 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.¹⁰

ANALYSIS

OWCP accepted that appellant was exposed to hazardous noise while working as a boilermaker at the employing establishment for intermittent periods from July 19, 1979 to November 21, 1991. In support of his claim, appellant submitted a January 17, 2013 report from Dr. Logan, an attending Board-certified otolaryngologist. Dr. Logan diagnosed bilateral mild sloping to severe sensorineural hearing loss. He opined in a January 2, 2014 letter that appellant’s presentation was consistent with cumulative exposure to loud noise, and that

⁶ *Joe D. Cameron*, 41 ECAB 153 (1989).

⁷ *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

⁸ 20 C.F.R. § 10.5(q).

⁹ *Solomon Polen*, 51 ECAB 341 (2000).

¹⁰ *Id.*

occupational noise exposure “more likely than not” contributed to the hearing loss. However, Dr. Logan did not provide medical rationale supporting this conclusion.

In its April 29, 2015 decision, OWCP denied appellant’s occupational disease claim, finding that the weight of medical opinion rested with Dr. Motto, a Board-certified otolaryngologist and second opinion physician, who found that appellant’s hearing loss was not causally related to the established employment-related noise exposure. The Board finds that this case is not in posture for decision.

In his May 31, 2014 report, Dr. Motto opined that the May 29, 2014 audiogram he obtained demonstrated hearing loss due to a metabolic component “plus some noise exposure.” He thus indicated that the accepted occupational exposure to hazardous noise contributed to the diagnosed hearing loss to some degree. Yet, Dr. Motto concluded that appellant’s federal work history did not cause his hearing loss because he also had an underlying metabolic condition. He did not explain why he attributed appellant’s hearing loss to both noise exposure and a systemic condition, but then excluded the accepted occupational noise exposure from this causation. In the absence of such rationale, Dr. Motto’s opinion is insufficient to represent the weight of the medical evidence in this case.¹¹

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.¹² 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.¹³ When it selects a physician for an opinion on causal relationship, it has an obligation to secure, if necessary, clarification of the physician’s report and to have a proper evaluation made.¹⁴ Because it referred appellant to Dr. Motto, it has the responsibility to obtain a report that will resolve the issue of whether his hearing loss was caused or contributed to by his federal employment.¹⁵

The case will be remanded to OWCP for further development of the medical evidence. On remand, OWCP should ask Dr. Motto to clarify his opinion on whether appellant’s hearing loss was caused or contributed to by the accepted level of noise exposure. Dr. Motto should also be asked to provide medical rationale in support of his conclusion.¹⁶ Following this and any other further development deemed necessary, OWCP shall issue a *de novo* decision on appellant’s claim.

¹¹ *Deborah L. Beatty*, 54 ECAB 340 (2003).

¹² *Richard Kendall*, 43 ECAB 790 (1992).

¹³ *Phillip L. Barnes*, 55 ECAB 426 (2004).

¹⁴ *Alva L. Brothers, Jr.*, 32 ECAB 812 (1981).

¹⁵ *See Ramon K. Farrin, Jr.*, 39 ECAB 736 (1988).

¹⁶ *M.E.*, Docket No. 14-1249 (issued October 22, 2014).

CONCLUSION

The Board finds that the case is not in posture for a decision as to whether appellant developed a sensorineural hearing loss in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 29, 2015 is set aside, and the case remanded for additional development consistent with this decision and order.

Issued: December 23, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board