United States Department of Labor
Employees' Compensation Appeals Board

C.D., Appellant **and** **U.S. POSTAL SERVICE, POST OFFICE, Chicago, IL, Employer**	)	**Docket No. 15-1523** **Issued: December 21, 2015**

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On July 7, 2015 appellant filed a timely appeal of a January 22, 2015 merit decision and a February 26, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). 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.[2]

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish hearing loss causally related to his employment duties; and (2) whether OWCP properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that, following the January 22, 2015 decision, OWCP received additional evidence. Appellant also submitted new evidence with his appeal to the Board. However, the Board may only review evidence that was in the record at the time OWCP issued its final decision. *See* 20 C.F.R. § 501.2(c)(1); *M.B.*, Docket No. 09-176 (issued September 23, 2009); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

On appeal appellant contends that OWCP failed to review the medical evidence submitted with his reconsideration request. He also argues that OWCP prematurely closed his case and that the employing establishment failed to provide OWCP with preemployment screening tests as requested by OWCP and appellant.

FACTUAL HISTORY

On July 24, 2014 appellant, then a 46-year-old tractor trailer operator, filed an occupational disease claim (Form CA-2) alleging that on May 7, 2002 he first became aware of his hearing loss. It was not until May 12, 2002 that he realized his employment duties and exposure to a very loud noise at the industrial facility was the cause of his bilateral hearing loss. Appellant stated that prior to starting work with the employing establishment he had to pass a hearing test. He last worked as a tractor trailer operator on September 27, 2011 and January 21, 2013 was the last day appellant worked for the employing establishment.

In support of his claim, appellant submitted audiological evaluation tests for the period May 7, 2002 to June 13, 2014.

By letter dated August 20 2014, OWCP informed appellant that the evidence of record was insufficient to support his claim. Appellant was advised as to the medical and factual evidence required and afforded 30 days to provide the requested information.

In a letter dated August 20, 2014, OWCP requested that the employing establishment provide evidence which included sources of noise exposure, job sites where noise exposure allegedly occurred, a noise survey report including frequency and decibel level, types of ear protection provided, and a copy of all medical examinations pertaining to appellant's ear or hearing problems, including all audiograms and preemployment examination.

In an April 20, 2007 medical examination report for commercial driver fitness determination, Dr. Eva Ostrowski, an employing establishment contract physician, provided a health history, comments on appellant's health history, and physical examination findings. Under comments, she noted appellant's decreased hearing and reported that an audiogram was ordered to determine whether appellant met Department of Transportation (DOT) criteria.

In a May 4, 2007 letter, Dr. Ostrowski informed the employing establishment that appellant was medically disqualified from driving a tractor trailer based on DOT medical fitness guidelines.

On September 29, 2014 OWCP received appellant's response to questions posed. Appellant noted that September 27, 2011 was the last day of exposure, and that he got hearing aids in 2008. He reported that it was on August 3, 2008 when he received his hearing aids, that he first realized that his hearing loss could be employment related. Appellant further noted that when he started his employment in 1996 he had perfect hearing and DOT required an annual physical and hearing evaluation.

On October 20, 2014 OWCP referred appellant for a second opinion evaluation with Dr. T.K. Venkatesan, a Board-certified otolaryngologist, to address appellant's hearing loss.

Dr. Venkatesan completed an undated outline for otologic evaluation (Form CA-1332), submitted a November 5, 2014 audiogram, and diagnosed bilateral sensorineural hearing loss. In the CA-1332 form, Dr. Venkatesan noted that no audiometric data was provided with respect to appellant's hearing at the beginning of his federal employment. He reported appellant's sensorineural hearing loss was greater than what would be predicted by presbycusis. However, Dr. Venkatesan was unable to conclude whether the hearing loss was employment related as there was no baseline data and the first audiogram was 16 years after first exposure. He opined that causation of the hearing loss could not be determined without job site noise ratings recorded at the time and audiometric data performed during appellant's years of employment. In concluding, Dr. Venkatesan checked a box that the bilateral sensorineural hearing loss was not due to federal employment noise exposure. In support of this conclusion, he reiterated that as no baseline audiometric data before 1996 was provided for review that he was "unable to track origin [and] progression of hearing loss."

By decision dated January 22, 2015, OWCP denied appellant's claim as it found the medical evidence failed to establish that his hearing loss was caused or aggravated by his employment.

In a form dated January 22, 2015, appellant requested reconsideration and stated that new evidence was attached. No evidence was received with the reconsideration form.

By decision dated February 26, 2015 OWCP denied reconsideration and noted that no evidence had been received with his request.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA[3] has the burden of establishing the essential elements of his 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.[4] 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.[5]

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

[3] 5 U.S.C. § 8101 *et seq.*

[4] *C.S.*, Docket No. 08-1585 (issued March 3, 2009); *Bonnie A. Contreras*, 57 ECAB 364 (2006).

[5] *S.P.*, 59 ECAB 184 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

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.[6]

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.[7] 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.[8] 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.[9]

ANALYSIS -- ISSUE 1

It is undisputed that appellant was exposed to noise for a number of years in the course of his federal employment as a tractor trailer operator. On January 22, 2015 OWCP denied the claim finding that the medical evidence did not support that the hearing loss was causally related to workplace noise exposure. It based its decision on the reports of the second opinion physician, Dr. Venkatesan, who performed an evaluation on November 5, 2014. The Board finds that this case is not in posture for decision as to whether appellant's hearing loss was causally related to his employment noise exposure.

In assessing medical evidence, the weight of such evidence is determined by its reliability, its probative value, its convincing quality, and the factors which enter into such an evaluation, including the opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of the analysis manifested, and the medical rationale expressed in support of the physician's opinion.[10] In the undated CA-1332 form, Dr. Venkatesan noted that no audiometric data pertaining to appellant's hearing at the beginning of his federal employment had been priority. He reported that appellant's sensorineural hearing loss was greater than what could be attributed to presbycusis, but, based on the medical and factual evidence OWCP provided, he was unable to determine whether appellant's hearing loss was employment related. Dr. Venkatesan noted that the first audiogram was 16 years after appellant's first employment-related noise exposure and there was no baseline data. As such, he found that appellant's bilateral sensorineural hearing loss was not due to federal employment noise exposure.

[6] *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).

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

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

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

[10] *See C.M.*, Docket No. 09-1268 (issued January 22, 2010); *K.W.*, 59 ECAB 271 (2007); *Michael S. Mina*, *supra* note 8.

Dr. Venkatesan's report is insufficient to resolve the question of whether appellant's workplace noise exposure caused or contributed to his hearing loss.[11] The Board has held that, 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.[12]

The record before the Board contains audiograms beginning May 7, 2002. It is well established that proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.[13] While appellant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.[14] 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.[15]

The case is remanded for OWCP to provide the entire record to OWCP's medical adviser and request an updated medical opinion. Following this and such other development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision. In light of the Board's disposition on the first issue, the second issue is moot.

[11] An employee is not required to prove that occupational factors are the sole cause of his claimed condition. If work-related exposures caused, aggravated, or accelerated appellant's condition, he is entitled to compensation. *See Beth P. Chaput*, 37 ECAB 158, 161 (1985); *S.S.*, Docket No. 08-2386 (issued June 5, 2008).

[12] *Peter C. Belkind*, 56 ECAB 580 (2005) (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).

[13] *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).

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

[15] *See P.K.*, Docket No. 08-2551 (issued June 2, 2009); *supra* note 12.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 22 and February 26, 2015 are set aside and the case remanded for further proceedings consistent with the above opinion.

Issued: December 21, 2015
Washington, DC

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

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board