

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

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**P.J., Appellant** )

**and** )

**DEPARTMENT OF HOMELAND SECURITY,** )  
**FEDERAL AIR MARSHAL SERVICE,** )  
**College Park, GA, Employer** )

\_\_\_\_\_ )

**Docket No. 15-1816**  
**Issued: December 23, 2015**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On September 1, 2015 appellant filed a timely appeal of a July 30, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case of this case.<sup>2</sup>

**ISSUE**

The issue is whether appellant has met his burden of proof to establish right ear hearing loss causally related to factors of his federal employment.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that in his appeal to the Board appellant submitted additional evidence. 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 alleged that his hearing loss was employment related as he had no hearing loss prior to working for the employing establishment.

### **FACTUAL HISTORY**

On May 4, 2015 appellant, then a 43-year-old federal air marshal, filed an occupational disease claim (Form CA-2) alleging that on March 20, 2015 he first realized that the hearing loss in his right ear was employment related.

In support of his claim, appellant submitted the following medical evidence.

In a March 23, 2015 audiogram, T. Winsted, an audiologist, reported moderate right hearing loss.

An unsigned May 15, 2015 progress report by Dr. Danko Cerenko, a treating Board-certified otolaryngologist, noted that appellant was seen for a follow-up visit for right ear hearing. Dr. Cerenko reported subjectively diminished right hearing loss.

By letter dated May 15, 2015, 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 and given 30 days to provide this information.

On June 1, 2015 appellant wrote to OWCP outlining the medical evaluations he had received for his alleged hearing loss, but did not discuss any factors of employment which could have caused his alleged hearing loss.

In a June 8, 2015 status report, Dr. Cerenko diagnosed right conductive hearing loss.

On June 24, 2015 OWCP again wrote to appellant and advised that the evidence was not sufficient to establish that he actually experienced employment factors which caused his alleged hearing loss. It requested that he submit responses to the attached questionnaire including identifying the work factors he believed contributed to his condition. Appellant did not respond.

By decision dated July 30, 2015, OWCP denied appellant's claim as he failed to establish fact of injury. Specifically, it found that he failed to identify the work factors that he believed caused or aggravated his condition.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>3</sup> 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

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<sup>3</sup> 5 U.S.C. § 8101 *et seq.*

employment injury.<sup>4</sup> 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.<sup>5</sup>

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.<sup>6</sup>

### ANALYSIS

Appellant must provide a factual statement identifying the employment factors alleged to have caused the employment injury before OWCP can review the medical evidence to determine whether an employment-related medical condition has been diagnosed. In this case, he did not offer any explanation on his claim form as to how he sustained his alleged hearing loss. Appellant simply stated that his right hearing loss was employment related. There is no explanation as to the type of noise, decibel level, or hours of exposure. There is no discussion of the duties of appellant's job or how his federal employment placed him in a situation wherein he was exposed to noise. There are no statements from appellant, his supervisor or any colleagues with regard to noise exposure. The Board therefore finds that appellant has failed to meet his burden of proof. Appellant did not respond to OWCP's May 15 and June 24, 2015 development letters and did not provide OWCP with the factual evidence requested. The Board finds that, in the instant case, the record lacks evidence to establish the factual element of his claim.<sup>7</sup>

An award of compensation may not be based on surmise, conjecture, or speculation.<sup>8</sup> Since appellant failed to establish the first component of fact of injury, it is not necessary to discuss whether he submitted medical evidence sufficient to establish that a medical condition existed and whether this condition was causally related his employment factors. However, the Board notes that there is no medical evidence in the record explaining how appellant's right hearing loss was related to his federal employment.

On appeal appellant argues that the medical evidence establishes that his hearing loss is employment related as he successfully passed previous medical examinations beginning in 2002

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

<sup>5</sup> *S.P.*, 59 ECAB 184 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

<sup>6</sup> *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).

<sup>7</sup> *L.M.*, Docket No. 14-0805 (July 21, 2014).

<sup>8</sup> *L.D.*, Docket No. 09-1503 (issued April 15, 2010); *D.I.*, 59 ECAB 158 (2007); *Daniel O. Vasquez*, 57 ECAB 559 (2006).

until failing the hearing test on October 23, 2014. The Board's review is limited to evidence in the record at the time of OWCP's decision.<sup>9</sup>

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 not met his burden of proof to establish right ear hearing loss causally related to factors of his federal employment.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated July 30, 2015 is affirmed.

Issued: December 23, 2015  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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

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<sup>9</sup> See *supra* note 2.