

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

R.M., Appellant)	
)	
and)	Docket No. 15-62
)	Issued: June 11, 2015
DEPARTMENT OF HOMELAND SECURITY,)	
IMMIGRATION & CUSTOMS)	
ENFORCEMENT, San Antonio, TX, Employer)	
)	

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 October 14, 2014 appellant filed a timely appeal from a June 23, 2014¹ merit decision of the Office of Workers' Compensation Programs (OWCP).² Pursuant to the Federal Employees' Compensation Act³ (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 binaural hearing loss or tinnitus causally related to his federal employment.

¹ Appellant stated that he was appealing an October 2, 2014 OWCP decision. The Board notes, however, that the record does not contain an adverse final decision issued by OWCP on that date.

² Appellant filed a timely request for oral argument. By order dated April 23, 2015, the Board, after exercising its discretion, denied his request on the grounds that his arguments could be adequately addressed in a decision based on a review of the case record. *Order Denying Request for Oral Argument*, Docket No. 15-62 (issued April 23, 2015).

³ 5 U.S.C. § 8101 *et seq.*

On appeal, appellant contends that he has hearing loss with severe ringing in his ears and that his tinnitus was worse than most due to his history of firearms usage. He further contends that the decision not to rate tinnitus by itself should be determined on an individual basis as his tinnitus is worse than the same condition in *Juan A. Trevino*.⁴

FACTUAL HISTORY

On April 17, 2012 appellant, then a 54-year-old supervisory special agent, filed an occupational disease claim alleging that on April 5, 2012 he first became aware of his hearing loss and first realized that his condition was caused or aggravated by his federal employment. In an April 17, 2012 narrative statement, he contended that his hearing had been declining for the past several years and it caused difficulties with his professional and personal life.

Appellant provided a history of his noise exposure while working approximately 31 years at the employing establishment. In 1981, he started work as a border patrol agent and claimed that proper ear protection was not available when he had to qualify at a shooting range every quarter. In 1983, appellant became a customs inspector and was exposed to loud noise from tractor trailers, buses, other vehicles at a port of entry, and airplanes. He worked as a firearms instructor from 1985 through April 2005 and he was responsible for qualifying approximately 85 customs inspectors every quarter at a pistol range. In January 1987, appellant became a customs criminal investigator and continued to qualify agents using various firearms on a quarterly basis. He did not stop work following the filing of his occupational disease claim.

Appellant submitted an April 6, 2012 annual audiogram.

By letter dated April 27, 2012, OWCP informed appellant that the evidence submitted was insufficient to establish his claim. It requested that he submit factual evidence in support of his claim. OWCP also requested that the employing establishment respond to appellant's allegations and provide a copy of all medical examinations pertaining to his hearing or ear problems, including any preemployment examinations and audiograms.

In a May 3, 2012 statement, appellant reiterated a history of his employment at the employing establishment and noted his military service from May 30, 1975 to May 30, 1980. He related that he was still exposed to hazardous noise at work and that his hearing loss had worsened. Appellant had no hobbies which exposed him to loud noise.

In a statement also dated May 3, 2012, Scott Torpey, an assistant special agent in charge, concurred with appellant's statements and allegations. He related that appellant was exposed to loud noise from the discharge of various calibers of firearms at close proximity approximately five hours a day, every three months during firearms qualifications. Appellant was given government-issued earmuffs. Mr. Torpey related that appellant would continue to be exposed to loud noise from various weapons during firearms qualification every quarter.

In an April 22, 2012 medical report, Dr. Fred Rosenberg, an osteopath, advised that an audiogram showed abnormal baseline hearing. He further advised that appellant's performance was outside the normal range. Dr. Rosenberg stated that no prior audiograms were available for

⁴ 54 ECAB 358 (2003) (the Board found that, as appellant did not have a ratable hearing loss, he was not entitled to a schedule award even though he had a percentage of hearing loss due to tinnitus).

comparison. He recommended a complete evaluation of appellant's hearing by an otolaryngologist or audiologist.

By letter dated September 20, 2012, OWCP referred appellant, together with a statement of accepted facts and the medical record, to Dr. William C. Smith, a Board-certified otolaryngologist, for a second opinion evaluation. In an October 8, 2012 report, Dr. Smith noted that he evaluated appellant. Regarding appellant's history, he stated that he did not have any data about appellant's hearing at the beginning of his significant noise exposure in federal civilian employment. An October 8, 2012 audiogram, with an attached calibration certificate, showed hearing levels at 500, 1,000, 2,000, and 3,000 hertz (Hz) respectively of 100, 105, 95, and 100 decibels (dB) on the right and 90, 90, 90, and 95 dB on the left. Dr. Smith reported that the current audiometric findings were unreliable. During his audiological evaluation, appellant had to be reinstructed several times due to inconsistent responses. He was asked repeatedly to respond by pressing a button when he heard the beeps, even if they were very soft, barely there, or sounded like they were very far away. Speech reception testing was performed and appellant responded at a level well below the level at which he claimed to hear the tones. Dr. Smith stated that correctly identifying speech was more complicated than responding to pure tones, and, thus, he should not have been able to respond to speech at a lower level. Other testing also revealed that hearing was better than reported. Dr. Smith opined that the described workplace exposure was sufficient as to intensity and duration to have caused sensorineural hearing loss. He set forth findings on examination and stated that he could not make a diagnosis due to appellant's inconsistent responses. Dr. Smith found no symptoms or signs related to either an acoustic neuroma or Ménière's disease. He advised that it was at least more likely than not that appellant had normal or near normal hearing based on his speech reception threshold and word reception score. Dr. Smith determined that he had reached maximum medical improvement on the date of his examination. He recommended reevaluation in one month to see if more accurate thresholds could be obtained. Dr. Smith stated that, if appellant's evaluation still had poor reliability, it may be necessary to obtain auditory brainstem response testing with a latency intensity search and otoacoustic emissions testing.

On October 18, 2012 OWCP's medical adviser reviewed Dr. Smith's October 8, 2012 findings. He stated that Dr. Smith's recommendation for auditory brainstem response testing should be approved.

On February 6, 2013 appellant underwent auditory testing performed by an audiologist, who found the test data difficult to analyze because appellant had caffeine approximately one to two hours before testing. The audiologist noted that caffeine could significantly decrease the latency of the Wave I, III, V, and I-V interpeak interval.

On March 8, 2013 Dr. Henry Mobley, a Board-certified internist serving as an OWCP medical adviser, reviewed the audiologist's February 6, 2013 report. He stated that this report did not meet OWCP requirements for a probative determination. Dr. Mobley noted that its regulations dictated that a schedule award for hearing loss be determined by a valid pure tone audiometry (PTA) and an evaluation by a Board-certified otologist. He noted that it was a claimant's responsibility to present a valid physician's evaluation and audiometry to OWCP. Dr. Mobley concluded that a probative schedule award could not be determined by an evaluation that was of questionable validity. He recommended that appellant be asked to submit the necessary information for a probative determination.

By letter dated April 29, 2013, OWCP referred appellant, together with a statement of accepted facts and the medical record, to Dr. John D. Edwards, a Board-certified otolaryngologist, for another second opinion evaluation. In a May 21, 2013 report, Dr. Edwards noted that he evaluated appellant to determine whether he had hearing loss secondary to loud noise exposure during his federal employment. Regarding appellant's history, he stated that he did not have any data about appellant's hearing at the beginning of his significant noise exposure in federal civilian employment. A May 21, 2013 audiogram, with an attached calibration certificate, showed hearing levels at 500, 1,000, 2,000, and 3,000 Hz, respectively of 10, 15, 15, and 20 dB on the right and 10, 15, 15, and 15 dB on the left. Dr. Edwards stated that current audiometric findings revealed a pure tone average of 14 dB on the left and 15 dB on the right. Speech reception threshold was 20 dB on the left and 15 dB on the right. The word recognition score was 100 percent. There was type A tympanogram with present ipsi lateral and contralateral reflexes bilaterally. Dr. Edwards advised that the audiogram was within normal limits. Appellant was above 20 dB at all frequencies on both sides. Dr. Edwards opined that he had workplace exposure for hearing loss, but he did not have any sensorineural hearing loss based on current audiometric findings. He set forth findings on examination and found no medical conditions, such as acoustic neuroma or Ménière's disease. Dr. Edwards diagnosed bilateral tinnitus and normal hearing. He noted that appellant denied dizziness or vertigo. Hearing aids were not recommended.

On August 22, 2013 Dr. Mobley reviewed the statement of accepted facts and Dr. Edwards' May 21, 2013 findings. He advised that the date of maximum medical improvement was May 21, 2013, the date of Dr. Edwards' examination. Dr. Mobley noted that the May 21, 2013 PTA was used because it was the most recent, it met all OWCP standards, and it was an integral part of the evaluation of the consulting otologist. Based on the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* and Dr. Edwards's reports, he determined that the calculated binaural hearing loss was zero percent. Dr. Mobley concluded that there was no measurable hearing loss.

In a September 17, 2013 decision, OWCP denied appellant's hearing loss claim. It found that Dr. Edwards' opinion constituted the weight of the evidence and established that he did not have hearing loss or tinnitus due to his accepted employment-related noise exposure.

On September 24, 2013 appellant requested an oral hearing before an OWCP hearing representative.

In a June 23, 2014 decision, the hearing representative affirmed the September 17, 2013 decision.

LEGAL PRECEDENT

An employee seeking compensation under FECA⁵ has the burden of establishing the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence,⁶ including that he or she is an employee within the meaning of FECA and that he or

⁵ *Id.*

⁶ *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 57 (1968).

she filed his or her claim within the applicable time limitation.⁷ The employee must also establish that he or she sustained an injury in the performance of duty as alleged and that his or her disability for work, if any, was causally related to the employment injury.⁸

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.⁹

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical evidence. 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.¹⁰

OWCP procedures set forth requirements for the medical evidence used in evaluating hearing loss. These include that the employee undergo both audiometric and otologic examination; that the audiometric testing be performed by an appropriately certified audiologist; that the otologic examination be performed by an otolaryngologist certified or eligible for certification by the American Academy of Otolaryngology and that the audiometric and otologic examination be performed by different individuals as a method of evaluating the reliability of the findings. Further, all audiological equipment authorized for testing meet the calibration protocol contained in the accreditation manual of the American Speech and Hearing Association; that the audiometric test results include both bone conduction and pure tone air conduction thresholds, speech reception thresholds and monaural discrimination scores. The otolaryngologist's report is to include: date and hour of examination, date and hour of employee's last exposure to loud noise, a rationalized medical opinion regarding the relation of the hearing loss to the employment-related noise exposure and a statement of the reliability of the tests.¹¹ The physician should be instructed to conduct additional tests or retests in those cases where the initial tests were inadequate or there is reason to believe that the claimant is malingering.¹²

⁷ See *M.H.*, 59 ECAB 461 (2008); *Emiliana de Guzman (Mother of Elpedio Mercado)*, 4 ECAB 357, 359 (1951); see 5 U.S.C. § 8101(1).

⁸ *R.C.*, 59 ECAB 427 (2008); *Kathryn A. O'Donnell*, 7 ECAB 227, 231 (1954); see 5 U.S.C. § 8122.

⁹ *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

¹⁰ See *I.J.*, 59 ECAB 408 (2008); see also *Victor J. Woodhams*, 41 ECAB 345 (1989).

¹¹ *Id.*

¹² *Luis M. Villanueva*, 54 ECAB 666 (2003). See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.8(a) (September 1995).

ANALYSIS

The record supports that appellant was exposed to occupational noise as a supervisory special agent. The Board finds, however, that the medical evidence does not establish that his hearing loss is causally related to the accepted employment-related noise exposure.

The Board finds that the weight of medical opinion is represented by Dr. Edwards, OWCP second opinion specialist. In his May 21, 2013 report, Dr. Edwards advised that the audiogram of the same date showed no evidence of sensorineural hearing loss. He found that appellant had normal hearing. Dr. Edwards stated that, while he had workplace exposure for hearing loss, he did not have any sensorineural hearing loss based on his current audiometric findings. He explained that the audiogram was normal and that appellant was above 20 dB at all frequencies on both sides. The Board finds that Dr. Edwards' opinion establishes that appellant did not meet his burden of proof to establish that he sustained hearing loss due to exposure to noise in the workplace.¹³ Further, although Dr. Edwards diagnosed bilateral tinnitus, he did not opine that this condition was caused by appellant's work-related noise exposure.

The April 6, 2012 audiogram indicated that it was obtained by a registered nurse. This audiogram is insufficient to establish appellant's burden of proof as it does not comply with the requirements set forth under OWCP. It lacks speech testing and bone conduction scores and it was not prepared or certified as accurate by a physician as defined by FECA. The Board notes that a registered nurse is not included among the health care professionals recognized as physicians under FECA.¹⁴ The audiogram was not accompanied by a physician's opinion addressing how appellant's employment-related noise exposure caused or aggravated any hearing loss. It is appellant's burden to submit a properly prepared and certified audiogram to OWCP.¹⁵ OWCP was not required to rely on this evidence in determining the degree of appellant's hearing loss as it failed to constitute competent medical evidence.¹⁶

Dr. Rosenberg's April 22, 2012 report found that appellant had abnormal baseline hearing. His report, however, offered no opinion regarding the cause of his hearing loss. Medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.¹⁷

¹³ See *R.J.*, Docket No. 11-1644 (issued February 14, 2012); *J.L.*, Docket No. 07-1740 (issued December 20, 2007).

¹⁴ See *Vincent Holmes*, 53 ECAB 468 (2002). See also Section 8101(2) of FECA which provides that physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. 5 U.S.C. § 8101(2).

¹⁵ See *R.B.*, Docket No. 10-1512 (issued March 24, 2011); *Robert E. Cullison*, 55 ECAB 570 (2004); *Vincent Holmes*, *supra* note 14 (OWCP does not have to review audiograms not certified by a physician and it is the claimant's burden to submit a properly certified audiogram for review if he objects to the audiogram selected by OWCP for determining the degree of hearing loss).

¹⁶ *Id.* See also *H.M.*, Docket No. 13-1061 (issued July 29, 2013); *M.T.*, Docket No. 12-1294 (issued December 6, 2012).

¹⁷ *S.E.*, Docket No. 08-2214 (issued May 6, 2009); *A.D.*, 58 ECAB 149 (2006); *Jaja K. Asaramo*, 55 ECAB 200 (2004); *Michael E. Smith*, 50 ECAB 313 (1999).

On appeal, appellant contended that he had hearing loss with severe ringing in his ears and that his tinnitus was worse than most due to his history of firearms usage. He further contended that the decision not to rate tinnitus by itself should be determined on an individual basis as his tinnitus was worse than the same condition in *Juan A. Trevino*.¹⁸ Appellant did not submit a rationalized medical opinion establishing a causal relationship between his accepted employment-related noise exposure and his hearing loss. Therefore, he has failed to meet his burden of proof.

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 binaural hearing loss or tinnitus causally related to his federal employment.

ORDER

IT IS HEREBY ORDERED THAT the June 23, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 11, 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

¹⁸ *Supra* note 4.