

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

R.V., Appellant

and

**DEPARTMENT OF THE NAVY, NAVAL SEA
SYSTEMS COMMAND, Panama City, FL,
Employer**

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**Docket No. 15-0159
Issued: October 7, 2015**

Appearances:
Robert E. O'Dell, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 23, 2014 appellant, through his representative, filed a timely appeal from a May 1, 2014 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.²

¹ 5 U.S.C. § 8101 *et seq.*

² Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from May 1, 2014, the date of OWCP's last merit decision, was October 28, 2014. Since using October 31, 2014, the date the appeal was received by the Clerk of the Appellate Boards would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is October 23, 2014, rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f) (1).

ISSUE

The issue is whether appellant met his burden of proof to establish hearing loss in the performance of duty.

FACTUAL HISTORY

On January 18, 2013 appellant, then a 62-year-old engineering technician, filed an occupational disease claim (Form CA-2) alleging that he developed bilateral hearing loss as a result of noise exposure from his federal employment. He reported that he worked in high level noise environments and often had no hearing protection. Appellant stated that his 2012 audiogram revealed severe hearing loss when compared to his baseline testing done in 2006.

Appellant reported that he began working at Ingall's Shipbuilding from 1969 to 1980 where hearing protection was not provided. He began his federal employment with the U.S. Navy Supervisor of Shipbuilding in 1984. From 1984 to 2003, hearing protection was not readily available. Appellant stated that exposure to shipbuilding noise was constant and included chipping, grinding, hammer blows against steel, fan motors, horns, alarms, and other noises. He reported that he was exposed to hazardous levels of noise for four to eight hours a day, five days a week.

Appellant reported that he had hunted using a .22 caliber rifle from childhood until about 20 years ago. Approximately three years ago, he began target shooting recreationally, approximately 10 to 20 rounds every couple of months. Appellant stated that he always wore ear plugs as well as industrial hearing protection ear muffs when shooting. He noted that he first began to experience hearing problems in 2000 when he was having trouble hearing conversations and was experiencing buzzing in his ears.

In support of his claim, appellant submitted a November 14, 2012 audiogram which revealed the following decibel (dB) losses at 500, 1,000, 2,000, and 3,000 hertz (Hz): 10, 15, 25, and 55 for the right ear and 20, 25, 55, and 65 for the left ear. His November 28, 2006 reference audiogram revealed the following dB losses at 500, 1,000, 2,000, and 3,000 Hz: 10, 10, 15, and 50 for the right ear and 20, 10, 35, and 65 for the left ear. In a November 15, 2012 audiology report, Alan Gregg Moore, an occupational audiologist, diagnosed sensorineural bilateral hearing loss likely due to a combination of years of occupational noise exposure, inadequately protected exposure to gunfire, and presbycusis.

In an unsigned employing establishment worksheet, appellant's supervisor reported that appellant's federal employment spanned from 1984 to the present and until recently, hearing protection was not always required or provided. He stated that appellant continued to be exposed to hazardous noise daily in his employment.

By letter dated February 4, 2013, OWCP requested additional factual information from both appellant and the employing establishment. Appellant was requested to provide information regarding his employment history and all nonoccupational exposure to noise, as well as when he first related his hearing loss to conditions of employment. OWCP also requested that he provide medical documentation pertaining to any prior treatment he received for ear or

hearing problems. It requested that the employing establishment provide noise survey reports for each site where appellant worked, the sources and period of noise exposure for each location, and copies of all medical examinations pertaining to hearing or ear problems.

In a February 25, 2013 narrative statement, appellant responded to OWCP questionnaire and provided details pertaining to the types of noise to which he was exposed while working at shipyards from 1969 to the present, noting the following dates of employment: 1969 to 1980 Ingall's Shipbuilding; 1980 to 1983 Hudson Shipbuilding; 1984 to present U.S. Navy Supervisor of Shipbuilding. He reported no prior workers' compensation claims for hearing loss or an ear condition.

In support of his claim, appellant submitted audiograms and hearing conservation data dated September 16, 1987 to November 14, 2012. He argued that his progressive loss of hearing was first discovered in his November 20, 2002 audiogram when compared to the September 16, 1987 reference baseline audiogram. Appellant stated that his November 28, 2006 audiogram became his baseline audiogram for testing done on August 11, 2011 and November 14, 2012 which revealed a progressive threshold shift in both ears. In a November 28, 2006 audiology report, Christon J. Duhon, an audiologist, diagnosed tinnitus and noise-induced hearing loss, noting that appellant was exposed to high levels of environmental noise. He also noted a noise exposure history since 17 years of age, most of which was from working in naval shipyards.

In a February 4, 2013 statement, Scott D. Buettner, appellant's supervisor stated that appellant worked at the U.S. Navy Supervisor of Shipbuilding from 1984 to the present and that his personal work statement and history supported his claim. He stated that appellant was exposed to noise from diesel engines, gas turbines, various machinery, hammers, peening of steel, and other high-frequency noise which included 400 Hz electronic equipment. Dr. Buettner stated that the only noise survey available was dated June 18, 2012. A copy of the June 18, 2012 industrial hygiene survey report was provided.

In a March 22, 2013 statement of accepted facts (SOAF), OWCP provided a summary of appellant's nonfederal employment, noting that he worked at Ingall's Shipbuilding from 1969 to 1979, and Hudson Shipbuilding from 1980 to 1983, and that his federal employment with the U.S. Navy spanned from 1984 to the present. The SOAF described the sources of federal noise exposure, which included 400 Hz electronic equipment, and noted that noise source dB levels ranged from 88 and higher dB. Appellant's hobbies included occasional hunting, from childhood until about 20 years ago, using a .22 caliber rifle, and target shooting with ear plugs and industrial ear muff protection.

OWCP referred appellant, the SOAF, and the case record to Dr. John S. Keebler, a Board-certified otolaryngologist, for a second opinion evaluation on April 16, 2013. Audiometric testing performed that same date revealed the following dB losses at 500, 1,000, 2,000, and 3,000 Hz: 15, 15, 30, and 55 for the right ear and 15, 15, 50, and 70 for the left ear. Dr. Keebler reported that appellant hunted in past years and would shoot guns occasionally. When comparing the 1987 audiogram to the 2013 audiogram, he reported that appellant's present audiometric findings were worse bilaterally. Dr. Keebler diagnosed bilateral sensorineural hearing loss which he opined was not due to employment-related noise exposure. He stated that appellant's sensorineural hearing loss was in excess of what would normally be predicated on the

basis of presbycusis in the left ear only. When asked if the workplace noise exposure was sufficient as to intensity and duration to have caused the loss in question, Dr. Keebler replied that it could have been but because only the left ear had changed enough for noise-induced hearing loss, the hearing loss was most likely caused by gun blast noise rather than industrial noise since industrial noise would harm both ears equally.

On May 8, 2013 OWCP routed Dr. Keebler's report to its district medical adviser (DMA) for an opinion pertaining to a schedule award. The DMA stated that Dr. Keebler opined that appellant's sensorineural hearing loss was not due to federal noise exposure. Dr. Keebler noted that since 1987 hearing loss greater than presbycusis was present in the left ear only and that this unilateral change was likely due to shooting guns rather than industrial noise exposure which would have injured both ears. The DMA noted that in view of Dr. Keebler's findings, a schedule award determination was not appropriate in this case.

OWCP denied appellant's claim by decision dated May 10, 2013 as the medical evidence did not support that his hearing loss was causally related to workplace noise exposure.

On May 30, 2013 appellant, through counsel, requested an oral hearing before the Branch of Hearings and Review.

In a March 15, 2014 report, Marianne Towell, an audiologist, reported that appellant's 1987 audiogram revealed bilateral hearing loss, worse in left ear, but not classically asymmetrical according to FDA standards. She stated that hearing thresholds had consistently worsened in the left and right ear from 1987 to 2013. Ms. Towell opined that a substantial portion of appellant's hearing loss was due to the shipyard noise exposure from 1984 to the present, especially given that his supervisor stated that appellant was exposed up to 100 dB noise exposure levels. She disagreed with Dr. Keebler's findings and noted that from 1987 to 2013, appellant's right ear had worsened greater than the left. Ms. Towell further stated that, while a right-handed shooter should have greater hearing decrease in the left ear, this is not substantiated by hearing decreases in test results from 1987 to 2013. She stated that there were multiple reasons which could cause one ear to be worse than the other in an industrial noise-exposed worker. Specifically, Ms. Towell provided examples stating that orientation to noise source can cause greater hearing damage to one ear than the other where, because of the head shadow effect, equal damage can only be expected to occur if the noise source is directly in front of or directly behind the worker. She further stated that ear canal size, improper use of ear protection, and excessive ear hair and ear wax could all contribute to asymmetrical hearing. An audiometric record of appellant's left ear and right ear was provided comparing numerous audiograms taken from September 19, 1987 to June 13, 2013.

At the March 17, 2014 hearing, counsel for appellant argued that his hearing loss was caused by his federal employment noise exposure. Appellant testified that he stopped hunting approximately 20 years ago. He stated that he would occasionally go to target practice, used a .40 caliber gun, and utilized hearing protection. Appellant further stated that he would shoot straight ahead with the pistol held by two hands in the center of the body mass. The record was held open for 30 days.

In an April 1, 2014 memorandum, counsel argued that Dr. Keebler incorrectly stated that the worsening of appellant's hearing since 1987 was more profound in the left ear as Ms. Towell stated that it was actually more profound in the right ear. He further argued that FECA did not allow for apportionment of causation and that a minor component of hearing loss could not override appellant's workplace-induced hearing loss.

By decision dated May 1, 2014, OWCP affirmed the May 10, 2013 decision finding that appellant failed to establish that his hearing loss was causally related to employment-related noise exposure. It noted that the weight of the medical evidence rested with Dr. Keebler and Ms. Towell's opinion was of no probative value as audiologists were not considered physicians under FECA.³

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 or specific condition for which compensation is claimed is causally related to the employment injury.⁴ These are the essential elements of every compensation claim regardless of whether the claim is predicated on a traumatic injury or occupational disease.⁵

Appellant has the burden of establishing by weight of the reliable, probative, and substantial evidence that his hearing loss condition was causally related to noise exposure in his federal employment.⁶ Neither the condition becoming apparent during a period of employment, nor the belief of the employee that the hearing loss was causally related to noise exposure in federal employment, is sufficient to establish causal relationship.⁷

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;⁸ (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition;⁹ and (3) medical evidence establishing the employment factors identified by the claimant were the proximate cause of the condition for

³ 5 U.S.C. § 8102(2).

⁴ *Gary J. Watling*, 52 ECAB 278 (2001); *Elaine Pendleton*, 40 ECAB 1143, 1154 (1989).

⁵ *Michael E. Smith*, 50 ECAB 313 (1999).

⁶ *Stanley K. Takahaski*, 35 ECAB 1065 (1984).

⁷ *See John W. Butler*, 39 ECAB 852, 858 (1988).

⁸ *Michael R. Shaffer*, 55 ECAB 386 (2004).

⁹ *Marlon Vera*, 54 ECAB 834 (2003); *Roger Williams*, 52 ECAB 468 (2001).

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.¹⁰

The medical evidence required to establish causal relationship generally is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable certainty and must be supported by medial rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.¹¹

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden to establish his or her claim, OWCP also has a responsibility in the development of the evidence.¹²

ANALYSIS

It is not disputed that appellant was exposed to hazardous employment-related noise at the U.S. Navy Supervisor of Shipbuilding. The issue is whether he established employment-related hearing loss due to noise exposure during his federal employment. The Board finds that this case is not in posture for decision.

OWCP properly referred appellant to Dr. Keebler, a Board-certified otolaryngologist, for a second opinion evaluation.¹³ In his April 16, 2013 report, Dr. Keebler stated that, from 1987 to the present, appellant's current audiometric findings were worse bilaterally. He diagnosed bilateral sensorineural hearing loss which he opined was not due to employment-related noise exposure. Dr. Keebler stated that appellant's sensorineural hearing loss was in excess of what would normally be predicated on the basis of presbycusis in the left ear only. When asked if the workplace noise exposure was sufficient as to intensity and duration to have caused the loss in question, he replied that it could have been but because only the left ear had changed enough for noise-induced hearing loss, the hearing loss was most likely caused by gun blast noise rather than industrial noise since industrial noise would harm both ears equally.

The Board finds that the medical evidence has not been properly developed. Dr. Keebler's opinion is speculative and equivocal in nature as he failed to provide a rationalized opinion establishing that occupational noise exposure had no effect on appellant's hearing.¹⁴ The Board notes that there is no requirement that the federal employment be the only cause of appellant's hearing loss. If work-related exposures caused, aggravated, or accelerated

¹⁰ *Beverly A. Spencer*, 55 ECAB 501 (2004).

¹¹ *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 465 (2005).

¹² *See Claudia A. Dixon*, 47 ECAB 168 (1995).

¹³ *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3(b) (January 2013).

¹⁴ *M.H.*, Docket No. 12-733 (issued September 5, 2012); *D.F.*, Docket No. 09-1080 (issued December 7, 2009).

appellant's condition, he is entitled to compensation.¹⁵ The Board has consistently held that a medical opinion not fortified by rationale is of limited probative value.¹⁶

It is well established that proceedings under FECA are not adversarial in nature and while the claimant has the burden to establish entitlement to compensation, OWCP shares the responsibility in the development of the evidence.¹⁷ When OWCP 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.¹⁸ Because it referred appellant to a second opinion physician, it has the responsibility to obtain a report that will resolve the issue of whether his hearing loss was caused by his federal employment.¹⁹ As OWCP referred appellant to Dr. Keebler, it has the responsibility to obtain a report that will resolve the issue of whether appellant's hearing loss was caused or contributed to by his federal employment.²⁰

Following this and any other further development deemed necessary, OWCP shall issue an appropriate merit decision on appellant's occupational disease claim.

CONCLUSION

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

¹⁵ See *Beth P. Chaput*, 37 ECAB 158, 161 (1985); *S.S.*, Docket No. 08-2386 (issued June 5, 2008).

¹⁶ *F.H.*, Docket No. 14-0268 (issued July 2, 2014); *A.D.*, 58 ECAB 149 (2006).

¹⁷ *P.K.*, Docket No. 08-2551 (issued June 2, 2009).

¹⁸ *Alva L. Brothers, Jr.*, 32 ECAB 812 (1981).

¹⁹ See *Ramon K. Farrin, Jr.*, 39 ECAB 736 (1988).

²⁰ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the May 1, 2014 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further proceedings consistent with this opinion.

Issued: October 7, 2015
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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