United States Department of Labor
Employees' Compensation Appeals Board

M.E., Appellant	)	
and	)	**Docket No. 16-0770**
	)	**Issued: July 26, 2016**
TENNESSEE VALLEY AUTHORITY, PARADISE FOSSIL PLANT, Drakesboro, KY, Employer	)	

Appearances:
Ronald K. Bruce, Esq., for the appellant[1]
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 March 7, 2016 appellant, through counsel, filed a timely appeal from a February 2, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant met his burden of proof to establish an occupational disease in the performance of duty.

FACTUAL HISTORY

This case has previously been before the Board.[3] By decision dated October 22, 2014, the Board found that OWCP failed to properly develop appellant's hearing loss claim as it had not obtained the employing establishment audiograms from 1972 and 1982. The Board further found that the report of second opinion examiner, Dr. Andrew Mickler, a Board-certified otolaryngologist, was not sufficiently rationalized. The facts and circumstances of the case as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are set forth below.

By letter dated November 26, 2014, OWCP requested that the employing establishment provide copies of audiograms that were conducted in the year 1972 and 1982.

The employing establishment forwarded additional records. A January 14, 1972 audiogram tested decibel losses at 500, 1,000, 2,000, and 3,000 hertz and recorded losses of 0, 10, 10, and 0 in the left ear. Testing at the same levels for the right ear recorded decibel losses of 0, 5, 10, and 5. A January 6, 1982 audiogram tested decibel losses at 500, 1,000, 2,000, and 3,000 hertz and recorded losses of 10, 0, 5, and 20 in the left ear. Testing at the same levels for the right ear recorded decibel losses of 15, 0, 0, and 5.

On December 22, 2014 appellant was again referred to Dr. Mickler for a second opinion examination. In a January 19, 2015 report, Dr. Mickler advised that according to the statement of accepted facts (SOAF) appellant was exposed to 86 to 90 decibels of noise for six to seven hours a day for five days a week. He noted that the SOAF indicated that some days he worked in areas with no exposure for one to two hours a day. Dr. Mickler explained that a noise notch is seen in cases of noise-induced hearing loss but the audiograms of record did not show a noise notch. He calculated that appellant's estimated exposure was 76.5 decibels based on the daily exposure to noise. Dr. Mickler opined that because appellant was not exposed to noise in excess of OSHA's 90 decibel limit during his federal employment, his hearing loss was not caused in part or in full by his federal employment. An accompanying January 19, 2015 audiogram tested decibel losses at 500, 1,000, 2,000, and 3,000 hertz and recorded losses of 15, 15, 30, and 60 in the left ear. Testing at the same levels for the right ear recorded decibel losses of 25, 20, 30 and 65.

By decision dated March 17, 2015, OWCP denied appellant's claim because the medical evidence of record did not establish that his hearing loss was causally related to his federal employment.

Appellant, through counsel, requested an oral telephone hearing. Prior to the hearing, appellant provided evidence from Dr. William Logan, a Board-certified otolaryngologist. In a

[3] Docket No. 14-1249 (issued October 22, 2014).

November 19, 2014 report, Dr. Logan advised that appellant complained of hearing loss and had a long history of noise exposure as a pipefitter. He diagnosed binaural sensorineural hearing loss and tinnitus. On March 2, 2015 Dr. Logan advised that appellant was employed by the employing establishment for two years after the January 6, 1982 audiogram was performed. He contended that because there were no subsequent hearing evaluations at or near the time appellant ceased federal employment, it could not be said with certainty that the occupational noise exposure during those two years did not contribute to his hearing loss. Dr. Logan explained that hearing loss due to noise exposure was cumulative. He opined that it was likely that appellant's noise exposure with the employing establishment contributed to appellant's hearing loss.

At the hearing held on November 18, 2015, counsel argued that Dr. Mickler's report was not sufficiently rationalized. He argued that Dr. Logan opined that appellant's federal employment contributed to his hearing loss and that, if any part of appellant's hearing loss was caused by his federal employment, then his claim is compensable.

In a December 23, 2015 statement, the employing establishment argued that there was no evidence that appellant was exposed to noise in excess of the permissible exposure limits set by OSHA. It argued that OWCP's prior decision should be affirmed.

In a January 5, 2016 statement, counsel disagreed with the employing establishment's assertion and noted that the employing establishment had indicated that appellant was exposed to 86 to 96 decibels in time weighted studies. He also highlighted that the Board noted in its October 22, 2014 decision that OWCP procedure manual specifies that a claimant is not required to show exposure to injurious noise in excess of 85 decibels as a condition to approval of the claim.

By decision dated February 2, 2016, the OWCP hearing representative affirmed the denial of appellant's occupational disease claim finding that there was no rationalized medical evidence of record to support that appellant's hearing loss was causally related to factors of his federal employment.

Counsel argues on appeal that medical evidence from Drs. William Logan and Thomas Logan[4] established that appellant's hearing loss was causally related to his federal employment.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of proof to establish 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 timely filed within the applicable time limitation, that an injury was sustained in the performance of duty as alleged, and that any disabilities and/or specific conditions for which compensation is claimed are causally related to

[4] In the prior appeal, *supra* note 2, the Board noted appellant's submission of a November 28, 2012 report from Dr. Thomas Logan, a Board-certified otolaryngologist. Dr. Thomas Logan noted appellant's history significant noise exposure in his employment and diagnosed bilateral mild sloping to severe sensorineural hearing loss.

the employment injury.[5] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[6]

Whether an employee actually sustained an injury in the performance of duty begins with an analysis of whether fact of injury has been established. To establish an occupational disease claim, 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.[7]

Causal relationship is a medical issue and the evidence generally required to establish causal relationship is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background, 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.[8] The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.[9]

ANALYSIS

The issue is whether appellant established that he sustained employment-related hearing loss due to noise exposure during his federal employment. The Board finds that this case is not in posture for a decision because the second opinion physician did not resolve the issue related to the cause of appellant's hearing loss.

On remand OWCP properly requested 1972 and 1982 audiograms from the employing establishment and referred appellant to Dr. Mickler for another second opinion evaluation.

In his January 19, 2015 report, Dr. Mickler advised that according to the SOAF, appellant was exposed to 86 to 90 decibels of noise for six to seven hours a day for five days a week. He explained that a noise notch is seen in cases of noise-induced hearing loss. However, the audiograms of record did not show a noise notch. Dr. Mickler calculated that appellant's estimated noise exposure was 76.5 decibels based upon the daily exposure to noise. He opined that because appellant was not exposed to noise levels in excess of OSHA's 90 decibel exposure limit during his federal employment, his hearing loss was not caused in part or in full by his federal employment. As previously noted in the October 22, 2014 decision, OWCP's procedure

[5] *Elaine Pendleton*, 40 ECAB 1143 (1989).

[6] *Victor J. Woodhams*, 41 ECAB 345 (1989).

[7] *R.H.*, 59 ECAB 382 (2008); *Ernest St. Pierre*, 51 ECAB 623 (2000).

[8] *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, *supra* note 5.

[9] *James Mack*, 43 ECAB 321 (1991).

manual states that hearing loss may result from decibel levels below 85 decibels if exposure is sufficiently prolonged.[10] Furthermore, OWCP does not require that the claimant show exposure to injurious noise in excess of 85 decibels as a condition to approval of the claim.[11] The Board finds that Dr. Mickler's report is also of limited probative value because his medical opinion is not adequately rationalized. Dr. Mickler explained that audiograms of record did not show a noise notch which is seen in cases of noise-induced hearing loss, but he fails to explain why the occupational noise exposure apparently had no effect on appellant's hearing.

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 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.[14] 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 or aggravated by his federal employment.[15]

The Board finds that this case is not in posture for a decision as Dr. Mickler did not adequately address the issue of causation. On remand, OWCP should refer appellant, together with an updated SOAF, including a statement of the dates of appellant's federal employment and the medical record, to an appropriate second opinion physician for an opinion on causal relationship.

CONCLUSION

The Board finds that this case is not in posture for a decision regarding whether appellant established that he sustained an employment-related hearing loss in the performance of duty.

[10] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.8(a) (September 1995). *See also C.S.*, Docket No. 10-2030 (issued June 9, 2011).

[11] *Id.*

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

[13] *Phillip L. Barnes*, 55 ECAB 426, 441 (2004).

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

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

ORDER

IT IS HEREBY ORDERED THAT the February 2, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development consistent with this decision.

Issued: July 26, 2016
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