

States Department of Labor
Employees' Compensation Appeals Board

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T.J., Appellant)	
)	
and)	Docket No. 16-0714
)	Issued: October 3, 2016
DEPARTMENT OF THE ARMY, U.S. ARMY)	
CORPS OF ENGINEERS, Vicksburg, MS,)	
Employer)	
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Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 29, 2016 appellant filed a timely appeal of a September 9, 2015 merit decision and an October 9, 2015 nonmerit 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

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish hearing loss causally related to his federal 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 OWCP received additional evidence following its October 9, 2015 decision. Since the Board's jurisdiction is limited to evidence that was before OWCP at the time it issued its final decision, the Board may not consider this evidence for the first time on appeal. See 20 C.F.R. § 501.2(c)(1); *J.T.*, 59 ECAB 293 (2008); *Rosemary A. Kayes*, 54 ECAB 373 (2003); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

FACTUAL HISTORY

On May 5, 2015 appellant, then a 55-year-old desk equipment foreman, filed an occupational disease claim (Form CA-2) alleging that he developed bilateral hearing loss as a result of working around different types of noisy equipment and tools at the employing establishment since 1978. He first became aware of his condition and realized that it resulted from his employment on April 30, 2015. Appellant included a detailed list and description of the job positions he had and the noise he was exposed to during his employment from 1978 to the present. He indicated that he did not have any preexisting hearing problems before he started work. Appellant reported that he still worked as the desk equipment foreman and wore double hearing protection when he was in the noisy areas. He believed his hearing loss was due to his federal employment because he had never worked anywhere except the employing establishment.

Appellant provided audiogram records from the employing establishment dated from August 7, 1978 to December 15, 2014. The records indicated that on August 7, 1978 appellant's hearing thresholds at 500, 1,000, 2,000, and 3,000 hertz (Hz) were 80, 70, 70, and 75 decibels for the right ear and 10, 10, 5, and 10 decibels for the left ear.

An April 30, 2015 audiogram by M. McCaskill, an audiologist, related that appellant's hearing thresholds at 500, 1,000, 2,000, and 3,000 Hz were 110, 120, 115, and 115 decibels for the right ear and 25, 25, 20, and 25 decibels for the left ear.

In a letter dated May 14, 2015, OWCP informed appellant that the evidence submitted was insufficient to establish his claim. It advised appellant to respond to the attached questionnaire and provide evidence to establish that he sustained hearing loss as a result of his employment. Appellant was afforded 30 days to submit this additional evidence.

OWCP sent a similar letter to the employing establishment and requested additional evidence in order to issue a decision regarding appellant's claim.

OWCP referred appellant's claim, along with the medical record and the statement of accepted facts (SOAF), to Dr. Bryan M. Clay, a Board-certified otolaryngologist, for a second opinion examination to determine whether appellant sustained employment-related hearing loss. Dr. Clay completed an outline for otologic evaluation (Form CA-1332) dated September 2, 2015 and provided audiometric test results. In the CA-1332 form, he noted that appellant had significant right ear hearing loss at the beginning of his employment in 1978. Dr. Clay reported that appellant worked in a noisy environment, but opined that there had not been much hearing loss in appellant's right or left ear in the sense that his right ear had severe hearing loss in 1978, such that he never had "useful" hearing on the right. He also noted that appellant's left ear hearing loss was not any worse through the baseline. On examination Dr. Clay observed clear and intact ear canals and drum mobility. He diagnosed right ear profound sensorineural hearing loss and normal left ear hearing. Dr. Clay reported that appellant had longstanding right ear hearing loss and checked a box indicating that appellant's hearing loss was "not due" to his civilian employment.

An audiogram performed on September 2, 2015 related hearing thresholds at 500, 1,000, 2,000, and 3,000 Hz were not ratable for the right ear, and were 10, 10, 15, and 20 decibels for the left ear.

In a decision dated September 9, 2015, OWCP denied appellant's claim finding the medical evidence failed to establish that his hearing loss was caused or aggravated by his employment.

On September 25, 2015 OWCP received appellant's request for reconsideration. Appellant stated that he had not worked anywhere else in his career except for at the employing establishment. He explained that he did not have any problems with his ears or hearing problems before he started working for the employing establishment in 1978. Appellant reported that his workstation was extremely noisy and that he worked in this area for 20 years. He believed that his employment affected his hearing.

By decision dated October 9, 2015, OWCP denied further merit review of appellant's case. It determined that no new evidence was submitted with appellant's reconsideration request.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence³ including that he or she sustained an injury in the performance of duty and that any specific condition or disability for work for which he or she claims compensation is causally related to that employment injury.⁴ In an occupational disease claim, appellant's burden requires submission of the following: (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.⁵

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.⁶ 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

³ *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

⁴ *M.M.*, Docket No. 08-1510 (issued November 25, 2010); *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁵ *R.H.*, 59 ECAB 382 (2008); *Ernest St. Pierre*, 51 ECAB 623 (2000).

⁶ *I.R.*, Docket No. 09-1229 (issued February 24, 2010); *D.I.*, 59 ECAB 158 (2007).

nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.⁷

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.⁸ 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.⁹

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.¹⁰

ANALYSIS -- ISSUE 1

Appellant alleges that he sustained bilateral hearing loss as a result of his exposure to noisy equipment and tools as a result of his federal employment. OWCP accepted that appellant was exposed to hazardous noise at the employing establishment, but denied appellant's claim finding that the medical evidence failed to establish that his hearing loss was caused or aggravated by his 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.

OWCP referred appellant to Dr. Clay for a second-opinion examination. Dr. Clay completed an outline for otologic evaluation (Form CA-1332) dated September 2, 2015 and provided audiometric test results. He noted that appellant had significant right hearing loss at the beginning of his employment in 1978 and explained that appellant did not have "useful" hearing in the right ear as of 1978. Dr. Clay reported that appellant worked in a noisy environment and indicated that his right ear was not any worse than baseline. He diagnosed right ear profound sensorineural hearing loss and normal left ear hearing. Dr. Clay checked a box which indicated that appellant's hearing loss was "not due" to his civilian employment and explained that his hearing loss "already existed in 1978."

The Board finds that Dr. Clay's report is of limited probative value because his medical opinion is not adequately rationalized. Dr. Clay acknowledged that appellant was exposed to a noisy work environment, but determined that his hearing loss was not related to his civilian employment because appellant had longstanding preexisting right ear hearing loss at the time he commenced employment in 1978. He did not, however, provide a full explanation of why appellant's occupational noise exposure apparently had no effect on his hearing.¹¹ OWCP's

⁷ *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 465 (2005).

⁸ *Stanley K. Takahaski*, 35 ECAB 1065 (1984).

⁹ *K.S.*, Docket No. 16-0035 (issued April 27, 2016).

¹⁰ *Phillip L. Barnes*, 55 ECAB 426, 441 (2004).

¹¹ *See M.E.*, Docket No. 16-0770 (issued July 26, 2016); *see also F.H.*, Docket No. 14-268 (issued July 2, 2014).

procedures provide that in cases involving a preexisting or underlying condition, a second-opinion specialist should be asked to provide a rationalized opinion as to whether the preexisting or underlying condition was aggravated by employment factors and, if so, whether the aggravation was temporary or permanent.¹² Dr. Clay's brief opinion on the issue of causal relationship lacks adequate medical rationale to support that appellant's hearing loss was not caused or contributed to by his employment.

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.¹³ 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.¹⁴ 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.¹⁵ 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.¹⁶

The Board finds that this case is not in posture for a decision as Dr. Clay did not adequately address the issue of causal relationship. On remand OWCP should refer appellant, together with an updated SOAF and the medical record, to Dr. Clay, if available and willing, or to another appropriate second-opinion physician for an opinion on causal relationship. Following any necessary further development, a *de novo* decision shall be issued.

CONCLUSION

The Board finds that this case is not in posture for a decision regarding whether appellant established an employment-related hearing loss in the performance of duty.¹⁷

¹² See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.9(e) (September 2010).

¹³ *Supra* note 10.

¹⁴ *Phillip L. Barnes*, 55 ECAB 426, 441 (2004).

¹⁵ *Alva L. Brothers, Jr.*, 32 ECAB 812 (1981).

¹⁶ See *Ramon K. Farrin, Jr.*, 39 ECAB 736 (1988).

¹⁷ Because of the disposition of the first issue, the second issue is moot.

ORDER

IT IS HEREBY ORDERED THAT the September 9, 2015 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development consistent with this decision.

Issued: October 3, 2016
Washington, DC

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

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

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