United States Department of Labor
Employees' Compensation Appeals Board

H.O., Appellant	)	
and	)	**Docket No. 16-0329**
	)	**Issued: September 12, 2016**
DEPARTMENT OF AGRICULTURE, ALL OTHER FOOD SAFETY & INSPECTION SERVICE, Minneapolis, MN, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant[1]
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 December 11, 2015 appellant, through counsel, filed a timely appeal from the September 9, 2015 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 the 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 a hearing loss causally related to factors of his federal employment.

FACTUAL HISTORY

On November 15, 2013 appellant, then a 66-year-old former inspection liaison officer, filed an occupational disease claim (Form CA-2) alleging that he was suffering from hearing loss, stress, and hypertension as a result of the duties of his federal employment. He claimed to have first become aware of his condition on January 1, 1978 and first realized that the condition was caused or aggravated by his employment on December 1, 2011. Appellant noted that he worked at various worksites throughout his career and that he was exposed to noise while inspecting slaughter/processing facilities. The employing establishment noted that he had retired on December 31, 2011.

In a statement supporting his claim, appellant provided his employment history. He noted that he commenced working for the employing establishment on March 18, 1968, and that he was exposed to noise from high volume production slaughter facilities and processing facilities throughout this federal career.

In a November 11, 2013 report, Dr. Roy Carlson, a Board-certified otolaryngologist, diagnosed sensorineural hearing loss. He opined that appellant's hearing loss was likely to be at least in part due to noise exposure, to a reasonable certainty. Dr. Carlson also attached an audiogram conducted on that date.

By letter to appellant dated December 24, 2013, OWCP stated that further information was necessary to support appellant's claim. It afforded him 30 days to submit this information.

On January 19, 2014 OWCP received appellant's request for extension of time to submit further evidence.

By letter dated January 27, 2014, OWCP denied appellant's claim as it determined that the evidence was not sufficient to establish that the events occurred as alleged, as he had not submitted evidence sufficient to establish noise exposure. It also noted that he had not explained how his alleged hearing loss caused stress and hypertension; therefore, it found that fact of injury had not been established.

By letter dated February 10, 2014, appellant requested an oral hearing before an OWCP hearing representative. On June 5, 2014 counsel entered an appearance in this case. At the hearing held on June 19, 2014 appellant reiterated his employment history. He noted that from 1968 through 1973 or 1974 he worked on the kill floors of the slaughterhouses as an inspector, and then he was assigned to their processing facilities, where he was exposed nonstop to machines that were involved in the slaughtering process. In 1979 appellant moved to an employee relations position, but still had to go to the field and visit inspectors and veterinarians. Counsel argued that there was *prima facie* evidence for a hearing loss claim and asked that OWCP's decision be reversed or at least remanded for further medical development.

In a July 30, 2014 report, Dr. Carlson noted that he met with appellant on November 13, 2013, and at the time of his visit appellant had hearing loss which significantly impaired his everyday life. He noted that appellant described a history of noise exposure over 44 years of employment which included extensive exposure to noise in various slaughterhouses. Dr. Carlson indicated that appellant had no other risk factors for hearing loss. He stated that appellant's audiogram showed a symmetric moderate-to-severe bilateral sensorineural hearing loss. Dr. Carlson diagnosed moderate sensorineural hearing loss due to his noise exposure given the degree of loss and absence of other significant factors to produce hearing loss. He indicated that, during a significant part of the interval of noise exposure, hearing protection was not available to appellant and that has contributed to the severity of his loss. Dr. Carlson noted causal relationship to a reasonable degree of medical certainty that is permanent and irreversible. He noted that appellant's hearing will likely slowly worsen due to the ineluctable changes of age as well.

By decision dated September 5, 2014, the hearing representative determined that appellant had submitted evidence sufficient to require further medical development, and remanded the case with instructions to refer appellant for a second opinion.

OWCP referred appellant to Dr. Sean Smullen, a Board-certified otolaryngologist, for a second opinion. In a November 18, 2014 narrative opinion, Dr. Smullen noted that currently appellant had some problems with tinnitus. He also noted that appellant had a past medical history of hypertension and noninsulin-dependent diabetes mellitus, as well as hypercholesterolemia. Dr. Smullen opined that appellant did have significant hearing loss. He noted that appellant had hearing loss that he claimed began 12 to 15 years ago. Dr. Smullen noted that a hearing test from October 2003 showed mild hearing loss, and another audiogram in January 2011 showed progression of hearing loss in the mild-to-moderate range. He noted that the audiogram taken for Dr. Carlson showed hearing loss clearly in the moderate range. Dr. Smullen concluded that appellant had significant hearing loss in the moderately severe range at this point, which appeared to have progressed over the last 15 years. He stated that one would have expected the bulk of appellant's hearing loss to have occurred in his early years of employment, when he was exposed to the most noise and not provided hearing protection. Dr. Smullen concluded that, although appellant did have significant hearing loss, within a reasonable degree of medical certainty, his hearing loss did not result from the noise exposure during his federal employment. He based this conclusion on the fact that appellant's hearing loss did not really begin until about 15 years ago and that he did not have the typical dip in the 4,000 Hertz range that one would expect with noise-induced hearing loss. Dr. Smullen noted that appellant's "hearing loss appears to be the result of age and genetics."

In completing the outline for otologic evaluation (Form CA-1332), Dr. Smullen reiterated his conclusion that audiometric findings were not demonstrative of sensorineural hearing loss as "this is in excess of what would be predicted based on presbycusis." Further, in response to the question of whether "workplace exposure … was sufficient as to intensity and duration to have caused the loss in question," he replied: "Yes. Workplace noise exposure was sufficient to cause the loss." When asked to provide any other relevant factors "as they relate to this individual's hearing loss sensorineural or conductive," Dr. Smullen replied that appellant's hearing loss "did not develop until after workplace exposure began and after hearing protection

became available." He added that "[t]his is extrapolated from data available and based on a reasonable degree of medical certainty."

In a December 11, 2014 decision, OWCP determined that appellant had established noise exposure during his federal employment and had established a diagnosis of hearing loss. However, it denied his claim because he had failed to establish a causal relationship between his hearing loss and the accepted work events.

On December 16, 2014 appellant, through counsel, requested a hearing.

In a March 31, 2015 letter, appellant indicated that he does not have diabetes mellitus. He also denied saying that his hearing loss started about 15 years ago, and indicated that he first started noticing hearing loss within 3 years of his employment and exposure to loud and continual slaughterhouse noises. Appellant also noted that no other person in his family had been diagnosed with deficient hearing.

At the video hearing held on June 24, 2015 appellant's counsel argued that it is only necessary that noise exposure at appellant's federal employment be a contributing factor, that appellant had no noise exposure outside of work, and that the noise exposure he had in the kill lines was significant. He argued that Dr. Smullen's report contained inaccuracies and inconsistencies, that the weight of the medical evidence rested with Dr. Carlson, and, at a minimum, there is a conflict in the medical evidence that necessitated referral to an impartial medical examiner.

In a decision date September 9, 2015, the hearing representative denied appellant's claim as she found that appellant had not established that his hearing loss was causally related to his federal employment. She found the medical report from Dr. Smullen represented the weight of the medical evidence.

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 timely filed within the applicable time limitation period, 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 the employment injury.[3] 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.[4]

Whether an employee actually sustained an injury in the performance of duty begins with an analysis of whether fact of injury has been established.[5] To establish fact of injury in an occupational disease claim, an employee must submit: (1) a factual statement identifying

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

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

[5] *See S.P.*, 59 ECAB 184, 188 (2007).

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.[6]

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.[7] Neither the fact that the condition became 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.[8]

ANALYSIS

OWCP determined that appellant had established factors of federal employment where he was exposed to noise during his federal employment and had established that he sustained a hearing loss, however, it denied appellant's claim for the reason that he failed to establish that his hearing loss was causally related to his exposure to noise during his federal employment. The Board finds that the case is not in posture for decision and should be remanded for further development.

In order to determine the extent and degree of any employment-related hearing loss, OWCP referred appellant to Dr. Smullen for a second opinion evaluation. Dr. Smullen examined appellant on November 18, 2014 and concluded that appellant's hearing loss was not caused by his noise exposure during his federal employment. In this regard, he noted that the majority of appellant's noise exposure occurred from 1968 through 1979, when he worked on the floors of the slaughterhouses. In 1979 appellant was transferred to employee relations, and although he still visited the slaughterhouses, he was not exposed to this environment with the same frequency. Dr. Smullen reviewed appellant's audiograms and noted that the hearing test in October 2003 showed mild hearing loss, that a January 2011 audiogram showed mild-to-moderate loss, and Dr. Carlson's audiogram in 2013 showed moderate-to-severe hearing loss. He noted that appellant's hearing loss progressed over the last 15 years, and that, if the noise exposure during his employment caused his hearing loss, one would have expected the most severe loss to have occurred over the earlier years of appellant's federal employment when he was exposed to the greatest noise. Dr. Smullen also noted that, if appellant had a noise-induced hearing loss, one would expect a dip at 4,000 Hertz which did not occur in this case. He concluded that appellant's hearing loss was due to age and genetics.

The Board notes that, although Dr. Smullen concluded in his narrative report that appellant's "hearing loss appears to be the result of age and genetics," he also concluded in the outline for otologic evaluation, Form CA-1332, that "workplace noise exposure was sufficient to cause the loss." Additionally, Dr. Smullen noted that appellant's hearing loss did not develop

[6] *See Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *see also P.W.*, Docket No. 10-2402 (issued August 5, 2011).

[7] *Stanley K. Takahaski*, 35 ECAB 1065 (1984); *see also K.S.*, Docket No. 16-0035 (issued April 27, 2016).

[8] *See John W. Butler*, 39 ECAB 852, 858 (1988).

until "well after workplace exposure began." These latter two statements imply that appellant's hearing loss progressed during federal employment. The Board notes that it is not necessary to prove a significant contribution of factors of employment to a condition for the purpose of establishing causal relationship. An employee is not required to prove that occupational factors are the sole cause of his claimed condition. If work-related exposures caused, aggravated, or accelerated appellant's condition, it is compensable.[9] The fact that he noted that appellant's hearing loss also progressed "after hearing protection was available," does imply that noise exposure may not have been contributory to appellant's hearing loss. The Board finds that Dr. Smullen's narrative and form reports appear to be inconsistent. However, the Board notes that OWCP did not seek clarification from him with regard to whether appellant's workplace noise exposure caused or contributed in any way to his hearing loss. As OWCP referred appellant to Dr. Smullen, it has the responsibility to obtain an evaluation which will resolve the issue involved in the case.[10] On remand, it shall seek clarification as to whether appellant's hearing loss is causally related to factors of his federal employment. Following this and any necessary further development, OWCP shall issue a *de novo* decision on appellant's claim.

CONCLUSION

The Board finds that the case is not in posture for decision and will be remanded for further development to determine whether appellant's hearing loss is causally related to factors of his federal employment.

[9] *H.C.*, Docket No. 16-0740 (issued June 22, 2016); *see also Beth P. Chaput*, 37 ECAB 158 (1985) (where the medical evidence reveals that factors of employment contributed in any way to the disabling condition, such condition is considered employment related for the purpose of compensation under FECA).

[10] *Id.; see also Mae Z. Hackett*, 34 ECAB 1421 (1983); *and Ayanle A. Hashi*, 56 ECAB 234 (2004) (where OWCP refers a claimant for a second opinion evaluation and the report does not adequately address the relevant issues, OWCP should secure an appropriate report on the relevant issues).

ORDER

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

Issued: September 12, 2016
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