

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

D.S., Appellant)	
)	
and)	Docket No. 16-0903
)	Issued: September 8, 2016
DEPARTMENT OF THE ARMY, ARMY)	
NATIONAL GUARD, Latham, NY, Employer)	
)	

Appearances:
Appellant, pro se
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 March 29, 2016 appellant filed a timely appeal from a November 12, 2015 merit decision and a March 7, 2016 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 the case.

ISSUES

The issues are: (1) whether OWCP properly denied appellant's request for review of the written record; and (2) whether appellant met his burden of proof to establish bilateral hearing loss causally related to factors of his federal employment.

On appeal, appellant contends that OWCP should have granted his request for review of the written record.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On May 12, 2015 appellant, then a 45-year-old surface maintenance mechanic leader, filed an occupational disease claim (Form CA-2) alleging that in 2010 his annual hearing test confirmed his suspicions that he had a light ringing in his ears. He noted that his place of employment was located adjacent to Albany International Airport. Appellant listed the nature of his disease or illness as slight ringing in both ears and hearing loss. His supervisor concurred with appellant's statement.

By letter dated May 29, 2015, OWCP informed appellant that he needed to submit further evidence in support of his claim. The information appellant was to provide included listing whether any hearing protection device was used, and the approximate number of hours per day and days per week that hearing protection was used. Appellant was afforded 30 days to respond to this letter. OWCP also sent a letter to the employing establishment on the same date requesting information about appellant's exposure to noise and information regarding hearing protection.

On June 9, 2015 appellant noted that he worked for the employing establishment as an automotive worker from May 2003 to July 2007, as a surface maintenance mechanic from July 2007 through May 2012, and as a surface maintenance mechanic leader from May 2012 to present. He noted that in all these positions he was exposed to noise produced by gasoline and diesel engine driven vehicles, construction equipment, air compressors, power generating equipment, and tools such as impact wrenches. Appellant indicated that he gradually became aware of ringing in his ears, and was formally told of possible hearing loss on January 13, 2010. He stated that the Medical Command referred him to an audiologist who confirmed that he did have hearing loss and bilateral tinnitus. Appellant noted that he continued to be exposed to hazardous noise daily. He stated that in 2003 he was provided with hearing protection and training on its use, and that he now wears earplugs and/or earmuffs whenever noise is present. Appellant also discussed his military service.

By letter dated June 9, 2015, the employing establishment responded to OWCP's request for more information. In the cover letter, Charles D. Tillman, a surface maintenance mechanic supervisor for the employing establishment, indicated that appellant was still exposed to hazardous noise as a federal technician. He indicated that appellant's shop is located in a building near the runways for the Albany County Airport. Mr. Tillman noted that noise in appellant's building is continuous throughout the day, and mechanics in other activities in the building often are engaged in noisy operations with no warning to the rest of the building. He submitted a noise survey taken at appellant's place of employment on March 4, 2015 which listed noise decibel (dBA) levels, and noted noise due to many machines, including the portable electric grinder (104 dBA), pneumatic impact wrenches (103 dBA), the electric stand grinder (95 dBA), the air compressor (95 dBA), the reciprocating saw (92 dBA), and the electric drills (88-91 dBA). The employing establishment also submitted the results of a prior noise study taken on February 12, 2007. Finally, it submitted copies of audiograms conducted for it dated from July 23, 2003 to May 18, 2015.

By decision dated November 12, 2015, OWCP denied appellant's claim, and noted that the evidence did not support that the injury and/or events occurred. It determined that he had not

provided a complete and detailed description of hazardous noise exposure at work as he did not specify whether hearing protection devices were used during all claimed periods of exposure, and did not state the number of hours per day and per week that he used hearing protection devices.

In a document mailed on December 16, 2015 and received by OWCP on December 18, 2015, appellant requested a review of the written record by an OWCP hearing representative. He resubmitted the evidence already in the record.

By decision dated March 7, 2016, OWCP denied appellant's request as it was not filed within the 30-day time limitation for requesting review of the written record.

LEGAL PRECEDENT -- ISSUE 1

Section 8124(b)(1) of FECA provides that "a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."² Section 10.615 of the federal regulations implementing this section of FECA provides that a claimant shall be afforded a choice of an oral hearing or a review of the written record.³ The regulations provide that a request for a hearing or review of the written record must be made within 30 days, as determined by the postmark or other carrier's date marking, of the date of the decision.⁴

ANALYSIS -- ISSUE 1

In the present case, appellant's request for a review of the written record was postmarked December 16, 2015 and received by the Branch of Hearings and Review on December 18, 2015. Since this is more than 30 days after the November 12, 2015 OWCP decision, appellant is not entitled to a review of the written record as a matter of right.

Although appellant's request for a review of the written record was untimely, OWCP has discretionary authority with respect to granting the request and must exercise such discretion.⁵ In this case, OWCP advised appellant that the issue could be addressed through the reconsideration process and the submission of new evidence. This is considered a proper exercise of the OWCP's discretionary authority.⁶ There is no evidence of an abuse of discretion in this case. The Boards find that OWCP properly denied appellant's request for review of the written record.

² *Id.* at § 8124(b)(1).

³ 20 C.F.R. § 10.615.

⁴ *Id.* at § 10.616(a).

⁵ *See Cora L. Falcon*, 43 ECAB 915 (1992).

⁶ *Id.*

LEGAL PRECEDENT -- ISSUE 2

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.⁷ 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.⁸

Appellant has the burden of establishing by the weight of the reliable, probative, and substantial evidence that his hearing loss condition was causally related to noise exposure in his federal employment.⁹ Neither the fact that the condition became apparent during a period of employment, nor the belief of the employee that the alleged hearing loss was causally related to noise exposure in federal employment, is sufficient to establish causal relationship.¹⁰

ANALYSIS -- ISSUE 2

OWCP denied appellant's claim as it found that, although appellant had provided a sufficient description of hazardous noise exposure at work, he had not specified whether any hearing protection devices were used during all claimed periods of exposure nor did he provide a detailed description of the hearing protection device he used which included the number of hours per day and week he used hearing protection devices. However, the Board finds that appellant met his burden of proof to establish that he was exposed to hazardous levels of noise.

The noise studies conducted for the employing establishment indicate that appellant was exposed to excessive noise. The employing establishment conceded that the noise in appellant's building was continuous throughout the day, and that appellant was often exposed to noisy operations with no warning. The noise survey conducted for the employing establishment on March 4, 2015 evinced high decibel levels from numerous machines. Appellant did wear hearing protection when he was to be exposed to loud noise, but as the employing establishment indicated, noise exposure sometimes occurred without warning.

The record establishes that appellant was exposed to hazardous noise as an automotive worker, a surface maintenance mechanic, and as a surface maintenance mechanic leader commencing May 2003. Appellant continued to be exposed to noise at the time he filed his claim. Consequently, regardless of the length of time that he wore hearing protection, OWCP must consider whether the employment-related noise exposure was sufficiently prolonged to result in acoustic trauma.¹¹ Such a question is medical in nature and should be resolved by a

⁷ *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁸ *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁹ *Stanley K. Takahaski*, 35 ECAB 1065 (1984); *see also K.S.*, Docket No. 16-0035 (issued April 27, 2016).

¹⁰ *See John W. Butler*, 39 ECAB 852, 858 (1988).

¹¹ *See W.P.*, Docket No. 15-0597 (issued January 27, 2016).

Board-certified otolaryngologist.¹² In hearing loss cases, OWCP shall refer the claimant for examination by a qualified specialist if the report submitted by the claimant does not meet all of OWCP's requirements for adjudication.¹³

Thus, the Board finds that this case is not in posture for decision and must be remanded for further development. On remand, OWCP shall make findings of fact concerning the noise levels in the employing establishment, the types of noise exposure, the length and period of such exposures, and any other occupational noise exposure. Once it has listed the pertinent factual evidence, it shall prepare a statement of accepted facts and refer appellant for an otological and audiological evaluation as to whether he sustained hearing loss causally related to the accepted employment exposure.¹⁴ After further development as it deems necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for a review of the written record. The Board further finds that appellant provided sufficient evidence of employment-related noise exposure to warrant further medical development. Therefore, the Board finds that this case is not in posture for decision.

¹² *Id.*

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims, Extended Development*, Chapter 2.800.9(a)(1) (June 2011). Some initial claims require full-scale medical development because the nature of exposure is in question, the diagnosis is not clearly identified, or the relationship of the condition to the exposure is not obvious.

¹⁴ C.S., Docket No. 10-2030 issued June 9, 2011).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 7, 2016 is affirmed and the decision dated November 12, 2015 is set aside and remanded for further development consistent with this decision.

Issued: September 8, 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