

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

J.L., Appellant

and

**DEPARTMENT OF THE NAVY, FLEET
READINESS CENTER SOUTHWEST,
San Diego, CA, Employer**

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**Docket No. 17-0782
Issued: August 7, 2017**

Appearances:

Appellant, pro se

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On February 24, 2017 appellant filed a timely appeal from a September 20, 2016 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

ISSUE

The issue is whether appellant met his burden of proof to establish bilateral sensorineural hearing loss causally related to factors of his federal employment.

¹ 5 U.S.C. § 8101 *et seq.*

² Appellant submitted new evidence on appeal. However, the Board is precluded from reviewing evidence which was not before OWCP at the time of its final decision. The Board therefore lacks jurisdiction to review this additional evidence on appeal. See 20 C.F.R. § 501.2(c)(1).

FACTUAL HISTORY

On April 15, 2015 appellant, then a 64-year-old machinist, filed an occupational disease claim (Form CA-2) alleging that on August 20, 2014 he first became aware of his bilateral sensorineural hearing loss and first realized that his condition was caused or aggravated by 41 years of prolonged exposure to noise from heavy duty machines at work. On the reverse of the claim form, the employing establishment indicated that appellant was last exposed to employment-related noise on August 20, 2014.

In a statement supporting his claim, appellant noted that he began working for the employing establishment in approximately 1974 and since that time he had been exposed to hazardous noise 8 to 12 hours a day, 5 to 7 days a week. He had been enrolled in the employing establishment's annual audiogram program since 1974. Appellant did not recall having a similar condition. He listed the physicians who have treated him.

Appellant submitted audiograms performed by the employing establishment as part of its hearing conservation program dated August 2 and 20, 2014. He also submitted a description of his machinist position.

By letter dated May 29, 2015, OWCP referred appellant, together with a statement of accepted facts (SOAF), the medical record, and a list of questions, to Dr. Theodore Mazer, a Board-certified otolaryngologist, for an otologic examination.

In a July 17, 2015 medical report, Dr. Mazer reviewed the SOAF and medical record. He noted appellant's primary complaint of hearing loss and left ear tinnitus which appellant attributed to workplace noise exposure from machines, sheet metal work, and beeping sound from a computer. Dr. Mazer noted appellant's history, reported findings on examination, and diagnosed mild bilateral hearing loss. Based on a July 17, 2015 audiogram, performed on his behalf, appellant had no ratable hearing loss on the right and 16.9 percent hearing loss on the left using nerve responses (2.8 percent binaural) and 30 percent (5 percent binaural) using air conduction testing under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).³ He indicated, however, that both the air conduction gap and even the nerve loss on the left may be related to otosclerosis and the overall asymmetry was less likely due to retrocochlear disease. Dr. Mazer opined that the overall findings did not support a work injury caused unilaterally by noise exposure. He recommended a magnetic resonance imaging (MRI) scan on a nonindustrial basis.

Dr. Mazer indicated that if such testing excluded retrocochlear disease and assuming that no testing existed to show preexisting unilateral left loss, otosclerosis was a more likely diagnosis than unilateral noise injury. He suggested that appellant consider middle ear exploration from his private physician. Absent surgery, Dr. Mazer advised that amplification for the left ear only was warranted. He further advised that repeat testing at the time of appellant's pending retirement at the end of the year should be performed to establish a permanent and stationary rating. Alternatively, as appellant would no longer be exposed to direct noise from machinery, he could use dual ear protection in noisy settings and avoid such settings altogether.

³ A.M.A., *Guides* (6th ed. 2009).

Dr. Mazer related that the current testing could be used for permanent and stationary rating purposes notwithstanding his comments, requiring elimination of retrocochlear disease or otosclerosis as causative. He indicated that computer beeping exposure did not appear to be causative.

In an August 14, 2015 decision, OWCP accepted appellant's exposure to noise, but denied his occupational disease claim because the medical evidence failed to establish that his mild bilateral hearing loss was causally related to his federal employment. It found that the medical report from Dr. Mazar represented the weight of the medical evidence.

On June 30, 2016 appellant requested reconsideration. He submitted an April 8, 2016 brain MRI scan report from Dr. Fernando A. Torres, a radiologist. In this report, Dr. Torres provided an impression of an unremarkable targeted evaluation of the internal auditory canals and relatively moderate-sized area of encephalomalacia in the left paracentral pons suggestive of a focal old infarct with mild chronic small vessel ischemic changes and no acute infarct. There was also vertebrobasilar ectasia with a dominant fusiform enlarged left vertebral artery and basilar artery. In addition, there was mild paranasal sinus disease with an atelectatic appearing on the left maxillary sinus, and a small effusion noted in left mastoid air cells.

By decision dated September 20, 2016, OWCP denied modification of its August 14, 2015 decision. It found that Dr. Torres' report was insufficient to establish that appellant's bilateral hearing loss was causally related to his accepted workplace noise exposure.

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 filed within the applicable time limitation, that an injury was sustained while in the performance of duty as alleged, and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.⁴ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an 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

⁴ C.S., Docket No. 08-1585 (issued March 3, 2009); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁵ S.P., 59 ECAB 184 (2007); *Victor J. Woodhams*, 41 ECAB 345 (1989); *Joe D. Cameron*, 41 ECAB 153 (1989).

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

⁷ K.S., Docket No. 16-0035 (issued April 27, 2016).

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit 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 employment factors identified by the claimant were the proximate cause of the condition for 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. The medical evidence required to establish a causal relationship 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 medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.⁸

ANALYSIS

It is not disputed that appellant was exposed to hazardous employment-related noise while working as a machinist at the employing establishment. In decisions dated August 14, 2015 and September 20, 2016, OWCP denied appellant's occupational disease claim finding that the medical evidence was insufficient to establish that his bilateral hearing loss was causally related to workplace noise exposure. The Board finds that this case is not in posture for decision.⁹

OWCP properly referred appellant to Dr. Mazer, a Board-certified otolaryngologist, for a second opinion evaluation. In his July 17, 2015 report, Dr. Mazer diagnosed mild bilateral hearing loss and determined that based on appellant's audiogram results he had no ratable hearing impairment for the right ear and 16.9 percent impairment of the left ear under the A.M.A., *Guides*. He opined that appellant's hearing loss condition was not "unilaterally" caused by the established workplace noise exposure. Dr. Mazar reasoned that air conduction gap and nerve loss on the left "may" be related to otosclerosis and the overall asymmetry was less "likely" due to retrocochlear disease. His opinion that appellant's bilateral hearing loss was not related to his federal employment was vague and speculative and is of limited probative value.¹⁰ It is not necessary to prove a significant contribution of factors of employment to a condition for the purpose of establishing causal relationship.¹¹ 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.¹² OWCP did not

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

⁹ *H.C.*, Docket No. 16-0740 (issued June 22, 2016).

¹⁰ See *S.E.*, Docket No. 08-2214 (issued May 6, 2009) (the Board has generally held that opinions such as the condition is probably related, most likely related or could be related are speculative and diminish the probative value of the medical opinion); *Cecilia M. Corley*, 56 ECAB 662 (2005) (medical opinions which are speculative or equivocal are of diminished probative value).

¹¹ *Supra* note 9.

¹² See *Beth P. Chaput*, 37 ECAB 158, 161 (1985); *S.S.*, Docket No. 08-2386 (issued June 5, 2008).

seek clarification from Dr. Mazar with regard to whether appellant's workplace noise exposure caused or aggravated his bilateral hearing loss condition.¹³

The Board will, therefore, remand the case to OWCP for further development of the medical evidence with regard to whether appellant's work-related noise exposure caused or aggravated his claimed hearing loss. Following this and such other development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the September 20, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with decision of the Board.

Issued: August 7, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹³ When it 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. See *Ayanle A. Hashi*, 56 ECAB 234 (2004) (when OWCP refers a claimant for a second opinion evaluation and the report does not adequately address the relevant issues, it should secure an appropriate report on the relevant issues); *Mae Z. Hackett*, 34 ECAB 1421 (1983) (where OWCP referred appellant to a second opinion physician, it has the responsibility to obtain an evaluation which will resolve the issue involved in the case).