

OWCP abused its discretion in denying appellant's request for an oral hearing before an OWCP hearing representative as untimely filed.

FACTUAL HISTORY

On July 6, 2015 appellant, then a 59-year-old supervisory airway transportation systems specialist, filed a traumatic injury claim (Form CA-1) alleging that on that date she sustained ringing in her right ear due to exposure to a high-pitched squeal from the public address (PA) system. She did not stop work.

In a September 16, 2015 Form CA-16, Authorization for Examination And/Or Treatment, an acting manager authorized appellant's medical treatment. He noted that appellant had ringing in her right ear since exposure to a high-pitched noise from the PA system on July 6, 2015.

On September 30, 2015 OWCP informed appellant that the evidence of record was insufficient to establish her claim. It advised her regarding the medical and factual evidence required. OWCP requested that appellant complete a questionnaire and afforded her 30 days to provide the requested information.

On October 23, 2015 OWCP received appellant's response to its development questionnaire. As to whether she sustained any other injury, either on or off duty, between the date of injury and the date it was first reported to a supervisor or physician, appellant noted "[n]o I did not I was already had hearing loss in the right ear, now it is constant ringing. From July 6th 2015 date." As to whether she had any similar disability or symptoms before the injury, appellant responded "No, I did not...."

OWCP thereafter received additional evidence.

In a July 14, 2015 report, Margaret Grogan, a family nurse practitioner, noted that appellant was seen for ringing in her ear which began on July 6, 2015. A physical examination revealed cerumen in the right ear, which was removed. Ms. Grogan diagnosed tinnitus due to noise exposure and cerumen impact. She recommended that appellant be evaluated by an audiologist.

On August 24, 2015 an audiological evaluation was performed by Chris Curtis and Quin Card, audiologists. This report noted that appellant was seen for diminished hearing following an incident at work where she was exposed to a shrill burst of sound over the PA system. An audiological evaluation was conducted with audiogram results noted. Results from the audiogram showed moderately severe right ear sensorineural hearing loss and normal-to-moderate left ear sensorineural hearing loss. Appellant attributed the asymmetry in the audiogram to a workplace incident.

By decision dated November 4, 2015, OWCP denied appellant's claim. It found the evidence of record insufficient to establish causal relationship between the medical condition and the accepted July 6, 2015 work incident. OWCP explained that nurse practitioners and audiologists are not considered physicians under FECA. Thus, their reports therefore had no probative value.

On December 10, 2015 OWCP received appellant's request for an oral hearing before an OWCP hearing representative. In an attached letter, appellant explained the delay in mailing her request. She related that she initially mailed her request *via* Priority Express Mail on December 3, 2015 and that due to an incorrect zip code the post office returned it to her on December 5, 2015. Appellant then resent her request Priority Express Mail on December 7, 2015. Attached to her request were copies of the mailings.

Subsequent to her request for an oral hearing, appellant submitted additional medical and factual evidence.

A November 24, 2015 audiogram, which was signed by an audiologist,³ noted that appellant was seen for constant tinnitus and provided the results of the test.

In a November 30, 2015 letter, Dr. Jennifer Norris, a treating Board-certified internist, noted that appellant had been referred to an ear, nose, and throat (ENT) specialist for evaluation of her sudden hearing decline from workplace exposure to loud noise.

By decision dated December 30, 2015, the Branch of Hearings and Review denied appellant's request for an oral hearing as it was untimely filed.⁴ It noted that her oral hearing request was not filed within 30 days of the November 4, 2015 decision as it was postmarked on December 7, 2015. Appellant was advised that the issue could equally well be addressed by requesting reconsideration.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA⁵ 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.⁶ 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.⁷

³ The signature of the audiologist is illegible.

⁴ The Board notes that, during the pendency of this appeal, OWCP issued a November 30, 2016 decision denying a merit review of the November 4, 2015 decision. The November 30, 2016 decision, however, is null and void as the Board and OWCP may not simultaneously have jurisdiction over the same issue. *See Terry L. Smith*, 51 ECAB 182 (1999); *Arlonia B. Taylor*, 44 ECAB 591 (1993); *Russell E. Lerman*, 43 ECAB 770 (1992); *Douglas E. Billings*, 41 ECAB 880 (1990).

⁵ *Supra* note 2.

⁶ *C.S.*, Docket No. 08-1585 (issued March 3, 2009); *Bonnie A. Contreras*, 57 ECAB 364 (2006).

⁷ *S.P.*, 59 ECAB 184 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

To determine whether a federal employee has sustained a traumatic injury in the performance of duty it must first be determined whether a fact of injury has been established.⁸ First, the employee must submit sufficient evidence to establish that she actually experienced the employment incident at the time, place, and in the manner alleged.⁹ Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.¹⁰

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.¹¹ Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on whether there is a causal relationship between the employee's diagnosed condition and the compensable employment factors.¹² 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 nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.¹³

Appellant has the burden of proof to establish by the weight of the reliable, probative, and substantial evidence that her hearing loss and tinnitus condition was causally related to noise exposure in her federal employment.¹⁴ Neither the condition becoming apparent during a period of employment, nor the belief of the employee that the conditions are causally related to noise exposure in federal employment, is sufficient to establish causal relationship.¹⁵

ANALYSIS -- ISSUE 1

Appellant alleged that she sustained right ear hearing loss and tinnitus due to exposure to a high-pitched sound emanating from the PA system at work on July 6, 2015. OWCP accepted that the July 6, 2015 incident occurred as alleged, but denied the claim due to the lack of medical evidence establishing causal relationship between the diagnosed condition and the accepted July 6, 2015 employment incident.

The Board finds that appellant has failed to meet her burden of proof to establish that she sustained hearing loss and tinnitus causally related to the accepted July 6, 2015 employment

⁸ *B.F.*, Docket No. 09-60 (issued March 17, 2009); *Bonnie A. Contreras*, *supra* note 6.

⁹ *D.B.*, 58 ECAB 464 (2007); *David Apgar*, 57 ECAB 137 (2005).

¹⁰ *C.B.*, Docket No. 08-1583 (issued December 9, 2008); *D.G.*, 59 ECAB 734 (2008); *Bonnie A. Contreras*, *supra* note 6.

¹¹ *Y.J.*, Docket No. 08-1167 (issued October 7, 2008); *A.D.*, 58 ECAB 149 (2006); *D'Wayne Avila*, 57 ECAB 642 (2006).

¹² *J.J.*, Docket No. 09-27 (issued February 10, 2009); *Michael S. Mina*, 57 ECAB 379 (2006).

¹³ *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

¹⁴ *S.R.*, Docket No. 16-1022 (issued October 6, 2016).

¹⁵ *See D.Y.*, Docket No. 16-0767 (issued July 25, 2016).

incident. Appellant failed to submit rationalized medical opinion evidence from a physician establishing causal relationship.

Appellant received treatment from Ms. Grogan, a family nurse practitioner, who diagnosed tinnitus due to noise exposure and cerumen. The Board has held that nurse practitioners are not considered physicians as defined under FECA.¹⁶ Thus, these treatment records are of no probative medical value in establishing appellant's claim.

Appellant also submitted an audiological evaluation and audiograms by Mr. Curtis and Mr. Card, audiologists. Neither the report nor the audiograms were accompanied by a physician's opinion addressing how appellant's employment-related noise exposure caused or aggravated any hearing condition. The Board notes that audiologists are not considered physicians under FECA.¹⁷ Therefore, a report from an audiologist is of no probative value on the issue of causal relationship.¹⁸ Thus, these reports are insufficient to meet appellant's burden of proof.

An award of compensation may not be based on surmise, conjecture, or speculation. Neither the fact that appellant's condition became apparent during a period of employment nor the belief that her condition was caused, precipitated, or aggravated by her employment is sufficient to establish causal relationship. Causal relationship must be established by rationalized medical opinion evidence.¹⁹ OWCP advised appellant, by letter dated September 30, 2015 of the evidence required to support her claim. Appellant failed to submit such evidence and, therefore, has not met her burden of proof.²⁰

The Board notes however, that the record does not verify that the issue of appellant's incurred medical expenses has been addressed. The record contains a Form CA-16 dated September 16, 2015 noting a July 6, 2015 injury date and signed by an acting employing establishment manager authorizing medical treatment. Ordinarily, where the employing establishment authorizes treatment of a job-related injury by providing the employee a properly

¹⁶ See *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses and physical therapists are not competent to render a medical opinion under FECA); 5 U.S.C. § 8101(2) (this subsection defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law). See also *L.D.*, Docket No. 17-0435 (issued April 5, 2017) (nurse practitioners are not considered "physicians" as defined under FECA).

¹⁷ *Thomas O. Bouis*, 57 ECAB 602 (2006).

¹⁸ *Howard P. Lane*, 36 ECAB 107 (1984).

¹⁹ See *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

²⁰ The Board notes that appellant's response to the development questionnaire was unclear as to whether appellant had a prior hearing loss.

executed Form CA-16,²¹ OWCP is under contractual obligation to pay for the medical expenses.²² The Board finds that upon return of the case record, this matter should be addressed.

On appeal appellant contends that her hearing loss and tinnitus began on July 6, 2015 when she heard a high-pitched sound from the PA system. She noted the medical bills she incurred for this condition and the medical personnel she had seen. As discussed above appellant failed to submit the requested rationalized medical evidence explaining how the diagnosed condition had been caused or aggravated by the accepted employment incident.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

Any claimant dissatisfied with an OWCP decision shall be afforded an opportunity for either an oral hearing or a review of the written record.²³ A request for a hearing or review on the written record must be submitted, in writing, within 30 days of the date of the decision for which a hearing is sought.²⁴ If the request is not made within 30 days, a claimant is not entitled to a hearing or a review of the written record as a matter of right. OWCP regulations further provide that the claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision.²⁵ Although a claimant who has previously sought reconsideration is not, as a matter of right, entitled to a hearing or review of the written record, the Branch of Hearings and Review may exercise its discretion to either grant or deny a hearing following reconsideration.²⁶ Similarly, the Branch of Hearings and Review may exercise its discretion to conduct a hearing or review of the written record where a claimant requests a second hearing or review on the written record on the same issue.²⁷

ANALYSIS -- ISSUE 2

OWCP received appellant's request for an oral hearing before an OWCP hearing representative on December 10, 2015. The request was postmarked December 7, 2015. As this was the only legible postmark date and it was more than 30 days after the November 4, 2015

²¹ See *Val D. Wynn*, 40 ECAB 666 (1989); see also Federal (FECA) Procedure Manual, Part 3 -- Medical, *Authorizing Examination and Treatment*, Chapter 3.300.3(a)(3) (February 2012).

²² 5 U.S.C. § 8103; 20 C.F.R. § 10.304. See *L.B.*, Docket No. 10-469 (issued June 2, 2010); see also Federal (FECA) Procedure Manual, *id.*

²³ 5 U.S.C. § 8124(b)(1); 20 C.F.R. § 10.615.

²⁴ *Id.* at 10.616(a).

²⁵ *Id.*

²⁶ *D.E.*, 59 ECAB 438 (2008); *Hubert Jones, Jr.*, 57 ECAB 467 (2006).

²⁷ 20 C.F.R. § 10.616(a).

OWCP decision, it was untimely filed. Section 8124(b)(1) is unequivocal on the time limitation for requesting a hearing.²⁸ Because the hearing request was untimely filed, appellant was not entitled to an oral hearing as a matter of right.

OWCP has the discretionary power to grant an oral hearing or review of the written record when a claimant is not entitled to one as a matter of right. It exercised this discretion in its December 30, 2015 decision, finding that appellant's issue could equally well be addressed by requesting reconsideration and submitting additional evidence. This basis for denying her request for a review of the written record is a proper exercise of OWCP's authority.²⁹ Accordingly, the Board finds that OWCP properly denied appellant's request for an oral hearing as untimely filed.

CONCLUSION

The Board finds that appellant has not established that she sustained hearing loss or tinnitus causally related to the accepted July 6, 2015 employment incident. The Board further finds that OWCP did not abuse its discretion in denying appellant's request for an oral hearing before an OWCP hearing representative as her request was untimely filed.

²⁸ *William F. Osborne*, 46 ECAB 198 (1994).

²⁹ *A.M.*, Docket No. 16-1307 (issued October 27, 2016); *Teresa M. Valle*, 57 ECAB 542 (2006).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 30 and November 4, 2015 are affirmed.

Issued: May 22, 2017
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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