United States Department of Labor
Employees' Compensation Appeals Board

T.C., Appellant	)	
and	)	**Docket No. 17-0872**
	)	**Issued: October 5, 2017**
U.S. POSTAL SERVICE, JOHN F. KENNEDY AIRPORT, Jamaica, NY, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On March 13, 2017 appellant, through counsel, filed a timely appeal from a September 22, 2016 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 to consider the merits of the case.

ISSUE

The issue is whether appellant has met his burden of proof to establish hearing loss due to noise exposure in his federal job duties.

[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.*

On appeal counsel argued that the medical evidence submitted was sufficient to establish that appellant's hearing loss was causally related to his federal noise exposure and that the claim was clearly compensable.

FACTUAL HISTORY

On October 29, 2014 appellant, then a 55-year-old ramp clerk, filed an occupational disease claim (Form CA-2) alleging hearing loss and ringing in both ears. He noted working on the airfield with no hearing protection and also earlier working as a clerk under a "SAC" sorter. Appellant indicated that he first became aware of his hearing loss on July 16, 2011 and first attributed his condition to his employment on that date. Appellant's supervisor noted that appellant's hearing protection was provided for all ramp clerks and that, while working under the "SAC" sorter, he could have asked for hearing protection. He indicated that appellant first reported his condition on October 29, 2014.

Appellant asserted that his hearing loss began in 2010 and that employing establishment hearing tests supported his hearing loss. He worked at the employing establishment for 33 years as a "SAC" sorter and on the ramp around aircraft. Appellant alleged that he had no hearing problems prior to his employment with the employing establishment.

In support of his claim, appellant submitted a report dated October 8, 2014 from Dr. Joseph M. Capo, a Board-certified otolaryngologist. Dr. Capo reported that appellant had worked for over 30 years at the airport on the ramps and was exposed to significant noise of jet engines. He reviewed an audiogram taken in conjunction with his examination and found bilateral moderate-to-severe sensorineural hearing loss especially in the high tones. Dr. Capo diagnosed bilateral sensorineural hearing loss causally related to excessive noise at the employing establishment. He also noted that appellant reported bilateral tinnitus.

Appellant submitted an audiological report dated October 8, 2014 from the employing establishment. This report indicated that appellant had 8.25 percent binaural hearing loss in 2014.

On January 6, 2015 OWCP requested additional factual and medical information from the employing establishment and appellant. It requested that appellant provide a list of his employment history, noise exposure, and the date he first noticed his hearing loss. OWCP requested that the employing establishment provide the location of job sites, the sources of exposure to noise, the decibel and frequency level for each job site, and a copy of all medical examinations pertaining to hearing or ear problems. It also requested that the employing establishment provide the date of last exposure to employment-related noise.

Appellant responded on January 14, 2015 and listed his employment from 1981 through November 2014 at the employing establishment. He noted that he worked under the "SAC" sorter from February 1984 through June 2004 and that from June 2004 through November 2014 he worked as a ramp clerk on the airfield exposed to jet engine noise. Appellant alleged that he never received hearing protection and that he requested this protection on numerous occasions. He indicated that the employing establishment hearing test in 2010 provided documentation of his hearing loss, but that he did not perceive his loss of hearing at that time. Appellant began to

notice his hearing loss while watching television and conversing. He reported that he received yearly hearing tests from the employing establishment and that on two occasions his results were retested by outside physicians. Appellant advised that he had retired from the employing establishment and denied any hobbies which involved loud noise exposure.

The employing establishment responded to OWCP's request for information on February 4, 2015. Appellant's supervisor indicated that appellant worked on the air field ramp approximately one hour a day. He also noted that appellant worked as a dispatch clerk under the "SAC" sorter machine. Appellant's supervisor acknowledged that appellant was exposed to noise from airplanes both on the air field and under the "SAC" sorter machine. He indicated that earmuffs were provided by the employing establishment and the airline. Appellant's supervisor confirmed that appellant had retired on November 29, 2015.

The employing establishment submitted three reports addressing noise monitoring. The first was dated August 12, 2009. In this report, the employing establishment noted that the action level of 85 decibels had been set by the Occupational Health and Safety Administration (OSHA) to protect workers from the health effects of noise on hearing, but that individual susceptibility to noise levels may not always guarantee no hearing loss. The employing establishment noted that exterior ramp operations and other areas ranged between 85.1 and 103.9 decibels and external ramp operations had the potential of exceeding the OSHA action level when aircraft operated in close proximity to the tug drivers.

The second report, dated February 8, 2011, reported four areas within the employing establishment building which exceeded 85 decibels, including the floor strapping machine, the Jogger, the floor drivers, and paging on the intercom from December 1 through 8, 2010. The jitney drivers who transported post containers were also exposed to more than 85 decibels. The report recommended that hearing protection be made available to tug and jitney drivers. All work areas with high noise potential had not been assessed, however, due to process shut down during the noise assessment. The report further noted that fluctuations in aircraft activities on exterior ramps and the condition of the load of containers being pulled could also affect noise levels experience by the drivers. The maximum continuous noise approached 115 decibels.

The third report, dated August 14, 2012, found that, on the date of testing May 23, 2012, noise levels did not exceed 85 decibels. This report indicated that all jitney drivers were enrolled in a hearing conservation program. The report noted that the peak noise on the loading dock was 80.3 decibels, but that there was limited activity on the loading dock and that the peak level was recorded when the intercom was operating. The report recommended continuing jitney drivers on the hearing conservation program.

The employing establishment submitted an audiogram log. Appellant did not have a baseline test, but his last audiogram taken by the employing establishment was dated July 16, 2011.

By decision dated September 22, 2016, OWCP denied appellant's claim for work-related hearing loss. It found that appellant had not provided sufficient details regarding his employment history prior to January 1981 and had not provided information regarding any

military service. OWCP also noted that appellant had not provided his employing establishment audiograms.

LEGAL PRECEDENT

An employee seeking benefits under FECA[3] has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence, including the fact that the individual is an "employee of the United States" within the meaning of FECA and that the claim was timely filed within the applicable time limitation period of FECA, that an injury was sustained in the performance of duty as alleged and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.[4]

OWCP's regulations define an occupational disease as "a condition produced by the work environment over a period longer than a single workday or shift."[5] To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; 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.

Appellant has the burden of proof to establish by the weight of the reliable, probative, and substantial evidence that his hearing loss 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]

OWCP's procedures note that hearing loss may result from prolonged exposure to noise levels above 85 decibels. These procedures further note, "Acoustic trauma may, however, result from decibel levels below 85 decibels if exposure is sufficiently prolonged. OWCP therefore

[3] *Id.*

[4] *Kathryn Haggerty*, 45 ECAB 383, 388 (1994).

[5] 20 C.F.R. § 10.5(q).

[6] *Stanley K. Takahaski*, 35 ECAB 1065 (1984); *R.J.*, Docket No. 16-1525 (issued January 9, 2017).

[7] *Lourdes Harris*, 45 ECAB 545, 547 (1994); *John W. Butler*, 39 ECAB 852 (1988); *R.J., id.*; *D.S.*, Docket No. 16-0903 (issued September 8, 2016).

does not require that the claimant show exposure to injurious noise in excess of 85 decibels as a condition to approval of the [hearing loss] claim."[8]

ANALYSIS

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

OWCP denied appellant's claim as it found that he failed to provide all the factual evidence requested.

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden of proof to establish his or her claim, OWCP also has a responsibility in the development of the evidence.[9] This is particularly true when the evidence is of the character normally obtained from the employing establishment or other government source.[10] The evidence regarding the hearing conservation program testing would be in the possession of the employer.[11] 20 C.F.R. § 10.118(a) states: "The employer is responsible for submitting to OWCP all relevant and probative factual and medical evidence in its possession, or which it may acquire through investigation or other means. Such evidence may be submitted at any time."[12] OWCP requested that the employing establishment provide copies of all of appellant's medical examinations pertaining to hearing or ear problems. The employing establishment did not respond with this information. It merely provided an audiogram log which indicated that appellant was last tested for hearing loss by the employing establishment on July 16, 2011. Once OWCP has begun investigation of a claim, it must pursue the evidence as far as reasonably possible, particular when such evidence is in the possession of the employing establishment and is, therefore, more readily accessible to OWCP.[13]

For these reasons, the Board finds that the case must be remanded to OWCP for further development. OWCP shall request that the employing establishment provide all records related to appellant's participation in the hearing conservation program. After conducting such further development as it deems appropriate, OWCP shall issue a *de novo* decision.

CONCLUSION

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

[8] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.8.a (September 1996).

[9] *See Claudia A. Dixon*, 47 ECAB 168 (1995).

[10] *R.E.*, 59 ECAB 323 (2008); *Willie A. Dean*, 40 ECAB 1208 (1989).

[11] *J.C.*, Docket No. 15-1517 (issued February 25, 2016); *T.M.*, Docket No. 14-1631 (issued December 2, 2014).

[12] 20 C.F.R. § 10.118(a).

[13] *J.C., supra* note 11.

ORDER

IT IS HEREBY ORDERED THAT the September 22, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development consistent with this decision of the Board.

Issued: October 5, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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