United States Department of Labor
Employees' Compensation Appeals Board

K.V., Appellant	)	
and	)	**Docket No. 18-0306**
	)	**Issued: August 8, 2018**
TENNESSEE VALLEY AUTHORITY, Chattanooga, TN, Employer	)	

Appearances:
Ronald K. Bruce, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On November 27, 2017 appellant, through counsel, filed a timely appeal from an October 2, 2017 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.

[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 has met his burden of proof to establish hearing loss causally related to factors of his federal employment.

FACTUAL HISTORY

On December 17, 2014 appellant, then a 64-year-old truck driver, filed an occupational disease claim (Form CA-2) alleging that he suffered hearing loss as a result of his federal employment duties. He indicated that he learned that his hearing loss was employment related when he reviewed the December 2, 2014 report of Dr. William A. Logan, a Board-certified otolaryngologist. The employing establishment controverted the claim.

In a development letter dated December 19, 2014, OWCP requested that appellant submit factual and medical evidence in support of his claim. To establish the factual portion of his claim, appellant was provided a questionnaire for his completion. OWCP afforded him 30 days to submit the necessary evidence.

In response, appellant submitted a supplemental statement labeled "CA 35B." In this statement, he indicated that he began work for the employing establishment on January 5, 1998 as a truck driver and worked in this position until he retired on September 30, 2014. Appellant noted that in this position he was exposed to loud noises on a daily basis produced by diesel powered 50 ton trucks and loud noises produced by diesel powered railroad engines. He also previously worked for the employing establishment as a truck driver from 1982 to 1985. Appellant noted that he wore ear plugs at work. He noted that he previously worked out of his local union office from August 31, 1994 to January 4, 1998 where he was also exposed to loud noise. Appellant also worked as an underground coal miner from 1985 to 1990 and from 1991 to 1993 where he was exposed to loud noise produced by mining equipment and did not wear ear plugs. He noted that he first noticed some hearing loss on January 1, 2012, and learned that his hearing loss was employment related on December 2, 2014.

In a March 10, 2015 report, Whitney Maudlin, an audiologist, reviewed appellant's claim for the employing establishment. She noted that he was not exposed to noise levels that were considered hazardous to the cochlea and, therefore, any hearing loss he was currently experiencing was not work related and was not compensable per FECA. Ms. Maudlin also noted that appellant wore state-of-the-art hearing protection devices. The employing establishment's audiograms of appellant, conducted on June 20 and September 22, 2014, were also submitted.

On April 7, 2015 OWCP referred appellant to Dr. Andrew S. Mickler, a Board-certified otolaryngologist, for a second opinion examination. In answers to questions dated April 30, 2015, Dr. Mickler diagnosed bilateral sensorineural hearing loss not due to appellant's federal employment. He indicated that hearing tests from prior to appellant's federal employment were not available, nor was a description of the noise exposure. Dr. Mickler explained that appellant's April 30, 2015 audiogram did not support a diagnosis of noise-induced hearing loss.

By decision dated June 23, 2015, OWCP denied appellant's claim, finding that the evidence of record was insufficient to establish that his hearing loss was causally related to "the accepted employment event(s)."

On July 7, 2015 appellant requested an oral hearing before an OWCP hearing representative.

By decision dated January 6, 2016, OWCP's hearing representative determined that the case was not in posture for a hearing as further development of the medical evidence was required. She instructed OWCP to request that Dr. Mickler provide rationale to support his opinion that appellant did not sustain a noise-induced hearing loss.

In a December 28, 2015 report obtained by counsel, Dr. Logan, a Board-certified otolaryngologist, determined that using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,[3] appellant had 5.6 percent hearing loss in the right ear and 0 percent hearing loss in the left ear for a combined 0.9 percent binaural hearing loss. He noted that appellant's CA-35B form documented multiple episodes of occupational noise exposure during this federal employment, and that it was likely that all of these occupational noise exposures contributed to hearing loss that was observed on his audiogram.

By letter dated January 6, 2016, OWCP asked Dr. Mickler to clarify his report by providing rationale to support his opinion that appellant did not sustain a noise-induced hearing loss as a result of noise exposure due to his federal employment. In a February 16, 2016 report, Dr. Mickler noted that no prior audiograms were provided for review and no levels of noise exposure were provided by the employing establishment. He further noted that appellant's audiogram from April 30, 2015 did show a sensori-neural hearing loss. It was asymmetric, with the right ear worse than the left. Dr. Mickler noted that noise-induced hearing loss produces bilateral symmetric sensori-neural hearing loss. There is usually a typical noise notch, a dip at 4,000 hertz (Hz). Dr. Mickler noted that neither of these indicators were found in appellant's audiogram. He further noted that asymmetry found could represent a retro-cochlear finding or some other diagnosis, none of which are related to noise exposure. Dr. Mickler concluded that, from the data provided, it did not appear that appellant's hearing loss was related to noise exposure at his federal civilian employment.

By decision dated February 22, 2016, OWCP denied appellant's claim as the medical evidence of record was insufficient to establish that his claimed hearing loss was related to the established work-related events.

On March 9, 2016 appellant, through counsel, requested an oral hearing before an OWCP hearing representative. By decision dated September 13, 2016, the hearing representative determined that the case was not in posture for decision. The hearing representative noted that, as OWCP had referred appellant to Dr. Mickler, it was obliged to provide a complete medical and factual documentation and request clarification from OWCP as to whether noise exposure in appellant's federal employment caused or contributed to hearing loss.

[3] A.M.A., *Guides* (6th ed. 2009).

In a December 1, 2016 report, Dr. Mickler noted that the audiogram testing provided by the employing establishment was for a different person, and that the audiogram of August 20, 2014 did not document the number of hours appellant was free of noise exposure prior to the audiogram. He again noted that appellant's hearing loss was not related to his federal employment. Dr. Mickler noted that the levels of noise to which appellant was exposed were insufficient to cause harm to the ear. He noted that he agreed with Dr. Mauldin's discussion and concluded that appellant's hearing loss was not caused by his federal employment.

By decision dated January 25, 2017, OWCP indicated that appellant's claim remain denied because Dr. Mickler indicated that appellant's hearing loss was not work related.

On February 2, 2017 appellant, through counsel, requested a telephone hearing before an OWCP hearing representative.

During the hearing held on July 28, 2017, appellant was represented by counsel. He testified that he worked for the employing establishment as a truck driver and was exposed to noisy diesel powered trucks. Appellant noted that from 1982 to 1985 he did not wear ear plugs. He also worked as a truck driver from 1998 to 2014. During this time, appellant also worked around trains that unloaded and dumped coal, and that produced a lot of noise. He also noted that there would be other noisy equipment running as he was doing his job, like dozers, unloaders, JLGs, and tire cranes. Appellant described his hearing issues. Counsel contended that the greatest weight should be given the well-rationalized medical opinion of Dr. Logan, who clearly opined that appellant's federal employment contributed to his hearing loss.

By decision dated October 2, 2017, OWCP's hearing representative determined that there was no rationalized medical evidence of record sufficient to establish hearing loss causally related to appellant's federal employment. He found that the weight of the medical opinion evidence rested with the report of Dr. Mickler as his report was based on a complete and accurate factual and medical history and a comprehensive physical examination of appellant, and Dr. Mickler determined that appellant did not have work-related hearing loss.

LEGAL PRECEDENT

An employee seeking benefits under FECA[4] has the burden of proof to establish the essential elements 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 or specific condition for which compensation is claimed is causally related to the employment injury.[5] These are the essential elements of every compensation claim regardless of whether the claim is predicated on a traumatic injury or occupational disease.[6]

[4] *Supra* note 2.

[5] *Gary J. Watling*, 52 ECAB 278-79 (2001); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[6] *Michael E. Smith*, 50 ECAB 313, 315 (1999).

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.[7]

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.[8] 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.[9]

Causal relationship is a medical issue and the evidence generally required to establish causal relationship is rationalized medical opinion evidence.[10] Rationalized medical opinion evidence is medical evidence which includes a physician's reasoned opinion on whether there is causal relationship between the claimant's diagnosed condition and the compensable employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, 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 claimant.[11] The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested, and the medical rationale express in support of the physician's opinion.[12]

ANALYSIS

The Board finds that appellant has not established that his hearing loss was caused or aggravated by factors of his federal employment. As appellant has not submitted rationalized medical evidence sufficient to establish causal relationship, he has not met his burden of proof to establish his claim.[13]

[7] *T.J.*, Docket No. 17-1850 (issued February 14, 2018).

[8] *T.C.*, Docket No. 17-0872 (issued October 5, 2017).

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

[10] *Elizabeth H. Kramm*, 57 ECAB 117, 123 (2005).

[11] *Leslie C. Moore*, 52 ECAB 132, 134 (2000).

[12] *Id.*

[13] *See supra* note 5.

OWCP referred appellant to Dr. Mickler for a second opinion examination and a determination as to whether appellant had a hearing loss and whether this hearing loss was causally related to factors of his federal employment. Dr. Mickler indicated that appellant's audiogram did not support a diagnosis of noise-induced hearing loss. He explained that appellant's audiogram from April 30, 2015 showed a sensori-neural hearing loss that was asymmetric with the right worse than the left ear. Dr. Mickler noted that noise-induced hearing loss produced a bilateral symmetric sensori-neural hearing loss. He also noted that there is usually a typical noise notch, a dip at 4,000 Hz. Dr. Mickler noted that neither of these were found on appellant's audiogram. His report, therefore, provided rationalized medical opinion and was of probative value. Thus, Dr. Mickler is entitled to the weight of the medical evidence.

Counsel contends that the opinion of Dr. Logan was entitled to greater weight than the opinion of Dr. Mickler. Dr. Logan's report was based on appellant's written statement with regard to noise level. It was not based on any objective findings, but rather on appellant's general statement with regard to his work duties. More importantly, Dr. Logan did not explain how appellant's audiogram established work-related noise-induced hearing loss. The Board notes that Dr. Logan opined that appellant's occupational noise exposure likely contributed to the hearing loss evinced on the audiogram. While the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, it must not be speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty.[14] The Board finds that the medical report of Dr. Logan is not well rationalized and is, therefore, of limited probative value.

It is appellant's burden of proof to establish causal relationship between his hearing loss and factors of his federal employment.[15] As he has not submitted rationalized medical evidence to support his allegation that his claimed hearing loss was caused by factors of his federal employment, appellant has not met his burden of proof to establish his claim.[16]

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.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish hearing loss causally related to factors of his federal employment.

[14] *S.T.*, Docket No. 17-1720 (issued April 23, 2018).

[15] *Supra* note 5.

[16] *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 2, 2017 is affirmed.

Issued: August 8, 2018
Washington, DC

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

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

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