

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

J.H., Appellant

and

**DEPARTMENT OF THE ARMY, ANNISTON
ARMY DEPOT, Anniston, AL, Employer**

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**Docket No. 17-1796
Issued: February 6, 2018**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 17, 2017 appellant filed a timely appeal from a March 8, 2017 merit decision and a July 31, 2017 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 to consider the merits of this case.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish hearing loss causally related to factors of his federal employment; and (2) whether OWCP abused its discretion in denying appellant's request for a telephonic hearing before an OWCP hearing representative.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On May 6, 2015 appellant, then a 62-year-old electrician, filed an occupational disease claim (Form CA-2) alleging that on December 9, 1998 he first realized that he had a bilateral hearing loss and that it was related to factors of his federal employment. He remained employed at the employing establishment following this awareness.

In a development letter dated May 15, 2015, OWCP advised appellant of the additional evidence needed to establish his claim, including a detailed history of occupational and nonoccupational noise exposure, and medical evidence diagnosing a condition causally related to noise exposure at work. It afforded appellant 30 days to submit such evidence.

In an April 21, 2015 statement, appellant noted that he first became aware of his hearing loss in June 1998 and that in January 2015 he first became aware of the connection to his federal employment, after his last hearing evaluation. He noted that he used hearing protection in the form of earplugs and that he started wearing hearing protection during his military service. Appellant listed military and other noise exposures from July 1972 to March 15, 2002. He also listed other noise exposure from various tools used at the employing establishment from November 2006 to the present.

Appellant submitted various employing establishment audiograms from 1981 to 2005 which revealed progressive bilateral high-frequency sensorineural hearing loss. He noted that during his employment from 1982 to the present time he was issued hearing protection in the form of earplugs and earmuffs.

OWCP received various employing establishment audiograms from 2006 to 2015 which revealed progressive bilateral high-frequency sensorineural hearing loss. In a memorandum dated April 29, 2015, the employing establishment noted that during appellant's employment from 2006 to the present time he was issued hearing protection, which he used when required. It noted that appellant had noise exposure prior to his employment with the employing establishment.

By letter dated July 21, 2015, OWCP referred appellant to Dr. Howard M. Goldberg, a Board-certified otolaryngologist, for otologic examination and audiological evaluation.

Dr. Goldberg completed an outline for otologic evaluation (Form CA-1332) dated August 18, 2015. He replied "normal hearing in the speech range" when asked to comment on appellant's hearing at the beginning of his significant noise exposure in federal employment. Dr. Goldberg also responded "no" indicating that appellant did not show a sensorineural hearing loss in excess of what would be normally predicated on the basis of presbycusis and that the workplace exposure was not of sufficient intensity and duration to have caused the loss in question. He reported a normal physical examination of the canals, drum motility, and basic fork tests and diagnosed mild bilateral sensorineural hearing loss. Dr. Goldberg checked a box indicating that appellant's hearing loss was "not due" to noise exposure during his federal employment. He explained that appellant had mild bilateral sensorineural hearing loss due to prior exposure to hazardous noise. Dr. Goldberg further reported that appellant's hearing was in the normal range both at the beginning and end of his federal employment. An audiogram

performed that day with testing at the frequency levels of 500, 1,000, 2,000, and 3,000 Hertz revealed decibel losses for the right ear as 15, 15, 25, and 30 respectively. Testing at the same frequency levels revealed decibel losses of 15, 15, 15, and 40 for the left ear.

By decision dated September 2, 2015, OWCP denied appellant's claim as it found that his hearing loss was not sustained in the performance of duty.

On March 17, 2016 OWCP received appellant's request for reconsideration dated September 2, 2015 and a letter dated March 5, 2016. Appellant contended that his hearing loss was employment related as the military had determined his hearing loss was not service related. He also related that he had worked for the employing establishment for 11 years and that he was retiring on April 30, 2016.²

By decision dated February 15, 2017, OWCP purportedly granted modification of its prior decision, without further findings. The appeal rights attached to the decision noted that appellant could request reconsideration before OWCP and review by the Board.

On a form dated February 22, 2017 and received by OWCP on February 27, 2017, appellant requested reconsideration.

On March 8, 2017 OWCP informed appellant that the February 15, 2017 decision had been issued in error and was vacated. It noted that the February 15, 2017 decision had been printed without content and that further review of his case would be undertaken. OWCP attached appeal rights, which included requesting either an oral hearing or review of the written record by an OWCP hearing representative.

In a separate decision dated March 8, 2017, OWCP modified its prior decision. It accepted that appellant was exposed to noise from machinery and tools at his federal employment, as alleged, but denied appellant's claim because he had not established hearing loss causally related to noise exposure at work.

On March 20, 2017 OWCP received appellant's request for review of the written record by an OWCP hearing representative.

By decision dated July 31, 2017, OWCP denied appellant's request for review of the written record by an OWCP hearing representative, as the only right of appeal appellant had was either to request reconsideration by OWCP or review by the Board. The hearing representative noted that OWCP had previously denied appellant's claim for a hearing loss by decision dated September 2, 2015. Appellant had requested reconsideration on March 17, 2016. He noted that the March 8, 2017 correspondence informing appellant that the February 15, 2017 decision had been issued in error inadvertently attached appeal rights, including the right to review of the written record by an OWCP hearing representative. However, as the correspondence did not contain any formal determination or denial, no appeal right should have been attached. The

² On May 18, 2016 appellant filed an appeal with the Board. In an order dated August 8, 2016, the Board dismissed his appeal to the Board from the September 2, 2015 decision as untimely filed. Docket No. 16-1207 (issued August 8, 2016).

hearing representative noted that the March 8, 2017 decision denying his claim on the basis that causal relationship had not been established included appeal rights of review by the Board or reconsideration by OWCP, as appellant had previously requested reconsideration.

Appellant was informed that his case had been considered in relation to the issues involved, and that the request was further denied because the issues in this case could be addressed by requesting reconsideration from OWCP and submitting evidence not previously considered.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA³ 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

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."⁶ 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.⁷ 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.⁸

³ *Supra* note 1.

⁴ *C.S.*, Docket No. 08-1585 (issued March 3, 2009); *Bonnie A. Contreras*, 57 ECAB 364 (2006).

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

⁶ 20 C.F.R. § 10.5(q).

⁷ *R.J.*, Docket No. 16-1525 (issued January 9, 2017); *Stanley K. Takahaski*, 35 ECAB 1065 (1984).

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

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.⁹ 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.¹⁰ 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.¹¹

ANALYSIS -- ISSUE 1

OWCP accepted that appellant was a federal civilian employee who filed a timely claim, that the employment factors occurred, that a medical condition had been diagnosed, and that he was within the performance of duty. It denied his claim, however, as the medical evidence did not establish a causal relationship between factors of his federal employment and his hearing loss. The Board finds that appellant has not met his burden of proof to establish that his hearing loss was causally related to factors of his federal employment.

In a report dated August 18, 2015, Dr. Goldberg examined appellant, reviewed his medical records and analyzed the results of an audiogram performed on that date. He diagnosed mild bilateral sensorineural hearing, but found that appellant's hearing loss was unrelated to noise exposure in his federal employment. Dr. Goldberg explained that appellant did not show a sensorineural hearing loss in excess of what would be normally predicated on the basis of presbycusis and that the workplace exposure was not of sufficient intensity and duration to have caused the loss in question. He completed a Form CA-1332 dated December 15, 2015 and provided audiometric test findings. Dr. Goldberg reported a normal physical examination of the canals, drum motility, and basic fork tests and diagnosed mild bilateral sensorineural hearing loss. He related that appellant's hearing loss was "not due" to noise exposure during his federal employment. Dr. Goldberg explained that appellant had a history of noise exposure prior to his federal employment and that his hearing was within the normal limits at the beginning and end of his federal employment.

The Board finds that Dr. Goldberg's opinion was based on a review of the evidence and supported by medical rationale explaining that appellant's hearing loss was not a result of noise exposure during his federal employment. Dr. Goldberg referenced prior noise exposure and noted appellant's hearing was within normal limits currently and at the beginning of his federal employment. He provided examination findings and a reasoned opinion explaining how appellant's hearing loss was not due to the noise exposure in his federal employment.¹² Dr. Goldberg's August 18, 2015 report, therefore, was sufficient to establish that appellant did

⁹ *Y.J.*, Docket No. 08-1167 (issued October 7, 2008); *A.D.*, 58 ECAB 149 (2006); *D'Wayne Avila*, 57 ECAB 642 (2006).

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

¹¹ *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

¹² *See M.I.*, Docket No. 16-0759 (issued June 10, 2016).

not sustain bilateral sensorineural hearing loss causally related to factors of his federal employment.

The Board notes that it is appellant's burden of proof to establish causal relationship. Appellant has however not submitted any 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.¹³ He therefore has not met his burden of proof.

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.¹⁴ A request for a hearing or review of the written record must be submitted, in writing, within 30 days of the date of the decision for which a hearing is sought.¹⁵ 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.¹⁶ 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.¹⁷ Similarly, the Branch of Hearings and Review may exercise its discretion to conduct a hearing or review the written record where a claimant requests a second hearing or review on the written record on the same issue.¹⁸

ANALYSIS -- ISSUE 2

On March 20, 2017 OWCP received appellant's request for review of the written record by an OWCP hearing representative. The Board finds that, because he had previously requested reconsideration under section 8128 of FECA, he was not entitled to a hearing as a matter of right under section 8124(b)(1).¹⁹ OWCP exercised its discretion and determined that the issue in the case could be resolved equally well through a request for reconsideration and the submission of

¹³ *Supra* note 10.

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

¹⁵ *Id.* at 10.616(a).

¹⁶ *Id.*

¹⁷ *D.E.*, 59 ECAB 438 (2008); *Hubert Jones, Jr.*, 57 ECAB 467 (2006).

¹⁸ 20 C.F.R. § 10.616(a).

¹⁹ *Marilyn F. Wilson*, 52 ECAB 347 (2001).

additional evidence.²⁰ The Board therefore finds that OWCP did not abuse its discretion in denying appellant's request for review of the written record in its July 31, 2017 decision.

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. The Board further finds that OWCP did not abuse its discretion in denying his request for review of the written record by an OWCP hearing representative.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 8 and July 31, 2017 are affirmed.

Issued: February 6, 2018
Washington, DC

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

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

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

²⁰ *J.D.*, Docket No. 15-1679 (issued December 14, 2015).