United States Department of Labor
Employees' Compensation Appeals Board

D.S., Appellant	)	
and	)	**Docket No. 17-1749**
	)	**Issued: January 23, 2018**
DEPARTMENT OF THE ARMY, ARMY NATIONAL GUARD, Latham, NY, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 9, 2017 appellant filed a timely appeal from a February 9, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

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

FACTUAL HISTORY

This case has previously been before the Board.[2] The facts as presented in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

[1] 5 U.S.C. § 8101 *et seq.*

[2] Docket No. 16-0903 (issued September 8, 2016).

On May 12, 2015 appellant, then a 45-year-old surface maintenance mechanic leader, filed an occupational disease claim (Form CA-2) alleging that he suffered from hearing loss and slight ringing in both ears as a result of his federal employment duties. He noted that his employing establishment was located adjacent to Albany International Airport.

In support of his claim, appellant submitted the results of multiple audiograms conducted from September 28, 2004 through May 18, 2015.

In a June 9, 2015 statement, appellant explained that he had worked for the employing establishment as an automotive worker from May 2003 to July 2007, as a surface maintenance mechanic from July 2007 through May 2012, and as a surface maintenance mechanic leader from May 2012 to present. He alleged that he was exposed to noise produced by gasoline and diesel engine driven vehicles, construction equipment, air compressors, power generating equipment, and tools such as impact wrenches. Appellant indicated that he gradually became aware of ringing in his ears and was formally told of possible hearing loss on January 13, 2010. He noted that he continued to be exposed to hazardous noise daily. Appellant stated that in 2003 he was provided with hearing protection, and that he now wore earplugs and/or earmuffs whenever noise was present. He also discussed his military service. In a letter of the same date, a surface maintenance mechanic coworker, indicated that appellant was still exposed to hazardous noise as a federal technician. He noted that appellant's shop was located in a building near the runways for Albany County Airport. The coworker also noted that the noise in appellant's building was continuous throughout the day, and that mechanics engaged in noisy operations with no warnings to the rest of the building.

By decision dated November 12, 2015, OWCP denied appellant's claim, noting that the evidence of record did not support that the injury and/or events occurred as alleged.

Appellant requested review of the written record by an OWCP hearing representative in an appeal form postmarked December 16, 2015. By decision dated March 7, 2016, OWCP denied appellant's request for a review of the written record as it was not filed within the 30-day time limitation for requesting review of the written record.

On March 26, 2016 appellant appealed with the Board. In a decision dated September 8, 2016, the Board found that OWCP properly denied appellant's request for review of the written record as untimely filed. However, the Board also found that appellant met his burden of proof to establish that he was exposed to hazardous levels of noise. The Board remanded the case, noting that OWCP must consider whether appellant's employment-related noise exposure was sufficiently prolonged to result in acoustic trauma. The Board indicated that such a question was medical in nature and should be resolved by a Board-certified otolaryngologist.[3]

On December 13, 2016 OWCP referred appellant to Dr. Michael Kortbus, an otolaryngologist of professorial rank, for a second opinion evaluation. In a December 27, 2016 report, Dr. Kortbus noted that appellant was exposed to loud noise while serving in the military in Iraq in 2005. He indicated that appellant noted a gradual decrease in hearing since 2010, and that appellant's hearing conservation screenings suggested a decline in puretone thresholds with marked decline from April 2014 to April 2015. Dr. Kortbus assessed normal thresholds at each

[3] *Id.*

ear between 250 Hertz (Hz) and 3,000 Hz. He also noted critical speech range within normal range, and normal middle ear function bilaterally. Dr. Kortbus did find bilateral tinnitus. In response to questions, he indicated that appellant did not show a sensorineural loss that was in excess of what would be normally predicated on the basis of presbycusis. However, Dr. Kortbus responded "yes" to a question as to whether appellant's workplace exposure was of sufficient intensity and duration to have caused the hearing loss in question. Later, in response to a different question, he indicated that appellant's sensorineural hearing loss was "not due" to his federal employment. Audiometric testing at the frequency levels of 500, 1,000, 2,000, and 3,000 cycles per second (cps) revealed the following: right ear 15, 15, 20, and 20 decibels; and left ear 15, 15, 15, and 20 decibels. Dr. Kortbus noted that this does not compute to a ratable hearing impairment, as appellant did not have any "noise notch."

By decision dated February 9, 2017, OWCP denied appellant's claim, finding that the medical evidence of record did not demonstrate that appellant had a medical condition causally related to the accepted work factors. It noted that Dr. Kortbus determined that, although appellant had hearing loss, it was not the result of his federal employment. Rather, it was the result of his longstanding history of excessive loud noise while in the military.

LEGAL PRECEDENT

An employee seeking benefits under FECA[4] 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.[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.[7]

[4] *Supra* note 1.

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

[6] 20 C.F.R. § 10.5(q).

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

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]

Regarding tinnitus, the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (6th ed. 2009), provide that tinnitus is not a disease, but rather a symptom that may be the result of disease or injury.[10] The A.M.A., *Guides* also provide that, if tinnitus interferes with activities of daily living, including sleep, reading (and other tasks requiring concentration), enjoyment of quiet recreation, and emotional well being, up to five percent may be added to a measurable binaural hearing impairment.[11]

It is well established that proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares the responsibility in the development of the evidence to see that justice is done.[12]

ANALYSIS

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

In its February 9, 2017 decision, OWCP denied appellant's claim for work-related hearing loss based on the second opinion of Dr. Kortbus. It noted that he had assessed sensorineural hearing loss, but concluded that the hearing loss was more so due to appellant's longstanding history of excessive loud noise while in the military, not his federal employment. The Board finds that OWCP erred in its evaluation of the report of Dr. Kortbus. While Dr. Kortbus noted appellant's exposure to excessive noise during his military deployment in 2005, he never stated that appellant's hearing loss was due to the military exposure.

Furthermore, in response to questions from OWCP with regard to whether appellant's work exposure caused appellant's hearing loss, he indicated that appellant's federal workplace exposure was of sufficient intensity and duration to have caused the loss in question. However, in response to the question of whether the sensorineural hearing loss seen was, in part or all, due to the exposure encountered in appellant's federal employment, Dr. Kortbus checked the box marked "not due." When asked for supporting rationale, he only referenced calculations finding no ratable permanent impairment and did not address causation.

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

[9] *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).

[10] A.M.A., *Guides* 249.

[11] *Id., see also R.O.,* Docket No. 13-1036 (issued August 28, 2013), *R.H.,* Docket No. 10-2139 (issued July 13, 2011).

[12] *D.G.*, Docket No. 15-0702 (issued August 27, 2015).

Once OWCP undertakes development of the medical evidence, it has the responsibility to do so in a manner that will resolve the relevant issues in the case.[13] Due to Dr. Kortbus' lack of rationale relative to causal relationship, further clarification of the medical evidence is necessary.[14] Accordingly, this case is remanded to OWCP for further development of the medical evidence, to be followed by the issuance of a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 9, 2017 is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: January 23, 2018
Washington, DC

Patricia H. Fitzgerald, Deputy 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

[13] *See V.H.*, Docket No. 17-0439 (issued December 13, 2017); *George Tseko*, 40 ECAB 948 (1989).

[14] *See E.R.*, 16-1529 (issued March 3, 2017); *Ramon K. Farrin, Jr.*, 39 ECAB 736 (1988).