

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

_____)	
R.V., Appellant)	
)	
and)	Docket No. 18-0552
)	Issued: November 5, 2018
DEPARTMENT OF THE ARMY,)	
INSTALLATION MANAGEMENT)	
COMMAND, Yuma, AZ, Employer)	
_____)	

Appearances:
Appellant, pro se
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 January 19, 2018 appellant filed a timely appeal from a January 2, 2018 merit 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.²

ISSUE

The issue is whether appellant has met his burden of proof to establish consequential binaural hearing loss.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the January 2, 2018 decision, OWCP received additional evidence. However, the Board's jurisdiction is limited to the evidence that was in the record at the time OWCP issued its final decision. Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c)(1).

FACTUAL HISTORY

On February 17, 2015 appellant, then a 47-year-old supervisory safety and occupational health manager, filed an occupational disease claim (Form CA-2) alleging that he developed sinusitis as the result of exposure to mold at his worksite. He noted that he first became aware of his claimed condition on October 20, 2014, but did not realize its relationship to his federal employment until February 15, 2015. Appellant did not stop work. OWCP accepted the claim for acute bronchitis and chronic frontal sinusitis.

In a March 20, 2017 report, Dr. Robert Smythe, a treating physician Board-certified in internal and bariatric medicines, diagnosed sinusitis and noted that appellant had been a patient since September 24, 2010. He observed bilateral ear and sinus cavity blockage and severe swelling. Dr. Smythe attributed appellant's hearing loss and severe scar tissue to the nasal blockage and prolonged ear canal swelling. He noted that appellant had reached maximum medical improvement.

On March 26, 2017 appellant filed a claim for a schedule award (Form CA-7).

On March 30, 2017 OWCP received hearing conservation data containing audiogram results from September 4, 2007 and March 28, 2017.

In a March 30, 2017 development letter, OWCP informed appellant of the conditions that had been accepted for his claim. It indicated that hearing loss was not accepted and advised him of the type of factual and medical evidence necessary to establish a consequential hearing loss claim. Appellant was provided a questionnaire to complete. OWCP afforded him 30 days to provide the necessary evidence.

On April 13, 2012 appellant completed and returned the questionnaire sent by OWCP.

By letter dated April 26, 2017, OWCP referred appellant to Dr. Jennifer H. Macewan, a physician specializing in otolaryngology, for otologic examination and audiological evaluation.

In a May 4, 2017 report, Dr. Macewan diagnosed binaural sensorineural hearing loss, which she opined was not employment related. In support of this conclusion she noted the canal swelling, as documented by Dr. Smythe, would cause conductive hearing loss while appellant's hearing loss was sensorineural. Therefore, appellant's hearing loss was not caused by the accepted work conditions.

By decision dated June 6, 2017, OWCP denied appellant's request to expand acceptance of his claim to include a consequential binaural hearing loss. It found Dr. Macewan's opinion, that appellant's hearing loss was not employment related, constituted the weight of the medical opinion evidence.

On June 13, 2017 appellant requested an oral hearing before an OWCP hearing representative. A telephonic hearing was held on November 6, 2017.

In a November 8, 2017 report, Dr. Smythe diagnosed chronic sinusitis and bronchial infection due to mold exposure at work. He attributed appellant's hearing impairment to severe bilateral ear canal scar tissue.

By decision dated January 2, 2018, the hearing representative affirmed the June 6, 2017 decision denying appellant's claim for a consequential hearing loss. He found Dr. Macewan's report constituted the weight of the medical opinion evidence.

LEGAL PRECEDENT

It is an accepted principle of workers' compensation law that when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent, intervening cause attributable to the employee's own intentional conduct.³ The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.⁴ With respect to consequential injuries, the Board has held that, where an injury is sustained as a consequence of an impairment residual to an employment injury, the new or second injury, even though nonemployment related, is deemed, because of the chain of causation to arise out of and in the course of employment and is compensable.⁵

A claimant bears the burden of proof to establish a claim for a consequential injury. As part of this burden, he or she must present rationalized medical opinion evidence, based on a complete factual and medical background, showing causal relationship. Rationalized medical evidence is an opinion of reasonable medical certainty supported by sound medical rationale explaining the nature of the relationship of the diagnosed condition and the specific employment factors or employment injury.⁶

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish consequential binaural hearing loss.

In support of his claim appellant submitted March 20 and November 8, 2017 reports from Dr. Smythe detailing appellant's history of injury and provided examination findings. Dr. Smythe diagnosed sensorineural hearing loss, which he attributed to appellant's accepted conditions of chronic sinusitis and bronchial infection, due to mold exposure at work. Although he related appellant's hearing loss to scar tissue caused by nasal blockage and ear canal swelling, he did not

³ *Albert F. Ranieri*, 55 ECAB 598 (2004); *Clement Jay After Buffalo*, 45 ECAB 707 (1994); *John R. Knox*, 42 ECAB 193 (1990).

⁴ *S.M.*, 58 ECAB 166 (2006); *Debra L. Dillworth*, 57 ECAB 516 (2006); *Carlos A. Marrero*, 50 ECAB 117 (1998); A. Larson, *The Law of Workers' Compensation* § 10.01 (2005).

⁵ *L.S.*, Docket No. 08-1270 (issued July 2, 2009); *Kathy A. Kelley*, 55 ECAB 206 (2004).

⁶ *J.B.*, Docket No. 14-1474 (issued March 13, 2015).

explain how the bilateral ear canal scar tissue caused appellant's diagnosed bilateral sensorineural hearing loss. Although, Dr. Smythe provided an affirmative opinion on causal relationship, the Board finds that he did not provide medical rationale supporting his conclusion that appellant's hearing loss was a consequence of his accepted employment injury. A medical report is of limited probative value when the opinion on causal relationship lacks medical rationale.⁷

OWCP referred appellant to Dr. Macewan for a second opinion evaluation. In a May 4, 2017 report, Dr. Macewan diagnosed binaural sensorineural hearing loss, which she concluded was unrelated to appellant's federal employment. She determined that as appellant's hearing loss was sensorineural it was not employment related. Dr. Macewan explained that the canal swelling Dr. Smythe documented would cause conductive hearing loss and not sensorineural hearing loss. Thus, appellant's hearing loss was not caused by the accepted employment factors as it was not conductive in nature, but rather sensorineural. Dr. Macewan provided examination findings and a reasoned opinion explaining why appellant's hearing loss was not a consequence of his accepted employment injury. As her opinion was based on a proper factual and medical history, and was supported by medical rationale, it constitutes the weight of the medical evidence.⁸

The Board finds that the medical evidence of record is insufficient to establish that consequential binaural hearing loss. Appellant, 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.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish consequential binaural hearing loss.

⁷ See *T.T.*, Docket No. 17-0471 (issued August 8, 2017); *Debra L. Dillworth*, 57 ECAB 516 (2006).

⁸ See *L.G.*, Docket No. 17-1448 (issued December 19, 2017); *M.I.*, Docket No. 16-0759 (issued June 10, 2016).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 2, 2018 is affirmed.

Issued: November 5, 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