

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

R.B., Appellant)	
)	
and)	Docket No. 18-0720
)	Issued: November 13, 2018
DEPARTMENT OF THE ARMY, ARMY)	
CORPS OF ENGINEERS, Vicksburg, MS,)	
Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
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 February 20, 2018 appellant, through counsel, filed a timely appeal from a January 22, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this 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 binaural hearing loss causally related to the accepted factors of his federal employment.

FACTUAL HISTORY

On November 27, 2015 appellant, then a 64-year-old retired engineer equipment operator,³ filed an occupational disease claim (Form CA-2) alleging that his binaural hearing loss was caused by factors of his federal employment. He indicated that he first became aware of his claimed condition on September 2, 1986 and of its relationship to factors of his federal employment on June 16, 1998. Appellant explained that his delay in filing his claim was because he had developed kidney failure and was in and out of the hospital.

By development letter dated December 30, 2015, OWCP advised appellant of the deficiencies in his claim. It requested that he submit additional evidence regarding the exposure or work factors he believed had caused his injury. Appellant was also asked to complete a questionnaire listing his employment history, exposure to hazardous noise at work, the date he first noticed his hearing loss, all previous ear or hearing programs in which he participated, and hobbies involving exposure to loud noise. OWCP afforded him 30 days to submit the requested information.

In a separate letter, also dated December 30, 2015, OWCP requested information from the employing establishment, including the locations of appellant's job sites where the alleged exposure occurred, sources of exposure to noise and machinery, the decibel and frequency level (to include a noise survey report for each job site) and period of exposure, the types of ear protection and noise attenuation in decibels if known, and copies of all medical examinations pertaining to hearing or ear problems, including preemployment examination, and all audiograms. It also requested employment data and the date of last exposure to hazardous noise and the pay rate in effect on that date.

OWCP subsequently received evidence that included the results of audiograms performed by the employing establishment's for their hearing conservation program dated September 2, 1986, June 16, 1998, June 29, 2000, and July 2012.

On November 11, 2015 Dr. Robert Moore, a Board-certified family practitioner, performed an audiogram and advised that appellant had 67 percent hearing loss in the right ear and 62 percent hearing loss in the left ear and recommended hearing aids.

On January 6, 2016 appellant responded to the development questionnaire OWCP sent to the employing establishment. He indicated that the employing establishment did not challenge his allegations. Appellant noted that he began working in the Mat Sinking unit at the employing establishment in 1984 and worked there for a total of 30 years. He worked with and was exposed to noise from heavy machinery such as, bulldozers, a track hoe with bucket, anchor driver machines, and other heavy equipment to perform various tasks. Appellant also worked fully with

³ The record reflects that appellant retired on July 31, 2013.

heavy machinery for 22 years in the Mat Sinking unit, and as a result, he claimed that he suffered a significant amount of hearing loss/damage. He related that a supervisor would provide all documentation pertaining to his claim.

On February 18, 2016 OWCP advised appellant that he had mistakenly responded to the employing establishment's development questionnaire. Appellant was asked to complete the development questionnaire sent to him.

On February 25, 2016 appellant responded to OWCP's development questionnaire directed to him. He indicated that his last date of exposure was January 24, 2013 and that he officially retired on July 31, 2013. Appellant further indicated that on June 16, 1998 he first realized his hearing loss. He maintained that he did not have any hobbies that involved loud noise. Appellant reiterated his employment history at the employing establishment, his exposure to equipment noise at work, and claimed that he sustained significant hearing loss/damage. He noted that he held several positions in the Mat Sinking unit, which included a revetment worker, engineer equipment operator, engineer equipment operator foreman, and engineer equipment operator leader in the Operations Divisions, River Operations Branch, Revetment Section. Appellant sometimes worked overtime. He claimed that, on average he worked "about 140 plus hours a week" in the Mat Sinking unit around loud machines such as, anchor drivers, bulldozers, and tract hoe machines. Appellant also worked in closed areas, such as the Mississippi River Bank and the Mat Plant which was on the Mississippi River. In addition, he worked around steel anchors along with the heavy machines during work hours. Appellant indicated that he was provided with small foam earplugs upon working in the Mat Sinking unit.

By letter dated May 2, 2016, OWCP referred appellant, together with a statement of accepted facts and the medical record, to Dr. Melanie H. Smith, a Board-certified otolaryngologist, for a second opinion to determine whether appellant sustained employment-related hearing loss. Dr. Smith completed an outline for otologic evaluation (Form CA-1332) dated June 1, 2016 and provided audiometric test results. In the CA-1332 form, she noted that appellant had normal hearing until 2012 when his hearing dropped substantially according to his medical records. On examination Dr. Smith observed a normal canal and drum mobility. There was no indication of any medical condition such as an acoustic neuroma or Meniere's disease. Dr. Smith suggested malingering. She checked a box indicating that appellant's sensorineural hearing loss was not due to noise exposure in his federal civilian employment. Dr. Smith noted that no other history contributed to his hearing loss. She recommended repeat audio testing as the present audiometric findings were inconsistent. In addition, Dr. Smith advised that appellant's hearing loss, as documented, did not match the otoacoustic emission test findings and that his speech discrimination scores were also inconsistent.

A June 1, 2016 audiogram performed on Dr. Smith's behalf by Cathryn Crawford Hollis, an audiologist reflected testing at the frequency levels of 500, 1,000, 2,000, and 3,000 hertz (Hz) which revealed the following: right ear 30, 40, 45, and 45 decibels (dBs), respectively, left ear 45, 45, 50, and 75 dBs, respectively. Ms. Crawford Hollis had to reinstruct appellant several times for consistency. Appellant's word recognition skills testing was very questionable. Ms. Crawford Hollis recommended repeat audio testing.

By decision dated June 21, 2016, OWCP denied appellant's hearing loss claim. It found that the evidence of record established that he was exposed to hazardous noise at work and that he was diagnosed with sensorineural hearing loss, however, he had not established that his hearing loss was causally related to his federal employment noise exposure. OWCP explained that the reason for the finding was that Dr. Smith opined that appellant's sensorineural hearing loss was not due to noise exposure in his federal employment.

In an appeal request form received on July 12, 2016 and by letter received on July 13, 2016, appellant requested a review of the written record by an OWCP hearing representative. He again contended that his hearing loss was caused by his employment-related noise exposure.

Appellant submitted a June 29, 2016 letter from Jason Massey, a Board-certified hearing instrument specialist. Mr. Massey performed an audiogram on that date which related testing at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz and revealed the following: right ear 85, 80, 75, and 75 dBs, respectively, left ear 90, 90, 95, and 95 dBs, respectively. He reported that the results of his evaluation indicated that appellant had profound bilateral sensorineural hearing loss. Mr. Massey noted that appellant's speech discrimination was at 68 percent in both ears. He further related that appellant had extreme difficulty communicating with others due to the nature of his hearing loss. Mr. Massey noted that he was being fitted with binaural hearing instruments, but that he was still expected to have problems communicating as the extent of his hearing loss was great.

On July 13, 2016 appellant augmented two of his February 25, 2016 responses to OWCP's development questionnaire. He noted that he first realized his hearing loss on September 2, 1986 rather than on June 16, 1988. Appellant further noted that he worked with heavy machinery in the Mat Sinking unit for 30 years instead of 22 years.

By decision dated November 7, 2016, an OWCP hearing representative set aside the June 21, 2016 decision and remanded the case to OWCP for further development of the medical evidence as Dr. Smith had recommended further audiologic testing and the record suggested malingering.

On January 17, 2017 OWCP again referred appellant to Dr. Smith for a second opinion to perform repeat audio testing as she had recommended. Dr. Smith completed a Form CA-1332 dated January 31, 2017 and provided audiometric test results. She reiterated that appellant's hearing was normal until 2012 when his hearing dropped as documented in enclosed documents. Dr. Smith maintained that the tests in these documents were not accurate. On examination she again observed a normal canal and drum mobility and restated her prior suggestion of malingering. Dr. Smith again checked a box indicating that appellant's sensorineural hearing loss was not due to noise exposure in his federal civilian employment and that no other history contributed to his hearing loss. She advised that his test results did not match and were inconsistent indicating that his hearing was better than he claimed. Dr. Smith maintained that appellant was dishonest, unreliable, and uncooperative on testing.

On January 31, 2017 Ms. Crawford Hollis performed another audiogram on Dr. Smith's behalf. Testing at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz revealed dBs losses of 30, 40, 45, and 45, respectively, for the right ear, and dBs losses of 45, 45, 50, and 75, respectively

for the left ear. Ms. Crawford Hollis indicated that the audiometric test results were not reliable and not representative of appellant's hearing sensitivity because he was purposefully trying to manipulate the test. Appellant had functional hearing loss and there was a strong possibility of malingering. Speech reception thresholds were inconsistent with pure tone averages and that even after reinstruction, results remained inconsistent. Otoacoustic emissions testing bilaterally indicated normal functioning of the outer hair cells in the inner ear and tympanograms bilaterally indicated normal middle ear function. Appellant had no difficulty communicating or following instructions at a normal conversation level of 50 dB, but he responded poorly on word recognition skills testing at 85 dB bilaterally.

By decision dated March 8, 2017, OWCP again denied appellant's claim, finding that the medical evidence of record failed to establish that his hearing loss was causally related to his accepted federal employment noise exposure. It found that the January 31, 2017 report of Dr. Smith represented the weight of the medical evidence.

On January 16, 2018 appellant, through counsel, requested reconsideration of the March 8, 2017 decision. Appellant submitted a December 19, 2017 letter and audiogram from Dr. Stephen D. Shorts, an otolaryngologist. Dr. Shorts noted appellant's work history at the employing establishment and reviewed the employing establishment audiograms performed in 1986, 1998, 2000, and 2012. He related that the audiograms performed from 1986 through 2000 were essentially normal for appellant's age. Dr. Shorts advised that the July 2012 audiogram showed hearing loss in the right ear from 55 to 80 dBs and 60 to 100 dBs in the left ear. He examined appellant and reported normal canals, tympanic membranes, and middle ears. Dr. Shorts further reported that audiometric testing revealed mild-to-moderate sensorineural hearing loss in both ears, right a little worse than left. Appellant's discrimination scores were 76 percent on the right and 80 percent on the left. Dr. Shorts noted that these scores placed appellant in hearing aid range. He further noted that it appeared that, from approximately 2,000 Hz and above, this type of loss could have been caused by noise exposure, but the loss approximately below 2,000 Hz was not caused by noise damage and was more likely hereditary. Dr. Shorts believed that appellant's exposure to noise for 30 years accelerated his hearing loss. He recommended hearing aids for both ears due to the degree of hearing loss. Dr. Shorts maintained that it was obvious that the 2012 audiogram was erroneous as the settings of that audiometer or background noise probably caused inaccurate testing. He recommended disregarding the audiogram for further comparison in the future.

The December 19, 2017 audiogram performed by Dr. Shorts related that hearing thresholds at 500, 1,000, 2,000, and 3,000 Hz were 20, 40, 45, and 40 dBs, respectively, for the right ear, and 30, 35, 30, and 25 dBs, respectively, for the left ear.

By decision dated January 22, 2018, OWCP reviewed the merits of appellant's claim, but denied modification of its March 8, 2017 decision. It found that Dr. Shorts' December 19, 2017 report was insufficient to establish causal relationship between the accepted factors of appellant's federal employment and his diagnosed hearing loss.

LEGAL PRECEDENT

An employee seeking benefits under FECA 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 FECA, 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 These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.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.

The medical evidence required to establish causal relationship, generally, is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is causal relationship between the claimant's diagnosed condition and the implicated 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.⁶

ANALYSIS

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

In support of his claim, appellant submitted the employing establishment's annual audiograms dated September 2, 1986, June 16, 1998, June 29, 2000, and July 2012. As these audiograms lack proper certification of calibration, speech testing, and bone conduction scores and were not prepared or certified as accurate by a physician as defined under FECA, they do not constitute probative medical evidence.⁷

⁴ *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁵ *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁶ *Id.*

⁷ *M.I.*, Docket No. 16-0759 (issued June 10, 2016).

Appellant also submitted Dr. Moore's November 11, 2015 audiogram results. Dr. Moore opined that appellant had 67 percent hearing loss in the right ear and 62 percent hearing loss in the left ear. However, he offered no opinion regarding the cause of appellant's hearing loss. The Board has held that medical evidence that does not offer an opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.⁸ As such, this report is insufficient to meet appellant's burden of proof.

Following the submission of evidence from appellant, OWCP referred him to a second opinion for an audiological and otologic evaluation by Dr. Smith, who concluded that he did not have sensorineural hearing loss due to his federal employment. On June 1, 2016 Dr. Smith examined him and reviewed the medical record, including the audiograms conducted during his federal employment. She suggested malingering. Dr. Smith recommended repeat audiometric testing as appellant's documented hearing loss did not match the otoacoustic emission test findings and his speech discrimination scores were inconsistent.

On June 21, 2016 OWCP denied appellant's hearing loss claim based on Dr. Smith's June 1, 2016 opinion. On November 7, 2016 an OWCP hearing representative remanded the matter to OWCP for additional audiologic testing as recommended by Dr. Smith.

Following remand of the case to OWCP by OWCP's hearing representative, OWCP requested that Dr. Smith perform repeat audiological testing. On January 31, 2017 Dr. Smith again reviewed the employing establishment audiograms, examined appellant, and performed a repeat audiogram. She restated that he had normal hearing until 2012 when it dropped. Dr. Smith maintained, however, that these test results were inaccurate. She reiterated her prior normal physical examination findings and her suggestion he was a malingerer. Dr. Smith also reiterated her prior opinion that appellant's sensorineural hearing loss was not due to his federal employment noise exposure. She reasoned that his hearing loss was better than he claimed as his test results were inconsistent with his condition. Dr. Smith noted that appellant was dishonest, unreliable, and uncooperative on testing. Ms. Crawford Hollis, an audiologist, performed the January 31, 2017 audiogram on Dr. Smith's behalf and related that the test results were not reliable and not representative of his hearing sensitivity as he was purposefully trying to manipulate the test. There was a strong possibility that appellant was malingering. Ms. Crawford Hollis indicated that, speech reception thresholds were inconsistent with pure tone averages and that even after reinstruction, results remained inconsistent. In addition, otoacoustic emissions testing bilaterally revealed normal functioning of the outer hair cells in the inner ear and tympanograms bilaterally indicated normal middle ear function. Ms. Crawford Hollis noted that appellant had no difficulty communicating or following instructions at a normal conversation level of 50 dB, but he responded poorly on word recognition skills testing at 85 dB bilaterally.

The Board finds that Dr. Smith's January 31, 2017 report represents the weight of the medical evidence and establishes that appellant's binaural hearing loss was not due to exposure to noise in the workplace.⁹ Dr. Smith's opinion is based on a proper factual and medical history as she reviewed current and previous audiometric test results and related her findings on examination

⁸ See *C.B.*, Docket No. 09-2027 (issued May 12, 2010); see also *S.E.*, Docket No. 08-2214 (issued May 6, 2009).

⁹ See *R.J.*, Docket No. 11-1644 (issued February 14, 2012); *J.L.*, Docket No. 07-1740 (issued December 20, 2007).

and testing in support of her opinion that his hearing loss was not due to the noise in his federal employment.¹⁰

The Board finds that the remaining medical evidence submitted by appellant in support of his hearing loss claim is insufficient to establish his burden of proof.

Dr. Shorts' December 19, 2017 report found that appellant's mild-to-moderate bilateral sensorineural hearing loss was accelerated by his federal employment noise exposure, but he failed to provide adequate medical rationale to support his opinion on causal relationship. He indicated that it appeared that appellant's hearing loss from 2,000 Hz and above could have been caused by noise exposure, while appellant's hearing loss below 2,000 Hz was more likely hereditary. The opinion of a physician supporting causal relationship must rest on a complete factual and medical background supported by affirmative evidence, address the specific factual and medical evidence of record, and provide medical rationale explaining the relationship between the diagnosed condition and the established incident or factor of employment.¹¹ Dr. Shorts noted that appellant's hearing was within a normal range until 2012, but he did not note that appellant retired in 2013. The Board finds that he did not adequately address how appellant's federal employment noise exposure, based upon an accurate factual and medical background, caused or contributed to the hearing loss he found in December 2017.¹² Dr. Shorts' opinion is couched in speculative terms, is not fully rationalized, and is of diminished probative value.¹³ The mere fact that a condition arises during a period of employment and was not present prior to the period of employment is insufficient to support causal relationship.¹⁴

The June 29, 2016 audiogram and report of Mr. Massey, a Board-certified hearing instrument specialist, have no probative medical value. A hearing instrument specialist is not considered a "physician" as defined under FECA.¹⁵ As such, this evidence is also insufficient to meet appellant's burden of proof.

Although appellant was exposed to noise while in the performance of his federal employment duties, the medical evidence of record is insufficient to establish that he had binaural hearing loss causally related to the accepted factors of his federal employment. Thus, the evidence of record is insufficient to establish his claim.¹⁶

¹⁰ See *T.T.*, Docket No. 17-0471 (issued August 8, 2017).

¹¹ *Supra* note 5.

¹² See *E.J.*, Docket No. 17-1755 (issued March 9, 2018); *Solomon Polen*, 51 ECAB 341 (2000).

¹³ *L.P.*, Docket No. 14-1360 (issued October 29, 2014).

¹⁴ See *M.J.*, Docket No. 17-0725 (issued May 17, 2018); *Michael S. Mina*, 57 ECAB 379 (2006).

¹⁵ 5 U.S.C. § 8101(2) of FECA provides as follows: (2) physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. See also *M.F.*, Docket No. 16-1296 (issued December 15, 2016); *Roy L. Humphrey*, 57 ECAB 238 (2005).

¹⁶ See *J.B.*, Docket No. 17-0984 (issued July 11, 2018); *Mary E. Marshall*, 56 ECAB 420, 427 (2005).

On appeal, counsel simply contends that the January 22, 2018 OWCP decision is contrary to fact and law. For the reasons stated above, the Board finds that the weight of the medical evidence of record is insufficient to establish that appellant sustained binaural hearing loss causally related to his federal employment noise exposure.

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 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 binaural hearing loss causally related to the accepted factors of his federal employment.

ORDER

IT IS HEREBY ORDERED THAT the January 22, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 13, 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