

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

H.O., Appellant	)	
	)	
and	)	<b>Docket No. 18-0210</b>
	)	<b>Issued: October 4, 2018</b>
<b>DEPARTMENT OF AGRICULTURE, FOOD</b>	)	
<b>SAFETY &amp; INSPECTION SERVICE,</b>	)	
<b>Minneapolis, MN, Employer</b>	)	
	)	

*Appearances:*  
Michael D. Overman, Esq., for the appellant<sup>1</sup>  
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 November 7, 2017 appellant, through counsel, filed a timely appeal from an August 24, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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<sup>1</sup> 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.

<sup>2</sup> 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

This case has previously been before the Board.<sup>3</sup> The facts contained in the prior Board decision are incorporated herein by reference. The relevant facts are as follows.

On November 15, 2013 appellant, then a 66-year-old retired inspection liaison officer, filed an occupational disease claim (Form CA-2) alleging that he sustained hearing loss, stress, and hypertension due to his exposure to noise when visiting private slaughter processing facilities during the course of his federal employment. He alleged that he first became aware of his claimed condition on January 1, 1978 and first realized that it was caused or aggravated by his federal employment on December 1, 2011. The employing establishment noted that appellant retired on December 31, 2011.

In a November 18, 2013 supplemental statement, appellant related that he started working at the employing establishment in 1968. He noted that from 1968 to 1973 he was assigned to various high volume slaughter facilities, and all of his inspection work was on the slaughter floor. Appellant related that exposure to noise levels above 90 decibels was a regular daily occurrence. He further explained that, from 1974 to 1979, he was assigned to various high volume processing facilities. The processing equipment involved high volume noise and an inspector was required to be in close proximity to this machinery in order to perform proper inspection tasks. Appellant noted that the noise levels at the processing facilities were the same, if not louder, than the slaughter house. He noted that, from 1974 to 1979, he utilized rubber earplugs in an effort to reduce the high noise levels. From 1979 to 1982, appellant worked as an employee relations specialist. His duties required regular travel to many various slaughter/processing locations. From 1982 to 1995, appellant worked as a quality control specialist and processing staff officer. He made regular visits to the same type of industrial locations previously referenced. Appellant noted that, from 1996 to January 2012, he worked as an inspection liaison officer, and at times he visited the same inspection sites.

In a November 11, 2013 report, Dr. Roy Carlson, a Board-certified otolaryngologist, diagnosed sensorineural hearing loss. He noted that appellant's hearing loss presented about 10 years ago and may be related to noise exposure. Dr. Carlson indicated that appellant stated that the noise exposure was secondary to industrial noise when he was inspecting slaughter houses and processing plants, which occurred 25 years ago. He noted that hearing protection was not available during most of his exposure. Dr. Carlson opined that appellant's hearing loss was likely to be at least in part due to noise exposure. He also attached an audiogram conducted on that date.

On January 27, 2014 OWCP denied appellant's claim, finding that the evidence of record was insufficient to establish that the claimed events occurred as alleged, as he had not submitted evidence sufficient to establish noise exposure. It also noted that he had not explained how his

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<sup>3</sup> Docket No. 16-0329 (issued September 12, 2016).

alleged hearing loss caused stress and hypertension. Therefore, it found that appellant had not been established an injury as defined under FECA.

On February 10, 2014 appellant requested a hearing before an OWCP hearing representative. At the hearing held on June 19, 2014, he testified that, when he worked in the slaughter houses, the noise level was above 95 decibels, and he had no hearing protection. Appellant worked 10 to 12 hours a day, 6 days a week. He also testified that the noise in the processing facilities was over 95 decibels. Appellant noted that at times in processing, he had to return to the slaughter house and work there as well. He noted that, from 1996 to 2012, he was an inspector liaison officer, and had to work on issues throughout the agencies. At times, appellant had to visit the processing area or the kill floor. He stated that in 2003 he had his hearing tested and was told that he had hearing loss. Appellant noted that the next time he had his hearing checked was in November 2013, and it was substantially worse. He testified that he had no hobbies that would expose him to loud noise.

In a July 30, 2014 report, Dr. Carlson noted that appellant described a history of extensive noise exposure during his 44 years of employment with the employing establishment including extensive exposure to noise in various slaughter houses. He diagnosed moderate sensorineural hearing loss. Dr. Carlson opined, within a reasonable degree of medical certainty, that appellant's hearing loss was due to his noise exposure given the degree of hearing loss and the absence of other significant factors to produce hearing loss. He noted that, during a significant part of the interval of noise exposure, hearing protection was not available to him and this contributed to the severity of the loss. Dr. Carlson indicated that the loss was permanent and irreversible, and will likely slowly worsen due to the ineluctable changes of age as well.

By decision dated September 5, 2014, the hearing representative vacated OWCP's January 27, 2014 decision as she determined that appellant had established that the employment exposure to noise occurred as alleged. The hearing representative further determined that the medical evidence of record was sufficient to require further development on the issue of causal relationship, and remanded the case with instructions to refer appellant for a second opinion evaluation.

On November 3, 2014 OWCP referred appellant to Dr. Sean Smullen, a Board-certified otolaryngologist, for a second opinion. In a report dated November 18, 2014, Dr. Smullen discussed, in detail, appellant's work history with the employing establishment. He opined that appellant did have significant hearing loss. Dr. Smullen noted that appellant provided a history that his hearing loss started about 12 to 15 years ago. He related that appellant's paperwork included a hearing test in October 2003, which showed mild hearing loss and excellent speech discrimination scores. Dr. Smullen noted that the November 11, 2013 test conducted by Dr. Carlson showed that appellant's hearing loss had progressed so that he was clearly now in the moderate loss range, and that his word discrimination scores decreased. He opined that appellant had better hearing scores at 4,000 Hertz (Hz) than at any other frequency.

Dr. Smullen opined that appellant had significant hearing loss and that, within a reasonable degree of medical certainty, the hearing loss did not result from his noise exposure during his federal employment. He noted that appellant did not have the typical dip in the 4,000 Hz range that one would expect with noise-induced hearing loss. Dr. Smullen also noted that appellant's

hearing loss appears to have progressed over the last 15 years, and appellant, by this trajectory, would not have had hearing loss in his early days when he was exposed to the most noise. He opined that appellant's hearing loss appeared to be the result of age and genetics. The record also contains Dr. Smullen's handwritten responses to OWCP's outline for otologic evaluation. In his response, Dr. Smullen noted that appellant's workplace noise exposure was sufficient to cause hearing loss, but that he did not develop his hearing loss until after his workplace exposure began, and after hearing protection was available. He further opined that appellant's pattern of hearing loss was consistent with presbycusis. Dr. Smullen determined that the pattern was not consistent with genetic loss and not consistent with noise-induced hearing loss.

In a December 11, 2014 decision, OWCP determined that appellant established noise exposure during his federal employment and had also established a diagnosis of hearing loss. However, it denied his claim because he had failed to establish causal relationship between his hearing loss and the accepted employment exposure.

On December 16, 2014 appellant, through counsel, requested a hearing before an OWCP hearing representative.

During the hearing held on June 24, 2015, counsel argued that appellant only needed to show that his employment was a contributing factor to his hearing loss. He contended that Dr. Smullen's report was inconsistent with his handwritten notes.

By decision dated September 9, 2015, the hearing representative denied appellant's claim, finding that appellant had not established that his significant hearing loss was causally related to his federal employment. She found that the medical report from Dr. Smullen represented the weight of the medical evidence.

On December 11, 2015 appellant, through counsel, appealed the September 9, 2015 OWCP decision to the Board.

By decision dated September 12, 2016, the Board set aside the September 9, 2015 decision and remanded the case to OWCP. The Board directed OWCP to seek clarification from Dr. Smullen as to whether appellant's hearing loss was causally related to factors of his federal employment. The Board noted that Dr. Smullen's report was internally inconsistent, and required clarification. The Board further noted that an employee was not required to prove that occupational factors are the sole cause of his condition.<sup>4</sup>

On December 21, 2016 OWCP referred appellant back to Dr. Smullen for an updated second opinion evaluation.

In a narrative opinion dated January 10, 2017, Dr. Smullen opined that appellant's hearing loss was not related to his federal employment. He noted that appellant had a significant moderate hearing loss. Dr. Smullen opined that he did not seem to have a noise-induced hearing loss based on the pattern of his hearing loss as demonstrated by a lack of high-frequency notch seen in noise-induced hearing loss. He further noted that appellant's hearing loss began not long before his first

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<sup>4</sup> *Id.*

audiogram in 2003, and that therefore, his hearing loss would have begun many years after his most significant noise exposure and after he started wearing hearing protection. At the same time, Dr. Smullen completed an outline for otologic evaluation, wherein he noted the appellant's present audiometric findings do not show sensorineural hearing loss that is in excess of what would normally be predicated on the basis of presbycusis. He did note that appellant's workplace exposure was of sufficient intensity and duration and that appellant had no significant noise exposure outside of work. Dr. Smullen attached a copy of appellant's January 10, 2017 audiogram.

By decision dated April 12, 2017, OWCP issued a *de novo* decision denying appellant's hearing loss claim, finding that the medical evidence of record was insufficient to establish that appellant's hearing loss was causally related to the accepted work events.

By letter dated April 26, 2017, appellant, through counsel, requested a hearing before an OWCP hearing representative. During the hearing held on July 19, 2017, he described the nature of his work with the employing establishment. Appellant repeated his prior descriptions of his noise exposure during his federal employment. He further discussed his use of hearing protection. Appellant testified that for the period 1968 to 1973, hearing protection was not supplied. For the period 1974 to 1979, he utilized rubber earplugs. Appellant testified that these earplugs did not help much, and it was hard to keep them in because of sanitation reasons. During the period from 1979 to 1982, he did not use earplugs all the time because he was moving around and it was difficult to constantly use earplugs. Appellant indicated that, from 2007 to the end of his career, he made every effort to utilize hearing protection. He noted that, during this time, he was on the slaughter floor less frequently, but that he would still be there for long hours at a time. Appellant testified that his hearing loss probably began around 1979, and that it was a gradual loss.

During the hearing, counsel argued that OWCP erred in relying on the opinion of Dr. Smullen because he made inaccurate statements with regard to appellant's noise exposure. He asked the hearing representative to consider appellant's testimony clarifying his exposure to noise and use of hearing protection. Counsel contended that Dr. Carlson's opinion supported causal relationship between appellant's hearing loss and factors of his federal employment. He asked that OWCP's prior decision be reversed based on the opinion of Dr. Carlson. In the alternative, counsel asked that the matter be further developed, and that Dr. Smullen clarify his opinion based on the evidence of appellant's use of hearing protection and exposure to noise.

By decision dated August 24, 2017, OWCP's hearing representative affirmed the April 12, 2017 OWCP decision, finding that the medical evidence of record was insufficient to establish that appellant's noise exposure during his federal employment caused or aggravated his hearing loss.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>5</sup> 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, that an injury was sustained in the performance of duty as alleged, and that any

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<sup>5</sup> *Supra* note 2.

disability or specific condition for which compensation is claimed is causally related to the employment injury.<sup>6</sup>

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.<sup>7</sup> 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.<sup>8</sup>

Appellant has the burden of proof to establish by the weight of the reliable, probative, and substantial evidence that his hearing loss condition was causally related to noise exposure in his federal employment.<sup>9</sup> Neither the fact that the condition became 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.<sup>10</sup>

### ANALYSIS

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

Appellant's physician, Dr. Carlson, opined that appellant's hearing loss was causally related to his employment noise exposure given the degree of the hearing loss and the absence of other significant factors to produce hearing loss. OWCP referred appellant to Dr. Smullen for a second opinion evaluation. The Board noted in its prior decision that Dr. Smullen's narrative reports were inconsistent with his form reports regarding the issue of causal relationship.<sup>11</sup> Specifically, the Board noted that Dr. Smullen concluded in his narrative report that appellant's "hearing loss appears to be the result of age and genetics," but also concluded in the outline for otologic evaluation on the Form CA-1332 that "workplace noise exposure was sufficient to cause the loss." In addition, the Board related that Dr. Smullen noted that appellant's hearing loss did not develop until "well after workplace exposure began." The Board noted that these latter two statements implied that appellant's hearing loss progressed during federal employment. Due to the aforementioned concerns, the Board remanded the case and asked OWCP to refer appellant to

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<sup>6</sup> *Kathryn Haggerty*, 45 ECAB 383, 388 (1994).

<sup>7</sup> 20 C.F.R. § 10.5(q).

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

<sup>9</sup> *T.J.*, Docket No. 17-1850 (issued February 14, 2018).

<sup>10</sup> *J.H.*, Docket No. 17-1796 (issued February 6, 2018).

<sup>11</sup> *Supra* note 3.

Dr. Smullen to seek clarification with regard to whether appellant's hearing loss is causally related to the factors of his federal employment.<sup>12</sup>

On remand, OWCP obtained a January 10, 2017 supplemental report by Dr. Smullen. In this report, Dr. Smullen opined that appellant's hearing loss was not related to or caused by his federal employment. In his outline for otologic evaluation, he noted that the present audiometric data did not show sensorineural loss in excess of what would normally be predicated on the basis of presbycusis. Dr. Smullen also noted that workplace exposure was sufficient, but determined that appellant's pattern of hearing loss was not consistent with noise exposure. In his narrative report, he stated that appellant did have significant hearing loss, currently in the moderate range. Dr. Smullen also noted that appellant had a trajectory of hearing loss that would indicate it began not long after his first available audiogram in 2003. He found that because of this, the hearing loss would have begun many years after his most significant noise exposure and after he started wearing hearing protection. Based on this report, OWCP found in its August 24, 2017 decision that appellant had not established that his hearing loss was causally related to his workplace noise exposure.

On appeal, counsel argues, *inter alia*, that Dr. Smullen's opinion is once again internally inconsistent. Dr. Smullen noted that appellant's hearing loss had progressed through the years, that he had significant noise exposure at work, and that this noise exposure was sufficient to cause the documented hearing loss. He mentioned the absence of the dip at the 4,000 Hz level that is often associated with noise related loss. Dr. Smullen also indicated that appellant's hearing loss began sometime after 2003 after the time of his significant work noise exposure. The Board notes that appellant was exposed to noise at the employing establishment for 44 years, *i.e.*, from 1968 until he left the employing establishment on December 31, 2011. From 1968 until 1973, appellant was exposed to loud noise from the slaughter houses with no protection and from 1974 to 1979 he wore rubber earplugs while he was exposed to this excessive noise. Although his exposure to noise after 1979 was more intermittent, he still was exposed to noise in his workplace.

An employee is not required to prove a significant contribution of factors of employment to a condition for the purpose of establishing causal relationship.<sup>13</sup> If work-related exposures caused, aggravated, or accelerated appellant's condition, it is compensable.<sup>14</sup>

The Board finds that Dr. Smullen's January 10, 2017 report does not resolve the issue of causal relationship. Once OWCP undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.<sup>15</sup> As Dr. Smullen failed to provide a sufficient response after being asked for clarification, on remand OWCP shall schedule a second opinion examination with a new physician.<sup>16</sup> The new second opinion physician

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<sup>12</sup> *Id.*

<sup>13</sup> *M.N.*, Docket No. 17-1729 (issued June 22, 2018).

<sup>14</sup> *J.L.*, Docket No. 17-0782 (issued August 7, 2017).

<sup>15</sup> *Richard F. Williams*, 55 ECAB 343, 346 (2004).

<sup>16</sup> *See M.A.*, Docket No. 17-0331 (issued June 15, 2018).

shall address the issue of whether appellant's hearing loss was causally related to his noise exposure during his federal employment. After it has further developed the medical record consistent with this directive and as it deems necessary, OWCP shall issue a *de novo* decision.

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 24, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further action consistent with this decision.

Issued: October 4, 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