

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

C.U., Appellant)	
)	
and)	Docket No. 18-1480
)	Issued: February 6, 2019
DEPARTMENT OF THE ARMY, ANNISTON)	
ARMY DEPOT, Anniston, AL, Employer)	
)	

Appearances:
Jeffrey P. Zeelander, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 25, 2018 appellant, through counsel, filed a timely appeal from a June 27, 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 hearing loss due to factors of his federal employment.

FACTUAL HISTORY

On August 2, 2017 appellant, then a 58-year-old small arms repairer, filed an occupational disease claim (Form CA-2) alleging an employment-related hearing loss. He asserted that he had been working around noise every day and had not been able to hear and understand his coworkers. Appellant indicated that he first became aware of his claimed condition on March 1, 2013 and first realized on the same date that it was caused or aggravated by his federal employment. He did not stop work.

Appellant submitted an undated document describing his jobs at the Anniston Army Depot (ANAD)³ which indicated that he worked as a forklift operator from December 26, 2007 to August 17, 2008. The document does not discuss appellant's exposure to noise while working as a forklift operator. Appellant worked as a sandblaster from August 17, 2008 to March 28, 2010 and was exposed to noise from blasting machines, sanding tables, tumblers, and sanding machines. He worked as a small arms repairer from March 28, 2010 to the present and was exposed to noise from hammers, impact wrenches, screwdrivers, punches, chisels, grinders, and other tools. The document indicates that appellant wore earplugs while working as a sandblaster and small arms repairer.⁴

In another undated document, appellant indicated that he worked as a supply technician in the U.S. Army from December 1977 to October 10, 1979 at which time he was exposed to noise from M16 rifles and hand grenades. Between 1986 and 2002, he worked for private employers in jobs such as nursing assistant, supervisor for a food manufacturing company, truck loader/unloader, and sheriff's deputy.

In a July 12, 2017 letter, Dr. Juan C. Diaz, a Board-certified occupational medicine physician and the medical director of an employing establishment health clinic, and Kerri Klingsels, the chief audiologist of an employing establishment hospital, indicated that appellant was exposed to noise while working at ANAD from 2008 to 2017. The officials reported that an audiological evaluation revealed that appellant had a sensorineural hearing loss which, based on degree and configuration of the audiogram, was likely caused by a combination of hazardous noise exposure and age-related hearing changes. They noted that, because appellant acknowledged wearing hearing protection at work when exposed to hazardous noise, it was unlikely that the changes in hearing noted on his hearing examinations were caused by employment-related hazardous noise exposure while working at ANAD. The officials noted that the noise exposure

³ Appellant's current employer is Tank Automotive & Armaments Command, also located in Anniston, AL.

⁴ In a December 8, 2016 document, appellant indicated that he worked as a small arms repairer for nine hours per day, five days per week. In a December 12, 2016 document, he noted that he started wearing ear protection at work on August 17, 2008, his first day of work as a sandblaster. In an undated document, appellant described the incidents in March 2013 which brought about his realization that he had a hearing loss.

levels at ANAD, as detailed in an attached document, did not take into consideration the wearing of hearing protection.⁵ Therefore, appellant's noise exposure levels at ANAD would have been at least 15 decibels lower than those listed on the document when he wore a hearing protection device. The officials noted, "In summary, [appellant's] noise exposure history and hearing protection usage indicate a lack of duration of exposure to high intensity noise for a hearing loss to be likely caused by noise from ANAD employment."

In an August 11, 2017 development letter, OWCP requested that appellant submit additional evidence in support of his occupational disease claim. It requested that he complete and return an attached questionnaire, which posed various questions regarding the exposures to hazardous noise at work, which he believed caused or aggravated his claimed hearing loss. On August 11, 2017 OWCP also requested additional information from the employing establishment. It afforded appellant and the employing establishment 30 days to respond.

On September 29, 2017 appellant submitted his August 29, 2017 responses to the questionnaire. He noted that he still was exposed to hazardous noise at work and advised that he did not have hobbies which involved noise exposure.

Audiograms obtained on December 11, 2007, July 11, 2014, January 7 and September 16, 2015, and October 3, 2016 were added to the record. The audiograms were obtained by audiologists and were not cosigned by physicians.⁶ The audiologists for the July 11, 2014 and October 3, 2016 audiograms noted that the results showed a high-frequency sensorineural hearing loss in both ears.

In September 2017, OWCP referred appellant for a second opinion examination to Dr. Howard Goldberg, a Board-certified otolaryngologist. It requested that Dr. Goldberg conduct a comprehensive audiologic evaluation and provide an opinion regarding whether appellant had a hearing loss due to exposure to hazardous noise at work. OWCP provided Dr. Goldberg with a statement of accepted facts (SOAF), which provided a detailed discussion of the hazardous noise to which appellant was exposed while working for ANAD as a sandblaster and small arms repairer.

In an October 17, 2017 report, Dr. Goldberg discussed appellant's factual and medical history, including the course of his reported hearing problems and the history of audiogram testing (including the testing from 2007). He reported the findings of the audiologic evaluation he conducted on October 17, 2017, noting that the examination of appellant's bilateral canals and drums was normal (including drum mobility) and that bilateral basic fork testing was normal. Dr. Goldberg noted that audiogram testing for the left ear at the frequency levels of 500, 1,000, 2,000, and 3,000 cycles per second revealed decibel losses of 20, 30, 30, and 40 respectively. Audiogram testing for the right ear at the frequency levels of 500, 1,000, 2,000, and 3,000 cycles per second revealed decibel losses of 25, 30, 30, and 35 respectively. Dr. Goldberg diagnosed mild high-frequency sensorineural hearing loss in both ears, with normal speech recognition threshold, and tinnitus in both ears. He noted that mild bilateral hearing loss was present at the

⁵ The record contains a document entitled, "Summary of employee's 8-hour time weighted average noise."

⁶ The December 11, 2007, January 7, and September 16, 2015 audiograms were obtained at an ANAD health facility and the July 11, 2014 and October 3, 2016 audiograms were obtained at a private facility.

start of appellant's federal employment and indicated that appellant wore hearing protection during such employment. Dr. Goldberg opined that appellant's current mild hearing loss was consistent with age-related loss and checked a box indicating that his hearing loss was not due, in part or all, to noise exposure in his federal employment.⁷

By decision dated October 24, 2017, OWCP denied appellant's claim for employment-related hearing loss. It noted that Dr. Goldberg determined in his October 17, 2017 report that appellant had a mild hearing loss which was due to age-related changes rather than exposure to hazardous noise in the workplace. OWCP indicated that appellant had not submitted medical evidence establishing that he had hearing loss due to the accepted employment-related noise exposure.

On November 29, 2017 appellant requested a telephonic hearing with a representative of OWCP's Branch of Hearings and Review.⁸

During the hearing, held on April 16, 2018, appellant testified regarding his exposure to hazardous noise at work and the progression of his hearing loss. He noted that he generally wore earplugs while operating noisy tools at work, but advised that he could hear some noise while doing so. Counsel argued that Dr. Goldberg's opinion that appellant did not have employment-related hearing loss was not supported by adequate medical rationale.⁹

By decision dated June 27, 2018, OWCP's hearing representative affirmed OWCP's October 24, 2017 decision. She indicated that the weight of medical evidence with respect to the cause of appellant's hearing loss continued to rest with the well-rationalized opinion of Dr. Goldberg.

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 of FECA, that the claim was timely filed within the applicable time limitation period of FECA, that the injury was sustained while 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.¹⁰ 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.¹¹

⁷ Dr. Goldberg recommended that appellant continue using hearing aids.

⁸ Counsel later submitted a March 27, 2018 letter in which he argued that Dr. Goldberg's opinion was equivocal and lacked medical rationalize in support of its opinion that appellant's hearing loss was due to nonwork factors.

⁹ After the hearing, counsel submitted a statement in which argued that the case should be remanded to OWCP in order to obtain a clarifying report from Dr. Goldberg.

¹⁰ 5 U.S.C. § 8101(1); *B.B.*, 59 ECAB 234 (2007); *Elaine Pendleton*, 40 ECAB 1143 (1989).

¹¹ *K.L.*, Docket No. 18-1029 (issued January 9, 2019); *S.P.*, 59 ECAB 184 (2007); *Joe D. Cameron*, 41 ECAB

To establish fact of injury, an employee must submit evidence sufficient to establish that he or she experienced a specific event, incident, or exposure occurring at the time, place, and in the manner alleged.¹² An employee must also establish that such event, incident, or exposure caused an injury.¹³ OWCP's regulations define the term "[o]ccupational disease or illness" as a condition produced by the work environment over a period longer than a single workday or shift.¹⁴ To establish that an injury was sustained in the performance of duty in an occupational disease claim, an employee 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 diagnosed condition is causally related to the employment factors identified by the employee.¹⁵

To establish causal relationship between the condition, as well as any attendant disability claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence supporting such causal relationship.¹⁶ Causal relationship is a medical issue, and the medical evidence required to establish causal relationship is rationalized medical evidence.¹⁷ 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 employee.¹⁸ Neither the mere fact that a disease or condition manifests itself during a period of employment, nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.¹⁹

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish hearing loss due to factors of his federal employment.

153 (1989).

¹² *J.C.*, Docket No. 16-0057 (issued February 10, 2016); *E.A.*, 58 ECAB 677 (2007).

¹³ *Id.*

¹⁴ 20 C.F.R. § 10.5(q); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.2b (June 2011).

¹⁵ *D.H.*, Docket No. 15-1876 (issued January 29, 2016); *D.I.*, 59 ECAB 158 (2007); *Victor J. Woodhams*, 41 ECAB 345 (1989).

¹⁶ *J.L.*, Docket No. 18-0698 (issued November 5, 2018); *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, *id.*

¹⁷ *L.D.*, Docket No. 17-1581 (issued January 23, 2018); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

¹⁸ *L.D.*, *id.*; *see also* *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

¹⁹ *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

The weight of the medical opinion evidence is represented by the thorough, well-rationalized opinion of Dr. Goldberg, OWCP's referral physician. The October 17, 2017 report of Dr. Goldberg shows that appellant did not sustain a hearing loss due to factors of his federal employment.

In his October 17, 2017 report, Dr. Goldberg detailed appellant's factual and medical history, and reported the findings of the audiologic evaluation he conducted on that date. He noted that audiogram testing for the left ear at the frequency levels of 500, 1,000, 2,000, and 3,000 cycles per second revealed decibel losses of 20, 30, 30, and 40 respectively. Audiogram testing for the right ear at the frequency levels of 500, 1,000, 2,000, and 3,000 cycles per second revealed decibel losses of 25, 30, 30, and 35 respectively. Dr. Goldberg diagnosed mild high-frequency sensorineural hearing loss in both ears, with normal speech recognition threshold, and tinnitus in both ears. He noted that mild bilateral hearing loss was present at the start of appellant's federal employment and indicated that appellant wore hearing protection during such employment. Dr. Goldberg opined that appellant's current mild hearing loss was consistent with age-related loss. He concluded that appellant's hearing loss was not due, in part or all, to noise exposure in his federal employment.

The Board has carefully reviewed the opinion of Dr. Goldberg and notes that it has reliability, probative value, and convincing quality with respect to its conclusions regarding the relevant issue of the present case. Dr. Goldberg provided a thorough factual and medical history and accurately summarized the relevant medical evidence.²⁰ He provided medical rationale for his opinion by explaining that the nature of appellant's hearing loss did not support an employment-related cause for the loss, but rather showed a naturally progressing hearing loss due to age. Appellant has, therefore, not met his burden of proof to establish hearing loss due to factors of his federal employment because he has not submitted rationalized medical evidence establishing causal relationship between a diagnosed hearing loss and the accepted hazardous noise exposure.²¹

On appeal counsel argues that Dr. Goldberg's opinion that appellant did not have employment-related hearing loss was not supported by adequate medical rationale. However, the Board has explained why his opinion contains such rationale. The Board also notes that the record contains other evidence which shows that appellant did not have an employment-related hearing loss.

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.

²⁰ See *J.W.*, Docket No. 18-0670 (issued September 11, 2018) (finding that a probative medical opinion must be based on a complete factual and medical background of the employee).

²¹ See *supra* notes 15 and 16. The Board notes that appellant also failed to show that his bilateral tinnitus was employment related.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish hearing loss due to factors of his federal employment.

ORDER

IT IS HEREBY ORDERED THAT the June 27, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 6, 2019
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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