

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

T.L., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
BOARD OF VETERANS APPEALS,)
Washington, DC, Employer)

**Docket No. 19-0087
Issued: June 26, 2019**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 16, 2018 appellant filed a timely appeal from an April 19, 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 over the merits of this case.

ISSUE

The issue is whether appellant has met his burden of proof to establish that he developed hearing loss and tinnitus causally related to the accepted factors of his federal employment.

FACTUAL HISTORY

On September 15, 2015 appellant, then a 38-year-old associate attorney, filed an occupational disease claim (Form CA-2) alleging that he sustained hearing loss and tinnitus due to noise exposure in the course of his federal employment. He stated that, for the period

¹ 5 U.S.C. § 8101 *et seq.*

November 2014 to February 2015, extensive work was done on the sub-level garages at the employing establishment. The work was done from 9:00 a.m. to 5:00 p.m., Monday through Friday, while appellant was working on the first level of the building. He indicated that the noise was “exceedingly loud inside, 170 [decibels].”

On February 24, 2016 OWCP referred appellant to Dr. Stephen Bane, a Board-certified otolaryngologist, for a second opinion evaluation to determine the nature and extent of his hearing loss and tinnitus. It scheduled the examination for March 10, 2016.

By decision dated March 28, 2016, OWCP denied appellant’s claim finding that the medical evidence of record failed to establish causal relationship between his hearing loss and tinnitus and his accepted employment exposure to noise.

OWCP received Dr. Bane’s March 10, 2016 report on March 29, 2016. Dr. Bane reviewed a statement of accepted facts, history of the injury, and the medical evidence of record. He conducted a physical examination and found that appellant’s ear canals and drums were normal. Drum motility was normal and the results of basic tuning fork testing was normal. Dr. Bane diagnosed mild high-frequency hearing loss in the left ear, but opined that the sensorineural hearing loss was not causally related to the noise exposure encountered in appellant’s federal employment. He explained that most people start to lose hearing in their 40s and if appellant’s hearing loss was secondary to noise exposure, both ears would have been expected to have loss. Dr. Bane noted that appellant only had mild hearing loss on the left side and concluded that “noise exposure from construction in a garage below the building [was] most likely not significant enough to have caused a hearing loss, let alone the loss in question.” He reiterated that if appellant did have hearing loss, it should have been symmetrical.

On April 29, 2016 appellant requested an oral hearing before a representative of OWCP’s Branch of Hearings and Review. A telephonic hearing was held on August 10, 2016. Appellant provided testimony and the hearing representative held the case record open for 30 days for the submission of additional evidence. OWCP did not receive additional evidence.

By decision dated September 27, 2016, OWCP’s hearing representative affirmed the March 28, 2016 decision.

On August 25, 2017 appellant requested reconsideration and submitted new medical evidence in support of his claim, including a June 21, 2017 report from Dr. Timothy J. O’Brien, a Board-certified otolaryngologist. Dr. O’Brien opined that “the only reasonable explanation is that [appellant’s] hearing loss and tinnitus [were], more likely than not, caused by or aggravated by the noise [he] was exposed to at 425 I.”

In a letter dated January 30, 2018, appellant informed OWCP of a change of address from Manassas to Bristow, Virginia. OWCP received his request on February 2, 2018

By letter dated February 6, 2018, OWCP acknowledged receipt of appellant’s change of address request and noted that action had been taken to change his address for the purposes of case management and compensation payments. This letter was sent to his updated address in Bristow, Virginia.

In a memorandum dated February 15, 2018, OWCP indicated that it had requested an addendum report from its second opinion examiner, Dr. Bane, with regard to appellant's hearing loss claim.

In a letter dated March 29, 2018, OWCP indicated that it had scheduled an appointment on April 10, 2018 at 1:00 p.m. for appellant to be reexamined by Dr. Bane for a supplemental second opinion examination. It noted that he was to refrain from exposure to loud noises for at least 16 hours prior to his examination. This letter was sent to appellant's former address in Manassas, Virginia.

In a subsequent letter dated April 4, 2018, OWCP indicated that it had scheduled an appointment on April 19, 2018 at 9:30 a.m. for appellant to be reexamined by Dr. Bane for a supplemental second opinion examination. This letter was also sent to appellant's former address in Manassas, Virginia.

In an e-mail message dated April 19, 2018, OWCP's medical referral group advised the claims examiner that appellant had not appeared for the appointment that was scheduled for that day at 9:30 a.m.

By decision dated April 19, 2018, OWCP denied modification of its prior decision. It noted that appellant was scheduled to be reevaluated by a second opinion specialist, Dr. Bane, on April 19, 2018 at 9:30 a.m. and appellant had not shown up for the examination."

LEGAL PRECEDENT

An employee seeking benefits under FECA² 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 of FECA,³ that an injury was sustained in the performance of duty as alleged, and that any disability or medical 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, an employee must submit the following: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or

² *Id.*

³ *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁴ *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁵ *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.⁶

In administering FECA, OWCP must attempt to obtain any evidence which is necessary for the adjudication of the case which is not received when the notice or claim is submitted. Some initial claims require full-scale medical development because the nature of exposure is in question, the diagnosis is not clearly identified, or the relationship of the condition to the exposure is not obvious. Certain types of conditions, such as hearing loss and asbestosis claims, require OWCP to refer the claimant for examination by a qualified specialist if the report submitted by the claimant does not meet all of its requirements for adjudication.⁷

It is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual.⁸ This presumption arises when it appears from the record that the notice was properly addressed and duly mailed.⁹ The appearance of a properly addressed copy in the case record, together with the mailing custom or practice of the sender, will raise a presumption that the original was received by the addressee. However, as a rebuttable presumption, receipt will not be assumed when there is evidence of nondelivery.¹⁰ Also, it is axiomatic that the presumption of receipt does not apply where a notice is sent to an incorrect address.¹¹

ANALYSIS

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

On February 2, 2018 OWCP received a letter dated January 30, 2018 from appellant informing OWCP of a change of address from Manassas to Bristow, Virginia. It acknowledged its receipt of his change of address request in a letter dated February 6, 2018. This letter was sent to appellant's current address in Bristow, Virginia. However, OWCP sent two notices dated March 29 and April 4, 2018, informing him that it had scheduled a supplemental second opinion examination to his former address in Manassas, Virginia before issuing its April 19, 2018 decision finding that he failed to appear for a reevaluation examination by Dr. Bane scheduled for April 19, 2019. Because it had not mailed its correspondences to appellant's current home address, the presumption of receipt under the mailbox rule is rebutted.¹² For this reason, the Board finds

⁶ *D.R.*, Docket No. 09-1723 (issued May 20, 2010). See also *Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994); *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.9 (June 2011). See also *id.* at Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600 (October 1990).

⁸ *George F. Gidicsin*, 36 ECAB 175 (1984) (when OWCP sends a letter of notice to a claimant, it must be presumed, absent any other evidence, that the claimant received the notice).

⁹ *Michelle R. Littlejohn*, 42 ECAB 463 (1991).

¹⁰ See *C.O.*, Docket No. 10-1796 (issued March 23, 2011); *M.U.*, Docket No. 09-0526 (issued September 14, 2009).

¹¹ See *M.C.*, Docket No. 17-0613 (issued August 7, 2018); *Clara T. Norga*, 46 ECAB 473 (1995); see also *W.A.*, Docket No. 06-1452 (issued November 27, 2006).

¹² *Id.*

that OWCP effectively denied his claim without proper notice and opportunity to attend the scheduled medical examinations.¹³

Accordingly, the Board finds that this case is not in posture for decision. The Board will set aside OWCP's April 19, 2018 decision denying appellant's claim. The case is remanded for issuance of notice to his proper home address detailing the date, time, and location of his appointment for a supplemental second opinion examination to determine the nature and extent of his tinnitus and hearing loss.¹⁴ After such further development as may be 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 April 19, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: June 26, 2019
Washington, DC

Christopher J. Godfrey, 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 *L.R.*, Docket No. 14-0361 (issued June 5, 2014) (remanding a case to OWCP because a development letter was not sent to the address shown on appellant's claim form).

¹⁴ *A.B.*, Docket No. 15-0290 (issued May 4, 2015).