

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

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<b>E.J., Appellant</b>	)	
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<b>and</b>	)	<b>Docket No. 19-0952</b>
	)	<b>Issued: November 5, 2019</b>
<b>DEPARTMENT OF JUSTICE, DRUG ENFORCEMENT ADMINISTRATION, Tacoma, WA, Employer</b>	)	
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*Appearances:* *Case Submitted on the Record*  
Alan J. Shapiro, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

**DECISION AND ORDER**

Before:  
JANICE B. ASKIN, Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On April 1, 2019 appellant, through counsel, filed a timely appeal from a March 11, 2019 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 to consider the merits of this case.<sup>3</sup>

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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.*

<sup>3</sup> The Board notes that, following the March 11, 2019 decision, OWCP received additional evidence. However, the Board’s *Rules of Procedure* provides: The Board’s review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal. 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

## ISSUE

The issue is whether appellant has met his burden of proof to establish that he developed left-sided hearing loss and tinnitus causally related to the accepted May 26, 2017 employment incident.

## FACTUAL HISTORY

This case has previously been before the Board.<sup>4</sup> The facts and circumstances of the case as presented in the prior Board decisions are incorporated herein by reference. The relevant facts are as follows.

On June 8, 2017 appellant, then a 46-year-old criminal investigator and firearms instructor, filed a traumatic injury claim (Form CA-1) alleging that hazardous noise during firearms training while in the performance of duty on May 26, 2017 caused constant ringing in his left ear that had not abated after seven days.

In a report dated June 29, 2017. Dr. Mario Alinea, a Board-certified family practitioner, noted appellant's complaints of left-sided hearing loss and tinnitus following exposure to firearms noise at a shooting range. Appellant asserted that he had no exposure to hazardous noise outside of his occupational exposure to firearms. Dr. Alinea obtained an audiogram on June 29, 2017. At the frequency levels of 500, 1,000 2,000, and 3,000 Hertz (Hz) in the right ear, appellant exhibited decibel (dB) losses of 10, 15, 10, and 20, respectively. Testing at the same frequency levels for the left ear revealed dB losses of 20, 30, 20, and 40, respectively. Tympanometry was within normal limits bilaterally. Dr. Alinea diagnosed left-sided sensorineural hearing loss with tinnitus. He explained that, based on appellant's history and clinical findings, he was "unclear if this hearing loss [was] attributable to firearms noise exposure on a more probable than not basis." Dr. Alinea remarked that, as most occupational noise exposures were symmetric, hearing loss was typically bilateral. He referred appellant to an audiologist to rule out other causes of unilateral hearing loss.

In the attending physician's portion of an authorization for examination and/or treatment (Form CA-16) Dr. Alinea, on June 29, 2017 diagnosed tinnitus and sensorineural hearing loss. He checked a box marked "yes" indicating his support for a causal relationship between the diagnosed conditions and exposure to firearms noise at work.<sup>5</sup> Dr. Alinea also completed a duty status report (Form CA-17) on June 29, 2017, in which he checked a box marked "yes" in support of causal relationship.

Also provided was a July 17, 2017 report from Jessica Hesson, an audiologist, who noted appellant's complaints and her findings on audiologic examination.

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<sup>4</sup> Docket No. 17-1755 (issued March 9, 2018).

<sup>5</sup> The Form CA-16 of record was not signed or otherwise executed by an employing establishment official. Block 8, designated for the signature of the authorizing official, and block 9, designated for the official's name and title, are blank. Where an employing establishment properly executes a Form CA-16 authorizing medical treatment related to a claim for a work injury, the form creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination/treatment regardless of the action taken on the claim. *C.W.*, Docket No. 17-1293 (issued February 12, 2018). *See Tracy P. Spillane*, 54 ECAB 608 (2003). However, as the Form CA-16 of record was not signed by an employing establishment official, no contractual obligation was created.

By decision dated July 27, 2017, OWCP accepted that appellant participated in firearms practice on May 26, 2017 as alleged, but denied the claim as causal relationship was not established between the accepted employment incident and the diagnosed left-sided sensorineural hearing loss. It found that Dr. Alinea did not provide medical rationale in support of a causal relationship between the diagnosed sensorineural hearing loss and the accepted May 26, 2017 employment incident. Appellant appealed to the Board.

During the pendency of the prior appeal, appellant submitted a July 17, 2017 report by Dr. Sepehr Oliaei, a Board-certified otolaryngologist. Dr. Oliaei noted a history of gradual onset of bilateral hearing loss, and that appellant had constant exposure to loud noise in his work as a firearms instructor. Appellant noted wearing hearing protection, but that he could “still hear the shots at very loud levels.” Dr. Oliaei obtained an audiogram demonstrating normal hearing in the right ear, and a mild sloping to moderate sensorineural hearing loss from 1,000 through 8,000 Hz in the left ear. He diagnosed tinnitus, noise-induced hearing loss, and sensorineural hearing loss in the left ear. Dr. Oliaei opined that appellant’s “current hearing protection device may be defective or inadequate for hearing protection” and suggested an audiological consultation.

By decision issued March 9, 2018,<sup>6</sup> the Board affirmed OWCP’s July 27, 2017 decision, finding that the medical evidence of record did not contain sufficient medical rationale supporting causal relationship to meet appellant’s burden of proof.

On August 7, 2018 appellant, through counsel, requested a telephonic hearing with a representative of OWCP’s Branch of Hearings and Review of OWCP’s July 27, 2017 decision.<sup>7</sup>

By decision dated August 14, 2018, an OWCP hearing representative denied appellant’s request for a telephonic hearing. She indicated to counsel that the final decision on the issue was the Board’s March 9, 2018 decision, and that OWCP’s Branch of Hearing and Review did not have jurisdiction to review final decisions of the Board. As such, appellant was not entitled to a hearing as a matter of right. OWCP’s hearing representative exercised her discretion and further denied the hearing request for the reason that the issue in the case could equally well be addressed by requesting reconsideration and submitting new evidence establishing an employment-related injury.

On March 6, 2019 appellant, through counsel, requested reconsideration. Counsel submitted additional evidence.

In a February 22, 2019 report, Dr. John J. Simmer, a Board-certified otolaryngologist, noted the accepted May 26, 2017 employment incident and subsequent treatment. He related appellant’s complaints of constant left-sided tinnitus interfering with sleep. Dr. Simmer reviewed an audiogram obtained by Stefanie M. Allan, an audiologist, which demonstrated a mild or borderline hearing loss in the left ear at frequencies greater than 2,000 Hz, and a borderline hearing loss on the right at 3,000 Hz and from 6,000 to 8,000 Hz. He diagnosed sensorineural hearing loss of the left ear with interval improvement since 2017, restricted hearing in the right ear, and tinnitus of the left ear. Dr. Simmer opined that loud noise exposure was a recognized cause of

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<sup>6</sup> *Supra* note 4.

<sup>7</sup> The August 7, 2018 letter notes the year of the July 27, 2017 decision as 2018. This appears to be a harmless typographical error.

sensorineural hearing loss and tinnitus, which could occur as an acute event “with exposure to extreme loud noise or can be gradual with frequent, regular exposure to loud noise.” He further noted that the temporal relationship of onset of appellant’s symptoms to presence on the firing range would suggest loud noise exposure as the source of appellant’s condition. Dr. Simmer indicated that appellant had “worse hearing in left ear on testing in 2017. Temporary HL [hearing loss] after acute noise exposure can happen.” He noted that tinnitus was subjective and could not be measured.

In a February 25, 2019 report, Dr. Nancy A. Becker, an osteopathic physician Board-certified in otolaryngology, noted appellant’s account of a 2004 employment incident in which he was exposed to firearms noise and lost hearing in his left ear for one month. Appellant had a second episode in May 2017 when the employing establishment changed to a short barrel assault weapon with a louder report than previous firearms used. He experienced bilateral tinnitus which abated on the right after one week. Appellant posited that noise reverberating from trees on the left side of the shooting range caused more severe tinnitus on the left. A February 25, 2019 audiogram demonstrated a 5 to 10 dB conductive hearing loss on the left and a sensorineural hearing loss on the left. Tympanometry was within normal limits bilaterally. Dr. Becker diagnosed left conductive hearing loss, left sensorineural hearing loss, left tinnitus, chronic rhinitis, and a eustachian tube dysfunction. She opined that the eustachian tube dysfunction “might be accounting for part of the conductive hearing loss.”

By decision dated March 11, 2019, OWCP denied modification of its July 27, 2017 decision. It found that the evidence presented was insufficient to establish that the diagnosed hearing loss and tinnitus were caused by the accepted May 26, 2017 employment incident.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>8</sup> 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,<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup>

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<sup>8</sup> *Supra* note 2.

<sup>9</sup> *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

<sup>10</sup> *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

<sup>11</sup> *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).

In order to determine whether a federal employee has sustained a traumatic injury in the performance of duty, OWCP must first determine whether fact of injury has been established.<sup>12</sup> There are two components involved in establishing fact of injury. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place, and in the manner alleged.<sup>13</sup> Second, the employee must submit evidence, generally only in the form of probative medical evidence, to establish that the employment incident caused a personal injury.<sup>14</sup>

To establish causal relationship between the condition and the employment event or incident, the employee must submit rationalized medical opinion evidence.<sup>15</sup> The opinion of the physician must be based on a complete factual and medical background of the employee, 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 factor(s) identified by the employee.<sup>16</sup> The weight of the medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.<sup>17</sup>

### ANALYSIS

The Board finds that appellant has not met his burden of proof to establish that he developed left-sided hearing loss and tinnitus causally related to the accepted May 26, 2017 employment incident.

Preliminarily, the Board notes that it is unnecessary for the Board to consider the evidence that was previously considered in its March 9, 2018 decision. Findings made in prior Board decisions are *res judicata*, absent any further review by OWCP under section 8128 of FECA.<sup>18</sup>

Following the Board's March 9, 2018 decision, OWCP received a July 17, 2017 report by Dr. Oliaei, who diagnosed gradual onset left-sided, noise-induced hearing loss, sensorineural hearing loss, and tinnitus, rather than the acute hearing loss and tinnitus appellant alleged. While Dr. Oliaei indicated that inadequate hearing protection when at work may have contributed to appellant's noise-induced hearing loss, he did not support a causal relationship between the diagnosed conditions and the accepted May 26, 2017 employment incident. Because he did not provide a reasoned opinion explaining how the May 26, 2017 employment incident caused or

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<sup>12</sup> *D.B.*, Docket No. 18-1348 (issued January 4, 2019); *E.J.*, *supra* note 4; *R.H.*, Docket No. 16-1055 (issued May 22, 2017); *S.P.*, 59 ECAB 184 (2007).

<sup>13</sup> *D.S.*, Docket No. 17-1422 (issued November 9, 2017); *Bonnie A. Contreras*, 57 ECAB 364 (2006).

<sup>14</sup> *B.M.*, Docket No. 17-0796 (issued July 5, 2018); *E.J.*, *supra* note 4; *R.H.*, *supra* note 12; *David Apgar*, 57 ECAB 137 (2005); *John J. Carlone*, 41 ECAB 354 (1989).

<sup>15</sup> *See S.A.*, Docket No. 18-0399 (issued October 16, 2018); *see also Robert G. Morris*, 48 ECAB 238 (1996).

<sup>16</sup> *H.M.*, Docket No. 19-0188 (issued April 26, 2019); *M.V.*, Docket No. 18-0884 (issued December 28, 2018); *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

<sup>17</sup> *James Mack*, 43 ECAB 321 (1991).

<sup>18</sup> *K.S.*, Docket No. 19-0537 (issued August 23, 2019); *T.B.*, Docket No. 19-0029 (issued June 21, 2019).

contributed to appellant's left-sided hearing loss and tinnitus, his report is insufficient to establish appellant's claim.<sup>19</sup>

Dr. Simmer, in his February 22, 2019 report, opined that the temporal relationship between appellant's presence at the firing range on May 26, 2017 and the onset of his symptoms suggested that hazardous noise exposure caused appellant's left sensorineural hearing loss and tinnitus. However, the Board has held that the fact that a condition manifests itself during a period of employment is insufficient to establish causal relationship. Temporal relationship alone will not suffice.<sup>20</sup>

In a February 25, 2019 report, Dr. Becker noted a 2004 employment incident with temporary left-sided hearing loss, as well as exposure to firearms noise at work in May 2017. She diagnosed left-sided conductive and sensorineural hearing loss, left tinnitus, chronic rhinitis, and a eustachian tube dysfunction. Dr. Becker did not address a causal relationship between the accepted May 26, 2017 employment incident and the diagnosed conditions. As she did not address the issue of causal relationship between appellant's hearing loss and tinnitus to the accepted May 26, 2017 employment incident, her report is of no probative value and, thus, is insufficient to establish his claim.<sup>21</sup>

An award of compensation may not be based on surmise, conjecture, speculation, or on the employee's own belief of causal relation.<sup>22</sup> Appellant's honest belief that the May 26, 2017 employment incident caused left-sided hearing loss and tinnitus, however sincerely held, does not constitute medical evidence necessary to establish causal relationship.<sup>23</sup> As he has not provided a rationalized medical opinion sufficient to establish a causal relationship between the claimed hearing loss and tinnitus and the accepted May 26, 2017 employment incident, he has failed to meet his burden of proof.<sup>24</sup>

On appeal counsel contends that OWCP's March 11, 2019 decision is "contrary to law and fact." However, for the reasons set forth above, appellant has not met his burden of proof to establish his claim.

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.

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<sup>19</sup> *D.E.*, Docket No. 18-1770 (issued March 20, 2019).

<sup>20</sup> *S.S.*, Docket No. 19-0675 (issued August 22, 2019); *M.H.*, Docket No. 18-1737 (issued March 13, 2019); *Daniel O. Vasquez*, 57 ECAB 559 (2006).

<sup>21</sup> *See L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

<sup>22</sup> *E.J.*, *supra* note 4; *D.D.*, 57 ECAB 734 (2006).

<sup>23</sup> *Id.*; *R.H.*, *supra* note 12.

<sup>24</sup> *E.J.*, *supra* note 4; *R.H.*, *supra* note 12; *D.D.*, *supra* note 22.

**CONCLUSION**

The Board finds that appellant has not met his burden of proof to establish that he developed left-sided hearing loss and tinnitus causally related to the accepted May 26, 2017 employment incident.

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 11, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 5, 2019  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

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