

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

M.M., Appellant	)	
	)	
and	)	<b>Docket No. 20-0574</b>
	)	<b>Issued: August 19, 2020</b>
U.S. POSTAL SERVICE, POST OFFICE,	)	
Letcher, SD, Employer	)	
	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
CHRISTOPHER J. GODFREY, Deputy Chief Judge  
JANICE B. ASKIN, Judge  
PATRICIA H. FITZGERALD, Alternate Judge

**JURISDICTION**

On January 18, 2020 appellant filed a timely appeal from a November 1, 2019 merit decision and a December 4, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether appellant has met his burden of proof to establish a hearing loss causally related to the accepted August 2, 2019 employment incident of exposure; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On August 17, 2019 appellant, then a 46-year-old postal support employee, filed a traumatic injury claim (Form CA-1) alleging that on August 2, 2019 he was injured when a weather siren went off as he was walking outside of the employing establishment while in the performance of duty. He indicated that he could feel his eardrums expand in his head and that he experienced constant ringing in his left ear and bad headaches as a result. On the reverse side of the claim form appellant's supervisor checked a box marked "No" to indicate her belief that appellant was not in the performance of duty when his injury occurred and reasoned that "He was done working for the day -- Outside work factor" at the time of his injury. Appellant did not stop work.

In an August 12, 2019 medical report, Dr. William Graham, a Board-certified otolaryngologist, evaluated appellant for acoustic trauma and left ear tinnitus related to the August 2, 2019 employment incident in which he was exposed to a loud siren at work. Appellant denied a prior history of hearing loss or acoustic trauma. Dr. Graham also noted that he had previously evaluated appellant in 2014 for decreased hearing in the left ear and tinnitus. He diagnosed tinnitus laterally left, hearing loss in the left ear, unspecified, and occupational exposure to noise.

In an August 19, 2019 letter, the employing establishment controverted appellant's claim contending that his injury was not work related because he was off the clock and he "could have been anywhere else" when the sirens went off and had the same thing happen. It also observed that appellant was seen by Dr. Graham in 2014 with complaints of decreased hearing in his left ear and tinnitus.

In an undated statement, appellant explained that on the afternoon of August 2, 2019 he was finishing work for the day at the employing establishment's facility in Alexandria, where he was assigned to work that afternoon because the employing establishment was in the process of hiring a new employee for that office. As appellant walked outside, a loud and high-pitched weather alarm went off. He stated that when the alarm was in his direction he could feel his eardrums expand in his head. Appellant ran to his car to try and block out some of the noise and waited several minutes for the alarm to stop before he left. He explained that he immediately experienced pain in both ears and had a ringing or buzzing sensation mostly in his left ear. Appellant indicated that he has experienced ringing in his ear since the alarm went off.

In a development letter dated August 20, 2019, OWCP advised appellant of the factual and medical deficiencies of his claim. It informed him of the type of evidence necessary to establish his claim and provided a questionnaire for his completion regarding the circumstances of his claimed injury. OWCP also requested a narrative medical report from appellant's treating physician, which contained a detailed description of findings and diagnoses, explaining how the alleged incident caused, contributed to, or aggravated his medical conditions. In a separate development letter of even date, it requested that the employing establishment provide additional information regarding appellant's traumatic injury claim. OWCP afforded both parties 30 days to respond.

An August 28, 2019 medical report with an illegible signature noted that appellant underwent an audiometric evaluation with otoscopic screening in response to the symptoms he

was experiencing since the August 2, 2019 employment incident. The otoscopic viewing was noted to be unremarkable bilaterally and appellant's hearing was found to be within the normal limits bilaterally.

In an August 29, 2019 response to OWCP's questionnaire, appellant indicated that his injury occurred on the sidewalk and in the parking lot of the employing establishment. He claimed that he was still on the premises performing his duty for a travel assignment when the injury occurred. Appellant explained that he had not sustained any other injury at that time or prior to the alleged employment incident. He indicated that he had experienced buzzing or ringing in his ear since the incident and occasional bad headaches. Appellant also attached photographs of the parking lot and surrounding area where the alleged incident occurred.

In a September 10, 2019 statement in response to OWCP's development letter, the employing establishment indicated that appellant reported that at the time of the alleged injury he was going home for the day and headed to his car in the employing establishment parking lot.

By decision dated September 30, 2019, OWCP denied appellant's traumatic injury claim finding that the evidence of record was insufficient to establish that his diagnosed conditions were causally related to the accepted August 2, 2019 employment incident.

In an October 14, 2019 statement, appellant explained that he was seen by Dr. Graham in 2014 because he had a cold and wax on his eardrum that was removed. He also noted that he had suffered from headaches and also sustained a neck injury from the weather siren, and had undergone treatment from a chiropractor.

On October 21, 2019 appellant requested reconsideration of OWCP's September 30, 2019 decision and submitted additional medical evidence.

In medical reports dated from September 27 to October 24, 2019, Dr. Scott Mullenmeister, a Board-certified chiropractic specialist, evaluated appellant for left-sided upper back and neck pain that occurred on August 2, 2019 when he jerked his neck after hearing a loud storm siren. Appellant also reported experiencing headaches and ringing in his left ear since the incident. Dr. Mullenmeister diagnosed segmental and somatic dysfunction of the cervical region, cervicgia, episodic tension headache, segmental and somatic dysfunction of the thoracic region, pain in the thoracic spine and segmental, and somatic dysfunction of the pelvic region.

By decision dated November 1, 2019, OWCP denied modification of its September 30, 2019 decision.

On November 20, 2019 appellant requested reconsideration of OWCP's November 1, 2019 decision. In an attached statement of even date, he contended that he was not given a straight answer on what information was needed from Drs. Graham and Mullenmeister in order to satisfy his claim. Appellant further explained that his 2014 visit with Dr. Graham was unrelated and that there was no problem with his ear until the August 2, 2019 employment incident.

By decision dated December 4, 2019, OWCP denied appellant's request for reconsideration finding that the evidence submitted was irrelevant or immaterial and thus had no bearing on the issue or was inconsequential in regards to the issue.

## LEGAL PRECEDENT -- ISSUE 1

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,<sup>2</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>3</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>4</sup>

To determine whether a federal employee has sustained a traumatic injury in the performance of duty it must first be determined whether fact of injury has been established.<sup>5</sup> First, the employee must submit sufficient evidence to establish that he actually experienced the employment incident at the time and place, and in the manner alleged.<sup>6</sup> Second, the employee must submit sufficient evidence to establish that the employment incident caused a personal injury.<sup>7</sup>

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 sufficient to establish such causal relationship.<sup>8</sup> The opinion of the physician must be based on a complete factual and medical background, 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.<sup>9</sup>

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

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<sup>2</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>3</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>4</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).

<sup>5</sup> *D.B.*, Docket No. 18-1348 (issued January 4, 2019); *T.H.*, 59 ECAB 388, 393-94 (2008).

<sup>6</sup> *D.S.*, Docket No. 17-1422 (issued November 9, 2017); *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>7</sup> *B.M.*, Docket No. 17-0796 (issued July 5, 2018); *John J. Carlone*, 41 ECAB 354 (1989).

<sup>8</sup> *K.V.*, Docket No. 18-0723 (issued November 9, 2018).

<sup>9</sup> *I.J.*, 59 ECAB 408 (2008).

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.<sup>10</sup>

### **ANALYSIS -- ISSUE 1**

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

OWCP accepted that appellant was exposed to a siren on August 2, 2019 while in the performance of duty. Consequently, regardless of the specific decibel level of exposure, it must consider whether the employment-related noise exposure was sufficiently prolonged to result in acoustic trauma.<sup>11</sup> Such a question is medical in nature and should be resolved by a Board-certified otolaryngologist.<sup>12</sup>

While Dr. Graham, in his August 12, 2019 medical report, diagnosed tinnitus laterally left, hearing loss in the left ear, unspecified and occupational exposure to noise, his report lacked sufficient rationale and thus lacked probative value to establish the claim. However, as a hearing loss claim, OWCP was required under its own procedures to refer him for examination by a qualified specialist.<sup>13</sup>

As OWCP failed to properly develop the evidence, the Board finds that the case must be remanded for the required referral to a qualified specialist for a medical evaluation in accordance with its procedures.<sup>14</sup> After this and other further development as may be deemed necessary, OWCP shall issue a *de novo* decision regarding whether appellant's workplace noise exposure caused, contributed to, or aggravated his hearing loss condition.<sup>15</sup>

### **CONCLUSION**

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

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<sup>10</sup> 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).

<sup>11</sup> See *W.P.*, Docket No. 15-0597 (issued January 27, 2016).

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

<sup>13</sup> *Supra* note 10.

<sup>14</sup> *Id.* at Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3(b) (January 2013). See also *M.W.*, Docket No. 10-992 (issued December 9, 2010).

<sup>15</sup> In light of the Board's disposition in Issue 1, Issue 2 is rendered moot.

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 4 and November 1, 2019 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 19, 2020  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board