

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

C.C., Appellant	)	
	)	
and	)	Docket No. 20-0151
	)	Issued: July 30, 2020
DEPARTMENT OF LABOR, MINE SAFETY & HEALTH ADMINISTRATION, Marquette, MI, 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 November 8, 2019 appellant filed a timely appeal from a September 26, 2019 merit 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.<sup>2</sup>

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

<sup>2</sup> The Board notes that, following the September 26, 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 binaural hearing loss causally related to the accepted factors of his federal employment.

## FACTUAL HISTORY

On November 16, 2018 appellant, then a 47-year-old inspector, filed an occupational disease claim (Form CA-2) alleging that he developed binaural hearing loss due to factors of his federal employment. He noted that he first became aware of his hearing loss on June 13, 2016 and first realized its relation to his federal employment on October 31, 2018.

In an audiometric examination dated June 13, 2016, Lisa Ward, a licensed practical nurse and certified occupational hearing conservationist, recorded audiometric findings at the frequency levels of 500, 1,000, 2,000, and 3,000 hertz (Hz) of losses for the right ear of 30, 5, 5, and 30 decibels (dBs) and for the left ear of 10, 0, 0, 0, and 35 dBs. Appellant also submitted an unsigned listing of the results of audiometric tests from 2014 through 2018. This report noted that on March 19, 2014 he demonstrated dB losses at 500, 1,000, 2,000, and 3,000 Hz of 5, 0, 0, 20 for the right ear and 5, 5, 0, 20 for the left ear; while on September 6, 2018 he demonstrated dB losses at those same frequencies of 5, 5, 0, 30 for the right ear and 5, 5, 0, 30 for the left ear.

In a letter dated September 19, 2018, the employing establishment informed appellant that the results of his last audiometric test performed on September 7, 2016 indicated that his right ear had sustained a standard threshold shift in hearing ability. It explained its responsibility to inform him of the hearing loss and to provide him with effective hearing conservation methods such as personal protective equipment.

In a December 6, 2018 development letter, OWCP advised appellant of the type of evidence needed to establish his hearing loss claim and provided a questionnaire for his completion. It afforded him 30 days to submit the requested information. In a separate letter on that, same date, OWCP requested that the employing establishment address the accuracy of appellant's allegations and describe his workplace exposure to hazardous noise.

The employing establishment subsequently provided appellant's job description and employment history since his start date on April 20, 2014. It listed several sites at which he could have possibly been exposed to noise, as well as sources of exposure, including active heavy equipment/machinery, generators, screeners, crushers, wash plants, industrial drills and saws, and other various plant machinery/equipment. The employing establishment explained that dB and frequency levels varied, with sand and gravel operations ranging from 100 to 104 dBs in and around generator trailers to 60 to 70 dB in out areas and material transfer points, where inspectors spend the majority of their time. At taconite plants, the average dB measurement in and around plants ranged from 60 to 90 dBs, whereas in the mining areas they were generally below 80 dBs. The employing establishment noted that hearing protection was provided.

Appellant responded to OWCP's inquiries by letter dated January 17, 2019. He reviewed his employment history as a foreman/loader operator for a private company from April 1995 through January 2013. Sources of noise in this private position included large offload mobile

mining equipment. Appellant was provided with hearing protection and wore it at all times. Beginning March 19, 2014, he worked as an inspector with the employing establishment. Sources of noise in this position included large off-road mobile mining equipment, grinding machines, screening equipment, and large generators. Appellant wore earplugs and dual hearing protection and was exposed to noisy conditions on a daily basis.

OWCP referred appellant for a second opinion evaluation with Dr. Steven J. Vandenberg, a Board-certified otolaryngologist, in order to determine whether his work-related noise exposure was sufficient to have caused hearing loss, and if so, the extent and degree of appellant's hearing loss. In a report dated March 21, 2019, Dr. Vandenberg noted that a baseline test at the beginning of employment on March 19, 2014 demonstrated bilateral moderate high-frequency hearing loss. He observed that present findings were very similar to the baseline values with no significant change, other than a slight progression at 3,000 Hz. Dr. Vandenberg found that there had not been a significant progression of hearing loss during the period of employment. Physical examination revealed normal ear canals and drums, normal drum motility, and normal results of basic fork tests. Dr. Vandenberg observed slight occasional and inconsequential tinnitus. He diagnosed sensorineural hearing loss, which was essentially unchanged during the period of employment. Dr. Vandenberg also reviewed the results of an audiometric test taken on March 20, 2019 at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz, which revealed the following losses: 10, 10, 10, 35 dBs for the right ear and 15, 5, 10, 45 dBs for the left ear. He opined that appellant's sensorineural hearing loss and tinnitus were not, in part or all, due to noise exposure in appellant's federal civilian employment. Dr. Vandenberg explained that there had been only mild change from the baseline in a single frequency. He determined that there was no significant impairment and that amplification was optional. Dr. Vandenberg calculated appellant's monaural and binaural hearing impairment at zero percent, noting a date of maximum medical improvement of March 20, 2019. He recommended hearing aids.

By decision dated April 9, 2019, OWCP denied appellant's claim, finding that the medical evidence of record was insufficient to establish causal relationship between his diagnosed hearing loss and his work-related noise exposure. It based its finding upon the March 21, 2019 report of Dr. Vandenberg.

On April 15, 2019 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held on August 12, 2019.

Appellant submitted a September 24, 2019 report from Dr. David J. Heichel, a Board-certified otolaryngologist, noting that he had evaluated appellant on September 19, 2019 and found that he may be considered a candidate for hearing aids. He further submitted results of audiometric testing dated September 19, 2019. In an accompanying report of even date, Dr. Heichel diagnosed bilateral sensorineural hearing loss, noting that appellant's audiogram demonstrated the condition beginning at 3,000 Hz with a very prominent loss which he described as a "classic noise (or occupational) notch loss." He opined that it would be very reasonable to deduce that this loss was more likely than not related to occupational exposure.

By decision dated September 26, 2019, OWCP's hearing representative affirmed the April 9, 2019 decision denying appellant's hearing loss claim.

## 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,<sup>3</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>4</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>5</sup>

In an occupational disease claim, appellant's burden requires submission of 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 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.<sup>6</sup>

Causal relationship is a medical issue, and the medical evidence required to establish causal relationship is rationalized medical opinion evidence.<sup>7</sup> 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 claimant.<sup>8</sup>

Section 8123(a) provides that, if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.<sup>9</sup> The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case. In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the

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<sup>3</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>4</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>5</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>6</sup> *S.C.*, Docket No. 18-1242 (issued March 13, 2019); *R.H.*, 59 ECAB 382 (2008).

<sup>7</sup> *A.M.*, Docket No. 18-1748 (issued April 24, 2019); *T.H.*, 59 ECAB 388 (2008).

<sup>8</sup> *M.V.*, Docket No. 18-0884 (issued December 28, 2018); *I.J.*, 59 ECAB 408 (2008).

<sup>9</sup> 5 U.S.C. § 8123(a); *M.G.*, Docket No. 19-1627 (issued April 17, 2020); *R.C.*, Docket No. 12-0437 (issued October 23, 2012).

conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>10</sup>

### ANALYSIS

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

OWCP referred appellant to Dr. Vandenberg in order to determine whether his work-related noise exposure was sufficient to have caused hearing loss, and if so, the extent and degree of that hearing loss. In his report dated March 21, 2019, Dr. Vandenberg opined that appellant's sensorineural hearing loss and tinnitus were not, in part or all, due to noise exposure in his federal civilian employment, explaining that according to his audiogram on March 20, 2019 there had been only mild change from the baseline in a single frequency. He observed that present findings were very similar to the baseline values with no significant change, other than a slight progression at 3,000 Hz. Dr. Vandenberg concluded that there had not been a significant progression of hearing loss during the period of federal employment.

However, by report dated September 24, 2019, Dr. Heichel, appellant's treating physician diagnosed bilateral sensorineural hearing loss, and noted that appellant's audiogram established a very prominent loss, which he explained was a classic noise (or occupational) notch loss. He opined that it would be very reasonable to deduce that appellant's hearing loss was more likely than not related to occupational exposure based upon this specifically identified finding.

For a conflict to arise, the opposing physician's opinions must be of equal weight.<sup>11</sup> The Board finds that the opinions of Drs. Vandenberg and Heichel are of equal weight regarding their opinion regarding the cause of appellant's binaural hearing loss.

Therefore, the case must be remanded for referral to an impartial medical examiner in accordance with section 8123(a) of FECA for resolution of this conflict in the medical opinion evidence regarding the cause of appellant's alleged hearing loss.<sup>12</sup> After this and other such further development as OWCP deems necessary, it shall issue a *de novo* decision.

### CONCLUSION

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

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<sup>10</sup> 20 C.F.R. § 10.321.

<sup>11</sup> *M.G.*, *supra* note 9; *Darlene R. Kennedy*, 57 ECAB 414 (2006).

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 26, 2019 decision of the Office of Workers' Compensation Programs is set aside and this case is remanded for further proceedings consistent with this decision of the Board.

Issued: July 30, 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