United States Department of Labor
Employees' Compensation Appeals Board

C.H., Appellant	)	
and	)	**Docket No. 19-1315**
	)	**Issued: March 16, 2020**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS BENEFITS ADMINISTRATION, Muskogee, OK, 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
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 29, 2019 appellant filed a timely appeal from an April 12, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that following the April 12, 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 evidence for the first time on appeal. *Id*.

ISSUE

The issue is whether appellant has met his burden of proof to establish hearing loss causally related to the accepted September 22, 2018 employment incident.

FACTUAL HISTORY

On November 16, 2018 appellant, then a 53-year-old claims examiner, filed an occupational disease claim (Form CA-2) alleging that while he was working in a quiet atmosphere on September 22, 2018 two printers next to his work area powered up at the same time, making a loud noise which caused his left ear to start ringing. The ringing continued and he noted that he could no longer hear out of his left ear when he snapped his fingers. Appellant noted that he first became aware of his condition and first realized its relation to his federal employment on September 22, 2018.

OWCP received an October 12, 2018 employing establishment accident report which repeated the description of the alleged September 22, 2018 employment incident.

On October 17, 2018 D.E., a support services specialist, and M.E., a safety and fire protection engineer, conducted an incident investigation regarding appellant's allegations. Appellant showed them his work area and identified the two printers that had made the loud noise. One of the printers was approximately eight-feet away from appellant's work area and partially obscured by a cubical wall. They printed out a few documents on that printer and measured the sound. The sound peaked at 63 decibels (dB) at approximately two-feet away from the printer. The other printer was closer to appellant's work area and located on the other side of the cubical wall of appellant's desk station. They printed a page from that printer and recorded the sound level in appellant's work area. D.E. noted that the cubical wall stopped a lot of the noise in the work area, and the meter peaked at 53 dBs. He indicated that Occupational Safety and Health Administration (OSHA) regulations allow for eight-hour day exposure to 90 dBs, and require an employer to administer a continuing, effective hearing conservation program when noise exposure equals or exceeds an eight-hour time-weighted average sound level measured on the A scale (slow response), or equivalently, at 50 percent. D.E. concluded that the noise level of the two printers, when combined, did not meet the minimum threshold for the implementation of a hearing conservation program and that 63 dBs was very unlikely to cause hearing damage. He noted that he was not a licensed industrial hygienist and that the dB meter had never been calibrated.

In a November 26, 2018 development letter, OWCP advised appellant that additional factual and medical evidence was required to establish his claim. It provided a questionnaire for his completion and afforded him 30 days to submit the necessary evidence.

In a separate November 26, 2018 development letter, OWCP requested additional evidence from the employing establishment. It listed information needed, including comments from a knowledgeable supervisor regarding the accuracy of appellant's statements relative to his claim. OWCP noted that, if there were points of disagreement, the supervisor should explain fully and provide appropriate supporting evidence.

In a December 10, 2018 report, Dr. Dwayne Atwell, a Board-certified otolaryngologist, noted that on September 22, 2018 appellant experienced loud noise exposure at work which resulted in significant hearing loss in his left ear and tinnitus without vertigo. He provided a history indicating that on November 8, 2018 he observed mild, old scarring of tympanic membranes bilaterally and that an audiogram revealed asymmetrical neurosensory loss in appellant's left ear. On November 11, 2018 Dr. Atwell reviewed appellant's magnetic resonance imaging (MRI) scan, which revealed a normal temporal bone, no evidence of an internal auditory canal tumor, and overall normal results. On November 27, 2018 he had noted that there were no otologic changes and that appellant's audiologic testing and MRI scan showed unilateral hearing loss with no other cause for hearing loss. Dr. Atwell diagnosed noise-induced hearing loss of the left ear and noted that the hearing loss was secondary to noise trauma on September 22, 2018. He recommended hearing conservation and another audiogram in six months or sooner if otologic changes occurred.

On December 17, 2018 appellant responded to OWCP's development questionnaire. He provided his previous employment history and history of noise exposure.

In a December 26, 2018 letter, the employing establishment recounted appellant's requests for headphones in addition to the support services specialist incident investigation, which it stated was based on OSHA guidelines for workspace occupational noise exposure.

On February 19, 2019 OWCP referred appellant, along with a statement of accepted facts (SOAF) and the medical record, to Dr. Richard Dawson, a Board-certified otolaryngologist, for a second opinion evaluation in order to determine the extent and degree of appellant's hearing loss and its relationship to his work-related noise exposure.

On March 8, 2019 Dr. Dawson reviewed the SOAF and Dr. Atwell's records and noted that appellant disagreed that both printers were located eight-feet from his work area and had clarified that one printer was located two-feet away from his left ear. Appellant noted that his hearing was normal prior to September 22, 2018 and that he had no audiometric records prior to that date. Dr. Dawson reported that on September 22, 2018 two printers turned on simultaneously, which appellant claimed caused ringing and hearing loss in his left ear, and that he had not experienced any changes since that incident.

Dr. Dawson conducted a physical examination which revealed that appellant's eardrums were open and intact, his drum motility was good, and his air conduction was greater than his bone conduction. There was no indication of a medical condition such as acoustic neuroma or Meniere's disease. Dr. Dawson noted that appellant occasionally had trouble concentrating due to his tinnitus, but otherwise tinnitus did not limit his daily activities.

Dr. Dawson noted his review of an audiogram which revealed poor tone average and speech reception threshold agreement in appellant's left ear. It also indicated 0 percent monaural hearing loss in appellant's right ear and 63 percent monaural hearing loss in his left ear, thereby displaying significant asymmetry. It additionally revealed 3 percent tinnitus impairment and 10.625 percent binaural hearing loss. Dr. Dawson noted that the poor tone average and speech reception threshold were not in agreement indicating poor test/retest reliability, but that a negative pure tone stenger was produced at a variety of different frequencies. Additionally, Dr. Dawson circled the word "no" in response to the whether "the audiometric test results are valid and

representative of this employee's hearing sensitivity." He also noted that additional hearing tests were required to confirm his monaural hearing loss calculation.

Dr. Dawson explained that, because appellant had no audiometric findings prior to September 22, 2018, he was unable to compare his audiometric findings with preincident findings. However, he did compare them with Dr. Atwell's findings and noted that appellant had considerably worsening hearing. Dr. Dawson suggested that his own results were more accurate than those of Dr. Atwell. He opined that appellant's sensorineural hearing loss was in excess of what would normally be predicted on the basis of presbycusis, but because he had normal hearing in his right ear and abnormal hearing in his left ear, his results were not consistent with typical noise exposure. Dr. Dawson explained that the workplace exposure described in the SOAF may have been sufficient as to intensity and duration to cause appellant's hearing loss, but it probably did not because this was a recent event and there was no hearing loss on his right side. He also opined that appellant's tinnitus was not due to noise exposure encountered in appellant's federal employment. Dr. Dawson recommended that appellant seek further medical evaluation to rule out central pathology.

By decision dated April 12, 2019, OWCP denied appellant's claim finding that the medical evidence of record was insufficient to establish causal relationship.[3]

LEGAL PRECEDENT

An employee seeking benefits under FECA[4] 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,[5] 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.[6] 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.[7]

[3] The Board notes that by accepting that appellant was exposed to hazardous noise on September 22, 2018 when two printers located near his work desk activated at the same time, OWCP effectively converted this claim to a traumatic injury claim as it was an injury occurring over the course of one single workday or shift. *See* 20 C.F.R. § 10.5(ee).

[4] *Supra* note 1.

[5] *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *Joe D. Cameron*, 41 ECAB 153 (1989).

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

[7] *R.R.*, Docket No. 19-0048 (issued April 25, 2019); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

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.[8] First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time and place, and in the manner alleged.[9] Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.[10]

Rationalized medical opinion evidence is required to establish causal relationship. 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 incident.[11]

ANALYSIS

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

The Board finds that Dr. Dawson's second opinion report requires further development to determine whether appellant has a hearing loss causally related to his accepted employment incident. In his March 8, 2019 report, Dr. Dawson related that appellant's physical examination revealed no evidence of a medical condition which would have caused appellant's hearing loss, such as acoustic neuroma or Meniere's disease. He also noted that appellant's sensorineural hearing loss was in excess of what would be normally predicted on this basis or presbycusis. Dr. Dawson speculated that appellant's workplace exposure may have been of sufficient intensity and duration to have caused appellant's hearing loss, but it probably did not because this was a recent event and he had no right-side hearing loss. He advised however that appellant should undergo further medical evaluation to rule out central pathology, as well as further audiometric evaluation to determine the reliability of the hearing loss evaluation. The Board has previously explained that it is not necessary to prove a significant contribution of factors of employment to a condition for the purpose of establishing causal relationship.[12] An employee is not required to prove that occupational factors are the sole cause of his claimed condition. If work-related exposures caused, aggravated, or accelerated appellant's condition, it is compensable.[13]

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation,

[8] *R.B.*, Docket No. 17-2014 (issued February 14, 2019); *B.F.*, Docket No. 09-0060 (issued March 17, 2009); *Bonnie A. Contreras*, 57 ECAB 364 (2006).

[9] *S.F.*, Docket No. 18-0296 (issued July 26, 2018); *D.B.*, 58 ECAB 464 (2007); *David Apgar*, 57 ECAB 137 (2005).

[10] *A.D.*, Docket No. 17-1855 (issued February 26, 2018); *C.B.*, Docket No. 08-1583 (issued December 9, 2008); *D.G.*, 59 ECAB 734 (2008); *Bonnie A. Contreras, supra* note 8.

[11] *M.N.*, Docket No. 17-1729 (issued June 22, 2018); *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

[12] *J.L.*, Docket No. 17-0782 (issued August 7, 2017); *H.C.*, Docket No. 16-0740 (issued June 22, 2016).

[13] *See M.N., supra* note 11; *see Beth P. Chaput*, 37 ECAB 158, 161 (1985); *S.S.*, Docket No. 08-2386 (issued June 5, 2008).

OWCP shares responsibility in the development of the evidence to see that justice is done.[14] Once OWCP undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case. As Dr. Dawson recommended MRI scan studies to rule out central pathology as the cause of appellant's hearing loss, as well as further audiometric testing to determine reliability of the hearing loss assessment, the Board will therefore remand the case to OWCP to obtain further development of the medical evidence as recommended by him. OWCP shall thereafter determine whether appellant's workplace noise exposure contributed in any degree to a left ear or binaural hearing loss condition.[15]

Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

[14] *J.R.*, 19-1321 (issued February 7, 2020); *S.S.*, Docket No. 18-0397 (issued January 15, 2019).

[15] When it refers a claimant for a second opinion evaluation and the report does not adequately address the relevant issues, OWCP should secure an appropriate report on the relevant issues. *See M.N., supra* note 11; *Ayanle A. Hashi*, 56 ECAB 234 (2004) (when OWCP refers a claimant for a second opinion evaluation and the report does not adequately address the relevant issues, it should secure an appropriate report on the relevant issues).

ORDER

IT IS HEREBY ORDERED THAT the April 12, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: March 16, 2020
Washington, DC

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

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

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