United States Department of Labor
Employees' Compensation Appeals Board

C.U., Appellant	)	
and	)	**Docket No. 20-0172**
	)	**Issued: November 3, 2020**
DEPARTMENT OF THE ARMY, ANNISTON ARMY DEPOT, Anniston, AL, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 16, 2019 appellant, through counsel, filed a timely appeal from an October 10, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[1] 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.

[2] 5 U.S.C. § 8101 *et seq.*

ISSUE

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

FACTUAL HISTORY

This case has previously been before the Board.[3] The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On August 2, 2017 appellant, then a 58-year-old small arms repairer, filed an occupational disease claim (Form CA-2) alleging an employment-related hearing loss. He asserted that he had been working around noise every day and had not been able to hear or understand his coworkers. Appellant noted that he first became aware of his claimed condition and its relation to his federal employment on March 1, 2013. He did not stop work.

Appellant submitted an undated document describing his jobs at the employing establishment. He indicated that he worked there as a forklift operator from December 26, 2007 to August 17, 2008, but he did not reference his exposure to noise while working in this job. Appellant noted that he worked as a sandblaster from August 17, 2008 to March 28, 2010 and was exposed to noise from blasting machines, sanding tables, tumblers, and sanding machines. He worked as a small arms repairer from March 28, 2010 to the present and was exposed to noise from hammers, impact wrenches, screwdrivers, punches, chisels, grinders, and other tools. Appellant advised that he utilized ear protection in the form of earplugs while working as a sandblaster and small arms repairer.[4]

In separate undated document, appellant indicated that he worked as a supply technician in the U.S. Army from December 1977 to October 10, 1979 at which time he was exposed to noise from M16 rifles and hand grenades. Between 1986 and 2002, he worked for private employers in various positions, including as a nursing assistant, supervisor for a food manufacturing company, truck loader/unloader, and sheriff's deputy.

In a July 12, 2017 letter, Dr. Juan C. Diaz, a Board-certified occupational medicine physician and the medical director of an employing establishment health clinic, and Kerri Klingsels, the chief audiologist of an employing establishment hospital, indicated that appellant was exposed to noise while working at the employing establishment from 2008 to 2017. The officials reported that an audiological evaluation revealed that appellant had a sensorineural hearing loss which, based on the degree and configuration of the audiogram, was likely caused by a combination of hazardous noise exposure and age-related hearing changes. They noted that,

[3] Docket No. 18-1480 (issued February 6, 2019).

[4] In a December 8, 2016 document, appellant indicated that he worked as a small arms repairer for nine hours per day, five days per week. In a December 12, 2016 document, he noted that he started wearing ear protection at work on August 17, 2008 his first day of work as a sandblaster. In an undated document, appellant described the incidents in March 2013 which brought about his realization that he had an employment-related hearing loss.

because he acknowledged wearing hearing protection at work when exposed to hazardous noise, it was unlikely that the changes in hearing noted on his hearing examinations were caused by employment-related hazardous noise exposure while working at the employing establishment. The officials noted that the noise exposure levels at the employing establishment, as detailed in an attached document, did not take into consideration the wearing of hearing protection. Therefore, appellant's noise exposure levels would have been at least 15 decibels (dBs) lower than those listed on the document when he wore hearing protection. The officials noted, "In summary, [appellant's] noise exposure history and hearing protection usage indicate a lack of duration of exposure to high intensity noise for a hearing loss to be likely caused by noise from … employment" at the employing establishment.

In an August 11, 2017 development letter, OWCP requested that appellant submit additional evidence in support of his occupational disease claim. It requested that he complete and return an attached questionnaire which posed various questions regarding his exposure to hazardous noise at work. In a letter of even date, OWCP also requested additional information from the employing establishment. It afforded both parties 30 days to respond.

On September 29, 2017 appellant submitted his August 29, 2017 responses to the development questionnaire. He noted that he continued to be exposed to hazardous noise at work and advised that he did not have hobbies which involved noise exposure. Audiograms obtained by audiologists on December 11, 2007, July 11, 2014, January 7 and September 16, 2015, and October 3, 2016 were added to the record. The audiograms were not cosigned by physicians. The July 11, 2014 and October 3, 2016 audiograms noted that the results showed binaural high-frequency sensorineural hearing loss in both ears.

In September 2017, OWCP referred appellant for a second opinion examination with Dr. Howard Goldberg, a Board-certified otolaryngologist. It requested that Dr. Goldberg conduct a comprehensive audiologic evaluation and provide an opinion regarding whether appellant had hearing loss due to exposure to hazardous noise at work. OWCP provided Dr. Goldberg with a statement of accepted facts that provided a detailed discussion of the hazardous noise to which appellant was exposed while working for the employing establishment as a sandblaster and small arms repairer.

In an October 17, 2017 report, Dr. Goldberg recounted appellant's factual and medical history, including the course of his reported hearing problems and the history of audiogram testing (including the testing from 2007). He reported the findings of the audiologic evaluation he conducted on October 17, 2017 noting that the examination of appellant's bilateral canals and drums was normal (including drum mobility) and that bilateral basic fork testing was normal. Dr. Goldberg noted that audiogram testing for the left ear at the frequency levels of 500, 1,000, 2,000, and 3,000 Hertz (Hz) revealed dB losses of 20, 30, 30, and 40, respectively. Audiogram testing for the right ear at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz revealed dB losses of 25, 30, 30, and 35, respectively. Dr. Goldberg diagnosed mild high-frequency sensorineural hearing loss in both ears, with normal speech recognition threshold, and tinnitus in both ears. He noted that mild bilateral hearing loss was present at the start of appellant's federal employment and indicated that appellant wore hearing protection during such employment. Dr. Goldberg opined that appellant's current mild hearing loss was consistent with age-related loss

and checked a box indicating that appellant's hearing loss was not due, in part or all, to noise exposure in his federal employment. He recommended that appellant continue with hearing aids.

By decision dated October 24, 2017, OWCP denied appellant's hearing loss claim, finding that the medical evidence of record was insufficient to establish hearing loss causally related to the accepted employment exposure. It afforded the weight of the medical evidence to second opinion physician Dr. Goldberg, who determined in his October 17, 2017 report that appellant had not developed employment-related hearing loss.

On November 17, 2017 appellant requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

During the hearing, held on April 16, 2018 appellant testified regarding his exposure to hazardous noise at work and the progression of his hearing loss. He noted that he generally wore ear plugs while operating noisy tools at work, but advised that he could hear some noise while doing so. Counsel argued that Dr. Goldberg's opinion that appellant did not have employment-related hearing loss was not supported by adequate medical rationale.

By decision dated June 27, 2018, OWCP's hearing representative affirmed OWCP's October 24, 2017 decision. She indicated that the weight of the medical opinion evidence with respect to the cause of appellant's hearing loss continued to rest with the well-rationalized opinion of Dr. Goldberg, OWCP's referral physician.

Appellant appealed his case to the Board and, by decision dated February 6, 2019,[5] the Board affirmed the June 27, 2018 hearing decision. The Board found that the weight of the medical opinion evidence was represented by the thorough, well-rationalized opinion of Dr. Goldberg, OWCP's referral physician.

On July 25, 2019 appellant, through counsel, requested reconsideration of the merits of his claim.

In support thereof, appellant submitted a June 11, 2019 report from Dr. Morton Goldfarb, a Board-certified otolaryngologist, who noted that appellant reported working at the employing establishment and had previously served in the military where he was exposed to loud machine gunfire. He advised that appellant reported that his job required working on 50-caliber machine guns, including rebuilding, testing, and firing them to make sure the mechanisms were correct. Dr. Goldfarb indicated that, although he did not have access to a hearing test taken prior to appellant's working at the employing establishment, he could say that appellant's bilateral hearing was "beyond what we would consider normal" for a person of age 60. He noted that his impression was that appellant's hearing loss had been directly affected by appellant's occupation at the employing establishment, including exposure to machine gunfire, and indicated that he would definitely say that the exposure to machine gunfire at work was "the culprit in giving rise to the

[5] *Supra* note 3.

hearing loss."[6] Dr. Goldfarb noted that appellant had hearing protection on when he was exposed to noise at work and indicated, "That could be a deciding factor indicating that perhaps exposure to the noise itself was not the culprit at the time that this was done." He advised that he could not provide a definitive answer on causation given that he did not have access to a hearing test taken prior to appellant's working at the employing establishment and he noted that "without the hearing protection in, I am sure [appellant's] noise level was beyond what is acceptable." Dr. Goldfarb indicated that the report of a 50-caliber machine gun was extremely loud even with hearing protection and noted, "I am not sure that the muffler hearing devices that [appellant] wore were adequate in stopping this sound from penetrating the inner ear and giving rise to a nerve hearing loss which he has." He further noted that appellant drove forklifts, which were very noisy, and advised that he reported not wearing hearing protection while driving them. Dr. Goldfarb indicated, "Please see if you can give [appellant] all consideration for getting some compensation for this hearing loss that he has had from his occupation." He attached a June 11, 2019 audiogram which he had obtained.

In a July 16, 2019 supplemental report, Dr. Goldfarb thanked counsel for sending him previous audiometric evaluations of appellant. He advised that one of the top audiologists in his office interpreted them as showing a significant drop in appellant's hearing between the October 17, 2017 and June 11, 2019 evaluations. Dr. Goldfarb noted that there definitely was a decrease in hearing acuity from the initial examination to the present time, and advised counsel that he would send him copies of the audiograms which the audiologist had plotted from 2007 to 2017, as well as from 2017 to 2019. He noted that one could see the significant differences in appellant's audiometric perception thresholds. Dr. Goldfarb indicated that he did not have this information previously and again noted that he would send counsel copies of the audiograms which contained the plotting. He attached a previously submitted October 17, 2017 audiogram (obtained by Dr. Goldberg, OWCP's referral physician) and another copy of the June 11, 2019 audiogram which he had obtained.

By decision dated October 10, 2019, OWCP denied modification, finding that appellant had not met his burden of proof to establish hearing loss causally related to factors of his federal employment.

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,[7] and 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

[6] Dr. Goldfarb advised that appellant's discrimination scores to determine what words were being presented were very good in the right ear (better than in the left ear) and indicated that appellant could benefit from amplification devices.

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

related to the employment injury.[8] 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.[9]

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant 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 condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the identified employment factors.[10]

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.[11] A physician's opinion on whether there is causal relationship between the diagnosed condition and the implicated employment factor(s) must be based on a complete factual and medical background.[12] Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factor(s).[13]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish hearing loss causally related to factors of his federal employment.

Preliminarily, the Board notes that it is unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of OWCP's June 27, 2018 decision because the Board considered that evidence in its February 6, 2019 decision and found it insufficient to establish causal relationship. The Board notes that findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.[14] In its February 6, 2019 decision, the Board found that OWCP had properly determined that the weight of the medical opinion evidence was represented by the thorough, well-rationalized October 17, 2017 opinion of Dr. Goldberg, OWCP's referral physician, who opined that appellant had not sustained a hearing

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

[9] *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).

[10] *R.G.*, Docket No. 19-0233 (issued July 16, 2019). *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).

[11] *W.M.*, Docket No. 14-1853 (issued May 13, 2020); *T.H.*, 59 ECAB 388, 393 (2008); *Robert G. Morris*, 48 ECAB 238 (1996).

[12] *M.V.*, Docket No. 18-0884 (issued December 28, 2018).

[13] *Id.*; *Victor J. Woodhams*, *supra* note 10.

[14] *See B.B.*, Docket No. 17-0294 (issued May 11, 2018).

loss due to factors of his federal employment. Dr. Goldberg explained that appellant's mild hearing loss was consistent with age-related loss and found that appellant's hearing loss was not due, in part or all, to noise exposure in his federal employment.

On reconsideration, appellant submitted June 11 and July 16, 2019 reports of Dr. Goldfarb.

In his June 11, 2019 report, Dr. Goldfarb opined that appellant had an employment-related hearing loss. He noted that his impression was that appellant's hearing loss had been directly affected by appellant's occupation at the employing establishment, including exposure to machine gunfire, and indicated that he would definitely say that the exposure to machine gunfire at work was "the culprit in giving rise to the hearing loss." Moreover, Dr. Goldfarb noted, "Please see if you can give [appellant] all consideration for getting some compensation for this hearing loss that he has had from his occupation." He also indicated that, although he did not have access to a hearing test taken prior to appellant's working at the employing establishment, he could say that appellant's bilateral hearing was "beyond what we would consider normal" for a person of age 60. Dr. Goldfarb's opinion on causal relationship is of limited probative value, however, because he did not provide adequate medical rationale, based on a complete factual background, in support of his opinion on causal relationship.[15] He did not provide a detailed account of appellant's accepted exposure to hazardous noise in the workplace. Dr. Goldfarb did not adequately describe the varied types of noise to which appellant was exposed or the degree and extent to which appellant was exposed to such noise over the course of years. He did not explain the medical process through which the accepted noise exposure could have caused the observed hearing loss and his opinion on causal relationship is essentially conclusory in nature. The Board has held that a report is of limited probative value regarding causal relationship if it does not contain medical rationale explaining how a given medical condition has an employment-related cause.[16]

In addition, the probative value of Dr. Goldfarb's June 11, 2019 report is further reduced with respect to the cause of appellant's hearing loss because the report also contains statements in which Dr. Goldfarb indicated that he could not relate appellant's hearing loss to hazardous work noise, thereby rendering his opinion equivocal in nature. He noted that appellant wore hearing protection when he was exposed to noise at work and indicated, "That could be a deciding factor indicating that perhaps exposure to the noise itself was not the culprit at the time that this was done." Dr. Goldfarb further advised that he could not provide a definitive answer on causation given that he did not have access to a hearing test taken prior to appellant's working at the employing establishment. The Board has held that an opinion which is equivocal in nature is of limited probative value regarding the issue of causal relationship.[17] For these reasons, Dr. Goldfarb's June 11, 2019 report is insufficient to create a conflict in the medical opinion evidence or otherwise establish appellant's hearing loss claim.

In connection with his June 11, 2019 report, Dr. Goldfarb attached a June 11, 2019 audiogram which he had obtained. The audiogram shows hearing loss, but it does not contain an

[15] *See supra* notes 11 through 13.

[16] *See T.T.*, Docket No. 18-1054 (issued April 8, 2020); *Y.D.*, Docket No. 16-1896 (issued February 10, 2017).

[17] *See E.B.*, Docket No. 18-1060 (issued November 1, 2018); *Leonard J. O'Keefe*, 14 ECAB 42, 48 (1962).

opinion on the cause of the hearing loss and, therefore, the audiogram is of no probative value on the issue of causal relationship. The Board has held that medical evidence that does not offer an opinion regarding the cause of an employee's medical condition is of no probative value on the issue of causal relationship.[18] Therefore, this report is also insufficient to create a conflict in the medical opinion evidence or otherwise establish appellant's hearing loss claim.

Appellant also submitted a July 16, 2019 supplemental report from Dr. Goldfarb. Dr. Goldfarb thanked counsel for sending him previous audiometric evaluations of appellant and advised that one of the top audiologists in his office interpreted them as showing a significant drop in appellant's hearing between the October 17, 2017 and June 11, 2019 evaluations. He noted that there definitely was a decrease in hearing acuity from the initial examination to the present time, and advised that one could see the significant differences in appellant's audiometric perception thresholds. However, the Board finds that this report of no probative value regarding appellant's claim for an employment-related hearing loss because Dr. Goldfarb did not provide an opinion on the cause of the observed hearing loss. As noted above, medical evidence that does not offer an opinion regarding the cause of an employee's condition or disability is of no probative value on the issue of causal relationship.[19] Therefore, this report is insufficient to create a conflict in the medical opinion evidence or otherwise establish appellant's hearing loss claim.

As appellant has not submitted rationalized medical evidence establishing hearing loss due to factors of his federal employment, or to create a conflict in medical opinion evidence, the Board finds that he has not met his burden of proof. The opinion of Dr. Goldberg, OWCP's second opinion specialist, continues to represent the weight of the medical evidence and establishes that appellant's hearing loss is not causally related to factors of his federal employment.

On appeal counsel argues that these reports are of sufficient probative value regarding appellant's claimed employment-related hearing loss to create a conflict in the medical opinion evidence regarding this matter and to require referral of appellant to an impartial medical specialist. As explained above the Board finds that appellant has not met his burden of proof.

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.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish hearing loss causally related to factors of his federal employment.

[18] *See L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

[19] *Id.*

ORDER

IT IS HEREBY ORDERED THAT the October 10, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 3, 2020
Washington, DC

Alec J. Koromilas, 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