United States Department of Labor
Employees' Compensation Appeals Board

D.O., Appellant	)	
and	)	**Docket No. 20-0006**
	)	**Issued: September 9, 2020**
DEPARTMENT OF THE NAVY, NAVAL MUNITIONS COMMAND ATLANTIC, UNIT CHARLESTON, Goose Creek, SC, Employer	)	

Appearances:
David G. Jennings, Esq., for the appellant[1]
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 October 2, 2019 appellant, through counsel, filed a timely appeal from a September 3, 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.[3]

[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.*

[3] The Board notes that following the September 3, 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 May 7, 2019 appellant, then a 62-year-old metal mechanic work leader, filed an occupational disease claim (Form CA-2) alleging that he had developed binaural hearing loss due to exposure to hazardous noise in the course of his federal employment. He noted that he first became aware of his hearing loss and realized its relationship to his federal employment on June 6, 2016. Appellant retired from the employing establishment on May 3, 2018.

OWCP received a statement from appellant, which detailed his employment history. Appellant indicated that he worked as a machinist apprentice/machinist from April 1976 to March 1992 and November 2006 to February 2014; a carpenter helper from September 1992 to September 1993; a food service worker from September 1993 to November 1999; a material handler/material handler inspector from March 2000 to July 2004; and a metal mechanic work leader from February 2014 to May 2018. Appellant also reported that his nonfederal employment included working as a laborer for a construction company from June 1975 to July 1975 and as a machine operator from November 2004 to May 2005. He noted that as a mechanic work leader and machinist, he was exposed to hazardous noise from various pneumatic tools, including grinders, nail guns, needle guns, saws, lathes, milling machines, band saws, sledge hammers, train whistles, tractor engines, forklifts, and trucks. Appellant noted that he was exposed to noise for eight hours per day and was provided with earplugs and earmuffs. He explained that his hearing loss could not be caused by anything other than noise at work.

An audiogram conducted by an audiologist on December 13, 2018 revealed mild-to-moderate sensorineural hearing loss bilaterally.

On June 7, 2019 appellant filed a claim for a schedule award (Form CA-7).

OWCP referred appellant, along with a statement of accepted facts (SOAF), for an otologic evaluation including an audiogram with Dr. John F. Ansley, a Board-certified otolaryngologist. In a June 18, 2019 report, Dr. Ansley noted his examination of appellant and his history of employment-related noise exposure. He noted that no audiogram was provided at the beginning of appellant's federal employment, but that appellant reported normal hearing. Dr. Ansley diagnosed sensorineural hearing loss and indicated that appellant had tinnitus. He advised that the external auditory canals, tympanic membranes, and drum motility were normal. Audiometric testing was conducted on Dr. Ansley's behalf and testing at the frequency levels of 500, 1,000, 2,000, and 3,000 Hertz (Hz) revealed right ear losses of 25, 45, 50, and 40 decibels (dBs) and left ear losses of 20, 50, 50, and 45 dBs. In response to questions provided by OWCP, he replied "yes" as to whether appellant showed a sensorineural loss that is in excess of what would be normally predicated on the basis of presbycusis. Dr. Ansley also replied "yes" to indicate that appellant's workplace exposure was sufficient, as to intensity and duration, to have caused the loss in question. He explained that appellant had a several year history of noise exposure. Dr. Ansley checked a box indicating that appellant's hearing loss and tinnitus were due his federal employment. He reported that appellant's hearing loss was "likely associated with the multiple years of noise exposure."

OWCP then referred appellant's case to Dr. Stephen Maturo, a Board-certified otolaryngologist serving as an OWCP district medical adviser (DMA). In a July 15, 2019 report, the DMA reviewed Dr. Ansley's June 18, 2019 report and audiogram and indicated that he disagreed with Dr. Ansley's opinion that appellant's hearing loss was due to workplace noise exposure. He noted that the only hearing tests available were from 2018 and 2019 and indicated that there was no audiometric or dosimetry data that would support a diagnosis of occupational hearing loss. The DMA indicated that there were no hearing tests that showed a slowly progressive hearing loss that would be typical of occupational hearing loss and no documentation of dosimetry data that showed that appellant was exposed to noise levels of an intensity and duration that would cause noise-induced hearing loss.

OWCP also received a position description for a metal mechanic leader as well as a hazard assessment and air sampling data for the employing establishment.

In a July 24, 2019 letter, the employing establishment controverted appellant's claim. It alleged that he had not established that the injury occurred as alleged or that his hearing loss was causally related to his employment.

OWCP received an audiogram memorandum dated July 17, 2019 by L.A. Stephenson, an occupational audiologist for the employing establishment. The audiologist indicated that he had reviewed appellant's hearing loss claim and noted that appellant had worked as a material handler, machinist, and metal mechanic leader in hazardous noise and potential oxotoxins. He noted that appellant was enrolled in a hearing conservation program and was instructed to wear double hearing protective devices in order to prevent hearing loss. The audiologist reported that appellant's May 2, 2018 audiogram revealed hearing loss that would be ratable at 14 percent binaural hearing loss. He opined that due to the lack of "noise notch," appellant's hearing loss was inconsistent with noise exposure, but was consistent with age-related hearing loss or presbycusis. The audiologist explained that appellant was in his sixties and that one in three adults aged sixty or over had age-related hearing loss. He further indicated that age-related hearing loss was typically identified as normal low frequency hearing loss not to exceed 75 dB and occurs equally in both ears, which was the pattern exhibited on appellant's retirement audiogram.

In a July 29, 2019 development letter, OWCP advised appellant of the type of evidence needed to establish his claim and provided a questionnaire for his completion. In a separate letter of even date, it requested that the employing establishment provide comments from a knowledgeable supervisor on the accuracy of his statements, describe the sources of exposure to noise, and provide a copy of all medical examinations pertaining to hearing or ear problems, including pre-employment examination and audiograms. OWCP afforded both parties 30 days to respond.

By decision dated September 3, 2019, OWCP denied appellant's occupational disease claim finding that the medical evidence of record was insufficient to establish that his diagnosed bilateral hearing loss was causally related to the accepted workplace noise exposure.

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 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]

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit: (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 claimant.[8]

Causal relationship is a medical issue, and the medical evidence required to establish causal relationship is rationalized medical opinion evidence.[9] 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 specific employment factors identified by the employee.[10]

ANALYSIS

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

Appellant alleged that he developed bilateral hearing loss due to sustained noise exposure during the course of his federal employment. He noted that during his federal employment, he was exposed to hazardous noise from various pneumatic tools for eight hours per day. In a July 17, 2019 memorandum, an audiologist for the employing establishment confirmed that appellant had worked as a material handler, machinist, and metal mechanic leader in hazardous noise and

[4] *Supra* note 2.

[5] *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *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] *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).

[8] *S.C.*, Docket No. 18-1242 (issued March 13, 2019); *R.H.*, 59 ECAB 382 (2008).

[9] *A.M.*, Docket No. 18-1748 (issued April 24, 2019); *T.H.*, 59 ECAB 388, 393 (2008); *Robert G. Morris*, 48 ECAB 238 (1996).

[10] *M.V.*, Docket No. 18-0884 (issued December 28, 2018); *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

potential oxotoxins. He further indicated that appellant was enrolled in the employing establishment hearing conservation program and was provided with hearing protection.

In a July 15, 2019 report, the DMA concluded that appellant's bilateral hearing loss was not causally related to his employment. However, he indicated that there was no audiometric or dosimetry data in the case file that showed that appellant was exposed to noise levels that would place appellant at risk for hearing loss. The DMA specifically noted that the only hearing tests were from 2018 and 2019. He further indicated that "without documentation of hearing during the time of employment, one cannot say that [appellant's] hearing loss is due to occupational noise."

In a development letter dated July 29, 2019, OWCP requested that the employing establishment address the accuracy of appellant's allegations and describe his workplace exposure to hazardous noise. It specifically requested that the employing establishment provide detailed information, including all medical examinations pertaining to hearing or ear problems, including pre-employment examination and all audiograms. The employing establishment, however, did not respond to the specific questions in its July 29, 2019 development letter or provide the audiograms or medical records from its hearing conservation program.

The Board finds that OWCP must further develop the factual aspect of this record. The record reflects that appellant participated in the employing establishment's hearing conservation program. However, audiological and other medical records from that program were not provided. The DMA specifically noted that the only hearing tests provided were from 2018 and 2019 and that additional documentation about appellant's hearing at the time of employment was needed to determine whether appellant's hearing loss was related to occupational noise. Accordingly, OWCP must develop this factual aspect of the case before a full and fair determination can be made regarding causal relationship.[11]

It is well established that proceedings under FECA are not adversarial in nature, and while appellant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other government source.[12] OWCP has an obligation to see that justice is done.[13] On remand it shall obtain all relevant records from the employing establishment's hearing conservation programs and from appellant's other known medical providers and thereafter provide the records it obtains to the DMA for a supplemental

[11] *See J.V.*, Docket No. 17-0973 (issued July 19, 2018).

[12] *See R.A.*, Docket No. 17-1030 (issued April 16, 2018); *Walter A. Fundinger, Jr.*, 37 ECAB 200, 204 (1985); *Michael Gallo*, 29 ECAB 159, 161 (1978); *William N. Saathoff*, 8 ECAB 769, 770-71; *Dorothy L. Sidwell*, 36 ECAB 699, 707 (1985).

[13] *See A.J.*, Docket No. 18-0905 (issued December 10, 2018); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983); *Gertrude E. Evans*, 26 ECAB 195 (1974).

report.[14] Following this and any other further development deemed necessary, OWCP shall issue a *de novo* decision in the case.[15]

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the September 3, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development consistent with this decision of the Board.

Issued: September 9, 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

[14] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.4, 2.800.7, 2.800.8, and 2.800.10 (June 2011).

[15] *E.S.*, Docket No. 17-0601 (issued August 10, 2017); *Philip L. Barnes,* 55 ECAB 426 (2004); *see also Virginia Richard (Lionel F. Richard),* 53 ECAB 430 (2002).