United States Department of Labor
Employees' Compensation Appeals Board

M.A., Appellant	)	
and	)	**Docket No. 20-1590**
	)	**Issued: May 12, 2021**
DEPARTMENT OF THE ARMY, TACOM FLEET MANAGEMENT EXPANSION, Fort Leonard Wood, MO, Employer	)	

Appearances:
Alan J. Shapiro, 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 September 4, 2020 appellant, through counsel, filed a timely appeal from a June 30, 2020 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 her burden of proof to establish binaural hearing loss causally related to the accepted factors of her federal employment.

FACTUAL HISTORY

On November 8, 2017 appellant, then a 58-year-old tool and parts attendant, filed an occupational disease claim (Form CA-2) alleging that she developed hearing loss due to factors of her federal employment, including working in a mechanic wheel shop with loud noises from trucks and air tools. She noted that she first became aware of her condition and its relation to her federal employment on November 20, 2012. Appellant did not stop work.

In a development letter dated November 15, 2017, OWCP informed appellant that the evidence of record was insufficient to establish her claim. It advised her of the type of factual and medical evidence needed and provided a questionnaire for her completion. In a separate development letter of even date, OWCP requested that the employing establishment provide additional information, including comments from a knowledgeable supervisor and an explanation of appellant's work activities and exposure to noise. It also requested all medical examinations pertaining to hearing or ear problems, including pre-employment examination and all audiograms. OWCP afforded both parties 30 days to submit the necessary evidence.

OWCP subsequently received base system civilian evaluation reports, position descriptions, and notifications of personnel action Standard Form (SF)-50 that noted appellant's employment history and job duties as a custodial worker from May 26, 1998 through July 31, 1999, a fabric worker from August 1, 1999 through April 5, 2003, a custodial worker from April 6 through June 28, 2003, a sewing machine operator from June 29, 2003 through July 10, 2005, a tool and parts attendant from July 11 through December 10, 2005, an optical instrument worker from December 11, 2005 through September 24, 2011, and a tool and parts attendant from September 25, 2011 through the present.

Appellant submitted her audiogram findings and hearing conservation data, dated March 2, 2012 through November 2, 2017. Audiograms, dated November 5, 2012, October 21, 2014, and October 20 and November 1, 2017, revealed changes in appellant's hearing when compared to her baseline audiogram such that it constituted reportable sensorineural hearing loss.

On December 5, 2017 appellant responded to OWCP's development questionnaire. She noted that she was exposed to noise from heavy military vehicles for 9 hours per day, 40 hours per week while working as a tool and parts attendant. Appellant indicated that she used triple-flange, rubber hearing protection. She noted that she was last exposed to hazardous noise in 2014 and first became aware of her hearing loss in 2012. Appellant indicated that she did not engage in any hobbies that involved exposure to loud noise. She recounted that she requested her medical hearing examinations from the employing establishment, but could only get records from 2012 through 2017. Appellant indicated that she had been moved to a different work site and no longer had significant exposure to noise.

In a December 5, 2017 email, J.S., appellant's supervisor, responded to OWCP's development questionnaire. He noted that appellant received an annual hearing test on November 7, 2012, which showed reportable hearing loss. J.S. indicated that appellant did not want to file an occupational disease claim at that time. He reported that appellant was exposed to noise from shop tools and military vehicles weighing up to 5 tons for 6.5 to 7.5 hours per day, 4 to 5 days per week. J.S. noted that appellant was provided with triple-flange ear protection. He indicated that appellant's audiograms and medical examinations pertaining to hearing or ear problems would have to be provided by the employing establishment's hearing program manager's office. J.S. stated that appellant was currently working as a tool and parts attendant for the employing establishment.

In a December 15, 2017 memorandum, the employing establishment noted that it conducted a noise test in the tool supply room where appellant had worked. It indicated that air ratchets and impact air wrenches had been shown to have noise levels over 90 A-weighted decibels (dBs). The employing establishment explained that if employees in the tool supply room entered the maintenance area where these tools were used, hearing protection was required. It reported that noise levels in the tool supply room were well below the allowable standard and therefore no hearing protection was required. The employing establishment provided a table showing noise levels in the tool supply room at different frequencies with work ongoing and an air compressor running in an adjacent room.

On September 5, 2018 OWCP referred appellant, along with a statement of accepted facts (SOAF), for a second opinion examination with Dr. Richard L. Barnes, an otolaryngologist. In a September 25, 2018 report, Dr. Barnes recounted appellant's medical history and history of employment-related noise exposure. He indicated that in reviewing appellant's medical record, there were no previous audiograms for comparison. Dr. Barnes examined appellant and performed an audiological evaluation. He reviewed appellant's audiogram performed that day, which demonstrated at 500, 1,000, 2,000, and 3,000 Hertz (Hz) losses of 40, 40, 55, and 80 dBs on the right, respectively and 40, 40, 70, and 80 dBs on the left, respectively. Dr. Barnes diagnosed sensorineural hearing loss, but opined that he could not determine if it was related to appellant's federal employment. He noted that appellant's hearing loss appeared to be functional and that the September 25, 2018 audiometric testing was not valid because there were signs of malingering. Dr. Barnes further explained that previous audiograms were needed to determine if appellant's hearing loss was caused by her federal employment. Utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),[3] he indicated that appellant had two percent impairment for tinnitus.

By decision dated November 16, 2018, OWCP denied appellant's claim, finding that she had not submitted medical evidence containing a medical diagnosis in connection with the accepted factors of her federal employment. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

[3] A.M.A., *Guides* (6th ed. 2009).

On December 17, 2018 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. On February 1, 2019 she requested a review of the written record in lieu of an oral hearing.

By decision dated April 2, 2019, an OWCP hearing representative, following a preliminary review, vacated the November 16, 2018 decision and remanded the case for a new second opinion examination with an otolaryngologist to determine if appellant had employment-related hearing loss.

On June 25, 2019 OWCP referred appellant, along with an updated SOAF, for a second opinion examination with Dr. Jay A. Dunfield, a Board-certified otolaryngologist. In a July 17, 2019 report, Dr. Dunfield noted that appellant's hearing tests appeared to be stable going back to 2014. He indicated that appellant stated that she had audiograms performed from 1999 through the present, but he did not receive any audiology records prior to 2012. Dr. Dunfield examined appellant and performed an audiological evaluation. He reviewed appellant's audiogram performed that day, which demonstrated at 500, 1,000, 2,000, and 3,000 Hz losses of 30, 35, 55, and 70 dBs on the right, respectively and 25, 40, 65, and 75 dBs on the left, respectively. Dr. Dunfield diagnosed sensorineural hearing loss and opined that appellant's hearing loss could have been caused by her employment-related noise exposure. He noted that since there were no audiograms prior to 2012, he could not determine if appellant's hearing loss predated her federal employment and would have to assume that it did not. Utilizing the sixth edition of the A.M.A., *Guides*, Dr. Dunfield calculated that appellant had 35 percent monaural hearing loss in the right ear and 39 percent monaural hearing loss in the left ear. He calculated appellant's binaural hearing loss and added 1 percent impairment for tinnitus for a total of 37 percent binaural hearing loss.

By decision dated June 30, 2020, OWCP denied appellant's claim, finding that the medical evidence of record was insufficient to establish causal relationship between appellant's diagnosed binaural hearing loss and the accepted factors of her federal employment.

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 period 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

[4] *Supra* note 2.

[5] *A.D.*, Docket No. 20-0758 (issued January 11, 2021); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

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 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.[8]

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.[9] 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.[10]

ANALYSIS

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

In a July 17, 2019 report, Dr. Dunfield, the second opinion examiner, diagnosed binaural sensorineural hearing loss and opined that appellant's hearing loss could have been caused by her employment-related noise exposure. He noted that appellant stated that she had audiograms performed from 1999 through the present. Dr. Dunfield reported that since he did not receive audiograms prior to 2012, he could not determine if appellant's hearing loss was causally related to her employment-related noise exposure.

In a development letter dated November 15, 2017, OWCP requested that the employing establishment address the accuracy of appellant's allegations and describe her 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.

[6] *V.P.*, Docket No. 20-0415 (issued July 30, 2020); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[7] 20 C.F.R. § 10.115; *S.A.*, Docket No. 20-0458 (issued July 23, 2020); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

[8] *See B.H.*, Docket No. 18-1693 (issued July 20, 2020); *Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

[9] *L.S.*, Docket No. 19-1769 (issued July 10, 2020); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

[10] *B.C.*, Docket No. 20-0221 (issued July 10, 2020); *Leslie C. Moore*, 52 ECAB 132 (2000).

In a December 5, 2017 e-mail, J.S., appellant's supervisor, indicated that appellant's audiograms and medical examinations pertaining to hearing or ear problems would have to be provided by the employing establishment's hearing program manager's office.

In a December 5, 2017 statement, appellant asserted that she requested her medical hearing examinations from the employing establishment, but could only get records from 2012 to 2017.

The employing establishment did not provide the audiograms or medical records from its hearing conservation program prior to 2012.

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 by the employing establishment. Dr. Dunfield specifically noted that audiograms were not provided prior to 2012 and that he, therefore, could not determine if appellant's hearing loss was causally related to her employment-related noise exposure. 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 program and provide the records it obtains to Dr. Dunfield for a supplemental report.[14] Following this and other such further development deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

[11] *See D.O.*, Docket No. 20-0006 (issued September 9, 2020); *J.V.*, Docket No. 17-0973 (issued July 19, 2018).

[12] *See D.O.*, *id.*, *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).

[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).

[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).

ORDER

IT IS HEREBY ORDERED THAT the June 30, 2020 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: May 12, 2021
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