

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

_____)	
W.S., Appellant)	
)	
and)	Docket No. 22-0372
)	Issued: August 10, 2022
DEPARTMENT OF THE ARMY, ANNISTON)	
ARMY DEPOT, Anniston, AL, Employer)	
_____)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On January 10, 2022 appellant filed a timely appeal from a December 10, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.²

ISSUE

The issue is whether appellant has met his burden of proof to establish that he sustained noise exposure in the performance of duty, as alleged.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the issuance of December 10, 2021 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.*

FACTUAL HISTORY

On August 23, 2021 appellant, then a 62-year-old mechanical parts repairer, filed an occupational disease claim (Form CA-2) alleging that he developed binaural hearing loss due to noise exposure causally related to factors of his federal employment. He noted that he first became aware of the condition on April 3, 2010 and realized its relation to his federal employment on April 2, 2021.

With his claim, appellant attached audiograms and audiology reports dated November 3, 2003 to August 10, 2021. He also submitted an occupational hearing test questionnaire and August 18 and 22, 2021 letters from the employing establishment, which informed him that his hearing had worsened significantly since his hearing baseline was determined. In the August 18, 2021 letter, the employing establishment also indicated that appellant's left ear hearing loss was considered an Occupational Safety and Health Administration (OSHA) reportable hearing loss.

In a development letter dated November 3, 2021, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of evidence necessary to establish his claim and provided a questionnaire for his completion regarding noise exposure. OWCP afforded appellant 30 days to respond.

In a separate letter dated November 3, 2021, OWCP requested that the employing establishment provide information regarding appellant's claimed noise exposure. Specifically, it asked the employing establishment to provide comments from a knowledgeable supervisor regarding the accuracy of appellant's statements relative to his claim and to indicate whether it concurred with his allegations. OWCP requested information regarding the locations of the job sites where exposure allegedly occurred, the sources of the noise exposure, the decibel and frequency level (per the noise survey report) for each job site, the period of exposure (hours per day and days per week), and the types of ear protection provided. It also asked the employing establishment to provide copies of appellant's job sheet, employment record, and application for federal employment (Form SF-171). OWCP noted that, in the absence of a full reply from the employing establishment, it would accept his allegations as factual.

OWCP received environmental studies from 2014 and noise sampling data from May 4, 2004 through September 7, 2021.

In a December 2, 2021 e-mail, J.M., appellant's supervisor, confirmed that appellant worked in buildings where he was exposed to noise. J.M. indicated the sources of noise were large machinery, large and small Keller impact wrenches, and canning of the engine and large sledgehammer. The period of exposure was noted as 18 years, 9 to 11 hours per day, 6 days per week. J.M. indicated that appellant wore ear protection.

On December 7, 2021 OWCP received appellant's November 30, 2021 signed response to the development questionnaire. Appellant provided the locations of the job sites where he was exposed to noise. He identified the sources of noise as air tools, 1/2 to 3/8 drive impact, and the period of exposure as 9 to 10 hours per day. Appellant indicated that he used soft yellow neon blasts ear plugs. He indicated that he was last exposed to noise at work in 2019. Appellant also indicated that he had ringing in both ears and no hobbies other than fishing.

By decision dated December 10, 2021, OWCP denied appellant's claim, finding that the evidence of record was insufficient "to establish a history of noise exposure over the course of your employment." It explained that evidence of record "did not contain a detailed description of the source of noise, or your employment-related history of exposure alleged to have caused hearing loss." OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

LEGAL PRECEDENT

An employee seeking benefits under FECA³ 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, 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.⁴ 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.⁵

To establish that an injury was sustained in the performance of duty in an occupational disease claim, an employee 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 employment factors identified by the employee.⁶

Appellant's burden of proof includes the submission of a detailed description of the employment factors, which he believes caused or adversely affected a condition for which compensation is claimed.⁷

ANALYSIS

The Board finds that appellant has met his burden of proof to establish noise exposure causally related to factors of his federal employment, as alleged.

In support of his claim, appellant noted that he had ringing in his ears and provided copies of audiology reports dated November 2, 2003 to August 10, 2021. Regarding his exposure to hazardous noise at the employing establishment, he responded to the November 3, 2021 OWCP development questionnaire and noted that he worked in buildings where he was exposed to noise 9 to 10 hours per day. Appellant related that he used soft yellow neon blasts ear plugs at work and

³ *Id.*

⁴ *D.J.*, Docket No. 19-1387 (issued December 20, 2019); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁵ *Id.*

⁶ *L.C.*, Docket No. 19-1301 (issued January 29, 2020); *Roy L. Humphrey*, 57 ECAB 238 (2005).

⁷ *S.J.*, Docket No. 17-1798 (issued February 23, 2018).

that he had no hobbies other than fishing. He also submitted statements from the employing establishment indicating that his hearing had worsened significantly since his hearing baseline was determined, and that his left ear hearing loss was OSHA reportable.

In response to the November 3, 2021 OWCP development questionnaire, the employing establishment confirmed that appellant worked in buildings where he was exposed to noise. The sources of noise were large machinery, large and small Keller impact wrenches, and canning of the engine and large sledgehammer. The employing establishment also confirmed that his period of exposure to noise at work was 18 years, 9 to 11 hours per day, 6 days a week, and that the hearing protection worn was soft yellow neon blasts. It also submitted records pertaining to noise sampling data dated from May 4, 2004 through September 7, 2021. As such, the employing establishment supported appellant's claim that he was exposed to multiple noise sources while working at the employing establishment.

Given the circumstances presented, the Board finds that appellant's allegation that he was exposed to various sources of hazardous noise during the performance of his federal employment is accepted as factual. Appellant, therefore, has sufficiently identified the employment factors alleged to have caused or contributed to his condition.⁸

However, as OWCP denied the factual portion of the claim, it did not review or develop the medical evidence with regard to the issue of causal relationship. Accordingly, the Board will set aside OWCP's December 10, 2021 decision and remand the case for consideration of the medical evidence with regard to whether appellant has established hearing loss causally related to the accepted employment exposure. After this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that appellant has met his burden of proof to establish that he sustained noise exposure in the performance of duty, as alleged. The Board further finds, however, that this case is not in posture for decision regarding whether he has established hearing loss causally related to the accepted employment exposure.

⁸ *Supra* note 6.

ORDER

IT IS HEREBY ORDERED THAT the December 10, 2021 decision of the Office of Workers' Compensation Programs is reversed in part and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 10, 2022
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board