United States Department of Labor
Employees' Compensation Appeals Board

J.C., Appellant	)	
and	)	**Docket No. 23-0933**
	)	**Issued: December 4, 2023**
DEPARTMENT OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, Barbourville, KY, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On June 26, 2023 appellant filed a timely appeal from a January 17, 2023 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.

ISSUE

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

FACTUAL HISTORY

On August 24, 2021 appellant, then a 62-year-old mine safety and health inspector, filed an occupational disease claim (Form CA-2) alleging that he developed hearing loss due to factors

[1] 5 U.S.C. § 8101 *et seq*.

of his federal employment, including loud noise exposure while inspecting mining equipment in confined areas in underground and surface coal mines for over 14 years. He noted that he first became aware of his condition and its relationship to his federal employment on March 31, 2017. Appellant did not stop work.

In a development letter dated August 31, 2021, OWCP informed appellant that the evidence of record was insufficient to establish his claim. It advised him of the type of factual and medical evidence needed and provided a questionnaire for his 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 noise exposure. It afforded both parties 30 days to submit the necessary evidence.

OWCP received a list of average decibel levels of various mining equipment including bulldozers, front end loaders, draglines, haulage trucks, shovels, pan scrapers, graders, surface drills, excavators, rail car shake outs, longwalls, continuous miners, load-haul dumps, bridge conveyors, roof bolters, jackleg drills, underground drills, ram cars, scalers, scoops, locomotive, and mantrips.

OWCP received appellant's employing establishment audiograms dated from August 1, 2006 to April 13, 2021.

In a supplemental statement, appellant reiterated that, as a health and safety mine inspector, he had performed inspections of coal preparation plants, loading facilities, underground mines, and surface mines, and was exposed to noise from all types of mining equipment. He denied any previous history of hearing problems and indicated that he received hearing aids on March 31, 2017.

OWCP received a hearing loss checklist from appellant's supervisor, W.C., who noted that he had reviewed appellant's statements, and they were true and factual. W.C. noted that appellant worked at locations where there was mining equipment/machinery operating and explosives blasting, that decibel and frequency levels varied from shift to shift, and that appellant was provided with various types of ear plugs and ear caps.

In a letter dated September 13, 2021, the employing establishment verified that appellant was exposed to hazardous noise at surface and underground mining facilities throughout the United States. It noted that all jobs listed by him were established as having exposure to hazardous noise levels and that he was exposed to excessive noise approximately 40 hours per week, 8 to 10 hours per day, for 4 to 5 days per week.

On September 24, 2021 OWCP referred appellant, along with a statement of accepted facts (SOAF) and the medical record, to Dr. William J. Brown, II, an audiologist, for audiometric testing, and to Dr. Andrew S. Mickler, a Board-certified otolaryngologist, for a second opinion evaluation.

In an October 22, 2021 report, Dr. Brown conducted an audiometric test, which revealed losses of 20, 30, 45, and 30 decibels (dBs) on the right and 20, 30, 40 and 35 dBs on the left at 500, 1,000, 2,000, and 3,000 Hertz (Hz), respectively.

In an October 22, 2021 narrative report, Dr. Mickler reviewed appellant's medical record and the SOAF, performed a physical examination, and completed OWCP's evaluation questionnaire. He compared the current audiogram with the audiogram from 2006 and found a worsening of hearing loss in both ears. In response to the question of whether the workplace 8-hour time-weighted average sound level (TWA) was sufficient to have caused the loss in question, Dr. Mickler responded: "No. [TWA] was below action level per OSHA." He diagnosed bilateral sensorineural hearing loss and opined that it was not due to noise exposure in the workplace.

By decision dated November 2, 2021, OWCP denied appellant's occupational disease claim, finding that the medical evidence of record was insufficient to establish hearing loss causally related to the accepted factors of his federal employment.

On October 21, 2022 appellant requested reconsideration and provided additional evidence.

In an October 4, 2022 report, Dr. Keith J. Alexander, a Board-certified otolaryngologist, noted that appellant was seen for follow up of mid and high-frequency sensorineural hearing loss. He related that appellant had been a mining inspector for the past 16 years and prior thereto had worked in coal mines. Dr. Alexander noted that appellant was exposed to loud noise throughout his employment and as mine inspector from 2006 to 2022. He reviewed appellant's 2006 audiogram and noted that it revealed hearing loss in each ear of around 30 to 45 dBs at 2,000 Hz and that his hearing loss in the frequencies around 2,000 Hz remained stable. Dr. Alexander further found that appellant's hearing in the frequencies above 3,000 Hz had dropped from 25 dB in each ear in 2006 down to 50 to 60 dB currently. He opined that the drop from 25 dB to 50/60 dB was likely the result of noise exposure and that appellant's exposure to noise occurred during his work as a coal mine inspector. Dr. Alexander diagnosed bilateral sensorineural hearing loss and bilateral tinnitus, secondary to sensorineural hearing loss.

Appellant also submitted chart notes from May 13, 2015 to May 12, 2017 from audiology appointments, and a September 26, 2022 audiogram.

By decision dated January 17, 2023, OWCP denied modification of the November 2, 2021 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA[2] 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,[3] 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

[2] *Id*.

[3] *See S.B.*, Docket No. 22-1346 (issued June 1, 2023); *D.D.*, Docket No. 19-1715 (issued December 3, 2020); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

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, 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) rationalized medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.[6]

Causal relationship is a medical issue, and the medical evidence required to establish causal relationship is rationalized medical opinion evidence.[7] 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.[8]

Section 8123(a) provides that, if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[9] The implementing regulations provide that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case. In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[10]

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[4] *Y.G.*, Docket No. 20-0688 (issued November 13, 2020); *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[5] *C.H.*, Docket No. 19-1781 (issued November 13, 2020); *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).

[6] *T.M.*, Docket No. 20-0712 (issued November 10, 2020); *S.C.*, Docket No. 18-1242 (issued March 13, 2019); *R.H.*, 59 ECAB 382 (2008).

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

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

[9] 5 U.S.C. § 8123(a); *see C.C.*, Docket No. 20-0151 (issued July 30, 020); *M.G.*, Docket No. 19-1627 (issued April 17, 2020); *R.C.*, Docket No. 12-0437 (issued October 23, 2012).

[10] 20 C.F.R. § 10.321. *See also J.H.*, Docket No. 22-0981 (issued October 30, 2023); *N.D.*, Docket No. 21-1134 (issued July 13, 2022); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001); *James P. Roberts*, 31 ECAB 1010 (1980).

ANALYSIS

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

OWCP referred appellant to Dr. Mickler in order to determine whether appellant's work-related noise exposure was sufficient to have caused hearing loss, and if so, the extent and degree of that hearing loss. In his report dated October 22, 2021, Dr. Mickler diagnosed sensorineural hearing loss and opined that it was not due to noise exposure encountered in the workplace.

However, by report dated October 4, 2022, Dr. Alexander noted that his comparison of the 2006 baseline audiogram with appellant's current audiogram revealed that appellant's hearing loss had remained stable in the 2,000 Hz range, but in the frequencies above 3,000 Hz his hearing had dropped from 25 dB to 50/60 dB. He opined that the drop in appellant's hearing was likely the result of noise exposure. Dr. Alexander also explained that appellant's noise exposure occurred during his work as a mine inspector.

For a conflict to arise, the opposing physicians' opinions must be of equal weight.[11] The Board finds that the opinions of Drs. Mickler and Alexander are of equal weight and that a conflict exists with regard to the cause of appellant's binaural hearing loss.

Therefore, in accordance with section 8123(a) of FECA, the case must be remanded for referral to an impartial medical specialist for resolution of the conflict in the medical opinion evidence regarding the cause of appellant's hearing loss.[12] After this and other such further development as OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

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

[11] *M.G.*, Docket No. 19-1627 (issued April 17, 2020); *Darlene R. Kennedy, id.*; *James P. Roberts, id.*

[12] *Id.*

ORDER

IT IS HEREBY ORDERED THAT the January 17, 2023 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: December 4, 2023
Washington, DC

Alec J. Koromilas, 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