

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

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<b>J.V., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 22-1022</b>
	)	<b>Issued: January 18, 2023</b>
<b>DEPARTMENT OF HOMELAND SECURITY,</b>	)	
<b>U.S. CUSTOMS AND BORDER PROTECTION,</b>	)	
<b>U.S. BORDER PATROL, Corpus Christi, TX,</b>	)	
<b>Employer</b>	)	
_____	)	

*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 June 25, 2022 appellant filed a timely appeal from a March 22, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (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 has met his burden of proof to establish hearing loss causally related to the accepted factors of his federal employment.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On June 18, 2021 appellant, then a 49-year-old border patrol agent, filed an occupational disease claim (Form CA-2) alleging that he sustained hearing loss due to factors of his federal employment. He alleged that, during his 22-year law enforcement career, his hearing had worsened due to exposure to noise in his “work environment and its elements.” Appellant asserted that audiograms confirmed hearing loss. He noted that he first became aware of his condition and realized its relation to his federal employment on June 14, 2021. Appellant did not stop work.

In an undated statement received with the Form CA-2, appellant indicated that he worked at two employing establishment locations since 1999: Laredo North Station from January 25, 1999 through June 6, 2006 and Corpus Christi Station from June 7, 2006 through the present. He advised that, when he worked at an immigration checkpoint at Laredo North Station, he was exposed for 10 hours each day to hazardous noise from trains, 18-wheeler trucks, and other motor vehicles. Appellant further noted that, four times per year, he engaged in qualification sessions and tactical training by shooting at targets with fully-automatic weapons, shotguns, and side arms. He maintained that his hearing protection became dislodged during tactical training and alleged that he developed ringing in his ears due to this training. Appellant asserted that a baseline audiogram taken when he first started working for the employing establishment was within normal parameters for good hearing, but that an audiogram taken a few years later denoted some hearing loss. He reported that he was exposed to loud noise when he worked as an infantryman in the U.S. Army from 1991 through 1995 and 1997 through 1998, but hearing tests administered during these periods did not show hearing loss. Appellant noted, however, that he was granted 10 percent disability by the military for tinnitus. He submitted an October 28, 1998 optional application for federal employment in which he discussed his duties with the U.S. Army from 1991 through 1995, including supervising live gunfire exercises.

Appellant also submitted a November 5, 1998 preplacement medical examination and history report, which was signed by an individual with a partially illegible signature. Testing for the left ear at the frequency levels of 500, 1,000, 2,000, and 3,000 Hertz (Hz) revealed losses of 17, 12, 11, and 18 decibels (dBs) respectively. Testing for the right ear at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz revealed losses of 17, 15, 15, and 7 dBs respectively.

An August 23, 2016 audiogram signed by Zulema Yaacobi, a registered nurse, showed testing for the left ear at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz revealed losses of 85, 90, 95, and 90 dBs respectively. Testing for the right ear at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz revealed losses of 75, 75, 70, and 70 dBs respectively. The report indicated that the reported sources of appellant’s exposure to noise at work were motor vehicles, trains, and firearms during qualification testing.

In a June 22, 2021 development letter, OWCP notified appellant of the deficiencies of 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 comments from a knowledgeable supervisor regarding appellant’s allegations. It afforded both parties 30 days to respond.

The employing establishment submitted a May 5, 1981 sound level survey for the firearms specialties branch of the Federal Law Enforcement Training Center, which listed decibel levels for several firearm ranges within the training center.

By decision dated July 23, 2021, OWCP denied appellant's claim, finding that the evidence of record was insufficient to establish the implicated employment exposure. It noted that he had not responded to the development questionnaire. OWCP concluded, therefore that the requirements had not been met to establish an injury as defined by FECA.

On August 25, 2021 appellant requested reconsideration of the July 23, 2021 decision and submitted additional evidence.

In an August 23, 2021 response to OWCP's development questionnaire, appellant noted that, when he was in the U.S. Army, he was exposed to loud noise during each weapons qualification session, but he wore earplugs on those occasions. He alleged that he first noticed his hearing loss in 2009 and that he was last exposed to hazardous noise at the employing establishment on June 21, 2021. Appellant noted that he did not have any hobbies that involved noise exposure.

OWCP also received a June 29, 2021 statement from the watch commander for the employing establishment, who concurred with appellant's assessment of his noise exposure. The watch commander indicated that both the Laredo North and Corpus Christi stations required quarterly qualification sessions for service pistols, rifles, and shotguns, and that appellant's collective noise exposure at these locations included noise from gunshots, freight train engines/horns, traffic while at checkpoints or carrying out traffic stops, all-terrain vehicle motors, and air tools used in vehicle maintenance. He indicated that all agents were provided earmuffs and foam earplugs.

In an August 24, 2021 report, Dr. Viraf Cooper, a Board-certified neurosurgeon, indicated that appellant visited on August 20, 2021 and reported that he had been exposed to noise while working at the employing establishment, including noise from firearms, train brakes, and motor vehicles. He noted that otoscopic examination revealed clear external auditory canals and tympanic membranes bilaterally with mild scarring of both eardrums. Appellant's left ear was more symptomatic than his right. Dr. Cooper diagnosed bilateral sensorineural hearing loss and bilateral tinnitus "secondary to repetitive and prolonged noise exposure throughout the course of [appellant's] occupation." He opined that appellant's diagnosed conditions developed after 22 years of occupational exposure to loud sounds and noises repetitively for prolonged periods during trains inspections, checkpoint inspection, firearms training, and other discharging of weapons.

In a September 19, 2021 note, appellant advised that he was submitting a copy of the last audiogram that was taken by the employing establishment during his employment. In the attached September 1, 2016 audiogram, which contains an illegible signature, testing for the left ear at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz revealed losses of 75, 85, 85, and 90 dBs respectively. Testing for the right ear at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz revealed losses of 75, 80, 80, and 85 dBs respectively.

On October 20, 2021 OWCP referred appellant, along with the case record and a statement of accepted facts (SOAF), for a second opinion examination and otologic evaluation with Dr. Matthew Steehler, a Board-certified otolaryngologist. It requested that Dr. Steehler provide an opinion regarding whether appellant had a work-related hearing loss.

In a November 19, 2021 narrative report, Dr. Steehler noted that appellant reported decreased hearing and tinnitus in both ears that was intermittent. He reported the findings of his evaluation, which included an audiogram taken on November 16, 2021. Testing for the left ear at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz revealed losses of 40, 45, 40, and 45 dBs respectively. Testing for the right ear at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz revealed losses of 50, 45, 40, and 45 dBs respectively. Dr. Steehler diagnosed sensorineural hearing loss of both ears and binaural tinnitus. He indicated that it could only be concluded that at least one of these two audiograms was embellished for secondary gain. Dr. Steehler noted, “[m]alingering is likely on the 2016 audiogram (at minimum) and may be also present today. Therefore, no conclusions can accurately be made regarding this patient and occupational noise exposure/loss.”

In a November 17, 2021 outline for otologic evaluation (Form CA-1332), Dr. Steehler indicated “probably” in response to a question regarding whether the workplace exposure, as described in the provided materials, was sufficient to have caused the hearing loss in question. In response to a question regarding whether appellant had a sensorineural loss exceeding what would be predicted due to presbycusis, he noted, “Nearly deaf 2016. Now mild[-]to[-]moderate loss. More likely than not malingering present in one or both tests.” Under the section for diagnosis, Dr. Steehler wrote, “N/A,” and, in response to a question regarding whether appellant had mixed sensorineural loss, which was, in part or all, due to the noise exposure in appellant’s federal civilian employment, Dr. Steehler checked a box marked “Not Due.” In response to a request for medical rationale supporting the opinion, he added a notation, “[c]annot come to any reasonable conclusion as [appellant] likely malingered on one or both audiograms.” Dr. Steehler then checked a box marked “No” and added the notation, “due to variable hearing tests,” in response to a question regarding whether the audiometric tests were valid and representative of appellant’s hearing sensitivity. In response to a question regarding whether appellant’s tinnitus was, in part or all, due to the noise exposure in his federal civilian employment, he checked a box marked “Not Due.” Dr. Steehler added a notation indicating that medical rationale supporting the opinion was found on the previous page, which discussed sensorineural hearing loss.

In a hearing evaluation attachment, completed on November 16, 2021 Dr Steehler applied OWCP’s standardized procedures<sup>2</sup> to his evaluation and found that appellant had 26.25 percent hearing loss in the left ear, 30 percent hearing loss in the right ear, and 26.88 percent binaural hearing loss. He advised that appellant reached maximum medical improvement on November 16, 2021 and that no impairment rating would be added for tinnitus.<sup>3</sup> However, Dr. Steehler added a

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<sup>2</sup> See American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6<sup>th</sup> ed. 2009) 250-51.

<sup>3</sup> Dr. Steehler had appellant complete a tinnitus handicap inventory on November 16, 2021 and added the following handwritten notation to an accompanying tinnitus handicap inventory severity score sheet: “N/A – cannot rule out/suspect malingering.”

notation in which he referenced appellant's audiograms taken in 2016 and 2021, and asserted that appellant likely malingered on one or both of them.

On November 23, 2021 OWCP requested that Dr. Steehler provide a supplemental report clarifying his November 16, 2021 report with respect to whether appellant's diagnosed bilateral sensorineural hearing loss and bilateral tinnitus were related to the accepted factors of his federal employment. On a November 24, 2021 letter from his own office requesting a response to OWCP's request, Dr. Steehler provided a handwritten notation on an unspecified date: "I have nothing more to say on this matter. Do not contact me again about this matter. Respect my wishes."

On December 9, 2021 appellant filed a claim for compensation (Form CA-7) for a schedule award.

By decision dated March 22, 2022, OWCP modified its July 23, 2021 decision to find that appellant had established the implicated employment exposure and a medical condition. However, it further found that the medical evidence of record was insufficient to establish hearing loss causally related to the accepted factors of his federal employment. OWCP based its denial of appellant's claim on the second opinion reports of Dr. Steehler.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>4</sup> 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 filed within the applicable time limitation, that an injury was sustained while in the performance of duty, as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.<sup>5</sup> These are the essential elements of every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.<sup>6</sup>

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.<sup>7</sup>

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<sup>4</sup> *Supra* note 1.

<sup>5</sup> *E.S.*, Docket No. 18-1580 (issued January 23, 2020); *M.E.*, Docket No. 18-1135 (issued January 4, 2019); *C.S.*, Docket No. 08-1585 (issued March 3, 2009); *Bonnie A. Contreras*, 57 ECAB 364 (2006).

<sup>6</sup> *E.S.*, *id.*; *S.P.*, 59 ECAB 184 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>7</sup> *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).

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.<sup>8</sup> 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.<sup>9</sup> 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).<sup>10</sup>

### ANALYSIS

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

In his November 19, 2021 narrative report, Dr. Steehler diagnosed sensorineural hearing loss of both ears and binaural tinnitus. He referenced August 23, 2016 and November 16, 2021 audiograms and indicated that it could only be concluded that at least one of these two audiograms was embellished for secondary gain. Dr. Steehler noted, "[t]herefore no conclusions can accurately be made regarding this patient and occupational noise exposure/loss." In a November 17, 2021 outline for otologic evaluation, he indicated "probably" in response to a question regarding whether the workplace exposure, as described in the provided materials, was sufficient to have caused the hearing loss in question. In response to a question regarding whether appellant had a sensorineural hearing loss exceeding what would be predicted due to presbycusis, Dr. Steehler noted, "Nearly deaf 2016. Now mild-to-moderate loss. More likely than not malingering present in one or both tests." Under the section for diagnosis, he wrote, "N/A," and, in response to a question regarding whether appellant had mixed sensorineural hearing loss which was, in part or all, due to the noise exposure in his federal civilian employment, he checked a box marked "Not Due." In response to a request for medical rationale supporting the opinion, Dr. Steehler added a notation, "[c]annot come to any reasonable conclusion as patient likely malingered on one or both audiograms." He then checked a box marked "No" and added the notation, "due to variable hearing tests," in response to a question regarding whether the audiometric tests were valid and representative of appellant's hearing sensitivity. In response to a question regarding whether appellant's tinnitus was, in part or all, due to the noise exposure in his federal civilian employment, he checked a box marked "Not Due." In a hearing evaluation attachment, completed on November 17, 2021 Dr. Steehler applied OWCP's standardized procedures to his evaluation and calculated the extent of appellant's hearing loss, but he also added a notation about suspected malingering by appellant.

In his November 19, 2021 narrative report, Dr. Steehler provided specific, diagnosed conditions, but in his November 16, 2021 form report he declined to provide a diagnosis. In portions of both the November 16 and 19, 2021 reports, he indicated that no opinion could be provided regarding appellant's hearing loss due to suspected malingering. However, in his

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<sup>8</sup> *W.M.*, Docket No. 14-1853 (issued May 13, 2020); *T.H.*, 59 ECAB 388, 393 (2008); *Robert G. Morris*, 48 ECAB 238 (1996).

<sup>9</sup> *M.V.*, Docket No. 18-0884 (issued December 28, 2018).

<sup>10</sup> *Id.*; *Victor J. Woodhams*, *supra* note 7.

November 16, 2021 report, Dr. Steehler provided opinions on the cause of the observed hearing problems, and these opinions were contradictory in nature. In one portion of the November 16, 2021 report, he indicated that appellant's hearing loss probably was related to his federal civilian work, but in another portion he indicated that appellant's sensorineural hearing loss and tinnitus were "Not Due" to his federal civilian work. Moreover, Dr. Steehler calculated the extent of appellant's hearing loss in a November 17, 2021 form report, but he also added a notation, which called into question the validity of the calculation. OWCP recognized that Dr. Steehler's reports required clarification and requested a supplemental report, but he unequivocally responded that he would not provide any further reports.

The Board has held that, while the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.<sup>11</sup> Accordingly, once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.<sup>12</sup> Once it starts to procure medical opinion, it must do a complete job in securing from its referral physician an opinion which adequately addresses the relevant issues.<sup>13</sup>

Given that OWCP attempted and failed to gain clarification of Dr. Steehler's reports, the case must therefore be remanded for referral of appellant to a new OWCP referral physician for examination and evaluation. It must refer appellant, along with the case record and a detailed SOAF, to an otolaryngologist for the purpose of obtaining a rationalized medical opinion regarding whether he has work-related hearing loss.<sup>14</sup> After this and such other further development as deemed necessary, OWCP shall issue a *de novo* decision.

### CONCLUSION

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

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<sup>11</sup> See *D.V.*, Docket No. 17-1590 (issued December 12, 2018); *Russell F. Polhemus*, 32 ECAB 1066 (1981).

<sup>12</sup> See *A.K.*, Docket No. 18-0462 (issued June 19, 2018); *Robert F. Hart*, 36 ECAB 186 (1984).

<sup>13</sup> *T.B.*, Docket No. 20-0182 (issued April 23, 2021); *L.V.*, Docket No. 17-1260 (issued August 1, 2018); *Mae Z Hackett*, 34 ECAB 1421, 1426 (1983).

<sup>14</sup> *J.H.*, Docket No. 19-1476 (issued March 23, 2021); *R.O.*, Docket No. 19-0885 (issued November 4, 2019); *Talmadge Miller*, 47 ECAB 673 (1996).

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 22, 2022 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: January 18, 2023  
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