

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

C.K., Appellant)	
)	
and)	Docket No. 21-0882
)	Issued: July 21, 2023
U.S. POSTAL SERVICE, POST OFFICE, Dallas, TX, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On May 17, 2021 appellant filed a timely appeal from a January 22, 2021 merit decision and a March 16, 2021 nonmerit 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 this case.

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish ratable hearing loss, warranting a schedule award; and (2) whether OWCP properly denied appellant's request for an oral hearing as untimely filed, pursuant to 5 U.S.C. § 8124(b).

FACTUAL HISTORY

On October 10, 2018 appellant, then a 56-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that she sustained hearing loss causally related to factors of her federal employment. She attributed her hearing loss to noise from forklifts, jitneys, honking

¹ 5 U.S.C. § 8101 *et seq.*

horns, loudspeaker notifications, and moving machinery at work for 30 years. Appellant noted that she first became aware of her condition and realized its relation to her federal employment on November 17, 2017. She did not stop work.

Appellant submitted audiograms from 1983, 1987, and 2018.

In a development letter dated October 10, 2018, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of factual and medical evidence needed to establish her claim. In a separate letter of even date, OWCP requested factual evidence from the employing establishment, including a description of any sources noise exposure, the decibel and frequency level at the site, the duration of exposure, and all audiograms. It afforded both parties 30 days to submit the requested information.

On October 19, 2018 the employing establishment controverted appellant's claim. It maintained that it had conducted at least five occupational noise exposure tests by Federal Occupational Health (FOH) program and the Occupational Safety and Health Administration (OSHA) in response to complaints about the noise levels. The employing establishment indicated that the noise from machinery and equipment complied with OSHA standards, and that corrective measures and testing had been performed throughout the years to ensure compliance. It asserted that, based on the evidence and testing, the noise level was not at a level to cause occupational hearing loss.

In a November 19, 2018 response, appellant advised that she had worked more than 30 years for the employing establishment as a mail handler, beginning in June 1983. She related that she was exposed to loud noise throughout the day, generated from constant bells for exiting containers, and loud alarms when an exit site was full. Appellant advised that she was also exposed to noise from forklifts, overhead belts, blowing horns, loudspeakers, machinery, and sound systems. She related that she had used earplugs provided by the employing establishment for the last 15 to 20 years.

On December 13, 2018 OWCP referred appellant, along with a statement of accepted facts (SOAF) and copy of the medical record to Dr. Spiros Manolidis, a Board-certified otolaryngologist, for a second opinion evaluation. The SOAF described appellant's work duties.

Audiological testing performed on February 4, 2019 at the frequencies of 500, 1,000, 2,000, and 3,000 hertz (Hz) revealed losses of 30, 25, 30, and 30 decibels (dBs) for the right ear, and losses of 30, 25, 35, and 30 dBs for the left ear.

In a report dated February 13, 2019, Dr. Manolidis found that appellant had bilateral sensorineural hearing loss, and opined that her workplace exposure was sufficient to have caused the hearing loss. He diagnosed mild bilateral sensorineural hearing loss secondary to noise exposure arising, at least in part, to noise exposure experienced in the course of her federal employment. Dr. Manolidis further diagnosed tinnitus due at least in part to noise exposure at work. He based his opinion on the results of the audiological testing.

On February 21, 2019 OWCP accepted appellant's claim for bilateral sensorineural hearing loss.

On March 6, 2019 Dr. Stephen Maturo, a Board-certified otolaryngologist serving as a district medical adviser (DMA), advised that the evidence failed to establish that appellant was exposed to loud noise at work. He noted that her hearing loss was mild and at the same frequencies, which he found was inconsistent with occupational noise loss. Dr. Maturo related that documentation failed to demonstrate that appellant's hearing loss resulted from her occupational exposure.

OWCP determined that a conflict arose between Dr. Manolidis, an OWCP referral physician, and Dr. Maturo, the DMA. It referred appellant to Dr. Gregg Govett, a Board-certified otolaryngologist, for resolution of the purported conflict.

In a report dated August 21, 2019, Dr. Govett diagnosed bilateral sensorineural hearing loss as demonstrated by audiological testing. He noted that, according to the employing establishment's October 2018 letter, appellant was not exposed at a sufficient level to have caused noise-induced hearing loss. Dr. Govett thus found that her hearing loss was unrelated to occupational noise exposure.

By decision dated January 10, 2020, OWCP denied appellant's schedule award claim.

On February 4, 2020 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

Following a preliminary review, by decision dated April 16, 2020, OWCP's hearing representative set aside the January 10, 2020 decision. She found that the SOAF failed to set forth that OWCP had accepted the claim for hearing loss, or provide the decibel level and duration of appellant's exposure to noise at work. The hearing representative further found that Dr. Manolidis' report was not based on a complete factual and medical background, and failed to address whether appellant had limitations due to her hearing loss or tinnitus. She remanded the case for OWCP to obtain copies of the noise level studies referenced in the employing establishment's October 19, 2018 letter, and a supplemental report from Dr. Manolidis based on an updated SOAF regarding whether appellant's hearing loss and tinnitus were due to noise exposure at work.

On April 21, 2020 OWCP requested that the employing establishment provide copies of the noise level studies referenced in its October 19, 2018 letter. In a June 16, 2020 response, the employing establishment submitted a May 14, 2015 evaluation of occupational noise exposure, based on test samples obtained on April 14, 2015 which found that noise exposure ranged from 73.9 to 75.1 dBs following OSHA hearing conservation parameters and from 66.2 to 68.8 dBs following OSHA's permissible exposure limit parameters. It recommended periodic noise monitoring to ensure the noise levels remained in compliance with OSHA standards.

In an August 10, 2020 SOAF, OWCP set forth the noise exposure levels from the April 14, 2015 testing and specified that it had accepted the claim for bilateral sensorineural hearing loss. It advised that appellant wore hearing protection. OWCP requested that Dr. Manolidis address how her hearing loss and tinnitus resulted from the accepted levels of her noise exposure at work.

In a supplemental report dated September 29, 2020, Dr. Manolidis related that appellant had no significant hearing loss and that, consequently, her hearing loss and tinnitus were unrelated

to noise exposure at work and did not limit daily activities. He indicated that her tinnitus was mild and did not limit her daily activities.

On November 13, 2020 Dr. Manolidis related that appellant's "mild tinnitus hearing loss and tinnitus may have been the result of loud constant noises from work including bells, alarms, heavy machinery, horns, and overhead speakers. He noted that she used hearing protection and that her tinnitus would not limit her activities of daily living.

On November 18, 2020 Dr. Manolidis indicated that, based on the April 14, 2015 noise exposure report, appellant's work was within permissible noise exposure levels. He related that it was "not likely that [appellant's] hearing loss and tinnitus were a direct result of occupational noise exposure."

On December 3, 2020 OWCP requested that Dr. Manolidis provide a definite opinion of the causal relationship between appellant's employment and the diagnosed conditions of hearing loss and tinnitus.

In a response dated January 14, 2021, Dr. Manolidis agreed with the DMA's finding that appellant's hearing protection was sufficient to protect her from occupational noise. He opined that it was unlikely that her hearing loss and tinnitus were directly related to occupational noise exposure based on the April 14, 2015 noise exposure report and the fact that she wore hearing protection.

By decision dated January 22, 2021, OWCP denied appellant's schedule award claim. It based its finding on the January 21, 2021 report from Dr. Manolidis finding that it was unlikely that her hearing loss and tinnitus were causally related to her federal employment.

In correspondence dated February 22, 2021, submitted to OWCP on February 24, 2021, appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated March 16, 2021, OWCP denied appellant's request for an oral hearing as untimely filed. It noted that the decision was rendered on January 22, 2021 and that the request for a hearing was either postmarked or electronically submitted on February 24, 2021. OWCP exercised its discretion and determined that the issue in the case could be equally well addressed by a request for reconsideration before OWCP along with the submission of new evidence supporting that appellant had a permanent impairment due to her accepted employment injury.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provisions of FECA,² and its implementing federal regulations,³ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be

² *Id.*

³ 20 C.F.R. § 10.404.

determined. The method used in making such a determination is a matter which rests in the discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*, published in 2009.⁴ The Board has approved the use by OWCP of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.⁵

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.⁶ Using the frequencies of 500, 1,000, 2,000, and 3,000 Hz, the losses at each frequency are averaged. Then, the fence of 25 dBs is deducted because, as the A.M.A., *Guides* points out, losses below 25 dBs result in no impairment in the ability to hear everyday speech under everyday conditions.⁷ The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.⁸ The binaural loss of hearing is determined by calculating the loss in each ear using the formula for monaural loss, the lesser loss is multiplied by five, then added to the greater loss and the total is divided by six to arrive at the amount of the binaural hearing loss.⁹ The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.¹⁰

The A.M.A., *Guides* provides that if tinnitus interferes with activities of daily living, including sleep, reading (and other tasks requiring concentration), enjoyment of quiet recreation, and emotional well-being, up to five percent may be added to a measurable binaural hearing impairment.¹¹

ANALYSIS -- ISSUE 1

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

OWCP accepted appellant's claim for bilateral sensorineural hearing loss based on the opinion of Dr. Manolidis, an OWCP referral physician. It subsequently determined that a conflict arose between Dr. Manolidis and Dr. Maturo, a DMA. However, as neither physician was

⁴ A.M.A., *Guides* (6th ed 2009).

⁵ *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

⁶ A.M.A., *Guides* 250.

⁷ *Id.*; *C.D.*, Docket No. 18-0251 (issued August 1, 2018).

⁸ *Id.*

⁹ *Id.*

¹⁰ *See D.R.*, Docket No. 20-1570 (issued April 14, 2021); *V.M.*, Docket No. 18-1800 (issued April 23, 2019).

¹¹ A.M.A., *Guides* 249.

appellant's treating physician, OWCP improperly declared a conflict in medical opinion.¹² Consequently, Dr. Govett's opinion is not that of an impartial medical examiner.

Based on Dr. Govett's report, by decision dated January 10, 2020, OWCP denied appellant's schedule award claim. An OWCP hearing representative set aside the January 10, 2020 decision and remanded the case for OWCP to obtain noise exposure data from the employing establishment and a supplemental report from Dr. Manolidis. She noted that OWCP had accepted the claim for bilateral sensorineural hearing loss but had not set forth its acceptance of the condition in the SOAF.

OWCP provided Dr. Manolidis with an August 10, 2020 SOAF which indicated that it had accepted the claim for bilateral sensorineural hearing loss. In a supplemental report dated September 29, 2020, Dr. Manolidis found that appellant had no significant hearing loss and that her tinnitus and any hearing loss was unrelated to noise exposure at work. On November 13, 2020 he advised that her tinnitus may have resulted from noise exposure at work. In a November 18, 2020 report, Dr. Manolidis found it unlikely that appellant had sustained tinnitus and hearing loss due to occupational noise exposure. In a supplemental report dated January 14, 2021, he asserted that her hearing loss and tinnitus had not resulted from occupational noise exposure. However, OWCP had accepted appellant's claim for bilateral sensorineural hearing loss. When OWCP has accepted an employment condition as occurring in the performance of duty, the physician must base his opinion on the accepted condition.¹³

It is OWCP's responsibility to prepare a complete and proper frame of reference for a physician by preparing a SOAF.¹⁴ OWCP's procedures and Board precedent dictate that when an OWCP medical adviser, second opinion specialist, or referee physician renders a medical opinion based on a SOAF which is incomplete or inaccurate, or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether.¹⁵ As Dr. Manolidis did not rely on the SOAF as a framework in reaching his conclusions, his report is of diminished probative value and insufficient to carry the weight of the medical evidence.¹⁶

It is well established that proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares the responsibility in the development of the evidence to see that

¹² See 5 U.S.C. § 8123(a); 20 C.F.R. § 10.321(b); *R.S.*, Docket No. 17-0344 (issued February 15, 2019); *S.G.*, 58 ECAB 383, 387 (2007) (a conflict may only exist between an employee's physician and a physician designated or approved by OWCP); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.11a (September 2010).

¹³ *D.T.*, Docket No. 21-1168 (issued April 6, 2022); *G.B.*, Docket No. 20-0750 (issued October 27, 2020); *T.P.*, 58 ECAB 524 (2007).

¹⁴ *M.H.*, Docket No. 21-1014 (issued July 8, 2022).

¹⁵ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990). See also *D.T.*, *id.*; *D.C.*, Docket No. 21-0780 (issued December 22, 2021); *Paul King*, 54 ECAB 356 (2003).

¹⁶ *Id.*; see also *J.Z.*, Docket No. 22-0829 (issued December 9, 2022).

justice is done.¹⁷ Once it undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.¹⁸ Accordingly, the Board finds that the case must be remanded to OWCP.¹⁹

On remand, OWCP shall obtain a reasoned opinion from a physician based on the SOAF regarding whether appellant sustained a permanent impairment due to loss of hearing.²⁰ Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the January 22 and March 16, 2021 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: July 21, 2023
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

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

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

¹⁷ See *J.Z., id.*; *L.F.*, Docket No. 20-0549 (issued January 27, 2021).

¹⁸ *P.W.*, Docket No. 22-0218 (issued November 28, 2022); *D.S.*, Docket No. 19-0292 (issued June 21, 2019).

¹⁹ *S.J.*, Docket No. 22-0714 (issued March 31, 2023).

²⁰ In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.