United States Department of Labor
Employees' Compensation Appeals Board

A.M., Appellant	)	
and	)	**Docket No. 25-0386**
	)	**Issued: April 18, 2025**
DEPARTMENT OF HOMELAND SECURITY, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, Edinburg, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 11, 2025 appellant filed a timely appeal from a January 6, 2025 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 has met his burden of proof to establish hearing loss causally related to the accepted factors of his federal employment.

FACTUAL HISTORY

On January 9, 2023 appellant, then a 48-year-old general inspection, investigation, and compliance officer, filed an occupational disease claim (Form CA-2) alleging that he sustained hearing loss causally related to factors of his federal employment. He attributed his hearing loss

[1] 5 U.S.C. § 8101 *et seq*.

to "repeated exposure to excessive noise at the shooting range during quarterly firearms training" for the past 23½ years. Appellant became aware of his condition and realized that it was related to his federal employment on October 13, 2022. He did not stop work.

In a development letter dated January 20, 2023, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence required and provided a questionnaire for his completion. OWCP afforded appellant 30 days to respond. In a separate development letter of even date, it requested that the employing establishment provide comments from a knowledgeable supervisor regarding the accuracy of appellant's allegations, including information about his noise exposure and the type of ear protection provided. OWCP requested that the employing establishment respond within 30 days.

On January 21, 2023 appellant described his work history, his noise exposure during firearms training/qualification, and the hearing protection provided. He advised that he became aware of his hearing loss after firearms training on October 13, 2022. Appellant related that he also had ringing in both ears, worse on the right.

In a response received January 26, 2023, the employing establishment advised that there were no noise survey reports and that appellant's work area noise level was 73 to 75 decibels (dBs). It listed the hearing protection provided. The employing establishment advised that it did not have copies of any medical examinations, including a preemployment examination, relevant to hearing problems.

By decision dated February 22, 2023, OWCP denied appellant's occupational disease claim. It found that he had factually established the alleged employment factors but failed to submit medical evidence containing a diagnosis in connection with the accepted work factors. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On February 23, 2023, an official with the employing establishment questioned why OWCP had not referred appellant to a second opinion physician for an audiogram and hearing loss evaluation in accordance with its usual process.

On August 21, 2023 appellant requested reconsideration.

By decision dated December 1, 2023, OWCP denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

Thereafter, OWCP received January 10, February 7, and August 8, 2023 reports from a physician assistant, who discussed appellant's work history and diagnosed bilateral sensorineural hearing loss. On August 8, 2023 she also diagnosed bilateral tinnitus.

In an unsigned report dated June 22, 2023, Dr. Joel L. Solis, Board-certified in family medicine, discussed appellant's complaints of decreased hearing and ringing in his ears bilaterally. He diagnosed bilateral hearing loss and tinnitus and referred appellant to an audiologist and otolaryngologist for evaluation.

Appellant underwent audiological testing on March 6 and July 12, 2023.

On January 9, 2024 appellant requested reconsideration.

On February 2, 2024 OWCP referred appellant, together with the case record and a statement of accepted facts, to Dr. Charles Theivagt, a Board-certified otolaryngologist, for a second opinion evaluation.

In a report dated April 4, 2024, Dr. Theivagt diagnosed moderate-to-moderately severe sensorineural hearing loss, cerumen impaction, and tinnitus unrelated to noise exposure encountered during appellant's federal employment. He provided as a rationale that "without a hearing test at the beginning of a person's job a nexus for hearing loss and tinnitus cannot be established." Dr. Theivagt recommended bilateral hearing aids. He reviewed an audiogram conducted by an audiologist on the same date and calculated 38 percent permanent impairment due to binaural hearing loss and tinnitus.

By decision dated April 8, 2024, OWCP modified its February 22, 2023 decision to find that appellant had established the medical component of fact of injury. It denied his claim, however, as the medical evidence failed to establish that his hearing loss was causally related to the accepted noise exposure.

On April 9, 2024 the employing establishment maintained that appellant "should not be penalized" because it did not have initial hearing tests, noting that the second opinion physician found an impairment unrelated to employment only because there was no baseline test.

In a report dated December 3, 2024, Dr. Simon Milov, a Board-certified otolaryngologist, obtained a history of appellant's being exposed to loud noise during his over 25-year federal work history. He advised that an audiologic evaluation performed on that date revealed "mild sloping to severe sensorineural hearing loss." Dr. Milov diagnosed bilateral sensorineural hearing loss and found a "clinical presentation of mild to low frequency to severe high-frequency sensorineural hearing loss with poor discrimination score with a long history of loud noise exposure consistent with the professional activities during [appellant's] time of service…." He recommended hearing aids.

On December 26, 2024 Dr. Solis related that he had treated appellant for around two years and found that he had "bilateral hearing loss and tinnitus that is attributed to his job, primarily occupational gunfire." Dr. Solis asserted that Dr. Milov had confirmed his findings.

On January 2, 2025 appellant requested reconsideration.

By decision dated January 6, 2025, OWCP denied modification of its April 8, 2024 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 filed within the applicable time limitation period of FECA,[3] 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.[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]

In an occupational disease claim, appellant's burden of proof requires submission of 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]

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 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.[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 in situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical examiner (IME) for the purpose of resolving the

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[2] *Id*.

[3] *S.M.*, Docket No. 21-0937 (issued December 21, 2021); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

[4] *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] *M.T.*, Docket No. 20-1814 (issued June 24, 2022); *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] *S.C.*, Docket No. 18-1242 (issued March 13, 2019); *R.H.*, 59 ECAB 382 (2008).

[7] *K.R.*, Docket No. 21-0822 (issued June 28, 2022); *A.M.*, Docket No. 18-1748 (issued April 24, 2019); *T.H.*, 59 ECAB 388 (2008).

[8] *G.S.*, Docket No. 22-0036 (issued June 29, 2022); *M.V.*, Docket No. 18-0884 (issued December 28, 2018); *I.J.*, 59 ECAB 408 (2008).

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

conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[10]

ANALYSIS

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

OWCP referred appellant to Dr. Theivagt for a second opinion 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 April 24, 2024, Dr. Theivagt diagnosed moderate-to-moderately severe sensorineural hearing loss and opined that it was not due to noise exposure encountered in the workplace. He indicated that there were no hearing tests obtained at the beginning of appellant's employment and thus found that employment-related hearing loss could not be established.

In a report dated December 3, 2024, Dr. Milov, appellant's treating physician, obtained a history of appellant's being exposed to loud noise during his over 25-year federal work history. He advised that an audiologic evaluation performed on that date revealed "mild sloping to severe sensorineural hearing loss." Dr. Milov diagnosed bilateral sensorineural hearing loss and found a "clinical presentation of mild to low frequency to severe high-frequency sensorineural hearing loss with poor discrimination score with a long history of loud noise exposure consistent with the professional activities during [appellant's] time of service…."

For a conflict to arise, the opposing physicians' opinions must be of equal weight.[11] The Board finds that the opinions of Drs. Theivagt and Milov 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 IME 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 deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

[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).

[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 6, 2025 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: April 18, 2025
Washington, DC

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

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

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