United States Department of Labor
Employees' Compensation Appeals Board

J.F., Appellant	)	
and	)	**Docket No. 15-0646**
	)	**Issued: June 22, 2015**
DEPARTMENT OF THE NAVY, SHIPBUILDING, CONVERSION & REPAIR, Pascagula, MS, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 29, 2015 appellant filed a timely appeal of an August 14, 2014 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 established hearing loss in the performance of duty.

Appellant argued that his federal employment noise exposure from 2004 to 2013 contributed to his hearing loss.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. On February 15, 2013 appellant, then a 55-year-old quality assurance specialist, filed an occupational disease claim alleging that on February 1, 2013 he first became aware of his hearing loss, which he attributed to his federal work duties over the past nine years. By decision dated January 27, 2014, the Board set aside a May 30, 2014 OWCP decision denying appellant's occupational hearing loss claim and remanded the case for further development of the evidence.[2] The Board found that the opinion of Dr. John S. Keebler, a second opinion Board-certified otolaryngologist, was of diminished probative value as it was based on an inaccurate factual background. The facts and circumstances of the Board's prior decisions are incorporated by reference.

On remand, OWCP requested that Dr. Keebler review his opinion based on accurate history of the facts regarding appellant's federal employment and noise exposure as outlined in the attached statement of accepted facts (SOAF) and provide an updated report on whether appellant's hearing loss was caused or aggravated by noise exposure in his federal employment. It also provided pages 72-220 from the National Fire Alarm and Signaling Code regarding the use of earplugs and permissible noise exposures according to the Occupational Safety and Health Administration (OSHA).

In a May 7, 2014 supplemental report, Dr. Keebler reviewed the history of appellant's exposure to fire alarms during his federal employment from 1986 to the present. He noted that appellant's exposure to fire alarms for 10 seconds a day for the periods 1986 to 1991, 1992 to 1993, and 1993 to 2003 should not have caused any injury. Dr. Keebler stated that the noise was unknown for the period 2003 to the present when appellant was exposed to noise from bells, machinery, horns, tests, alarms, and drills, wore earplugs, and he stated the "noise is unknown and could be harmful." He concluded that the 1986 to 2003 noise exposure was insufficient to cause permanent damage as appellant already had sensorineural hearing loss by 2004. Dr. Keebler concluded that appellant's hearing loss was attributable to noise exposure from 1978 to 1983 during his military service.

On May 13, 2014 an OWCP medical adviser reviewed Dr. Keebler's May 7, 2014 supplemental report and concluded calculation of a schedule award was unwarranted.

On May 19, 2014 OWCP noted that it had received Dr. Keebler's supplemental report, but found that it failed to contain a rationalized opinion or basis supporting the doctor's findings. It requested him to review the National Fire Alarm and Signaling Code page 72-770 which had been previously provided, summarize the time periods involved and provide a basis for his conclusion.

On July 10, 2014 OWCP referred appellant, together with a SOAF, a copy of pages 72-770 from the National Fire Alarm and Signaling Code, and list of questions to Dr. Robert G. Brousse, a Board-certified otolaryngologist, for a second opinion evaluation regarding appellant's claimed hearing loss. The SOAF reported that from 1986 to 2003 appellant was not provided with any safety devices for his exposure to fire alarm noise.

[2] Docket No. 13-1814 (issued January 27, 2014).

In a second supplemental report dated July 22, 2014, Dr. Keebler stated appellant's work place noise exposure was insufficient to have caused his hearing loss. He explained that "[a]ccording to the National Fire Alarm and Signaling Codes table and OSHA, a person would have to be exposed to 120 decibel (dB) for 7.5 minutes per day for 40 years to be at risk. Dr. Keebler related that appellant's exposure for 10 seconds to at most 104.9dB would not put him at risk and supports his conclusion that appellant's federal employment noise exposure did not cause his hearing loss.

In an undated form report received on August 7, 2014, Dr. Brousse related that appellant had been evaluated on July 28, 2014 and diagnosed with mild-to-severe sensorineural hearing loss since 2005. He checked "no" to the question whether appellant's sensorineural hearing loss was in part or all causally related to his federal employment noise exposure, except that it could possibly be related to his pre-2004 federal employment noise exposure based on the fact that appellant had no significant hearing loss change since 2004, except for mild low frequency changes.

In an August 6, 2014 addendum, Dr. Brousse stated that appellant's exposure to levels of fire alarm noise "for 10 seconds at thresholds, per diagram provided, at most 104.9 dB" would not be the sole cause of appellant's hearing loss, but might be a contributing factor provided he did not use hearing protection.

On August 12, 2014 the medical adviser, who had previously reviewed Dr. Keebler's May 7, 2014 supplemental report, reviewed Dr. Brousse's report, and argued that appellant's hearing loss was unrelated to his federal employment. He concluded that a schedule award was also not indicated.

By decision dated August 14, 2014, OWCP denied appellant's claim, finding that the medical evidence was insufficient to demonstrate a causal relationship between his hearing loss condition and employment-related noise exposure.

LEGAL PRECEDENT

An employee seeking benefits under FECA[3] has the burden of establishing 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 and/or specific condition for which compensation is claimed are 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 on a traumatic injury or an occupational disease.[5]

To establish that an injury was sustained in the performance of duty in a claim for occupational disease, an employee must submit: (1) a factual statement identifying employment

[3] 5 U.S.C. § 8101 *et seq.*

[4] *C.S.*, Docket No. 08-1585 (issued March 3, 2009); *Bonnie A. Contreras*, 57 ECAB 364 (2006).

[5] *S.P.*, 59 ECAB 184 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

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 generally required to establish causal relationship is rationalized medical opinion evidence.[7] Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on whether there is a causal relationship between the employee's diagnosed condition and the compensable employment factors.[8] 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 the specific employment factors identified by the employee.[9]

ANALYSIS

The record establishes that appellant suffered from bilateral high-pitch sensorineural hearing loss due to his military service and that he was exposed to loud noise in his federal workplace. The Board had previously remanded the case because Dr. Keebler's opinion had been insufficient to support denial of appellant's claim as it was based on an inaccurate factual history. On August 14, 2014 OWCP denied the claim finding that the medical evidence did not support that the hearing loss was causally related to workplace noise exposure. It based its decision on the supplemental reports dated May 7 and July 22, 2014 from Dr. Keebler, a second opinion physician, reports received by OWCP on August 7, 2014 from Dr. Brousse, another second opinion physician, and the medical adviser's reports reviewing the reports by Drs. Brousse and Keebler. The Board has carefully reviewed the reports from Drs. Keebler and Dr. Brousse's, and finds that neither physician properly resolved the issue before him, specifically whether appellant's hearing loss was caused or aggravated by employment noise exposure.

Dr. Brousse indicated that appellant's pre-2004 federal work noise exposure may have aggravated his hearing loss. While Dr. Keebler definitively states that appellant's hearing loss was caused by his military service. He does not address whether appellant's federal employment noise exposure may have contributed to his hearing loss.

The Board has noted that in assessing medical evidence the weight of such evidence is determined by its reliability, its probative value, its convincing quality, and the factors which enter in such an evaluation include the opportunity for and thoroughness of examination, the

[6] *D.U.*, Docket No. 10-144 (issued July 27, 2010); *R.H.*, 59 ECAB 382 (2008); *Roy L. Humphrey*, 57 ECAB 238 (2005); *Donald W. Wenzel*, 56 ECAB 390 (2005).

[7] *Y.J.*, Docket No. 08-1167 (issued October 7, 2008); *A.D.*, 58 ECAB 149 (2006); *D'Wayne Avila*, 57 ECAB 642 (2006).

[8] *J.J.*, Docket No. 09-27 (issued February 10, 2009); *Michael S. Mina*, 57 ECAB 379 (2006).

[9] *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

accuracy and completeness of the physician's knowledge of the facts and medical history, and the care of the analysis manifested and the medical rationale expressed in support of the physician's opinion.[10] On August 7, 2014 OWCP received Dr. Brousse's report in which he checked "no" to the question of whether appellant's hearing loss was caused or aggravated by federal noise exposure, but noted that it could be due to pre-2004 federal employment noise exposure. In his August 6, 2014 addendum, Dr. Brousse clarified his opinion by noting that appellant's pre-2004 federal employment noise exposure might have contributed to appellant's hearing loss if he did not use hearing protection.

The Board finds that Dr. Brousse's reports are speculative and equivocal, as the physician stated that appellant's pre-2004 federal employment noise exposure might have contributed to appellant's hearing loss. It is unclear from Dr. Brousse's report as to whether appellant's hearing loss had been caused or aggravated by his federal employment noise exposure as the physician stated the federal employment noise exposure might have contributed to the hearing loss. There is no definitive opinion from Dr. Brousse as to whether appellant's hearing loss had been aggravated by his federal employment noise exposure. The Board has held that medical opinions which are speculative or equivocal in character have little probative value.[11] As Dr. Brousse failed to provide a definitive opinion as to whether appellant's hearing loss had been aggravated by his federal noise exposure, his report is insufficient to resolve the question of whether appellant's hearing loss had been aggravated by his 1986 to present federal employment noise exposure.

Similarly, Dr. Keebler's supplemental reports are also insufficient to resolve the question of whether appellant's hearing loss had been caused or aggravated by his 1986 to present federal employment noise exposure. In both his May 7 and July 22, 2014 supplemental reports, he reiterates his opinion that appellant's federal noise exposure was of insufficient duration and strength to have caused appellant's hearing loss. Dr. Keebler concluded that from 1986 to 2003 the noise exposure was insufficient to cause permanent damage as appellant already had sensorineural hearing loss by 2004. This implies some contribution by federal employment.[12] However, Dr. Keebler went on to conclude that the hearing loss was due to military service. While he opined that appellant's federal noise employment exposure was insufficient to have caused his hearing loss, Dr. Keebler did not address or provide an opinion on whether this noise exposure might have aggravated appellant's hearing loss. The Board has held that, when OWCP

[10] *C.B.*, Docket No. 08-1583 (issued December 9, 2008); *K.W.*, 59 ECAB 271 (2007); *Michael S. Mina*, *supra* note 8.

[11] *T.M.*, Docket No. 08-975 (issued February 6, 2009); *D.E.*, 58 ECAB 448 (2007); *Kathy A. Kelley*, 55 ECAB 206 (2004).

[12] The Board notes where a person has a preexisting condition which is not disabling but which becomes disabling because of aggravation causally related to the employment, then regardless of the degree of such aggravation, the resulting disability is compensable. *See Henry Klaus*, 9 ECAB 333 (1957) (the Bureau, OWCP's predecessor, denied appellant's claim finding his disabling back condition was neither caused nor aggravated by employment. The Board remanded, negating the Bureau's attempt to dismiss an employment-related aggravation because the physician concluded his estimate of a five percent contribution to a 20 percent physical impairment was "not material." The Board found no attempt should be made to apportion the disability between the preexisting condition and the aggravation of that condition).

refers a claimant for a second opinion evaluation and the report does not adequately address the relevant issues, OWCP should secure an appropriate report on the relevant issues.[13]

Therefore, the medical evidence is insufficiently developed with regard to whether appellant's hearing loss was aggravated by employment noise exposure. It is well established that proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.[14] While appellant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.[15] When OWCP undertakes to develop the medical aspects of a case, it must exercise extreme care in seeing that its administrative processes are impartially and fairly conducted.[16]

The case is remanded for OWCP to refer appellant to a new second opinion physician for a detailed, reasoned medical opinion explaining whether appellant's hearing loss was caused or aggravated by workplace noise exposure. Following this and such other development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

[13] *See Ayanle A. Hashi*, 56 ECAB 234 (2004) (when OWCP refers a claimant for a second opinion evaluation and the report does not adequately address the relevant issues, OWCP should secure an appropriate report on the relevant issues).

[14] *R.B.*, Docket No. 08-1662 (issued December 18, 2008); *A.A.*, 59 ECAB 726 (2008); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Vanessa Young*, 55 ECAB 575 (2004).

[15] *D.N.*, 59 ECAB 576 (2008); *Richard E. Simpson*, 55 ECAB 490 (2004).

[16] *See P.K.*, Docket No. 08-2551 (issued June 2, 2009); *Peter C. Belkind*, 56 ECAB 580 (2005).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 14, 2014 is set aside and the case remanded for further proceedings consistent with the above opinion.

Issued: June 22, 2015
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board