United States Department of Labor
Employees' Compensation Appeals Board

M.H., Appellant	)	
and	)	**Docket No. 16-0228**
	)	**Issued: June 8, 2016**
TENNESSEE VALLEY AUTHORITY, CSB MOD SVS, Chattanooga, TN, Employer	)	

Appearances:
Ronald K. Bruce, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 24, 2014 appellant, through counsel, filed a timely appeal from a December 16, 2013 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 hearing loss causally related to factors of his federal employment.

FACTUAL HISTORY

On November 15, 2012 appellant, then a 61-year-old boilermaker/welder, filed an occupational disease claim (Form CA-2) alleging that he sustained hearing loss as a result of employment-related noise exposure. He first became aware of his condition on January 1, 1991

[1] 5 U.S.C. § 8101 *et seq.*

and of its relationship to his employment on October 11, 2012. Appellant worked at the employing establishment intermittently until March 9, 1991 and retired from nonfederal employment in 2006.

By letter dated December 6, 2012, OWCP requested additional factual information from both appellant and the employing establishment. Appellant was requested to provide information regarding his employment history, when he related his hearing loss to conditions of employment, and all nonoccupational exposure to noise. OWCP also requested that he provide medical documentation pertaining to any prior treatment he received for ear or hearing problems. It requested that the employing establishment provide noise survey reports for each site where appellant worked, the sources and period of noise exposure for each location, and copies of all medical examinations pertaining to hearing or ear problems.

An official employing establishment employment history was submitted which showed appellant's intermittent employment from October 5, 1977 through September 19, 1983 as a boilermaker/welder. An employing establishment job history summary also revealed intermittent employment as a boilermaker/welder from September 17, 1984 through March 9, 1991.

In an undated narrative statement, appellant responded to OWCP development letter stating that he began his employment with the employing establishment in 1977 where he worked as a boilermaker/welder at the Paradise and Shawnee power plants. He was exposed to loud noises produced by gouging, beating on steel, pneumatic chisels, jack hammers, large fans, large pumps, grinders, and units popping off. Appellant noted that at first he did not wear ear protection. He worked over eight hours a day, five days per week and was exposed to noise on a daily basis. Appellant reported that he also worked in nonfederal employment as a boilermaker at Blacksmith Union from 1977 to 2006 when he retired. During this time, he worked for the employing establishment as well as nonfederal contractors. Appellant reported no other hobbies involving loud noises or history of hearing loss. He stated that he first became aware of his hearing loss in 1991 as it gradually worsened. Appellant first realized his hearing loss was work related on October 11, 2012 after seeking treatment with an otolaryngologist.

In a September 18, 2012 medical report, Dr. Uday Dave, a Board-certified otolaryngologist, reported that appellant complained of hearing difficulty and noticed a gradual worsening of his hearing for the past 20 years. He noted that appellant worked for approximately 30 years in an employing establishment plant, and had been around significant noise as a result of this. An audiogram was performed that same date which revealed the following decibel (dB) losses at 500, 1,000, 2,000, and 3,000 hertz (Hz): 15, 15, 20, and 40 for the right ear and 5, 0, 55, and 65 for the left ear. Speech reception thresholds were 15 dB on the right and 10 dB on the left and speech discrimination scores were 88 percent on the right and 80 percent on the left. Dr. Dave diagnosed bilateral sensorineural hearing loss with a history of exposure to noises, chronic not controlled. He noted that appellant could benefit from hearing aids. In an October 18, 2012 addendum, Dr. Dave reported that appellant initially informed him that he worked at the employing establishment for 30 years. He noted that this was incorrect as appellant worked for 30 years as a boilermaker, with several of these years being in employing establishment plants.

By letter dated February 4, 2013, the employing establishment controverted the claim arguing that appellant did not timely file his hearing loss claim. It further stated that he worked there intermittently, totaling only four years, and was last exposed to factors to which he attributed his hearing loss to in 1991. The employing establishment noted that appellant had only three hearing tests performed while employed there and the audiograms documented no hearing loss or shift in hearing to signify evidence of injury.

The employing establishment submitted audiograms dated October 5, 1977, October 17, 1980, and February 18, 1988. Appellant's October 5, 1977 audiogram revealed the following dB losses at 500, 1,000, 2,000, and 3,000 Hz: 5, 0, 0, and 0 for the right ear and 0, 0, 0, and 15 for the left ear. The February 18, 1988 audiogram revealed the following dB losses at 500, 1,000, 2,000, and 3,000 Hz: 5, 0, 0, and 0 for the right ear and 5, 0, 0, and 15 for the left ear.

In a February 5, 2013 statement of accepted facts (SOAF), OWCP provided a summary of appellant's federal and nonfederal employment, stating that he began his federal employment on October 5, 1977 and was last exposed to noise in 2006 when he retired from his nonfederal employment. Appellant first became aware of his hearing loss in January 1991 when he realized he had difficulty understanding speech. He was exposed to noise in his federal employment at the employing establishment as a boilermaker/welder intermittently from October 5, 1977 through March 9, 1991. Appellant was exposed to noise from gouging, beating on steel, pneumatic chisels, jack hammers, large fans, large pumps, grinders, and the units popping off. Earplugs were worn later in employment, up to 93 dB, and he was exposed to loud noise for eight hours per day, five days per week.[2] Appellant was also exposed to noise at his nonfederal employment. From 1977 to 2006, he worked as a boilermaker/welder at Blacksmith Union for eight hours per day, five days per week. Appellant was exposed to noise from gouging, beating on steel, pneumatic chisels, jack hammers, large fans, large pumps, grinders, and the units popping off. Earplugs were worn.

OWCP referred appellant, the SOAF, and the case record to Dr. Andrew S. Mickler, a Board-certified otolaryngologist, for a second opinion evaluation on February 8, 2013. Audiometric testing performed that same date revealed the following dB losses at 500, 1,000, 2,000, and 3,000 Hz: 25, 25, 25, and 40 for the right ear and 20, 25, 55, and 55 for the left ear. Speech reception thresholds were 25 dB on the right and 30 dB on the left while auditory discrimination scores were 96 percent bilaterally. Dr. Mickler noted that no prior audiograms were provided for review from the beginning of appellant's federal employment. He stated that the workplace noise exposure was sufficient as to intensity and duration to have caused the loss in question. Dr. Mickler diagnosed bilateral sensorineural hearing loss and reported that it was impossible to determine the cause as there were no audiograms from the beginning or end of appellant's federal civilian employment. He noted that appellant also had other nonfederal employment which consisted of noisy environments. Dr. Mickler explained that it would be impossible to determine which of his jobs contributed to his hearing loss and to what extent.

[2] The SOAF noted the intermittent months appellant was employed by the employing establishment: 2 months in 1977; 2 months in 1978; 5 months in 1980; 2 months in 1981; 3.5 months in 1982; 3 months in 1983; 3 months in 1984; 8 months in 1985; 9 months in 1986; 3 months in 1988; 3.5 months in 1989; 7 months in 1990; and 2 months in 1991.

On March 7, 2013 OWCP routed Dr. Mickler's report to Dr. Eric Puestow, an OWCP district medical adviser (DMA) for an opinion pertaining to a schedule award. Dr. Puestow reviewed Dr. Mickler's report and noted that his second opinion audiogram performed 22 years after appellant left federal employment may not reflect noise damage encountered during this employment. He requested employment audiograms as close to the onset and cessation of his federal civilian employment.

OWCP routed the October 5, 1977 and February 18, 1988 audiograms to Dr. Mickler and the DMA for review.

In a supplemental March 12, 2013 report, the DMA reported that he reviewed audiograms dated October 5, 1977 and February 18, 1988, which demonstrated that appellant had normal, excellent hearing. He concluded that, as of February 18, 1988, appellant did not have sensorineural hearing loss and a schedule award was not appropriate in this case.

In a March 19, 2013 report, Dr. Mickler reported that appellant's hearing was essentially normal at the beginning of his employment. He noted that comparison of the October 5, 1977 and February 18, 1988 audiograms showed no standard threshold shift in either ear. When asked if the workplace noise exposure was sufficient as to intensity and duration to have caused the loss in question, Dr. Mickler reported that, when comparing the October 5, 1977 and February 18, 1988 audiograms, there was no evidence of noise-induced hearing loss. He opined that appellant's bilateral hearing loss was not due to noise exposure from his federal employment.

By decision dated May 30, 2013, OWCP denied appellant's hearing loss claim, finding that he failed to establish fact of injury because the evidence did not support that the injury and/or events occurred.

On June 11, 2013 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

At the October 21, 2013 hearing, appellant described the employment-related noise he was exposed to while working for the employing establishment beginning in 1977. He reported that his last audiogram was completed on February 18, 1988 and there was no exit audiogram completed in 1991 when he left his federal employment. Appellant retired from nonfederal employment in 2006. Counsel argued that appellant was exposed to noise from his federal employment for 15 months following his last February 18, 1988 audiogram to when he left in 1991, which caused his hearing loss. He stated that appellant's most recent 2013 audiogram revealed that he had work-related hearing loss because he would be entitled to an impairment rating when compared to the October 1977 and February 1988 audiograms. Counsel further argued that appellant's employment at the employing establishment did not have to be the sole cause of his hearing loss, but that it had contributed to his condition.

By letter dated November 19, 2013, the employing establishment reviewed the hearing transcript and provided comments for consideration. It noted that appellant worked for the employing establishment for brief and intermittent periods from October 1977 until March 1991. During this period, appellant was fitted for and provided mandatory hearing protection.

Audiograms were performed which showed he had no standard threshold shift in either ear. The employing establishment argued that no evidence was submitted that established a noise-induced hearing loss as a result of appellant's federal employment. It noted that only a small portion of his career was spent as a boilermaker for the employing establishment. Appellant failed to produce any audiogram or definitive medical opinion to establish that he had a hearing loss for the period February 18, 1988 through March 9, 1991, and no audiograms were provided for the periods of his nonfederal employment. It further explained that an exit audiogram was not performed in 1991 because he was employed for very brief periods, consisting mainly of a few days, or weeks.

By letter dated December 3, 2013, counsel for appellant asserted that appellant's total time at the employing establishment added up to four and one-third years. He argued that four years of exposure to loud noises was sufficient to contribute to a work-related hearing loss. Counsel further disagreed with the employing establishment's statements on hearing protection noting that there was no mandatory use of hearing protection.

By letter dated December 10, 2013, the employing establishment stated that it's Hearing Conservation Program and Hearing Protection Standard required the use of mandatory hearing protection.

By decision dated December 16, 2013, the OWCP hearing representative affirmed the May 30, 2013 decision finding that appellant failed to establish fact of injury.

LEGAL PRECEDENT

An employee seeking benefits under FECA 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.[3] These are the essential elements of every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[4]

Appellant has the burden of establishing by the weight of the reliable, probative, and substantial evidence that his hearing loss condition was causally related to noise exposure in his federal employment.[5] Neither the condition becoming apparent during a period of employment, nor the belief of the employee that the hearing loss was causally related to noise exposure in federal employment, is sufficient to establish causal relationship.[6]

[3] *Gary J. Watling*, 52 ECAB 278 (2001); *Elaine Pendleton*, 40 ECAB 1143, 1154 (1989).

[4] *Michael E. Smith*, 50 ECAB 313 (1999).

[5] *Stanley K. Takahaski*, 35 ECAB 1065 (1984).

[6] *See John W. Butler*, 39 ECAB 852, 858 (1988).

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed;[7] (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition;[8] and (3) medical evidence establishing the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.[9]

The medical evidence required to establish causal relationship generally is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable certainty and must be supported by medial rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.[10]

ANALYSIS

The Board finds that appellant failed to meet his burden of proof to establish that he developed bilateral hearing loss due to factors of his employment as a boilermaker/welder.[11]

Appellant must establish all of the elements of his claim in order to prevail. In its May 30 and December 16, 2013 decisions, OWCP found that he had not established fact of injury. The Board finds that appellant has alleged that he was exposed to employment-related noise while working for the employing establishment as detailed in the SOAF and his narrative statements. The record also establishes a firm medical diagnosis of bilateral sensorineural hearing loss provided by both Dr. Dave and Dr. Mickler, as well as Dr. Puestow, the DMA. The question remains whether appellant's alleged federal employment noise exposure caused his bilateral sensorineural hearing loss.[12]

[7] *Michael R. Shaffer*, 55 ECAB 386 (2004).

[8] *Marlon Vera*, 54 ECAB 834 (2003); *Roger Williams*, 52 ECAB 468 (2001).

[9] *Beverly A. Spencer*, 55 ECAB 501 (2004).

[10] *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 465 (2005).

[11] In a case of an occupational disease, the time for filing a claim begins to run when the employee first becomes aware, or reasonably should have been aware, of a possible relationship between the condition and his employment. By factors of federal employment, the time limitation begins to run on the date of the last exposure to the implicated factors. *See Larry E. Young*, 52 ECAB 264 (2001). OWCP has accepted that the claim was timely filed. The Board has held that a program of annual audiometric examinations conducted by an employing establishment in conjunction with an employee testing program for hazardous noise exposure is sufficient to constructively establish actual knowledge of a hearing loss, such as to put the immediate supervisor on notice of an on-the-job injury. *See W.P.*, Docket No. 15-0597 (issued January 27, 2016).

[12] *See Leon Thomas*, 52 ECAB 202 (2001).

The Board finds that the medical evidence of record does not establish that appellant sustained hearing loss causally related to his federal employment as a boilermaker/welder at the employing establishment.[13]

In support of his claim, appellant submitted a September 18, 2012 report from Dr. Dave who diagnosed bilateral sensorineural hearing loss. Dr. Dave provided no opinion regarding the cause of appellant's hearing loss and simply noted a history of exposure to noise. The Board has held that medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value.[14]

Following Dr. Dave's report, OWCP referred appellant to Dr. Mickler for a second opinion examination. While Dr. Mickler diagnosed bilateral sensorineural hearing loss, he opined that the hearing loss was not due to noise exposure from his federal employment. He explained that appellant's hearing was essentially normal at the beginning of his employment and comparison of the October 5, 1977 and February 18, 1988 audiograms showed no standard threshold shift in either ear and no evidence of occupational noise-induced hearing loss from the employing establishment. An OWCP DMA reviewed the case record and agreed that the October 5, 1977 and February 18, 1988 audiograms demonstrated that appellant had normal, excellent hearing.

The Board has recognized that a claimant may be entitled to a schedule award for hearing loss, even after exposure to hazardous noise has ceased, if causal relationship is supported by the medical evidence of record.[15] The Board also notes that there is no requirement that the federal employment be the only cause of appellant's hearing loss. If work-related exposures caused, aggravated, or accelerated his condition, he is entitled to compensation.[16] In this case, there is no medical evidence before OWCP at the time of its December 16, 2013 decision containing an opinion that appellant's hearing loss was work related. Appellant failed to submit any auditory testing around 1991, the time he left his federal employment, which showed a decrease in hearing. Moreover, he continued to be exposed to employment-related noise working as a boilermaker in his nonfederal employment for an additional 15 years following his retirement from federal employment in 2006.

The only medical evidence containing a definitive opinion as to the relation of appellant's hearing loss and factors of his federal employment is the March 19, 2013 report of Dr. Mickler, which found that his hearing loss was not related to industrial noise exposure with the employing establishment. The Board finds that appellant has not submitted any medical evidence supportive of a causal relationship between his federal employment and his hearing loss, and thus has not met his burden to establish such a causal relationship.[17]

[13] *W.C.*, Docket No. 15-668 (issued June 1, 2015).

[14] *C.B.*, Docket No. 09-2027 (issued May 12, 2010); *S.E.*, Docket No. 08-2214 (issued May 6, 2009).

[15] *See J.R.*, 59 ECAB 710, 713 (2008).

[16] *See Beth P. Chaput*, 37 ECAB 158, 161 (1985); *S.S.*, Docket No. 08-2386 (issued June 5, 2008).

[17] *See R.S.*, Docket No. 14-1995 (issued February 25, 2015).

An award of compensation may not be based on surmise, conjecture, speculation, or on the employee's own belief of causal relation.[18] In the instant case, the record is without rationalized medical evidence establishing causal relationship between appellant's occupational noise exposure and his bilateral hearing loss. Thus, appellant has failed to meet his burden of proof.

Appellant may submit additional evidence, together with a written request for reconsideration, to OWCP within one year of the Board's merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.606 and 10.607.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained hearing loss causally related to factors of his federal employment.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated December 16, 2013 is affirmed.

Issued: June 8, 2016
Washington, DC

Christopher J. Godfrey, 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

[18] *D.D.*, 57 ECAB 734 (2006).