

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

E.R., Appellant)	
)	
and)	Docket No. 16-1529
)	Issued: March 3, 2017
DEPARTMENT OF LABOR, MINE SAFETY & HEALTH ADMINISTRATION, Norton, VA,)	
Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 22, 2016 appellant filed a timely appeal from a March 7, 2016 merit 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.

ISSUE

The issue is whether appellant met his burden of proof to establish increased hearing loss causally related to factors of his federal employment.

FACTUAL HISTORY

On January 5, 2015 appellant, then an 87-year-old supervisor, filed an occupational disease claim (Form CA-2) alleging that he developed sensorineural hearing loss as a result of

¹ 5 U.S.C. § 8101 *et seq.*

noise exposure to various mining equipment while he conducted mine inspections in the performance of duty. He first became aware of his condition and realized it resulted from his employment on December 4, 2014. The employing establishment noted that appellant retired from the employing establishment on January 2, 1994.

In an attached statement, B.H., assistant district manager of the employing establishment, explained that an employee doing inspection work had exposure to many different kinds of mining machinery and that noise levels varied with each type of mining. He related that noise exposure typically ranged from 50 to 125 percent of a 90 decibel permissible exposure level for an eight-hour period for mining equipment operators and helpers. B.H. indicated that appellant retired from the employing establishment on January 3, 1994 and that he had previously filed a hearing loss claim under File No. xxxxxx859. He noted that the employing establishment did not have any records on file to show the date of appellant's last exposure. B.H. reported that hearing protection was always available for employees since 1987 so he had no reason to believe that appellant did not wear hearing protection as instructed. He indicated that appellant was no longer exposed to noise since he retired from the employing establishment on January 3, 1994 and that his last hearing test was taken on July 17, 1992 as part of appellant's periodic physical.

The employing establishment provided a list of the equipment appellant worked around and the average sound levels for each piece of equipment. It also submitted a timeline of the various job positions he had at the employing establishment, his employment duties, and the duration and intensity of noise exposure. The employing establishment also provided a position description of appellant's job as a mine inspector.

Dr. Fredia Helbert, an audiologist, treated appellant and provided a December 4, 2014 report. She observed clear canals and visible drums bilaterally on visual inspection. Dr. Helbert related that audiometric testing revealed a severe sensorineural hearing loss bilaterally dropping in the high frequencies. She recommended bilateral hearing aids. An audiogram taken on that day indicated that appellant's hearing thresholds at 500, 1,000, 2,000, and 3,000 hertz (Hz) were 20, 35, 50, and 65 decibels for the right ear and 20, 40, 55, and 60 decibels for the left ear.

In a January 12, 2015 letter, C. Slayton E. Sparks, the district manager, controverted appellant's claim. He related that appellant had a previously accepted hearing loss claim under File No. xxxxxx859 that was not considered severe enough to be ratable. Mr. Sparks pointed out that appellant retired from the employing establishment on January 3, 1994 and had no work-related noise exposure since December 1993. He also noted that when appellant became a supervisor in 1976 his exposure to work-related noise would have been considerably less than when he was an inspector. Mr. Sparks explained that over the last few years appellant's exposure to work-related noise would have been very minimal due to the nature of his assignments. He asserted that appellant's hearing loss was not due to factors relating to the performance of his duties, but rather that any additional hearing loss could be attributable to any work he may have performed outside the employing establishment and/or age related.

OWCP informed appellant in a letter dated February 4, 2015 that the evidence of record was insufficient to establish his claim. It advised him to respond to the attached questionnaire and provide evidence to establish that he sustained hearing loss as a result of his employment. Appellant was afforded 30 days to submit additional evidence.

On February 23, 2015 OWCP received appellant's response to its questionnaire. Appellant related that prior to his employment with the employing establishment in 1971 as a coal mine inspector he had no previous history, medical or otherwise, of any hearing problems. He reported that he did not have any exposure to loud noise since retiring on January 3, 1994. Appellant alleged that he worked as a coal mine inspector and a supervisory coal mine inspector for 20 years and was exposed to loud noise levels ranging from 80 to 115 decibels from various coal mining equipment and machinery. He noted that he worked 8 to 10 hours per day, 5 to 6 days per week. Appellant provided a detailed description of his work duties. He asserted that his audiograms and statements from two medical physicians confirmed that his hearing loss was caused and is related to his employment with the Federal Government.

Appellant submitted a February 13, 2015 report by Dr. Michael W. Wheatley, a Board-certified family practitioner, who provided an opinion that appellant "suffers from hearing loss due to occupational exposure to loud noises while inspecting the coal mining industry."

In a note dated January 21, 2015, Dr. Bruce A. Abkes, a Board-certified otolaryngologist, related that appellant worked as a mine inspector for 20 years and was exposed to mine equipment noise ranging from 80 to 115 decibels. He reported that it was "as likely as not that his hearing loss is related to job[-]related hearing noise exposure."

Appellant also resubmitted Dr. Helbert's December 4, 2014 report and audiogram and provided several documentations about his prior hearing loss claim. He submitted a July 29, 1994 report from OWCP's medical adviser, a statement of accepted facts (SOAF) dated January 25, 1994, a February 16, 1994 report from a second opinion physician, and the August 1, 1994 acceptance decision from OWCP. Appellant provided audiogram records from the employing establishment dated from February 20, 1974 to March 27, 1989.

OWCP referred appellant's claim, along with the medical record and the SOAF, to Dr. Albert James Paine, Jr., a Board-certified otolaryngologist, for a second opinion examination to determine whether appellant sustained employment-related hearing loss. Dr. Paine, Jr., completed an outline for otologic evaluation (Form CA-1332) dated April 14, 2015 and provided audiometric test results. In the CA-1332 form, he noted that appellant began working for the employing establishment in 1971 and his hearing at that time showed just a mild drop that looked somewhat worse in the left ear than the right. Dr. Paine, Jr., related that present audiometric findings showed a binaural high frequency sensorineural hearing loss that was moderate to severe. He indicated that this sensorineural hearing loss was in excess of what would normally be predicted on the basis of presbycusis. Dr. Paine, Jr., explained that the workplace exposure described in the materials provided was sufficient as to intensity and duration as to have caused the loss in question. He noted that appellant had hypertension, which could potentially contribute to sensorineural hearing loss, but other than that, was essentially healthy. Upon physical examination, Dr. Paine, Jr., observed that external ear canals and tympanic membranes were clear bilaterally. He diagnosed binaural sensorineural hearing loss consistent with excessive noise exposure. Dr. Paine, Jr., noted that the hearing loss was, in part or all, due to noise exposure encountered in appellant's federal employment. He explained that all of the patient records and audiograms were reviewed and showed a deteriorating drop in the hearing over the course of his employment through the employing establishment that was consistent with his noise exposure that he was around.

An audiogram performed on April 14, 2015 related hearing thresholds at 500, 1,000, 2,000, and 3,000 Hz were 10, 40, 40, and 35 decibels for the right ear and were 20, 45, 50, and 55 decibels for the left ear.

On June 18, 2015 Dr. Daniel D. Zimmerman, an OWCP medical adviser, noted that appellant retired from federal employment on January 3, 1994. He indicated that appellant had an audiogram and otologic evaluation on February 7, 1994, approximately one month after he retired, and related that his current audiogram represented presbycusis and/or noxious noise exposure avocationally or in nonfederal employment since he left the employing establishment on January 3, 1994 in which time his claim was accepted for a hearing loss that was insufficiently severe to have caused a ratable loss of hearing. Dr. Zimmerman reported that the hearing loss worsening as shown in the April 14, 2015 audiometric evaluation was due to presbycusis and or noxious noise exposure since he retired. He explained that once the noise exposure in federal employment ceased as of January 3, 1994, the hearing loss due to noise exposure that was not demonstrated was not a consequence of noxious exposure last incurred in federal employment before January 3, 1994. Dr. Zimmerman referenced otologic literature, which indicated that “occupational deafening does not seem to progress when noise exposure stops, whereas presbycusis generally progresses though very slowly.” He concluded that appellant, by being accepted for noise-induced hearing loss in federal employment with a maximum medical improvement date of February 7, 1994, would be eligible for hearing aids, but not for a schedule award.

OWCP denied appellant’s claim in a decision dated July 2, 2015. It found that the medical evidence of record failed to establish that his hearing loss was causally related to the accepted work events. OWCP determined that Dr. Paine, Jr., the second opinion examiner, did not properly explain how appellant’s noise exposure during his federal employment, which ceased on January 3, 1994, caused an increase in hearing loss between February 16, 1994 and April 14, 2015 when he was no longer exposed to the noisy environment. As Dr. Paine’s, Jr., opinion was of diminished probative value, it failed to establish appellant’s claim for hearing loss.

On July 16, 2015 OWCP received appellant’s request for reconsideration. Appellant requested that OWCP request clarification from Dr. Paine, Jr., about his findings in his April 14, 2015 second opinion report.

In a decision dated December 17, 2015, an OWCP hearing representative set aside the July 2, 2015 decision finding that OWCP incorrectly assigned the weight of medical evidence to OWCP’s medical adviser. He remanded the July 2, 2015 decision and directed OWCP to combine appellant’s previous hearing loss claim, OWCP File No. xxxxxx859 serving as the Master File No., with his current claim and request a supplemental report from Dr. Paine, Jr., addressing the progression of appellant’s hearing loss since the 1994 claim was adjudicated prior to his retirement from federal service.

Dr. Paine, Jr., provided a supplemental report dated February 10, 2016. He opined that appellant’s workplace exposure, which ceased on January 3, 1994, was not of sufficient intensity and duration to have caused an increase in hearing loss after his federal employment. Dr. Paine, Jr., explained that appellant’s current degree of hearing loss was “felt to be related to presbycusis

as well as to [appellant's] prior noise exposure that he had prior to retiring in 1994." He indicated that audiograms performed after retirement showed a significant drop in the high frequencies and the loss in question at that time would have to be attributed to presbycusis due to appellant not having any more noise exposure within that time. Dr. Paine, Jr., noted that when appellant was originally evaluated in his office on April 14, 2015 he was unaware that appellant was filing for an increase in a hearing loss claim. He reported that appellant did have sensorineural hearing loss prior to retiring that would be consistent with excessive noise exposure, but that the worsening of his hearing loss after his retirement could not be attributed to noise.

OWCP issued a *de novo* decision on March 7, 2016 which denied appellant's hearing loss claim. It found that the weight of medical evidence rested with Dr. Paine's, Jr., report, which noted that appellant's work exposure, which ended in 1994, was not of sufficient intensity or duration to have caused an increase in hearing loss since his retirement on February 7, 1994. Accordingly, OWCP determined that appellant's increased hearing loss after 1994 was not caused by his employment factors.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence² including that he or she sustained an injury in the performance of duty and that any specific condition or disability for work for which he or she claims compensation is causally related to that employment injury.³ In an occupational disease claim, appellant's burden 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.⁴

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.⁵ 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.⁶

² *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

³ *M.M.*, Docket No. 08-1510 (issued November 25, 2010); *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁴ *R.H.*, 59 ECAB 382 (2008); *Ernest St. Pierre*, 51 ECAB 623 (2000).

⁵ *I.R.*, Docket No. 09-1229 (issued February 24, 2010); *D.I.*, 59 ECAB 158 (2007).

⁶ *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 465 (2005).

Appellant has the burden of establishing by weight of the reliable, probative, and substantial evidence that his hearing loss condition was causally related to noise exposure in his federal employment.⁷ 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.⁸

Once OWCP undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.⁹

ANALYSIS

Appellant alleges that he sustained increased hearing loss as a result of exposure to mine equipment at his employment. The record revealed that he retired from federal employment on January 3, 1994. OWCP denied appellant's claim finding that the medical evidence of record did not establish that his additional hearing loss was causally related to his federal employment. The Board finds that this case is not in posture for decision.

OWCP referred appellant to Dr. Paine, Jr., for a second opinion examination. Dr. Paine, Jr., completed a (Form CA-1332) dated April 14, 2015 and provided audiometric test results. He noted that present audiometric findings showed a binaural high frequency sensorineural hearing loss that was moderate to severe. Dr. Paine, Jr., indicated that this sensorineural hearing loss was in excess of what would normally be predicted on the basis of presbycusis. He opined that the workplace exposure described in the materials provided was sufficient as to intensity and duration as to have caused the loss in question. Dr. Paine, Jr., diagnosed binaural sensorineural hearing loss consistent with excessive noise exposure. He concluded that the hearing loss was, in part or all, due to noise exposure encountered in appellant's federal employment.

On June 18, 2015 Dr. Zimmerman, an OWCP medical adviser, reviewed Dr. Paine's, Jr., April 14, 2015 report and disagreed with conclusion. He reported that the hearing loss worsening as shown in the April 14, 2015 audiometric evaluation was due to presbycusis and or noxious noise exposure since he retired. Dr. Zimmerman explained that once the noise exposure in federal employment ceased as of January 3, 1994, the hearing loss due to noise exposure that was not demonstrated was not a consequence of noxious exposure last incurred in federal employment before January 3, 1994. In *Adelbert E. Buzzell*, the Board cautioned against an OWCP medical adviser providing a blanket, unrationalized statement that hearing loss does not progress following the cessation of hazardous noise exposure.¹⁰

In a supplemental report dated February 10, 2016, Dr. Paine, Jr., noted that when appellant was originally evaluated in his office on April 14, 2015 he was unaware that appellant was filing for an increase in a hearing loss claim. He reported that appellant did have

⁷ *Stanley K. Takahaski*, 35 ECAB 1065 (1984).

⁸ *K.S.*, Docket No. 16-0035 (issued April 27, 2016).

⁹ *Phillip L. Barnes*, 55 ECAB 426, 441 (2004).

¹⁰ 34 ECAB 96 (1982).

sensorineural hearing loss prior to retiring that would be consistent with his excessive noise exposure, but that the worsening of his hearing loss after his retirement could not be attributed to noise. Dr. Paine, Jr., concluded that the workplace exposure that appellant was around, which ceased on January 3, 1994, was not of sufficient intensity and duration to have caused an increase in hearing loss after his federal employment. He explained that appellant's current degree of hearing loss was "felt to be related to presbycusis as well as to his prior noise exposure that he had prior to retiring in 1994."

The Board has long recognized that, if a claimant's employment-related hearing loss worsens in the future, he may apply for an additional schedule award for any increased permanent impairment.¹¹ Dr. Paine, Jr., initially acknowledged that appellant's noise exposure at work was of sufficient intensity to cause his current hearing loss. In his February 10, 2016 report, however, he noted that appellant's current degree of hearing loss was "felt to be related to presbycusis as well as to [appellant's] prior noise exposure that he had prior to retiring in 1994." 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.¹² The Board finds that Dr. Paine's, Jr., opinion is vague and equivocal and failed to firmly explain the causal relationship, or lack thereof, between appellant's hearing loss and his work-related noise exposure. The Board has held that medical opinions that are speculative or equivocal in character are of diminished probative value.¹³ As Dr. Paine, Jr., attributed appellant's current hearing loss to both presbycusis and his work-related noise exposure prior to his retiring, he did not provide a full explanation of why appellant's occupational noise exposure apparently had no effect on his additional hearing loss.

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 to establish entitlement to compensation, OWCP shares the responsibility in the development of the evidence to see that justice is done.¹⁴ Once OWCP undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.¹⁵ When OWCP selects a physician for an opinion on causal relationship, it has an obligation to secure, if necessary, clarification of the physician's report and to have a proper evaluation made.¹⁶ Because it referred appellant to a second opinion physician, it has the responsibility to obtain a report that will resolve the issue of whether his hearing loss was caused or aggravated by his federal employment.¹⁷

¹¹ *W.H.*, Docket No. 14-1661 (issued December 24, 2014).

¹² *D.G.*, Docket No. 15-0702 (issued August 27, 2015).

¹³ *D.D.*, 57 ECAB 734, 738 (2006); *Kathy A. Kelley*, 55 ECAB 206 (2004).

¹⁴ *Supra* note 12.

¹⁵ *Phillip L. Barnes*, 55 ECAB 426, 441 (2004).

¹⁶ *Alva L. Brothers, Jr.*, 32 ECAB 812 (1981).

¹⁷ *See Ramon K. Farrin, Jr.*, 39 ECAB 736 (1988).

The Board finds that this case is not in posture for a decision as Dr. Paine, Jr., did not adequately address the issue of causal relationship. On remand, OWCP should refer appellant, together with an updated SOAF and the medical record, to an appropriate second opinion physician for an opinion on causal relationship. Following any necessary further development OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for a decision regarding whether appellant established that he sustained an employment-related increased hearing loss casually related to factors of his federal employment.

ORDER

IT IS HEREBY ORDERED THAT the March 7, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development consistent with this decision.

Issued: March 3, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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