United States Department of Labor
Employees' Compensation Appeals Board

J.V., Appellant	)	
and	)	**Docket No. 17-0973**
	)	**Issued: July 19, 2018**
DEPARTMENT OF THE NAVY, FLEET READINESS CENTER, SW, San Diego, CA, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 3, 2017 appellant filed a timely appeal from a February 27, 2017 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 factors of his federal employment.

FACTUAL HISTORY

On September 1, 2016 appellant, then a 56-year-old pneudraulic systems mechanic, filed an occupational disease claim (Form CA-2) alleging that his hearing loss was caused by factors of his federal employment. He indicated that he first became aware of his loss of hearing on January 23, 2015 and related it to factors of his federal employment on July 26, 2016. Appellant explained that he noticed a loss of hearing over the two prior years, which was worsening. He

[1] 5 U.S.C. § 8101 *et seq.*

further explained that he worked around loud machinery and test equipment constantly while wearing hearing protection. Appellant further explained that his delay in filing his claim was because his supervisor was on vacation and he could not complete the form. He did not stop work.

OWCP received a July 26, 2016 audiology report from Susan Fletcher, an audiologist. Ms. Fletcher noted that the comprehensive audiometry report showed normal hearing to speech for each ear. She explained that pure tones showed a borderline normal-to-mild sensorineural hearing loss of 250 to 800 Hertz (Hz) for each ear. Ms. Fletcher explained that word recognition was excellent in the left ear and good in the right ear. She also found tympanometry was normal for each ear. Additionally, ipsi and contra acoustic reflexes were present at 500, 1,000, and 2,000 Hz for each ear. Ms. Fletcher determined that appellant was fit for duty and should implement consistent use of hearing protection devices both on and off duty to prevent further hearing loss. She recommended annual hearing screening to monitor hearing sensitivity. Ms. Fletcher determined that appellant had unspecified sensorineural hearing loss.

By development letter dated September 6, 2016, OWCP requested additional information from appellant. It explained that the evidence submitted was insufficient to establish that he actually experienced the employment factors alleged to have caused the injury. OWCP requested that appellant complete a questionnaire listing his employment history, exposure to hazardous noise at work, the date he first noticed his hearing loss, and all previous ear or hearing programs and hobbies involving exposure to loud noise. It did not request that he provide a complete medical history form or submit past medical records. OWCP afforded appellant 30 days to submit the requested information.

In a separate letter to the employing establishment dated September 6, 2016, OWCP requested details to include: the locations of appellant's job sites where the alleged exposure occurred; sources of exposure to noise and machinery; the decibel and frequency level (to include a noise survey report for each job site and the period of exposure; and the types of ear protection and noise attenuation in decibels if known. It also requested employment data and the date of last exposure to hazardous noise, if no longer exposed to noise, and the pay rate in effect on that date.

In a September 21, 2016 response to the questionnaire, appellant indicated that he had no prior claims for hearing or ear conditions, nor did he have any hobbies which involved exposure to loud noise. He explained that he worked for the employing establishment from January 7, 1985 to present as a pneudraulic mechanic on aircraft components for over 22 years at one site, and 10 years at another site. Appellant was constantly surrounded by noises on test stands and test equipment with other machinery in the pneudraulic shop while always wearing his ear protection at all times for 8 to 10 hours a day, 5 to 6 days a week. He explained that they had pneumatic tools and loud test equipment, which had loud noises and pitching sounds continuously. Furthermore, appellant explained that he worked on cargo plane jet engines, aircraft, and test stands that were loud for 16 years in the Air Force reserves. He noted that his exposure to loud and noisy aircraft and test stands over a course of 40 years contributed to the loss of his hearing, which was worsening as time went on. Appellant also noted that it was difficult to listen to people talking and hear music or television. He explained that while he was working in a noisy environment he wore hearing protection, but that did not prevent the loud noises and constant ringing and humming sounds. Appellant indicated that, on February 15,

2014, he noticed his hearing was worsening and it was harder for him to hear, and he had blockage and buzzing sounds. He noted that, on December 23, 2015, he had difficulty listening and understanding while communicating with others and his hearing tests were getting worse and declining as a result, as his records indicated. Appellant explained that he had hearing tests with the employing establishment personnel physicians and that he planned to submit the audiogram results to OWCP.

Appellant provided a copy of the July 26, 2016 audiogram from Ms. Fletcher, which was illegible.

OWCP also received an August 16, 2016 e-mail from R.M., a safety and occupational health specialist, who noted that he was providing notification that appellant had a shift in his hearing. R.M. also noted that appellant could work without restrictions.

On November 14, 2016 OWCP contacted the employing establishment requesting a position description, along with any audiograms or medical records from the agency hearing loss programs.

In a November 17, 2016 e-mail, D.T., a supervisor, confirmed that appellant was exposed to noise in the hydraulic shop and test room. He indicated that appellant was exposed to high-to-moderate decibel frequencies for 8 to 10 hours a day, 6 days a week, for 18 years in the present shop. D.T. noted that appellant wore double hearing protection, earplugs, and earmuffs. He also provided a position description, but noted no copy of his medical records.

On November 23, 2016 OWCP referred appellant, together with the medical record and a statement of accepted facts (SOAF), to Dr. Theodore Mazer, a Board-certified otolaryngologist, for a second opinion evaluation to include audiometric testing.

In a December 23, 2016 report, Dr. Mazer noted appellant's history. He indicated that appellant's chief complaints were declining hearing since at least five years ago. Dr. Mazer noted that he was seen at Kaiser Permanente four years ago, but no records were received, and that appellant participates in a hearing conservation program and that he baseline had been reset three to four times, but those records were not sent for review. He requested that, when they became available, he would provide a supplemental report. Dr. Mazer also noted that appellant complained of occasional ringing in the ears, which was always present. He explained that appellant indicated that there was an "occasional ringing in the ears, always present." When Dr. Mazer asked appellant to clarify the description, he responded that it was there "on and off continuously and fluctuating but annoying and not interfering with sleep or activities of daily living." He noted that appellant had vertigo a few years prior, with a negative medical evaluation at Permanente Otolaryngology, treated with some pills. Dr. Mazer explained that he used dual ear protection in noise and planned to retire in approximately two to three years. He noted that appellant was also part of the hearing conservation program.

Dr. Mazer examined appellant's ears and found that they were unremarkable. He determined that tuning fork testing was normal, conversational speech understanding in a quiet room was normal at normal volumes. Furthermore, there was no objective tinnitus on auscultation, nor any bruits or murmurs. Regarding the audiometric evaluation, Dr. Mazer advised that the audiogram was calibrated prior to the examination. He determined that internal

inconsistencies (speech discrimination scores were normal reflex levels and disparities compared with July 2016 raised concerns about the accuracy responses to the test). Dr. Mazer opined that the results showed bilaterally flat hearing loss, with the left greater than the right, through 3,000 Hz, with a mild down sloping loss above 2,000 Hz and minimal signs of noise notch on the right ear at 3,000 Hz. He advised that the speech reception threshold was 20 decibels on the right, 40 decibels on the left, compared to 25 decibels in each ear only five months earlier. Dr. Mazer determined that speech discrimination scores were below projected at only 64 percent on the right, and 56 percent on the left, despite normal conversational observation and normal excellent speech discrimination scores just five months earlier. He found that impedance and reflex testing were within normal limits. Dr. Mazer determined that there was no elevation of reflexes in either ear, highlighting possible exaggeration of pure tone responses. He diagnosed bilaterally flat hearing loss with the left greater than the right. Dr. Mazer explained that the variation of testing over just five months, from nonratable to ratable levels of loss and for symmetric loss to left symmetry along with marked and out of proportion drop in speech discrimination scores raises concern regarding accuracy of testing. He advised that it was not consistent with the usual course of noise-induced loss to "suddenly accelerate after 30 years of reported exposure nor is the low frequency loss consistent with noise[-]induced injury." Dr. Mazer opined that "although the current testing if used for ratings purposes would result in a ratable impairment not present on testing should not be relied upon the rating purpose. In addition, any current loss would not be permanent and stationary as he continues in the same noise exposure environment at work with no immediate retirement plans." He explained that appellant had a history of hearing loss and tinnitus at the time of military discharge, absent any records from that time. Dr. Mazer further explained that appellant had a history of nonwork-related dizziness, which may be related to other ear conditions for which evaluation was done in 2014, for which records were not made available for his review. He also explained that even if he accepted the current testing, "the pattern of loss did not support occupational noise exposure."

Dr. Mazer determined that under the current testing, and the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,[2] (A.M.A., *Guides*), appellant had monaural hearing losses of 11.25 percent on the right and 30 percent on the left, for a combined 14.4 percent binaural hearing loss. He reiterated that he did not believe that the current testing was an accurate reflection of appellant's hearing level nor supportive of his occupational injury. Additionally, Dr. Mazer determined that the tinnitus was preexistent and did not raise a ratable level at this time, constituting a mere annoyance with nonspecific descriptions of intensity and persistence. He opined that appellant's hearing loss was not permanent and stationary at this time. Dr. Mazer noted that his prior medical records, including all of his hearing conservation testing or other hearing tests at work and from his prior employers, should be forwarded for review and a supplemental report. He opined that there were no work restrictions aside from usual hearing conservation. Dr. Mazer explained that there were no work restrictions, aside from the usual hearing conservation. He recommended a repeat hearing test in six months rather than a year in order to determine more accurately his hearing status for any progression, especially given the reported changes since July 2016. Dr. Mazer explained that, based upon the July 2016 testing, appellant was only a marginal candidate for amplification. He noted that he did not recommend amplification at this time, at least until a

[2] A.M.A., *Guides* (6th ed. 2009).

subsequent testing to compare the two most recent tests. Dr. Mazer further explained that the amplification would not be work related for the above-noted reasons.

By decision dated February 27, 2017, OWCP denied appellant's claim. It denied the claim because the requirements had not been met for establishing that he sustained an injury causally related to the accepted work factors. OWCP explained that the reason for the finding was that Dr. Mazer found inconsistencies in the testing and raised concerns regarding the accuracy of responses to the testing. It determined that even when viewed in a light most favorable to appellant, the medical evidence of record could not be construed as substantive, reliable, and probative evidence that he sustained a work-related hearing impairment.

LEGAL PRECEDENT

An employee seeking benefits under FECA[3] 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 FECA, that the claim was timely filed within the applicable time limitation period of FECA, that an injury was sustained 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]

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; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that 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.

The medical evidence required to establish causal relationship, generally, is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is causal relationship between the claimant's diagnosed condition and the implicated employment factors. 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.[6]

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. Although it is the claimant's burden of proof to establish his or her claim, OWCP shares

[3] *Supra* note 1.

[4] *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[5] *Victor J. Woodhams*, 41 ECAB 345 (1989).

[6] *Id.*

responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other government source.[7] It shares responsibility to see that justice is done.[8]

ANALYSIS

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

Appellant filed a claim for occupational hearing loss and indicated that he first became aware of his loss of hearing on January 23, 2015 and related it to factors of his federal employment on July 26, 2016. He explained that he noticed a loss and worsening of his hearing over the past two years. Appellant further explained that he worked around loud machinery and test equipment constantly while wearing hearing protection. It is undisputed that appellant was in a hearing conservation program with the employing establishment.

In the development of the claim the employing establishment was instructed to provide audiograms or medical records from its hearing conservation program. No records were provided by the employing establishment.

OWCP referred appellant to second opinion physician, Dr. Mazer, for an opinion regarding whether he had developed sensorineural hearing loss due to his federal employment duties. On December 23, 2016 Dr. Mazer examined appellant and reviewed the medical records and noted that appellant's chief complaints were declining hearing for at least the past five years. He specifically noted that some of appellant's records were unavailable. For example, Dr. Mazer explained that appellant was seen at Kaiser Permanente four years prior for his hearing problems, but no records were received relative to that medical treatment. Furthermore, he noted that appellant was actively involved in the employing establishment's hearing conservation program and his baseline had been reset three or four times. Dr. Mazer indicated that he would provide a supplemental report if provided with the additional records.

The Board finds that OWCP must further develop the factual aspect of this record. Dr. Mazer advised in his second opinion report that appellant had received treatment relative to his hearing with Kaiser Permanente approximately four years prior to the second opinion examination and these records had not been provided for his review. Moreover, he noted that while appellant was in the employing establishment's hearing conservation program, audiological and other records from that program were not provided for his consideration. OWCP must develop this factual aspect of the case before a determination can be made regarding causal relationship.

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. Although it is the claimant's burden of proof to establish his or her claim, OWCP shares responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other government source.[9] It

[7] *See R.A.*, Docket No. 17-1030 (issued April 16, 2018).

[8] *See S.P.*, Docket No. 11-1271 (issued April 19, 2012).

[9] *Supra* note 7.

shares responsibility to see that justice is done.[10] OWCP shall obtain all relevant records from the employing establishment's hearing conservation programs and from appellant's other known medical providers and thereafter provide all relevant records it obtains to Dr. Mazer for a supplemental report.[11] Following this and any other factual development deemed necessary, OWCP shall issue a *de novo* decision in the case.[12]

The case will be remanded for further factual development.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the February 27, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development consistent with this decision of the Board.

Issued: July 19, 2018
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

[10] *Supra* note 8.

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapters 2.800.4, 2.800.7, 2.800.8, and 2.800.10 (June 2011).

[12] *E.S.*, Docket No. 17-0601 (issued August 10, 2017); *Phillip L Barnes*, 55 ECAB 426 (2004); *see also Virginia Richard (Lionel F. Richard)*, 53 ECAB 430 (2002).