

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

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W.S., Appellant)	
)	
and)	Docket No. 24-0082
)	Issued: April 8, 2024
DEPARTMENT OF LABOR, MINE SAFETY)	
AND HEALTH ADMINISTRATION, Norton, VA,)	
Employer)	
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Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On November 7, 2023 appellant filed a timely appeal from an October 13, 2023 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 has met his burden of proof to establish an increase in hearing loss for the period June 4, 2015 through January 29, 2016 in the performance of duty, as alleged.

FACTUAL HISTORY

On November 10, 2022 appellant, then a 70-year-old mine safety and health inspector, filed an occupational disease claim (Form CA-2) alleging that he developed hearing loss as a result of

¹ 5 U.S.C. § 8101 *et seq.*

factors of his federal employment including exposure to loud noises from mining equipment. He noted that he first became aware of his hearing loss on January 9, 2009 and realized its relationship to his federal employment on January 30, 2015.²

In an undated statement, appellant explained that he worked as a laborer from January 17, 1975 through April 2000, and thereafter worked for the employing establishment. From April 2000 through December 2004, he was employed as a coal mine inspector; from December 2004 through December 2007 as a field office supervisor; from January 2008 through January 2009 as a staff assistant; from January 2009 through January 2010 as a ventilation supervisor; from January 2010 through June 2011 as a field office supervisor; and as an assistant district manager from June 2011 through his retirement on January 29, 2016. Appellant alleged that he was exposed to loud noises from mining equipment while performing inspections for six hours per day on average.

By letter dated November 21, 2022, OWCP informed appellant that it had received his occupational disease claim for hearing loss under OWCP File No. xxxxxx538. It noted that he had an accepted hearing loss claim with a date of injury of September 9, 2009 under OWCP File No. xxxxxx385. OWCP advised that if appellant intended to file a claim for an increased schedule award, he should submit a claim for compensation (Form CA-7) under File No. xxxxxx385. It noted that no further action would be taken on the occupational disease claim under OWCP File No. xxxxxx538.

In a development letter dated November 22, 2022, OWCP advised appellant to disregard its November 21, 2022 letter. It requested that he clarify whether he was claiming an increase in hearing loss from June 4, 2015 through January 29, 2016 due to exposure at work, or whether he meant to claim an additional schedule award under OWCP File No. xxxxxx385.

On November 27, 2022 appellant clarified that he intended his claim under OWCP File No. xxxxxx538 to be for additional hearing loss due to exposure at work from June 4, 2015 through January 29, 2016.

OWCP referred appellant for a second opinion examination with Dr. Mark Williams, a Board-certified otolaryngologist. In a report dated July 17, 2023, Dr. Williams related that additional information was required before he could provide an opinion regarding the cause of appellant's increased hearing loss.

OWCP forwarded Dr. Williams' report to a district medical adviser (DMA) for review. The DMA replied in letters dated July 30 and September 5, 2023. The DMA concluded that appellant had additional binaural hearing loss; however, he also related that the audiogram results from November 15, 2016 appeared to be suspect.

In an e-mail dated September 7, 2023 to the employing establishment, OWCP asked for clarification regarding appellant's exposure to hazardous noise from June 4, 2015 through

² Under OWCP File No. xxxxxx385, OWCP accepted appellant's occupational disease claim for binaural hearing loss on July 13, 2015. By decision dated August 25, 2015, it issued a schedule award for 25 percent binaural hearing loss. OWCP has administratively combined OWCP File Nos. xxxxxx538 and xxxxxx385, with the latter serving as the master file.

January 29, 2016. In an email response dated September 12, 2023, the employing establishment advised that an “IT person” related that appellant had no exposure for the period June 4, 2015 through January 29, 2016.

By decision dated October 13, 2023, OWCP denied appellant’s claim finding that he had not established that his current hearing loss arose during the course of employment and within the scope of compensable work factors, as defined by FECA.

LEGAL PRECEDENT

An employee seeking benefits under FECA³ 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 timely filed within the applicable time limitation period of FECA,⁴ that an injury was sustained in the performance of duty, as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.⁵ 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.⁶

The phrase “sustained while in the performance of duty” has been interpreted by the Board to be the equivalent of the commonly found prerequisite in workers’ compensation law of “arising out of and in the course of employment.”⁷ To arise in the course of employment, in general, an injury must occur: (1) at a time when the employee may reasonably be stated to be engaged in the master’s business; (2) at a place when he or she may reasonably be expected to be in connection with his or her employment; and (3) while he or she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto.⁸ In deciding whether an injury is covered by FECA, the test is whether, under all the circumstances presented, causal relationship exists between the employment itself, or the conditions under which it is required to be performed, and the resultant injury.⁹

³ *Supra* note 1.

⁴ *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁵ *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁶ *R.R.*, Docket No. 19-0048 (issued April 25, 2019); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁷ *C.L.*, Docket No. 19-1985 (issued May 12, 2020); *S.F.*, Docket No. 09-2172 (issued August 23, 2010); *Valerie C. Boward*, 50 ECAB 126 (1998).

⁸ *S.V.*, Docket No. 18-1299 (issued November 5, 2019); *Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006); *Mary Keszler*, 38 ECAB 735, 739 (1987).

⁹ *J.N.*, Docket No. 19-0045 (issued June 3, 2019); *M.W.*, Docket No. 15-0474 (issued September 20, 2016); *Mark Love*, 52 ECAB 490 (2001).

The Board has previously held that where exposure to noise at work causes an adverse effect on an employee's hearing, every such exposure constitutes a new injury.¹⁰ If an employee continues to be exposed to noise at work subsequent to the filing of a hearing loss claim and he believes the additional exposure has caused an increase in his loss of hearing, he must file another claim for the additional injury in order to secure benefits for the increased loss.¹¹

ANALYSIS

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

In an e-mail dated September 7, 2023 to the employing establishment, OWCP asked for clarification regarding appellant's exposure to hazardous noise from June 4, 2015 through January 29, 2016. In an email response dated September 12, 2023, the employing establishment advised that an "IT person" related that appellant had no exposure for the period June 4, 2015 through January 29, 2016. OWCP, however, did not formally request a statement from the employing establishment concerning appellant's allegations, as is required under its procedures.¹²

As discussed, OWCP's regulations provide that an employer who has reason to disagree with an aspect of the claimant's allegation should submit a statement that specifically describes the factual argument with which it disagrees and provide evidence or argument to support that position.¹³ Its procedures further provide in certain types of claims, such as when performance of duty is at issue, a statement from the employer is imperative to properly develop, and adjudicate the claim.¹⁴ While appellant provided a response to OWCP's development letter, OWCP did not send a separate development letter to the employing establishment.

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility to see that justice is done.¹⁵ It 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.¹⁶ Since appellant's allegations and the evidence of record indicate that the employing establishment would have in its possession evidence relevant to appellant's allegations that he continued to be exposed to

¹⁰ *Henry Ross, Jr.*, 39 ECAB 373, n.13 (1988); *Robert Goodloe*, 10 ECAB 164 (1958).

¹¹ *See Charles E. Moore*, 35 ECAB 876 (1984).

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.7 (June 2011).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *L.G.*, Docket No. 21-0690 (issued December 6, 2021).

¹⁶ *See id.*; *K.W.*, Docket No 15-1535 (issued September 23, 2016).

hazardous noise, OWCP should obtain a response from the employing establishment to the allegations.¹⁷

As such, the Board will remand the case for OWCP to further develop the claim. On remand, OWCP shall obtain all relevant information from the employing establishment necessary to determine whether appellant sustained an increase in hearing loss for the period June 4, 2015 through January 29, 2016 in the performance of duty. Following this and other such further development as deemed necessary, it shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the October 13, 2023 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 8, 2024
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board

¹⁷ *Id.*; see 20 C.F.R. § 10.117(a), which provides that an employing establishment that has reason to disagree with any aspect of the claimant's report shall submit a statement to OWCP that specifically describes the factual allegation or argument with which it disagrees and provide evidence or argument to support its position. The employing establishment may include supporting documents such as witness statements, medical reports or records, or any other relevant information; see also *A.F.*, Docket No. 20-1635 (issued June 9, 2022); *P.K.*, Docket No. 21-0967 (issued December 3, 2021).