

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

G.B., Appellant)	
)	
and)	Docket No. 23-0686
)	Issued: December 17, 2024
DEPARTMENT OF THE ARMY, RED RIVER)	
ARMY DEPOT, Texarkana, TX, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On April 10, 2023 appellant filed a timely appeal from a November 14, 2022 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.²

ISSUES

The issues are: (1) whether OWCP has met its burden of proof to rescind acceptance of appellant's hearing loss claim; and (2) whether appellant has met his burden of proof to establish hearing loss in the performance of duty causally related to factors of his federal employment.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the November 16, 2023 decision, appellant submitted additional evidence to OWCP. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

FACTUAL HISTORY

On March 13, 2019 appellant, then a 53-year-old welder, filed an occupational disease claim (Form CA-2) alleging that he developed bilateral hearing loss due to factors of his federal employment. He noted that he first became aware of his condition and realized its relation to his federal employment on March 27, 2018. Appellant did not stop work. On August 7, 2019 OWCP accepted his claim for bilateral sensorineural hearing loss, based on the opinion of Dr. Charles Hollingsworth, a Board-certified plastic surgeon and otolaryngologist, who opined that appellant had bilateral sensorineural hearing loss, due in part to the accepted employment exposure.

OWCP subsequently referred the case record, along with a statement of accepted facts (SOAF) to Dr. Jeffrey Israel, a Board-certified otolaryngologist serving as an OWCP district medical adviser (DMA), for an evaluation and rating of permanent impairment, pursuant to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).³

In an August 10, 2019 report, Dr. Israel found that the audiogram results of record were inconsistent.

OWCP subsequently found a conflict in the medical evidence between Dr. Hollingsworth and Dr. Israel with regard to whether appellant had permanent impairment due to hearing loss. It referred appellant, along with the case record and a SOAF to Dr. Greg Govett, a Board-certified otolaryngologist, to resolve the conflict in medical opinion.

In a January 14, 2020 report, Dr. Govett, serving as the impartial medical examiner (IME), noted that audiometric testing was performed that same date and noted physical examination and audiometric findings. However, he opined that appellant's hearing loss was not work related because the test results were completely inconsistent with the pure tone average and did not correlate at all with the speech reception threshold. Dr. Govett further opined that appellant's tinnitus was not work related because he did not have significant noise exposure at work.

OWCP subsequently requested that Dr. Govett clarify whether appellant had employment-related tinnitus. On May 20, 2020 Dr. Govett responded that appellant's tinnitus was work related.

On July 10, 2020 OWCP notified appellant of its proposed rescission of its acceptance of his claim for bilateral sensorineural hearing loss and afforded him 30 days to respond.

Appellant subsequently submitted additional evidence, including an August 10, 2020 narrative statement, a July 20, 2020 medical note from a provider with an illegible signature, and an August 11, 2020 audiogram.

By decision dated August 21, 2020, OWCP rescinded its acceptance of bilateral sensorineural hearing loss, effective that date. It found that the special weight of the medical evidence rested with Dr. Govett, the IME, who found that appellant had work-related tinnitus, but not work-related sensorineural hearing loss.

³ 6th ed. 2009.

By separate decision dated August 21, 2020, OWCP accepted the claim for bilateral tinnitus.

On September 2, 2020, appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review and submitted additional evidence. A hearing was held on November 30, 2020.

By decision dated February 2, 2021, OWCP's hearing representative affirmed OWCP's August 21, 2020 rescission decision.

On February 1, 2022 appellant, through counsel, requested reconsideration. In support of the request, counsel submitted a December 20, 2021 audiogram and narrative reports of even date by Dr. Henry J. Hollier, a Board-certified otolaryngologist.

Thereafter, OWCP further developed the claim. On May 3, 2022 it referred appellant, along with the SOAF and the medical record, to Dr. Mark D. Gibbons, a Board-certified otolaryngologist, serving as a second opinion physician, and for an audiogram with Thomas D. Burns, an audiologist. Thereafter, OWCP received a May 20, 2022 report from Dr. Gibbons.

On June 24, 2022 OWCP referred the medical record, including Dr. Gibbons' May 20, 2022 report, and SOAF to Dr. Israel, serving as a DMA, to determine the extent of appellant's hearing loss due to his employment-related noise exposure. In a June 30, 2022 report, Dr. Israel recommended further testing, including an audio brainstem response (ABR) evaluation and a Stenger test to rule out malingering, to determine the extent of the hearing loss.

On August 10, 2022 OWCP referred appellant, along with the SOAF and the medical record, to Dr. Paul D. Whitt, a Board-certified otolaryngologist serving as a second opinion physician. In a September 8, 2022 report, Dr. Whitt diagnosed bilateral sensorineural hearing loss, which he opined was genetic and not due to appellant's federal employment.

By decision dated November 14, 2022, OWCP denied modification of the February 2, 2021 decision.

LEGAL PRECEDENT -- ISSUE 1

Section 8128 of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his or her own motion or on application.⁴ The Board has upheld OWCP's authority under this section to reopen a claim at any time on its own motion and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.⁵ The Board has noted, however, that the power to annul an award is not arbitrary, and that an award for compensation can only be set aside in the manner provided by the compensation statute.⁶

⁴ 5 U.S.C. § 8128.

⁵ See *W.H.*, Docket No. 17-1390 (issued April 23, 2018); *John W. Graves*, 52 ECAB 160 (2000); 20 C.F.R. § 10.610.

⁶ *D.W.*, Docket No. 17-1535 (issued February 12, 2018); *Delphia Y. Jackson*, 55 ECAB 373 (2004).

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits. This also holds true where OWCP later decides that it erroneously accepted a claim.⁷

OWCP bears the burden of justifying rescission of acceptance on the basis of new evidence, legal argument and/or rationale.⁸ Probative and substantial positive evidence or sufficient legal argument must establish that the original determination was erroneous. OWCP must also provide a clear explanation of the rationale for rescission.⁹

Section 8123(a) of FECA provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.¹⁰ This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case. In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an IME for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹¹

ANALYSIS -- ISSUE 1

The Board finds that OWCP met its burden of proof to rescind the acceptance of appellant's hearing loss claim.

On August 7, 2019 OWCP accepted appellant's claim for bilateral sensorineural hearing loss. It subsequently found a conflict in the medical evidence between Dr. Hollingsworth and Dr. Israel with regard to whether appellant had permanent impairment due to hearing loss. OWCP properly referred appellant, along with the case record and a SOAF, to Dr. Govett to resolve the conflict in medical opinion, pursuant to 5 U.S.C. § 8123(a).

In a January 14, 2020 report, Dr. Govett, serving as the IME, noted that audiometric testing was performed that same date and noted physical examination and audiometric findings. However, he opined that appellant's hearing loss was not work related because the test results were inconsistent with the pure tone average and did not correlate with the speech reception threshold. Dr. Govett further opined that appellant's tinnitus was not work related because he did not have significant noise exposure at work. OWCP subsequently requested that Dr. Govett clarify whether appellant had employment-related tinnitus. On May 20, 2020 he responded that appellant's tinnitus was work related. The Board has reviewed the opinion of Dr. Govett and notes that it has

⁷ See *V.C.*, 59 ECAB 137 (2007).

⁸ See *L.G.*, Docket No. 17-0124 (issued May 1, 2018); *John W. Graves*, *supra* note 5.

⁹ *W.H.*, *supra* note 5.

¹⁰ 5 U.S.C. § 8123(a). See *R.C.*, Docket No. 18-0463 (issued February 7, 2020); see also *G.B.*, Docket No. 16-0996 (issued September 14, 2016).

¹¹ 20 C.F.R. § 10.321. See also *J.H.*, Docket No. 22-0981 (issued October 30, 2023); *N.D.*, Docket No. 21-1134 (issued July 13, 2022); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001); *James P. Roberts*, 31 ECAB 1010 (1980).

reliability, probative value, and convincing quality with respect to its conclusions regarding the relevant issue of the cause of appellant's hearing loss. He provided a thorough factual and medical history and sufficient medical rationale for his opinion.¹² The Board, therefore, finds that Dr. Govett's opinion is entitled to the special weight of the medical evidence.

Following OWCP's July 10, 2020 notice of proposed rescission, appellant subsequently submitted additional evidence, including an August 10, 2020 narrative statement, a July 20, 2020 medical note from a provider with an illegible signature, and an August 11, 2020 audiogram. This evidence, however, is insufficient to overcome the special weight accorded to Dr. Govett.¹³

As such, the Board finds that OWCP met its burden of proof to rescind acceptance of appellant's sensorineural hearing loss claim.

LEGAL PRECEDENT -- ISSUE 2

An employee seeking benefits under FECA¹⁴ has the burden of proof to establish the essential elements of his or her claim, including 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 of FECA,¹⁵ 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.¹⁶ 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.¹⁷

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit: (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) rationalized medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.¹⁸

¹² *M.S.*, Docket No. 24-0625 (issued September 17, 2024).

¹³ *L.M.*, Docket No. 16-1539 (issued April 3, 2017); *D.W.*, *supra* note 6.

¹⁴ *Supra* note 1.

¹⁵ *See S.B.*, Docket No. 22-1346 (issued June 1, 2023); *D.D.*, Docket No. 19-1715 (issued December 3, 2020); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

¹⁶ *Y.G.*, Docket No. 20-0688 (issued November 13, 2020); *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

¹⁷ *C.H.*, Docket No. 19-1781 (issued November 13, 2020); *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

¹⁸ *T.M.*, Docket No. 20-0712 (issued November 10, 2020); *S.C.*, Docket No. 18-1242 (issued March 13, 2019); *R.H.*, 59 ECAB 382 (2008).

Causal relationship is a medical issue, and the medical evidence required to establish causal relationship is rationalized medical opinion evidence.¹⁹ 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 specific employment factors identified by the employee.²⁰

ANALYSIS -- ISSUE 2

The Board finds this case not in posture for decision with regard to whether appellant has established that he sustained employment-related hearing loss in the performance of duty, as alleged.

In the case of *William A. Couch*,²¹ the Board held that when adjudicating a claim, OWCP is obligated to consider and address all evidence properly submitted by a claimant and received by OWCP before the final decision is issued.

It is crucial that OWCP consider and address all evidence received prior to the issuance of its final decision, as the Board's decisions are final with regard to the subject matter appealed.²² OWCP, in its November 14, 2022 decision, did not consider all of the evidence received in the case, including the December 20, 2021 audiogram and narrative reports of even date by Dr. Hollier, the May 20, 2022 second opinion evaluation report by Dr. Gibbons, and the June 30, 2022 report of DMA, Dr. Israel.²³ On remand, OWCP shall consider and address all evidence of record. Following any further development as deemed necessary, it shall issue a *de novo* decision.

CONCLUSION

The Board finds that OWCP met its burden of proof to rescind the acceptance of appellant's hearing loss claim. The Board further finds that this case is not in posture for decision with regard to whether appellant has established that he sustained employment-related hearing loss in the performance of duty, as alleged.

¹⁹ *A.M.*, Docket No. 18-1748 (issued April 24, 2019); *T.H.*, 59 ECAB 388, 393 (2008); *Robert G. Morris*, 48 ECAB 238 (1996).

²⁰ *Id.*

²¹ 41 ECAB 548 (1990); *see also G.T.*, Docket No. 19-1619 (issued May 22, 2020); *R.D.*, Docket No. 17-1818 (issued April 3, 2018).

²² *See C.S.*, Docket No. 18-1760 (issued November 25, 2019); *Yvette N. Davis*, 55 ECAB 475 (2004); *Order Remanding Case, W.H.*, Docket No. 19-0346 (issued November 26, 2019); *Order Remanding Case, K.K.*, Docket No. 15-1662 (issued December 2, 2015); *see also William A. Couch, id.*

²³ *See V.C.*, Docket No. 16-0694 (issued August 19, 2016).

ORDER

IT IS HEREBY ORDERED THAT the November 14, 2022 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: December 17, 2024
Washington, DC

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

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

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