

U. S. DEPARTMENT OF LABOR  
Employees' Compensation Appeals Board

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In the Matter of JESUS ESTRADA and DEPARTMENT OF THE AIR FORCE,  
KELLY AIR FORCE BASE, Tex.

*Docket No. 96-687; Submitted on the Record;  
Issued January 12, 1998*

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DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,  
A. PETER KANJORSKI

The issues are: (1) whether appellant has met his burden of proof to establish that he sustained a hearing loss in the performance of duty as alleged; and (2) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's application for review on December 5, 1995.

The Board has duly reviewed the case record in the present appeal and finds that the Office hearing representative properly determined in its May 12, 1995 decision, which affirmed the Office's September 28, 1994 decision, that appellant failed to meet his burden of proof in establishing his claim due to insufficient medical evidence.

An employee seeking benefits under the Federal Employees' Compensation Act has the burden of establishing 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 the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.<sup>1</sup> These are the essential elements of each and every claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.<sup>2</sup>

In the present case, on June 23, 1993, appellant filed a claim for occupational disease alleging that he sustained a hearing loss as a result of noise exposure in his federal employment. In a decision dated March 8, 1994, the Office denied appellant's claim on the grounds that the

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<sup>1</sup> *Elaine Pendelton*, 40 ECAB 1143 (1989).

<sup>2</sup> The Office's regulations clarify that a traumatic injury refers to injury caused by a specific event or incident or series of incidents occurring within a single workday or work shift whereas occupational disease refers to injury produced by employment factors which occur or are present over a period longer than a single workday or shift; *see* 20 C.F.R. §§ 10.5(a)(15), (16).

weight of the medical evidence, as represented by the January 4, 1994 report of Dr. Herbert K. Eastwood, an otolaryngologist and Office referral physician, and the February 17, 1994 review of Dr. Eastwood's report by Dr. R. Meador, an Office medical adviser, established that although appellant did sustain a hearing loss, it was due to presbycusis, or aging, and unrelated to factors of his federal employment. Appellant requested a hearing, and by decision dated September 2, 1994, an Office hearing representative set aside the March 8, 1994 decision on the grounds that Dr. Eastwood's report required further clarification. On remand, the Office requested, and Dr. Eastwood provided, additional rationale for his earlier conclusion that appellant's hearing loss was caused by presbycusis, and was not caused by acoustic trauma during appellant's federal employment. In a decision dated September 28, 1994, the Office denied appellant's claim on the basis of Dr. Eastwood's supplemental report. Appellant requested a hearing and submitted additional medical evidence, and by decision dated May 12, 1995, an Office hearing representative affirmed the September 28, 1994 decision. The hearing representative found that neither of the newly submitted medical reports contained a rationalized opinion establishing a causal relationship between appellant's hearing condition and his federal employment, and that the weight of the medical evidence rested with the newly clarified, well-rationalized report opinion of Dr. Eastwood.

There is no dispute that appellant is a federal employee, that he timely filed his claim for compensation benefits and that he has a hearing loss. However, the medical evidence is insufficient to establish that appellant sustained his hearing loss as a result of noise exposure during his federal employment because it does not contain a rationalized medical opinion explaining how appellant's hearing loss injury was caused or aggravated by factors of his federal employment.<sup>3</sup>

For example, in support of his claim, appellant submitted a note dated January 16, 1993 and supplemental report dated April 7, 1994 from Dr. David Padilla, a Board-certified family practitioner. In his earlier note, Dr. Padilla stated that appellant had been evaluated for chronic hearing loss and that examination and audiometric testing "suggests strongly that his problem is due to past noise exposure." In his supplemental report, the physician verified that his office had evaluated appellant for bilateral hearing loss and noted that appellant "had a history of chronic decreased hearing bilaterally with a long history of noise exposure" at the employing establishment. He added that his evaluation had revealed a mild to moderate range of hearing loss bilaterally, and concluded that appellant "has had a bilateral hearing loss secondary to noise trauma in the past." Dr. Padilla did not, however, explain why he believed appellant's condition was due to acoustic trauma or specifically state that appellant's hearing loss was caused by noise exposure in his federal employment.

Similarly, in a January 6, 1995 report Dr. Gilbert M. Ruiz, a Board-certified otolaryngologist, noted that appellant had a 20-year history of exposure to aircraft engine noise, and stated that the "[a]udiogram shows a 4K Hertz noise notch suggesting noise-induced hypoacusis." The physician provided no further explanation or rationale for his conclusion.

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<sup>3</sup> Part of a claimant's burden of proof includes the submission of rationalized medical evidence based upon a complete factual and medical background showing causal relationship between claimed injury and employment factors; see *Mary J. Briggs*, 37 ECAB 578 (1986); *Joseph T. Gulla*, 36 ECAB 516 (1985).

In contrast, Dr. Eastwood, the Office referral physician, after performing an audiogram and reviewing all of the medical evidence of record, including annual audiogram results dating from January 25, 1974, early in appellant's federal employment, through July 8, 1993, shortly following appellant's retirement, diagnosed "bilateral moderate nerve type hearing loss, severity undetermined, due to presbycusis [aging] and nonjob-related acoustic trauma," and indicated by check mark that this hearing loss was not due to noise exposure encountered in appellant's federal employment. In response to the Office's request for further clarification, Dr. Eastwood explained, in his supplemental report dated September 22, 1994, that "a hearing loss caused by acoustic trauma usually has normal hearing for low frequencies with a decrease maximum at 4000 Hz with recovery at 6000 and 8000 Hz. This claimant's loss was almost flat for all frequencies. There was essentially no changes in the hearing during his time of federal employment."

The Office advised appellant of the type of medical evidence needed to establish his claim but he did not provide such evidence. Consequently, appellant has not submitted sufficient medical evidence to establish that he sustained a hearing loss as a result of noise exposure during his federal employment. In view of this, appellant has not met his burden of proof in establishing that he sustained an occupational disease in the performance of duty.

The Board also finds that the Office did not abuse its discretion by denying appellant's application for review.

Following the decision dated May 12, 1995, appellant requested that the Office reconsider his case. In support of this request for reconsideration, appellant submitted an additional report from, Dr. Gilbert Ruiz, dated August 24, 1994. Dr. Ruiz reiterated that appellant had been seen by him on January 6, 1995 and that at that time it was noted that appellant had been exposed to loud noise in the past, during employment, while working with aircraft engines for over 20 years. He further reiterated his earlier conclusion that audiometric examination revealed a "'noise notch' suggesting noise-induced hypoacusis. Noise-induced hearing loss by history."

Section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of his or her claim under 5 U.S.C. § 8128(a) by written request to the Office identifying the decision and the specific issues within the decision which the claimant wishes the Office to reconsider and the reasons why the decision should be changed and by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.<sup>4</sup> Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.138(b)(1) will be denied by the Office without review of the merits of the claim.<sup>5</sup>

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<sup>4</sup> 20 C.F.R. § 10.138(b)(1).

<sup>5</sup> 20 C.F.R. § 10.138(b)(2).

The Office, in denying appellant's application for review, properly noted that Dr. Ruiz's report did not contain any additional relevant evidence, or contain any additional rationale for his earlier conclusion that appellant's hearing loss was causally related to factors of his federal employment. As Dr. Ruiz's report merely reiterated his previous findings, it did not require a reopening of the case for merit review.

The decisions of the Office of Workers' Compensation Programs dated December 5 and May 12, 1995 are hereby affirmed.

Dated, Washington, D.C.  
January 12, 1998

George E. Rivers  
Member

David S. Gerson  
Member

A. Peter Kanjorski  
Alternate Member