U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ERNEST E. GAYLOR and DEPARTMENT OF THE NAVY, AIR SYSTEMS COMMAND, NAVAL AIR STATION, Alameda, Calif.

Docket No. 97-523; Submitted on the Record;
Issued October 9, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON, WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly suspended appellant's potential entitlement to compensation benefits based on his refusal to submit to a directed second medical examination or based upon an obstruction of the medical examination he did attend.

On January 29, 1996 appellant, then a 71-year-old equipment cleaner, filed a claim alleging that he sustained hearing loss due to working in a high-noise area across the runway from the jet engine run-up area. The employing establishment confirmed that appellant was working in a hazardous noise environment.

In support of his claim, appellant submitted multiple audiograms dating from 1983 through 1996 obtained as a result of appellant being followed for hazardous noise exposure by the employing establishment occupational medicine clinic hearing conservation program. These audiograms demonstrated recurring significant threshold shifting at multiple frequencies from his baseline audiograms.

On April 29, 1996 the Office referred appellant to Dr. Bruce J. Rice, a Board-certified otolaryngologist, for further detailed examination, evaluation and testing to develop his claim and it advised appellant of the provisions of 5 U.S.C. § 8123(d). This was not a second opinion examination as no primary opinion as to whether appellant had noise-induced hearing loss had been submitted to the case record.

By report dated June 19, 1996, Dr. Rice detailed his May 31, 1996 physical examination findings, presented his audiologic testing results and opined that appellant had a bilateral hearing loss but that the results demonstrated considerable inconsistency with respect to pure tone thresholds. Dr. Rice opined that appellant had a significant mixed hearing loss in the left ear with a conductive component of 45 decibels and a moderately severe sensorineural hearing loss in the right ear but that there were inconsistencies and unreliable responses to pure tones and that

the speech reception thresholds did not correlate well with the pure tone thresholds. However, he further noted that, although testing was somewhat unreliable, there was no question regarding the reliability of the left ear conductive, nonnoise-induced hearing loss.

On June 24, 1996 the Office received a response from appellant claiming that the equipment with which Dr. Rice tested him was obsolete and was not working properly. He stated that it was outdated and did not work and that he was very unsatisfied with that kind of equipment. Appellant requested a hearing testing specialist and claimed that Dr. Rice did not test him at all.

By letter dated June 26, 1996, the Office requested clarification from Dr. Rice as to his rationale for his diagnosis, given appellant's unreliable and inconsistent responses and it questioned whether appellant had a noise-induced hearing loss.

By letter dated July 8, 1996, Dr. Rice advised that because of appellant's unreliable and inconsistent responses to pure tone and speech thresholds, he could not say whether appellant had noise-induced hearing loss. Dr. Rice indicated that he requested that appellant return for a repeat audiogram, but stated that he had refused to return for repeat testing. Dr. Rice explained that in order to determine whether there was an occupational hearing loss, a reliable audiogram was necessary. Dr. Rice further explained that the detection of the left ear conductive hearing loss was reliable, but that there was no industrial responsibility for a conductive hearing loss.

On July 15, 1996 the Office re-referred appellant to Dr. Rice for a repeat audiogram and it reiterated the provisions of 5 U.S.C. § 8123(d) regarding obstruction of medical examinations. The Office indicated that appellant's appointment was for August 2, 1996.

On August 5, 1996 the Office checked to see whether appellant attended the scheduled appointment and discovered that appellant had changed the audiogram appointment to August 19, 1996.

On August 7, 1996 the Office advised appellant that his audiometric appointment was rescheduled for August 19, 1996 and that an examination was scheduled for August 26, 1996. It again reminded him of the provisions of 5 U.S.C. § 8123(d) regarding obstruction.

Then, by decision dated August 15, 1996, the Office suspended appellant's potential claim for compensation benefits finding that he refused to comply with the regulations of an Office directed medical evaluation. It indicated that the provisions of 5 U.S.C. § 8123(d) were being implemented.

The Board finds that the Office improperly suspended appellant's claim for potential entitlement to compensation benefits on August 15, 1996.

Section 8123(d) of Title 5 of the U.S. Codes states:

> "If an employee refuses to submit to or obstructs an examination, his right to compensation … is suspended until the refusal or obstruction stops."

The Board notes that the record shows that appellant did not refuse to submit to or attend the August 2, 1996 audiometric appointment but indicated his willingness to undergo it by rescheduling it for August 19, 1996.[1] The Board also notes that appellant did this rescheduling at some point prior to the August 5, 1996 discovery by the Office that he did not attend the August 2, 1996 appointment. Therefore, when the Office discovered that appellant had not attended the August 2, 1996 appointment, it simultaneously discovered that he had rescheduled the appointment and that, therefore, he was not refusing to submit to or attend such appointment. Accordingly, the Office did not have that basis for making its August 15, 1996 decision.

Prior to the Office's August 5, 1996 discovery that appellant had rescheduled his appointment, there is no evidence in the record that appellant was refusing to attend an appointment he had been directed to attend by letter dated July 15, 1996. The Board further notes that prior to July 15, 1996 appellant had not been directed by the Office to attend a specific appointment and hence had not refused to submit to a directed medical examination. The fact that appellant merely told Dr. Rice on May 31, 1996 that he refused to return for repeat testing, does not rise to a refusal to submit to a directed medical examination because there was no specifically scheduled medical examination subsequent to May 31, 1996 that the Office had directed him to attend.

The Board further notes that the Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(e) states: "if no medical report is received within 30 days from the date of the appointment arranged by the Office ... compensation will be suspended if he or she fails to appear for the appointment without good cause." In this case this was not a referee examination, as section 3.500.4(e) contemplates, that prior to July 15, 1996 there was no scheduled appointment that appellant refused to attend and that subsequent to July 15, 1996 there was no evidence of refusal as appellant merely rescheduled the appointment manifesting a willingness to submit to and attend such appointment, that the Office did not wait 30 days from the date of the appointment arranged for August 2, 1996 and rescheduled to August 19, 1996 to act and that appellant did not fail to appear without good cause, but merely rescheduled the appointment because he had a head cold, which would have invalidated the testing results. Consequently, the Office's August 15, 1996 decision was premature.

Moreover, the Office discusses appellant's May 31, 1996 unreliable responses in its memorandum and notes that appellant was obstructing that examination, which it states was not justified. The Board notes that in *Daniel F. O'Donnell*,[2] it explained that the fact that the audiometric results are deemed inconsistent and unreliable, cannot be regarded as conclusive as to

[1] *See, generally, Corlisia L. Sims (Smith)*, 46 ECAB 172 (1994).

[2] 46 ECAB 890 (1995).

establishing obstruction.[3] Therefore, there is no evidence to support such a conclusive, unexplained inference that appellant obstructed the May 31, 1996 examination.

As there is no evidence of record that appellant refused to attend a directed medical examination and no explanation, in light of *O'Donnell*, as to how and why unreliable and inconsistent results constituted an obstruction or refusal to undergo a medical examination, the Office had no basis upon which to invoke a suspension of appellant's claim for potential entitlement to compensation on August 15, 1996.

Consequently, the decision of the Office of Workers' Compensation Programs dated August 15, 1996 is hereby reversed.

Dated, Washington, D.C.
October 9, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

[3] The Board's finding that the Office's August 15, 1996 suspension decision was improper does not effect subsequent Office decisions as to whether there was obstruction of other previously scheduled, Office-directed examinations, if indeed such evidence does exist regarding previously scheduled, subsequently attended examinations in light of the Board's holding in *O'Donnell*.