

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DANIEL O'DONNELL and DEPARTMENT OF THE NAVY,  
PHILADELPHIA NAVAL SHIPYARD, Philadelphia, Pa.

*Docket No. 97-395; Submitted on the Record;  
Issued May 19, 1999*

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DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in rescinding its acceptance of appellant's hearing loss claim.

This is the second appeal in this case.<sup>1</sup> By decision and order dated July 19, 1995, the Board found that the Office, in its October 27, 1992 decision, had improperly suspended appellant's compensation benefits for obstruction of a medical examination on July 14, 1992. The facts of this case are more fully set forth in the Board's July 19, 1995 decision and are herein incorporated by reference.

On February 6, 1990 appellant, then a 43-year-old former mechanic's helper, filed an occupational disease claim alleging that in the early 1970's he sustained a hearing loss causally related to factors of his federal employment. By decision dated October 27, 1992, the Office accepted appellant's claim for hearing loss causally related to factors of his federal employment but suspended his right to entitlement of a schedule award for obstruction of a medical examination.

Following the Board's July 19, 1995 decision reversing the Office's October 27, 1992 decision, the Office referred appellant, along with a statement of accepted facts and copies of medical records, to Dr. Joseph Sataloff, a Board-certified otolaryngologist of professorial rank, for an examination and evaluation as to whether appellant had sustained any employment-related hearing loss.

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<sup>1</sup> See Docket No. 94-428.

In a report dated November 9, 1995, Dr. Sataloff provided a history of appellant's condition based upon his review of the medical records and previous audiograms, and his findings on examination and stated:

“[Appellant] worked chiefly as a mechanic at the [employing establishment]. In 1971 he was declared 100 [percent] disabled and has not worked since then as the result of an injury. He speaks with a loud voice and wore a hearing aid. He is not a satisfactory user of a hearing aid because it makes him self-conscious.

“The physical findings in the ears, nose and throat are normal. The enclosed audiologic findings are reasonably valid; however, when compared to previous studies, including the audiological tests of 1992, there is a marked inconsistency. The present findings show a speech reception of 25 [decibels] in the right ear and 20 [decibels] in the left ear which show that [appellant] has very good hearing in all of the important speech frequencies. This is demonstrable in his present audiogram where he has a very minimal loss in the speech frequency range from 500 to 2,000 [hertz]. He apparently does have a substantial[ly] high frequency sensorineural hearing loss, but his discrimination scores in a quiet room are excellent. This means he has good ability to get along in everyday communication. In a noisy background I have no doubt he has some difficulty in discriminating certain speech.

“[Appellant] certainly can be satisfactorily employed from a hearing aspect in most situations. I had no difficulty communicating with him, and he heard me quite satisfactorily without any hearing aid. He does have a high frequency sensorineural hearing loss. I do not feel that it has been caused or aggravated by any occupational noise exposure. It is probably genetic or heredity, progressive nerve deafness even though it may not be evident in his immediate family. From his history, I do not feel he has been exposed to enough hazardous noise to cause this type, or degree, of hearing loss. It is not possible.

“[Appellant] was quite cooperative in all of the studies, and the enclosed findings are valid and reliable. The audiologist agrees about the reliability of these tests. The audiometer was calibrated in January 1995 and is calibrated daily clinically. The audiologic testing was done in our office on [November 8, 1]1995 at 10:20 A.M., at least a day after any noise exposure.”

Accompanying Sataloff's report were audiometric test results dated November 8, 1995.

In a memorandum dated December 7, 1995, an Office medical adviser stated his agreement with Dr. Sataloff that appellant's hearing loss was not employment related.

By decision dated December 28, 1995, the Office rescinded its acceptance of appellant's hearing loss claim on the grounds that the evidence of record established that there was no causal relationship between appellant's hearing loss and his federal employment.

By letter dated January 2, 1996, appellant requested an oral hearing before an Office hearing representative.

On June 17, 1996 a hearing was held before an Office hearing representative at which time appellant testified that he began working at the employing establishment in 1968 and was exposed to heavy equipment noise for approximately eight hours a day. Appellant testified that he left his job in 1970 due to a back injury and had not been exposed to loud noises since that time. He testified that when he reported for the November 1995 examination by Dr. Sataloff, scheduled by the Office, he recalled Dr. Sataloff's name. Appellant testified that he contacted individuals at the office of the attorney who represented him regarding a hearing loss claim in the late 60's and these individuals told him that Dr. Sataloff was a physician employed by his former attorney to conduct hearing loss evaluations. Appellant argued at the hearing that Dr. Sataloff's November 1995 report was not sufficient to justify rescission of his claim and that it was improper for Dr. Sataloff to examine him on behalf of the Office as he had previously been examined by this physician. Appellant also argued that he was not given an opportunity to participate in the selection of Dr. Sataloff whom appellant described as an impartial medical specialist.

At the oral hearing, appellant submitted a February 5, 1996 report from Dr. Thomas F. Kozlek, a Board-certified otolaryngologist, consisting of one paragraph, in which he indicated that appellant had substantial noise exposure from 1968 through 1970 and had no history of familial or hereditary hearing loss. He stated "the only causative factor related to his hearing loss is his noise exposure as a crane mechanic helper from 1968 through 1970. [Appellant] has 90 percent hearing loss." No audiometric test results were included with this report.

By decision dated August 8, 1996, the Office hearing representative affirmed the Office's December 28, 1995 decision.

The Board finds that the Office has met its burden of proof in rescinding its acceptance of appellant's hearing loss claim.

The Board has upheld the Office's authority to reopen a claim at any time on its own motion under section 8128(a) of the Federal Employees' Compensation Act<sup>2</sup> and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.<sup>3</sup> The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.<sup>4</sup> It is well established that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.<sup>5</sup> This holds true where, as here, the Office later decides that it has erroneously accepted a claim for compensation. To justify rescission of

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<sup>2</sup> 5 U.S.C. § 8128(a).

<sup>3</sup> *Eli Jacobs*, 32 ECAB 1147, 1151 (1981).

<sup>4</sup> *Shelby J. Rycroft*, 44 ECAB 795 (1993).

<sup>5</sup> *See Frank J. Mela, Jr.*, 41 ECAB 115, 124 (1989).

acceptance, the Office must establish that its prior acceptance was erroneous based on new or different evidence or through new legal argument and/or rationale.<sup>6</sup>

In this case, the Office accepted that appellant sustained an employment-related hearing loss in an October 27, 1992 decision. Subsequently appellant was examined by Dr. Sataloff, a Board-certified otolaryngologist of professorial rank, who submitted a November 9, 1995 report based upon his review of the medical records, his examination of appellant, and audiological testing. He described the extent of appellant's hearing loss and stated that it was not possible for his hearing loss to have been caused or aggravated by his two-year noise exposure at the employing establishment, ending in 1970. Dr. Sataloff stated that appellant had not been exposed to sufficient hazardous noise to have caused this type or degree of hearing loss. He opined that appellant's hearing loss was probably due to genetic or hereditary progressive nerve deafness even though hearing loss might not be evident in his immediate family. Dr. Sataloff stated that appellant was cooperative in the studies and the audiometric test results were valid and reliable.

The Board finds that the thorough and well-rationalized report of Dr. Sataloff in which he opined that appellant's hearing loss was not employment related constitutes new and different evidence which establishes that the Office's prior acceptance of appellant's hearing loss was erroneous. This report was sufficient to discharge the Office's burden of proof in its December 28, 1995 decision rescinding its acceptance of appellant's hearing loss claim.

After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that he or she had a employment-related disability which continued after termination or modification of compensation benefits.<sup>7</sup>

After the Office's December 28, 1995 decision rescinding its acceptance of appellant's hearing loss claim, appellant submitted additional medical evidence which he felt showed that he was entitled to compensation benefits for a hearing loss. Given that the Board has found that the Office properly relied on the opinion of Dr. Sataloff in rescinding its acceptance of appellant's hearing loss claim, the burden shifts to appellant to establish that he sustained a hearing loss in the performance of duty. The Board has reviewed the additional evidence submitted by appellant and finds that it is not of sufficient probative value to establish that appellant sustained an employment-related hearing loss. The February 5, 1996 report of Dr. Kozlek, a Board-certified otolaryngologist, is not sufficient to overcome the report of Dr. Sataloff and discharge appellant's burden of proof. In his one-paragraph report, Dr. Kozlek stated his opinion that appellant's hearing loss was employment-related based upon the fact that appellant was exposed to noise at the employing establishment from 1968 to 1970. However, he failed to provide a sufficient explanation as to why he felt that appellant's hearing loss was due to the two-year industrial noise exposure and could not have been caused by some other factor. The Board held

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<sup>6</sup> See *Laura H. Hoexter (Nicholas P. Hoexter)*, 44 ECAB 987 (1993).

<sup>7</sup> *Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

in *Adelbert E. Buzzell*<sup>8</sup> that it is not a *per se* rule that noise-induced hearing loss does not progress following cessation of occupational noise exposure, but indicated that such a conclusion must be based on well-rationalized medical opinion. Dr. Kozlek did not provide a well-rationalized medical opinion in his report to establish that appellant's hearing loss subsequent to his leaving the employing establishment in 1970 was employment related. Therefore, this report from Dr. Kozlek is not sufficient to overcome the thorough and well-rationalized report of Dr. Sataloff upon which the Office's rescission of appellant's hearing loss claim was based and to discharge appellant's burden of proof.

Regarding appellant's argument at the oral hearing that he was not allowed the opportunity to participate in the selection of an impartial medical specialist, the Board notes that Dr. Sataloff was not acting in the capacity of an impartial medical specialist. Therefore, appellant was not entitled to participate in the selection process of Dr. Sataloff.<sup>9</sup>

Regarding appellant's allegation that Dr. Sataloff had examined him in the 1960's and it was not proper for him to examine appellant on behalf of the Office, appellant has provided no documentation of his allegation. Therefore, the Board finds that the Office's reliance on Dr. Sataloff's report in rescinding its acceptance of appellant's hearing loss claim was proper.

The decisions of the Office of Workers' Compensation Programs dated August 8, 1996 and December 28, 1995 are affirmed.

Dated, Washington, D.C.  
May 19, 1999

David S. Gerson  
Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>8</sup> 34 ECAB 96 (1992).

<sup>9</sup> *Henry J. Smith, Sr.*, 43 ECAB 524 (1992); *reaff'd on recon.*, 43 ECAB 842 (1992).