U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GARY L. McGEE and TENNESSEE VALLEY AUTHORITY, BROWNS FERRY NUCLEAR PLANT, Decatur, AL

Docket No. 03-1661; Submitted on the Record;
Issued March 4, 2004

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON, MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's compensation claim for loss of hearing on the grounds that his claim was not filed within the applicable time limitation provisions of the Federal Employees' Compensation Act; and (2) whether the Office properly refused to reopen appellant's claim for further reconsideration of the merits of his claim under 5 U.S.C. § 8128(a).

On May 23, 2002 appellant, a former laborer, filed an occupational disease claim (Form CA-2), alleging that he sustained hearing loss due to exposure to noise during his federal employment. Appellant stated that he first became aware of his hearing loss on January 30, 1999. Appellant stated that he was working around all kinds of loud noises at the employing establishment as a laborer when he first noticed that his hearing was not what it used to be in that he would talk loud even in a quiet place. Appellant stated that he first became aware of his hearing loss and related it to factors of his employment on January 30, 1999. On the reverse side of the form, appellant's supervisor indicated that appellant first reported his condition on May 21, 2002 and was last exposed to the conditions alleged to have caused his hearing loss on March 27, 1991.

Accompanying the claim was the employing establishment's history of appellant's employment which noted that appellant worked from September 19, 1989 to June 8, 1990 and July 12, 1990 to March 27, 1991. Also submitted were medical examination records for 1989 and 1990, an employing establishment September 18, 1989 audiogram, the accompanying audiogram results and the employing establishment's May 24, 2002 letter controverting the claim in which the employing establishment noted that appellant had hearing protection throughout his employment, the use of which was mandatory in the areas in which he worked. Additionally, the employing establishment stated:

> "[Appellant] not only had no hearing loss while at [the employing establishment] but there was also no standard threshold shift in hearing to signify evidence of an injury. Therefore, it is clear that no injury occurred to [appellant] and no hearing

loss was identified [to] constitute actual knowledge by the [employing establishment]."

Also submitted was appellant's statement that he worked at the employing establishment from October 1989 to May 1996. In an undated statement, appellant stated that he worked from "May 1996 till now" at Wilson Dam mowing grass and weed eating and using a power pruner. He stated that when laid off from Wilson Dam he worked at the employing establishment.

By decision dated June 5, 2002, the Office denied appellant's claim on the grounds that the evidence of record failed to demonstrate that it was timely filed.

By undated letter to the Office's Branch of Hearings and Review, received on June 19, 2002, appellant stated that he noticed a hearing impairment in 1999 and had not undergone testing since March 19991. He stated that he worked at least 1,000 hours a year every year from 1989 until 2002 and is stilling working at Wilson Dam mowing grass for the employing establishment and stated that "I would like for you to please reconsider after maybe taking another audiogram or other tests you may want to take.

By letter dated June 26, 2002, the Office requested that appellant clearly state whether he wanted a hearing or reconsideration.

By undated letter received by the Office on July 15, 2002, appellant stated that he wanted reconsideration. Appellant reiterated his contention that his hearing had not been tested since 1991.

By decision dated July 23, 2002, the Office denied appellant's request for reconsideration finding that the request was insufficient to warrant review of the prior decision, as he failed to raise substantive legal questions or include new and relevant evidence.

By undated letter received on May 19, 2003, appellant questioned why he was not being compensated for his hearing loss, stating "time has nothing to do with this," and that he had no doubt "that his hearing loss occurred during his employment at the employing establishment, thus; he should be compensated.

By decision dated May 28, 2003, the Office denied appellant's request for reconsideration finding that the request was insufficient to warrant review of the prior decision, as he failed to raise substantive legal questions or include new and relevant evidence.

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

Proceedings under the Act[1] are not adversarial in nature and the Office is not a disinterested arbiter.[2] While appellant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other

[1] 5 U.S.C. §§ 8101-8193.

[2] *Richard Kendall*, 43 ECAB 790, 799 (1992).

government source.[3] It has the obligation to see that justice is done.[4] As part of its adjudicatory function, the Office must make findings of fact.[5] The Board has stated that, once the Office has begun an investigation of a claim, it must pursue the evidence as far as reasonably possible.[6] The Office did not fulfill this obligation in the present case, as it did not resolve the dispute in the factual evidence. The employing establishment provided an employment history for appellant stating that he worked from September 19, 1989 to June 8, 1990 and July 12, 1990 to March 27, 1991 and that he was last exposed to noise on March 27, 1991. Appellant stated that he worked at the employing establishment from October 1989 to May 1996 and at "Wilson Dam from May 1996 till now." Appellant stated that when he was laid off from Wilson Dam mowing grass, weed eating and using a power pruner, he worked at the employing establishment. As the issue in this case is timely filing of the claim, the question of when appellant was last employed by the employing establishment and last exposed to the noise to which he attributes his hearing loss must be fully resolved. Therefore, further development of the factual evidence is necessary. On remand the Office should secure any documents that establish appellant's periods of employment and noise exposure. Following this and such further necessary development, the Office shall issue a *de novo* decision.

Accordingly, the decisions dated May 28, 2003 and July 23 and June 5, 2002 of the Office of Workers' Compensation Programs are set aside and the case is remanded for further action consistent with this decision.[7]

Dated, Washington, DC
March 4, 2004

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[3] *Id; Monroe Fears*, 43 ECAB 608 (1992)*; Robert A. Redmond*, 40 ECAB 796 (1989).

[4] *William J. Cantrell*, 34 ECAB 1223 (1983).

[5] *See generally, Clarence E. Brockman*, 40 ECAB 753, 761 (1989)*; John A. Snowberger*, 34 ECAB 790 (1983).

[6] *Leon C. Collier*, 37 ECAB 378, 379 (1986).

[7] Due to the Board's disposition of the first issue in this case, the second issue is rendered moot.