U. S. DEPARTMENT OF LABOR

# Employees' Compensation Appeals Board

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In the Matter of BERNARD L. MAZURKIEWICZ and DEPARTMENT OF DEFENSE, DMA AEROSPACE CENTER, St. Louis, Mo.

*Docket No. 96-159; Submitted on the Record;*
*Issued March 19, 1998*

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DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT, A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly suspended appellant's entitlement to compensation benefits for his refusal to submit to a medical examination that he was directed to undergo.

This is the third appeal in this case. The facts and circumstances of the case are set forth in the Board's August 15, 1988 decision and are hereby incorporated by reference.[1] In that decision the Board affirmed that appellant had no greater than a six percent binaural hearing loss, for which he received a schedule award.

On January 23, 1995 appellant underwent otologic examination and audiologic evaluation at the office of Dr. Laurence A. Levine, a Board-certified otolaryngologist. The testing audiologist, Mary M. Lewis, noted that testing results indicated bilateral severe to profound sensorineural hearing loss, left worse than right, but that certain inconsistencies throughout the evaluation cast doubt on the absolute reliability. She noted that when tones were switched between ears, specific responses were inconsistent and the right was better than the left, where appellant had previously not responded. Ms. Lewis also noted that appellant gave no response to bone conduction testing, even at a level where the profoundly deaf have vibratory responses. She also noted that speech recognition scores were absolutely remarkable given the degree of pure tone loss manifested previously, and opined that it was very unusual to obtain such high recognition scores. She further noted that with reduction by only five decibels appellant stopped responding completely. Ms. Lewis additionally noted that acoustic reflexes observed were better than pure tone thresholds when one would expect them to be absent, and that appellant manifested behavioral changes with lower decibel tone changes. She opined that the degree of appellant's bilateral sensorineural hearing loss was uncertain because of the above-

[1] Docket No. 90-535 (issued August 7, 1990); Docket No. 88-821 issued (August 15, 1988).

mentioned considerations, and she recommended brainstem evoked response testing to quantify the losses, which was scheduled for February 7, 1994.

Appellant did not attend the scheduled appointment for the brainstem evoked response testing and failed to cancel or to reschedule his appointment.

By decision dated February 22, 1995, the Office suspended appellant's entitlement to benefits under the Act finding that he obstructed a medical examination by poor effort which resulted in invalid test results and by failure to report for a brainstem evoked response examination as requested by the Office. The Office also noted that appellant had failed to attend a previously scheduled otologic evaluation on July 27, 1994, and had been advised that if an employee refused to submit to or obstructs an examination required by the Office his right to compensation benefits under the Federal Employees' Compensation Act shall be suspended until the refusal or obstruction stops.

In a March 1, 1995 report, Dr. Levine noted that appellant claimed occupational exposure to hazardous noise for over 30 years but that there was no supporting documentation to substantiate such exposure. He indicated that audiometric testing revealed severe sensorineural hearing losses bilaterally but noted that there were significant inconsistencies as noted by Ms. Lewis. He noted that brainstem evoked response testing was scheduled and the process and nature of the testing was explained to appellant, but that he failed to keep his testing appointment and failed to call to cancel or reschedule.

Appellant requested an oral hearing on April 6, 1995, and by decision dated April 28, 1995 the Office denied his request finding that it was untimely requested more than 30 days after the February 22, 1995 decision, and that appellant could adequately address the issue by requesting reconsideration and submit evidence showing that he did not obstruct the scheduled examination, and/or by submitting evidence that he rescheduled and underwent the brainstem evoked response testing at his own expense.

Thereafter appellant requested reconsideration and by decision dated July 10, 1995 the Office denied appellant's request for a review of the case on its merits finding that his letter of request neither raised substantive legal questions nor included new and relevant evidence.

Thereafter appellant again requested reconsideration and by decision dated November 3, 1995 the Office denied appellant's request for a review of the case on its merits finding that his letter of request neither raised substantive legal questions nor included new and relevant evidence.

The Board finds that the Office properly suspended appellant's compensation benefits for refusing to submit to a medical examination that he was directed to undergo.

Section 8123(a) of the Act provides:

> "An employee shall submit to examination by a medical officer of the United States, or by a physician designated or approved by the Secretary of Labor, after

the injury and as frequently and at the times and places as may be reasonably required…."

Section 8123(d) provides:

"If an employee refuses to submit to or obstructs an examination, his right to compensation under this subchapter is suspended until the refusal or obstruction stops. Compensation is not payable while a refusal or obstruction continues and the period of refusal or obstruction is deducted from the period for which compensation is payable to the employee."[2]

In the instant case, the Board finds that appellant's inconsistent effort and responses during the January 23, 1995 audiometric testing and his failure to keep the scheduled appointment for the brainstem evoked response testing did constitute a refusal to submit, without good cause, to a medical examination that was reasonably required.[3]

The Board further concludes, in evaluating appellant's arguments and allegations that he did not understand what the brainstem evoked response testing was for and that he was concerned about side effects, did not constitute good cause for his refusal to submit to the requested medical evaluation.

Accordingly, as appellant refused to submit to a medical examination without good cause, the Office properly invoked the penalty provision of 5 U.S.C. § 8123(d). Appellant's right to compensation is suspended until his refusal stops.

Further the Board finds that appellant's request for an oral hearing was properly denied as being untimely made beyond 30 days after the February 22, 1995 decision, and that the Office properly explained that it also considered the matter with respect to the issue involved and advised appellant that he could either request reconsideration and submit evidence that he did not obstruct the medical examination, or that he could choose to undergo the required examination.

Additionally, the Board notes that section 8128(a) does not require the Office to review final decisions of the Office awarding or denying compensation. This section vests the Office with the discretionary authority to determine whether it will review a claim following the issuance of a final decision by the Office.[4] Although it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under 5 U.S.C. § 8128(a),[5] the Office, through regulations, has placed limitations on the exercise of that discretion with respect to a claimant's request for reconsideration. By these regulations, the Office has stated that it will reopen a claimant's case and review the case on its merits whenever the claimant's application

[2] *See Larry B. Guillory*, 45 ECAB 522 (1994); *see also* 20 C.F.R. § 10.407.

[3] *See Dallas E. Mopps*, 44 ECAB 454 (1993).

[4] *Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

[5] *See Charles E. White*, 24 ECAB 85 (1972).

for review meets the specific requirements set forth in sections 10.138(b)(1) and 10.138(b)(2) of Title 20 of the Code of Federal Regulations.

To require the Office to reopen a case for reconsideration, section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides in relevant part that a claimant may obtain review of the merits of his claim by written request to the Office identifying the decision and specific issue(s) within the decision which the claimant wishes the Office to reconsider and the reasons why the decision should be changed and by:

> "(i) Showing that the Office erroneously applied or interpreted a point of law, or
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> "(ii) Advancing a point of law or fact not previously considered by the Office, or
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> "(iii) Submitting relevant and pertinent evidence not previously considered by the Office."[6]

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 paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.[7] Where a claimant fails to submit relevant evidence not previously of record or advance legal contentions not previously considered, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128 of the Act.[8]

Evidence which does not address the particular issue involved,[9] or evidence which is repetitive or cumulative of that already in the record,[10] does not constitute a basis for reopening a case.

As appellant submitted neither legal argument nor new and relevant evidence, the Board finds that the Office did not abuse its discretion in either of its nonmerit decisions in denying appellant's requests for reconsideration under 5 U.S.C. § 8128.

[6] 20 C.F.R. § 10.138(b)(1).

[7] 20 C.F.R. § 10.138(b)(2).

[8] *Joseph W. Baxter*, 36 ECAB 228 (1984).

[9] *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

[10] *Eugene F. Butler*, 36 ECAB 393 (1984).

Accordingly, the decisions of the Office of Workers' Compensation Programs dated November 3, July 10, April 28 and February 22, 1995 are hereby affirmed.

Dated, Washington, D.C.
March 19, 1998

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member