

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DENNIS M. DARENSBOURG and DEPARTMENT OF DEFENSE,  
NAS NORTH ISLAND SECURITY DEPARTMENT, San Diego, Calif.

*Docket No. 97-2167; Submitted on the Record;  
Issued April 27, 1999*

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DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,  
A. PETER KANJORSKI

The issues are: (1) whether appellant sustained a hearing or brain loss causally related to factors of his employment; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing.

On May 20, 1996 appellant, then a 54-year-old police officer, filed a notice of occupational disease, alleging that he suffered a "hearing/brain loss" which was aggravated by his working conditions. Appellant stated that he became aware of the relationship between his condition and his employment during his annual physical.

On September 11, 1992 a physician signing illegibly indicated that appellant was experiencing a hearing loss in his right ear.

On October 21, 1992 Dr. Richard W. Alexander, appellant's treating physician and an otolaryngologist, indicated that appellant suffered a mixed hearing loss. An audiogram was performed on that same date.

On January 14, 1993 Dr. Alexander indicated that appellant was scheduled for ear surgery.

On March 6, 1993 Dr. Alexander indicated that appellant had a large conductive hearing loss and diagnosed cholesteatoma, right ear.

On March 25, 1993 Dr. Alexander diagnosed cholesteatoma, right ear and he performed a right mastoid typanoplasty, first stage. He noted that appellant had a long-standing conductive hearing loss at the right ear.

On April 2, 13 and 22, 1993 Dr. Alexander examined appellant. On April 13, 1993 Dr. Alexander indicated that appellant was disabled from March 25 through April 14, 1993.

On May 21, 1993 Dr. Alexander indicated that appellant's graft was well healed.

On August 17, 1993 Dr. Alexander examined appellant in preparation for his surgery.

On September 23, 1993 Dr. Alexander diagnosed post right mastoid tympanoplasty for cholesteatoma. He noted his earlier ear surgery on March 25, 1993. Dr. Alexander also reviewed an audiogram on September 23, 1993.

On October 21, 1993 Dr. Robert A. Cueva, a Board-certified otolaryngologist, diagnosed status post right intact canal wall mastoidectomy with tympanoplasty for cholesteatoma. He performed a revision right tympanoplasty with mastoidectomy and a resection of brain hernia with abdominal fat graft. Following this procedure, Dr. Cueva also diagnosed residual cholesteatoma, extensive typanosclerosis of the middle ear, blue line of posterior and lateral semicircular canals and temporal lobe brain hernia.

On October 29, 1993 Dr. Alexander stated that appellant was no longer experiencing vertigo and that he was healing well.

On November 10, 1993 Dr. Cueva indicated that appellant was admitted to the hospital on October 21, 1993 and underwent a revision right tympanoplasty, mastoidectomy, with resection of a brain hernia and abdominal fat graft. Dr. Cueva stated that appellant tolerated the procedure well in spite of having a temporal lobe hernia and semicircular canal fistulae of the posterior and lateral semicircular canals. He noted that appellant's initial hospital course was significant for vertigo related to the cholesteatoma fistulae of his semicircular canals, but that this resided three days after surgery.

On November 10, 1993 Dr. Alexander indicated that appellant remained unsteady and extended his disability until December 15, 1993.

On November 16, 1993 Dr. Alexander diagnosed post right mastoid tympanoplasty for cholesteatoma. Dr. Alexander noted appellant's earlier surgery for a canal mastoid tympanoplasty on March 25, 1993. He stated that a second look procedure, right ear, for possible recurrent cholesteatoma and possible ossicular reconstruction was warranted.

On January 4, 1994 Dr. Alexander indicated that appellant was disabled from work from October 31, 1993 through January 9, 1994 due to postoperative disequilibrium. Dr. Alexander also reviewed an audiogram on January 4, 1994.

On August 25, 1995 Dr. Alexander examined appellant and discussed hearing aids. Dr. Alexander also reviewed an audiogram performed on the same date.

On July 16, 1996 Drs. Alexander and Cueva recorded that appellant provided a history that "illness occurred over a period of years during enlistment in military possibly, but was aggravated since employment with [the employing establishment] which required surgery and loss of hearing (right ear) and percentage of the brain." The physicians diagnosed hearing loss right ear.

In a separate statement, appellant also indicated that illness occurred over a period of years during enlistment in military possibly, but was aggravated since employment with the employing establishment which required surgery and loss of hearing (right ear) and percentage of the brain.

On September 19, 1996 the Office requested additional evidence from appellant in order to establish his claim. The Office requested a complete employment and noise exposure history. It requested information concerning whether appellant was still exposed to noise at his employment and how appellant related his hearing loss to his work exposure. The Office also asked appellant to explain how his hearing loss or other condition was aggravated by his employment. Finally, the Office requested additional medical opinion evidence. Appellant was given 30 days to respond.

By phone call made on November 1, 1996, appellant requested that the Office allow him until November 18, 1996 to supply additional information.

By decision dated January 23, 1997, the Office rejected appellant's claim because fact of injury had not been established between appellant's hearing/brain loss condition and factors of his employment. In an accompanying memorandum, the Office noted that appellant failed to submit the requested factual information to establish the employment factors which he believed contributed to his claimed condition. The Office further stated that there was no medical evidence submitted to establish that his condition is related to claimed employment factors.

By letter posted March 11, 1997, appellant requested an oral hearing.

By decision dated April 15, 1997, the Office exercised its discretion and denied appellant's request for a hearing because it was not made within 30 days of the January 23, 1997 decision, denying benefits.

The Board finds that appellant failed to establish that he sustained a hearing or brain loss causally related to factors of his employment.

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition, for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.<sup>1</sup> The medical evidence required to establish a causal relationship, generally, is rationalized medical opinion

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<sup>1</sup> See *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

evidence.<sup>2</sup> Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant,<sup>3</sup> must be one of reasonable medical certainty,<sup>4</sup> and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>5</sup>

In this case, appellant failed to submit a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition. In his notice of occupational disease, appellant only indicated that he suffered a "hearing/brain loss" which was aggravated by his working conditions and that he became aware of the relationship between his condition during his annual physical. This statement fails to describe the employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition. In an undated statement, appellant indicated that illness occurred over a period of years during enlistment in military possibly, but was aggravated since employment with the employing establishment which required surgery and loss of hearing (right ear) and percentage of the brain. Appellant's statement was noted in a July 16, 1996 report from Drs. Alexander and Cueva. Nevertheless, the statement fails to address the specific employment factors which resulted in appellant's alleged condition. On September 19, 1996 the Office advised appellant of the deficiency of his claim and provided appellant with an opportunity to submit additional evidence regarding this issue. Although appellant indicated that he would submit additional evidence, he failed to do so. Accordingly, because appellant failed to submit a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition, the Office properly denied his claim.<sup>6</sup>

The Board also finds that the Office properly denied appellant's request for a hearing under section 8124 of the Federal Employees' Compensation Act.

Section 8124(b)(1) of the Act, concerning a claimant's entitlement to a hearing before an Office representative, provides in pertinent part: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."<sup>7</sup> As section 8124(b)(1) is unequivocal in setting

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<sup>2</sup> The Board held that, in certain cases where the causal connection is obvious, expert testimony may not be necessary; see *Naomi A. Lilly*, 10 ECAB 560, 572-73 (1959). The instant case, however, is not one of obvious casual connection.

<sup>3</sup> *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

<sup>4</sup> See *Morris Scanlon*, 11 ECAB 384, 385 (1960).

<sup>5</sup> See *James D. Carter*, 43 ECAB 113 (1991); *George A. Ross*, 43 ECAB 346 (1991); *William E. Enright*, 31 ECAB 426, 430 (1980).

<sup>6</sup> See *Victor J. Woodhams*, *supra* note 1.

<sup>7</sup> 5 U.S.C. § 8124(b)(1).

forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.<sup>8</sup>

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.<sup>9</sup> Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act, which provided the right to a hearing,<sup>10</sup> when the request is made after the 30-day period for requesting a hearing,<sup>11</sup> and when the request is for a second hearing on the same issue.<sup>12</sup>

In the present case, appellant's hearing request was made more than 30 days after the date of issuance of the Office's prior decision dated January 23, 1997 and, therefore, appellant was not entitled to a hearing as a matter of right. Appellant requested a hearing in a letter postmarked March 11, 1997. Hence, the Office correctly stated that appellant was not entitled to a hearing as a matter of right because the request was not made within 30 days of the Office's January 27, 1997 decision.

While the Office also has the discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right, the Office in its April 15, 1997 decision, properly exercised its discretion by stating that it considered the matter in relation to the issue involved and had denied appellant's hearing request on the basis that the case could be resolved by submitting additional evidence to establish that an injury was sustained as alleged. The Board has held that as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.<sup>13</sup> In the present case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's hearing request which could be found to be an abuse of discretion. For these reasons, the Office properly denied appellant's request for a hearing under section 8124 of the Act.

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<sup>8</sup> *Ella M. Garner*, 36 ECAB 238, 241-42 (1984).

<sup>9</sup> *Henry Moreno*, 39 ECAB 475, 482 (1988).

<sup>10</sup> *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

<sup>11</sup> *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

<sup>12</sup> *John S. Henderson*, 34 ECAB 216, 219 (1982).

<sup>13</sup> *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

The decisions of the Office of Workers' Compensation Programs dated April 15 and January 23, 1997 are affirmed.

Dated, Washington, D.C.  
April 27, 1999

Michael J. Walsh  
Chairman

George E. Rivers  
Member

A. Peter Kanjorski  
Alternate Member