U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHARLES F. WESTMORELAND and DEPARTMENT OF THE NAVY, NAVAL AVIATION DEPOT, Norfolk, VA

Docket No. 00-377; Submitted on the Record;
Issued December 6, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
PRISCILLA ANNE SCHWAB

The issue is whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

The Board has duly reviewed the case record and finds that the Office acted within its discretion in refusing to reopen appellant's case for further consideration of the merits of his claim.

The Board's jurisdiction to consider and decide appeals from a final decision of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.[1] As appellant filed the appeal with the Board on October 4, 1999, the only decision before the Board is the July 15, 1999 decision denying appellant's request for reconsideration.

To require the Office to reopen a case for merit review under section 8128(a) of Federal Employees' Compensation Act, the Office's regulations provide that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[2] A timely request for reconsideration may be granted if the Office determines that the employee has

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[1] *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

[2] Section 10.606(b)(2)(i-iii).

presented evidence and/or arguments that meet at least one of the standards described in section 10.606(b)(2).[3] If reconsideration is granted, the case is reopened and reviewed on the merits.[4]

In this case, appellant, then a 60-year-old quality assurance specialist, filed a claim on November 7, 1995 for an occupational hearing loss in the right ear and subsequently extended the claim to include an occupational hearing loss in the left ear.

In a report dated December 6, 1996, a referral physician, Dr. Mark Frey, a Board-certified otolaryngologist and Office referral physician, stated that appellant was diagnosed with Meniere's disease in the left ear in 1986 and had three shunt operations. Appellant had a severe nerve hearing loss in the right ear in 1976 at the time he began his employment with the employing establishment. Dr. Frey stated that Meniere's disease most likely caused appellant's severe hearing loss in his left ear because of the flat nature on his audiogram which was not consistent with noise exposure and the sound level at his employment which did not appear to be "intense enough." In a report dated January 23, 1997, the district medical adviser agreed with Dr. Frey.

By decision dated February 27, 1997, the Office denied the claim, stating that the causal relationship between the medical condition and employment factors had not been established.

By letter dated December 10, 1997, appellant requested reconsideration of the Office's decision and submitted the September 22, 1997 report of Dr. George H. Williams, a Board-certified otolaryngologist. Based on appellant's medical records, he opined that appellant had a sensorineural hearing loss with a typical pattern of acoustic trauma in his left ear and a profound sensorineural hearing loss in the right ear. Dr. Williams stated that acoustic trauma or noise insult damaged appellant's left ear and the damaged inner ear was then susceptible to Meniere's disease which later developed. He opined that Meniere's disease secondary to acoustic trauma was difficult to treat and could progress to profound sensorineural hearing loss.

To resolve the conflict between Drs. Frey's and Williams' opinion, the Office referred appellant to the impartial medical specialist, Dr. Charles B. Beasley, also a Board-certified otolaryngologist. In his report dated April 14, 1998, Dr. Beasley opined that appellant's hearing loss was not related to his federal employment because he had a severe hearing loss in the right ear prior to his employment in 1976 and Meniere's disease "most likely" caused the progressive hearing loss in the left ear because the noise levels and ear protection appellant wore were not likely to result in a hearing loss.

By decision dated May 12, 1998, the Office denied appellant's request for modification.

By letter dated April 20, 1999, appellant requested reconsideration and submitted additional evidence including Dr. Williams' September 22, 1997 report, a copy of the Office's May 12, 1998 decision, a memorandum dated December 15, 1998 and related documents from the employing establishment at Cherry Point, North Carolina describing changes to hearing

[3] Section 10.608(a).

[4] *Id.*

protection use requirements and results of a noise dosimetry. He also submitted a copy of his statement describing his employment history and a copy of the February 7, 1995 notice of scheduled physical examination.

Dr. Williams' September 22, 1997 report and appellant's statement describing his employment history were previously submitted in the record. The February 7, 1995 notice is not relevant to whether appellant's hearing loss is work related. Further, the December 1998 documents describing the change in hearing protection use requirements and dosimetry results are not relevant to the noise level at appellant's place of work. The evidence appellant submitted therefore does not constitute relevant and pertinent new evidence not previously considered by the Office which could establish that his hearing loss was work related.

Appellant has not established that the Office abused its discretion in its July 15, 1999 decision by denying his request for a review on the merits of its May 12, 1998 decision because he failed to show that the Office erroneously applied or interpreted a specific point of law, to advance a relevant legal argument not previously considered by the Office or to submit relevant and pertinent new evidence not previously considered by the Office.

The decision of the Office of Workers' Compensation Programs dated July 15, 1999 is hereby affirmed.

Dated, Washington, DC
December 6, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Priscilla Anne Schwab
Alternate Member