United States Department of Labor
Employees' Compensation Appeals Board

BOBBY R. SADLER, Appellant	)	
and	)	**Docket No. 05-1327**
	)	**Issued: September 23, 2005**
DEPARTMENT OF THE NAVY, NAVY DARE BOMBING RANGE, Stumpy Point, NC, Employer	)	

Appearances:
Lila S. Brinn, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge

JURISDICTION

On June 6, 2005 appellant filed a timely appeal of an Office of Workers' Compensation Programs' decision dated September 14, 2004 denying his hearing loss claim and a nonmerit January 14, 2005 decision denying his reconsideration request. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the hearing loss claim and the nonmerit issue.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he sustained an injury in the performance of duty; 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).

FACTUAL HISTORY

On July 1, 2004 appellant, a 67-year-old electronic mechanic, filed an occupational disease claim (Form CA-2), alleging that he sustained a hearing loss due to exposure to jet noise

during his federal employment. Appellant indicated that he first became aware of his hearing loss on September 25, 1987 and that he subsequently realized on July 20, 2001 that his hearing loss was caused or aggravated by his employment. He did not stop work. Appellant stated that he could hear but could not understand the words and alleged that his hearing problem had gotten worse over the years. On the reverse side of the form, his supervisor indicated that appellant was exposed to the conditions alleged to have caused his hearing loss "every workday." Appellant's claim was accompanied by a series of audiograms administered by the employing establishment during the period 1987 through 1996, 2001 and 2004. Earplugs were noted to have been issued to appellant in 1987.

In a June 3, 2004 medical and audio report, an employing establishment audiologist noted that appellant had a high frequency hearing loss prior to the mid-1980s, that he worked on a bombing range with jet noise greater than 85 decibels which was chronic or on a continuous basis, and that there was no high level of environmental noise at work or at home. Appellant was diagnosed with a sensorineural hearing loss consistent with noise exposure and presbycusis and restricted from working in an area of noise greater than 84 decibels without hearing protection devices. On June 2, 2004 the employing establishment informed appellant that the hearing test indicated a significant threshold shift. It further noted that he had been provided with properly fitted hearing protection and refresher training regarding the Hearing Conservation Program.

By letter dated July 20, 2004, the Office requested additional factual information from both appellant and the employing establishment. Appellant was requested, *inter alia,* to provide information regarding his employment history and nonoccupational exposure to noise. The Office also requested that appellant provide medical documentation pertaining to any prior treatment he may have received for ear or hearing problems. In response, appellant and the employing establishment submitted his current job description for electronics mechanic and a partial copy of a job description which noted that appellant was an electronics mechanic on October 21, 1985. Also submitted was an April 29, 2004 letter from William M. Tucker, a hearing aid specialist, which noted that appellant worked in a room tracking several different aircrafts and had a hearing loss typical of exposure to noise. The employing establishment, however, did not respond to the Office's request for information.

By decision dated September 14, 2004, the Office denied appellant's claim based on his failure to establish fact of injury. The Office specifically noted that appellant failed to provide the requested factual information regarding his employment history and noise exposure and there was no medical evidence to provide a diagnosis which could be connected to the claimed event(s).

In an October 4, 2004 letter, appellant requested reconsideration of the Office's September 14, 2004 decision. He stated that he was around jet noise eight hours a day and that it had affected his hearing. His request was accompanied by several duplicate audiograms and a copy of an October 31, 2003 sound pressure level summary sheet.

By decision dated January 14, 2005, the Office denied appellant's request for reconsideration finding that the evidence was insufficient to warrant review of the prior decision as it was either cumulative or irrelevant to the pertinent issue of fact of injury, "*i.e.,* specific

information concerning particular noise exposure during and prior to [appellant's] federal employment."

LEGAL PRECEDENT -- ISSUE 1

When an employee claims that he sustained an injury in the performance of duty he must submit sufficient evidence to establish that he experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged. He must also establish that such event, incident or exposure caused an injury.[1] Once an employee establishes that he sustained an injury in the performance of duty, he has the burden of proof to establish that any subsequent medical condition or disability for work, for which he claims compensation is causally related to the accepted injury.[2]

ANALYSIS -- ISSUE 1

The Office indicated in its March 24, 2004 decision that the evidence of record failed to support that the claimed event occurred in the manner alleged. The factual evidence, however, establishes appellant's occupational exposure to noise while performing his duties as an electronics mechanic.

The record indicates that appellant worked as an electronics mechanic from approximately 1985 until the present at a test or bombing range. Additionally, the employing establishment's audiologist reported that appellant worked on a bombing range with jet noise greater than 85 decibels which was chronic or on a continuous basis. The audiologist also reported that appellant participated in the employing establishment's hearing conservation program, which required him to wear hearing protection at work.[3] Lastly, the audiologist noted that, based on the June 3, 2004 audiogram, appellant showed a high frequency hearing loss consistent with noise exposure and presbycusis.

While the employing establishment's audiologist is not considered a "physician" under the Federal Employees' Compensation Act,[4] this limitation imposed by the Act does not render him incapable of providing factual information regarding appellant's occupational exposure.[5] The employing establishment does not appear to dispute the accuracy of the information provided by its audiologist or dispute appellant's work duties from October 1985 onward. Furthermore, to the extent that noise exposure data is the type of information normally obtained

[1] *See generally John J. Carlone*, 41 ECAB 354 (1989); *see also* 5 U.S.C. § 8101(5) ("injury" defined); 20 C.F.R. § 10.5(q) and (ee) (1999) ("occupational disease or illness" and "traumatic injury" defined). *See Victor J. Woodhams*, 41 ECAB 345 (1989) regarding a claimant's burden of proof in an occupational disease claim.

[2] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[3] The audiologist in the 1987 audiogram reported that earplugs had been issued.

[4] Audiologist is not included among the list of healthcare professionals recognized as a "physician" under the Act. 5 U.S.C. § 8101(2).

[5] *Leon Thomas*, 52 ECAB 202 (2001).

from the employing establishment or other government source, the Office shares in the responsibility in the development of such evidence.[6]

Although appellant may not have provided specific responses to the Office's July 20, 2004 request for additional information, most of the requested information can be gleaned from the record. In addition to the information provided by the employing establishment's audiologist, appellant's Form CA-2 includes information regarding the fact of his continued exposure to employment conditions allegedly responsible for his claimed hearing loss.

Based on the evidence of record, the Board finds that appellant was exposed to occupational noise levels of approximately 84 to 85 decibels for a period of approximately 19 years. The question remains as to whether appellant's occupational exposure caused an injury. In the instant case, while the employing establishment's audiologist diagnosed a sensorineural hearing loss consistent with noise exposure and presbycusis, the record does not include a physician's opinion diagnosing a hearing loss.

Proceedings under the Act are not adversarial in nature, nor is the Office a disinterested arbiter.[7] While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.[8]

On remand, the Office should refer appellant, the case record and a statement of accepted facts to an appropriate medical specialist for an evaluation and a rationalized medical opinion on whether appellant sustained a hearing loss causally related to the accepted employment exposure. After such development of the case record as the Office deems necessary, a *de novo* decision shall be issued.

CONCLUSION

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

[6] *See Henry Ross, Jr.*, 39 ECAB 373, 377 (1988).

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

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

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs decisions dated January 14, 2005 and September 14, 2004 are set aside and the case is remanded for further action consistent with this decision.[9]

Issued: September 23, 2005
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

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