United States Department of Labor
Employees' Compensation Appeals Board

F.R., Appellant	)	
and	)	**Docket No. 06-1185**
	)	**Issued: October 4, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Oakland, CA, Employer	)	

Appearances:
F.R., pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 17, 2006 appellant filed a timely appeal from the January 23, 2006 merit decision of the Office of Workers' Compensation Programs, which denied compensation for the hearing loss in his left ear. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this decision.

ISSUE

The issue is whether the Office has met its burden of proof to rescind acceptance of appellant's claim for the condition of noise-induced sensorineural hearing loss, left side.

FACTUAL HISTORY

On November 24, 1999 appellant, then a 45-year-old maintenance operations support clerk, filed a claim alleging that the loss of hearing and constant ringing in his left ear was a result of his federal employment: "I answer the telephone, which rings constantly. A loud high pitch alarm has been attached to my telephone behind my head causing a loud shrill noise and

constant ringing in my left ear causing a loss of hearing to me."[1] Appellant alleged that this alarm was installed on or about November 19, 1999. He was relocated to a quieter environment on November 24, 1999.

Appellant saw his physician, Dr. Mark S. Schwartz, Board-certified in emergency and internal medicine, on November 24, 1999. Dr. Schwartz noted that appellant was subjected to a very loud, high-pitched shrill noise while at his workstation and experienced a sudden onset of tinnitus and decreased hearing in his left ear. He diagnosed "acute hearing loss as secondary to loud sound exposure." Dr. Schwartz released appellant to return to work that date with a restriction against exposure to loud, high-pitched noises until December 24, 1999.

The Office referred appellant, together with the case record and a statement of accepted facts, to Dr. Adnan J. Hadeed, a Board-certified otolaryngologist, for examination and a second opinion. On March 30, 2000 Dr. Hadeed reported appellant's history and complaints and his findings on examination and testing. He diagnosed mild high-frequency sensorineural hearing loss on the left, etiology unknown, and intermittent tinnitus on the left. Dr. Hadeed concluded that the causation could not be determined as possible industrial noise exposure/acoustic trauma. He reported that a February 28, 2000 magnetic resonance imaging (MRI) scan of the brain revealed normal findings. Dr. Hadeed added that appellant had moderate sensorineural hearing loss, noise induced, left side, secondary to acoustic trauma.

Dr. David N. Schindler, a Board-certified otolaryngologist and Office medical consultant, reported on May 9, 2000 that appellant's condition was not related to his federal employment:

> "After reviewing the records, I submit that the condition found in the examination of March 6, 2000, was not aggravated by the conditions of federal employment. The diagnosis is flat to high frequency left-sided neurosensory hearing loss, not consistent with hearing loss of noise exposure. This is more consistent with inner ear membrane bleed or rupture, possibly Meniere's Syndrome or endolymphatic hydrops."

In a decision dated March 25, 2002, the Office denied appellant's claim. On March 29, 2001 an Office hearing representative set aside the denial and remanded the case for review of additional evidence and a supplemental opinion from Dr. Hadeed. The hearing representative noted that the employing establishment purchased and installed telephone ringers and that appellant and his coworkers were subsequently exposed to loud noise from these ringers. Noise-level tests on December 1, 1999 confirmed decibel levels well over 85. The employing establishment took appropriate steps to alleviate the employees' discomfort. This evidence, the hearing representative found, provided the factual basis for a medical opinion on causal relationship.

[1] Two years earlier, on August 18, 1997, appellant filed a similar claim, alleging that the loss of hearing and ringing in his ears was a result of his prolonged exposure to high-decibel noise created by a jitney around his confined work area. In a decision dated March 27, 1998, the Office denied this claim on the grounds that the evidence did not establish exposure to hazardous levels of noise or that a noise-induced hearing loss existed. OWCP File No. 13-1142072.

In a supplemental report dated September 16, 2001, Dr. Hadeed reviewed additional evidence and addressed the issue of causal relationship:

> "Based on the additional records reviewed, as well as the audiometric findings and the prior audiometric findings performed in my office, although the auto acoustic emission test was not provided, I have reached the conclusion that the patient's diagnosis is: moderate sensorineural hearing loss, left-sided, noise-induced acoustic trauma.
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> "In my opinion, the diagnosed condition is related to the factors of the claimant's federal employment, wherein he was exposed to occupational noise levels from 1985 though 1997 and a noise survey obtained on December 1999 confirmed an exposure to noise that measured from 92.5 to 98 decibels. Also, there are no other causes identified that would cause or contribute to the claimant's hearing loss."

On September 21, 2001 the Office advised appellant that it had accepted his claim for the condition of noise-induced sensorineural hearing loss, left side.

On November 12, 2001, however, Dr. Schindler disagreed with Dr. Hadeed's opinion: "After reviewing the records, I submit that the condition [Dr. Hadeed] found in the examination of February 7, 2000, was not *aggravated* by the conditions of [f]ederal [e]mployment. The diagnosis is fluctuating high frequency neurosensory hearing loss, most consistent with endolymphatic hydrops (cochlear hydrops)." (Emphasis in the original.)

The Office referred appellant, together with the case record and a statement of accepted facts, to Dr. Andrew W. Moyce, a Board-certified otolaryngologist, for further examination and opinion. On February 21, 2002 Dr. Moyce related appellant's history of injury, complaints and symptoms. He described his findings on physical examination and the results of audiometric testing, noting that 85 percent of the hearing loss in appellant's left ear was attributable to factors other than natural aging. After reviewing appellant's records, Dr. Moyce diagnosed probable Meniere's disease, left ear:

> "[Appellant] demonstrates a hearing loss in the left ear, which varies somewhat from test to test. Whether this represents a fluctuating hearing loss or problems with test accuracy is not clear. He also gave me a significant history of balance disturbance, with episodes of room-spinning vertigo associated with nausea and occasional vomiting. A fluctuating hearing loss, with a vertigo history and normal MRI [scan] is characteristic of Meniere's disease. Meniere's is a condition of fluctuating pressure in the fluid of the inner ear of unknown cause. While a Meniere's-damaged ear may be more sensitive to loud noises, there is no causal relationship between Meniere's and hazardous noise.
>
> "Noise[-]induced hearing loss is usually bilateral and symmetrical. There is a relationship between the intensity of damaging noise and the time of exposure required to produce damage. While a single explosion, for example, can damage an ear in a fraction of second, decibel levels documented in the noise survey would require hours and possibly weeks of exposure to cause damage. The

pattern of hearing loss seen on audiogram in noise cases is usually that of high frequency loss to both ears."

Dr. Moyce continued:

"[Appellant] demonstrates symptoms and findings consistent with a chronic condition in the left ear, probably Meniere's disease. Though this condition could render the ear sensitive to loud noises such as that described in the incident of November 1999, there is no causative relationship between the noisy incident and his present symptoms. I recommend denial of the claim of industrial injury and referral to his private physician for diagnosis and treatment of the inner ear condition.

"There is no work disability to preclude him from working at his normal employment as a clerk."

In a decision dated March 25, 2002, the Office found that the weight of the medical evidence rested with Dr. Moyce and established that appellant's hearing loss was not causally related to his federal employment but rather to a chronic medical condition unrelated to hazardous noise.

In a decision dated January 23, 2006, an Office hearing representative affirmed the denial of benefits, finding that Dr. Moyce's opinion negating causal relationship was the weight of the medical evidence.

LEGAL PRECEDENT

The Board has upheld the Office's authority to reopen a claim at any time on its own motion under section 8128(a) of the Federal Employees' Compensation Act and, where supported by the evidence, to set aside or modify a prior decision and issue a new decision.[2] The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can be set aside only in the manner provided by the compensation statute.[3]

It is well established that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. This holds true where, as here, the Office later decides that it has erroneously accepted a claim for compensation.[4] In establishing that its prior acceptance was erroneous, the Office is required to provide a clear explanation of its rationale for rescission.[5]

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[2] *Eli Jacobs*, 32 ECAB 1147 (1981); *see* 5 U.S.C. § 8128(a).

[3] *Doris J. Wright*, 49 ECAB 230 (1997); *Shelby J. Rycroft*, 44 ECAB 795 (1993).

[4] *See* 20 C.F.R. § 10.610 (1999).

[5] *James C. Bury* (Docket No. 03-596, issued April 24, 2003).

ANALYSIS

Following its acceptance of appellant's claim, the Office referred appellant to Dr. Moyce, a Board-certified otolaryngologist. The Office provided Dr. Moyce with appellant's case record and a statement of accepted facts so that he could base his opinion on a proper factual and medical background. In his February 21, 2002 report, Dr. Moyce diagnosed probable Meniere's disease, left ear, and provided a sound, well-reasoned opinion on the issue of causal relationship. He explained that a fluctuating hearing loss, together with a significant history of balance disturbance, episodes of room-spinning vertigo associated with nausea and occasional vomiting, and a normal MRI scan, was characteristic of Meniere's disease. He then explained the nature of Meniere's disease, how it may make an ear more sensitive to noise but has no causal relationship to hazardous noise. Dr. Moyce went on to explain that noise-induced hearing loss is usually bilateral and symmetrical, something not shown on appellant's audiometric tests. Further, he noted that the noise levels documented in the December 1999 noise survey would require hours and possibly weeks of exposure to cause damage. Dr. Moyce concluded that there was no causal relationship between the accepted occupational exposure and appellant's present symptoms.

The Board finds that the opinion given by Dr. Moyce is the most probative medical evidence in this case on whether appellant sustained an injury in the performance of duty as a result of his accepted exposure to noise from November 19 to 24, 1999. Further, the Board finds that this evidence is sufficiently convincing that it discharges the Office's burden of proof to justify rescinding its acceptance of appellant's claim.

There is some evidence to the contrary. On November 24, 1999 appellant's physician, Dr. Schwartz, related that appellant experienced a "sudden onset" of tinnitus and decreased hearing in his left ear. He diagnosed "acute" hearing loss secondary to loud sound exposure. But the evidence shows that appellant long complained of hearing loss and ringing in his ears. Indeed, he filed a claim for compensation on August 18, 1997 alleging loss of hearing and ringing in his ears as a result of prolonged exposure to high-decibel noise at work. This evidence suggests that appellant did not relate a complete and accurate history to Dr. Schwartz. Further, Dr. Schwartz did not explain why he believed that appellant's hearing loss was secondary to loud noise, other than because appellant related such a history, and Dr. Schwartz is not a specialist in otolaryngology. For these reasons, the Board finds that his opinion is of little or no probative value and is insufficient to create a conflict with the opinion given by Dr. Moyce.[6]

The only other opinion supporting an employment-related hearing loss is the opinion given by Dr. Hadeed, a Board-certified otolaryngologist and Office referral physician, who also had appellant's record and a statement of accepted facts from which to operate. On September 16, 2001 he unequivocally reported that the moderate sensorineural hearing loss in appellant's left ear was related to federal employment. However, Dr. Hadeed made no attempt to explain whether both the intensity and duration of the accepted exposure were sufficient to cause damage to appellant's hearing and he did not explain how the accepted exposure to noise caused an asymmetrical hearing loss. Moreover, he failed to address the possibility of Meniere's disease. Dr. Schindler, the Board-certified otolaryngologist and Office medical consultant, had earlier reported that appellant's condition was more consistent with inner ear bleed or rupture,

[6] Appellant rightly argues on appeal that 5 U.S.C. § 8123(a) has no bearing on this case.

possibly Meniere's syndrome. Dr. Hadeed chose not to address the subject. For these reasons, the Board finds that the opinion given by Dr. Hadeed is of diminished probative value. It is not as convincing as the reasoned opinion provided by Dr. Moyce.

As the weight of the medical evidence supports that appellant's left ear condition is not causally related to his accepted noise exposure from November 19 to 24, 1999, the Board will affirm the Office's January 23, 2006 decision denying benefits.

CONCLUSION

The Board finds that the Office has met its burden of proof to rescind acceptance of appellant's claim. The weight of the medical evidence, represented by the opinion of Dr. Moyce, establishes no causal relationship between appellant's left ear condition and his accepted exposure to noise.

ORDER

IT IS HEREBY ORDERED THAT the January 23, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 4, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board