United States Department of Labor
Employees' Compensation Appeals Board

R.L., Appellant	)	
and	)	**Docket No. 06-1912**
	)	**Issued: January 12, 2007**
DEPARTMENT OF THE NAVY, PUGET SOUND NAVAL SHIPYARD, Bremerton, WA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 14, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' June 16, 2006 decision denying his request for an oral hearing as untimely filed and a February 27, 2006 merit decision denying his claim for hearing loss. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has established that he sustained hearing loss in the performance of duty causally related to factors of his employment; and (2) whether the Office properly denied a request for an oral hearing pursuant to 5 U.S.C. § 8124.

FACTUAL HISTORY

On May 23, 2005 appellant, a 61-year-old pipe fitter, filed an occupational disease claim alleging that his hearing loss was caused or aggravated by his federal employment. He stated

that he first became aware of his hearing loss in January 1980 and failed his hearing test in 2001. Appellant retired in March 2006.

In a letter dated September 1, 2005, the Office asked appellant to provide additional factual and medical information, including medical reports and audiograms for any ear or hearing problems.

In support of his claim, appellant submitted evidence pertaining to his work history and noise exposure, his service card, a standard Form 50, a copy of a pipe fitter's position description and noise exposure data. Medical records and audiograms from 1975 to 2005 were also received. In an August 15, 2005 report, Dr. Gerald G. Randolph, a Board-certified otolaryngologist, noted appellant's occupational history, performed an audiogram, diagnosed bilateral sensorineural hearing loss and advised that appellant was a candidate for bilateral hearing aids.[1] Although the audiometric result of 4,000 cycles per second in the left ear suggested hearing loss aggravated by past noise exposure, he stated that the audiogram did not reflect an audiometric configuration compatible with hearing loss due to past noise exposure. Dr. Randolph explained that the relatively flat nature of appellant's hearing loss with the involvement of the lower frequencies suggested more than one cause of appellant's hearing loss, which he did not identify. A copy of the July 26, 2005 audiogram was received together with a request for hearing aids.

The Office referred appellant, his medical record, a list of questions and a statement of accepted facts, to Dr. Richard W. Seaman, a Board-certified otolaryngologist, for a second opinion evaluation. In a February 13, 2006 report, Dr. Seaman diagnosed bilateral sensorineural hearing loss and bilateral tinnitus, right side greater than the left. He opined that appellant's hearing loss was not due to his work exposure. Dr. Seaman explained that appellant's hearing loss pattern was not compatible with damage due to noise exposure and that appellant showed no progression of hearing loss during the first 10 years of his employment, when damage due to industrial noise exposure would occur. He advised that appellant required hearing aids in both ears, but it was not due to damage incurred during his federal employment.

By decision dated February 27, 2006, the Office denied appellant's claim on the grounds that the medical evidence was insufficient to establish that his bilateral hearing loss was caused or aggravated by his federal employment.

In a form postmarked May 2, 2006, appellant requested an oral hearing of the Office's February 27, 2006 decision. In a separate statement, he explained that he received the Office's decision late as he retired March 3, 2006 and went out of state for six and half weeks. He submitted duplicate copies of the factual and medical evidence previously of record.

By decision dated June 16, 2006, the Office denied appellant's request for an oral hearing, finding that it was not made within 30 days of the February 27, 2006 decision. The

[1] Dr. Randolph rated appellant with a 28.44 percent binaural hearing loss comprising of a 39.75 percent loss in the right ear and 26.25 percent loss in the left ear.

Branch of Hearings and Review further denied the request finding that the issue could equally well be addressed through the reconsideration process.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[2] has the burden to establish the essential elements of his claim including the fact that the individual is an employee of the United States within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability or condition for which compensation is claimed is causally related to the employment injury.[3] Regardless of whether the asserted claim involves traumatic injury or occupational disease, an employee must satisfy this burden of proof.[4]

To establish a causal relationship between appellant's hearing loss and his employment, he must submit rationalized medical opinion evidence based on a complete factual and medical background supporting such a causal relationship. Rationalized medical opinion evidence is medical evidence which includes a physician's opinion on the issue of whether there is a causal relationship between the claimant's condition and the implicated employment factors.[5] The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty 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.[6]

ANALYSIS -- ISSUE 1

Appellant claimed that his hearing loss was caused or aggravated by his federal employment. The Office denied his claim on the grounds that he did not submit sufficient medical evidence to establish that he sustained a hearing condition in the performance of duty. The Board finds that appellant did not submit sufficient medical evidence to establish that he sustained a hearing loss in the performance of duty.

The medical evidence supports that appellant has bilateral sensorineural hearing loss and a need for bilateral hearing aids. However, there is no well-rationalized opinion that his condition is causally related to his federal employment. Both Dr. Randolph and Dr. Seaman opined that appellant's hearing loss pattern was not compatible with loss due to his noise exposure at work. While Dr. Randolph opined that there may be more than one cause for appellant's hearing loss, he did not identify a specific cause. Dr. Randolph stated that the

[2] 5 U.S.C. §§ 8101-8193.

[3] *Barbara R. Middleton*, 56 ECAB ___ (Docket No. 05-1026, issued July 22, 2005).

[4] *Donald W. Wenzel*, 56 ECAB __ (Docket No. 05-146, issued March 17, 2005).

[5] *Kathryn E. Demarsh*, 56 ECAB ___ (Docket No. 05-269, issued August 18, 2005).

[6] *Gary J. Watling*, 52 ECAB 278 (2001); *Gloria J. McPherson*, 51 ECAB 441 (2000).

audiometric result of 4,000 cycles per second in the left ear suggested hearing loss aggravated by past noise exposure. This is speculative. Medical opinions which are speculative or equivocal are of diminished probative value.[7] Additionally, medical reports containing no medical rationale on causal relationship are entitled to little probative value.[8] Thus, Dr. Randolph's report is insufficient to establish the claim. Dr. Seaman opined that appellant's hearing loss was not due to his work exposure. He was provided with appellant's complete medical record and a statement of accepted facts and found that appellant showed no progression of hearing loss during the first 10 years of his employment, when damage due to industrial noise exposure would occur. Dr. Seaman's well-rationalized report does not establish the claim.

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's condition became apparent during a period of employment, nor the belief that his condition was caused, precipitated or aggravated by his employment is sufficient to establish causal relationship.[9] Causal relationship must be established by rationalized medical opinion evidence and he failed to submit such evidence.[10]

As there is no rationalized medical evidence of record establishing that appellant's hearing condition was caused or aggravated by his employment duties as alleged, the Board finds that he has failed to meet his burden of proof.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b) of the Act, concerning a claimant's entitlement to a hearing before an Office representative, states: "Before review under section 8128(a) of this title, a claimant not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."[11]

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 the Office must exercise this discretionary authority in deciding whether to grant a hearing. 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, when the request is made after the 30-day period established for requesting a hearing, or when the request is for a second hearing on the same issue. The Office's procedures, which require the Office to exercise its discretion to

[7] *Cecelia M. Corley*, 56 ECAB ___ (Docket No. 05-324, issued August 16, 2005).

[8] *Mary E. Marshall*, 56 ECAB ___ (Docket No. 04-1048, issued March 25, 2005).

[9] *Kathryn E. Demarsh*, *supra* note 5.

[10] *Frankie A. Farinacci*, 56 ECAB ___ (Docket No. 05-1282, issued September 2, 2005).

[11] 5 U.S.C. § 8124(b)(1).

grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.[12]

ANALYSIS -- ISSUE 2

Appellant's request for an oral hearing was postmarked May 2, 2006, more than 30 days after the February 27, 2006 decision. Therefore, he is not entitled to an examination of the written record as a matter of right. The Office properly exercised its discretion in denying an oral hearing upon appellant's untimely request by determining that the issue could be equally well addressed by requesting reconsideration and submitting additional evidence to the Office.

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 deductions from known facts.[13] There is no evidence in the case record to establish that the Office abused its discretion in refusing to grant appellant's hearing request.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained his hearing loss in the performance of duty. The Board further finds that the Office properly denied his request for an oral hearing before an Office hearing representative under 5 U.S.C. § 8124.

[12] *Claudio Vazquez*, 52 ECAB 496 (2001); *Henry Moreno*, 39 ECAB 475 (1988).

[13] *Daniel J. Perea*, 42 ECAB 214 (1990).

ORDER

IT IS HEREBY ORDERED THAT the June 16 and February 27, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 12, 2007
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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