U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANTHONY MOLINO and DEPARTMENT OF THE NAVY, PHILADELPHIA NAVY SHIPYARD, Philadelphia, Pa.

Docket No. 96-1574; Submitted on the Record;
Issued April 9, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS, WILLIE T.C. THOMAS

The issues are: (1) whether appellant met his burden of proof in establishing that his binaural hearing loss is causally related to his federal employment; and (2) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for a hearing.

On April 5, 1993 appellant, then a 61-year-old sheet metal mechanic, filed an occupational disease claim alleging that his hearing loss was caused by exposure to hazardous noise levels in the course of his federal employment. In a June 21, 1993 statement, he indicated that his hearing loss began six or seven years previously and had gradually worsened. He indicated that his last exposure was in April 1993.

The employing establishment also submitted medical and audiological records including audiograms, which covered the period February 1978 to November 1992 and indicated that appellant was required to work "in all noise levels" and wear earplugs. On January 14, 1994 the Office referred appellant, along with a statement of accepted facts and the medical record, to Dr. Herbert Kean, a Board-certified otolaryngologist, for a second opinion evaluation. On January 14, 1994 appellant requested that his claim be withdrawn, and by decision dated February 1, 1994, his request was granted. On June 15, 1994 appellant requested reconsideration, and submitted an April 28, 1993 report from Dr. David Bromberg, a Board-certified otolaryngologist.

The relevant medical evidence includes a February 17, 1994 report from Dr. Kean who noted that appellant had been exposed to noise at work and wore earplugs. Audiographic testing

revealed low and high frequency hearing loss in both ears with a more significant high frequency hearing loss on the left. Dr. Kean advised:

> "The earliest audiogram in his records is dated 1988 and it indicates normal hearing in the right ear with a very significant, high frequency hearing loss in the left ear. As late as November of 1992 he had perfectly normal hearing in the speech ranges in the right ear up to and including 3,000 Hz [hertz]. The marked hearing loss of the left persisted at that time.
>
> "It is impossible for him to develop the change in hearing which he exhibits in the right ear in the space of one year as a result of noisy occupation. The change in hearing in the right ear involves all frequencies equally which is not related to occupational noise. The severe degree of asymmetry of the left ear indicates that his hearing loss appears to be preexisting or unrelated to occupation. Occupational hearing loss never shows a unilateral component such as this.
>
> "It is my opinion that [appellant's] present hearing level is unrelated to his occupation at the [employing establishment] during his employment of 1978 to 1993."

By report dated April 28, 1993, Dr. Bromberg advised that appellant had a bilateral hearing loss, much greater at high frequencies and high-pitched tinnitus.

By decision dated September 20, 1994, the Office, crediting Dr. Kean's report, rejected appellant's claim on the grounds that his hearing loss was not causally related to factors of employment. In the attached memorandum, the Office credited the opinion of Dr. Kean who advised that appellant's hearing loss was not employment related. On August 8, 1995 appellant, through counsel, requested a hearing, and by decision dated December 6, 1995, an Office hearing representative denied the request as untimely.

Appellant subsequently requested reconsideration and submitted a May 1, 1995 report in which Dr. Carol Schmidt, a Board-certified family practitioner, noted that she had reviewed appellant's employing establishment audiograms from 1991 to 1993 and advised that he suffered a hearing loss during his employment there. By decision dated February 6, 1996, the Office denied modification of the prior decision, finding that, while Dr. Schmidt noted that appellant's hearing loss became apparent during his federal employment, she did not indicate that his hearing loss was employment related.

The Board finds that appellant has failed to establish that his hearing loss is causally related to his federal employment.

An employee seeking benefits under the Federal Employees' Compensation Act[1] has the burden of establishing the essential elements of his or her claim[2] including the fact that the

[1] 5 U.S.C. §§ 8101-8193.

[2] *See Daniel R. Hickman*, 34 ECAB 1220 (1983); *see also* 20 C.F.R. § 10.110.

individual is an "employee of the United States" within the meaning of the Act,[3] that the claim was timely filed within the applicable time limitation period of the Act,[4] that an injury was sustained in the performance of duty as alleged, and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[5] These are essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[6]

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. The medical evidence required to establish a causal relationship, generally, is rationalized medical opinion evidence. 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, 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.[7]

The Office accepts that appellant experienced employment-related noise exposure at the time, place and in the manner alleged. However, the question of whether employment factors caused a personal injury generally can be established only by medical evidence,[8] and in this case appellant has not submitted medical evidence to establish that the employment factors caused a personal injury.

The only medical evidence addressing the cause of appellant's hearing loss indicates that it was not caused by employment factors. Neither Dr. Bromberg nor Dr. Schmidt provided an opinion regarding the cause of appellant's hearing loss, and Dr. Kean unequivocally stated that appellant's hearing loss was not employment related. Consequently, the Board finds that the Office properly determined that the medical opinion evidence establishes that appellant's bilateral hearing loss is not due to factors of his federal employment.

[3] *See James A. Lynch*, 32 ECAB 216 (1980); *see also* 5 U.S.C. § 8101(1).

[4] 5 U.S.C. § 8122.

[5] *See Melinda C. Epperly*, 45 ECAB 196 (1993).

[6] *See Delores C. Ellyett*, 41 ECAB 992 (1990); *Victor J. Woodhams*, 41 ECAB 345 (1989).

[7] *Id.*

[8] *See John J. Carlone*, 41 ECAB 354 (1989).

The Board further finds that the Office properly denied appellant's request for a hearing as untimely.

In the present case, the Office denied appellant's request for a hearing on the grounds that it was untimely. In its December 6, 1995 decision, the Office stated that appellant was not, as a matter of right, entitled to a hearing since his request had not been made within 30 days of its September 20, 1994. The Office noted that it had considered the matter in relation to the issue involved and indicated that appellant's request was denied on the basis that the issue of whether he sustained a hearing loss in the performance of duty could be addressed through a reconsideration application.

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.[9] In the present case, appellant's request for a hearing on August 8, 1995 was made more than 30 days after the date of issuance of the Office's prior decision dated September 20, 1994 and, thus, appellant was not entitled to a hearing as a matter of right. Hence, the Office was correct in stating in its August 8, 1995 decision that appellant was not entitled to a hearing as a matter of right because his hearing request was not made within 30 days of the Office's September 20, 1994 decision.

While the Office also has the discretionary power to grant a hearing request when a claimant is not entitled to a hearing as a matter of right, the Office, in its December 6, 1995 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issues involved and had denied appellant's request on the basis that the issue of whether he sustained a hearing loss in the performance of duty could be addressed through a reconsideration application. 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.[10] 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.

[9] *Henry Moreno*, 39 ECAB 475, 482 (1988).

[10] *See Daniel J. Perea*, 42 ECAB 214, 221 (1990).

The decisions of the Office of Workers' Compensation Programs dated February 6, 1996 and December 6, 1995 are hereby affirmed.

Dated, Washington, D.C.
April 9, 1998

Michael J. Walsh
Chairman

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member