U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT J. GREEN and DEPARTMENT OF THE NAVY, NAVAL SURFACE WARFARE CENTER, Silver Spring, Md.

Docket No. 96-1421; Submitted on the Record;
Issued July 17, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON, BRADLEY T. KNOTT

The issues are: (1) whether appellant has met his burden of proof in establishing that he sustained hearing loss in both ears causally related to a June 28, 1992 employment incident; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing under section 8124(b)(1) of the Federal Employees' Compensation Act.

On October 19, 1992 appellant, then a 38-year-old explosives test worker, filed a claim for hearing loss.[1]

The employing establishment submitted various documents including a copy of audiograms taken during appellant's employment and health unit records covering the period July 9 through September 23, 1992. In the July 9, 1992 employing establishment health record it was noted that two weeks ago appellant was involved in an explosion and was experiencing tinnitus and some pain in both ears. Appellant was diagnosed with impacted cerumen, status post exposure to explosion, hearing loss, ear pain, tinnitus and cough. A hearing test was recommended. On a July 29, 1992 it was noted that appellant awakened with pain in his right ear which was believed to be mild right otitis media (inflammation of the ear) which was treated with amoxicillin. It was also noted that "can't say" whether or not it was related to the June 28, 1992 explosion. On the September 30, 1994 it was noted that appellant was near an explosion in 1992. It was also noted that on two subsequent hearing tests performed in 1992 and 1993, appellant's hearing was normal. It was further noted that appellant was uncooperative during testing and advised that the degree of loss is probably noncompensable. The audiogram performed on September 30, 1994 revealed normal results with a nonorganic etiology.

[1] The record indicates that appellant filed Forms CA-1 and CA-2 claiming the same injury. The Office, after a discussion with appellant, determined that the claims were duplicative, and one was deleted. Also, on the CA-1 form appellant indicated that he suffered an ear infection. It is not known if appellant incurred any expenses regarding an ear infection and the Office did not mention it in its decision. Therefore, the matter is not before the Board.

By letter dated May 19, 1995, the Office referred appellant to Dr. Burger Zapf, a Board-certified otolaryngologist, for an examination including audiometric testing.

In a report dated August 29, 1995, Dr. Zapf stated that "[appellant] came on June 1, 1995 for reexamination of Evoke Brain Stem Response and Acoustic Emission testing to substantiate previously inconsistent voluntary thresholds in the conventional audiogram."[2] Dr. Zapf went on to say:

> "The patient suffered a blast noise injury in 1992. Previous audiograms were essentially normal and isolated audiograms after the blast injury were normal as well. The patient then suddenly complained of a significant hearing loss with ringing and pain that could not be explained.
>
> "Previous examination showed voluntary thresholds of 40 dB sensorineural in both ears. Repeated audiograms were inconsistent with his responses.
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> "The Evoked Response testing thresholds were within 15 dB of normal hearing and do not substantiate the voluntary thresholds the patient gave in previous examinations. A high frequency hearing loss cannot be ruled out with this testing. The Acoustic Evoked Emissions were also within normal limits.
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> "A hearing handicap to a degree allowing compensation is therefore excluded."

Dr. Zapf submitted copies of the test performed.

On October 5, 1995 the Office referred Dr. Zapf's report and the case record to an Office medical adviser for review. The medical adviser, using the audiogram dated September 30, 1994 (the latest audiogram of record at that time) added the hearing loss figures for both ears at the four measured frequencies and then divided the sum by 4 to calculate that appellant had an average hearing loss of 45 in the right ear and 65 in the left ear. After deducting the 25 decibel fence from each average, he concluded that appellant had a 0 percent hearing loss. The medical adviser stated that appellant has a bilateral sensorineural hearing loss that is nonratable for compensation and that the record reveals that there are some inconsistencies in appellant's responses that have suggested a nonorganic etiology.

By letter dated December 11, 1995, the Office advised appellant that it had been determined that he had sustained hearing loss, however, the etiology of the hearing loss had not been determined. Therefore the Office referred appellant to Dr. Robert Schwager, a Board-certified otolaryngologist, for a second opinion examination.

In a report dated January 16, 1996, Dr. Schwager stated that he saw appellant on January 11, 1996. He discussed the June 28, 1992 employment incident. Dr. Schwager stated:

[2] The record reflects that Dr. Zapf previously referred appellant for audiometric testing which was performed on July 19, 1994, and which revealed a bilateral sensorineural hearing loss of moderate proportions.

> "Apparently [appellant] has been tested at several locations since that time and due to inconsistencies of responses he underwent a brain stem evoked response audiometric test on June 1, 1995. The result of that test was normal indicating thresholds within 15 decibels of normality and did not substantiate the voluntary audiometric test thresholds which were given in prior examinations. At this time [appellant] complains that there still are effects on his life secondary to the hearing loss. [Appellant] has hissing tinnitus. [Appellant] thinks the right is the better hearing ear. His hearing was documented to be normal prior to the explosion."

Dr. Schwager further stated that on examination appellant's tympanic membranes and canals to be within normal limits bilaterally and that audiometric testing revealed bilaterally normal hearing with a mild high frequency sensorineural hearing loss in the left ear. Speech reception thresholds were at 10 and 20 decibels, discrimination scores at 92 and 100 percent right and left, respectively. He also stated "By A.M.A., criteria there is no rating for a hearing loss of this mild degree." Dr. Schwager noted that it was necessary to reinstruct [appellant] as to the proper response method and then appellant was retested with fair consistency of responses. Dr. Schwager's impression was "[m]ild left sensorineural hearing loss, questionably attributable to the incident of June 1992. At this point in time there is no rating as the hearing loss is too mild to generate any rating. [Appellant] can certainly resume his usual occupational duties without restriction from my point of view. It is unlikely that progression of the hearing loss, mild as it is will occur in this case at the rate any faster than another person of the same chronologic age."

In a February 26, 1996 decision, the Office found that appellant's injury was not sustained as alleged. It therefore denied the claim for compensation because fact of injury was not established.

By letter dated April 4, 1996 and received April 5, 1996, appellant requested an oral hearing before a hearing representative. By letter decision dated May 22, 1996, the Office's Branch of Hearings and Review denied appellant's request on the grounds that it was not filed within 30 days of the Office last merit decision issued on February 26, 1996. The Office stated that it had considered the matter in relation to the issue involved and further denied appellant's hearing request on the basis that the case could be resolved by submitting additional evidence on reconsideration to establish that any injury was sustained as alleged.

The Board finds that appellant has failed to meet his burden of proof in establishing that he sustained an injury in the performance of duty on June 28, 1992, as alleged.

An employee seeking benefits under the Act[3] has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was filed within the applicable time limitations of the Act, 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 is causally related to

[3] 5 U.S.C. § 8101.

the employment injury.[4] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or occupational disease.[5]

An award of compensation may not be based on surmise, conjecture, speculation or appellant's belief of causal relationship.[6] The Board has held that the mere fact that a disease or condition manifests itself during a period of employment does not raise an inference of causal relationship between the condition and the employment.[7] Neither the fact that the condition became apparent during a period of employment nor appellant's belief that employment caused or aggravated his condition is sufficient to establish causal relationship.[8] While the medical opinion of a physician supporting causal relationship does not have to reduce the cause or etiology of a disease or condition to an absolute certainty,[9] neither can such opinion be speculative or equivocal. The opinion of a physician supporting causal relationship must be one of reasonable medical certainty that the condition for which compensation is claimed is causally related to federal employment and such relationship must be supported with affirmative evidence, explained by medical rationale and be based upon a complete and accurate medical and factual background of the claimant.[10]

In order to determine whether an employee actually sustained an injury in the performance of duty, the Office begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.[11] In the instant case, there is no dispute that the claimed incident occurred at the time, place and in the manner alleged. However, the Office found that the medical evidence was insufficient to support that appellant sustained an injury as a result of the incident.

The second component of fact of injury is whether the employment incident caused a personal injury and generally can be established only by medical evidence. To establish a causal relationship between the condition, as well as any attendant disability, claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence, based on a complete factual and medical background, supporting such a causal relationship.[12]

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[4] *Joe Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143, 1154 (1989).

[5] *Victor J. Woodhams*, 41 ECAB 345 (1989).

[6] *Williams Nimitz, Jr.*, 30 ECAB 567, 570 (1979); *Miriam L. Jackson Gholikely*, 5 ECAB 537, 538-39 (1953).

[7] *Edward E. Olson*, 35 ECAB 1099, 1103 (1984).

[8] *Joseph T. Gulla*, 36 ECAB 516, 519 (1985).

[9] *See Kenneth J. Deerman*, 34 ECAB 641 (1983).

[10] *See Margaret A. Donnelly*, 15 ECAB 40 (1963); *Morris Scanlon*, 11 ECAB 384 (1960).

[11] *Elaine Pendleton, supra* note 4.

[12] *Kathryn Haggerty*, 45 ECAB 383 (1994); s*ee* 20 C.F.R. § 10.110(a).

The record in this case supports that appellant's hearing prior to the June 28, 1992 blast was essentially normal. As well, the record contains audiograms done subsequent to the June 28, 1992 incident which also revealed essentially normal hearing. Dr. Zapf, in his August 29, 1995 report, noted that previous audiograms were essentially normal and isolated audiograms after the June 28, 1992 blast were also normal. "Then [appellant] complained of a significant hearing loss with ringing and pain that could not be explained." Dr. Zapf further stated that the Evoked Response testing thresholds were within 15 dB of normal hearing and did not substantiate the voluntary thresholds [appellant] gave in previous examinations. A District medical adviser opined that appellant's hearing loss is not work related, noting that the latest audiogram revealed a nonratable sensorineural hearing loss bilaterally. He went on to say that there are some inconsistencies in appellant's responses that suggest nonorganic etiology. Appellant after being advised that his hearing loss is of an undetermined etiology was referred to Dr. Schwager, who found appellant's hearing to be within normal limits bilaterally. Dr. Schwager's impression was "mild left sensorineural hearing loss, questionably attributable to the incident of June 1992" and he also stated "there is no rating as the hearing loss is too mild to generate any rating. None of the evidence supports a causal relationship between appellant's hearing loss and the June 28, 1992 employment incident. Therefore, the Board finds that appellant has failed to met his burden of proof.

The Board further finds that the Office properly denied appellant's request for a hearing under section 8124 of the Act.

Section 8124(b)(1) of the Act, concerning a claimant's entitlement to a hearing before an Office hearing representative, provides in pertinent part: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary … is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[13] As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.[14]

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.[15] 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,[16] when the request is made after the 30-day period for requesting a hearing[17] and when the request is for a second hearing on the same issue.[18]

[13] 5 U.S.C. § 8124(b)(1).

[14] *Ella M. Garner*, 36 ECAB 238, 241-42 (1984).

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

[16] *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

In the present case, appellant's hearing request was made more than 30 days after the date of issuance of the Office's prior decision dated February 26, 1996 and, thus, appellant was not entitled to a hearing as a matter of right. Appellant requested a hearing in a letter received April 5, 1996. Therefore, the Office was correct in finding in its May 22, 1996 decision that appellant was not entitled to a hearing as a matter of right because her hearing request was not made within 30 days of the Office's February 26, 1996 decision.

While the Office also has the discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right, the Office, in its May 22, 1996 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's hearing request on the basis that the case could be resolved by submitting additional evidence to establish that his hearing loss was causally related to the June 28, 1992 employment incident. 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.[19] 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.[20] For these, reasons, the Office properly denied appellant's request for a hearing under section 8124 of the Act.

[17] *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

[18] *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

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

The decision of the Office of Workers' Compensation Programs dated May 22, 1996 and February 26, 1996 are affirmed.

Dated, Washington, D.C.
July 17, 1998

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member