

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALFONSO C. PELLAS and DEPARTMENT OF THE NAVY,
U.S. NAVAL SHIP REPAIR FACILITY, Guam

*Docket No. 97-391; Submitted on the Record;
Issued March 3, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant has met his burden of proof to establish that he sustained a hearing loss in the performance of duty; and (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for a merit review on September 12, 1996.

On May 17, 1993 appellant, then a 56-year-old training leader welder, filed a notice of occupational disease, alleging that he suffered hearing loss as a result of his federal employment. Appellant stated that he became aware of the disease and that it was related to his employment on January 21, 1993. Appellant indicated that he was exposed to a lot of structural noise stemming from grinder machines, pneumatic tools, hammers, needle guns, boilers, chipping deck scalers, chipping guns and sandblasters. Appellant did not stop working.

On March 8, 1993 Dr. Rai B. Hong, a Board-certified otolaryngologist, examined appellant and found that there was no perforated tympanic membrane in either ear. He stated that his audiogram showed a sensorineural hearing loss in the left ear.

The employing establishment subsequently indicated that it agreed with appellant's statement concerning his noise exposures.

Appellant then submitted audiograms dated February 4, March 30 and April 28, 1993. The audiograms were not accompanied with a physician's opinion.

On June 21, 1993 the Office referred appellant to Dr. John A. Garrett, a Board-certified otolaryngologist, for a second opinion. Dr. Garrett examined appellant on July 6, 1993. He noted appellant's complaint of left ear hearing loss with intermittent tinnitus. Dr. Garrett reviewed appellant's February 4, 1993 audiogram and noted that it revealed a moderate middle tone and severe high tone loss in the left ear, and a mild sensorineural hearing loss in the right ear. He diagnosed a moderate to severe left sensorineural hearing loss consistent with that seen

in cases of acoustic trauma in the form of industrial noise. Dr. Garrett further stated that the fact that appellant does not have a bilateral symmetrical loss weakens, but does not destroy the argument that the loss was due to acoustic trauma from industrial noise. He indicated that appellant had a 39 percent impairment of the left ear which was stable and permanent.

On September 17, 1993 the Office medical consultant reviewed the file and indicated that additional medical evidence was required to rule out other etiologies, including an acoustic neuroma, as the cause of appellant's hearing loss.

Appellant submitted audiograms on January 26 and March 17, 1995 which were not accompanied by a medical reports.

On February 2, 1995 the Office requested a clarifying opinion from Dr. Garrett. On March 28, 1995 he supplied his supplemental report. Initially, Dr. Garrett indicated that he performed a computerized axial tomography (CAT) scan of the internal auditory meati in March 1993 which yielded normal results. He further stated that there were no symptoms of vertigo or facial nerve weakness. Dr. Garrett noted a worsening of appellant's hearing loss. Upon reviewing the March 17, 1995 audiogram, he diagnosed a mild to moderate to severe sensorineural hearing loss of a type consistent with that seen in cases of acoustic trauma in the form of industrial noise. He noted that the impairment in the left ear was 6 percent and that the impairment in the right ear was 26 percent. Dr. Garrett stated that the progression of the hearing loss indicated inadequate ear protection. He opined that because the loss was proportionate bilaterally, it argued for acoustic trauma in the form of industrial noise.

On May 15, 1995 Dr. Brain Schindler, the Office medical consultant, expressed his disagreement with the findings of Dr. Garrett's medical evaluation, finding his conclusions were inconsistent with the fluctuations in audiograms and the discrepancy in the hearing loss in the right and left ears.

On June 15, 1995 the Office referred appellant, along with a statement of accepted of facts, to Dr. Roland F.S. Tam, a Board-certified otolaryngologist, for an impartial medical examination. Dr. Tam examined appellant on July 13, 1995. He noted that the left tympanic membrane was normal, but that the right tympanic membrane showed scarring and a monomere. Dr. Tam reviewed an audiogram performed on July 13, 1995 in his office and all the audiograms of record. He opined that the configuration of the hearing loss did not appear to be the classic type associated with a noise-induced hearing loss with a notch at 3,000 or 4,000 hertz. Dr. Tam noted that the classical configuration for a noise-induced hearing loss shows essential normal hearing for 250 to 1,000 hertz, followed by a descending curve (more precipitous above 2,000 hertz) to a maximum loss at 4,000 hertz at about 60 to 70 decibel hearing loss with a slight return at 8,000 hertz. He opined that he did not believe appellant's hearing loss was noise induced, but rather that the hearing loss of a fluctuating nature was due to an undetermined cause. Dr. Tam diagnosed a sensorineural hearing loss, not noise induced, which was not due to, precipitated, accelerated, aggravated or proximately caused by exposure to hazardous noise levels of appellant's federal employment.

On July 31, 1996 Dr. Schindler reviewed Dr. Tam's report and concluded that appellant failed to establish a causal relationship between his hearing loss and noise exposure.

By decision dated August 5, 1996, the Office rejected appellant's claim because the medical evidence of file failed to establish that appellant's hearing loss was causally related to his federal employment.

On August 16, 1996 appellant requested reconsideration. In support, appellant submitted two forms completed by the employing establishment's medical officer dated August 2, 1977 and May 21, 1985 demonstrating that appellant did not have a hearing loss at the time the forms were completed.

By decision dated September 12, 1996, the Office denied appellant's request for review because the evidence submitted in its support was cumulative and immaterial in nature. In an accompanying memorandum, the Office noted that the two forms lacked evidentiary value because they failed to address whether appellant's current condition was causally related to his federal employment.

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

An employee seeking benefits under the Federal Employees' Compensation Act¹ has the burden of establishing the essential elements of his claim, including the fact 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.²

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 the 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 claimant.³

In the present case, the Office found that a conflict in medical opinion was created between Dr. Garrett, a Board-certified otolaryngologist, opining that appellant's hearing loss was due to his industrial noise exposure, and Dr. Schindler, the Office medical consultant, who found that Dr. Garrett's diagnosis was inconsistent with the fluctuating results of appellant's audiograms and the discrepancy in the hearing loss in the right and left ears. The Office, subsequently, referred appellant to Dr. Tam, a Board-certified otolaryngologist, for an impartial medical examination pursuant to section 8123 of the Act.⁴ Because Dr. Garrett and the Office medical adviser are both Office referral physicians, their opinions are not sufficient to create a

¹ 5 U.S.C. §§ 8101-8193.

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

³ *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁴ 5 U.S.C. § 8128 *et seq.*

conflict pursuant to section 8123 of the Act.⁵ The Office, therefore, erred in relying on Dr. Tam as an impartial medical specialist.⁶ The Board will vacate the Office's September 12, 1996 and August 5, 1996 decisions denying appellant benefits and remand the case to the Office to refer appellant to another Board-certified otolaryngologist for an opinion addressing the causal relationship of appellant's hearing condition.

The decisions of the Office of Workers' Compensation Programs dated September 12 and August 5, 1996 are vacated and this case is remanded for further development consistent with this opinion.

Dated, Washington, D.C.
March 3, 1999

George E. Rivers
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

⁵ See *Leanne E. Maynard*, 43 ECAB 482, 490 (1992).

⁶ *James C. Ross*, 45 ECAB 424 (1994).