U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LEE EARL MERSON and DEPARTMENT OF THE NAVY, NAVAL SURFACE WARFARE CENTER, West Bethesda, MD

Docket No. 98-704; Submitted on the Record;
Issued January 18, 2000

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM, BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to rescind acceptance of appellant's hearing loss.

On November 12, 1996 appellant, then a 59-year-old mechanical engineering technician, filed an occupational disease claim (Form CA-2), alleging that he sustained a hearing loss in the performance of duty, that he first became aware of and related it to his employment on May 29, 1996. He did not stop work.

The employing establishment submitted a copy of appellant's medical records, including audiograms taken during appellant's employment, audiometric results, reports concerning these audiograms and a noise data survey report for appellant's occupation. The employing establishment advised the Office that appellant worked as a machinist from 1979 until October 1990 when he was promoted to a mechanical engineer technician, that the employing establishment has a hearing conservation program where hearing protection is required and worn, that appellant's work is usually performed indoors and that "there are times when the place of work, weather, noise, smoke and other conditions make it poor."

An annual audiogram dated May 29, 1996 by Lynn E. Cook, an occupational audiologist for a Dr. Bowden, a physician for the employing establishment, testing both ears at the frequency levels of 500, 1,000, 2,000 and 3,000 hertz (Hz), revealed a moderate-to-severe high frequency hearing loss at 3,000 Hz in the right ear and a moderate-to-profound high frequency at 3,000 Hz in the left ear. The employing establishment also submitted position descriptions for appellant's current position and his prior position as a machinist and his personal qualifications statement (Form -171).

On January 22, 1997 the Office referred appellant, a statement of accepted facts and the case record to Dr. Gerald Martin Reed, a Board-certified otolaryngologist, for an examination, including audiometric testing. The Office noted in the statement of accepted facts that the

"(decibels) measurement range is 76.4." Dr. Reed reported on March 21, 1997 that he evaluated appellant in his office on February 7, 1996, who related a history of working with motors and generators "which caused loud noise"; that he had a history of hunting, but had not engaged in hunting for the past three years; and that he had no familial history of hearing problems. He reported that audiometric testing revealed that appellant demonstrated mild hearing loss through 2,000 Hz and thereafter developed a symmetrical mild-to-severe hearing loss and that he compared the present audiometric evaluation with the one done in 1987 and there was virtually no change. Dr. Reed found that the percentage of hearing loss was zero percent in both ears for the low and mid-frequency region (500, 1,000 and 2,000 Hz) and that the percentage of loss for the high frequency region (2,000, 3,000 and 4,000 Hz) was 41 percent in the right ear and 31 percent in the left ear. Dr. Reed opined that "this hearing curve can be compatible with a noise-induced hearing loss. However, based on the available history, I believe he had no further hearing loss since 1987."

The Office referred the case record to an Office medical adviser for his review and comment. In an April 15, 1997 rating form, the Office medical adviser noted that the audiogram dated February 7, 1997 accompanying Dr. Reed's report indicated testing at 500, 1,000, 2,000 and 3,000 Hz and revealed in the right ear decibel losses of 20, 25, 25 and 60 respectively. The Office medical adviser totalled these losses at 130 decibels and divided by 4 to obtain the average hearing loss at 32.5 decibels. He then reduced the average of 32.5 decibels by 25 decibels (the first 25 decibels were discounted) to equal 7.5, which he multiplied by the established factor of 1.5 to compute an 11.25 percent loss of hearing in the right ear.[1] Testing for the left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 Hz revealed decibel losses of 20, 25, 20 and 50. The Office medical adviser totaled these losses at 115 decibels. Utilizing the same above-noted formula resulted in a 5.62 percent hearing loss in the left ear.[2] The Office medical adviser then multiplied the 5.62 percent hearing loss in the left ear (the ear with the lesser loss) by 5, added the 11.25 percent hearing loss in the right ear (the ear with the greater loss) and divided the sum by 6 in order to calculate a binaural hearing loss of 6.5 percent.[3] The Office medical adviser opined that, as the noise exposure at the workplace was around 76.4 decibels and as appellant was 60 years old, presbycusis was more likely than was noise-induced loss.

In an attached report also dated April 15, 1997, the Office medical adviser stated that he did not believe that appellant's hearing loss was a result of employment factors, as the statement of accepted facts stated that the noise level at workplaces was in the range of 76.4, "hardly a level to produce noise-influenced loss." He further noted that, due to appellant's age and the audiometric curve, appellant's hearing loss was more consistent with presbycusis. He went on to say: "Unless it can be shown that his noise exposure has been at levels and duration that could be consistent with noise-induced hearing impairment, I do not feel that a disposition can be made

[1] Federal (FECA) Procedure Manual Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4(b)(2)(b) (September 1994).

[2] *Id.*

[3] *Id.*; *see also Donald C. Swiger*, 50 ECAB ____ (Docket No. 97-2809, issued July 8, 1999).

based upon noise as a causative factor primarily." He noted that under Office procedures, appellant had a 6.5 percent binaural sensorineural hearing loss.

On May 30, 1997 the Office accepted appellant's claim for binaural hearing loss and informed appellant that he could apply for a schedule award. The Office mailed appellant a Form CA-7. On July 9, 1997 appellant submitted a claim for compensation on account of traumatic injury or occupational disease, Form CA-7.

The record reveals that the Office issued appellant a schedule award check for a seven percent binaural loss of hearing. However, by telephone call of August 20, 1997 and letter of August 21, 1997, the Office requested that appellant return the check in the amount of $8,738.38 as the check was issued in error.

By decision dated August 21, 1997, the Office denied appellant's claim for compensation. Specifically, the Office noted, "The [Office medical adviser] reviewed your file and indicated that you had a hearing loss but not due to noise exposure at work. The evidence provided by your employing [establishment] indicated that you were exposed to noise levels at 76.4 decibels. The [Office medical adviser] indicated that a decibel level of 76.4 was hardly a level to produce noise-induced loss and that your age makes presbycusis a very likely cause…." The Office noted that the Office medical adviser attributed appellant's hearing loss to presbycusis.

The Board finds that the Office improperly rescinded acceptance of appellant's claim.

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, set aside or modify a prior decision and issue a new decision.[4] However, the power to annul an award is not an arbitrary one and an award of compensation may only be set aside in the manner provided by the compensation statute.[5] It is well established that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.[6] This holds true where, as here, the Office later decided that it erroneously accepted a claim.[7] To justify rescission of acceptance of a claim, the Office must establish that its prior acceptance was erroneous through new or different evidence.[8]

In the instant case, the Office notified appellant that it accepted his hearing loss claim and subsequently issued appellant a compensation check in the amount of $8,738.38 for a seven

[4] *Noah Ooten*, 50 ECAB ____ (Docket No. 96-1405, issued March 12, 1999); *Eli Jacobs*, 32 ECAB 1147 (1981).

[5] *Julietta M. Reynolds*, 50 ECAB ___ (Docket No. 97-695, issued August 13, 1999); *Shelby J. Rycroft*, 44 ECAB 795 (1993).

[6] *Michael L. Rosenbaum*, 50 ECAB ___ (Docket No. 96-2469, issued August 3, 1999).

[7] *Noah Ooten*, *supra* note 4; *Alfonso Martinisi*, 33 ECAB 841 (1982).

[8] *Major W. Jefferson, III*, 47 ECAB 295 (1996); *see also Martha L. Cook*, 47 ECAB 226, 230-31 (1995); *Roseanna Brennan*, 41 ECAB 92 (1989), *petition for recon. denied*, 41 ECAB 371 (1990).

percent binaural loss of hearing. The Office subsequently determined that this was an error, and requested that appellant return the check.

In its August 21, 1997 decision, the Office found, "The [Office medical adviser] reviewed your file and indicated that you had a hearing loss but not due to noise exposure at work. The evidence provided by your employing [establishment] indicated that you were exposed to noise levels at 76.4 decibels. The [Office medical adviser] indicated that a decibels level of 76.4 was hardly a level to produce noise-induced loss and that your age makes presbycusis a very likely cause…"

The Board finds that the Office's rationale in this case does not provide sufficient grounds to support rescission.

Results of hearing level studies performed for the employing establishment indicate an eight-hour time-weighted decibel average of 76.4 based on noise samples taken on June 14, 1995. At the time appellant filed his claim on June 3, 1996, he had worked at the employing establishment for 18 years. The time-weighted average obtained on June 14, 1995 does not rule out appellant's exposure to hazardous noise levels before or after that date. Furthermore, the Office has never adopted the position that noise-induced hearing loss cannot be caused by levels under 76.4 decibels.[9] The opinion of the Office medical adviser, adopted by the claims examiner, consists of an unrationalized blanket statement that noise at 76.4 decibels would not likely produce a hearing loss. This fails to adequately address appellant's history of noise exposure during his 18 years at the employing establishment or otherwise address Dr. Reed's conclusion that the audiometric tests were compatible with a noise-induced hearing loss. In view of these deficiencies, the Office improperly rescinded its acceptance of the claim.

[9] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4(b) (October 1990); *see also* American Medical Association, *Guides to the Evaluation of Permanent Impairment*, Hearing, pp. 224-25 (4th ed. 1993).

The decision of the Office of Workers' Compensation Programs dated August 21, 1997 is reversed.

Dated, Washington, D.C.
January 18, 2000

George E. Rivers
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member