

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DOUGLAS J. MARKS and DEPARTMENT OF THE NAVY,  
NAVAL AIR SYSTEMS COMMAND CENTER, Point Mugu, CA

*Docket No. 99-1008; Submitted on the Record;  
Issued June 15, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issues are: (1) whether appellant has met his burden of proof in establishing that he sustained a hearing loss causally related to his federal employment; and (2) whether the Office of Workers' Compensation Programs, by its July 13, 1998 decision, properly denied appellant's request for reconsideration under 5 U.S.C. § 8128.

On May 23, 1997 appellant, then a 40-year-old operations supervisor, filed a claim that his hearing loss was causally related to his federal employment. In an accompanying statement, appellant provided his employment history and indicated that he had worked in various positions in the San Nicolas Island Power Plant from September 1988 until present whereby he was subjected to noise from generators. Appellant stated he first became aware of his hearing loss in 1994.

The employing establishment furnished the Office with copies of appellant's job description, employment records, employee medical reports and audiograms performed.<sup>1</sup> The employing establishment noted appellant was exposed to hazardous noise on a regular basis from September 1988 to the present.

In a letter dated July 1, 1997, the Office requested additional information from the employing establishment. The Office specifically requested the decibel and frequency level for each job site appellant was located, the period of exposure as well as the type of ear protection provided.

On July 7, 1997 the employing establishment provided documents which showed the noise-hazardous operations at the San Nicolas Island Power Plant where appellant was employed. The findings indicated that employees, such as appellant, who worked in this area

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<sup>1</sup> The audiograms performed were dated October 14, 1988 through March 6, 1997. The October 14, 1988 audiogram was preemployment and the remaining audiograms were performed by the employing establishment.

were placed on a Hearing Conservation Program. The employing establishment noted that appellant was placed on medical surveillance for hearing conservation because he was at risk for exposure to hazardous noise. The employing establishment also noted that proper controls were implemented whereby employees were issued protective hearing equipment.

By letter dated July 30, 1997, the Office referred appellant to Dr. Arif Shaikh, a Board-certified otolaryngologist, for otological examination and audiological evaluation. The Office provided Dr. Shaikh with a statement of accepted facts, and available noise exposure information. Dr. Shaikh obtained the audiograms from the employing establishment.

Dr. Shaikh performed an otologic evaluation of appellant on October 10, 1997 and audiometric testing was conducted on the doctor's behalf on the same date. He issued a report on December 22, 1997.

Dr. Shaikh reviewed all of the audiological tests performed at the employing establishment. He indicated appellant's responses were inconsistent and that appellant did have a mild mixed hearing loss and that he has had, in the past, a mild sensorineural hearing loss. Dr. Shaikh noted that the audiogram performed for him on October 10, 1997, revealed that appellant had normal hearing with normal discrimination in both ears. He determined this was completely contradictory to the previous employing establishment audiograms which revealed some sort of sensorineural hearing loss, but were very inconsistent. Dr. Shaikh referred appellant for an auditory brainstem response (ABR) test to rule out the possibility of an acoustic neuroma. The results of the ABR were abnormal with a possible pathology for the right ear, which explained the sensorineural hearing loss in the right ear in the past. However, the ABR did not substantiate the hearing loss in appellant's left ear as noted on his past military records. Dr. Shaikh referred appellant for a magnetic resonance imaging (MRI) scan to rule out retrocochlear involvement especially in lieu of the inconsistent audiograms from the military and the normal audiogram performed in his office.

On February 6, 1998 appellant underwent an MRI of the brain and internal auditory canals. The findings indicated no evidence of abnormal enhancement in either internal auditory canal; however, a mild ethmoid and maxillary sinus disease was noted.

On February 13, 1998 Dr. Shaikh issued an addendum report in which he reviewed all available information in the case, including the most recent MRI. He concluded that there was no concrete explanation for the sensorineural hearing loss seen in appellant's prior military audiograms, other than the fact that it appeared to be temporary. Dr. Shaikh determined, based on current diagnostic testing, that appellant had normal hearing with normal discrimination in both ears. Dr. Shaikh further determined that there was no evidence appellant suffered any permanent sensorineural hearing loss related to his federal employment.

By decision dated March 9, 1998, the Office determined that appellant did not meet his burden of proof in establishing that he sustained a hearing loss causally related to noise exposure in his federal employment.

By letter dated April 11, 1998, appellant requested reconsideration of his claim. In support of his request, appellant submitted audiograms dated April 30, 1990 through August 26,

1997; a letter from the Department of the Navy dated July 26, 1995 noting that appellant had a permanent shift in hearing level; and a letter from appellant noting that he utilized appropriated hearing protection equipment during his federal employment.

By decision dated July 13, 1998, the Office denied appellant's request for reconsideration because the evidence submitted was found to be immaterial and duplicative and not sufficient to warrant review of the prior decision.

The Board finds that appellant has failed to establish that he sustained a hearing loss causally related to noise exposure in his federal employment.

An employee seeking benefits under the Federal Employees' Compensation Act 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 timely filed within the applicable time limitation period of the Act, that the 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.<sup>2</sup> These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.<sup>3</sup>

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) 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 causal relationship is generally 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.<sup>4</sup>

In the instant case, it is not disputed that appellant was exposed to hazardous noise during his employment with the federal government. However, the Office's referral doctor, Dr. Shaikh, concluded, after review of all available information in this case, that there was no evidence that appellant suffered any permanent sensorineural hearing loss related to his federal employment.

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<sup>2</sup> *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>3</sup> *Victor J. Woodhams*, 41 ECAB 345 (1989).

<sup>4</sup> *Id.*

Dr. Shaikh performed a comprehensive evaluation which included reviewing preemployment and employing establishment audiograms; an audiogram performed on his behalf in October 1997; as well as an MRI of the auditory canals. Dr. Shaikh determined the sensorineural hearing loss seen in appellant's prior military audiograms was temporary as the current diagnostic testing performed in October 1997 indicated appellant's hearing to be normal, with normal discrimination in both ears. There is no other medical evidence addressing the cause of appellant's claimed condition.

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.<sup>5</sup> Causal relationship must be established by rationalized medical opinion evidence. Appellant has failed meet his burden of proof and the Office therefore properly denied appellant's claim for compensation.

The Board further finds that the Office, in its July 13, 1998 decision, properly denied appellant's request for reconsideration under 5 U.S.C. § 8128.

To require the Office to reopen a case for reconsideration, section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides in relevant part that a claimant may obtain review of the merits of his claim by written request of the Office identifying the decision and specific issues(s) within the decision which the claimant wishes the Office to reconsider and the reasons why the decision should change and by:

“(i) Showing that the Office erroneously applied or interpreted a point of law; or

“(ii) Advancing a point of law or fact not previously considered by the Office; or

“(iii) Submitting relevant and pertinent evidence not previously considered by the Office.”<sup>6</sup>

Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.<sup>7</sup> Where a claimant fails to submit relevant evidence not previously of record or advance legal contentions not previously considered, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128 of the Federal Employees' Compensation Act.<sup>8</sup>

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<sup>5</sup> See *Victor J. Woodhams*, *supra* note 3.

<sup>6</sup> 20 C.F.R. § 10.138(b)(1).

<sup>7</sup> 20 C.F.R. § 10.138(b)(2).

<sup>8</sup> *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

In the present case, the Office denied appellant's claim on the grounds that the medical evidence did not establish that he sustained a hearing loss while employed with the federal government. In support of his request for reconsideration, appellant submitted audiograms dated April 30, 1990 through August 26, 1997; a letter from the employing establishment dated July 26, 1995 noting appellant had a permanent shift hearing level; and a letter from appellant noting that he utilized protection equipment during his federal employment. All of the evidence submitted represented duplicative medical evidence which was considered by the Office in rendering its March 9, 1998 decision.<sup>9</sup> Evidence which is repetitive or cumulative of that already in the record, does not constitute a basis for reopening a case.<sup>10</sup> Appellant did not submit relevant and probative evidence not previously considered by the Office.<sup>11</sup> Therefore, the Office properly denied appellant's request for reconsideration under 5 U.S.C. § 8128.

The decisions of the Office of Workers' Compensation Programs dated July 13 and March 9, 1998 are hereby affirmed.

Dated, Washington, D.C.  
June 15, 2000

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

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<sup>9</sup> In the Office's decision dated July 13, 1998, the examiner noted that the employing establishment audiology report dated August 26, 1997 was not considered by Dr. Shaikh in his evaluation of appellant. However, the audiological report prepared on behalf of Dr. Shaikh on October 10, 1997 specifically notes the August 26, 1997 report as one of a variety of military records reviewed for the audiological report.

<sup>10</sup> *Eugene F. Butler*, 36 ECAB 393 (1984).

<sup>11</sup> Appellant submitted new evidence to the Board with his request for appeal. The Board cannot consider new evidence on appeal; *see* 20 C.F.R. § 501.2(c).