U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SANDRA L. FLINT-SMITH and DEPARTMENT OF VETERANS AFFAIRS, MEDICAL CENTER, St. Louis, MO

Docket No. 98-2562; Submitted on the Record;
Issued March 2, 2000

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether appellant has met her burden to establish that she sustained a hearing loss in the performance of duty.

On April 10, 1992 appellant, a 40-year-old pharmacist, filed a claim for benefits, alleging that she sustained a hearing loss causally related to her federal employment when a door alarm malfunctioned, resulting in a persistent, unremitting high frequency sound.

Although appellant missed no time from work and her claim had not been accepted by the Office of Workers' Compensation Programs, she filed a claim for recurrence of disability on June 28, 1996, claiming that she had sustained a tinnitus condition caused or aggravated by the April 10, 1992 employment incident.

By decision dated May 2, 1997, the Office denied appellant's claim, finding that she failed to submit medical evidence sufficient to establish that she sustained a hearing loss in the performance of duty.

By letter dated May 27, 1997, appellant requested an oral hearing, which was held on October 22, 1997. In support of her claim, appellant submitted reports dated August 1 and October 30, 1997 from Dr. Robert D. Craig, a Board-certified otolaryngologist. In his August 1, 1997 report, Dr. Craig stated that his April 10, 1992 audiogram of appellant indicated a long-standing, sensorineural bilateral hearing loss of a significant to moderate nature. He advised that it was possible that her symptoms of hearing loss and tinnitus could have been exacerbated by the sustained ringing of the alarm on April 12, 1992 but that he was unable to prove this. Dr. Craig further stated:

> "I subsequently saw [appellant] again on June 18, 1997. Her symptoms really had not changed. Repeat audiometry showed continued deterioration in her speech discrimination down to 88 [percent] on the right and 84 [percent] on the left. This certainly suggests a progressive sensorineural hearing loss process. [Appellant] gave additional information at that time, that not only did she have the one time

exposure to this alarm at work, but also at multiple times during the year the alarm would sound for variable periods of time.... In summation, [appellant] appears to have a progressive sensorineural hearing loss. I have documented that it has deteriorated since 1995. It is possible that her exposure to the loud noise in 1992 could have exacerbated her symptoms. I would like to point out that it is not a onetime occurrence, but there have been other alarm soundings for variable periods of time."

In his October 30, 1997 report, Dr. Craig expanded on his earlier reports by stating:

"I do find, to a reasonable medical certainty, that the hearing condition of [appellant] is, in part, employment related. That is to say that I feel that it is a reasonable medical certainty that her present hearing loss is, in part, employment related.

By decision dated April 22, 1998, the Office set aside the previous decision and remanded for further development of the medical evidence. The Office hearing representative stated that appellant presented additional factual evidence that she had been exposed to long-term noise in addition to the ringing of an alarm bell on April 10, 1992 and that the factual evidence in the case established that such exposure was not a one-time occasion, but was an ongoing process. The hearing representative also found that Dr. Craig's August 1, 1997 report presented medical evidence indicating that appellant's hearing loss was causally related to such repeated noise exposure. The hearing representative found that this evidence, while not sufficient to meet appellant's burden of proof of establishing that she had a hearing loss causally related to her employment, was sufficient to require further development of the medical evidence.[1]

In order to clarify the issue of whether appellant's exposure to loud noise at the employing establishment had caused or aggravated her hearing loss, the Office referred appellant for a second opinion audiologic and otologic evaluation with Dr. George P. Katsantonis, a Board-certified otolaryngologist, for an audiologic and otologic evaluation, which was scheduled for July 21, 1998.

In his July 23, 1998 report, Dr. Katsantonis stated that appellant had an essentially normal examination, that the audiogram showed bilateral symmetrical moderate sensorineural hearing loss and advised that the audiometric curve was essentially flat across the frequency boards. Dr. Katsantonis opined that it was evident by the audiometric evaluation that appellant's hearing loss was caused not by the reported noise exposure, but by a delayed onset of a hereditary type of hearing loss.

In a decision dated August 17, 1998, the Office, relying on Dr. Katsantonis' opinion, found that appellant had not sustained a hearing loss in the performance of duty.

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

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

In the present case, there was disagreement between Dr. Katsantonis, the second opinion otolaryngologist and Dr. Craig, appellant's treating otolaryngologist, as to whether appellant's hearing loss was causally related to her employment. Dr. Craig, her treating otolaryngologist, believed that appellant's hearing loss and tinnitus was at least partly attributable to her federal employment. Dr. Katsantonis contradicted this opinion, stating that appellant's hearing loss was not causally related to her employment and, therefore, was not the responsibility of the Office. When such conflicts in medical opinion arise, 5 U.S.C. § 8123(a) requires the Office to appoint a third or "referee" physician, also known as an "impartial medical examiner."[2]

In order to resolve the conflict of medical opinion, the Office should, pursuant to 5 U.S.C. § 8123(a), refer appellant, the case record, a statement of accepted facts to an appropriate, impartial medical specialist or specialists for a reasoned opinion as to whether appellant's hearing loss was sustained or aggravated by employment factors. Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.[3] After such development as it deems necessary, the Office shall issue a *de novo* decision.

The Office of Workers' Compensation Programs' decision of August 17, 1998 is therefore set aside and the case is remanded to the Office for further action consistent with this decision of the Board.

Dated, Washington, D.C.
March 2, 2000

George E. Rivers
Member

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

[2] Section 8123(a) of the Federal Employees' Compensation Act provides in pertinent part, "If there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." *See Dallas E. Mopps*, 44 ECAB 454 (1993).

[3] *Aubrey Belnavis*, 37 ECAB 206 (1985).