U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES A. PRAY and DEPARTMENT OF THE ARMY,
3RD INFANTRY DIVISION M FORT STEWART, Fort Stewart, GA

Docket No. 99-807; Submitted on the Record;
Issued November 9, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant has met his burden of proof in establishing that the loss of hearing in his left ear is causally related to his exposure to noise in his federal employment; and (2) whether the Office of Workers' Compensation Programs, by its August 27, 1998 decision, abused its discretion by refusing to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128.

In August, 1997 appellant, then a 49-year-old engineering equipment operator, filed an occupational disease claim (Form CA-2) alleging that he sustained a severe high-frequency hearing loss in his left ear due to exposure to noise in the course of his federal employment. He also stated that he first became aware that he had a hearing loss problem and related it to his employment on April 27, 1983. On the reverse side of the form, the employing establishment indicated that appellant first reported his condition to his supervisor on April 27, 1983 and that he had not stopped work.

Accompanying the claim, the employing establishment submitted various documents, including a January 4, 1994 magnetic resonance imaging (MRI) scan of the brain interpreted by Dr. S.G. Zerden, a Board-certified radiologist, as showing "Normal IACS bilaterally, specifically there is no evidence of an acoustic neuroma on the left nor any posterior fossa mass or lesion. No intracranial abnormalities."

A December 30, 1993 auditory brainstem response (ABR) report, by Dr. Fred L. Daniel, a Board-certified otolaryngologist, who stated, "The ABR is abnormal. Waves I-V are identified with normal absolute latencies on the right and the Wave I/V amplitude ratio is normal on the right. No wave forms could be obtained on the left, however. Due to the absence of wave forms on the left, further testing is recommended to rule out retrocochlear pathology."

The record also contains January 7, 1994 and December 29, 1993 audiograms and an employing establishment May 11, 1993 memorandum advising appellant that he had been

diagnosed with a severe high-frequency hearing loss in the left ear which requires that he be tested annually, and that he must wear hearing protections;" noise surveys showing appellant was exposed to noise levels of 65 to 105 decibels; appellant's undated statement regarding noise exposure; employing establishment hearing conservation data covering July 1985 to March 1993.

Also included in the record is a March 29, 1993 employing establishment consultation report by a doctor whose name is not legible, who after reviewing audiogram results and appellant's history diagnosed "unilateral hearing loss -- etiology undetermined doubt noise induced despite history of noise exposure. Will see if ENT [ears, nose and throat] at WACH will see -- if not recommend civilian ENT;" an April 27, 1993 audiogram which revealed "gradually sloping high-frequency senineural hearing [SNHL] loss in the left ear."

A November 4, 1985 audiogram was submitted by Dr. Susan S. Despain, who stated "[appellant] was referred to ENT doctor in 1979. [He] reports Dr. could not find anything to explain hearing loss in left ear. [Appellant] denies trauma or loud noise exposure to left ear. Things appear unchanged since audio[gram] [of] April 27, 1983. Gradually sloping high freq[uency] SNHL in left ear starting at 2000 Hz."

The Office referred appellant to Dr. J. Robert Logan, a Board-certified otolaryngologist, for an examination and evaluation of medical records. In an October 30, 1997 interpretation of an ABR test Dr. Logan stated that "the right ear has a normal ABR." He also stated that "this ABR test indicates that we have a normal ABR in the right ear with the statement that there is a normal auditory pathway on the right side from the cochlea through the mid-brainstem. On the left side, it is an abnormal study, however, because of the significance of the hearing loss, the abnormalities that are identified may well be due strictly to the degree of the hearing loss.

In a November 30, 1997 report, Dr. Logan reviewed appellant's history of noise exposure as provided to him in a statement of accepted facts. He also stated:

> "The first identification in the records submitted of a hearing loss in this patient is in 1983 when he was identified to have a unilateral hearing loss in the left ear above the 1,000 frequency area. A statement on the consultation sheet dated the 29th of November, 1993, says that the patient had a unilateral hearing loss of undetermined etiology. They doubted the noise-induced etiology. The audiograms that are available for review be[gin] in 1983 and go all the way up to 1994, and indicate that the right ear remains an essentially normal ear and there has been some progressive hearing loss in the left ear in the frequencies above 1,000 kHz."

Dr. Logan stated, "Basic tuning forks indicate that there is normal hearing in the right ear with the Schwabach being normal in the tuning forks 250 to 500, 1,024 and 2,048. In the left ear, there is essentially normal hearing at 250 to 500. It is prolonged at 1,000 and then it cannot be heard above that area." He went on to say, "Audiometric studies done in our office on the 21st of

October revealed essentially normal hearing in the right ear in all frequencies tested with the exception of a mild loss at 6,000 and 8,000. The left ear the pure tone audiogram was very inaccurate and, therefore, could not be considered reliable." Dr. Logan stated:

> "The otacoustic emissions test was performed on October 30, 1997 which showed that there is normal cochlear function in the right ear. There were no remissions elicited in the left ear which can be interpreted as stating that there is a hearing loss greater than 30 db HTL. Auditory brainstem response test was then done. Again, it revealed a normal auditory pathway from the cochlea to the mid-brainstem in the right, however, the left ear also was extremely abnormal. This would have to be interpreted as possibly due to the significance of the hearing loss in the left ear."

He further stated:

> "We certainly have evidence of well-documented hearing loss in the left ear dating as early as 1983. It has been slightly progressive since that time, however, there has been essentially very little, if any, change in the hearing in the right ear during that period of time. Because of the fact that this hearing loss dated to 1983, it is my interpretation at this point that if we were going to assume that the left ear was due to a noise-induced problem, then why is not the right ear being involved. Under these circumstances, it would be very difficult to make a diagnosis as to the etiology of the left hearing loss due to noise. My interpretation would be that we have a unilateral hearing loss on the left ear of unknown etiology."

In a report of a follow-up visit on March 30, 1998, Dr. Logan stated that appellant has been wearing protectors since his visit in October to November 1997. He found that testing revealed that both ears were essentially unchanged since testing done in January 1997. Dr. Logan stated, "[Appellant] has had a variety of studies done … all of which would indicate that the right ear remains normal. The left ear has a very severe sensorineural hearing loss above the 500 kHz area." He recommended that appellant continue to wear protectors and to have yearly audiometric studies.

Dr. Logan found that testing at the frequency levels of 500, 1,000, 2,000 and 3,000 hertz: in the right ear decibel levels of 0, 10, 30 and 20 respectively; and in the left ear, decibel levels of 30, 80, 75 and 90 respectively.

On March 30, 1998 a district medical adviser applied the standards of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* to the findings of Dr. Logan to determine that appellant had normal hearing in the right ear and a profound hearing loss in the left ear which was not causally related to noise exposure during his federal employment. The district medical adviser stated "cause unknown." The district medical adviser indicated the date of maximum medical improvement was March 30, 1998.

By decision dated July 2, 1998, the Office denied appellant's claim for a loss of hearing in his left ear[1] finding that it was not due to employment-related noise exposure.

By letter received by the Office on July 13, 1998, appellant requested reconsideration of the prior decision. In support, appellant submitted hearing conservation data, audiograms and noise surveys which were previously of record.

By decision dated August 27, 1998, the Office denied appellant's request finding that the evidence was repetitive in nature and insufficient to warrant review of the prior decision.

The Board finds that appellant has not met his burden of proof in establishing that his left ear loss of hearing is 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 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 the employment injury."[2] 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.[3]

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 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, generally, is 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.[4]

[1] The Board notes that, the Office in its August 27, 1998 decision, incorrectly stated right ear.

[2] *Elaine Pendleton*, 40 ECAB 1143, 1154 (1989).

[3] *David J. Overfield*, 42 ECAB 718, 721 (1991).

[4] *Id*.

In this case, the medical evidence of record is insufficient to establish a causal relationship between appellant's left ear hearing loss and exposure to noise during his federal employment. Audiograms performed for the employing establishment revealed that appellant's hearing in the right ear was normal, but that he had a loss of hearing in his left ear dating as far back as 1983. On an employing establishment November 1993 consultation sheet it was stated that appellant had a unilateral hearing loss in the left ear -- etiology undetermined, but doubted it was noise induced. A January 4, 1994 MRI of the brain found no acoustic neuroma. A December 30, 1993 abnormal ABR test recommended further testing to rule out a retrocochlear pathology. The referral physician, Dr. Logan, after reviewing appellant's history of noise exposure and medical records, as well as examining appellant and conducting further audiometric studies, opined that appellant's loss of hearing in the left ear had been slightly progressive since 1983, but hearing in the right ear had essentially remained the same. He stated that if the left ear hearing loss was noise induced then the right ear should also have been affected. Dr. Logan stated that "Under these circumstances, it would be very difficult to make a diagnosis as to the etiology of the left ear hearing loss due to noise. My interpretation would be that we have a unilateral hearing loss on the left ear of unknown etiology." The Board finds that the evidence of record is insufficient to establish appellant's claim.

The Board also finds that in its decision dated August 27, 1998, the Office did not abuse its discretion in refusing to reopen appellant's case for further consideration of his claim on the merits under 5 U.S.C. § 8128(a).

Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his claim by showing that the Office erroneously applied or interpreted a point of law; by advancing a point of law or a fact not previously considered by the Office; or by submitting relevant and pertinent evidence not previously considered by the Office.[5] Section 10.138(b)(2) provides that when application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.[6]

In his July 8, 1998 request for reconsideration, appellant did not show that the Office erroneously applied or interpreted a point of law, nor did he advance a point of law or a fact not previously considered by the Office. In support of his reconsideration request, appellant submitted copies of noise surveys and audiograms previously of record.[7]

As appellant's July 8, 1998 request for reconsideration does not meet at least one of the three requirements for obtaining a merit review, the Board finds that the Office did not abuse its discretion in denying that request.

[5] 20 C.F.R. § 10.138(b)(1). *See generally* 5 U.S.C. § 8128.

[6] 20 C.F.R. § 10.138(b)(2).

[7] *Eugene Butler*, 36 ECAB 393, 398 (1984) (where the Board found that evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.)

The decisions of the Office of Workers' Compensation Programs dated August 27 and July 2, 1998 are affirmed.

Dated, Washington, DC
November 9, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member