U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES A. PRICE and DEPARTMENT OF THE ARMY, CORPS OF ENGINEERS, Port Allen, LA

Docket No. 00-1886; Submitted on the Record;
Issued April 24, 2001

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether appellant sustained a loss of hearing causally related to his exposure to noise in his employment.

On January 6, 1988 appellant, then a 50-year-old lock and dam operator, filed a claim for a bilateral hearing loss that he attributed to exposure to noise in his employment. The Office of Workers' Compensation Programs referred appellant to Dr. Frank L. Fazio, a Board-certified otolaryngologist, who, in a report dated May 9, 1988, concluded that appellant had "minimal hearing loss in the speech range in the left ear and none in the right." On August 24, 1988 the Office requested that the employing establishment do a noise survey of appellant's work area and the employing establishment performed such a survey on August 29, 1988.

By decision dated December 29, 1988, the Office found that appellant's hearing loss was not causally related to his employment. Appellant requested a hearing; an Office hearing representative, by decision dated May 31, 1989, remanded the case for referral to another Board-certified otolaryngologist.

On September 19, 1989 the Office referred appellant and a statement of accepted facts that included the information from the employing establishment's noise survey to Dr. Robert H. Miller, a Board-certified otolaryngologist. In a report dated October 10, 1989, Dr. Miller concluded that, based on the Office's statement of accepted facts, "it seems that overall noise levels as well as time of exposure and given that patient utilizes ear protection, that claimant's noise exposure as described is insufficient to cause permanent hearing loss." By decision dated April 3, 1990, the Office found that appellant's hearing loss was not related to his employment.

Appellant requested a hearing, which was held on January 17, 1991. By decision dated March 13, 1991, an Office hearing representative found that the evidence established that appellant used ear protection only when operating an auxiliary generator; the case was remanded for referral back to Dr. Miller based upon this history of noise exposure and ear protection. In a

report dated June 18, 1991, Dr. Miller noted that there was no documentation of the noise level of the sound phone. The Office provided this noise level -- a peak of 99 decibel average (dBA) for less than 1 second occurring between 8 and 12 times in an 8-hour shift -- to Dr. Miller, who, in a supplemental report dated October 7, 1991, concluded that appellant "was not exposed to enough noise at work to produce his hearing loss. As I stated previously, the listed dBA levels of a duration of less than one second would not produce a hearing loss."

By decision dated October 17, 1991, the Office found that appellant did not sustain a hearing loss causally related to his employment. Appellant requested a hearing, which was held on May 21, 1992. By decision dated July 16, 1992, an Office hearing representative found that appellant's testimony that the sound phone was muffled by a rag during the noise survey raised serious doubt about this aspect of the employing establishment's noise survey; the case was remanded for a test of the noise level of the sound phone without muffling.

The employing establishment performed such a test and the result -- a maximum impulse noise of 124 dB at a distance of 14 inches, with a normal ringing time of one second or less and a peak reading of 139.1 dB with other noises in the control booth -- was forwarded to Dr. Miller. In a report dated November 3, 1992, he stated:

> "Because of the trading relationship between intensity and duration, a 124 dB [decibels] noise which lasts less than one second is not likely to be the source of the claimant's unilateral hearing loss. The peak reading during the one-hour monitoring period, as reported by William. Tabor [of the employing establishment] in his memo[randum] dated September 10, 1992 was reported to be 139.1 dB which does not exceed the allowable levels for OSHA [Occupational Safety and Health Administration] for impulse noise. The 140 dB impulse level represents the 95 [percent] confidence interval for protection against noise-induced damage. In light of the stated durations of exposure to the ringing telephone, the noise levels reported are not likely to be sufficient to be the cause of the claimant's left-sided complaint."

By decision dated December 16, 1992, the Office found that appellant's hearing loss was not causally related to his employment. Appellant requested a hearing, which was held on September 24, 1993. By decision dated December 6, 1993, an Office hearing representative found that the evidence established that the actual number of sound phone rings was 12 rather than 8 for an 8-hour shift and that 90 percent of the time appellant's left ear was closer to the sound phone. The case was remanded for another referral to Dr. Miller, who in a report dated January 31, 1994 stated: "The additional exposure reported in the newest statement does not represent, in our opinion, a significant change in this individuals' total noise dose." By decision dated February 4, 1994, the Office found that appellant's hearing loss was not causally related to his employment.

Appellant requested a hearing and submitted a report dated July 22, 1994 from Dr. Michael R. Menachof, a Board-certified otolaryngologist. Dr. Menachof diagnosed sensorineural hearing loss and stated:

> "It is reasonable to assume that a certain portion of his hearing loss is due to the noise exposure he has had at work. It does not sound like he has been exposed to significant noise otherwise. A portion of his hearing loss may also be his genetically programmed presbycusis. While mention has been made in the chart that the hearing loss is unlikely due to noise exposure due to its asymmetry, I do n[o]t find a significant asymmetry today and feel it is certainly reasonable that a portion of his hearing loss is due to noise he has been exposed to at work."

By decision dated December 14, 1994, an Office hearing representative found that there was a conflict of medical opinion between Drs. Menachof and Miller. To resolve this conflict, the Office referred appellant, the case record and a statement of accepted facts to Dr. Denbo Montgomery, a Board-certified otolaryngologist. In a report dated January 31, 1995, Dr. Montgomery stated:

> "[Appellant] was evaluated in my office on January 31, 1995. He was cooperative during the examination. [Appellant] is a 58-year-old male who has worked for the [employing establishment] 1974. He indicated that he was not given any type of hearing protection until around 1981 or 1982. I reviewed your statement of accepted facts carefully with [appellant]. His only changes to those facts were as follows. He indicates that exposure to the phone ringing ranged in duration from ¾ to 4 seconds at a time. He further indicated that while in the U.S. Navy from 1955 to 1959 he wore hearing protectors at all times. As a carpenters helper in 1964 he indicated that he was not exposed to any type of power tools and in fact was prohibited from using them. Further, as a truck driver for two years he indicated he was simply driving a pickup truck. He also indicated that although he has access to noise protective devices at all times he frequently cannot wear them because he has to hear the radio to perform his job properly.
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> "His otolaryngologic physical examination was entirely normal.
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> "[Appellant] denied any noise exposure for the 48 hours prior to this examination. An audiogram was obtained and a copy is enclosed for your review. I carefully reviewed all of the documents and earlier evaluations that were sent to me prior to this examination. It appears that the unresolved question is whether the noise exposure on his job has been intense enough to cause his hearing loss. While [appellant] indicates that at times he must work around tow boats, generators, etcetera without his hearing protective devices, I have relied strictly on the statement of accepted facts for my determination. There was no indication of the noise levels of the phone ringing in the statement of accepted facts. I found two references to them, one in a memorandum from Mr. Tabor [of the employing establishment] dated July 25, 1991. In addition, in Dr. Miller's letter of November 3, 1992, he references a later memo[randum] by Mr. Tabor that I could not find. OSHA regulations allow continuous 8 hour a day exposure to 85 d[B] of

noise without the use of sound protective devices. It is felt that this intensity is not responsible for noise-induced hearing loss. Further OSHA regulations allow pulse noise of up to 140 d[B]. Based on the evidence before me it appears that [appellant] has not exceeded either of those limits. Therefore, based on OSHA guidelines I do not believe that the noise levels listed in the [state of accepted facts] were of enough intensity-duration to cause his hearing loss. I do recommend that [appellant] continue to use noise protective devices while working in noise. I would further suggest that he continue to have his hearing monitored on an annual basis. Since he does have a moderate to severe sensorineural hearing loss he is a reasonable candidate for hearing aid trials depending upon his motivations about them. I think another prudent action would be to lower the intensity of the phone. Compensating for this could be a strobe light signal for alerting when the phone is ringing."

By decision dated February 21, 1995, the Office found that appellant had not established that his hearing loss was causally related to his employment. Appellant requested a hearing and submitted an October 17, 1995 report from Dr. Menachof, who noted that it appeared that appellant had not been around noise louder than 85 dB for more than 8 hours per day and that he did not receive a pulse noise greater than 140 dB. He then stated:

"Therefore, strictly based on OSHA guidelines, it would not appear that [appellant] had been around noises loud enough to cause significant hearing loss based on their criteria. However, it is clear that he has been around quite a bit of noise throughout his working career and he certainly does have a sensorineural hearing loss at this point. It is impossible to say how much of this is due to presbycusis and how much is due to a noise induce hearing loss, but it is certainly reasonable to assume that some of the hearing loss is due to noise. It has been well documented that there is quite a bit of individuality with regards to sensitivity to noise. Some people's ears are more sensitive with regard to noise exposure, that does not mean that he could not have a noise induced component to his hearing loss.

"In summary, my feeling is that [appellant] has some component of noise-induced hearing loss, however, it is not possible to determine what percentage of his total hearing loss is due to noise as opposed to the normal aging process."

By decision dated November 20, 1995, an Office hearing representative found that the opinion of Dr. Montgomery constituted the weight of the medical evidence and established that appellant's hearing loss was not causally related to his employment. Appellant requested reconsideration and submitted a copy of Dr. Menachof's October 17, 1995 report. By decision dated August 8, 1996, the Office found that this report had already been considered in the Office hearing representative's November 20, 1995 decision and that the evidence submitted by appellant with his request for reconsideration was repetitious and not sufficient to warrant review of its prior decisions.

Appellant appealed this decision to the Board, which by order dated May 5, 1998, remanded the case to the Office for reconstruction and proper assemblage of the case record and

in order to fully protect appellant's appeal rights, issuance of an appropriate decision.[1] By decision dated July 29, 1998, the Office found that the evidence submitted in support of appellant's request for reconsideration was repetitious and not sufficient to warrant review of its prior decisions. Appellant appealed this decision to the Board, which, by decision and order dated February 8, 2000, found that the Office's July 29, 1998 decision did not comply with the Board's May 5, 1998 order, in that the Board had jurisdiction over the merits of the claim at the time of the prior appeal. By decision dated April 18, 2000, the Office found that the evidence submitted with appellant's request for reconsideration was not sufficient to warrant modification of its prior decisions.

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

The Office extensively developed the evidence in this case requesting and receiving a noise level survey for appellant's work area. The Office then referred appellant to Dr. Miller, a Board-certified otolaryngologist, who concluded that appellant's hearing loss was not related to noise in his federal employment. Based upon further information provided by appellant about his noise exposure, his use of ear protection and the methodology used in performing the noise level survey, the Office on four subsequent occasions referred the case back to him for a supplemental opinion based on revised exposure information. Dr. Miller still concluded that appellant's hearing loss was not due to his exposure to noise in his federal employment.

Appellant then submitted a report from Dr. Menachof, a Board-certified otolaryngologist, who concluded that it was reasonable to assume that a certain portion of appellant's sensorineural hearing loss was due to his exposure to noise in his federal employment. An Office hearing representative, in a December 14, 1994 decision, properly concluded that there was a conflict of medical opinion regarding the relationship of appellant's hearing loss to his exposure to noise in his federal employment. To resolve this conflict of medical opinion, the Office, pursuant to section 8123(a) of the Federal Employees' Compensation Act,[2] referred appellant to Dr. Montgomery, a Board-certified otolaryngologist.

The Board has held that when a case is referred to an impartial medical specialist for the purpose of resolving a conflict in medical opinion evidence, the opinion of such specialist, if sufficiently well rationalized and based on a proper medical background, must be given special weight.[3] The Board has also held that in a situation where the Office secures an opinion from an impartial medical specialist and the opinion from such specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original report.[4]

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[1] Docket No. 96-2585.

[2] 5 U.S.C. § 8123(a) states in pertinent part: "If there is 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."

[3] *James P. Roberts*, 31 ECAB 1010 (1980).

[4] *Harold Travis*, 30 ECAB 1071 (1979).

In his January 31, 1995 report, Dr. Montgomery concluded that he did not believe that the noise levels to which appellant was exposed were of enough intensity and duration to cause his hearing loss. He, however, did not answer the Office's question whether appellant's sensorineural hearing loss was in part due to his noise exposure in federal employment. Aggravation or contribution by employment to a hearing loss is as compensable as direct causation.[5] The case will be remanded for the Office to obtain a supplemental opinion from Dr. Montgomery addressing whether noise in appellant's federal employment contributed to his hearing loss. In requesting this supplemental opinion, the Office should advise Dr. Montgomery that it has accepted that appellant used ear protection only when operating the auxiliary pump or generator, as it advised Dr. Miller. The statement of accepted facts supplied to Dr. Montgomery states that ear muffs were provided when appellant used the auxiliary generator, but also later states that appellant "used hearing protection equipment consisting of muffs," which implies that he used this protective equipment at other or even all times.

The decision of the Office of Workers' Compensation Programs dated April 18, 2000 is set aside and the case remanded to the Office for action consistent with this decision of the Board, to be followed by an appropriate decision.

Dated, Washington, DC
April 24, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

[5] *See George W. Frazier*, 34 ECAB 776 (1983); *Ofus G. Hobson*, 14 ECAB 142 (1962).