

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ALI MESCHI and U.S. POSTAL SERVICE,  
POST OFFICE, Santa Ana, CA

*Docket No. 00-2217; Submitted on the Record;  
Issued July 6, 2001*

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DECISION and ORDER

Before MICHAEL J. WALSH, BRADLEY T. KNOTT,  
A. PETER KANJORSKI

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 abused its discretion in denying appellant's request for an oral hearing.

This case has been before the Board previously. By decision and order dated December 11, 1998, the Board found that appellant failed to establish that he sustained a loss of hearing in the performance of duty, causally related to factors of his federal employment.<sup>1</sup> The law and facts as set forth in the previous decision and order are incorporated herein by reference.

Subsequent to the December 11, 1998 decision, on November 12, 1999 appellant requested reconsideration by the Office and submitted additional evidence. By decision dated November 23, 1999, the Office denied modification of the prior order on the grounds that the evidence was insufficient to establish that appellant was exposed to hazardous noise during the years of his employment from 1981 to 1991 and that he sustained a resulting hearing loss.

On February 9, 2000 appellant, through counsel, requested an oral hearing of the November 23, 1999 decision and submitted additional evidence. By decision dated March 17, 2000, the Office denied appellant's request for an oral hearing on the grounds that he was not entitled to a hearing as a matter of right and on the grounds that the issue in the case could be equally well addressed by the submission of evidence not previously considered by the Office and a request for reconsideration.

On February 14, 2000 appellant through counsel requested reconsideration to the Office of the November 23, 1999 decision and submitted additional evidence. By decision dated

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<sup>1</sup> Docket No. 97-924.

May 16, 2000, the Office denied modification of the November 23, 1999 decision on the grounds that the evidence was insufficient to warrant modification.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.<sup>2</sup> As appellant filed his appeal with the Board on June 19, 2000, the only decisions properly before the Board are the Office's May 16, 2000 decision, the March 17, 2000 decision and the November 23, 1999 decision. The Board has no jurisdiction to consider the prior decisions of the Office dated August 17, 1995, February 7 and December 9, 1996.

The Board finds that appellant has failed to meet his burden of proof in establishing that he sustained a hearing loss causally related to his federal employment.

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 diagnosed condition is causally related to the employment factors identified by the claimant. The medical opinion 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>3</sup>

In this case, appellant has established that he sustained a hearing loss. However, appellant has failed to meet his burden of proof in establishing through medical evidence that his condition was caused by employment factors. Causal relationship is a medical issue, which requires a physician to explain how or why he or she believes that the accident, incident or work factor caused or affected the physical condition, and the objective findings that support that conclusion.

In support of his request for reconsideration, appellant submitted noise dosimetry results from Health Science Associates regarding the noise levels generated in his general work area. Appellant's counsel argued that this information established that appellant was exposed to hazardous noise, even though the report does not specifically discuss his particular work area. This report lacks probative value in that it does not refer to appellant's specific work area but areas similar to that in which appellant worked and therefore cannot be relied upon in determining whether appellant was exposed to hazardous noise due to the implicated employment factors.

Appellant also submitted a detailed medical report dated January 5, 2000 from Dr. Eugene Freed, a Board-certified otorhinolaryngologist, who discussed appellant's symptomatology and medical history, and outlined the results of audiograms performed since February 20, 1984. Dr. Freed reported that, when appellant began working at the employing

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<sup>2</sup> 20 C.F.R. §§ 501.2(c); 501.3(d)(2).

<sup>3</sup> *Charles E. Burke*, 47 ECAB 185 (1995).

establishment, he did not recognize a hearing loss; however, over the 10 years that he was employed there, he noted a significant drop in his hearing acuity. He stated that, at the end of many workdays, appellant would experience ringing in both ears and a dullness in hearing which would seem to improve after he was away from the noisy environment for a number of hours. Dr. Freed reported that this temporary threshold shift for both his hearing and tinnitus at the end of the workday, indicated that the noise energy encountered in the work area was sufficient to produce permanent change of hearing and and/or the onset of tinnitus. He further reported that appellant had a high tone loss, which is a classically characteristic of what one finds in the usual noise-induced hearing loss case. Dr. Freed noted that individuals working side by side can incur a great difference in degree of ear damage from identical levels of sound and that it is the individual's sensitivity to sound, which will ultimately determine the degree of damage induced by sound energy contacted anywhere in the environment. As a consequence, he determined that there could be a great variance in the hearing loss levels of employees who worked in the same noisy areas. Dr. Freed further stated: "There is no question in my mind that all of [appellant's] bilateral hearing nerve loss and minimal tinnitus are exclusively due to the noise he contacted while working for the [employing establishment]."

Dr. Freed's conclusions are insufficient to establish the requisite causal relationship because he failed to provide a clear, unequivocal and rationalized explanation for attributing appellant's hearing loss to an occupational exposure. He simply reported in theoretical terms the characteristics of noise-induced hearing loss and how appellant's symptomatology fell in line with those characteristics and he did not explain with objective medical evidence how appellant's diagnosed hearing loss was causally related to employment factors. Furthermore, Dr. Freed did not address the fact that, based on previous reports of record, appellant was not exposed to what is considered acceptable hazardous noise levels during his employment according to the Federal (FECA) Procedure Manual. The record contains noise surveys, which establish that, during appellant's employment, he was not exposed to sustained decibel levels in excess of 85 decibels but was instead exposed to levels ranging from 52 to 70 decibels, with only an occasional spike of up to 108.7 decibels. Therefore, the report lacks a sufficient probative medical opinion attributing appellant's hearing loss to any employment-related exposure.

The Board further finds that the Office did not abuse its discretion in denying appellant's request for an oral hearing.

Section 8124(b)(1) of the Federal Employees' Compensation Act, concerning a claimant's entitlement to a hearing before an Office representative, provides in pertinent part: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."<sup>4</sup>

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary

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<sup>4</sup> 5 U.S.C. § 8124(b)(1).

authority in deciding whether to grant a hearing.<sup>5</sup> Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right to a hearing,<sup>6</sup> when the request is made after the 30-day period for requesting a hearing,<sup>7</sup> and when the request is for a second hearing on the same issue.<sup>8</sup> The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.<sup>9</sup>

In the present case, appellant's hearing request was made after he had requested reconsideration in connection with his claim and, thus, appellant was not entitled to a hearing as a matter of right. On February 9, 2000 appellant had requested an oral hearing of the Office's November 23, 1999 decision, which was a denial of his previous reconsideration request. Hence he was not entitled to a hearing as a matter of right because he made his hearing request after he had requested reconsideration.

While the Office also has the discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right, the Office, in its decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's hearing request on the basis that the issue in the case could be resolved by submitting evidence not previously considered by the Office. In the present case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's hearing request, which could be found to be an abuse of discretion. Appellant submitted new medical evidence with the February 9, 2000 request for a hearing. The Office properly determined that the issue in this case could equally be addressed by requesting reconsideration from the Office and submitting such evidence. The Office exercised its discretionary powers in denying appellant's request for a hearing and in so doing, did not act improperly.<sup>10</sup> For these reasons, the Office properly denied appellant's request for an oral hearing.

The decisions of the Office of Workers' Compensation Programs dated November 23, 1999, May 16 and March 17, 2000 are affirmed.

Dated, Washington, DC  
July 6, 2001

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<sup>5</sup> *Henry Moreno*, 39 ECAB 475 (1988).

<sup>6</sup> *Rudolph Bermann*, 26 ECAB 354 (1975).

<sup>7</sup> *Herbert C. Holley*, 33 ECAB 140 (1981).

<sup>8</sup> *Johnny S. Henderson*, 34 ECAB 216 (1982).

<sup>9</sup> *Stephen C. Belcher*, 42 ECAB 696 (1991).

<sup>10</sup> *Ella M. Garner*, 36 ECAB 238 (1948).

Michael J. Walsh  
Chairman

Bradley T. Knott  
Alternate Member

A. Peter Kanjorski  
Alternate Member