

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of JOHNNY B. FLETCHER and TENNESSEE VALLEY AUTHORITY,  
WATTS BAR NUCLEAR PLANT, Chattanooga, TN

*Docket No. 00-642; Submitted on the Record;  
Issued January 25, 2002*

---

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,  
A. PETER KANJORSKI

The issues are: (1) whether appellant has established that he was totally disabled for work on and after April 16, 1993 due to the accepted conditions of binaural hearing loss and depression; and (2) whether the Office of Workers' Compensation Programs abused its discretion under section 8128 of the Federal Employees' Compensation Act by denying appellant's request for a merit review.

This is appellant's second appeal before the Board. By decision and order issued November 10, 1997,<sup>1</sup> the Board affirmed an April 12, 1995 decision of the Office, finding that appellant had not established that he sustained greater than a 15 percent binaural hearing loss, for which he received a schedule award.<sup>2</sup> The law and facts of the case as set forth in the Board's prior decision and order are hereby incorporated by reference.<sup>3</sup>

On December 5, 1997 appellant filed a petition for reconsideration with the Board, asserting that the evidence in his case was not fully and fairly considered, and that various decisions were "stale" and no longer binding.<sup>4</sup> By order dated April 1, 1998, the Board denied appellant's petition for reconsideration on the grounds that appellant "failed to establish any

---

<sup>1</sup> Docket No. 96-353.

<sup>2</sup> By decision dated October 17, 1995, the Office also accepted that appellant sustained depression due to his hearing loss, and authorized psychotherapy. This decision is not before the Board on the present appeal.

<sup>3</sup> Appellant submitted January 6, 1998 and January 7, 1999 affidavits of earnings and employment (Form CA-1032) showing that he had not worked during the previous 15 months.

<sup>4</sup> Appellant also submitted a November 21, 1997 letter attempting to appeal the Office's October 17, 1995 decision, and asking for "full back pay." He enclosed an October 24, 1994 report from Dr. Robertson previously of record.

error of fact or law warranting further consideration.” The Board found that appellant merely reiterated arguments previously of record.

In an April 13, 1998 letter, appellant requested reconsideration, asserting that the Office’s October 17, 1995 decision, finding him able to perform the selected position of security guard, was in error. He also requested “full back pay to April 1993,” the date he asserts he became totally disabled for work. Appellant submitted additional evidence.

In an October 28, 1996 report, Dr. Charles G. Robertson, Jr., an attending family practitioner, noted treating appellant on September 5, 1996 for “an ear infection and draining of the left ear,” requiring four follow-up visits through October 24, 1996. Dr. Robertson noted that “the left ear was dry and still had a large perforation in the eardrum. The ear is still unsafe ... and may become infected if contaminated.” Dr. Robertson prescribed “medication for his neurological condition and tinnitus,” and found that appellant was “still disabled for work.”

In a February 17, 1998 letter, Dr. Robertson noted that on appellant’s February 16, 1998 examination, “tinnitus and neurological condition [were] unchanged” and that he remained disabled for work.

By decision dated August 31, 1998, the Office denied modification on the grounds that the evidence submitted was insufficient to warrant modification of the prior decision. The Office found that Dr. Robertson’s reports did not contain any medical rationale supporting total disability for work or that he was “unable to perform the job of security guard.”

Appellant disagreed with this decision and in an October 5, 1998 letter requested reconsideration. He submitted additional evidence.<sup>5</sup>

In a September 29, 1998 report, Dr. Robertson noted treating appellant for an ear infection on July 7, 1998. “The ear is still medically unsafe and may easily become infected.” Dr. Robertson noted that appellant continued to require medication for tinnitus, anxiety and depression. Dr. Robertson explained that appellant was disabled due to the original occupational injury of April 5, 1983 which caused his hearing loss and tinnitus and that he was unable “to perform the duties of a security guard or any other type of productive, public work. As a security guard he would not be able to hear intruders. Furthermore, because of his neurological condition, he could easily become agitated at a patron or coworker.” Dr. Robertson elaborated that any “public work” was “objectionable.... He has not been able to work since April 16, 1993 due to the severe tinnitus.”

By decision dated January 13, 1999, the Office denied modification on the grounds that the evidence submitted was insufficient to warrant review of the prior decision. The Office explained that in order for appellant to be entitled to total disability compensation, he would have to establish that he was totally disabled at the time of the October 17, 1995 decision reducing his compensation benefits based on his wage-earning capacity in the selected position

---

<sup>5</sup> Appellant also submitted copies of medical reports previously of record: an October 24, 1994 report from Dr. Robertson; May 3 and August 7, 1995 reports from Dr. Joseph Cutri, a Board-certified psychiatrist and neurologist and second opinion physician.

of security guard. The Office found that Dr. Robertson's September 29, 1998 report was insufficient to establish that appellant was totally disabled for work, and could not perform the duties of a security guard, as of October 17, 1995. However, the Office found that appellant was entitled to wage-loss compensation for partial disability for the period March 6, 1994 to February 19, 1995.<sup>6</sup> The Office recommended that appellant file a claim for recurrence of disability "due to a worsening of [his] accepted conditions."

Appellant disagreed with this decision and in a March 8, 1999 letter requested reconsideration. He reiterated his argument that he was totally disabled for work beginning in April 1993 and was thus entitled to total disability compensation from that time forward. Appellant submitted additional evidence.

In a February 1, 1999 report requested by the Office, Dr. Robertson stated that, as of a January 14, 1999 examination, appellant had a perforated left eardrum, with continuing tinnitus and associated anxiety. He diagnosed "acoustic trauma, with recurrent otitis media with a hole in the left eardrum and severe tinnitus and anxiety state" with associated depression. Dr. Robertson attributed these diagnoses to the accepted "April 5, 1983 injury, at which time he incurred a permanent injury to his ears as well as a continuous tinnitus which is permanent." He stated that appellant was "disabled for work since April 16, 1993" and required continuing medication for anxiety, depression, tinnitus and recurrence ear infections.

By decision dated June 4, 1999, the Office denied reconsideration on the grounds that the evidence submitted in support of appellant's request was merely cumulative and therefore insufficient to warrant a merit review of the prior decision. The Office found that Dr. Robertson's February 1, 1999 report repeated findings previously of record, did not establish that appellant was unable to perform the selected security guard position as of October 17, 1995, and did not otherwise present new, pertinent evidence.

Regarding the first issue, the Board finds that appellant has established that he was totally disabled for work on and after April 16, 1993, due to the accepted conditions of binaural hearing loss and depression.

When an employee claims a period of disability causally related to an accepted employment injury, he or she has the burden of establishing by the weight of the reliable, probative and substantial medical evidence that the claimed disability is causally related to the accepted injury. As part of this burden, appellant must submit rationalized medical evidence based on a complete and accurate factual and medical background showing causal relationship.<sup>7</sup>

---

<sup>6</sup> Prior to March 6, 1994, appellant received wage-loss compensation based on his ability to perform the security guard position. The schedule award began on February 19, 1995. In a January 15, 1999 letter, the Office advised appellant that he would receive "a compensation check in the amount of \$19,583.89 for compensation for reduced wages during the period March 6, 1994 to February 19, 1995. [T]his compensation represents [appellant's] ability to earn wages as a security guard ... and does not represent full compensation."

<sup>7</sup> See *Armando Colon*, 41 ECAB 563 (1990).

As applied to this case, appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence, a causal relationship between his claimed condition on and after April 16, 1993, the April 5, 1983 injury and accepted binaural hearing loss and depression.<sup>8</sup>

Appellant asserts that he was totally disabled for work beginning on April 16, 1993 due to his accepted binaural hearing loss and depression, and was thus unable to perform the selected position of security guard. In support of his assertions, appellant submitted a series of reports from Dr. Robertson, an attending family practitioner.

In reports dated October 28, 1996, February 17 and September 29, 1998 and February 1, 1999, Dr. Robertson found recurrent serous otitis media of the left ear due to a perforated tympanic membrane, severe tinnitus, depression and anxiety. He opined that these conditions disabled appellant for work since April 16, 1993. In the September 29, 1998 report, Dr. Robertson opined that appellant was unable “to perform the duties of a security guard” or any other “public work” as he could not “hear intruders” and would experience agitation when dealing with coworkers or customers due to his depression and anxiety.

Dr. Robertson’s reports establish that appellant could not perform the selected position of security guard due to his occupational hearing loss, which precluded him from performing an essential job function of hearing intruders. Dr. Robertson also noted that appellant’s accepted depression might cause him to become agitated when interacting with co-workers or members of the public, which are also critical to the security guard job.

Dr. Robertson’s reports are based on his direct clinical observations over several years of treating appellant. Also, these reports specifically address the requirement of the security guard position, and contain detailed rationale explaining why appellant’s accepted conditions would prevent him from performing the position. Thus, Dr. Robertson’s reports are entitled to great weight, and are sufficient to meet appellant’s burden of proof in establishing a total and continuous disability for work on and after April 16, 1993.<sup>9</sup>

Thus, appellant has submitted sufficient medical evidence to establish total disability for work on and after April 16, 1993. Therefore, the case will be returned to the Office for calculation and payment of all compensation due appellant from April 16, 1993 onward.

In light of the disposition above, the second issue is moot.

The decisions of the Office of Workers’ Compensation Programs dated June 4 and January 13, 1999 are hereby reversed.

Dated, Washington, DC  
January 25, 2002

---

<sup>8</sup> *Dominic M. DeScala*, 37 ECAB 369, 372 (1986); *Bobby Melton*, 33 ECAB 1305, 1308-09 (1982).

<sup>9</sup> *See Laura J. Lowery (Charles H. Lowery)*, 12 ECAB 171, 173 (1960).

Willie T.C. Thomas  
Member

Bradley T. Knott  
Alternate Member

A. Peter Kanjorski  
Alternate Member