U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PING Y. LEO and DEPARTMENT OF THE AIR FORCE, HILL AIR FORCE BASE, UT

Docket No. 01-1283; Submitted on the Record;
Issued January 17, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, BRADLEY T. KNOTT, PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant established that his hearing loss was causally related to factors of his federal employment; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing under 5 U.S.C. § 8124(b).

On August 9, 1999 appellant, then a 49-year-old former aircraft mechanic and production controller, filed an occupational disease claim, alleging that his exposure to noise in the course of his prior employment caused his hearing loss. He first became aware that his illness was caused by employment factors on August 6, 1999. Appellant retired on medical disability on June 15, 1992.

Appellant submitted a report dated August 9, 1999 from Victor Berrett, an audiologist, who related appellant's history of working close to reciprocating and jet engine aircraft for more than 27 years. He indicated that an audiogram was performed that day which revealed a bilateral, symmetrical, high frequency hearing loss and attached the audiogram for reference. Mr. Berrett further stated: "The configuration, normal in the low frequencies, coupled with [appellant]'s history, suggests that the loss is related to exposure to intense sound levels without adequate hearing protection."

On February 10, 2000 the Office advised appellant that the evidence submitted was insufficient and requested additional documentation. Appellant responded with factual evidence.

On July 24, 2000 the Office referred appellant to Dr. Ronald Gordon, a Board-certified otolaryngologist, for a second opinion examination. In an August 14, 2000 form report, Dr. Gordon noted that appellant worked for the employing establishment from 1971 to 1980 and indicated that he was exposed to noise every year after 1971 in the course of his employment. He also indicated that appellant was in the military for three and a half years prior to working for the employing establishment and was qualified to use an M-16 weapon. Dr. Gordon diagnosed

sensorineural hearing loss (SNHL) and stated that appellant had had no increase in hearing loss since his initial examination but that it was significant enough to warrant a hearing aid. He attached a June 8, 2000 audiogram report for reference performed at his request.

In response to a form report question as to whether appellant's SNHL was due to noise exposure encountered during his federal employment, Dr. Gordon stated: "Hard to say for certain. Pattern is consistent with noise but there is no documented determination." He further recommended that appellant's discharge audiogram from the military be obtained to compare it to his 1980 audiogram from the employing establishment.

In an August 22, 2000 memorandum to the file, the Office medical adviser reviewed Dr. Gordon's report and noted that the record is void of hearing test results from 1980 to1983 or 1992 and that there had been no change in hearing loss since his initial examination. The Office medical adviser stated, therefore, that an award of compensation was not indicated.

In a letter dated August 30, 2000, the Office requested that appellant obtain and forward a copy of his military discharge audiogram or submit any inquiry made to his prior military branch concerning a request for such records. In response, appellant submitted a portion of his prior military record, but did not submit the requested audiogram. By letter dated September 13, 2000, the Office made a second request for the military discharge audiogram. In a letter dated September 18, 2000, appellant responded that he had forwarded all the pertinent records regarding his hearing and that he did not recall taking a physical upon discharge.

In a decision dated September 27, 2000, the Office denied compensation based on appellant's failure to establish a causal relationship between his hearing loss and his employment-related noise exposure. The Office explained that Dr. Gordon was unable to determine whether appellant's hearing loss was due to his civilian employment.

In a letter postmarked December 8, 2000, appellant requested an oral hearing and submitted evidence.

By decision dated January 22, 2001, the Office denied appellant's request as untimely. The Office noted that the last decision of record was issued on September 27, 2000 and appellant's request for an oral hearing "was postmarked December 8, 2000," more than 30 days after the September 27, 2000 decision. The Office noted considering the request and denied it on the additional grounds that the issue involved could be addressed equally well on reconsideration by submitting new evidence establishing causal relationship.

The Board finds that appellant failed to establish that his hearing loss was causally related to factors of his federal employment.

When an employee claims that he sustained an injury in the performance of duty he must submit sufficient evidence to establish that he experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged. He must also establish that such event, incident or exposure caused an injury.[1] Once an employee establishes that he sustained an injury

[1] *See generally John J. Carlone*, 41 ECAB 354 (1989); *see also* 5 U.S.C. § 8101(5) ("injury" defined); 20 C.F.R.

in the performance of duty, he has the burden of proof to establish that any subsequent medical condition or disability for work for which he claims compensation is causally related to the accepted injury.[2]

In this case, appellant alleged that he developed noise-related hearing loss caused by his federal employment. However, the only evidence submitted by appellant in support of his claim was an audiogram performed in August 1999, seven years after he retired and general medical records while on active duty in the military prior to 1970. Appellant was referred to a Board-certified otolaryngologist for examination; however, the physician could not make a determination as to whether appellant's hearing loss was causally related to noise exposure between 1971 to 1980 during his federal employment.

The Office afforded appellant the opportunity to submit pertinent medical evidence requested by Dr. Gordon in order to make a determination on the cause of his hearing loss, however, no such evidence was submitted. As the record lacks sufficient probative medical opinion, attributing appellant's hearing loss to his accepted employment exposure, the Office properly denied compensation.

The Board further finds that the Office properly denied appellant's request for a hearing.

Section 8124(b)(1) of the Act provides, in pertinent part, that a "claimant for compensation not satisfied with the 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."[3] As section 8124(b)(1) is unequivocal in setting forth the time limitations for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.[4]

In this case, the Office issued its decision denying appellant's claim on September 27, 2000. He requested a hearing in by a letter postmarked December 8, 2000. The Board notes that appellant was provided with appropriate appeal rights accompanying the September 27, 2000 decision, which stated explicitly that a request for an oral hearing "must be postmarked within 30 days of the date of this decision." Appellant's request for a hearing was not within 30 days of the Office's September 27, 2000 decision. Therefore, he is not entitled to a hearing under section 8124 as a matter of right.

Nonetheless, even when the hearing request is not timely, the Office has discretion to grant the hearing request and must exercise that discretion. In this case, in its decision dated January 22, 2001, the Office advised appellant that it considered his request in relation to the

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§ 10.5(q) and (ee) ("occupational disease or illness" and "traumatic injury" defined).

[2] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[3] 5 U.S.C. § 8124(b)(1).

[4] *Delmont L. Thompson*, 51 ECAB ___ (Docket No. 97-988, issued November 1, 1999); *Charles J, Prudencio*, 41 ECAB 499 (1990); *Ella M. Garner*, 36 ECAB 238 (1984).

issue involved. The Office found that the hearing was also denied on the grounds that appellant could address the issue equally well on reconsideration, by submitting new medical evidence establishing causal relationship.

The Board has held that an abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from established facts.[5] The Board finds that there is no evidence in this case that the Office abused its discretion in denying appellant's request for a hearing.

The January 22, 2001 and September 27, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
January 17, 2001

Michael J. Walsh
Chairman

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member

[5] *Daniel J. Perea*, 42 ECAB 214 (1990).