U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EDWARD RILEY SPENCER and DEPARTMENT OF THE NAVY, NORFOLK NAVAL BASE, TRANSPORTATION DEPARTMENT, Norfolk, VA

Docket No. 01-1338; Submitted on the Record;
Issued January 25, 2002

DECISION and ORDER

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

The issue is whether appellant has established that he sustained a bilateral sensorineural hearing loss in the performance of duty on or before August 5, 1977.

On April 15, 1999 appellant, then an 83-year-old retired diesel truck driver, filed a notice of occupational disease (Form CA-2), alleging that he sustained bilateral hearing loss due to factors of his federal employment on or before January 1, 1968. Appellant worked at the employing establishment as a truck driver from 1944 to when he voluntarily retired on August 5, 1977. He recalled constant exposure for approximately 40 hours a week to noise from diesel truck and bus engines and that he was not provided with ear-plugs until approximately 1955. Appellant noted filing a claim for hearing loss in March 1979 and enclosed a copy of a letter to the Office of Workers' Compensation Programs dated December 27, 1979 inquiring about the status of his claim.[1]

A February 28, 1977 employing establishment audiogram showed thresholds in the right ear at the frequencies of 500, 1,000, 2,000 and 3,000 hertz of 10, 30, 50 and 40 decibels and in the left ear at 35, 40, 45 and 70 decibels. The audiogram notes that appellant had been employed as a truck driver for 32 years. An employing establishment physician, whose signature is illegible, diagnosed appellant with mild to moderate bilateral sensorineural hearing loss.[2]

In an April 15, 1999 letter, Ms. Joyce Johnson, an employee of the employing establishment's health clinic, noted that appellant first obtained a hearing aid sometime between 1980 and 1993. She commented that appellant seemed "almost totally deaf."

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[1] The record indicates that the Office found that appellant submitted sufficient evidence substantiating that he filed a timely claim for hearing loss in March 1979. The Board concurs with the Office's finding of timeliness.

[2] A June 20, 1997 audiogram showed thresholds in the right ear at the frequencies of 500, 1,000, 2,000 and 3,000 hertz of 40, 80, 85, 90 decibels and in the left ear at 55, 60, 75 and 85 decibels.

In a November 9, 1999 letter and development checklist, the Office advised appellant that the evidence he had submitted thus far was insufficient to establish his claim. The Office requested a detailed employment history, history of occupational noise exposure and whether he experienced any other difficulties with hearing loss. The Office did not request that appellant obtain or submit any medical evidence.[3]

Accompanying a December 2, 1999 letter, the employing establishment submitted industrial hygiene surveys performed from 1986 to 1998 in the areas in which appellant worked prior to his 1977 retirement. These surveys show noise from trucks and buses ranging from 65 to 95 decibels, with a "hazard radius" of 6 to 20 feet.

By decision dated March 2, 2000, the Office denied appellant's claim on the grounds that fact of injury was not established. The Office stated that the evidence "of record was not sufficient because a diagnosis, submitted by a certified otolaryngologist was not given" and the factual history of occupational noise exposure was insufficiently detailed. The Office explained that appellant's burden of proof entailed submitting "rationalized medical opinion evidence" establishing that the alleged employment factors "were the proximate cause of the condition for which compensation is claimed."

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

It is well established that in order for a claimant to establish that a condition was sustained in the performance of duty in an occupational disease claim, he or she must submit:

> (1) medical evidence establishing the presence of the claimed condition; (2) a statement specifying the employment factors alleged to have caused or contributed to that condition; and (3) medical evidence explaining how and why the diagnosed condition is causally related to the employment factors identified by the claimant.[4]

However, a claimant cannot meet this burden of proof without an awareness of its elements. Thus, the Board has held that the Office must advise a claimant of the defects in his or her claim and of the type of evidence needed to meet the applicable evidentiary burden.[5] In this case, the Office failed to advise appellant of the first and third elements of the burden of proof for an occupational disease claim.

In the November 9, 1999 letter and development checklist, the Office did not advise appellant of the critical need for him to submit a report by an otolaryngologist discussing his occupational noise exposure, findings on audiometric examination and explaining how and why those findings would be caused by his exposure to hazardous noise at work. Yet, in its March 2,

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[3] In a November 10, 1999 letter, the Office requested that the employing establishment submit pertinent noise survey data and occupational health records related to appellant's hearing loss. The Office provided appellant with a copy of this letter.

[4] *Charles E. Burke*, 47 ECAB 185 (1995).

[5] *Shirley A. Temple*, 48 ECAB 404 (1997).

2000 decision, the Office denied appellant's claim because appellant did not submit "rationalized medical opinion evidence" establishing causal relationship. The Board finds that the Office improperly denied appellant's claim for failing to submit evidence which the Office did not inform him was needed. As appellant was unaware of the necessity of submitting rationalized medical evidence, he could not be expected to meet his burden of proof in this regard.

The Board further finds that appellant has provided sufficient evidence to warrant further development by the Office, as he submitted an audiogram performed during his federal employment showing a ratable hearing loss.

Under the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, the uniform standard adopted by the Office and applicable to all claimants,[6] hearing loss is evaluated by determining decibel loss at the following frequency levels: 500, 1,000, 2,000 and 3,000 hertz. The losses at each frequency are added up and averaged and a "fence" of 25 decibels is deducted since, as the A.M.A., *Guides* points out, losses below 25 decibels result in no impairment in the ability to hear everyday speech in everyday conditions.[7] The remaining amount is multiplied by 1.5 to arrive at the percentage of monaural hearing loss. The binaural loss is determined by calculating the loss in each ear using the formula for monaural loss. The lesser loss is multiplied by five, then added to the greater loss and the total is divided by six to arrive at the amount of the binaural hearing loss.[8]

Applying this formula to the results of the February 28, 1977 employing establishment audiogram, appellant showed thresholds in the right ear at the frequencies of 500, 1,000, 2,000 and 3,000 hertz of 10, 30, 50 and 40 decibels, for a total of 130 decibels. Dividing the total of 130 by 4 to obtain the average, results in 32.5. After subtracting the "fence" of 25 decibels, this leaves 7.5 decibels. In the left ear, appellant's thresholds of 35, 40, 45 and 70 decibels total 190, with an average of minus the fence of 25, leaves 47.5. Multiplying the lesser loss of 7.5 by 5 results in a figure of 37.5. Adding the greater loss of 47.5 to 37.5 equals 85.0. Finally, the total of 85 is divided by 6, equaling a 14.1 percent binaural hearing loss.

The Board notes, however, that the 1977 audiogram, while sufficient to establish that appellant had a ratable degree of hearing loss at that time and that appellant reported a 32-year history of driving trucks for the employing establishment, is not sufficiently recent to allow the Office to determine appellant's current percentage of hearing loss. Appellant also submitted a June 20, 1997 audiogram, demonstrating an even higher percentage of hearing loss. However, this audiogram is not accompanied by medical rationale explaining the causal relationship, if

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[6] The schedule award provisions of the Federal Employees' Compensation Act, 5. U.S.C. § 8115, set forth the number of weeks of compensation to be paid for permanent loss of use of the members listed in the schedule. The Act, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determinations is a matter, which rests in the sound discretion of the Office. However, as a matter of administrative practice and to ensure consistent results to all claimants, the Office has adopted and the board has approved of the A.M.A., *Guides* as the uniform standard applicable to all claimants. *Jimmy B. Newell*, 39 ECAB 181 (1987).

[7] A.M.A., *Guides*, pp. 224-25 (4th ed. 1993).

[8] *Id. See also Danniel C. Goings*, 37 ECAB 781, 784 (1986).

any, between appellant's occupational noise exposure and his hearing loss. This is precisely why the Office should have advised appellant to submit a rationalized report from his attending otolaryngologist noting findings on current audiometric examination and discussing the role of appellant's occupational noise exposure in causing those findings. Under such circumstances, the audiogram is sufficient to require further development of the record, especially given the absence of any opposing medical evidence.[9]

The Board further finds that appellant has submitted sufficient factual evidence to require further development. The employing establishment noise surveys indicate that appellant could have been exposed to noises of between 65 and 95 decibels at work over an approximate 33-year period. However, this data was obtained beginning in 1986, nearly 10 years after appellant retired. Thus, it is unclear how similar appellant's noise exposure was to the noise levels found in those surveys. Also, it is not evident from the record for how many hours a day appellant was exposed to these types of noises, for what percentage of time he drove as opposed to merely being in the vehicle bays with other engines running, or how often he was within the "hazard radius."

On return of the case, the Office shall refer appellant, a statement of accepted facts and the record to a Board-certified otolaryngologist for clinical examination, audiometric testing and a rationalized opinion discussing whether appellant's work as a truck driver over a 33-year period could cause the claimed hearing loss. The Office shall also obtain all appropriate industrial hygiene data, position descriptions and other documentation regarding appellant's occupational noise exposure prior to his retirement in 1977 and provide such materials to the specialist selected. If the employing establishment asserts that such data is no longer available from any source, or cannot be reliably estimated or reconstructed, the Office shall note this in the record. Following this and any other development deemed necessary, the Office shall issue an appropriate decision in the case.

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[9] *John J. Carlone*, 41 ECAB 354 (1989).

The decision of the Office of Workers' Compensation Programs dated March 2, 2000 is hereby set aside and the case remanded to the Office for further development consistent with this decision.

Dated, Washington, DC
January 25, 2002

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member