

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JEFFREY N. ENGLAND and DEPARTMENT OF THE ARMY,
AIR NATIONAL GUARD, Portland, OR

*Docket No. 01-1985; Submitted on the Record;
Issued November 6, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, COLLEEN DUFFY KIKO,
WILLIE T.C. THOMAS

The issue is whether appellant met this burden of proof to establish that he sustained employment-related tinnitus entitling him to compensation.

On May 24, 2001 appellant, then a 41-year-old automotive worker, filed a claim alleging that he sustained "ringing in both ears" due to exposure to hazardous noise at work. He indicated that he was exposed to noise from airplanes, diesel engines, generators, air tools and other equipment.¹ By letter dated June 29, 2001, the Office of Workers' Compensation Programs advised appellant of the need to submit additional evidence in support of his claim. The Office indicated that his case would be held open for 30 days to afford him an opportunity to submit the requested information.² By decision dated July 31, 2001, the Office denied appellant's claim on the grounds that he did not submit sufficient medical evidence to establish that he had ringing in his ears or tinnitus due to an employment-related condition. The Office indicated that it had advised appellant, by letter June 29, 2001, of the need to submit additional evidence, but that the additional evidence was not received.

The Board finds that the case is not in posture for decision regarding whether appellant met his burden of proof to establish that he sustained employment-related tinnitus entitling him to compensation.

¹ It has been accepted that appellant was exposed to hazardous noise as alleged.

² The Office requested that appellant complete an attached list of questions regarding his claimed condition.

Compensation for tinnitus may be awarded if the medical evidence establishes that an employee has employment-related tinnitus, including a finding that such a condition has caused or contributed to a permanent and ratable hearing loss.³ Compensation may also be awarded if it is shown that employment-related tinnitus caused an employee to incur medical expenses or to experience a loss in wage-earning capacity.⁴

In the present case, the Office advised appellant, by letter dated June 29, 2001, of the need to submit additional evidence in support of his claim that he sustained employment-related tinnitus. The Office provided appellant 30 days to comply with this request. In its July 31, 2001 decision, the Office indicated that appellant did not submit the requested additional evidence. However, the record reveals that the Office received such additional evidence from appellant prior to the issuance of its July 31, 2001 decision.⁵ On July 24, 2001 the Office received from appellant a number of medical records which discussed the treatment of his hearing problems. Several of the reports contained a discussion of appellant's exposure to noise at work and indicated that he was diagnosed with tinnitus.⁶ Appellant also provided answers to the list of questions that the Office sent to him in connection with its June 29, 2001 request for additional information.

The Federal Employees' Compensation Act⁷ provides that the Office shall determine and make findings of fact in making an award for or against payment of compensation after considering the claim presented by the employee and after completing such investigation as the Office considers necessary with respect to the claim.⁸ Since the Board's jurisdiction of a case is limited to reviewing that evidence which is before the Office at the time of its final decision,⁹ it is necessary that the Office review all evidence submitted by a claimant and received by the Office prior to issuance of its final decision. As the Board's decisions are final as to the subject matter appealed,¹⁰ it is crucial that all evidence relevant to that subject matter which was

³ See *Donald A. Larson*, 41 ECAB 947, 953-55 (1990); *Charles H. Potter*, 39 ECAB 645, 648-49 (1988). According to the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, tinnitus in the presence of unilateral or bilateral hearing impairment may impair speech discrimination. Therefore, an impairment percentage of up to five percent may be added for employment-related tinnitus in the presence of measurable hearing loss if the tinnitus impacts the ability to perform activities of daily living; see A.M.A., *Guides* 246 (5th ed. 2001). Disturbances of vestibular function due to tinnitus may cause dysequilibrium or otherwise prevent the usual activities of daily living.

⁴ See *Larson* at 953-54; *Charles H. Potter*, *supra* note 3 at 648.

⁵ Moreover, the evidence was issued within the 30-day time period allotted by the Office's June 29, 2001 letter.

⁶ One of the form reports included a diagnosis of tinnitus and contained the notation "probably greater than 50 percent" in response to the question "Result of industrial exposure?"

⁷ 5 U.S.C. §§ 8101-8193.

⁸ 5 U.S.C. § 8124(a)(2); 20 C.F.R. § 10.130.

⁹ See 20 C.F.R. § 501.2(c).

¹⁰ 20 C.F.R. § 501.6(c).

properly submitted to the Office prior to the time of issuance of its final decision be addressed by the Office.¹¹

In the present case, the Office did not review evidence received from appellant prior to the issuance of its July 31, 2001 decision, *i.e.*, the evidence it received on July 24, 2001. The Board, therefore, must set aside the decision dated July 31, 2001 and remand the case so that the Office may fully consider the evidence that was properly submitted by appellant and received by the Office prior to the issuance of this decision. Following such further consideration and after such further development as it deems necessary, the Office shall issue an appropriate decision.

The decision of the Office of Workers' Compensation Programs dated July 31, 2001 is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.¹²

Dated, Washington, DC
November 6, 2002

Michael J. Walsh
Chairman

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

¹¹ *William A. Couch*, 41 ECAB 548, 553 (1990).

¹² Appellant submitted additional evidence after the Office's July 31, 2001 decision. This evidence included a June 11, 2001 report in which Dr. Michael L. Adams, an attending physician Board-certified in preventive medicine, checked a "yes" box indicating that appellant's "ringing in ears" was employment related and stated, "most likely due to chronic noise exposure." However, the Board cannot consider such evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c).