U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of STEVEN E. FUTCH and DEPARTMENT OF THE AIR FORCE
SAN ANTONIO AIR LOGISITICS CENTER, KELLY AIR FORCE BASE, TX

Docket No. 02-1127; Submitted on the Record;
Issued October 17, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, ALEC J. KOROMILAS,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a).

On June 15, 1999 appellant, then a 39-year-old sheet metal mechanic, filed a notice of occupational disease and claim for compensation (Form CA-2), attributing that his hearing loss arose from the hazardous noise that he was exposed to while in performance of his federal job duties.[1]

In support of his claim, appellant enclosed employment records, statements and medical information including audiograms.

By letter dated July 12, 1999, the Office referred appellant and a statement of accepted facts to Dr. Susan Marenda, a Board-certified otolaryngologist for a second opinion examination.

In a report dated August 6, 1999, Dr. Marenda diagnosed bilateral moderately severe to severe sensorineural hearing loss, right worse than left, consistent with noise exposure and chronic disabling tinnitus. She also advised the use of hearing aids.

On September 27, 1999 the Office referred appellant's medical records to an Office medical adviser who applied the Office's standards in reports dated October 12, 1999 and February 4, 2000. He found that appellant sustained a 15 percent monaural hearing loss of the right ear. He also authorized hearing aids.

[1] The record reflects that appellant also had a claim for lumbar strain on November 10, 1997, which was accepted.

By letter dated February 4, 2000, the Office accepted the claim for a right ear monaural hearing loss.[2]

On March 20, 2000 appellant submitted his Form CA-7.

By decision dated April 7, 2000, the Office granted appellant a schedule award based on a 15 percent monaural hearing loss of the right ear. The award ran for 7.8 weeks from August 6 to September 29, 1999.

By letter dated April 21, 2000, appellant requested a review of the written record.

By decision dated September 25, 2000, the Office hearing representative affirmed the April 7, 2000 decision.

By letter dated September 22, 2001, appellant requested reconsideration and included; memorandums dating from February 13, 1997 to February 17, 1999 written by several chief's of audiology services at the employing establishment; a chronological record of medical care dating from August 8, 1994 to February 14, 1997; a list of employees with audiograms within a peg with shift in either or both ears through May 14, 1999, all of which were previously submitted. Additionally appellant alleged that he only recently became aware that the employing establishment was unethically adjusting the hearing thresholds and baselines to ensure he would pass the hearing examinations. Appellant indicated that he became aware of this upon requesting that his medical records be released to him and that this was a new legal argument not previously considered by the Office. He also indicated that the hearing aids were not effective and that his hearing was at the same levels as before wearing hearing aids. Appellant indicated that this was new medical evidence. Further, he disagreed with the February 4, 2000 report indicating that he only had monaural hearing loss. Finally appellant explained that he had to change careers and suffered a loss in wage-earning capacity due to his hearing loss.

By decision dated December 4, 2001, the Office denied merit review on the grounds that the evidence submitted was cumulative and previously submitted.

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.[3] As appellant filed his appeal with the Board on March 18, 2002, the Board lacks jurisdiction to review the Office's most recent merit decision dated September 25, 2000. Consequently, the only decision properly before the Board is the Office's December 4, 2001 decision denying appellant's request for reconsideration.

The Board finds that the Office properly denied merit review of appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a).

[2] By letter dated February 11, 2000, appellant requested a new decision. The Office subsequently advised appellant that a decision for a schedule award had not been made yet.

[3] 20 C.F.R. § 10.607(a) (1999).

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his or her own motion or on application. The Secretary in accordance with the facts found on review may --
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> (1) end, decrease or increase the compensation awarded; or
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> (2) award compensation previously refused or discontinued."

Under 20 C.F.R. § 10.606(b)(2) (1999), a claimant may obtain review of the merits of the claim by submitting evidence and argument: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office. Section 10.608(b) (1999) provides that where the request is timely but fails to meet at least one of the standards described in section 10.606(b)(2) (1999) or where the request is untimely and fails to present any clear evidence of error, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[4]

In the present case, relevant and pertinent new medical evidence did not accompany appellant's request for reconsideration. This is important since the underlying issue in the claim, whether appellant had greater than a 15 percent monaural hearing loss of the right ear, is essentially medical in nature.

Along with his request for reconsideration appellant submitted numerous diagnostic tests and reports that were previously considered by the Office. As these reports are duplicative of reports previously submitted, they are insufficient to warrant further review of appellant's claim.[5]

With the exception of the letter dated September 22, 2001, appellant did not provide any new evidence that was not repetitious in nature. In his letter, appellant argued that the employing establishment failed to take appropriate action in removing him from a hazardous noise area and he sustained unnecessary permanent damage to his hearing. He alleged that the employing establishment was adjusting the hearing thresholds "unethically" and he did not become aware of this until he requested that his medical records be released in 1999. However, he did not submit any evidence to confirm his allegations; further these arguments have no reasonable color of validity in view of the absence of medical evidence relevant to the point at issue.[6]

Appellant also indicated that the Office authorized hearing aids for both ears but he only received an award for the right ear and that his hearing was not helped by the aids. He indicated that this was new medical evidence. However, appellant's opinion is insufficient to be qualified

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[4] 20 C.F.R. § 10.608(b) (1999).

[5] *Eugene F. Butler*, 36 ECAB 393 (1984); *Bruce E. Martin*, 35 ECAB 1090 (1984).

[6] *See John F. Critz*, 44 ECAB 788 (1993) (reopening of a claim not required where a legal contention does not have a reasonable color of validity).

as medical evidence. Section 8101(2) of the Act[7] states, in relevant part: "'physician' includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law." Appellant is not qualified to render a medical opinion. As the percentage of impairment is a medical question that can only be resolved by medical opinion evidence,[8] the opinion of appellant that his condition has worsened is not relevant and pertinent new evidence.

Finally, appellant's having to change careers and be subjected to a pay cut is not relevant to whether he is entitled to an additional schedule award as this can only be resolved by medical opinion evidence.[9]

Appellant did not submit any new evidence or contend that the Office erroneously applied or interpreted a specific point of law. He also did not raise any legal arguments not previously considered by the Office. As appellant failed to meet one of the above standards, the Office decision to deny the application for reconsideration without reopening the case for review on the merits was proper.[10]

The December 4, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
October 17, 2002

Michael J. Walsh
Chairman

Alec J. Koromilas
Member

Willie T.C. Thomas
Alternate Member

[7] 5 U.S.C. § 8101(2).

[8] *Ausberto Guzman*, 25 ECAB 362 (1974).

[9] *Id.*

[10] 20 C.F.R. § 10.608(b).