

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JEROME J. KUBIN and DEPARTMENT OF THE AIR FORCE,
RANDOLPH AIR FORCE BASE, San Antonio, TX

*Docket No. 03-1830; Submitted on the Record;
Issued October 1, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant sustained an injury in the performance of duty.

On February 26, 2003 appellant, then a 59-year-old retired aircraft mechanic, filed an occupational disease claim alleging that he sustained hearing loss and tinnitus as a result of his federal employment. Appellant attributed his condition to years of working on aircrafts. He identified June 16, 2002 as the date he first realized his condition was employment related. Appellant retired effective August 30, 2002.

In support of his claim, appellant enclosed his employment history, audiograms, hearing conservation diagnostic reports and radiological examinations.¹ Included among this evidence was a September 27, 1997 report from Dr. Karen A. Fox who diagnosed asymmetric hearing loss.²

By letters dated April 15, 2003, the Office of Workers' Compensation Programs requested that the employing establishment and appellant provide additional information.

Appellant provided his employment history and advised the Office, by letter dated May 1, 2003, that he had submitted the requested information with his Form CA-2 and that he had confirmed that the employing establishment forwarded his information on March 6, 2003.

In a May 20, 2003 decision, the Office denied appellant's claim on the basis that the evidence submitted was insufficient to establish that the events occurred as alleged. Additionally, the Office stated that appellant failed to provide the baseline audiogram to establish a diagnosis of hearing loss.

¹ In the employment history, appellant indicated that his federal service began in June 1962, as an aircraft mechanic and continued intermittently in various federal agencies until his retirement on August 30, 2002.

² Dr. Fox is Board-certified in aerospace and occupational medicine.

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

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.³ Once an employee establishes that he sustained an injury 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.⁴

In the instant case, the Office requested that the employing establishment and appellant provide additional information by letter dated April 15, 2003. Appellant responded by letter dated May 1, 2003 and provided the requested information. He also indicated that he was informed that the employing establishment had submitted a package of materials as of March 6, 2003. The employing establishment, however, did not respond to the Office's request for information. The Office denied appellant's claim as the evidence was not sufficient to establish that the events occurred as alleged and because he failed to provide the baseline audiogram, which established a diagnosis of hearing loss. However, the Office did not specifically request that appellant provide a baseline audiogram.

Proceedings under the Federal Employees' Compensation Act are not adversarial in nature and the Office is not a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.⁵

The record includes medical evidence indicating that appellant has asymmetrical hearing loss. Based on the limited evidence submitted thus far, the earliest referenced audiogram appears to have been administered on July 15, 1996. Thus, contrary to the Office's finding, the record includes a baseline audiogram and a diagnosis of hearing loss. Appellant alleged that his hearing loss was caused by his exposure while working as an aircraft mechanic. The employing establishment challenged the claim on the basis that there was no evidence that noise exposure from appellant's civilian position was the direct result of any current hearing loss. As the employing establishment did not respond to the Office's April 15, 2003 request for information, there is no evidence of record to either corroborate or contradict appellant's allegation of occupational noise exposure.

Section 10.117(b) of the Office's regulations provides that if the employing establishment disagrees with any of the facts as stated by appellant, the employing establishment must provide evidence or argument to support its position. In the absence of such a written explanation from the employer, the Office may accept the claimant's report of injury as factual.⁶ The employing

³ See *John J. Carlone*, 41 ECAB 354 (1989); see also 5 U.S.C. § 8101(5) ("injury" defined); 20 C.F.R. § 10.5(q) and (ee) (1999) ("occupational disease or illness" and "traumatic injury" defined).

⁴ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁵ *William J. Cantrell*, 34 ECAB 1223 (1983).

⁶ 20 C.F.R. § 10.117(b) (1999).

establishment's reluctance or refusal to submit the requested evidence regarding the extent of appellant's occupational noise exposure should not be an impediment to appellant's successful prosecution of the claim. The type of information being sought is normally within the custody of the employing establishment and not readily available to appellant. Accordingly, appellant should not be penalized for the employing establishment's failure to submit the requested information. In its April 15, 2003 correspondence with the employing establishment, the Office cited section 10.117(b). While this provision is not mandatory, it is not at all clear from the Office's May 20, 2003 decision why it declined to invoke the provision on appellant's behalf given the employing establishment's failure to submit the requested information concerning appellant's occupational exposure. The Office merely stated that "[t]he evidence submitted is insufficient to establish that the event(s) occurred as alleged."

On remand, the Office should again request any pertinent information from the employing establishment regarding appellant's employment history and occupational noise exposure. The employing establishment should be reminded of the likely consequence of its repeated failure to respond. Upon receipt of the requested information, the Office should refer appellant, the case record and a statement of accepted facts to an appropriate medical specialist for an evaluation and a rationalized medical opinion on whether appellant sustained a hearing loss causally related to his employment exposure. After such further development of the case record as the Office deems necessary, a *de novo* decision shall be issued.

The May 20, 2003 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Dated, Washington, DC
October 1, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member