United States Department of Labor
Employees' Compensation Appeals Board

DAVID B. PAULEY, Appellant	)	
and	)	**Docket No. 04-1898**
	)	**Issued: December 13, 2004**
DEPARTMENT OF THE NAVY, SPACE & NAVAL WARFARE SYSTEM CENTER, North Charleston, SC, Employer	)	

Appearances:
David S. Jennings, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On July 26, 2004 appellant, through his attorney, filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated May 17, 2004 finding that he had not established that his hearing loss was causally related to his federal employment. The record also contains an Office decision dated June 8, 2004 denying appellant's request for review of the merits of his claim pursuant to 5 U.S.C. § 8128(a). Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit hearing loss denial and the nonmerit decision in this case.

ISSUES

The issues are: (1) whether appellant has met his burden of proof in establishing that his hearing loss was due to his federal employment; and (2) whether the Office properly refused to reopen appellant's claim for further review of the merits on June 8, 2004.

FACTUAL HISTORY

On July 23, 2004 appellant, then a 62-year-old former electronics technician, filed an occupational disease claim alleging that he had developed hearing loss due to exposure to noise in the performance of his federal duties. Appellant indicated that he first became aware of his hearing loss in 1987 and first attributed the hearing loss to his employment exposures in 1987. Appellant last worked at the employing establishment in April 1996.

Appellant submitted factual evidence in support of his claim, and alleged that during the course of his federal employment he was exposed to noise from drilling, grinding, jack hammers, power saws, pneumatic tools, ship horns, bull horns, occasional rocket launchers, missile launchers and gun mount firing. This noise exposure was up to 8 hours a day, 40 hours a week. The employing establishment provided ear plugs. He also submitted an audiogram dated October 12, 2003.

In a letter dated February 4, 2004, the Office requested additional factual and medical information from appellant and noted that appellant's claim did not appear to be timely filed. The Office requested information regarding the employing establishment's awareness of appellant's loss of hearing.

Appellant submitted audiograms dated from 1981 through 1993 from the employing establishment health unit which demonstrated a significant threshold shift on July 22, 1993.[1] The July 22, 1993 audiogram report demonstrated losses at the frequencies of 500, 1,000, 2,000 and 3,000 cycles per second in the right ear of 15, 20, 20 and 30 decibels (dBs) respectively and in the left ear losses of 10, 20, 20, and 30 dBs respectively. The Office referred this evidence to the Office medical adviser on March 10, 2004. He determined that the audiograms revealed a significant worsening in appellant's hearing from normal to a mild high frequency hearing loss bilaterally.

On April 9, 2004 the Office referred appellant and a statement of accepted facts for a second opinion evaluation with Dr. Robert Marwick, a Board-certified otolaryngologist. In a report dated April 30, 2004, Dr. Marwick reviewed the statement of accepted facts and appellant's prior audiogram reports. He noted that appellant's 1980 audiogram revealed normal hearing bilaterally. Dr. Marwick then compared appellant's 1980 audiogram with his 1993 audiogram and stated that the 1993 findings "do not significantly exceed the anticipated presbycusic curve of a 52-year-old." He stated that his present findings indicated a mild to moderate bilateral sensorineural hearing loss and opined that this loss of hearing was not due to employment-related noise exposure. Dr. Marwick again stated, "When the June 25, 1980 baseline tests is compared to the final federal employment audiogram, dated July 22, 1993, no OSHA (Occupational Safety & Health Administration) defined (3-83) standard threshold was noted in either ear. Of course, the claimant worked another three years before retiring in 1996."

[1] The Board has held that a program of annual audiometric examinations conducted by an employing establishment in conjunction with an employee testing program is sufficient to constructively establish actual knowledge of a hearing loss such as to put the immediate supervisor on notice of an on-the-job injury. *James A. Sheppard*, 55 ECAB ___ (Docket No. 03-692, issued May 5, 2004).

Appellant's April 30, 2004 audiogram taking in concert with Dr. Marwick's report demonstrated losses at the frequencies of 500, 1,000, 2,000 and 3,000 cycles per second in the right ear of 30, 30, 25 and 45 dBs respectively and in the left ear losses of 30, 30, 30, and 40 dBs respectively.

By decision dated April 17, 2004, the Office denied appellant's claim for an employment-related loss of hearing. The Office noted that Dr. Marwick opined that appellant's loss of hearing was not due to his employment-related noise exposure and found that appellant had not met his burden of proof in establishing his claim.

Appellant, through his attorney, requested reconsideration of the Office's April 17, 2004 decision on May 25, 2004. Appellant's attorney argued that Dr. Marwick should have considered whether appellant sustained any additional hearing loss due to noise exposure from 1993 to 1996 rather than basing his opinion on the 1993 audiogram. By decision dated June 8, 2004, the Office declined to reopen appellant's claim for consideration of the merits.

LEGAL PRECEDENT -- ISSUE 1

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence of existence of a disease or condition for which compensation is claimed; (2) a factual statement identifying the employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The medical opinion must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[2]

Proceedings under the Federal Employees' Compensation Act are not adversarial in nature nor is the Office a disinterested arbiter. While appellant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.[3] Once the Office has begun an investigation of a claim, it must pursue the evidence as far as reasonably possible.[4] The Office has an obligation to see that justice is done.[5]

ANALYSIS -- ISSUE 1

In this case, appellant submitted factual and medical evidence supporting noise exposure during his federal employment as well as a loss of hearing. While this evidence was not sufficient to meet appellant's burden of proof, as the audiograms were not certified by a

[2] *Solomon Polen*, 51 ECAB 341, 343-44 (2000).

[3] *John J. Carlone*, 41 ECAB 354, 359-60 (1989).

[4] *Edward Schoening*, 41 ECAB 277, 282 (1989).

[5] *Lourdes Davila*, 45 ECAB 139, 143 (1993).

physician as being accurate[6] and there was no opinion on the causal relationship between appellant's job-related noise exposure and his hearing loss, the evidence was sufficient to require additional development of the medical evidence by the Office. The Office undertook such development initially by referring the audiograms to the Office medical adviser who determined that the audiogram reports demonstrated a significant worsening of appellant's hearing. The Office referred appellant, the medical evidence of record and a statement of accepted facts to Dr. Marwick, a Board-certified otolaryngologist, for an opinion on the causal relationship between appellant's loss of hearing and his employment-related noise exposure.

Dr. Marwick's April 30, 2004 report does not adequately address the central issue in this case, whether appellant's loss of hearing is due to noise exposure in the performance of his federal duties and requires further development of the medical evidence by the Office. Dr. Marwick limited his opinion regarding appellant's loss of hearing to that presented by the most recent employing establishment audiogram report from June 22, 1993. Appellant continued to work at the employing establishment through April 1996. Dr. Marwick recognized that appellant had additional employment-related noise exposure, but failed to consider the impact of such exposure after 1993 on appellant's hearing. The Board has recognized that a claimant may be entitled to an award for increased hearing loss, even after exposure to hazardous noise has ceased, if causal relationship is supported by the medical evidence of record.[7] In this case, the Office's referral physician did not address appellant's current loss of hearing or indeed any loss of hearing after 1993 and did not address whether this loss of hearing is causally related to his accepted noise exposure in the performance of his federal job duties through April 1996. Since the Office referred appellant to Dr. Marwick it should secure an appropriate report on the relevant issues.[8]

On remand the Office should request that Dr. Marwick[9] specifically address appellant's current hearing loss and opine whether such loss was caused or contributed to by his employment-related noise exposure through April 1996. After this and such other development as the Office deems necessary, the Office should issue an appropriate decision.[10]

CONCLUSION

The Board finds this case not in posture for decision. The Office undertook development of the medical evidence, but the second opinion physician failed to adequately address the issue of causal relationship. On remand, the Office should specifically request that he address this issue.

---

[6] *Joshua A. Holmes*, 42 ECAB 231, 236 (1990).

[7] *Paul R. Reedy*, 45 ECAB 488, 490 (1994).

[8] *Robert Kirby*, 51 ECAB 474, 476 (2000).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.9.g. (June 2002).

[10] Due to the disposition of this issue, it is not necessary for the Board to address whether the Office properly declined to reopen appellant's claim for consideration of the merits on June 8, 2004.

ORDER

IT IS HEREBY ORDERED THAT the May 17, 2004 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for additional development consistent with this decision of the Board.

Issued: December 13, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member