United States Department of Labor
Employees' Compensation Appeals Board

STEVE E. KIMBROUGH, Appellant	)	
and	)	**Docket No. 04-1623**
	)	**Issued: November 8, 2004**
TENNESSEE VALLEY AUTHORITY, BROWNS FERRY NUCLEAR PLANT, Athens, AL, Employer	)	

Appearances:
Steve E. Kimbrough, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On June 4, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' nonmerit decision dated April 22, 2004 and merit decisions of February 26, 2004 and of October 20, 2003, which denied his occupational injury claim. Pursuant to 20 C.F.R. §§ 501.2 and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant sustained an injury while in the performance of duty; and (2) whether the refusal of the Office to reopen appellant's case for further consideration on the merits of his claim pursuant to 5 U.S.C. § 8128(a) constituted an abuse of discretion.

FACTUAL HISTORY

On April 16, 2003 appellant, a 60-year-old retired electrician, filed an occupational injury claim (Form CA-2) alleging that he sustained hearing loss as a result of noise exposure during

his 33-year career with the federal government. Appellant first became aware of the hearing loss on July 23, 1998, as a result of a hearing test administered by his employer, but failed to report the condition because "the loss was mild at the time." The record reflects that he was last exposed to noise on November 29, 2002 and first reported his condition to his supervisor on August 5, 2003. In support of his claim, appellant submitted numerous reports from hearing tests conducted by the employing establishment, including a report dated August 14, 2002, which revealed that he had a mild loss for speech sounds in both ears; a moderately severe loss for high pitch sounds in his left ear; and a moderate loss for high pitch sounds in his right ear. The report also indicated that appellant's hearing was slightly worse for high frequency sounds in at least one ear when compared to his previous test. Two previous reports dated July 31, 1998 and September 13, 2000 reflected mild loss for speech sounds in the left ear and moderate and moderately severe loss in the right and left ear respectively for high frequency sounds.

The statement of accepted facts, dated September 9, 2003, accepted that appellant was exposed to noise from turbines, generator motors, and air compressors' steam going through pipes 5 days per week for 4 to 6 hours per day at levels of 78 to 91 decibels.

At the request of the Office, appellant was referred to Dr. George Godwin, a Board-certified otolaryngologist, who performed a second opinion examination on October 9, 2003. Based upon the statement of accepted facts, a review of the entire case record, testing and examination of appellant, Dr. Godwin opined that appellant's bilateral hearing loss was not causally related to his employment. Noting that appellant did not "show significant progression of hearing loss during federal employment," he concluded that his hearing loss was "consistent with presbycusis."

By decision letter dated October 20, 2003, the Office denied appellant's claim finding that the medical evidence did not demonstrate that his hearing loss was causally related to the accepted conditions of employment. The Office relied on the opinion of Dr. Godwin that appellant's hearing loss was due to presbycusis, a normal hearing loss due to aging.

Appellant requested reconsideration and submitted a medical report dated November 18, 2003, from Dr. Kenneth LeMaster, a Board-certified otolaryngologist, who examined appellant on November 17, 2003 and reviewed several hearing tests, which reflected a sloping high frequency sensorineural hearing loss that was symmetric bilaterally. He stated that, although the audiometric patterns were nonspecific and more closely resembled the audiometric patterns associated with presbycusis or age-related hearing loss, they were out of character for a 60-year-old man. After referring to appellant's description of the nature of his noise exposure in his job as an electrician in his 33 years of employment with the federal government, the doctor opined that "more likely than not," the noise exposure that appellant described contributed to his hearing loss.

By decision letter dated February 26, 2004, the Office denied modification of the October 20, 2003 decision, finding that appellant had failed to submit medical evidence sufficient to establish that his hearing loss was causally related to his employment. The Office determined that Dr. LeMaster's report did not constitute a well-reasoned medical opinion, nor did it explain the relationship between his then current level of hearing loss and his employment duties or equipment he used in the workplace.

By letter dated March 18, 2003, appellant requested reconsideration on the grounds that "my previous hearing test were reviewed but that no results of these test were presented." He indicated that he would like to know if he had a hearing loss prior to 2003 and, if so, whether it was due to age or noise. By decision dated April 22, 2004, the Office denied appellant's request for reconsideration, finding that he failed to either submit new and relevant evidence or to raise substantive legal questions.

LEGAL PRECEDENT -- ISSUE 1

The issue is whether appellant has met his burden of proof in establishing that he sustained an injury causally related to factors of his federal employment.

An employee seeking benefits under the Federal Employees' Compensation Act[1] has the burden of establishing the essential elements of his or her claim, including the fact that an injury was sustained in the performance of duty as alleged,[2] and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[3] 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 or existence of the 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.[4]

Causal relationship is a medical issue, and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on whether there is a causal relationship between the claimant's diagnosed condition and the established incident or factor of employment. The opinion must be based on a complete factual and medical background of the claimant, 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 established incident or factor of employment.[5]

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[1] 5 U.S.C. §§ 8101-8193.

[2] *Joseph W. Kripp,* 55 ECAB ___ (Docket No. 03-1814, issued October 3, 2003); *see also Leon Thomas*, 52 ECAB 202, 203 (2001). "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." *See also* 5 U.S.C. § 8101(5) ("injury" defined); 20 C.F.R. § 10.5(q) and (ee) (2002) ("[o]ccupational disease or [i]llness" and "[t]raumatic injury" defined).

[3] *Dennis M. Mascarenas*, 49 ECAB 215, 217 (1997).

[4] *Michael R. Shaffer,* 55 ECAB ___ (Docket No. 04-233, issued March 12, 2004). *See also Solomon Polen*, 51 ECAB 341, 343 (2000).

[5] *John W. Montoya,* 54 ECAB ___ (Docket No. 02-2249, issued January 3, 2003).

Appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which compensation is claimed was caused by the accepted injury. This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to employment factors and supports that conclusion with sound medical reasoning. Medical conclusions unsupported by rationale are of little probative value.[6] An award of compensation cannot be made on the basis of surmise, conjecture or speculation or on appellant's unsupported belief of causal relation.[7]

The Office has delineated requirements for the type of medical evidence used in evaluating hearing loss. The requirements, as set forth in the Office's procedure manual, are very specific and require that the employee undergo both audiometric and otologic examination and that the otolaryngologist's report include a rationalized medical opinion regarding the relationship of the hearing loss to the employment-related noise exposure.[8]

ANALYSIS -- ISSUE 1

The medical evidence of record does not establish that appellant's hearing loss was causally related to his employment.

An employee seeking benefits under the Act has the burden of proof to establish the essential elements of his claim. 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 or existence of the 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.[9] The medical evidence presented establishes the existence of the condition for which compensation is claimed, namely hearing loss. The record includes copies of numerous hearing tests reflecting appellant's loss of hearing, as well as Dr. Godwin's second opinion report dated October 10, 2003, stating that appellant had a binaural sensorinueral hearing loss condition. With regard to identification of employment factors, appellant submitted a personal statement identifying the employment factors alleged to have caused or contributed to the occurrence of his condition, to wit: that, over the course of his 33-year career with the federal government, he was exposed to loud noises from "turbins, generator motors, air compressors' steam going through pipes." He further alleged in his CA-2 that his

[6] *Willa M. Frazier*, 55 ECAB ___ (Docket No. 04-120, issued March 11, 2004).

[7] *John D. Jackson*, 55 ECAB ___ (Docket No. 03-2281, issued April 8, 2004); *see also Michael E. Smith*, 50 ECAB 313, 317 (1999).

[8] *Raymond H. VanNett*, 44 ECAB 480, 483 (1993), *citing* Federal (FECA) Procedural Manual, Part 4 -- Medical Management, *Hearing Loss*, Chapter 4.300 (May 1991).

[9] *Michael R. Shaffer*, 55 ECAB ___ (Docket No. 04-233, issued March 12, 2004). *See also Solomon Polen*, 51 ECAB 341, 343 (2000).

hearing loss was a direct result of his exposure to the high noise levels associated with his employment. However, although appellant has established his exposure to noise in his work, he has failed to provide medical evidence establishing a causal relationship between the accepted noise exposure and his hearing loss.[10]

Causal relationship is a medical issue, and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on whether there is a causal relationship between the claimant's diagnosed condition and the established incident or factor of employment. The opinion must be based on a complete factual and medical background of the claimant, 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 established incident or factor of employment.[11]

The only medical opinion evidence before the Office is that of Dr. Godwin, who reviewed the statement of accepted facts; reviewed reports of 15 of appellant's hearing tests over the course of his federal employment; administered his own hearing tests; and examined appellant. Based upon a complete medical and factual history, and with knowledge of the types of equipment and noise levels to which appellant was exposed during his employment, Dr. Godwin opined that appellant's hearing loss was not causally related to his employment, in that it did not show significant progression of hearing loss during federal employment. He further proffered that the hearing loss was consistent with presbycusis.

On reconsideration, appellant submitted a medical report from Dr. LeMaster. Based upon a physical examination and review of the October 9, 2003 audiogram and another evaluation dated "October 28,"[12] Dr. LeMaster observed a sloping high frequency sensorineural hearing loss that was symmetric bilaterally. He stated that the audiometric patterns were "nonspecific" and more closely resembled the audiometric patterns associated with presbycusis or age[-]related hearing loss." Pointing out that it is "out of character for a 60-year-old man," Dr. LeMaster opined that "it is more likely than not" that the noise exposure described by appellant contributed to his hearing loss.

Dr. LeMaster's report lacks probative value for several reasons. There is no indication that the doctor reviewed the entire record in this case, including the accepted statement of facts and the various hearing tests. The report does not provide a rationalized opinion on whether there is a causal relationship between appellant's hearing loss and the conditions of employment. Without offering any medical explanation as to the nature of the relationship between the hearing loss and the employment conditions, he rendered an opinion that it was "more likely than not," that the noise exposure contributed to appellant's condition. Because Dr. LeMaster's medical conclusions are unsupported by medical rationale, they are of diminished probative value.[13]

[10] *Betty J. Parker*, 46 ECAB 920, 923 (1995).

[11] *John W. Montoya*, *supra* note 5.

[12] The above referenced "October 28" evaluation does not appear in the record.

[13] *Willa M. Frazier*, *supra* note 6.

Appellant has not met his burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which compensation is claimed was caused by the accepted injury.

LEGAL PRECEDENT -- ISSUE 2

The refusal of the Office to reopen appellant's case for further consideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a) did not constitute an abuse of discretion.

Under 20 C.F.R. § 10.606 a claimant may obtain review of the merits of his claim by written request to the Office identifying the decision and specific issue(s) within the decision which the claimant wishes the Office to reconsider and the reasons why the decision should be changed and by:

"(i) Showing that the Office erroneously applied or interpreted a point of law; or

"(ii) Advancing a point of law or fact not previously considered by the Office; or

"(iii) Constituting relevant and pertinent evidence not previously considered by the Office."[14]

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs 10.606(b)(2)(i) through (iii) of that section will be denied by the Office without review of the merits of the claim.[15] However, where a claimant fails to submit relevant evidence not previously of record or advance legal contentions not previously considered, the Office has discretion to reopen a case for further consideration under the Act.[16]

ANALYSIS -- ISSUE 2

The Board finds that the Office's refusal to reconsider its merit decision of February 26, 2004 did not constitute an abuse of discretion.

In order for appellant to obtain review of the merits of his claim, it was necessary for him either to show that the Office erroneously applied or interpreted a point of law; to advance a point of law or fact not previously considered by the Office; or to submit relevant and pertinent evidence not previously considered by the Office."[17]

By letter dated March 18, 2003, appellant requested reconsideration of the Office's refusal to modify its original decision of October 20, 2003, on the grounds that "my previous

[14] 20 C.F.R. § 10.606.

[15] 20 C.F.R. § 10.608(b).

[16] *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

[17] 20 C.F.R. § 10.606.

hearing test were reviewed but that no results of these test were presented." He indicated that he would like to know if he had a hearing loss "prior to 60 years old" and, if so, whether it was due to age or noise. By decision dated April 22, 2004, the Office denied appellant's second request for reconsideration based upon his failure either to submit new and relevant evidence or to raise substantive legal questions. Appellant offered no additional medical evidence, or new evidence of any nature whatsoever. He did not allege that the Office erroneously applied or interpreted a point of law, nor did he advance a point of law or fact or submit relevant and pertinent evidence not previously considered by the Office." Essentially, appellant just wanted another "bite at the apple," and the Office was within its statutory rights to deny his request for reconsideration.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he sustained an injury in the performance of duty; and the Office did not abuse its discretion in refusing to reopen appellant's case for further consideration on the merits of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated April 22 and February 26, 2004 and October 20, 2003 are affirmed.

Issued: November 8, 2004
Washington, DC

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member