United States Department of Labor
Employees' Compensation Appeals Board

DALTON O. LOGAN, Appellant	)	
and	)	**Docket No. 05-1752**
	)	**Issued: November 16, 2005**
TENNESSEE VALLY AUTHORITY, Chattanooga, TN, Employer	)	

Appearances:
Rodney D. Logan, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge

JURISDICTION

On August 22, 2005 appellant's representative filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated October 25, 2004 in which an Office hearing representative affirmed the Office's finding that he had not met his burden of proof in establishing that his hearing loss was causally related to his federal employment and a February 8, 2005 nonmerit decision which denied appellant's request for a merit review of his claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.2, the Board has jurisdiction over both merit and nonmerit issues of this case.

ISSUES

The issues are: (1) whether appellant has met his burden of proof in establishing that he sustained a hearing loss in the performance of duty; and (2) whether the Office properly denied appellant's request for a review of the merits of his claim under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On March 7, 2003 appellant, a 79-year-old power service -- carpenter shop,[1] filed an occupational disease claim alleging that in 1979 he first realized his hearing loss was employment related.[2] He noted that he was constantly exposed to loud machinery noise.

In support of his claim, appellant submitted audiograms dated March 22, 1977, May 6, 1996, May 8, 2001 and October 6, 2003 and a statement. In his statement, appellant indicated that he had been employed by the Southern Sash Carpenter Shop for 24 years.

By letter dated May 28, 2003, the Office informed appellant that the 1978 audiogram performed at the beginning of his federal employment and postretirement audiograms were insufficient to support his claim. The Office asked him to submit additional information including a comprehensive medical report from his treating physician which included a reasoned explanation as to how the specific work factors or incidents identified by appellant had contributed to his claimed hearing loss.

In a second letter of the same date, the Office requested that the employing establishment provide copies of appellant's employment records, including audiograms. The employing establishment submitted, *inter alia*, audiograms and audiometric test results reflecting annual testing dating back to the beginning of his employment.

The Office accepted appellant's claim as timely and on March 17, 2004 referred him, a copy of his medical record and a statement of accepted facts to Dr. George Godwin, a Board-certified otolaryngologist, for a determination as to whether his hearing loss was caused by his federal employment. In a statement of accepted facts dated March 17, 2004, the Office stated that appellant had performed carpentry work for the employing establishment from March 24, 1977 to February 19, 1988. It also stated that he "was exposed to sandblasters, plainers, joiners and table, band dewalt saws" five days a week, eight hours a day and that he wore ear plugs.

In a report dated April 22, 2004, Dr. Godwin reported findings of an audiogram conducted by a certified audiologist on April 15, 2005 and found that appellant had moderate sensorineural binaural hearing loss but that it was not caused by industrial noise exposure. Dr. Goodwin noted that appellant's hearing loss was present in 1977, prior to his federal employment and at the end of his federal employment, at the time he retired in 1988, "was essentially the same." He concluded "[t]his would indicate no significant hearing loss progression during federal employment."

By decision dated April 29, 2004, the Office denied appellant's claim on the grounds that the evidence failed to support that his hearing loss was caused by his employment.

Appellant requested a review of the written record by an Office hearing representative on May 27, 2004.

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[1] Appellant retired from the employing establishment effective February 19, 1988.

[2] The Office received the claim on May 12, 2003.

By decision dated October 25, 2004, an Office hearing representative affirmed the denial of appellant's hearing loss claim.

In a letter dated July 7, 2005, appellant requested reconsideration.

In a nonmerit decision dated August 8, 2005, the Office denied appellant's request for reconsideration.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act has the burden of establishing the essential elements of his claim, including the fact that the individual is an employee of the United States within the meaning of the Act, that the claim was filed within the applicable time limitation of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury. These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[3]

In order to determine whether an employee actually sustained an injury in the performance of duty, the Office begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.[4] The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence. To establish a causal relationship between the condition, as well as any attendant disability claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence, based on a complete factual and medical background, supporting such a causal relationship.[5]

Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician 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 specific employment factors identified by the claimant.[6] The weight of the medical evidence is determined by its reliability, its

[3] *Phillip L. Barnes*, 55 ECAB ___ (Docket No. 02-1441, issued March 31, 2004); *Gary J. Watling*, 52 ECAB 357 (2001).

[4] *Michael E. Smith*, 50 ECAB 313 (1999).

[5] *Id.*

[6] *Leslie C. Moore*, 52 ECAB 132 (2000).

probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.[7]

ANALYSIS -- ISSUE 1

Appellant claimed that he sustained a hearing loss due to exposure to hazardous noise at work. Although the evidence establishes that he has a hearing loss and that he had workplace noise exposure, the medical evidence does not support his claim that his hearing loss was caused by his civilian federal employment.

In an August 31, 2004 report, the Office second opinion physician, Dr. Godwin, a Board-certified otolaryngologist, provided a comprehensive report noting appellant's history and findings on examination and audiometric testing. He found that appellant's hearing loss was not employment related. Dr. Godwin explained his opinion on causal relationship, noting that appellant's hearing loss was present at the time he started his federal employment in 1977 and his hearing was essentially the same at the time of his retirement in 1988. As his hearing loss did not worsen during his federal employment, Dr. Godwin concluded "[t]his would indicate no significant hearing loss progression during [f]ed[eral] employment." Thus, he found no basis on which to attribute appellant's hearing loss to his workplace noise exposure. Consequently, the Board finds that the medical evidence does not establish that appellant's federal employment caused or contributed to his hearing loss.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act[8] vests the Office with discretionary authority to determine whether it will review an award for or against compensation. Thus, the Act does not entitle a claimant to a review of an Office decision as a matter of right.[9]

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provide that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (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.[10] Section 10.608(b) provides that, when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[11] When reviewing an

[7] *Jimmie H. Duckett*, 52 ECAB 332 (2001); *Franklin D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value).

[8] 5 U.S.C. § 8128(a) ("[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application").

[9] *Jeffrey M. Sagrecy*, 55 ECAB ___ (Docket No. 04-1189, issued September 28, 2004); *Veletta C. Coleman*, 48 ECAB 367 (1997).

[10] 20 C.F.R. § 10.606(b)(2).

[11] 20 C.F.R. § 10.608(b).

Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.[12]

ANALYSIS -- ISSUE 2

Appellant's July 7, 2005 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, he did not advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).[13] He also failed to satisfy the third requirement under section 10.606(b)(2), as appellant did not submit any evidence with his request for reconsideration. As appellant failed to submit any relevant and pertinent new evidence not previously considered by the Office, he is not entitled to a review of the merits of his claim based on the third requirement under section 10.606(b)(2).[14] Because he was not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2), the Office properly denied the July 7, 2004 request for reconsideration.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he sustained a hearing loss in the performance of duty. The Board also finds that the Office properly denied his request for reconsideration under 5 U.S.C. § 8128(a).

[12] *Annette Louise*, 54 ECAB ___ (Docket No. 03-335, issued August 26, 2003).

[13] 20 C.F.R. §§ 10.606(b)(2)(i) and (ii).

[14] 20 C.F.R. § 10.606(b)(2)(iii).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 8, 2005 and October 25, 2004 are affirmed.

Issued: November 16, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board