United States Department of Labor
Employees' Compensation Appeals Board

JUANITA CRUMP, Appellant	)	
	)	**Docket No. 06-675**
and	)	**Issued: July 20, 2006**
DEPARTMENT OF THE AIR FORCE, ROBINS AIR FORCE BASE, GA, Employer	)	

Appearances:
John C. Hall, 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 24, 2006 appellant filed a timely appeal of the January 27, 2005 Office of Workers' Compensation Programs' decision denying her hearing loss claim and a November 28, 2005 decision which denied further merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether appellant has met her burden of proof in establishing that she developed hearing loss in the performance of duty; and (2) whether the Office properly denied her request for reconsideration.

FACTUAL HISTORY

On October 23, 2002 appellant, then a 48-year-old sheet metal worker, filed a claim for compensation benefits alleging that she sustained a hearing loss due to her federal employment. She became aware of her hearing loss on September 30, 2002. On October 8, 2002 appellant changed her job site because of permanent restrictions from another injury. She did not stop

work. Appellant submitted a record of injury or illness dated October 23, 2002 which noted that she had been working in the steam room for 10 months and experienced a hearing loss and bilateral ringing in her ears. She advised that she wore earplugs which were ineffective in preventing her hearing loss.

The employing establishment submitted a job description as well as a master workplace exposure data summary. In a memorandum dated November 5, 2002, Henry S. Personius, deputy of the bioenvironmental engineering flight, advised that appellant was permanently removed from her sheet metal mechanic job due to another injury and was temporarily assigned to building 49 as administrative support. The buildings to which she was transferred were designated hazardous noise areas because the noise levels were over the 85 decibels limit. Mr. Personius advised that appellant was provided with earplugs, ear muffs and administrative time limits for certain activities. Also submitted was a report documenting a noise survey which was conducted on behalf of the employing establishment.

By letter dated December 2, 2002, the Office advised appellant of the factual and medical evidence needed to establish her claim. It requested that she submit a physician's reasoned opinion addressing the relationship of her claimed hearing loss and specific employment factors. In a letter of the same date, the Office requested that the employing establishment provide comments from a knowledgeable supervisor on the accuracy of appellant's statements, periods of exposure and ear protection provided.

In a statement dated December 16, 2002, appellant noted that she was employed as a sheet metal worker from 1991 to the present and exposed to low noises from using air tools, working on aircraft and in aircraft hangars. She also worked as an escort in a steam room and wore earplugs. Also submitted was results of audiograms performed August 28, 1991 to October 30, 2002, compiled by Angela Williamson, an employing establishment audiologist.

The employing establishment submitted audiograms dated March 12, 1993 to October 30, 2002 revealing normal range of hearing in all frequencies tested in each ear. On October 30, 2002 Ms. Williamson noted that appellant presented with a history of normal hearing from 1991 to 2002. Appellant reported that after a recent temporary-duty assignment to a steam room area she experienced decreased hearing accompanied by tinnitus bilaterally. Ms. Williamson noted that she had no specific complaints regarding difficulty hearing or understanding. Appellant advised that she used disposable ear protection. Ms. Williamson noted poor intra-test reliability and normal cochlear function in both ears.

A statement of accepted facts dated April 17, 2003 noted that, from 1991 to the present, appellant was employed as a sheet metal worker and was exposed to low noises from air tools, aircraft and aircraft hangars. She also worked in a steam room and was provided with earplugs. On October 8, 2002 appellant was transferred to an environment without hazardous noise.

The Office referred appellant to Dr. Kenneth J. Walker, a Board-certified otolaryngologist, for an otologic examination and an audiological evaluation. He performed an otologic evaluation on May 13, 2003 and audiometric testing was conducted on his behalf on that date. Testing at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second (CPS) revealed the following: right ear 10, 10, 10 and 10 decibels; left ear 15, 10, 5 and 10 decibels.

Dr. Walker determined that appellant developed a nonratable mild sensorineural hearing loss. He advised that the external auditory canals, tympanic membranes and middle ears were normal on examination. Dr. Walker advised that tympanometry was within normal range. He indicated that the audiogram revealed the presence of very mild bilateral high frequency sensorineural hearing loss and opined that the mild hearing loss was consistent with presbycusis, not noise exposure.

By decision dated July 7, 2003, the Office denied appellant's claim on the grounds that the weight of the medical evidence established that her hearing loss was not causally related to noise exposure during federal employment.

On July 22, 2003 appellant requested an oral hearing before an Office hearing representative. On February 11, 2004 she withdrew her request for an oral hearing and requested a review of the written record.

By a decision dated May 21, 2004, the hearing representative affirmed the July 7, 2003 decision.

By letter dated December 1, 2004, appellant requested reconsideration. She submitted an audiogram dated July 23, 2003 from Natalie Gibbs, an audiologist. It revealed type a tympanogram within normal limits bilaterally consistent with normal middle ear function bilaterally and mild high frequency hearing loss bilaterally. An audiogram dated March 18, 2004 prepared by Shea White, an audiologist, revealed mild to moderate sensorineural hearing loss bilaterally and the audiologist recommended hearing aids bilaterally. In a report dated November 1, 2004, Ms. White noted a history of appellant's hazardous noise exposure, including aircraft, air tools, working in aircraft hangars and heavy machinery. She advised that appellant wore ear muffs and earplugs. Ms. White noted that from July 23, 2003 to March 18, 2004 her hearing thresholds decreased by 15 to 20 decibels to mild to moderate sensorineural hearing loss across all frequencies bilaterally and she recommended hearing aids.

On January 26, 2005 an Office medical adviser reviewed Dr. Walker's report and the audiometric test of May 13, 2003. He concluded that appellant did not sustain a work-related hearing loss. He concurred with Dr. Walker, who determined that appellant had a mild nonratable, high frequency hearing loss due to presbycusis (normal aging) and which was not work related. The medical adviser noted that appellant had no exposure to hazardous noise at work after October 8, 2002 and, therefore, any worsening of her hearing loss after this period could not be attributed to her federal employment. He noted that the audiogram of March 18, 2004 was consistent with increased hearing loss, but the changes were not typical of noise-induced hearing loss and could not be related to federal employment.

In a decision dated January 27, 2005, the Office denied modification of the May 21, 2004 decision.

In a letter dated November 7, 2005, appellant, through her representative, requested reconsideration and asserted that she has sustained work-related hearing loss. She attached evidence from Ms. Williamson previously of record.

By decision dated November 28, 2005, the Office denied appellant's reconsideration request on the grounds that her request neither raised substantive legal questions nor included new and relevant evidence and was, therefore, insufficient to warrant review of the prior decision.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act has the burden of establishing the essential elements of his or 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 timely filed within the applicable time limitation period of the Act, that the 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.[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 or existence of the disease or condition for which compensation is claimed; (2) factual statement identifying 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 employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by claimant. The medical evidence required to establish causal relationship is generally rationalized medical opinion evidence. 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.[2]

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's condition became apparent during a period of employment nor the belief that his condition was caused, precipitated or aggravated by his employment is sufficient to establish causal relationship. The mere fact that a disease or condition manifests itself or worsens during a period of employment[3] or that work activities produce symptoms revelatory of an underlying condition[4] does not raise an inference of causal relation between the

[1] *Gary J. Watling*, 52 ECAB 357 (2001).

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

[3] *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

[4] *Richard B. Cissel*, 32 ECAB 1910, 1917 (1981).

condition and the employment factors. Neither the fact that appellant's condition became apparent during a period of employment nor the belief that the condition was caused, precipitated or aggravated by his employment is sufficient to establish a causal relationship.[5]

ANALYSIS -- ISSUE 1

In the instant case, it is not disputed that appellant was exposed to hazardous noise from 1991 to the present in the course of her employment. However, the weight of the medical evidence does not establish that her hearing loss is causally related to her employment-related noise exposure. Appellant did not submit any medical report from an attending physician addressing how her employment-related noise exposure caused or aggravated her hearing loss. Various audiograms were submitted from Ms. Williamson, an employing establishment audiologist, dated October 30, 2002. She advised that the test batteries showed inconsistencies which were common in individuals who attempt to exaggerate a hearing loss. Appellant also submitted several audiograms from Ms. Gibbs and Ms. White, also audiologists, which revealed mild to moderate sensorineural hearing loss bilaterally and a recommendation for hearing aids bilaterally. However, none of the audiograms were accompanied by a physician's discussion of the employment factors believed to have caused or contributed to appellant's hearing loss. Thus, these reports and audiograms from audiologists do not constitute probative medical evidence.[6]

The Office referred appellant to Dr. Walker, a Board-certified specialist. In a report dated May 23, 2003, he determined that she developed a nonratable mild sensorineural hearing loss that was not attributed to her history of noise exposure at work. Dr. Walker advised that the audiogram revealed the presence of very mild bilateral high frequency sensorineural hearing loss and opined that it was consistent with presbycusis, not noise exposure. An Office medical adviser also noted that appellant's hearing loss was due to presbycusis (normal aging) and was not work related. The Board notes that Dr. Walker had specific knowledge of her employment factors and opined that her hearing loss was not causally related to appellant's federal employment but was consistent with presbycusis. His report constitutes the weight of medical opinion.

There is no other medical evidence providing a specific opinion on causal relationship between appellant's hearing loss and her federal employment. Consequently, the medical evidence does not establish that the hearing loss was due to her federal employment noise exposure.

[5] *Robert G. Morris*, 48 ECAB 238-39 (1996).

[6] *See* 5 U.S.C. § 8101(2). This subsection defines the term "physician." *See also Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (where the Board held that medical opinion, in general, can only be given by a qualified physician); *Herman L. Henson*, 40 ECAB 341 (1988) (an audiologist is not considered a physician under the Act).

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of the Act,[7] the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,[8] which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

> "(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or
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> (ii) Advances a relevant legal argument not previously considered by the (Office); or
>
> (iii) Constitutes relevant and pertinent new evidence not previously considered by [the Office]."

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 section 10.606(b) will be denied by the Office without review of the merits of the claim.[9]

ANALYSIS -- ISSUE 2

Appellant's November 7, 2005 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, she did not advance a relevant legal argument not previously considered by the Office.

Appellant's request for reconsideration asserted that the chronological audiograms prepared by Ms. Williamson supported her contention that she had bilateral hearing loss. However, appellant's letter is not germane to the underlying medical issue of whether her hearing loss was work related. The letter does not establish that the Office erroneously applied or interpreted a point of law or advance a point of law or fact not previously considered by the Office.

With respect to the third requirement, appellant submitted a duplicate copy of a document which noted results of audiograms performed from August 28, 1991 to October 30, 2002. However, this document is duplicative of evidence and was previously considered by the Office in its decision dated July 7, 2003.[10] The underlying issue in this case is medical in nature,

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[7] 5 U.S.C. § 8128(a).

[8] 20 C.F.R. § 10.606(b).

[9] 20 C.F.R. § 10.608(b).

[10] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case; *see Daniel Deparini*, 44 ECAB 657 (1993); *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

whether medical evidence establishes that appellant's hearing loss is employment related and this evidence is not responsive to this key point. Therefore, the Office properly determined that this evidence did not constitute a basis for reopening the case for a merit review. Appellant neither showed that the Office erroneously applied or interpreted a point of law; advanced a point of law or fact not previously considered by the Office; nor did she constitute relevant and pertinent evidence not previously considered by the Office."[11]

The Board finds that the Office properly determined that appellant was not entitled to a review of the merits of her claim pursuant to any of the three requirements under section 10.606(b)(2) and properly denied her November 7, 2005 request for reconsideration.

CONCLUSION

The Board finds that appellant has not met her burden of proof in establishing that she developed hearing loss in the performance of duty. The Board further finds that the Office properly denied her request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the November 28 and January 27, 2005 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 20, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

[11] 20 C.F.R. § 10.606(b).