United States Department of Labor
Employees' Compensation Appeals Board

D.G., Appellant	)	
and	)	**Docket No. 09-906**
	)	**Issued: October 27, 2009**
TENNESSEE VALLEY AUTHORITY,	)	
Muscle Shoals, AL, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 20, 2009 appellant filed a timely appeal from a November 24, 2008 merit decision of the Office of Workers' Compensation Programs and a nonmerit decision dated January 8, 2009. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he sustained a hearing loss causally related to his federal employment; and (2) whether the Office properly refused to reopen his case for reconsideration under 5 U.S.C. § 8128.

FACTUAL HISTORY

On June 20, 2008 appellant, a 76-year-old painter and sandblaster, filed an occupational disease claim alleging that he sustained bilateral hearing loss as a result of work-related noise exposure. The record reflects that he retired on December 27, 1996.[1]

In a July 8, 2008 letter, the Office informed appellant that the information he submitted was insufficient to establish his claim. It requested additional information, including a history of work-related noise exposure and a physician's report containing a diagnosis and an opinion as to the cause of the diagnosed condition. The Office asked appellant to fill out a questionnaire pertaining to these subjects.

On July 24, 2008 appellant completed the questionnaire and advised that he had exposure to end grinders, scoffing, air pots, portable electric chipping, air hammers, handsaws gas and electric air compressors, 8 to 12 hours per day, five to seven days per week, throughout his federal employment from 1962 through 1996. He noted that he was not provided any hearing protection. In support of his claim, appellant submitted copies of employing establishment audiograms performed from June 20, 1967 to November 30, 1989, either unsigned or bearing illegible signatures, reflecting bilateral hearing loss.

The record contains reports of audiograms dated June 11, 1991 and June 25, 2008. The June 11, 1991 audiogram, reflecting responses of 5, 15, 5 and 35 decibels at 500, 1,000, 2,000 and 3,000 Hertz (Hz) in the left ear and 40, 20, 15 and 40 decibels at 500, 1,000, 2,000 and 3,000 Hz in the right ear. The July 25, 2008 audiogram showed responses of 55, 55, 70 and 70 decibels at 500, 1,000, 2,000 and 3,000 Hz in the left ear and 45, 40, 60 and 65 at 500, 1,000, 2,000 and 3,000 Hz in the right ear.

The Office referred appellant, together with a copy of his medical record and a statement of accepted facts, to Dr. Howard M. Goldberg, a Board-certified otolaryngologist, for an opinion on whether appellant had a hearing loss caused by his employment-related noise exposure. In a September 16, 2008 report, Dr. Goldberg opined that appellant's hearing loss was not related to the accepted noise exposure in his federal employment. He noted that appellant was exposed to significant noise levels during his federal employment; however, appellant already had a very mild, high frequency, sensorineural bilateral hearing loss at the time he commenced federal employment. A review of the sequential audiograms did not reveal a progression of hearing loss during appellant's federal workplace exposure. Appellant opined that the audiogram taken on the day of his examination showed evidence of sensorineural bilateral hearing loss compatible with bilateral presbycusis rather than noise exposure.[2] Dr. Goldberg's examination of appellant was within normal limits and revealed that tympanic membranes and canals were clear.

[1] The statement of accepted facts dated August 5, 2008 listed that appellant retired on December 27, 1991. The date listed, however, is apparently incorrect.

[2] A September 16, 2008 audiogram, performed by Aaron Johnson, an audiologist, accompanied Dr. Goldberg's report. Testing of the right ear at frequency levels of 500, 1,000, 2,000 and 3,000 Hz revealed decibel losses of 35, 35, 45 and 55, respectively and in the left ear decibel losses of 35, 45, 60 and 70 respectively.

In a September 22, 2008 report, an Office medical adviser noted that Dr. Goldberg had found that appellant's hearing loss was not work related. However, he disagreed with Dr. Goldberg's statement that there had been no progression of hearing loss during appellant's period of federal employment. The medical adviser noted that there was an increase in the thresholds at 3,000 Hz.

By decision dated November 24, 2008, the Office accepted that appellant had filed a timely claim and that he had been exposed to noise during his federal employment. However, it denied his claim on the grounds that the medical evidence failed to establish that his hearing loss was causally related to established work-related noise exposure.

By letter dated December 29, 2008, appellant requested reconsideration. He did not submit any additional medical evidence with his request.

By decision dated January 8, 2009, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require the Office to review its 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 her 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.[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) 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 a 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

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

nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[4]

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 the condition was caused, precipitated or aggravated by his employment, is sufficient to establish a causal relationship.[5] The mere fact that a disease or condition manifests itself or worsens during a period of employment[6] or that work activities produce symptoms revelatory of an underlying condition[7] does not raise an inference of causal relation between the condition and the employment factors.

ANALYSIS -- ISSUE 1

It is not disputed that appellant was exposed to work-related noise from 1962 to 1996. However, the weight of the medical evidence of record does not establish that his hearing loss is causally related to his accepted employment-related noise exposure.

Appellant submitted various audiogram results, which were either unsigned or bore illegible signatures, reflecting bilateral hearing loss. However, none of the audiograms were accompanied by a physician's discussion of the employment factors believed to have caused or contributed to his hearing loss. Thus, these reports from audiologists do not constitute probative medical evidence.[8] Appellant has not submitted any other medical evidence providing an opinion as to the cause of his hearing loss. Thus, the evidence of record is insufficient to establish his claim.[9]

Dr. Goldberg examined appellant and reviewed the medical record, including the sequential audiograms conducted during appellant's federal employment and a September 16, 2008 audiogram. He provided examination findings and diagnosed progressive (conductive) hearing loss in the left ear only, noting that the right ear was stable. Dr. Goldberg explained that the hearing loss pattern was not suggestive of noise-induced hearing loss. He also advised that appellant did not show a sensorineural loss in excess of what would normally be predicted on the basis of presbycusis. Based upon his review of the record and examination of appellant,

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

[5] *Robert G. Morris*, 48 ECAB 238-39 (1996); *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

[6] *William Nimitz, Jr., supra* note 5.

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

[8] *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). *See also Robert E. Cullison*, 55 ECAB 570 (2004) (the Office does not have to review every uncertified audiogram, which has not been prepared in connection with an examination by a medical specialist).

[9] *See Mary E. Marshall*, 56 ECAB 420, 427 (2005).

Dr. Goldberg found that appellant's hearing loss was not causally related to noise exposure during her federal employment.

The Board finds that the medical evidence does not establish that appellant's hearing loss was employment related. Dr. Goldberg provided a reasoned medical opinion that appellant's hearing loss was not related to occupational noise exposure.

The Board notes that the Office medical adviser disagreed with one aspect of Dr. Goldberg's opinion that appellant sustained no progression of hearing loss during his period of federal employment. He noted an increase in threshold losses at 3,000 Hz. The Office medical adviser, however, did not state that appellant's hearing loss was caused by noise exposure in his employment. There is no medical evidence of record establishing that appellant's hearing loss was causally related to his federal employment. The Board will affirm the November 24, 2008 Office decision.

LEGAL PRECEDENT -- ISSUE 2

Under 20 C.F.R. § 10.606(b), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law; by advancing a relevant legal argument not previously considered by the Office; or by constituting relevant and pertinent evidence not previously considered by the Office.[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.[11]

ANALYSIS -- ISSUE 2

In the present case, appellant has not shown that the Office erroneously applied or interpreted a specific point of law. He did not advance a relevant legal argument not previously considered by the Office. Appellant did not submit any additional medical evidence in connection with his December 29, 2008 reconsideration request; therefore, it did not contain any new and relevant evidence for the Office to review. The Board finds that the Office properly refused to reopen appellant's claim for reconsideration.[12]

CONCLUSION

The Board finds that appellant did not sustain a hearing loss causally related to noise exposure in his federal employment. The Office properly refused to reopen appellant's case for reconsideration on the merits of his claim under 5 U.S.C. § 8128(a).

[10] 20 C.F.R. § 10.606(b)(1); *see generally* 5 U.S.C. § 8128(a).

[11] *Howard A. Williams,* 45 ECAB 853 (1994).

[12] The Board notes that appellant indicated in his appeal that Dr. Goldberg's report was insufficiently probative to represent the weight of the medical evidence in this case. The Office, however, properly refused to reopen his claim for reconsideration, as his letter did not advance a relevant legal argument not previously considered by the Office and did not contain any new and relevant evidence.

ORDER

IT IS HEREBY ORDERED THAT the January 8, 2009 and November 24, 2008 decisions of the Office of Workers' Compensation Programs be affirmed.

Issued: October 27, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board