United States Department of Labor
Employees' Compensation Appeals Board

P.J., Appellant	)	
and	)	**Docket No. 09-513**
	)	**Issued: September 28, 2009**
DEPARTMENT OF THE NAVY, NAVAL AIR SYSTEMS COMMAND STATIONS, Cherry Point, NC, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 15, 2008 appellant filed a timely appeal of the Office of Workers' Compensation Programs' March 7 and September 16, 2008 merit decisions denying his occupational disease claim and the June 19, 2008 nonmerit decision denying his request for review of the written record. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), 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 in the performance of duty; and (2) whether the Office properly denied his request for a review of the written record.

FACTUAL HISTORY

On September 14, 2007 appellant, a 46-year-old machine operator (sandblaster), filed an occupational disease claim alleging that he sustained a bilateral hearing loss as a result of work-

related noise exposure. He first realized that his hearing loss was employment related on September 5, 2007. Appellant did not stop working. In an accompanying statement, he indicated that his job required the use of power tools, sandblasters and air nozzles. Appellant stated that he was exposed to work-related noise 40 hours per week and that earplugs were provided by the employing establishment.

On September 24, 2007 the Office informed appellant that the information submitted was insufficient to establish his claim. He was advised to submit additional evidence, including audiograms and a physician's report explaining how the alleged hearing loss was causally related to factors of his employment.

The record contains audiologists reports dated July 28, 1989 to September 5, 2007, either unsigned or bearing illegible signatures and reflecting bilateral hearing loss. A July 28, 1989 reference audiogram performed by Bryana J. Locklear, reflected responses of 0, 5, 10 and 5 decibels at 500, 1,000, 2,000 and 3,000 cycles per second in the left ear and 0, 0, 20 and 10 decibels at those levels in the right ear. An August 27, 2007 audiogram prepared by Roger Rath contained a notation indicating that appellant's work involved "steady noise exposure."

On October 10, 2007 the employing establishment controverted appellant's claim. Noting that noise exposure levels in appellant's work environment exceeded the established occupational exposure limit of 84 decibels, he had been provided with hearing protection devices, which should have precluded a hearing loss.

The Office referred appellant a copy of his medical record and a statement of accepted facts (SOAF), to Dr. Charles B. Beasley, a Board-certified otolaryngologist, for a determination as to whether his hearing loss which was caused by employment-related noise exposure.[1] In a December 14, 2007 report, he reported the results of an audiogram performed on that date noting responses of 40, 35, 30 and 40 decibels at 500, 1,000, 2,000 and 3,000 cycles per second in the left ear and 45, 40, 50 and 55 decibels at those levels in the right ear. Dr. Beasley stated that appellant had a "possible hearing loss with functional overlay," but speech thresholds were normal. He indicated that the workplace environment as described was sufficient as to intensity and duration to have caused a hearing loss. However, Dr. Beasley opined that appellant was "malingering" and that the pure tone thresholds were not valid. He recommended that appellant be required to submit to an auditory brainstem response (ABR) threshold test in order to obtain accurate thresholds.

The record contains a January 31, 2008 report from Mary Haddock, an audiologist, who provided results of an ABR threshold test performed on that date.[2] Testing was suggestive of normal hearing in low frequencies, with some degree of hearing loss at higher levels.

1 The November 8, 2007 SOAF indicated that, prior to appellant's federal employment, he worked in private industry as equipment cleaner, where he was exposed to occupational noise 40 hours per week.

2 Ms. Haddock stated that ABR testing, a screening test to monitor for hearing loss, is a reflection of neural synchrony to sound.

Ms. Haddock indicated that test results indicated no more than a mild hearing loss at high frequencies in either ear.

In a March 4, 2007 supplemental report, Dr. Beasley opined that appellant's hearing loss was not due to noise exposure in his federal employment. He stated that the January 31, 2008 ABR threshold test demonstrated no more than mild hearing loss at high frequencies in either ear. Noting that the ABR test results were inconsistent with the December 14, 2007 audiogram, Dr. Beasley opined that the pure tone thresholds were invalid. He concluded that, since appellant's hearing loss was present in high frequencies when he began his federal employment in 1989, it was not causally related to his work-related noise exposure.

By decision dated March 7, 2008, the Office denied appellant's claim, on the grounds that the medical evidence failed to establish that his claimed medical condition was causally related to established work-related events.

Appellant requested review of the written record. Although the form is dated April 3, 2008, it contains a facsimile verification reflecting that it was sent to the Office on May 15, 2008.

By decision dated June 19, 2008, the Office denied appellant's request for review of the written record as untimely. It found that the issue presented could be equally well addressed through a request for reconsideration.

On July 28, 2008 appellant requested reconsideration. He submitted a July 22, 2008 audiologist's report which did not provide specific audiometric measurements. Appellant also submitted an unsigned report dated July 22, 2008 from an unidentified physician. The unidentified physician diagnosed bilateral sensorineural hearing loss, but stated that the person could not definitively determine whether the hearing loss was employment related.

By decision dated September 16, 2008, the Office denied modification of its March 7, 2008 decision, on the grounds that appellant had not established that his hearing loss was causally related to his employment.

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 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]

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

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 the claimant. The medical evidence required to establish causal relationship is generally rationalized medical opinion evidence. Rationalized medical opinion evidence is 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.[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 1989 to the present. The weight of the medical evidence; however, does not establish that his hearing loss is causally related to his employment-related noise exposure.

Appellant submitted various audiogram results that were either unsigned or bore illegible signatures. None of these audiograms were accompanied by a physician's discussion of the

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

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

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

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

employment factors believed to have caused or contributed to appellant's hearing loss. This evidence is not probative medical evidence.[8]

Appellant also submitted an unsigned report dated July 22, 2008 from an unidentified physician, who diagnosed bilateral sensorineural hearing loss. As there is no indication that the person completing the report is a "physician" as defined in 5 U.S.C. § 8101(2), the report may not be considered as probative medical evidence.[9] The Board notes that the substance of the July 22, 2008 report does not support appellant's claim, as the individual who completed the form stated that the person could not definitively determine whether appellant's hearing loss was employment related.[10]

The Office's second opinion physician examined appellant and reviewed the entire medical record and SOAF. Dr. Beasley reported the results of a December 14, 2007 audiogram, which he opined that he did not provide valid pure tone thresholds. He stated that appellant had a "possible hearing loss with functional overlay," but speech thresholds were normal. Dr. Beasley acknowledged that appellant worked in a noisy environment, which was sufficient in intensity and duration to have caused a hearing loss, but recommended that an auditory brainstem response threshold test be obtained in order to obtain accurate hearing thresholds. In a March 4, 2007 supplemental report, he reviewed the results of the January 31, 2008 ABR test, which demonstrated no more than mild hearing loss at high frequencies in either ear. Dr. Beasley concluded that, since appellant's hearing loss was present in high frequencies when he began his federal employment in 1989, it was not causally related to his work-related noise exposure. The Board finds that his well-reasoned report constitutes the weight of medical evidence and does not establish appellant's claim.

Because there is no medical evidence of record establishing that appellant's hearing loss was causally related to factors of employment, the Board finds that he has failed to meet his burden of proof.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act provides that a claimant for compensation not satisfied with a decision of the Secretary is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary.[11]

---

[8] *See* 5 U.S.C. § 8101(2). This subsection defines the term physician. *See 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). *See also Herman L. Henson*, 40 ECAB 341 (1988) (an audiologist is not considered a physician under the Act); *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).

[9] 5 U.S.C. § 8101(2)

[10] The Board notes that the Office medical adviser calculates the percentage of impairment if a schedule award is at issue. *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.600.8(a)(6). In this case, appellant did not request a schedule award. Therefore, review by the Office medical adviser was not required.

[11] 5 U.S.C. § 8124(b)(1).

Sections 10.617 and 10.618 of the federal regulations implementing this section of the Act provide that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.[12] The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.[13]

ANALYSIS -- ISSUE 2

By decision dated March 7, 2008, the Office denied appellant's occupational disease claim. Appellant filed his request for a review of the written record with the Office by facsimile on May 15, 2007, which was more than 30 days after the issuance of the Office's final decision. Thus, the Office properly found that appellant's request for a review of the written record was not timely filed under section 8124(b)(1) of the Act and that he was not entitled to such review as a matter of right.

The Office then exercised its discretion and determined that the issue in the case could equally well be addressed in a request for reconsideration. As the only limitation on its authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from known facts.[14] The Board finds that there is no evidence of record that the Office abused its discretion in denying appellant's request. Thus, the Board finds that the Office's denial of appellant's request for review of the written record was proper under the law and the facts of this case.[15]

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he developed bilateral hearing loss in the performance of duty. The Board further finds that the Office properly denied appellant's request for a review of the written record.

[12] 20 C.F.R. §§ 10.616, 10.617.

[13] *Claudio Vasquez*, 52 ECAB 496 (2002).

[14] *Daniel J. Perea*, 42 ECAB 214 (1990).

[15] The Board notes that pursuant to appellant's subsequent request for reconsideration, the Office fully reviewed and considered the evidence of record and his arguments in its September 16, 2008 merit decision.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 16, June 19 and March 7, 2008 are affirmed.

Issued: September 28, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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