United States Department of Labor
Employees' Compensation Appeals Board

J.R., Appellant	)	
and	)	**Docket No. 10-392**
	)	**Issued: August 19, 2010**
DEPARTMENT OF THE AIR FORCE, LACKLAND AIR FORCE BASE, TX, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 30, 2009 appellant filed a timely appeal from the July 16, 2009 merit decision of the Office of Workers' Compensation Programs, which denied his hearing loss claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case. The Board also has jurisdiction to review the Office's September 17, 2009 nonmerit decision denying appellant's request for a hearing.

ISSUES

The issues are: (1) whether appellant sustained a hearing loss in the performance of duty; and (2) whether the Office properly denied appellant's request for a hearing.

FACTUAL HISTORY

On April 22, 2009 appellant, then a 55-year-old aircraft mechanic, filed a claim alleging that he sustained a hearing loss in the performance of duty: "I have worked on the flight line and have been exposed to aircraft engine C5 noise throughout my career and have had numerous audios readjusted." On May 14, 2009 the Office asked appellant for additional information

about his injury. It advised that, if it did not receive the requested information within a reasonable period of time, approximately 30 days, or an indication that the information was forthcoming or evidence that the information was not necessary to decide his claim, "we will be required to render a decision on your claim on the evidence in file."

In a July 16, 2009 decision, the Office denied his claim. It found insufficient information to establish appellant's exposure to hazardous levels of noise in the workplace and no medical evidence showing that he had a noise-induced hearing loss as a result of his federal employment.

On August 23, 2009 appellant requested an oral hearing before an Office hearing representative.

In a decision dated September 17, 2009, the Office denied his request. It found the request untimely and determined that he could equally well address the issue in his case by requesting reconsideration from the district Office and submitting evidence on his hearing loss.

On appeal, appellant notes that all his documentation was taken by civilian personnel when he retired. He attached e-mails from work to support his hearing loss claim.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.[1] An employee seeking benefits under the Act has the burden of proof to establish the essential elements of his claim. 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.[2]

Causal relationship is a medical issue,[3] 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 of the physician must be based on a complete factual and medical background of the claimant,[4] must be one of reasonable medical certainty[5]

[1] 5 U.S.C. § 8102(a).

[2] *John J. Carlone*, 41 ECAB 354 (1989).

[3] *Mary J. Briggs*, 37 ECAB 578 (1986).

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

[5] *See Morris Scanlon*, 11 ECAB 384, 385 (1960).

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.[6]

ANALYSIS -- ISSUE 1

With appellant's claim for workers' compensation benefits, he has the burden to submit evidence to support the essential elements of his claim. He submitted nothing. The Office asked for additional information and gave appellant 30 days to respond. It notified him that, if he did not submit the requested information within that time, it would render a decision on his claim based on the evidence that was in the file. Appellant filed a claim for benefits but submitted no evidence to support his claim.

The Board finds that appellant has not met his burden of proof to establish that he sustained a hearing loss injury in the performance of duty. The Board will affirm the Office's July 16, 2009 decision to deny his claim.

On appeal, appellant explained that all his documentation was taken by civilian personnel when he retired but it does not excuse his failure to respond in a timely fashion to the Office's request for information. Appellant attached e-mails from work to support his hearing loss claim but the Board has no jurisdiction to review evidence that was not before the Office when it issued its July 16, 2009 merit decision.[7]

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act provides:

> "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section 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."[8]

The hearing request must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought.[9] The Office has discretion, however, to grant or deny a request that is made after this 30-day period.[10] In such a

[6] *See William E. Enright*, 31 ECAB 426, 430 (1980).

[7] The Board's review of a case is limited to the evidence in the case record that was before the Office at the time of its final decision. Evidence not before the Office will not be considered by the Board for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

[8] 5 U.S.C. § 8124(b)(1).

[9] 20 C.F.R. § 10.616(a).

[10] *Herbert C. Holley*, 33 ECAB 140 (1981).

case, it will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.[11]

ANALYSIS -- ISSUE 2

Appellant had 30 days from the Office's July 16, 2009 decision, or until August 17, 2009, to request a hearing on his claim.[12] His August 23, 2009 request for an oral hearing is therefore untimely. Appellant is not entitled to a hearing as a matter of right.

The Office nonetheless had discretion to grant appellant's request, but denied a discretionary hearing because another avenue of review was open to him, namely, submitting new and relevant evidence to the district Office with a request for reconsideration. As appellant may equally pursue his claim by requesting reconsideration from the district Office, the Board finds that the Office did not abuse its discretion in denying appellant's request for a hearing.[13] The Board will affirm the Office's September 17, 2009 decision denying appellant's untimely request for a hearing.

CONCLUSION

The Board finds that appellant has not met his burden to establish that he sustained a hearing loss injury in the performance of duty. The Board also finds that the Office properly denied a discretionary hearing.

[11] *Rudolph Bermann*, 26 ECAB 354 (1975).

[12] August 15, 2009 was a Saturday.

[13] The Board has held that the denial of a hearing on these grounds is a proper exercise of the Office's discretion. *E.g., Jeff Micono*, 39 ECAB 617 (1988).

ORDER

IT IS HEREBY ORDERED THAT the September 17 and July 16, 2009 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 19, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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