United States Department of Labor
Employees' Compensation Appeals Board

M.B., Appellant	)	
and	)	**Docket No. 09-1219**
	)	**Issued: January 21, 2010**
DEPARTMENT OF THE NAVY, NAVFAC MIDLAND, NAVAL STATION, Norfolk, VA, 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 April 6, 2009 appellant filed a timely appeal from a February 3, 2009 merit decision of the Office of Workers' Compensation Programs that denied his claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant established that he sustained an employment-related noise-induced hearing loss.

FACTUAL HISTORY

On August 1, 2008 appellant, then a 52-year-old crane rigger, filed an occupational disease claim alleging that employment factors caused a loss of hearing. He noted that between October 4, 2006 and September 25, 2007 his hearing worsened and that an employing establishment audiologist recommended his removal from working in a hazardous noise environment. He attached a description of his employment.

By letters dated August 27, 2008, the Office informed appellant of the evidence needed to support his claim. It asked that the employing establishment provide appellant's employment information including a noise exposure record. An August 6, 2007 hearing conservation report noted that appellant had an audiogram. In a September 27, 2007 annual screening audiological examination, Joel R. Bealer, an audiologist, noted a diagnosis of mixed conductive and sensorineural hearing loss. On January 12, 2008 he reiterated this diagnosis. He advised that the screening revealed a significant decrease in hearing sensitivity in both ears that could pose a significant safety risk in appellant's current occupation and recommended that he be removed from working in a hazardous noise environment and seek private medical intervention.

On August 21, 2008 the employing establishment provided a job description and noise exposure reading for the crane rigger position. On September 16, 2008 appellant accepted a light-duty assignment in a low noise area. In a September 16, 2008 statement, Bradley W. White, Jr., appellant's supervisor, advised that he was exposed to noise as a crane operator for seven hours a day, five days a week, and a variety of hearing protection was provided. The record also contains employing establishment audiogram results dating from September 17, 1982 to September 25, 2007.

On November 7, 2008 appellant was referred to Dr. Lorenz Lassen, a Board-certified otolaryngologist, for a second opinion evaluation. The examination was scheduled for November 18, 2008. A November 18, 2008 e-mail from Katrina Davis, with MCN, the contract medical appointment scheduler, advised the Office that appellant had attended the scheduled examination, but that following examination Dr. Lassen requested a magnetic resonance imaging (MRI) scan study for a condition unrelated to appellant's hearing. The record supports that MRI scan studies were scheduled for December 29, 2008 and January 16, 2009.

On January 9, 2009 the Office proposed to suspend appellant's compensation because he failed to keep scheduled appointments on December 15, 18 and 29, 2008. In a January 20, 2009 e-mail, Ms. Davis advised the Office that appellant was unable to complete an MRI scan study due to claustrophobia, even in a large open machine.

By report dated January 20, 2009, Dr. Christopher J. Jankosky, an employing establishment physician Board-certified in occupational medicine, neurology and undersea and hyperbaric medicine, noted his review of the medical record including serial audiograms. He advised that the record supported a predominantly conductive hearing loss unrelated to occupational noise exposure but that he could not exclude the possibility that a sensorineural component from occupational noise exposure contributed to appellant's hearing loss, particularly in the right ear at the higher frequencies. Dr. Jankosky stated that submission of an evaluation from an otolaryngologist would answer this question, and recommended that appellant be removed from all high noise work areas.

Appellant filed Form CA-7, claims for compensation for four hours each on December 29, 2008, January 5, 6 and 16, 2009. He stated that on December 29, 2008 he was scheduled for an MRI scan but could not use the closed machine, that on January 5, 2009 the machine was broken, and that, on January 6, 2009, he could not handle the open machine.

By decision dated February 3, 2009, the Office denied appellant's claim. It noted that he failed to keep scheduled appointments on December 15, 18 and 29, 2008, and that Dr. Jankosky concluded that appellant's hearing loss was not a result of noise exposure.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act[1] has the burden of establishing the essential elements of his or 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 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. Regardless of whether the asserted claim involves traumatic injury or occupational disease, an employee must satisfy this burden of proof.[2]

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) a 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 diagnosed condition is causally related to the employment factors identified by the claimant. The medical opinion 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.[3]

Causal relationship is a medical issue, and the medical evidence required to establish a causal relationship is rationalized medical evidence.[4] Rationalized medical evidence is medical evidence which includes a physician's rationalized medical 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.[5] Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.[6]

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[1] 5 U.S.C. §§ 8101-8193.

[2] *Gary J. Watling*, 52 ECAB 278 (2001).

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

[4] *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

[5] *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

[6] *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

Office procedures set forth requirements for the type of medical evidence used in evaluating hearing loss. These include that the employee undergo both audiometric and otologic examination; that the audiometric testing precede the otologic examination; that the audiometric testing be performed by an appropriately certified audiologist; that the otologic examination be performed by an otolaryngologist certified or eligible for certification by the American Academy of Otolaryngology; that the audiometric and otologic examination be performed by different individuals as a method of evaluating the reliability of the findings; that all audiological equipment authorized for testing meet the calibration protocol contained in the accreditation manual of the American Speech and Hearing Association; that the audiometric test results include both bone conduction and pure tone air conduction thresholds, speech reception thresholds and monaural discrimination scores; and that the otolaryngologist's report include: date and hour of examination, date and hour of employee's last exposure to loud noise, a rationalized medical opinion regarding the relation of the hearing loss to the employment-related noise exposure and a statement of the reliability of the tests.[7] A physician conducting an otologic examination should be instructed to conduct additional tests or retests in those cases where the initial tests were inadequate or there is reason to believe the claimant is malingering.[8]

ANALYSIS

The Board finds this case is not in posture for decision. The issue in this case is whether appellant established that he had a hearing loss caused by noise exposure at work. The Office proposed to suspend his compensation for failure to attend scheduled MRI scan examinations and denied his claim on that basis.

The determination of the need for an examination, the type of examination, the choice of locale and the choice of medical examiners are matters within the province and discretion of the Office.[9] Section 8123(d) of the Act and section 10.323 of Office regulations provide that, if an employee refuses to submit to or obstructs a directed medical examination, his or her compensation is suspended until the refusal or obstruction ceases.[10] The Board notes that, while an MRI scan examination may be scheduled to rule out acoustic neuroma in adjudicating hearing loss claims, the record supports that the requested MRI scan was for a medical condition unrelated to appellant's claimed hearing loss, and there is no indication as to the type of MRI scan scheduled. While appellant's claim was denied in part for failure to attend scheduled MRI scan studies on December 15, 18 and 29, 2008, the only notification of appointment found in the record is for a December 29, 2008 study. The evidence also supports that appellant attended a number of scheduled MRI scan examinations but was unable to complete the studies due to claustrophobia. Appellant reported for the scheduled examination with Dr. Lassen and that the examination was performed. There is, however, no report from Dr. Lassen or evidence that audiological testing was performed. Contrary to the Office's finding in the February 3, 2009

[7] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.8(a) (September 1995); *Luis M. Villanueva*, 54 ECAB 666 (2003).

[8] *Luis M. Villanueva, id.*

[9] *Scott R. Walsh*, 56 ECAB 353 (2005).

[10] 5 U.S.C. § 8123(d); 20 C.F.R. § 10.323, *see Dana D. Hudson*, 57 ECAB 298 (2006).

decision, Dr. Jankosky did not advise that appellant's hearing loss was not a result of noise exposure. Rather, he opined that, while the record supported a predominantly conductive hearing loss unrelated to occupational noise exposure, he could not exclude the possibility that a sensorineural component from occupational noise exposure contributed to his hearing loss, especially as to the right ear.

Although it is a claimant's burden to establish his or her claim, the Office is not a disinterested arbiter but, rather, shares responsibility in the development of the evidence, and the Office shares responsibility to see that justice is done.[11] Once the Office undertakes development of the record, it has the responsibility to do so in a proper manner.[12] For the foregoing reasons, the case will be remanded to the Office.[13] Upon remand the Office should request a rationalized opinion from Dr. Lassen regarding his examination of appellant. After any further development as it deems necessary, it should issue an appropriate decision on the merits of appellant's hearing loss claim.[14]

CONCLUSION

The Board finds that this case is not in posture for decision regarding whether appellant established that he sustained a hearing loss causally related to his federal employment.

[11] *N.S.*, 59 ECAB ____ (Docket No. 07-1652, issued March 18, 2008).

[12] *P.K.*, 60 ECAB ____ (Docket No. 08-2551, issued June 2, 2009).

[13] *Id*.

[14] *Supra* note 7.

ORDER

IT IS HEREBY ORDERED THAT the February 3, 2009 decision of the Office of Workers' Compensation Programs be vacated and the case remanded to the Office for proceedings consistent with this opinion of the Board.

Issued: January 21, 2010
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