United States Department of Labor
Employees' Compensation Appeals Board

L.E., Appellant	)	
and	)	**Docket No. 09-1306**
	)	**Issued: March 18, 2010**
DEPARTMENT OF THE NAVY, NORFOLK NAVAL SHIPYARD, Portsmouth, VA, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 22, 2009 appellant filed a timely appeal from the March 27, 2009 decision of Office of Workers' Compensation Programs denied his hearing loss claim. Under 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 met his burden of proof to establish that he sustained a hearing loss causally related to his federal employment.

FACTUAL HISTORY

On January 9, 2006 appellant, then a 62-year-old retired rigger,[1] filed an occupational disease claim alleging that his hearing loss was caused by factors of his federal employment. He stated that, when he first started working for the employing establishment, his hearing was

[1] The record reflects that appellant retired on October 1, 2005.

"perfect." However, appellant recently noticed that his hearing was weak. He first became aware that his condition was caused by his employment on September 1, 2005.

Appellant's work history, notification of personnel action, employing establishment audiograms and medical records accompanied the claim. He worked for the employing establishment from 1963 to 1983 as a boatswain mate and from 1987 to 2005 as a rigger.

On July 21, 2006 the Office referred appellant, together with the medical record and a statement of accepted facts,[2] to Dr. Robert Marwick, a Board-certified otolaryngologist, for a second opinion evaluation and audiometric testing.

In an August 3, 2006 report, Dr. Marwick noted that the earliest audiogram available was October 8, 1987 and it revealed normal hearing at all test frequencies. He compared the 1987 audiogram with those obtained on June 29, 2004 and August 3, 2006. Dr. Marwick noted that the June 29, 2004 report did not exhibit a standard threshold shift or exceed the anticipated presbycusic curve of a 60 year old. He advised that appellant's hearing on June 29, 2004 and August 3, 2006 was within normal limits bilaterally. On examination, Dr. Marwick stated that the "canals were clear" and the temporomandibular joint intact. He advised that the tympanometry revealed normal middle ear limits bilaterally. Dr. Marwick opined that appellant had normal hearing. He found that appellant did not have any sensorineural hearing loss due to his federal employment noise exposure. Dr. Marwick submitted the results of audiometric testing performed by a certified audiologist. For hearing thresholds of the right ear at 500, 1,000, 2,000 and 3,000 cycles per second, testing showed 20, 20, 20 and 25 decibels. For the left ear at 500, 1,000, 2,000 and 3,000 cycles per second, it showed 20, 15, 15 and 20 decibels.

On June 29, 2007 the Office medical adviser reviewed the medical evidence and concluded that appellant had normal hearing. He also referred to the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, 166 (5th ed. 2001) (A.M.A., *Guides*) and determined that appellant did not sustain a ratable hearing loss under the application standards.

By decision dated November 7, 2007, the Office denied appellant's claim for compensation as the medical evidence failed to demonstrate a hearing loss causally related to the accepted work-related noise exposure.

Appellant subsequently requested a hearing that was held on June 10, 2008. He testified that he worked for the employing establishment from 1987 to 2005 in a noisy environment as a rigger. Appellant did not wear hearing aids, as he worked in groups of "four, to five, ten people and you had to hear what each one was saying." He denied being involved in any activities outside his employment, which involved loud noise.

[2] The statement of accepted facts included that appellant worked for the employing establishment from 1966 to 1969 as a gunner, with exposure to loud noise and use of earplugs. It also indicated that appellant worked for the employing establishment from 1972 to 1990 as an outside machinist with exposure to noise for six hours per day and the use of earplugs.

In letters dated June 12 and 20, 2008, appellant's representative provided additional evidence. A June 9, 2008 report from James Spratt, a hearing instrument dispenser and Miracle-Ear representative enclosed an audiogram. It did not provide any information regarding the date of calibration or whether it was performed by a certified audiologist. In a letter dated June 13, 2008, Mr. Spratt indicated that appellant's initial hearing test showed severe nerve-type damage due to prolonged exposure to noise, which was most likely job related.

By decision dated September 4, 2008, the Office hearing representative affirmed the November 7, 2007 decision.

The Office received copies of evidence previously of record. In a September 12, 2008 report, Dr. Edward Giove, a Board-certified family practitioner and osteopath, stated that appellant was evaluated and found to have bilateral sensorineural hearing loss. He noted that appellant's "20-plus year history of exposure to loud noises in the workplace would indicate the probable cause of this impairment."

By decision dated March 27, 2009, the Office denied modification of its prior decision.

LEGAL PRECEDENT

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]

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

It is not disputed that appellant was exposed to work-related noise from 1963 to 1983 as a boatswain mate and from 1967 to 2005 as a rigger. 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.

In support of appellant's claim, the Office received reports dated June 9 and 13, 2008 from Mr. Spratt. However, he is not a physician under the Act and, therefore, his opinion regarding the cause and extent of appellant's hearing impairment is not probative.[8] The accompanying audiogram is also deficient in that it does include information regarding the calibration of the equipment used, does not show the date and hour of appellant's last noise exposure and does not contain a statement concerning the reliability of the testing.[9] Furthermore, it was not certified by a physician as accurate.[10]

Appellant also submitted a September 12, 2008 report from Dr. Giove, a Board-certified family practitioner and osteopath, who indicated that appellant was evaluated and had bilateral sensorineural hearing loss. However, Dr. Giove did not provide a rationalized explanation to

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[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., id.*

[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] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.8.a (September 1994); Exhibit 4 (December 1994, September 1996).

[10] *See Joshua A. Holmes*, 42 ECAB 231, 236 (1990). *See also James A. England*, 47 ECAB 115 (1995) (finding that an audiogram not certified by a physician as being accurate has no probative value; the Office need not review uncertified audiograms).

explain how he arrived at this opinion or to advise the extent of the hearing loss. For example, he did not indicate that he reviewed appellant's audiograms nor did he explain particular findings on examination or review of audiometric data that led him to his conclusion that appellant had a work-related hearing loss.

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.[11]

The Board also notes that both the second opinion physician, Dr. Marwick, concluded that appellant did not have any sensorineural hearing loss due to his federal employment. On August 3, 2006 Dr. Marwick examined appellant and reviewed the medical record, including the sequential audiograms conducted during appellant's federal employment. He noted that the earliest audiogram from 1987 revealed normal hearing at all frequencies. Dr. Marwick found that there was no standard threshold shift and the reports did not exceed the anticipated presbycusic curve of a 60 year old. He advised that appellant's results were within normal limits bilaterally. Dr. Marwick opined that appellant had normal hearing and he did not have any sensorineural hearing loss. The Office medical adviser also determined appellant had normal hearing based upon his review of the record.

Although appellant was exposed to noise, the medical evidence does not establish that appellant had any hearing loss, which was employment related. There is no medical evidence of record establishing that appellant has hearing loss, which was causally related to his federal employment. The Board will affirm the March 27, 2009 Office decision.

CONCLUSION

The Board finds that appellant has not met his burden of proof in establishing that he sustained a hearing loss causally related to his federal employment.

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

ORDER

IT IS HEREBY ORDERED THAT the March 27, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 18, 2010
Washington, DC

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

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

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