United States Department of Labor
Employees' Compensation Appeals Board

M.B., Appellant	)	
and	)	**Docket No. 10-658**
	)	**Issued: October 26, 2010**
DEPARTMENT OF THE AIR FORCE, ROBINS AIR FORCE BASE, GA, 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 January 13, 2010 appellant filed a timely appeal from the September 28, 2009 merit decision of the Office of Workers' Compensation Programs denying his occupational disease claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he sustained an injury in the performance of duty.

FACTUAL HISTORY

On August 13, 2009 appellant, then a 60-year-old depot maintenance analyst, filed an occupational disease claim (Form CA-2) alleging that he sustained hearing loss as a result of employment-related noise exposure. His duties involved working around air hammers, rivet guns, generators and noise emitting machines. Appellant first became aware of his claimed condition on December 8, 2008, when he received the results of an audiogram.

By letter dated August 21, 2009, the Office informed appellant that the information submitted was insufficient to establish his claim and requested additional factual and medical evidence.

On September 28, 2009 appellant submitted a December 8, 2008 audiogram, which revealed hearing thresholds of 15, 10, 15 and 15 decibels on the left and 15, 15, 10 and 25 decibels on the right at 500, 1,000, 2,000 and 3,000 cycles per second. The report noted that he had a severe bilateral high frequency hearing loss. Appellant also provided a September 1, 2009 memorandum from the Air Force bioenvironmental engineering deputy summarizing appellant's work history exposure; the Air Force standard core personnel document describing his position and the physical requirements for duty; August 28 and September 1, 2009 statements regarding his condition from the employer; a memorandum from the Air Force audiology air commander dated September 1, 2009 and a ROSHA Form 301 incident report.

By decision dated September 28, 2009, the Office denied appellant's claim on the grounds that the evidence was insufficient to establish the injury as alleged. It found that he had not submitted any evidence or information in response to the Office's August 21, 2009 letter.

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[2] and that an injury was sustained in the performance of duty.[3] These are the essential elements of each compensation claim, regardless of whether the claim is predicated upon a traumatic injury or occupational disease.[4]

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 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.[5]

[1] 5 U.S.C. §§ 8101-8193.

[2] *Joe D. Cameron*, 41 ECAB 153 (1989).

[3] *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[4] *Delores C. Ellyet*, 41 ECAB 992 (1990).

[5] *Id.*

The Act[6] provides that the Office shall determine and make findings of fact in making an award for or against payment of compensation after considering the claim presented by the employee and after completing such investigation as the Office considers necessary with respect to the claim.[7] Since the Board's jurisdiction of a case is limited to reviewing the evidence which was before the Office at the time of its final decision,[8] it is necessary that the Office review all evidence submitted by a claimant and received by the Office prior to the issuance of its final decision. As Board decisions are final as to the subject matter appealed,[9] it is crucial that all of the evidence relevant to that subject matter which was properly submitted to the Office prior to the time of issuance of its final decision be addressed by the Office.[10]

ANALYSIS

The Board finds that this case is not in posture for a decision regarding whether appellant sustained an injury in the performance of duty, as the Office failed to review and consider all evidence of record prior to issuing its September 28, 2009 decision. Therefore, the case must be remanded for a merit review of all evidence received and an appropriate final decision.

In its August 21, 2009 development letter, the Office provided appellant 30 days to submit additional factual and medical information. In its September 28, 2009 denial of his claim, the Office stated that it had received no further evidence from appellant in response to its August 21, 2009 development letter. However, the record reflects that the Office received new factual and medical evidence from appellant on September 28, 2009, the day the decision was issued. The Office received a September 1, 2009 letter summarizing appellant's work history exposure from the Air Force bioenvironmental engineering deputy, a November 6, 1998 Air Force standard core personnel document, August 28 and September 1, 2009 statements from the employing establishment regarding his condition, a ROSHA Form 301 incident report and a September 1, 2009 memorandum from the Air Force audiology air commander along with appellant's hearing test results.

The Office is required to review all evidence submitted by a claimant and received by the Office prior to the issuance of its final decision, including evidence received on the date of the decision.[11] It makes no difference that the claims examiner may not have been directly in possession of the evidence. Indeed, Board precedent envisions evidence received by the Office but not yet associated with the case record when the final decision is issued.[12] In the instant case,

[6] 5 U.S.C. § 8101 *et seq*.

[7] *Id*. at § 8124(a)(2); 20 C.F.R. § 10.130.

[8] *See* 20 C.F.R. § 501.2(c).

[9] *Id*. at § 501.6(c).

[10] *William A. Couch*, 41 ECAB 548 (1990)

[11] *See Yvette N. Davis*, 55 ECAB 475 (2004); *see also William A. Couch*, *id*. (the Office did not consider new evidence received four days prior to the date of its decision); *see Linda Johnson*, 45 ECAB 439 (1994) (applying *Couch* where the Office did not consider a medical report received on the date of its decision).

[12] *See Yvette N. Davis*, *id*.

the Office was apparently unaware that appellant had submitted additional evidence in response to the August 21, 2009 development letter and, therefore, did not review or consider such evidence prior to issuing its final decision.

The Board, therefore, will set aside the September 28, 2009 decision and remand the case to the Office to fully consider the evidence which was properly submitted by appellant prior to the September 28, 2009 decision.

CONCLUSION

The Board finds that this case is not in posture for a decision on whether appellant sustained an injury in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the Office's September 28, 2009 decision is set aside and the case remanded for further action consistent with this decision.

Issued: October 26, 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