United States Department of Labor
Employees' Compensation Appeals Board

A.V., Appellant	)	
and	)	**Docket No. 10-1321**
	)	**Issued: February 7, 2011**
DEPARTMENT OF THE NAVY, FLEET READINESS CENTER SOUTHWEST, San Diego, CA, 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 12, 2010 appellant filed a timely appeal from a February 17, 2010 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 met his burden of proof to establish that he has an employment-related noise-induced hearing loss.

On appeal, appellant asserts that he attended a scheduled appointment on February 16, 2010.

FACTUAL HISTORY

On November 3, 2009 appellant, then a 65-year-old aircraft machinist, filed an occupational disease claim alleging that noise levels at work caused a hearing loss. He was first aware of his condition on August 19, 1992 and its relationship to his employment on

September 28, 1995. The employing establishment advised that appellant was still working and exposed to noise. Appellant submitted employing establishment audiograms dated April 13, 1984 to March 30, 2006 and the employer submitted noise exposure information.

The Office accepted that appellant had normal hearing when he began federal employment and had occupational noise exposure at levels above 85 decibels commencing in 1984. By letters dated November 30, 2009, appellant was informed that appointments had been made with Dr. Theodore Mazer, a Board-certified otolaryngologist, on December 18, 2009, at 10:00 a.m. for hearing testing and at 11:00 a.m. with him. Before the scheduled appointments, he called Dr. Mazer's office to cancel because he would be traveling to Florida on December 18, 2009. The appointments were cancelled, and appellant was informed that the appointments were rescheduled for January 19, 2010 at 10:00 a.m. and 11:00 a.m. respectively. The record next indicates that the appointments were rescheduled to February 16, 2010.

On February 17, 2010 QTC Medical Services, Inc., the medical appointment scheduler, informed the Office that appellant had not appeared for the appointments scheduled on February 16, 2010.

By decision dated February 17, 2010, the Office denied appellant's claim. It noted that the initial appointments of November 19, 2009 were rescheduled for January 19, 2010 but, a scheduling mix-up occurred. Although appellant appeared for the appointments, the audiologist could not see him; and he was rescheduled for February 16, 2010 but did not appear for the appointments that day. Because appellant did not appear for the February 16, 2010 appointments, the Office was unable to determine if his claimed hearing loss was caused by employment factors, because the medical evidence did not contain a physician's opinion establishing causal relationship.

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

[1] 5 U.S.C. §§ 8101-8193.

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

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]

An employee shall submit to examination by a medical officer of the United States, or by a physician designated or approved by the Secretary of Labor, after the injury and as frequently and at the times and places as may be reasonably required.[4] If an employee refuses to submit to or obstructs an examination, his or her right to compensation is suspended until the refusal or obstruction stops. Compensation is not payable while a refusal or obstruction continues and the period of the refusal or obstruction is deducted from the period for which compensation is payable to the employee.[5]

To invoke this provision of the law, the Office must ensure that the claimant has been properly notified of his or her responsibilities with respect to the medical examination scheduled. Either the claims examiner or the medical management scheduling assistant may contact the physician directly and make an appointment for examination. The claimant and representative, if any, must be notified in writing of the name and address of the physician to whom he or she is being referred as well as the date and time of the appointment. The notification of the appointment must contain a warning that benefits may be suspended under 5 U.S.C. § 8123(d) for failure to report for examination. The claimant must have a chance to present any objections to the Office's choice of physician, or any reasons for failure to appear for the examination, before the Office acts to suspend compensation.[6]

If the claimant does not report for a scheduled appointment, he or she should be asked in writing to provide an explanation within 14 days.[7] If good cause is not established, entitlement to compensation should be suspended in accordance with section 8123(d) of the Act until the date on which the claimant agrees to attend the examination. Such agreement may be expressed in writing or by telephone, as documented on an Office (Form CA-110). When the claimant actually reports for examination, payment retroactive to the date on which the claimant agreed to attend the examination may be made. The claimant's statement that he or she will not appear for an examination is not sufficient to invoke the penalty. Refusal to schedule an examination at the direction of the Office is also insufficient to invoke section 8123(d).[8] The action of the employee's representative is considered the action of the employee for the purpose of

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

[4] 5 U.S.C. § 8123(a); 20 C.F.R. § 10.320.

[5] *Id*. at § 8123(d); *Id*. at § 10.323.

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.14 (July 2000).

[7] *E.B.*, 59 ECAB 298 (2008).

[8] *Id*.

determining whether the employee refused to submit to or in any way obstructed an examination required by the Office.[9]

ANALYSIS

The Board finds that this case is not in posture for decision. As noted, the Office has developed procedures for processing hearing loss claims, noting that they require a specialized medical opinion before adjudication.[10] Appellant was initially referred for audiological testing and to Dr. Mazur on December 18 2009. When notified of the appointments, he immediately called to reschedule because he would be traveling. The appointments were rescheduled for January 19, 2010. Appellant appeared on January 19, 2010, but due to a scheduling mix-up, audiological testing could not be performed that day. The appointments were then rescheduled for February 16, 2010 and, contrary to his assertion on appeal, the record indicates that he did not appear for these appointments.

When a claimant fails to appear for a scheduled appointment, the principles of section 8123 of the Act are applicable.[11] While the Act and the Office's regulations provide that a claimant must submit to examination by a qualified physician as often and at such time and places as the Office considers reasonably necessary,[12] the Board has held that if the claimant does not report for a schedule appointment, he or she should be asked in writing to provide an explanation within 14 days.[13] In this case, one day after appellant did not show for the scheduled February 16, 2010 appointment, the Office denied his claim. He was not given an opportunity to explain why he did not appear for the scheduled evaluation of his hearing. The Office did not properly adjudicate this case. Upon remand, it shall ask appellant to provide an explanation in writing within 14 days as to why he did not attend the appointments scheduled for February 16, 2010. After such further development as it deems necessary, it should issue an appropriate decision.[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.

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[9] 20 C.F.R. § 10.323.

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Evidence Needed*, Chapter 2.805.3 (July 2000), Part 3 -- Medical, *Specific Conditions*, Chapter 3.600.8 (September 1995).

[11] 5 U.S.C. § 8123.

[12] *Supra* note 9.

[13] *E.B.*, *supra* note 7.

[14] The Board notes that appellant submitted medical evidence with his appeal to the Board. The Board cannot consider this evidence as its review of the case is limited to the evidence that was before the Office at the time it rendered its final decision. 20 C.F.R. § 501.2(c)(1); *M.B.*, 60 ECAB ___ (Docket No. 09-176, issued September 23, 2009).

ORDER

IT IS HEREBY ORDERED THAT the February 17, 2010 decision of the Office of Workers' Compensation Programs be set aside. The case is remanded to the Office for proceedings consistent with this opinion of the Board.

Issued: February 7, 2011
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