

**United States Department of Labor
Employees' Compensation Appeals Board**

M.G., Appellant)

and)

**DEPARTMENT OF THE NAVY, PUGET
SOUND NAVAL SHIPYARD, Bremerton, WA,
Employer**)

**Docket No. 15-1396
Issued: October 15, 2015**

Appearances:

Linda Gibson-Gomez, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 8, 2015 appellant, through his representative, filed a timely appeal from an April 7, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 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 OWCP met its burden of proof to rescind its acceptance of appellant's claim for bilateral hearing loss.

FACTUAL HISTORY

On April 20, 2011 appellant, then a 68-year-old retired insulator, filed an occupational disease claim (Form CA-2) alleging that he sustained bilateral hearing loss in the performance of

¹ 5 U.S.C. § 8101 *et seq.*

duty. He stated that he became aware of his condition and its relation to his employment on May 4, 2004. Appellant advised that he had learned of work-related hearing loss when an annual hearing test showed a marked shift in his hearing. The employing establishment noted that he was last exposed to occupational noise on June 1, 2006 when he retired.

Audiograms and employing establishment hearing conservation data from 1973 to 2006 were placed in the record. On April 20, 2011 appellant submitted his employment history and noise exposure. He advised that from 1977 to 2007 he worked as an insulator at the employing establishment where he was exposed to noise from needle guns, ratchet guns, rattle guns, pneumatic chisels, deck crawlers, motors, generators, and cranes. Appellant worked with hearing protection. He also detailed his nonfederal employment where he was exposed to low levels of noise and to his military service from 1958 to 1961. Appellant stated that he was exposed to the noise of military gunfire and motors two to three times per year.

In a March 9, 2011 report, Dr. Drew Lambert, a Board-certified diagnostic radiologist, advised that an internal auditory canal and brain magnetic resonance imaging (MRI) scan revealed mild age-related microvascular ischemic change and mild sinusitis. He noted that appellant had a history of progressive right hearing loss and new left hearing loss.

In an April 25, 2011 report, Dr. Gerald G. Randolph, a Board-certified otolaryngologist and second opinion physician, detailed appellant's employment history and noise exposure. Examination of the ears revealed dry and somewhat crusty external auditory canals and normal tympanic membranes. Dr. Randolph diagnosed bilateral sensorineural hearing loss. He opined that appellant's audiogram revealed findings that were not compatible with hearing loss from past occupational noise exposure. Dr. Randolph noted that appellant's industrial audiograms revealed that over the years his hearing loss progressed in those frequencies generally not affected by noise and in excess of the degeneration of hearing in those frequencies which were more likely to be affected by noise. He assessed 39.69 percent binaural hearing impairment using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*² and noted that appellant was a candidate for bilateral hearing aids. An accompanying April 20, 2011 audiogram tested decibel losses at 500, 1,000, 2,000, and 3,000 hertz and recorded losses of 40, 50, 65, and 55 in the left ear. Testing at the same levels for the right ear recorded decibel losses of 55, 60, 55, and 35.

By letter dated August 11, 2011, OWCP requested that Dr. Randolph complete a Form CA-1087, to confirm that his report was based on an enclosed statement of accepted facts (SOAF), and also to provide certification of the instrument calibration for audiograms connected with the examination.

In an August 25, 2011 response, Dr. Randolph advised that he reviewed the SOAF and opined that appellant's sensorineural hearing loss was not due to industrial noise exposure during his federal service. He reiterated that appellant's hearing loss had progressed in a manner inconsistent with hearing loss due to industrial noise exposure. Dr. Randolph noted very significant hearing loss in lower frequencies, which are not generally affected by industrial noise exposure. However, in an August 24, 2011 Form CA-1087, he marked the space for "due" when

² A.M.A., *Guides* (6th ed. 2009).

asked if the hearing loss was “due” or “not due” to noise exposure encountered in appellant’s federal employment.

On November 11, 2011 OWCP accepted the claim for bilateral hearing loss.

By report dated November 17, 2011, an OWCP medical adviser, after reviewing the record, advised that clarification was needed from Dr. Randolph as to whether the hearing loss was, in fact, due to workplace exposure because of conflicting statements in his reports. He highlighted that Dr. Randolph indicated that appellant’s hearing loss was from exposure in his federal employment by checking the space marked “due.” However, the medical adviser’s August 25, 2011 report advised that the hearing loss was not due to industrial noise during his federal employment. He opined that appellant’s hearing loss was most likely not due to or aggravated by industrial noise during his federal employment.

On November 21, 2011 OWCP forwarded a copy of the medical adviser’s November 17, 2011 report to Dr. Randolph. It asked him to clarify his opinion as to whether the sensorineural hearing loss was due to noise exposure encountered in appellant’s federal employment.

Dr. Randolph, in a December 5, 2011 addendum report, advised that he had mistakenly marked “due” instead of “not due” regarding his opinion as to the likelihood that appellant’s hearing loss was caused or aggravated by his federal employment. He opined that appellant’s hearing loss was not due to industrial noise exposure from his federal employment.

By letter dated July 19, 2012, OWCP proposed to rescind the acceptance of appellant’s claim. It advised that Dr. Randolph had erroneously marked a box indicating that hearing loss was due to his exposure during his federal employment. OWCP advised that there was no evidence in the record establishing that the hearing loss was causally related to his federal employment and that the record would be held open for 30 days for the submission of additional evidence.

In an August 22, 2012 decision, OWCP rescinded the acceptance of appellant’s claim and terminated his entitlement to compensation benefits. On July 17, 2014 it reissued its rescission decision.³

On July 24, 2014 appellant requested an oral telephone hearing. At the hearing on February 10, 2015, he argued that annual audiograms from the employing establishment showed significant hearing loss from his employment. Appellant also argued that the decision should not have been based on Dr. Randolph’s opinion because he did not go through his entire medical record. OWCP hearing representative advised appellant that there was no medical evidence establishing a hearing loss related to his federal employment. The record was held open for submission of additional evidence.

³ The record indicates that appeal rights accompanying the August 22, 2012 decision contained an incorrect name and case number.

In a February 14, 2015 statement, appellant advised that he was unable to find a doctor to accept workers' compensation for medical payment in Arizona and that he would schedule an appointment and forward the report to OWCP when he arrived back in Washington.

By decision dated April 7, 2015, an OWCP hearing representative affirmed the July 17, 2014 decision.

On appeal, appellant, through his representative, argued that there was 33 years of documentation showing hearing loss attributable to his federal employment. He further argued that it is only required to show that he received "any" hearing loss from his employment to receive OWCP benefits.

LEGAL PRECEDENT

Pursuant to section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at any time on his or her own motion or on application.⁴ The Board has upheld OWCP's authority under this section to reopen a claim at any time on its own motion and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.⁵ The Board has noted, however, that the power to annul an award is not arbitrary and that an award for compensation can only be set aside in the manner provided by the compensation statute.⁶

Workers' compensation authorities generally recognize that compensation awards may be corrected, in the discretion of the compensation agency and in conformity with statutory provision, where there is good cause for so doing, such as mistake or fraud. Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits. This also holds true where OWCP later decides that it erroneously accepted a claim.⁷

OWCP bears the burden of justifying rescission of acceptance on the basis of new evidence, legal argument and/or rationale.⁸ Probative and substantial positive evidence⁹ or sufficient legal argument¹⁰ must establish that the original determination was erroneous. OWCP must also provide a clear explanation of the rationale for rescission.¹¹

⁴ 5 U.S.C. § 8128.

⁵ See *John W. Graves*, 52 ECAB 160, 161 (2000). See 20 C.F.R. § 10.610.

⁶ *Delphia Y. Jackson*, 55 ECAB 373 (2004).

⁷ See *V.C.*, 59 ECAB 137 (2007).

⁸ See *John W. Graves*, *supra* note 5; *Alice M. Roberts*, 42 ECAB 747, 753 (1991).

⁹ See *Michael W. Hicks*, 50 ECAB 325, 329 (1999).

¹⁰ See, e.g., *Beth A. Quimby*, 41 ECAB 683, 688-89 (1990).

¹¹ See *supra* note 7.

ANALYSIS

Appellant alleged that he sustained bilateral hearing loss caused by noise exposure attributable to his federal employment. On November 11, 2011 OWCP accepted his claim for bilateral hearing loss. On July 19, 2012 it proposed rescinding the acceptance of appellant's claim and the rescission was made final in an August 22, 2012 decision, which was reissued on July 17, 2014.

The Board finds that OWCP presented sufficient evidence to meet its burden of proof to rescind its acceptance of appellant's claim. OWCP accepted the claim after it received an August 24, 2011 form report from Dr. Randolph which marked a space "due" with regard to whether appellant's hearing loss was work related. Subsequently, an OWCP medical adviser noted in a November 17, 2011 report that Dr. Randolph had provided conflicting statements regarding the cause of appellant's hearing loss. After reviewing the entire record, the medical adviser opined that appellant's hearing loss was not due to his workplace noise exposure and recommended that OWCP obtain clarification from Dr. Randolph. In a December 5, 2011 addendum report, Dr. Randolph clarified that he mistakenly marked "due" instead of "not due" regarding his opinion as to the likelihood that appellant's hearing loss was caused or aggravated by his federal employment. He opined that appellant's hearing loss was not due to industrial noise exposure from his federal employment. The Board finds that Dr. Randolph's opinion constitutes probative and substantial positive medical evidence and it is sufficiently rationalized to discharge OWCP's burden of proof to support rescinding its acceptance of appellant's claim. Dr. Randolph, in his December 5, 2011 report, explained that he mistakenly marked the wrong word on a form report which caused the report to erroneously indicate support for causal relationship. He clarified that appellant's hearing was not due to workplace noise exposure. The medical adviser also provided a November 17, 2011 report opining that appellant's hearing loss was not employment related. Dr. Randolph had previously explained in his August 25, 2011 narrative that appellant's audiogram revealed hearing loss with an audiometric configuration that was incompatible with hearing loss that was a result of past noise exposure.

OWCP thus provided a clear explanation in establishing that its prior acceptance of the claim was erroneous and properly rescinded its acceptance. The Board notes that the record does not contain any other medical opinion supporting an employment-related hearing loss. Accordingly, there is no probative medical report establishing that appellant's bilateral hearing loss was due to or aggravated by noise exposure during his federal employment. Therefore, OWCP presented sufficient evidence to show that appellant did not sustain hearing loss causally related to his federal employment. It met its burden of proof to rescind its acceptance of appellant's claim for bilateral hearing loss.

On appeal, appellant contends that his claim should be approved because documentation shows that he sustained hearing loss during his federal employment. However, the Board has held that neither the mere fact that a disease or condition manifests itself during a period of employment, nor the belief that the disease was caused or aggravated by employment factors or incidents, is sufficient to establish a causal relationship.¹²

¹² *Phillip L. Barnes*, 55 ECAB 426 (2004); *see also Dennis M. Mascarenas*, 49 ECAB 215 (1997).

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP has met its burden of proof to rescind acceptance of appellant's claim for bilateral hearing loss.

ORDER

IT IS HEREBY ORDERED THAT the April 7, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 15, 2015
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board