U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RAYMOND T. KLOSOWSKI and DEPARTMENT OF THE AIR FORCE, AIR NATIONAL GUARD, Duluth, Minn.

Docket No. 97-2217; Submitted on the Record;
Issued May 18, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly rescinded its acceptance of appellant's claim for noise-induced bilateral hearing loss.

Appellant, then a 54-year-old air commander, filed an occupational disease claim on November 22, 1995 for hearing loss which was due to exposure to hazardous noise levels due to his federal employment as a jet fighter pilot.[1] The employing establishment did not controvert the claim filed on appellant's behalf.

In support of his claim for a schedule award, appellant submitted audiograms dated 1962, 1963, 1974, 1985, 1987, 1995, a November 3, 1995 report from Dr. Michael Savage in support of his claim and a description of his job. In a report dated November 3, 1995, he diagnosed mild high-frequency hearing loss due to noise exposure and noted that appellant had a long history of noise exposure due to his employment as a F16 fighter pilot and recommended hearing protection at work and recreational noise exposure.

On December 21, 1995 the Office accepted his claim for noise-induced bilateral hearing loss.

On December 29, 1995 appellant filed a claim for a schedule award. He retired December 31, 1995.

By letter dated March 1, 1996, the Office advised appellant that his claim had been prematurely accepted for a hearing loss and that he was being referred to an audiologist for a second opinion.

[1] Appellant indicated that he used ear protection while hunting upland, but did not use ear protection when big game hunting.

By letter dated March 26, 1996, the Office referred appellant to Dr. Joseph H. Leek, a Board-certified otolaryngologist, for an opinion on appellant's hearing loss.

In a letter dated April 23, 1996, Dr. Leek diagnosed a senorineural hearing loss which was worse in the left ear. As to the cause of appellant's hearing loss, Dr. Leek stated:

> "The important issue for you in this particular case is the fact that he not only has had occupational noise exposure but weapon noise exposure and with him being right hand[ed] and shooting off the right shoulder the left ear has greater defect compatible with the use of weapons."

In the Outline for Otologic Evaluation (Form CA-332) Dr. Leek indicated that appellant's hearing loss was partially due to noise encountered in his federal employment. He also placed a "?" next to partial when attributing appellant's hearing loss in part to his federal employment and referred to his clinical notes.

In clinical notes dated April 23, 1996, Dr. Leek noted that appellant had severe noise exposure to aircraft noise for approximately 30 years and that 10 years prior he began using ear protection. He also noted that appellant used weapons while hunting for deer and duck and that he attempts to use ear protection while duck hunting. Dr. Leek also stated that "there could not be a definitive way to determine how much of his identified hearing loss is related to his occupational noise exposure and how much is due to the use of weapons."

In a January 12, 1997 report, an Office medical adviser noted that appellant's hearing loss was not ratable for schedule award purposes but did not address the cause of appellant's condition.

In March 26 and April 30, 1997 reports, a second Office medical adviser also found appellant's hearing loss to be nonratable for schedule award purposes. The Office medical adviser also indicated that the hearing loss could have resulted from workplace noise or firearms use.

In a decision dated May 16, 1997, the Office determined that the evidence of record was insufficient to establish a causal relationship between appellant's hearing loss and factors of his employment. The Office noted its March 1, 1996 letter that previously informed appellant that his claim had been prematurely accepted for a bilateral hearing loss.

The Board finds that the Office did not meet its burden of proof to rescind its acceptance of appellant's claim for a bilateral hearing loss.

Once the Office accepts a claim, it has the burden of justifying the termination or modification of compensation benefits. This holds true where, as here, the Office later decides that it erroneously accepted a claim.[2] To satisfy its burden, the Office cannot merely

[2] *Gareth D. Allen*, 48 ECAB _____ (Docket No. 95-1184, issued April 15, 1997); *Daniel E. Phillips*, 40 ECAB 1111, 1119 (1989); *petition on recon. denied*, 41 ECAB 201 (1989).

second-guess the initial set of adjudicating officials but must establish through new evidence, legal arguments or rationale, that its acceptance was erroneous.[3]

The Board has upheld the Office's authority under 5 U.S.C. § 8128(a) 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.[4] The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.[5] It is well established that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.[6] This holds true where, as here, the Office later decides that it has erroneously accepted a claim for compensation. To justify rescission of acceptance, the Office must establish that its prior acceptance was erroneous based on new or different evidence or through new legal argument and/or rationale.[7]

In the instant case, the Office originally accepted appellant's claim for bilateral hearing loss based upon the November 3, 1995 report by Dr. Savage. However, after accepting the claim on December 21, 1995, the Office in a letter dated March 1, 1996 informed appellant that his claim had been prematurely accepted and that he was being referred to an audiologist for a second opinion.

In its May 16, 1997 decision, the Office noted that its acceptance had been premature. The Board notes that the Office has effectively rescinded its earlier acceptance of the claim for bilateral hearing loss.[8]

The Board finds that the Office has not met its burden of proof in rescinding its acceptance of the claim. It has produced neither new medical evidence to establish that appellant's hearing loss was not work related nor has it offered any new legal argument or rationale to support its conclusion that the acceptance was premature. At the time of the Office's March 1, 1996 letter, the first indication of record that the claim was no longer accepted, the medical evidence of record either supported that appellant's hearing loss was caused in part by workplace noise exposure or it only addressed ratability for schedule award purposes without any opinion on the cause of the hearing loss. Subsequent to this, the Office produced no new medical evidence establishing that appellant's bilateral hearing loss was not work related.

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[3] *Id*.

[4] *Eli Jacobs*, 32 ECAB 1147, 1151 (1981).

[5] *Shelby J. Rycroft*, 44 ECAB 795 (1993). *Compare Lorna R. Strong*, 45 ECAB 470 (1994).

[6] *See Frank J. Meta, Jr.*, 41 ECAB 115, 124 (1989); *Harold S. McGough*, 36 ECAB 332, 336 (1984).

[7] *Laura H. Hoexter (Nicholas P. Hoexter)*, 44 ECAB 987 (1993); *Alphonso Walker*, 42 ECAB 129, 132-33 (1990); *petition for recon. denied*, 42 ECAB 659 (1991); *Beth A. Quimby*, 41 ECAB 683, 688 (1990); *Roseanna Brennan*, 41 ECAB 92, 95 (1989); *Daniel E. Phillips*, 40 ECAB 1111, 1118 (1989), *petition for recon. denied*, 41 ECAB 201 (1990).

[8] *See Ausbon Johnson*, 50 ECAB ___ (Docket No. 97-1567, issued March 19, 1998) (where the Board found that the Office effectively rescinded an earlier acceptance of right ear hearing loss claim).

Dr. Leek questioned why appellant's left hearing loss would be greater if his right ear had more exposure to loud noise from use of firearms. However, his report and treatment notes indicate that the hearing loss was at least partially due to workplace noise exposure and nothing in his submissions purport to indicate workplace noise exposure did not contribute to his hearing loss.[9]

Furthermore, subsequent to Dr. Leek's submissions, two Office medical advisers reviewed the record and, while both agreed that appellant's hearing loss was not ratable for schedule award purposes, neither gave any indication that workplace noise exposure did not contribute to appellant's bilateral hearing loss. In fact, the second of the two reviewing Office medical advisers indicated that workplace exposure did contribute to the nonratable hearing loss.[10]

Consequently, as the Office has not provided new medical evidence or new legal argument or rationale to justify its rescission of acceptance of appellant's claim for a bilateral hearing loss, the Office has not met its burden of proof and such rescission must be reversed.

The decision of the Office of Workers' Compensation Programs dated May 16, 1997 is hereby reversed.

Dated, Washington, D.C.
May 18, 1999

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member

[9] For a condition to be employment related, it need only be shown that the employment contributed to such condition. It is not necessary that the employment be the sole or most significant cause of a claimed condition. *See Beth P. Chaput*, 37 ECAB 158 (1985).

[10] The Board notes that the fact a hearing loss claims is accepted as being employment related is a totally separate matter from the question of whether an accepted hearing loss is ratable for schedule award purposes; *see Danniel C. Goings*, 37 ECAB 781 (1986) regarding the uniform standards adopted by the Office and approved by the Board for evaluating hearing loss for schedule award purposes once a hearing loss claim is accepted as being employment related.