United States Department of Labor
Employees' Compensation Appeals Board

A.C., Appellant	)	
and	)	**Docket No. 06-1032**
	)	**Issued: August 4, 2006**
DEPARTMENT OF HOMELAND SECURITY, IMMIGRATION ENFORCEMENT, Miami, FL, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge

JURISDICTION

On March 27, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' October 6, 2005 and March 14, 2006 merit decisions denying his hearing loss claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof that he sustained an employment-related hearing loss.

FACTUAL HISTORY

On February 19, 2004 appellant, then a 36-year-old immigration enforcement agent, filed an occupational disease claim due to exposure to noise from airplanes, buses and gun ranges at

work.[1] He indicated that he first became aware of his condition in May 2003 and first realized it was employment related on February 16, 2004. Appellant did not stop work.

Appellant submitted the findings of February 16, 2004 audiometric testing, which was obtained by Dr. Craig S. Shapiro, an attending osteopath specializing in ear, nose and throat medicine. He indicated that air bone audiometry revealed that appellant had a mild sensorineural hearing loss.[2]

By decision dated September 1, 2004, the Office denied appellant's claim on the grounds that he had not submitted medical evidence showing that he sustained an employment-related hearing loss. He requested a review of the written record by an Office hearing representative and, by decision dated and finalized February 15, 2005, the Office hearing representative set aside the Office's September 1, 2004 decision and remanded the case to the Office for further development including referral of appellant to a second opinion physician.

Appellant submitted a February 14, 2005 report in which Dr. Stephen E. Guilder, an attending Board-certified otolaryngologist, reported the findings of his audiologic testing and evaluation.[3] He indicated that he had been provided with a description of appellant's exposure to noise at work and discussed the various noise sources identified by appellant. Dr. Guilder stated that appellant denied any prior history of head trauma, concussions, meningitis, high blood pressure, diabetes, elevated cholesterol or triglycerides, primary ear disease or family history of ear disease or hearing loss. He made note of hearing testing from eight months prior which showed bilateral sensorineural hearing loss. Dr. Guilder stated that his examination of appellant revealed grossly normal eardrums and ear canals, abnormal bilateral otoacoustic emissions and bilateral sensorineural mid and high frequency hearing loss.[4] Regarding the cause of the hearing loss, he stated:

> "At this time based upon the history which has been provided and the complete consistency and reliability of his auditory testing as well as the similarity of test results approximately eight months apart it is my opinion with medical certainty that the patient has suffered hearing loss related to the noise exposure in the work environment. Although there may be other contributory factors I could not discern any given the current medical records which I have been provided. If additional records or information can be provided particularly any prior hearing

[1] In a supplemental statement, appellant provided more details about his exposure to noise at work. He indicated that he also was exposed to noise from all terrain vehicles, loud buzzers on gates and doors, public announcement speakers and groups of inmates and noted that his exposure to hazardous noise occurred for up to 12 hours per day.

[2] The record contains an audiogram showing the results of the air bone audiometry testing.

[3] Dr. Guilder refers to an "independent medical evaluation" but it does not appear that he produced his report in response to a process initiated by the Office.

[4] Dr. Guilder attached a February 8, 2005 audiogram showing the results of the air bone audiometry testing.

test performed early in his period of employment which demonstrated the presence of preexisting hearing loss the above opinion would be changed completely."[5]

In July 2005, the Office referred appellant and the case record to Dr. Lawrence Grobman, a Board-certified otolaryngologist, for audiologic testing and evaluation of his claimed employment-related hearing loss.

In a report dated September 9, 2005, Dr. Grobman discussed the documents in the regarding appellant's exposure to hazardous noise at work. He indicated that his examination revealed normal ear canals and tympanic membranes and that an attached audiogram which he obtained on September 9, 2005 showed a bilateral moderate sensorineural hearing loss with normal speech discrimination, normal acoustic reflexes and normal tympanograms. Dr. Grobman stated:

"According to the appearance of the audiogram, it is not possible to state the etiology of the hearing loss. It does not at all conform to the normal pattern of noise-induced hearing loss…. In a noise-induced hearing loss, initially it is expected to see hearing loss at the 3,000/4,000 hertz [Hz] frequency range, initially in a V-shaped pattern with recovery of the thresholds at the higher 8,000 [Hz] level; however, that is not seen in this case where the hearing loss begins in the mid frequencies and remains flat. This configuration is inconsistent with noise-induced hearing loss where the ear maximally amplifies sound due to its anatomy with a resident frequency of between 3,000 and 4,000 [Hz]; therefore, noise-induced hearing loss is concentrated specifically at those levels and then progresses at the higher frequencies, but would not be expected to be involving equally at 1,000 or even 2,000 [Hz].

"Impression is that the patient does suffer from hearing loss. The etiology is uncertain. I do not feel that this is a characteristic finding in noise-induced hearing loss and it is just as possible that this is an inherited genetic susceptibility or just degeneration without a known etiology. I do not feel that noise exposure can be the accepted etiology of this hearing loss."

By decision dated October 6, 2005, the Office denied appellant's claim on the grounds that the medical evidence showed that he did not sustain an employment-related hearing loss. The Office found that the weight of the medical evidence rested with the September 9, 2005 report of Dr. Grobman.

By decision dated November 8, 2005, the Office vacated its October 6, 2005 decision and remanded the case to the Office for further development of the medical evidence. The Office found that the opinion of Dr. Grobman was not sufficiently well rationalized to constitute the weight of the medical evidence regarding the cause of appellant's claimed hearing loss.

[5] In April 2005, the record was supplemented to include sound level tests of the employing establishment environment, which were obtained in 2003 and 2004.

On remand the Office requested that Dr. Grobman provide a supplemental report regarding the cause of appellant's claimed hearing loss.[6]

In a report dated January 29, 2006, Dr. Grobman stated that, in contrast to appellant's findings, excessive noise exposure usually shows greater high frequency loss in a more descending pattern where the highest frequencies are lost more so than the middle frequencies. He indicated that sensorineural hearing loss that is symmetric and involving middle frequencies, such as shown in appellant's findings, usually is genetic in origin, especially if it is not greater in the highest frequencies where noise trauma would be more suspected as a cause.

By decision dated March 14, 2006, the Office denied appellant's claim on the grounds that the medical evidence showed that he did not sustain an employment-related hearing loss. The Office found that the weight of the medical evidence rested with the September 9, 2005 and January 29, 2006 reports of Dr. Grobman.

LEGAL PRECEDENT

An employee seeking compensation under the Federal Employees' Compensation Act[7] has the burden of establishing the essential elements of his claim, including that he sustained an injury in the performance of duty as alleged and that an employment injury contributed to the permanent impairment for which schedule award compensation is alleged.[8]

The medical evidence required to establish a causal relationship is 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 nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[9]

Section 8123(a) of the Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[10] When there are

[6] The Office requested that Dr. Grobman provide medical rationale to support his opinion that appellant's hearing loss was not due to "excessive noise exposure" and to explain why he believed that appellant's hearing loss was due to "genetic factors."

[7] 5 U.S.C. §§ 8101-8193.

[8] *See Bobbie F. Cowart*, 55 ECAB ___ (Docket No. 04-1416, issued September 30, 2004). In *Cowart*, the employee claimed entitlement to a schedule award for permanent impairment of her left ear due to employment-related hearing loss. The Board determined that appellant did not establish that an employment-related condition contributed to her hearing loss and, therefore, it denied her claim for entitlement to a schedule award for the left ear.

[9] *Victor J. Woodhams*, 41 ECAB 345, 351-52 (1989).

[10] 5 U.S.C. § 8123(a).

opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.[11]

ANALYSIS

Appellant claimed that he sustained hearing loss due to exposure to hazardous noise at work. The Office found that the medical evidence did not show that appellant's hearing loss was caused by employment factors. It determined that the weight of the medical evidence on this matter rested with the September 9, 2005 and January 29, 2006 reports of Dr. Grobman, a Board-certified otolaryngologist, who served as an Office referral physician.

The Board finds that there is a conflict in the medical evidence regarding the cause of appellant's hearing loss between Dr. Grobman, the physician for the Office and Dr. Guilder, an attending Board-certified otolaryngologist.

In a February 14, 2005 report, Dr. Guilder stated that his examination of appellant revealed grossly normal eardrums and ear canals, abnormal bilateral otoacoustic emissions and bilateral sensorineural mid and high frequency hearing loss. He discussed the hazardous noise exposure implicated by appellant and detailed the medical history relevant to appellant's hearing condition. Dr. Guilder noted that, based upon the provided factual and medical history, the complete consistency and reliability of the auditory testing and the similarity of test results approximately eight months apart, it was his opinion appellant suffered hearing loss related to the noise exposure in the work environment. He stated that although there might be other contributory factors he could not discern any given the current medical records. Dr. Guilder noted that his opinion might be changed if records existed from appellant's early employment, which demonstrated the presence of preexisting hearing loss, but noted that no such records currently existed.

In contrast, Dr. Grobman concluded in a September 9, 2005 report that appellant did not sustain a noise-induced hearing loss due to exposure to hazardous noise at work. He indicated that his examination revealed normal ear canals and tympanic membranes and noted that the audiogram he obtained of appellant's hearing loss did not at all conform to the normal pattern of noise-induced hearing loss in that appellant's hearing loss began in the mid frequencies and remained flat. Dr. Grobman stated that this configuration was inconsistent with noise-induced hearing loss which usually was concentrated at the 3,000 and 4,000 Hz levels and then progressed at the higher frequencies, but would not be expected to equally involve the 1,000 or 2,000 Hz levels. He stated: "It is just as possible that this is an inherited genetic susceptibility or just degeneration without a known etiology." In a supplemental report dated January 29, 2006, he stated that, in contrast to appellant's findings, excessive noise exposure usually shows greater high frequency loss in a more descending pattern where the highest frequencies are lost more so than the middle frequencies.

Given this conflict in the medical evidence between Dr. Guilder and Dr. Grobman regarding the cause of appellant's hearing loss, the case should be remanded to the Office for

[11] *William C. Bush*, 40 ECAB 1064, 1975 (1989).

referral of appellant and the case record to an impartial medical specialist for consideration of this matter.[12] After such development it deems necessary, the Office should issue an appropriate decision regarding appellant's claim for an employment-related hearing loss.

CONCLUSION

The Board finds that the case is not in posture regarding whether appellant met his burden of proof that he sustained an employment-related hearing loss. Due to a conflict in the medical evidence regarding the cause of appellant's hearing loss, the case must be remanded to the Office for referral to an impartial medical specialist for consideration of this matter.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' March 14, 2006 decision is set aside and the case remanded to the Office for proceedings consistent with this decision of the Board.

Issued: August 4, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

[12] *See supra* note 11 and accompanying text.