United States Department of Labor
Employees' Compensation Appeals Board

I.H., Appellant	)	
and	)	**Docket No. 09-141**
	)	**Issued: August 6, 2009**
DEPARTMENT OF HOMELAND SECURITY, BUREAU OF CUSTOMS & BORDER PROTECTION, El Paso, TX, Employer	)	

Appearances:
Gordon Reiselt, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 20, 2008 appellant, through counsel, filed a timely appeal from a February 13, 2008 decision of the Office of Workers' Compensation Programs and a September 23, 2008 decision of an Office hearing representative denying his hearing loss 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 established that he sustained hearing loss on June 22, 2004 in the performance of duty as alleged. On appeal, appellant's counsel contends that the medical reports of the second opinion physician and the impartial medical examiner's report should be excluded because he, counsel, was not properly notified of the examinations.

FACTUAL HISTORY

On July 18, 2004 appellant, then a 49-year-old immigration inspector, filed a traumatic injury claim (Form CA-1) claiming that he experienced buzzing in both ears and diminished hearing during a weapons qualification course on June 22, 2004. He stated that he notified his instructor after the first practice training course and requested replacement of his hearing protection. Appellant continued the course in order to qualify.[1]

On July 29, 2004 the Office notified appellant of the deficiencies in his claim and requested that he provide additional information.

By decision dated September 2, 2004, the Office denied the claim. It found that the work event occurred as alleged but that appellant did not submit medical evidence containing a causally related diagnosis.

By signed letter dated February 15, 2005, appellant authorized counsel to represent him.

On August 31, 2005 appellant, through counsel, filed a request for reconsideration. He submitted medical reports dated July 6 and August 11, 2005 from Dr. Gary Nañez, a Board-certified otolaryngologist, who diagnosed mild sensorineural hearing loss and opined that the hearing loss was very likely a result of acoustic trauma following an event on the firing range.

By decision dated November 17, 2005, the Office found that appellant submitted sufficient medical evidence to require further development including a second opinion evaluation.

In a December 6, 2005 letter, appellant's counsel requested that the Office provide him with details regarding appellant's second opinion examination.

On December 22, 2005 the Office referred appellant along with a statement of accepted facts to Dr. Twana L. Sparks, a Board-certified otolaryngologist, for a second opinion evaluation. Dr. Sparks reviewed appellant's history and opined that his noise exposure was not sufficient to cause the loss exhibited by pure tone. She diagnosed functional hearing loss but indicated that the loss was not due to noise exposure encountered during appellant's federal civilian employment. Dr. Sparks also stated that the audiological results were unreliable and, while they suggested a functional hearing loss, calculations could not be based on the results.

The Office subsequently referred appellant to Matthew H. Lyon, an audiologist, for additional testing. On February 6, 2006 Mr. Lyon performed auditory brainstem response and otoacoustic emission tests. He stated that both otoacoustic emissions and brainstem auditory responses were present and within normal limits. Mr. Lyon opined that the test results indicated normal auditory function and that appellant's hearing was within normal limits bilaterally.

[1] The Board notes that appellant also filed a traumatic injury claim alleging hearing loss on October 17, 2003 during a separate weapons qualification. This claim is not at issue in the present case.

In a February 20, 2006 medical report, Jonni McClure, an audiologist, stated that the audiological results performed on December 22, 2005 showed pure tone averages that were inconsistent with speech recognition thresholds and speech audiometry showing hearing within normal limits. Appellant gave half spondee responses, which suggested functional loss. Due to the inconsistencies, Ms. McClure recommended the February 6, 2006 auditory brainstem response and otoacoustic emission testing, which showed hearing within normal limits bilaterally. She opined that, with the inconsistent evidence, it was impossible to determine the extent of appellant's hearing. However, Ms. McClure stated that the objective evidence points to hearing within normal limits and there was no evidence of damage due to acoustic injury.

The Office determined that a conflict of medical opinion existed and referred appellant along with a statement of accepted facts to Dr. Marc T. Taylor, a Board-certified otolaryngologist, on July 19, 2007 for an impartial medical examination.[2]

In a letter dated June 1, 2007, appellant's counsel stated that he was notified by an Office e-mail dated May 31, 2006 that appellant was referred for a second opinion evaluation and requested copies of the statement of accepted facts, questions posted to the physician and any Office medical adviser reviews of the December 22, 2005 and February 6, 2006 evaluations.

In a July 19, 2007 medical report, Dr. Taylor reported that audiometric testing was performed demonstrating a hearing level of 30 to 40 decibels at all frequencies. A copy of the audiological evaluation was not included. Dr. Taylor noted that there were some inconsistencies but the reliability of the tests was fair. Physical examination did not reveal any abnormalities of the head and neck. Tympanic membranes were intact bilaterally and appellant was capable of carrying on the examination while he spoke in a normal tone. Dr. Taylor opined that there was no objective evidence of any hearing loss as a result of the June 22, 2004 reported event at the firing range. He stated that appellant's reported history was significantly different than the documented history in his medical records. Appellant denied any prior problems or treatment for hearing even though records documented an otolaryngology evaluation on October 24, 2003. Further, Dr. Taylor stated the historical test results were inconsistent and varied from one test to another on the same date. He opined that the objective tests performed February 6, 2006 documented normal hearing results that were compatible with the results of the speech reception threshold testing in all of the audiological evaluations.

By letter dated July 31, 2007, appellant's counsel stated that it was his understanding that appellant attended a referee evaluation on July 19, 2007 with Dr. Taylor and requested a copy of the medical report, a revised statement of accepted facts and any questions posed to the doctor.

The Office referred appellant's case to Dr. R. Meador, an Office medical adviser. In a December 1, 2007 report, Dr. Meador referred to Dr. Taylor's medical report finding that there was no probative evidence of hearing loss related to appellant's federal employment.

[2] The Board notes that in determining the existence of a conflict of medical evidence, the Office stated that the conflict existed between Dr. Sparks and Dr. Lyon. As Mr. Lyon is not a physician, it appears as though the Office intended to find a conflict of medical opinion between Dr. Sparks and Dr. Nañez.

By decision dated February 13, 2008, the Office denied the claim based on Dr. Taylor's and Dr. Meador's findings that there was no objective evidence of hearing loss related to noise exposure during appellant's employment.

On March 14, 2008 appellant, through counsel, filed a request for an oral hearing before an Office hearing representative. A telephonic hearing took place on July 8, 2008.

In a July 9, 2008 letter, appellant's counsel contended that the Office should be precluded from considering the second opinion and impartial medical examiner's reports because he was not notified of these evaluations. Along with this letter, he submitted a copy of the change of address notification dated July 21, 2005.[3]

By decision dated September 23, 2008, the Office hearing representative affirmed the February 13, 2008 decision on the grounds that the weight of the medical evidence rested with Dr. Taylor, who performed a thorough examination, obtained certified audiological testing and determined that appellant did not have any evidence of hearing loss related to the alleged exposure. The hearing representative also deemed the fact that the results and notices of the second opinion and impartial medical examinations were mailed to counsel's former address was harmless error because the record contained multiple written correspondences from counsel indicating that he was aware of these examinations.

LEGAL PRECEDENT

An employee seeking compensation under the Federal Employees' Compensation Act[4] has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence,[5] including that he is an "employee" within the meaning of the Act[6] and that he filed his claim within the applicable time limitation.[7] The employee must also establish that he sustained an injury in the performance of duty as alleged and that his disability for work, if any, was causally related to the employment injury.[8]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether the fact of injury has been established. There are two components involved in establishing the fact of injury. First, the employee must

[3] The record reveals that the notices of examinations were sent to the address initially provided by appellant's counsel and not to the address listed in the July 21, 2005 letter.

[4] 5 U.S.C. §§ 8101-8193.

[5] *J.P.*, 59 ECAB ___ (Docket No. 07-1159, issued November 15, 2007); *Joseph M. Whelan*, 20 ECAB 55, 57 (1968).

[6] *See M.H.*, 59 ECAB ___ (Docket No. 08-120, issued April 17, 2008); *Emiliana de Guzman (Mother of Elpedio Mercado)*, 4 ECAB 357, 359 (1951); *see* 5 U.S.C. § 8101(1).

[7] *R.C.*, 59 ECAB ___ (Docket No. 07-1731, issued April 7, 2008); *Kathryn A. O'Donnell*, 7 ECAB 227, 231 (1954); *see* 5 U.S.C. § 8122.

[8] *G.T.*, 59 ECAB ___ (Docket No. 07-1345, issued April 11, 2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged.[9] Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.[10]

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."[11] When there are 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.[12]

The Office procedure manual provides that, once it has been determined that an impartial medical examination is necessary in order to resolve a conflict, the Office's medical management assistant will contact the physician directly and make the appointment for examination, then notify the claimant and his representative of the existence of a conflict; the name and address of the physician; any request(s) to forward x-rays, electrocardiograms, *etc.* to the specialist; copies of Forms SF-1012, SF-1012A and instructional Form CA-77 to claim travel expenses; and a warning that benefits may be suspended for a failure to report for examination.[13]

Office regulations provide that a properly appointed representative who is recognized by the Office may make a request or give direction to the Office regarding the claims process, including a hearing. This authority includes presenting or eliciting evidence, making arguments on the facts or the law and obtaining information from the case file, to the same extent as the claimant.[14] Any notice requirement contained in the regulations or the Act is fully satisfied if served on the representative and has the same force and effect as if sent to the claimant.[15] The Board has held that decisions under the Act are not deemed to have been properly issued unless both appellant and the authorized representative have been sent copies of the decision.[16]

[9] *Bonnie A. Contreras*, 57 ECAB 364, 367 (2006); *Edward C. Lawrence*, 19 ECAB 442, 445 (1968).

[10] *T.H.*, 59 ECAB ___ (Docket No. 07-2300, issued March 7, 2008); *John J. Carlone*, 41 ECAB 354, 356-57 (1989).

[11] 5 U.S.C. § 8123(a).

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

[13] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(d) (May 2003).

[14] 20 C.F.R. § 10.700(c).

[15] *Id. See also Sara K. Pearce*, 51 ECAB 517 (2000).

[16] *See Travis L. Chambers*, 55 ECAB 138 (2003). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Communications*, Chapter 2.300.4(e) (February 2000).

ANALYSIS

The issue is whether appellant established that he sustained hearing loss on June 22, 2004 due to noise exposure during his weapons qualification course. The Board finds this case is not in posture for decision.

The Office determined that a conflict of medical opinion existed between Dr. Nañez, the treating physician, and the second opinion physician, Dr. Sparks, regarding whether appellant sustained employment-related hearing loss. It referred appellant to an impartial medical examiner, Dr. Taylor, a Board-certified otolaryngologist, for a resolution of the conflict.[17]

In a July 19, 2007 medical report, Dr. Taylor opined that there was no objective evidence of any hearing loss related to the June 22, 2004 work incident at the firing range. He cited to the February 6, 2006 documented normal hearing results, which he stated were compatible with the results of the speech reception threshold testing in all of the audiological evaluations. Dr. Taylor also stated that audiometric testing was performed demonstrating a hearing level of 30 to 40 decibels at all frequencies, but, failed to include the audiometric results.

On appeal, appellant's counsel contends that he did not receive notice of Dr. Sparks' second opinion evaluation or Dr. Taylor's impartial medical examination.[18] Counsel alleges that he notified the Office of a change of address on July 21, 2005. He resubmitted a copy of this notification with his July 9, 2008 letter. Although the July 21, 2005 change of address letter notification was not previously contained in the record, by virtue of the mailbox rule it is presumed to have been received by the Office.[19] The record reveals that all correspondence and notifications were sent to counsel's prior address and not the address contained in the July 21, 2005 letter. Therefore, he was not properly notified of the second opinion and impartial medical examinations.[20]

However, where a representative had actual knowledge of examinations, the Board has held that lack of proper notification is harmless error.[21] By letter dated December 6 2005, counsel stated that appellant was notified of a second opinion examination and requested additional information. This letter demonstrates that counsel had actual knowledge of the December 22, 2005 medical examination. Further, counsel was apprised of the forthcoming

[17] *L.R.*, 58 ECAB ___ (Docket No. 06-1942, issued February 20, 2007).

[18] Appellant authorized counsel to act as his representative by letter dated February 15, 2005.

[19] In absence of evidence to the contrary, a letter properly addressed and mailed in the due course of business, such as in the course of appellant's counsel's practice, is presumed to have arrived at the mailing address in due course. The Board has held that the presumption of receipt under the mailbox rule must apply equally to claimants and the Office alike. *Larry L. Hill*, 42 ECAB 596 (1991).

[20] *See Donald J. Knight*, 47 ECAB 706 (1996); *Henry J. Smith, Jr.*, 43 ECAB 524 (1992); *reaff'd on recon.*, 43 ECAB 892 (1992).

[21] *See David Alan Patrick*, 46 ECAB 1020 (1995).

second opinion evaluation in the November 17, 2005 decision.[22] Thus, appellant was not denied the opportunity for counsel's assistance in exercising his rights under section 10.320.[23] The Board finds that Office's failure to provide proper notice of the December 22, 2005 second opinion examination is harmless error.

With respect to the July 19, 2007 impartial medical evaluation by Dr. Taylor, the record reveals that counsel did not have actual knowledge of the nature of the evaluation, nor was he provided with the specifics of the conflict or questions posed to the doctor. In a June 1, 2007 letter, counsel stated that he was not notified that appellant was referred for a second opinion evaluation. He requested that the Office provide copies of the statement of accepted facts and the questions posed to the doctor. Further, in a July 31, 2007 letter, counsel again requested a copy of the questions posed to Dr. Taylor. These letters show that he was not actually aware of the nature of the July 19, 2007 examination as an impartial medical examination, nor did he have access to the details regarding the conflict or the questions posed to the doctor.

In the case of *Henry J. Smith*,[24] the Board held that when the Office does not notify a claimant of a physician's status as an impartial medical examiner, that physician may not serve as the impartial medical examiner in that case. These procedures are intended to assure a claimant's knowledge that a physician is an impartial medical examiner so that he may then choose to exercise the procedural right to participate in the selection of the doctor.[25] The Board finds that, in the instant case, counsel was not properly notified of the July 19, 2007 impartial medical examination; nor did he have actual knowledge of the nature of the impartial medical examination or the existing conflict. The Board notes that it is of no relevance that appellant was properly notified of the impartial medical examination because the failure to notify counsel denied appellant the opportunity for assistance in pursuing his procedural rights.[26] Therefore, the Board finds that Dr. Taylor's report cannot be given the special weight afforded an impartial medical examiner and is insufficient to resolve the conflict of medical opinion.[27]

The Board notes counsel's contention that Dr. Taylor's medical report should be excluded from the record. However, lack of proper notification is not a reason for exclusion of report. Exclusion of a medical report obtained from an impartial medical specialist is required only under specific circumstances. Board precedent distinguishes situations in which the Office

[22] *See id.* (Where the Board held that actual knowledge of an impartial medical examination was evidence from the Office's prior decision finding a conflict of medical opinion).

[23] Section 10.320 provides that an employee may have a qualified physician, paid by him or her, present at a second opinion examination. 20 C.F.R. § 10.320.

[24] *Supra* note 20.

[25] *See David Alan Patrick*, *supra* note 21.

[26] *See Sara K. Pearce*, *supra* note 15. *See also J.L.*, Docket No. 08-811 (issued August 21, 2008) (where the Board held that, although appellant was notified on an impartial medical examination, appellant's counsel was not properly notified of the examination and, therefore, appellant was denied an opportunity to participate in the selection process).

[27] *See Henry J. Smith*, *supra* note 20.

or the employing establishment may have influenced the opinion of the impartial medical specialist from circumstances in which the evidence establishes that the medical report is defective for other procedural reasons.[28] Because the instant case involves the procedural issue of notification and there is no indication of any undue influence by the Office or the employing establishment, Dr. Taylor's medical report should not be excluded from the record. The Board further notes that although lack of proper notification is not sufficient to exclude Dr. Taylor's report from the record, the report is of diminished probative value because the doctor failed to include the required certified audiogram with the report, as provided by Office procedures and adopted by this Board *via* precedent.[29]

The Board finds that appellant's counsel was not properly notified of Dr. Taylor's July 19, 2007 impartial medical examination, thereby rending the corresponding medical report insufficient to resolve the conflict of medical opinion. On remand, the Office should refer appellant for another impartial medical examination to resolve the existing conflict of medical evidence.

CONCLUSION

The Board finds this case is not in posture for decision regarding whether appellant sustained hearing loss due on June 22, 2004 in the performance of duty.

[28] *See Terrance R. Stath*, 45 ECAB 412 (1994).

[29] Office procedures set forth requirements for the type of medical evidence used in evaluating hearing loss. These include that the employee undergo both audiometric and otologic examination; that the audiometric testing precede the otologic examination; that the audiometric testing be performed by an appropriately certified audiologist; that the otologic examination be performed by an otolaryngologist certified or eligible for certification by the American Academy of Otolarynology; that the audiometric and otologic examination be performed by different individuals as a method of evaluating the reliability of the findings; that all audiological equipment authorized for testing meet the calibration protocol contained in the accreditation manual of the American Speech and Hearing Association; that the audiometric test results include both bone conduction and pure tone air conduction thresholds, speech reception thresholds and monaural discrimination scores; and that the otolaryngologist's report include: date and hour of examination, date and hour of employee's last exposure to loud noise, a rationalized medical opinion regarding the relation of the hearing loss to the employment-related noise exposure and a statement of the reliability of the tests. *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.8(a) (September 1995); *Louis M. Villanueva*, 54 ECAB 666 (2003). *See also J.H.*, Docket No. 06-2081 (issued April 17, 2007) (where the Board held a medical report was of diminished probative value because it did not include a certified audiogram and was not signed).

ORDER

IT IS HEREBY ORDERED THAT the September 23 and February 13, 2008 decisions of the Office of Workers' Compensations Programs are set aside and the case is remanded for further proceedings not inconsistent with this decision.

Issued: August 6, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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