

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

M.B., Appellant)	
)	
and)	Docket No. 10-882
)	Issued: February 18, 2011
DEPARTMENT OF THE AIR FORCE,)	
AIRCRAFT QUALITY BRANCH, TINKER AIR)	
FORCE BASE, OK, 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 February 17, 2010 appellant filed a timely appeal from the September 17 and December 11, 2009 merit decisions of the Office of Workers' Compensation Programs. 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 the Office met its burden of proof to rescind acceptance of appellant's hearing loss.

FACTUAL HISTORY

On April 11, 2008 appellant, then a 56-year-old quality assurance specialist (aircraft), filed an occupational disease claim alleging that working in and around aircraft, running jet engines, and power tools caused bilateral hearing loss and ringing in his ears. In letters dated April 18, 2008, the Office asked that he and the employing establishment provide a description

of the job sites where the exposure occurred, the extent of noise exposure and medical reports including audiograms.

Appellant submitted statements describing his job duties, noise exposure and equipment commencing April 7, 1971.¹ He wore earplugs and earmuffs daily for hearing protection, and attached records of employing establishment hearing conservation examinations and audiometric testing from September 26, 1980 to March 14, 2008. Appellant noted that he had a mastoid removed in the 1980s and an ear infection in 1990-91 that required surgery in the ear canal. His physician told him that the infection was caused by the use of earplugs. Kristopher Clements, deputy branch chief of aircraft quality, advised that appellant was exposed to aircraft jets engines in operation, aircraft ground support equipment, and hand and shop tools for eight hours a day, five to seven days a week and was still exposed to hazardous noise.

The Office referred appellant to Dr. Ronald E. Wright, a Board-certified otolaryngologist, for a second opinion evaluation. On November 5, 2008 audiometric testing was obtained. In a November 19, 2008 report, Dr. Wright reviewed the medical record, statement of accepted facts and history of noise exposure. He noted that appellant had a prior history of a right tympanoplasty 15 years prior and tubes 4 to 5 years prior. Dr. Wright provided findings on physical examination and reviewed the November 5, 2008 audiometric results. He diagnosed a mixed hearing loss on the right side and normal hearing on the left. In response to questions posed by the Office, Dr. Wright stated “yes” that appellant’s workplace noise exposure was sufficient in intensity and duration to cause the hearing loss. He opined that the right ear hearing loss was not due to appellant’s noise exposure in his federal employment as it was conductive in nature. Dr. Wright stated that workplace noise exposure was sufficient as to intensity and duration to cause the hearing loss and that appellant did not show a sensorineural hearing loss in excess of what would be normally predicted on the basis of presbycusis. Hearing aids were not recommended.

On November 25, 2008 the Office accepted that appellant sustained a noise-induced hearing loss. On December 29, 2008 appellant filed a schedule award claim.

In a January 3, 2009 report, an Office medical adviser reviewed the medical record. The medical adviser noted that Dr. Wright advised that the hearing loss in appellant’s right ear was conductive rather than sensorineural and that appellant had normal hearing loss in the left ear but that noise exposure at work was sufficient to have caused the loss in question. An Office medical adviser rated the extent of hearing loss, noting no impairment of the left ear and a 16.9 percent loss on the right.

At the Office medical adviser’s recommendation, the Office asked Dr. Wright to clarify his opinion on causal relation as to the left ear. In an undated response, Dr. Wright reiterated his diagnosis of mixed hearing loss on the right and normal hearing on the left. The Office

¹ Appellant was on active military duty from April 1971 to April 1980. He began working at the employing establishment in June 1980.

medical adviser advised that the hearing loss on the right was not due to employment-related noise exposure, stating:

“[Appellant’s] loss in the right ear is primarily conductive in nature. The bone hearing levels are essentially equal. Noise trauma does not cause conductive hearing loss.”

In an August 16, 2009 report, the Office medical adviser reviewed the medical record. He noted that Dr. Wright’s supplemental report found that appellant’s hearing loss was not made worse by occupational noise exposure.

By decision dated September 17, 2009, the Office rescinded acceptance of appellant’s claim on the grounds that the medical evidence established that his hearing loss was not caused by employment-related noise exposure.

On November 30, 2009 appellant requested reconsideration and submitted a November 11, 2009 report from Dr. Jeremy A. Moore, an attending Board-certified otolaryngologist, who advised that appellant had a long history of ear problems with multiple surgeries on his right ear that was caused by wearing ear canal plugs for hearing protection that led to significant scarring of the external canal such that the eardrum was no longer visible. Dr. Moore opined that this caused a maximal conductive hearing loss in the right ear that would likely require further surgery. He concluded that appellant also had high-frequency hearing loss in his left ear “that may be related to history of noise exposure.”

In a December 11, 2009 merit decision, the Office denied modification of the September 17, 2009 decision.

LEGAL PRECEDENT

Section 8128 of the Federal Employees’ Compensation Act² provides that the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application.³ The Board has upheld the Office’s authority to reopen a claim at any time on its own motion under 5 U.S.C. § 8128 and, where supported by the evidence, set aside or modify a prior decision and issue a new decision. The power to annul an award, however, is not an arbitrary one and an award for compensation can only be set aside in the manner provided by the compensation statute. The Office’s burden of justifying termination or modification of compensation holds true where the Office later decides that it has erroneously accepted a claim for compensation. In establishing that its prior acceptance was erroneous, the Office is required to provide a clear explanation of its rationale for rescission.⁴

² 5 U.S.C. §§ 8101-8193.

³ *Id.* at § 8128.

⁴ *Amelia S. Jefferson*, 57 ECAB 183 (2005).

ANALYSIS

The Board finds that the Office did not meet its burden of proof to rescind acceptance of appellant's hearing loss. On November 25, 2008 the Office accepted that appellant sustained a noise-induced hearing loss. In its September 17, 2009 decision, it rescinded acceptance of the claim, finding that the evidence of record did not establish that appellant's hearing loss was caused by factors of his federal employment.

Dr. Wright, an Office referral otolaryngologist, diagnosed normal hearing on the left and a mixed hearing loss on the right. The responses provided by the physician on the Office's otologic evaluation form were brief but he noted "yes" that the workplace exposure was sufficient as described in intensity and duration to have caused the hearing loss in question. In addressing his diagnosis, Dr. Wright marked "not due" in response to the question concerning whether the sensorineural loss seen was, in part or all, related to noise exposure encountered in the claimant's federal employment.

The Office asked Dr. Wright to clarify his opinion and he submitted the same responses on a second Office's otologic form report. Dr. Wright again noted that appellant's right ear hearing loss was "primarily conductive in nature" and that noise trauma did not cause conductive hearing loss.

The Board finds that the supplemental report of Dr. Wright is not sufficient to support rescission of acceptance of appellant's hearing loss. Dr. Wright's medical reports support that appellant's hearing loss was at least partially due to workplace noise exposure. The supplemental report does not provide sufficient support for the finding that Dr. Wright eliminated the accepted noise exposure as a contributing cause of appellant's hearing loss. In this regard, the present case is similar to *Raymond T. Klosowski*,⁵ in which the Board reversed the Office's rescission of the employee's claim for noise-induced bilateral hearing loss.⁶ The record supports that appellant was exposed to noise in his federal employment of sufficient duration and intensity to cause his hearing loss. No attempt should be made to apportion a condition between employment and nonemployment-related conditions.⁷ Moreover, the November 11, 2009 report of Dr. Moore, an attending otolaryngologist, advised that appellant had multiple surgeries on his right ear due to wearing canal plugs related to hearing protection in his employment that caused significant scarring. The record supports that appellant wore earplugs daily at work. Dr. Wright was not asked to address the question of whether appellant's right ear hearing loss was related to this aspect of his federal employment.

For these reasons, the Office did not meet its burden of proof to rescind acceptance of appellant's hearing loss. The Board will reverse the Office's September 17 and December 11, 2009 decisions.

⁵ Docket No. 97-2217 (issued May 18, 1999).

⁶ Compare *Lee Earl Merson*, 51 ECAB 283 (2000) and *Ausbon N. Johnson*, 50 ECAB 304 (1999).

⁷ *John D. Ayers*, 48 ECAB 440 (1997).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the December 11 and September 17, 2009 decisions of the Office of Workers' Compensation Programs be reversed.

Issued: February 18, 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