

In the Matter of the Compensation of
HECTOR M. VERGARA, Claimant

WCB Case No. 08-01368

ORDER ON REVIEW

Scott M McNutt Jr, Claimant Attorneys
Reinisch Mackenzie PC, Defense Attorneys

Reviewing Panel: Members Weddell and Lowell.

Claimant requests review of Administrative Law Judge (ALJ) Davis' order that upheld the self-insured employer's denial of his occupational disease claim for bilateral hearing loss and tinnitus. On review, the issue is compensability.

We adopt and affirm the ALJ's order with the following supplementation.

Claimant worked for the employer from 1978 to 1982 and again from 1992 to 2008. (Tr. 12-15). Between 1982 and 1991, he was in the Navy. (Tr. 14).

From 1978 to 1982, claimant was a forklift driver in a plant with a high noise level. (Tr. 13). He typically did not wear any hearing protection, but may have worn foam inserts approximately five percent of the time. (Tr. 13-14, 27-28). He did not notice any hearing problems during this period. (Tr. 14).

After returning to the employer in 1992, he worked as a machinist building trucks. (Tr. 15). From 1992 onward, he used foam inserts for hearing protection. (*Id.*) For that same time period, he worked 40 hours per week with occasional overtime. (Tr. 16). With the exception of work in the "electric shop" from around 1998 to 2000, he worked in a high noise work environment, especially when working inside the cabs. (Tr. 15-16).

Around 2004, claimant noticed a ringing in his ears. (Tr. 16-17). At that point, he added earmuffs on top of the foam inserts for added protection. (Tr. 17).

Claimant treated with Dr. Lipman, who diagnosed bilateral high tone sensorineural hearing loss associated with tinnitus. (Ex. 8). Dr. Lipman believed that the hearing condition was the direct result of loud workplace noise exposure over many years. (*Id.*)

In January 2008, Dr. Hodgson examined claimant at the employer's request. He diagnosed bilateral high-frequency sensorineural hearing loss and tinnitus. (Ex. 10-4, 5). Dr. Hodgson believed that the hearing condition was more typical of

age-related presbycusis than workplace noise. (Ex. 10-5). Although Dr. Hodgson opined that the occupational noise exposure contributed to claimant's hearing condition, he concluded that presbycusis was the major contributing cause of the claimed condition. (Ex. 10-7).

Dr. Lipman disagreed with Dr. Hodgson's opinion, asserting that claimant's condition was more indicative of noise exposure than presbycusis. (Ex. 16-7). Dr. Lipman also believed that claimant was too young to be a candidate for presbycusis when he first developed hearing loss. (Ex. 16-9).

The employer denied claimant's occupational disease claim. Claimant requested a hearing.

The ALJ upheld the denial, relying on the opinion of Dr. Hodgson. On review, claimant asserts that Dr. Lipman's opinion persuasively establishes compensability of his condition. We disagree, reasoning as follows.

Claimant bears the burden of proving the compensability of his hearing condition as an occupational disease by establishing that workplace exposure was the major contributing cause of the claimed disease. ORS 656.266(1); ORS 656.802(2)(a); *Lecangdam v. SAIF*, 185 Or App 276, 282 (2000); *William B. Schulte*, 60 Van Natta 1130, 1131 (2008). Because medical experts disagree regarding the relative contribution of various causes of claimant's hearing loss, this case presents a complex medical question that must be resolved by expert medical opinion. *Barnett v. SAIF*, 122 Or App 279, 283 (1993); *Schulte*, 60 Van Natta at 1131. We give more weight to those opinions that are well reasoned and based on complete information. *Somers v. SAIF*, 77 Or App 259, 263 (1986).

Here, we find Dr. Hodgson's opinion more persuasive. In concluding that presbycusis, rather than workplace noise, was the major cause of the claimed hearing condition, Dr. Hodgson explained that claimant's hearing tests showed a pattern more indicative of presbycusis-based hearing loss. (Ex. 10-5, 6; Tr. 84-91). In particular, Dr. Hodgson noted the absence of a "noise notch" at a level that would show noise-induced hearing loss. (*Id.*)

In disagreeing with Dr. Hodgson's opinion, Dr. Lipman stated that a 1992 and 1993 audiogram showed a noise notch at 6,000kHz. (Ex. 16-7). Such a notch, Dr. Lipman opined, was typical of noise exposure, not presbycusis. (*Id.*)

Dr. Hodgson responded that the recovery from 6,000kHz to 8,000kHz could be indicative of a noise notch, but that it was very unusual to have a peak at 6,000kHz. (Tr. 90). Moreover, Dr. Hodgson noted that none of the other numerous audiograms from 1992 through 2008 showed any noise notch that would indicate noise-induced hearing loss. (Tr. 91). Dr. Lipman did not rebut that conclusion.

Dr. Hodgson also noted that audiograms conducted in 2005, 2007 and 2008 all showed a consistent pattern typical of age being the primary cause of claimant's hearing loss. (Tr. 110-11; *see also* Exs. 5A-2; 5B-3; 10-9). Dr. Lipman did not rebut this finding. Accordingly, we are persuaded by Dr. Hodgson's opinion that the hearing tests, as a whole, do not establish that occupational noise exposure was the major contributing cause of the claimed hearing condition.

In so concluding, we note that Dr. Hodgson also rebutted Dr. Lipman's assertion that presbycusis would not be a factor in hearing loss for a 46-year-old individual. Dr. Hodgson explained that such a process typically begins at about age 22, with slow progression up until around age 50, when the process accelerates. (Tr. 92). Again, Dr. Lipman did not respond to Dr. Hodgson's precise rebuttal regarding the commencement of presbycusis.

Lastly, we disagree with claimant's assertion that Dr. Hodgson's opinion is unpersuasive because it only relied on generalized statistics, rather than claimant's individual presentation. As set forth above, Dr. Hodgson's opinion was based on conducting a hearing test and analyzing numerous hearing tests on claimant over the course of 16 years. Moreover, Dr. Hodgson weighed numerous potentially causative factors in arriving at his opinion, including the use of protective hearing devices, genetic contributions, and medications. (Tr. 61-62, 68-69). That Dr. Hodgson also used medical literature, as applied to claimant's test results, in reaching his causation conclusion, does not mean that his opinion was based on generalized information that was insufficiently directed at claimant's particular circumstances.

In sum, we agree with the ALJ's conclusion that the medical evidence did not persuasively establish that claimant's workplace noise exposure was the major contributing cause of the claimed hearing loss. Therefore, we affirm.

ORDER

The ALJ's order dated August 4, 2008 is affirmed.

Entered at Salem, Oregon on January 13, 2009