

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GEORGE J. KIENY and DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION, Washington, DC

*Docket No. 98-270; Submitted on the Record;
Issued August 11, 1999*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether appellant has met his burden of proof in establishing that he sustained a loss of hearing causally related to noise exposure in his federal employment.

On November 10, 1995 appellant, then a 57-year-old special agent, filed a claim for hearing loss. He stated he became aware of the hearing loss and it related to his employment on October 17, 1979. Appellant retired on February 28, 1996.

The employment establishment submitted a copy of appellant's medical records, including audiograms taken during appellant's employment and a summary of occupational exposure to noise.

The Office of Workers' Compensation Programs accepted appellant's claim for tinnitus of the left ear. The Office referred appellant to Dr. Stuart Heaton, a Board-certified otolaryngologist, for an examination and audiometric testing. In his report, Dr. Heaton indicated that an audiometric evaluation was performed on equipment last calibrated to standards on August 31, 1995. He reported that the audiogram revealed a left sensorineural hearing loss of unknown etiology which he doubted was noise-induced based on the unilaterality and flat/low/mid frequency of the left ear hearing. Dr. Heaton recommended further testing to rule out an acoustic neuroma as the cause of appellant's hearing loss in his left ear.

By decision dated September 16, 1996, the Office denied appellant's claim on the grounds that the evidence of record failed to establish that appellant's left ear hearing loss was causally related to noise exposure in his federal employment.

By letter dated October 11, 1996, appellant requested an oral hearing before an Office hearing representative. The hearing was scheduled and held on Tuesday, April 29, 1997.

By decision dated July 22, 1997, the hearing representative affirmed the Office's September 16, 1996 decision. He noted that appellant submitted an April 17, 1997 report by

Dr. J. Dan Toney, a Board-certified otolaryngologist, who after a physical examination and review of appellant's previous audiograms and work history, opined that appellant had a left sensorineural hearing loss as a result of noise exposure at work (pistol firing). However, his report did not conform to the Office standards. The hearing representative found that Dr. Heaton's report which was in accordance with the Office standards carried the weight of medical opinion evidence in this case.¹

The Board finds that this case is not in posture for decision and must be remanded for further development of the medical evidence.

An employee seeking benefits under the Federal Employees' Compensation Act² has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was filed within the applicable time limitations of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.³ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or occupational disease.⁴

An award of compensation may not be based on surmise, conjecture, speculation or appellant's belief of causal relationship.⁵ The Board has held that the mere fact that a disease or condition manifests itself during a period of employment does not raise an inference of causal relationship between the condition and the employment.⁶ Neither the fact that the condition became apparent during a period of employment nor appellant's belief that employment caused or aggravated his condition is sufficient to establish causal relationship.⁷ While the medical opinion of a physician supporting causal relationship does not have to reduce the cause or etiology of a disease or condition to an absolute certainty,⁸ neither can such opinion be speculative or equivocal. The opinion of a physician supporting causal relationship must be one of reasonable medical certainty that the condition for which compensation is claimed is causally related to federal employment and such a relationship must be supported with affirmative

¹ The Board notes that the hearing representative stated that Dr. Heaton opined that the cause of the left ear hearing loss was an acoustic neuroma. However, Dr. Heaton stated that the left ear hearing loss was of an unknown etiology but that there was indication of an acoustic neuroma on examination that needed further testing before it could be ruled out. The hearing representative also stated that an Office medical adviser applied the Office's standards to Dr. Heaton's August 29, 1996 audiogram, however, this is not supported by the evidence of record.

² 5 U.S.C. § 8101.

³ *Joe Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143, 1154 (1989).

⁴ *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁵ *Williams Nimitz, Jr.*, 30 ECAB 567, 570 (1979); *Miriam L. Jackson Gholikely*, 5 ECAB 537, 538-39 (1953).

⁶ *Edward E. Olson*, 35 ECAB 1099, 1103 (1984).

⁷ *Joseph T. Gulla*, 36 ECAB 516, 519 (1985).

⁸ See *Kenneth J. Deerman*, 34 ECAB 641 (1983)

evidence, explained by medical rationale and be based upon a complete and accurate medical and factual background of the claimant.⁹

In this case, although Dr. Heaton stated that appellant's left ear hearing loss was not caused by noise exposure in his federal employment and provided medical rationale for his opinion, he recommended that the results of additional testing be obtained to rule out an acoustic neuroma. While the hearing representative stated that Dr. Heaton's audiogram was referred to an Office medical adviser, the record does not support such. While appellant has the burden of establishing entitlement to compensation, proceedings under the Act are not adversarial and when the Office has undertaken the development of medical evidence, the Office has an obligation to see that justice is done.¹⁰

On remand the Office should refer appellant for testing for an acoustic neuroma and after obtaining the test results refer them to a district medical adviser for an opinion. Following such further development as the Office deems necessary, it shall issue a *de novo* decision.

The decisions of the Office of Workers' Compensation Programs dated July 22, 1997 and September 16, 1996 are set aside and the case is remanded for further action consistent with this decision.

Dated, Washington, D.C.
August 11, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

⁹ See *Margaret A. Donnelly*, 15 ECAB 40 (1963); *Morris Scanlon*, 11 ECAB 384 (1960).

¹⁰ 20 C.F.R. § 10.110(b).