

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM D. CHAPPELL and DEPARTMENT OF THE ARMY,
FORT McCLELLAN, Ala.

*Docket No. 96-884; Submitted on the Record;
Issued February 23, 1998*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant has met his burden to establish that he sustained a loss of hearing, chronic ear drainage and ear infections in his right ear in the performance of duty.

On March 1, 1991 appellant, a 39-year-old exhibit maker, filed a claim for compensation alleging that he sustained a loss of hearing, chronic ear drainage and ear infections in his right ear due to factors of his federal employment and that he first became aware of these injuries as of February 21, 1987. In a handwritten letter from appellant accompanying the claim form, appellant alleged that during a hearing examination in February 1987, he had a large piece of skin removed from his ear canal by a physician at the employing establishment's health clinic. Appellant claimed that since this incident occurred, he experienced ear drainage and loss of hearing. Appellant specifically claimed that the hearing in his right ear had worsened to the extent that he had lost nearly all of the hearing in his right ear and that his ear drained on a daily basis.

In addition, appellant submitted to the Office of Workers' Compensation Programs several documents describing his employment history with the employing establishment, some of which indicated that he had been exposed to loud noise with the employing establishment.

In an April 19, 1991 letter, the Office informed the employee that he had to submit additional information in support of his hearing loss claim. The Office requested that he provide a complete history of his exposure to loud noise with the employing establishment, a medical report documenting his hearing loss and how specific work factors or incidents contributed to his condition. Appellant did not respond to this request.

In a decision dated June 14, 1991, the Office found that appellant had not sustained an employment-related hearing loss.

The employing establishment submitted a two-way memorandum to the Office dated July 5, 1991, which indicated that appellant had contacted them and requested that they resubmit the medical documentation indicating that he did have something removed from his ear canal in 1987. In a August 7, 1991 letter to the employing establishment, an Office claims examiner made reference to the July 5, 1991 memorandum confirming there was documentation in appellant's medical file which supported appellant's assertion.¹ The claims examiner stated that he had reviewed the case file and determined that the Office had never received the data from the employing establishment indicating the level of noise to which appellant was exposed; the claims examiner then requested that the employing establishment provide this information.

In response, the employing establishment submitted a form letter dated September 4, 1991 indicating it had submitted, in a packet attached to the letter, information regarding appellant's employment records and his levels of noise exposure that was requested by the Office.

Appellant underwent exploratory surgery on his right ear on July 7, 1992, which was performed by Dr. John O. Brown, a specialist in otolaryngology. In a medical report dated July 17, 1992, Dr. Brown stated that appellant underwent a computerized axial tomography (CAT) test scan² which revealed a questionable lesion in the attic consistent with a possible cholesteatoma. Dr. Brown stated that the surgery, an exploratory tympanotomy and tympanoplasty, revealed a fracture of the lenticular process of the malleus in addition to a disarticulation of the incus ossicular discontinuity. Appellant also had some infected tissue removed from the posterior canal wall.

In a letter dated August 13, 1992, the Office referred appellant and a statement of accepted facts to Dr. Roger C. Suttle, a Board-certified otolaryngologist, for an audiologic and otologic evaluation of appellant. In a Form CA-1332 received by the Office on October 28, 1992, Dr. Suttle reviewed the audiogram taken on his behalf and diagnosed a mixed hearing loss with mild conductive loss in the right ear. However, Dr. Suttle indicated that appellant did not show a sensorineural loss exceeding what would be normally predicated on the basis of presbycusis. With regard to whether the workplace exposure was sufficient as to intensity and duration to have caused or contributed to the hearing loss, Dr. Suttle stated "unknown; probably so." Dr. Suttle stated that appellant did complain of otorrhea (ear discharge) in 1987 or 1988 and did have some waxy debris removed from his right ear, but he stated that the tympanic membrane was felt to be normal. In addition, Dr. Suttle stated that while the findings had been somewhat inconsistent, his hearing had remained essentially normal until audiometric studies in 1987 began to show a greater loss primarily in the high frequencies and that by 1990 the hearing loss in the high frequencies had increased.

The audiologist performing the September 15, 1992 audiogram for Dr. Suttle noted findings on audiological evaluation. At the frequencies of 500, 1,000, 2,000 and 3,000 hertz, the

¹ See appellant's clinical notes of March 2, 1987.

² This CAT scan was performed on May 27, 1992.

following thresholds were reported: right ear -- 20, 15, 30, and 30 decibels: left ear -- 20, 15, 20 and 20 decibels.

In a decision dated January 14, 1993, the Office found that appellant had not sustained an employment-related hearing loss. In a memorandum dated January 11, 1995, the claims examiner stated that Dr. Suttle's report had negated a causal relationship between appellant's hearing loss and noise exposure with the employing establishment.

In a letter to the Office dated January 18, 1993, appellant requested a hearing.

In a decision dated May 24, 1993, an Office hearing representative vacated the Office's decision of January 14, 1993. The hearing representative stated that Dr. Suttle, in his September 15, 1992 report, had not considered whether appellant's hearing loss in his right ear might have resulted from the treatment he received on March 2, 1987 at the employing establishment and therefore remanded the case back to the Office for further development.

The Office prepared a new statement of facts and referred appellant back to Dr. Suttle for a second opinion medical evaluation on August 25, 1993. In a September 27, 1993 report, Dr. Suttle stated that on reexamination and on the basis of an additional audiogram appellant demonstrated a mixed loss in the right ear with a mild, conductive component and recommended hearing aids; he did not, however, provide an opinion regarding causal relationship. In a letter to Dr. Suttle dated October 26, 1993, the Office reiterated that it required an answer, with supporting medical reasons, to the question of whether the March 1987 incident caused appellant's hearing loss in his right ear. In a supplemental report dated November 8, 1993, Dr. Suttle stated that he did not feel there was a reasonable possibility that appellant's hearing loss was related to the medical treatment he received in February and March 1987. Dr. Suttle stated that a cholesteatoma, or skin debris, can accumulate to the extent that it appears to be just ear wax, as it apparently did in appellant's ear canal. Dr. Suttle stated, however, that the removal of the ear canal skin was not what produced appellant's hearing loss and opined that the most likely etiology was chronic infection dating over many years. Dr. Suttle further noted that a cholesteatoma can act as a conducting mechanism for sound and damage a person's hearing when it is removed.

By decision dated December 7, 1993, the Office denied appellant's claim finding that the medical evidence failed to establish that appellant's hearing loss in the right ear was caused by the hearing examinations or treatment of February and March 1987.

In a letter dated December 12, 1993, appellant requested an oral hearing. A hearing was held on May 17, 1994. Subsequent to the hearing, appellant submitted medical reports dated May 20 and July 6, 1994 from Dr. Brown. Dr. Brown stated in his July 6, 1994 report that the CAT scan he performed on appellant on May 27, 1992 had shown some soft tissue in the epitympanic recess on the right and that this did not have the appearance of a discreet mass but was felt to represent residual inflammatory tissue or residual mass, though appellant gave no history of having had previous surgery. Dr. Brown stated that often a cholesteatoma can cause such changes or they could be caused congenitally, though he had no information to support this latter opinion based on appellant's preinjury medical history. Dr. Brown concluded that "somehow, a portion of the skin from the ear canal infiltrated behind the tympanic membrane at

some point in time; whether this was caused by the trauma, which in this case appears to be the only antecedent event, then I feel that I would favor the possibility that this occurred from [appellant's] injury to his ear canal sustained during the cleaning in 1987.”

In a decision dated July 26, 1994, the hearing representative found that a conflict in medical opinion existed between Drs. Suttle and Brown regarding whether appellant's treatment at the employing establishment on March 2, 1987 resulted in a hearing loss to appellant's right ear. The hearing representative therefore set aside the Office's decision of December 7, 1993 to refer the case to an impartial referee medical examiner. The hearing representative also instructed appellant to arrange to obtain the CAT scan films noted by Dr. Brown and take them with him to the impartial medical examination.

The Office prepared a new statement of facts and on August 12, 1994 referred appellant to Dr. Arthur F. Toole, III, a Board-certified otolaryngologist, for an impartial medical examination pursuant to section 8123(a).³

In an October 4, 1994 report, Dr. Toole performed a physical examination and reviewed appellant's medical records and the statement of facts. Dr. Toole concluded, in response to questions posed by the Office, that appellant had a hearing loss in his right ear, but stated that he showed a hearing loss in 1987 and 1989 in the mid and higher frequencies. Dr. Toole commented that while this was significantly different from the hearing level in 1981, there was little significant change in hearing between the 1987 audiogram and the January 1989 audiogram. Dr. Toole further stated that since the current hearing loss was not seen audiometrically until after an interval audiogram in 1989, it was unlikely that the treatment at the employing establishment on March 2, 1987 caused the hearing loss. Dr. Toole stated that he suspected that the right ear hearing loss was due to other causes based on Dr. Brown's description. Dr. Toole opined that cholesteatomata of the middle ear can occur from negative pressure in the middle ear due to an obstructed eustachian tube, due to congenital rests of squamous epithelium, or to migration of squamous epithelium from the ear canal through a hole in the eardrum or retracted areas of the eardrum. Dr. Toole also opined that someone could also have cholesteatomata of the ear canal due to chronic infections in the ear canal as well.

In a decision dated February 16, 1995, the Office denied appellant's claim, finding that the weight of the medical opinion, represented by Dr. Toole, the referee medical specialist, failed to show a causal relationship between appellant's hearing loss in his right ear and the medical treatment he received at the employing establishment on March 2, 1987.

In a letter postmarked March 6, 1995, appellant again requested an oral hearing. A hearing was scheduled for July 19, 1995, at which appellant testified that he was not comfortable with Dr. Toole's examination and opinion because he did not administer any diagnostic tests, such as x-rays.

In a decision dated October 2, 1995, the Office hearing representative vacated the February 16, 1995 decision. The Office hearing representative found that Dr. Toole's report

³ 5 U.S.C. § 8123(a).

failed to resolve the conflict in medical opinion as the physician had failed to indicate in his October 4, 1994 opinion that he reviewed the May 27, 1992 CAT scan in his evaluation. The hearing representative directed that the Office request a supplemental, report from Dr. Toole to review the May 27, 1992 CAT scan and provide his opinion as to whether the results from the CAT scan supported a causal relationship between appellant's right ear condition and the treatment he received at the employing establishment on March 2, 1987.

In a letter dated November 1, 1995, the Office asked Dr. Toole to review the CAT scan of May 27, 1992 and clarify his earlier report on the issue of causal relation.

Dr. Toole submitted a supplemental medical report dated November 16, 1995. Dr. Toole stated that he doubted that the changes seen on the CAT scan would be related to cleaning cerumen from the ear and that the enlargement of the bony external ear canal, indicated on the CAT scan, would be in response to a surgical procedure. Dr. Toole stated in reply to question No. 2 that the audiogram administered on February 13, 1987 and the audiogram administered on March 2, 1987 contained essentially the same findings with regard to the right ear and that another audiogram dated January 9, 1989 showed no change in the hearing in appellant's right ear. Dr. Toole noted that the first audiogram to show a worsening of hearing in appellant's right ear was the one administered on January 4, 1990 and stated that generally, hearing loss resulting from an injury would occur immediately after the injury, although there were exceptions to this rule such as where there is a rupture of the eardrum with an ingrowth of skin from the ear canal into the ear. Dr. Toole stated that he had not found a note describing such a hole in the eardrum between 1987 and Dr. Brown's 1992 surgery that would reflect this reason as a cause for appellant's hearing loss. Dr. Toole stated, since there was no documentation of hearing loss at or shortly after the time of injury, he was unable to conclude that the March 2, 1987 injury was the cause of appellant's hearing loss.

In a decision dated January 10, 1996, the Office denied appellant's claim. The Office found based on Dr. Toole's November 16, 1995 letter that the medical evidence of record failed to establish that the claimed condition or disability is causally related to the alleged March 2, 1987 injury.

The Board finds that appellant has not met his burden to establish that he sustained a loss of hearing, chronic ear drainage and ear infections in his right ear in the performance of duty.

An employee seeking benefits under the Federal Employees' Compensation Act⁴ has the burden of establishing that 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 timely filed within the applicable time limitation period 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.⁵ These are the

⁴ 5 U.S.C. §§ 8101-8193.

⁵ *Joe Cameron*, 42 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁶

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed, or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The medical evidence required to establish causal relationship is usually rationalized medical 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 appellant'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 appellant, 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 appellant.⁷

The Office accepts that appellant experienced the employment incident at the time, place and in the manner alleged. However, the question of whether an employment incident caused a personal injury generally can be established only by medical evidence,⁸ and appellant has not submitted medical evidence to establish that the employment incident caused a personal injury.

In the Office's October 2, 1995 decision, the Office hearing representative directed the independent medical examiner, Dr. Toole, to reconsider the opinion he rendered in his October 4, 1994 medical report, *i.e.*, whether appellant sustained a hearing loss causally related to employment factors based on his review of the May 27, 1992 CAT scan films and to restate his opinion in order to finally resolve the conflict in the medical evidence. In his updated report of November 1, 1995, Dr. Toole clearly indicated that there was no causal relationship between appellant's claimed condition and his March 2, 1987 episode at the employing establishment. Based on his evaluation of appellant, his review of the record and his review of the May 27, 1992 CAT scan, as directed by the Office in its October 2, 1995 decision, Dr. Toole stated that because there was no documentation of hearing loss at the time of injury, he was unable to conclude that the March 2, 1987 injury was the cause of appellant's hearing loss.

⁶ *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁷ *Id.*

⁸ *See John J. Carlone*, 41 ECAB 353 (1989).

In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.⁹ The Board finds that Dr. Toole's November 1, 1995 opinion is entitled to special weight and resolves the conflict as to whether appellant's treatment at the employing establishment's clinic on March 2, 1987¹⁰ resulted in an employment-related injury; *i.e.*, loss of hearing, chronic ear drainage and ear infections in appellant's right ear.

Consequently, the Board finds that the Office properly determined that appellant did not sustain a loss of hearing, chronic ear drainage and ear infections in his right ear in the performance of duty.

The January 10, 1996 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, D.C.
February 23, 1998

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

⁹ *Kathryn Haggerty*, 45 ECAB 383 (1994).

¹⁰ The exact date of the examination is in question. Appellant asserted in his Form CA-2 that the examination took place on February 21, 1987 and stated in his accompanying letter that it happened in February 1987. The clinic note from the employing establishment describes treatment occurring on March 2, 1987 and most of the Office decisions refer to the treatment date as March 2, 1987.