

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

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**BOBBIE F. COWART, Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Inglewood, CA, Employer**

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**Docket No. 04-1416  
Issued: September 30, 2004**

*Appearances:*  
*Bobbie F. Cowart, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chairman  
DAVID S. GERSON, Alternate Member  
MICHAEL E. GROOM, Alternate Member

**JURISDICTION**

On May 5, 2004 appellant filed a timely appeal from the March 5, 2004 merit decision of the Office of Workers' Compensation Programs, which denied her hearing loss claim as a result of her federal employment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review this decision.

**ISSUES**

The issues are: (1) whether the hearing loss in appellant's left ear is causally related to her occupational exposure to hazardous noise; (2) whether appellant has a compensable hearing loss in her right ear; and (3) whether the Office properly denied payment for the eight hours of wage loss that appellant incurred the night before her Office-scheduled hearing evaluation.

**FACTUAL HISTORY**

On October 9, 2003 appellant, then a 47-year-old mail processing clerk, filed a claim alleging that the hearing loss in her left ear was a result of her federal employment. She submitted a June 2, 2003 audiogram indicating that an evaluation of her right ear was within normal limits but that her left ear showed a mild to severe mixed hearing loss. The Office

referred her, together with a statement of accepted facts, to Dr. Montra M. Kanok, a Board-certified otolaryngologist.

On February 19, 2004 Dr. Kanok reported his findings on otologic examination and audiometric evaluation. He noted that the right ear was essentially within normal limits in all frequencies.<sup>1</sup> The left ear, however, showed hearing thresholds of 65, 60, 50, 45, 45 and 30 decibels at frequencies, respectively, of 250, 500, 1,000, 2,000, 4,000 and 8,000 cycles per second. Dr. Kanok explained the significance of these findings:

“The configuration of the nerve [curve] on the left ear is strongly suggestive of a Carhart notch. The hearing loss is mainly on the lower frequency and not on the high frequencies.

“This type of hearing loss, and the pure tone testing is more suggestive of a conductive loss, particularly with the Carhart notch. It is strongly suggestive of otosclerosis of the left ear.”

\* \* \*

“The type of hearing loss, conductive loss, mostly is the cause for otosclerosis. It is not related to any noise exposure. There is no evidence of noise-induced hearing loss by the hearing tests, either on the right or the left ear. Since the hearing loss is not caused by loud noise exposure there is no occupational connection in this situation. Particularly, otosclerosis can cause hearing loss increase, as the patient increases in age. The condition, otosclerosis, causing hearing loss is usually detected in the early 20s and becomes more pronounced when the [patient] ages. There is no injury[-]related [hearing loss] in this situation. The patient’s hearing loss in the left ear is not caused by loud noise exposure; however, [she] does work in a noisy environment, which potentially could cause more problems to the ears, particularly the right side. Even though at this point, it is not evident, the patient should be cautious as to using ear protection whenever possible, especially on the right ear.”

On February 17, 2004 appellant requested reimbursement for wage loss: “I was in a leave without pay status prior to doctor’s appointment February 17, 2004. At the doctor’s request I was to avoid loud noise for at least 16 hours before hearing test.” Appellant’s appointment was at 2:30 p.m. on February 17, 2004, and Dr. Kanok’s office advised her to avoid any loud noise for at least 16 hours prior to that appointment. Appellant’s work shift was from 9:50 p.m. on February 16, 2004 to 6:00 a.m. on February 17, 2004.

In a decision dated March 5, 2004, the Office denied the payment of a schedule award on the grounds that the evidence failed to establish that appellant’s medical condition was causally related to her occupational exposure to noise. The Office paid compensation for eight hours of lost wages incurred on February 17, 2004 “due to your attending the Office-scheduled Second

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<sup>1</sup> Hearing thresholds at 250, 500, 1,000, 2,000, 4,000 and 8,000 cycles per second were 15, 10, 10, 15, 10 and 10 decibels respectively.

Opinion examination” but denied compensation for February 16, 2004 “due to this Office requesting that you avoid exposure to loud noises.”

### **LEGAL PRECEDENT -- ISSUE 1**

An employee seeking benefits under the Federal Employees’ Compensation Act<sup>2</sup> has the burden of proof to establish the essential elements of her claim. When an employee claims that she sustained an injury in the performance of duty, she must submit sufficient evidence to establish that she experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged. She must also establish that such event, incident or exposure caused an injury.<sup>3</sup>

Causal relationship is a medical issue,<sup>4</sup> and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence that includes a physician’s rationalized opinion on whether there is a causal relationship between the claimant’s diagnosed condition and the established incident or factor of employment. The opinion of the physician must be based on a complete factual and medical background of the claimant,<sup>5</sup> must be one of reasonable medical certainty,<sup>6</sup> and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the established incident or factor of employment.<sup>7</sup>

### **ANALYSIS -- ISSUE 1**

The Office accepts occupational exposure to noise levels above 85 decibels. The question for determination is whether this exposure caused the hearing loss found in appellant’s left ear. Dr. Kanok, the evaluating physician, reported that there was a hearing loss in the left ear but no occupational connection. He explained that the configuration of the curve on the left, with hearing loss mainly in the low frequencies and not in the high frequencies, was more suggestive of a conductive loss and strongly suggestive of otosclerosis in the left ear. As this type of hearing loss is not related to exposure to loud noise, there was no work-related hearing loss.

The Board finds that Dr. Kanok’s opinion is based on a proper factual background and is sufficiently well reasoned that it carries the weight of the medical evidence on the issue of causal relationship. There is no medical opinion to the contrary. Appellant, therefore, has not met her

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<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> See *Walter D. Morehead*, 31 ECAB 188, 194 (1979) (occupational disease or illness); *Max Haber*, 19 ECAB 243, 247 (1967) (traumatic injury). See generally *John J. Carlone*, 41 ECAB 354 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>4</sup> *Mary J. Briggs*, 37 ECAB 578 (1986).

<sup>5</sup> *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

<sup>6</sup> See *Morris Scanlon*, 11 ECAB 384, 385 (1960).

<sup>7</sup> See *William E. Enright*, 31 ECAB 426, 430 (1980).

burden of proof to establish that her accepted exposure to noise levels above 85 decibels at work caused the hearing loss in her left ear. The Board will affirm the Office's March 5, 2004 decision with respect to the left ear and the issue of causal relationship.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8107 of the Act<sup>8</sup> authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body. Such loss or loss of use is known as permanent impairment. The Office evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.<sup>9</sup> Using the frequencies of 500, 1,000, 2,000 and 3,000 cycles per second, the losses at each frequency are added up and averaged. Then, a "fence" of 25 decibels is deducted because, as the A.M.A., *Guides* points out, losses below 25 decibels result in no impairment in the ability to hear everyday sounds under everyday conditions. The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss. The binaural loss is determined by calculating the loss in each ear using the formula for monaural loss; the lesser loss is multiplied by five, then added to the greater loss and the total is divided by six to arrive at the amount of the binaural hearing loss.<sup>10</sup> The Board has concurred in the Office's adoption of this standard for evaluating hearing loss.<sup>11</sup>

### **ANALYSIS -- ISSUE 2**

Regarding the hearing loss in the right ear, the audiogram obtained for Dr. Kanok contained no reading at the required frequency of 3,000 cycles per second. Whether this is fatal to the audiogram's use in this case, given such consistently low thresholds across the entire band of frequencies on the right, is a question for the Office medical adviser. The Office, however, failed to forward the record to an Office medical adviser for an opinion concerning the nature and percentage of impairment, as standard procedure in schedule award cases requires.<sup>12</sup> The Board will set aside the Office's March 5, 2004 decision with respect to the ratability and employment relatedness of the hearing loss in appellant's right ear. The Board will remand the case for further development and an appropriate final decision on this issue.

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<sup>8</sup> 5 U.S.C. § 8107.

<sup>9</sup> 20 C.F.R. § 10.404. Effective February 1, 2001 the Office began using the A.M.A., *Guides* (5<sup>th</sup> ed. 2001). FECA Bulletin No. 01-05 (issued January 29, 2001).

<sup>10</sup> A.M.A., *Guides* 250 (5<sup>th</sup> ed. 2001).

<sup>11</sup> *Donald E. Stockstad*, 53 ECAB \_\_\_\_ (Docket No. 01-1570, issued January 23, 2002), *petition for recon. granted (modifying prior decision)*, Docket No. 01-1570 (issued August 13, 2002).

<sup>12</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.800.6.d (August 2002).

### **LEGAL PRECEDENT -- ISSUE 3**

Section 8123 of the Act provides that an employee shall submit to examination by a medical officer of the United States, or by a physician designated or approved by the Secretary of Labor, after the injury and as frequently and at the times and places as may be reasonably required.<sup>13</sup> An employee is entitled to be paid expenses incident to an examination required by the Secretary which in the opinion of the Secretary are necessary and reasonable, including transportation and loss of wages incurred in order to be examined.<sup>14</sup>

### **ANALYSIS -- ISSUE 3**

When the Office referred appellant to Dr. Kanok for an evaluation of her hearing, Dr. Kanok's office advised appellant as follows: "Please avoid any loud noise for at least 16 hours prior to your appointment for the hearing test portion." The appointment was scheduled for 2:30 pm on February 17, 2004. This meant that appellant had to avoid any loud noise after 10:30 pm on February 16, 2004, if not earlier. Appellant's shift on February 16, 2004 began at 9:50 pm. Because the Office accepts that she works in a noisy environment and is exposed to noise levels exceeding 85 decibels, the instructions she received from Dr. Kanok's office required her to avoid most, if not all, of her shift the night before her appointment. Appellant followed these instructions and took leave without pay.

The Office denied compensation resulting from having to avoid exposure to loud noise, but it did so by applying section 8117 of the Act, which provides that an employee is not entitled to compensation for the first three days of temporary disability, with certain exceptions.<sup>15</sup> Appellant is not claiming disability for work or an incapacity to earn wages because of an employment injury.<sup>16</sup> She claims eight hours of leave without pay the night before her appointment as an expense incident to the examination required by the Office. The Office did not exercise its discretion under section 8123(b) of the Act to determine whether this expense was necessary and reasonable. The Board will therefore set aside the Office's March 5, 2004 decision on the issue of whether appellant is entitled to payment for the eight hours of wage loss she incurred the night before her Office-scheduled hearing evaluation. The Board will remand the case for a proper exercise of discretion under section 8123(b) and an appropriate final decision on this issue.

### **CONCLUSION**

The Board finds that appellant has not met her burden of proof to establish that the hearing loss in her left ear is causally related to her occupational exposure to hazardous noise. The Board finds that this case is not in posture for decision on whether appellant has a

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<sup>13</sup> 5 U.S.C. § 8123(a).

<sup>14</sup> *Id.* at § 8123(b).

<sup>15</sup> *Id.* at § 8117.

<sup>16</sup> *See* 20 C.F.R. § 10.5(f) (1999) (defining "disability" as the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury).

compensable hearing loss in her right ear. Further development of the medical evidence is required on this issue. The Board also finds that this case is not in posture for decision on whether appellant is entitled to payment for the eight hours of wage loss she incurred the night before her Office-scheduled hearing evaluation. The Office must exercise its discretion on this issue under section 8123(b) of the Act.

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 5, 2004 decision of the Office of Workers' Compensation Programs is affirmed in part and is set aside in part. The case is remanded for further action consistent with this opinion.

Issued: September 30, 2004  
Washington, DC

Alec J. Koromilas  
Chairman

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member