

conflict of medical opinion between his treating physician and the second opinion physician as to the cause of his hearing loss.

FACTUAL HISTORY

On October 14, 2005 appellant, then a 53-year-old coal mine inspector, filed an occupational disease claim (Form CA-2) alleging that he sustained a hearing loss due to his federal employment. He first realized that his hearing loss was related to his employment on March 25, 2002.

In a September 22, 2005 statement, appellant noted that he worked at the employing establishment since 1999, during which time he was subjected to a variety of noises. Since 2002, his job duties included inspecting both surface and underground coal mines. During this time appellant wore earplugs when he encountered high noise areas, generally four to six hours daily. He was last exposed to loud noises after working a second shift inspection on September 15, 2005. Appellant submitted a series of audiometric test results dated November 25, 1998 through September 22, 2005 indicating a hearing loss in both ears. A November 25, 1998 preemployment audiogram revealed hearing levels of 15, 15, 15 and 50 decibels in the left ear and 10, 15, 20 and 10 decibels in the right ear at 500, 1000, 2000 and 3000 hertz (Hz), respectively.

On September 27, 2005 the employing establishment stated that appellant was assigned to work at underground and surface mines and was primarily exposed to noise from machinery, including continuous miners, diesel equipment, roof bolting machines, haul trucks, conveyor chains and conveyor belts. It submitted a list showing the average sound levels of various mining equipment, ranging from 83.8 decibels to 115.5 decibels and noted that he was exposed to different levels of noise for approximately four to six hours a day, three or four days per week.

The Office referred appellant, together with a medical record and a statement of accepted facts, to Dr. Kevin T. Kavanagh, a Board-certified otolaryngologist, for examination.

In a February 27, 2006 report, Dr. Kavanagh reviewed appellant's medical and occupation history, noting a history of high blood pressure, heart disease and a June 2005 myocardial infarction. He noted that appellant smoked one pack of cigarettes a day for the past 10 years. On examination, appellant had little or no difficulty understanding speech in a quiet environment. Weber was midline at 256 Hz but lateralized to the right ear at 512 Hz. Rinne test was positive on both sides at 256 and 512 Hz. Physical examination also revealed significant rhinitis with mild decreased nasal airway and increased nasal secretions. Dr. Kavanagh diagnosed asymmetrical sensorineural hearing loss. He stated that appellant's preemployment audiogram showed a significant sensorineural hearing loss, which had progressed to an extent in excess of what would be normally attributed to presbycusis. Dr. Kavanagh advised that the described workplace noise exposure was sufficient in intensity and duration to have caused a hearing loss; however, the asymmetry of the loss made it highly likely that it was due to a cause other than noise exposure. He relayed that appellant could not recall any acute incident where his ear was toward a blast or extremely loud noise that would have caused auditory trauma to the ear unilaterally. Additionally, Dr. Kavanagh opined that appellant's heart disease and smoking might have caused vascular disease, which could explain the mild hearing loss progression. He

concluded that, more likely than not, appellant did not sustain a significant noise-induced hearing loss due to his federal employment. Dr. Kavanagh included the results of an audiogram, showing hearing levels of 15, 25, 20 and 30 decibels in the right ear and 20, 20, 70 and 75 decibels in the left ear at 500, 1000, 2000 and 3000 Hz, respectively and submitted a recent calibration certificate. He recommended a magnetic resonance imaging (MRI) scan of the posterior fossa and internal auditory canals.

The Office referred Dr. Kavanagh's medical report to, Dr. Daniel D. Zimmerman, a Board-certified internist and Office medical adviser, for review. In a March 3, 2006 report, Dr. Zimmerman agreed with Dr. Kavanagh's finding that appellant did not sustain a hearing loss due to noise exposure in his federal employment.

In a March 24, 2006 decision, the Office denied appellant's claim on the grounds that the medical evidence did not establish that he sustained a hearing loss due to his federal employment. It based its decision on Dr. Kavanagh's finding that appellant did not sustain a work-related hearing loss.²

In an April 18, 2006 letter, appellant stated that a recent MRI scan showed that he did not have any other medical condition that could affect his hearing loss. He attached the April 7, 2006 MRI scan report of his internal auditory canals and brain, including the posterior fossa, showing no abnormality.

On May 17, 2006 appellant requested reconsideration.

On June 5, 2006 the Office forwarded the April 7, 2006 MRI scans to Dr. Zimmerman to determine whether the information warranted modification of the March 24, 2006 decision. In a June 11, 2006 report, Dr. Zimmerman stated that noise exposure had a recognizable pattern as shown on audiometric testing. He opined that the MRI scan evaluations of the internal auditory canals and the brain had no impact on the process used to determine whether a hearing loss was related to employment-related noise exposure.

By decision dated June 14, 2006, the Office denied modification of the March 24, 2006 decision on the grounds that the weight of the medical opinion established that appellant did not sustain a hearing loss related to his federal employment.

On August 28, 2006 appellant filed a request for reconsideration. In an August 9, 2006 medical report, Dr. Richard L. Schultz, a Board-certified otolaryngologist, reported that appellant had a history of working in hazardous noise areas. An audiogram revealed normal decreasing to moderate sensorineural hearing loss in the right ear and normal decreasing to severe sensorineural hearing loss in the left ear, both of which were worse at 4000 Hz. Dr. Schultz advised that appellant sustained bilateral high frequency sensorineural hearing loss, worse in the left ear, compatible with a history of noise exposure.

² On April 26, 2006 appellant requested an oral hearing before an Office hearing representative. On May 24, 2006 he withdrew his request for an oral hearing before an Office hearing representative and filed a request for reconsideration. The Office accepted appellant's request to withdraw the hearing request by decision dated June 2, 2006.

In an October 4, 2006 report, Dr. Zimmerman advised that Dr. Schultz did not provide an audiogram to validate his assertion that appellant sustained hearing loss due to noise exposure.

By decision dated October 31, 2006, the Office denied modification of the prior decisions on the grounds that Dr. Schultz did not support his opinion of work-related hearing loss with audiometric test results. The weight of medical evidence continued to rest with Dr. Kavanagh.

On December 11, 2006 appellant filed a request for reconsideration and resubmitted Dr. Schultz' August 9, 2006 medical report with a copy of an August 9, 2006 audiogram showing hearing levels of 15, 25, 35 and 45 decibels in the right ear and 20, 20, 65 and 75 decibels in the left ear at 500, 1000, 2000 and 3000 Hz, respectively.

By decision dated January 19, 2007, the Office denied modification of the prior decisions finding that the submitted audiogram was not performed in accordance with Office procedures.

On March 9 and June 20, 2007 appellant filed requests for reconsideration.

By decisions dated March 16 and June 28, 2007, the Office denied appellant's requests for reconsideration on the grounds that he did not raise substantive legal questions or include new and relevant evidence.

On July 20, 2007 appellant, through his representative, filed a request for reconsideration.

In a July 5, 2007 medical report, Dr. Schultz stated that appellant reported a history of working in the mines since 1974 with exposure to hazardous noise most of that time. He stated that a May 23, 2007 audiogram revealed bilateral high frequency sensorineural hearing loss that was worse in the left ear. Dr. Schultz opined that appellant had a permanent hearing impairment, which was compatible with noise-induced hearing loss due to working in the mines for many years. An attached audiogram showed hearing levels at 20, 30, 30 and 30 decibels in the right ear and 25, 25, 70 and 70 decibels in the left ear at 500, 1000, 2000 and 3000 Hz, respectively, with good reliability.

On August 21, 2007 the Office forwarded appellant's record to Dr. Zimmerman for review. In an August 26, 2007 report, Dr. Zimmerman advised that Dr. Schultz did not distinguish appellant's work-related civilian federal employment noise exposure from his preemployment noise exposure. He concluded that there was no basis to accept that appellant sustained a noise-induced hearing loss due to his civilian federal employment.

In an October 18, 2007 decision, the Office denied modification of the prior decisions denying appellant's claim. It found that Dr. Schultz did not provide a rationalized medical opinion and failed to address audiograms predating appellant's federal civilian employment showing a preexisting hearing loss.

On October 20, 2008 appellant requested reconsideration.

By decision dated January 28, 2009, the Office denied modification of the prior decisions on the grounds that appellant did not provide a rationalized medical opinion establishing that his hearing loss was caused by his noise exposure from his federal civilian employment.

LEGAL PRECEDENT

An employee seeking compensation under the Federal Employees' Compensation Act³ has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence,⁴ including that he is an "employee" within the meaning of the Act⁵ and that he filed his claim within the applicable time limitation.⁶ The employee must also establish that he sustained an injury in the performance of duty as alleged and that his disability for work, if any, was causally related to the employment injury.⁷

To establish that an injury was sustained in the performance of duty in a claim for occupational disease, an employee must submit: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.⁸

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on whether there is a causal relationship between the employee's diagnosed condition and the compensable employment factors. The opinion of the physician must be based on a complete factual and medical background of the employee, 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 the employee.⁹

Office procedures set forth requirements for the type of medical evidence used in evaluation hearing loss. These include that the employee undergo both audiometric and otologic examination; that the audiometric testing be performed by an appropriately certified audiologist; that the otologic examination be performed by an otolaryngologist certified or eligible for certification by the American Academy of Otolaryngology; that the audiometric and otologic examination be performed by different individuals as a method of evaluating the reliability of the findings; that all audiological equipment authorized for testing meet the calibration protocol

³ 5 U.S.C. §§ 8101-8193.

⁴ *J.P.*, 59 ECAB ___ (Docket No. 07-1159, issued November 15, 2007); *Joseph M. Whelan*, 20 ECAB 55, 57 (1968).

⁵ *See M.H.*, 59 ECAB ___ (Docket No. 08-120, issued April 17, 2008); *Emiliana de Guzman (Mother of Elpedio Mercado)*, 4 ECAB 357, 359 (1951); *see* 5 U.S.C. § 8101(1).

⁶ *R.C.*, 59 ECAB ___ (Docket No. 07-1731, issued April 7, 2008); *Kathryn A. O'Donnell*, 7 ECAB 227, 231 (1954); *see* 5 U.S.C. § 8122.

⁷ *G.T.*, 59 ECAB ___ (Docket No. 07-1345, issued April 11, 2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁸ *See Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994).

⁹ *I.J.*, 59 ECAB ___ (Docket No. 07-2362, issued March 11, 2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

contained in the accreditation manual of the America Speech and Hearing Association; that the audiometric test results include both bone conduction and pure tone air conduction thresholds, speech reception thresholds and monaural discrimination scores; and that the otolaryngologist's report include: date and hour of examination, date and hour of employee's last exposure to loud noise, a rationalized medical opinion regarding the relation of the hearing loss to the employment-related noise exposure and a statement of the reliability of the tests.¹⁰ The physician should be instructed to conduct additional tests or retests in those cases where the initial tests were inadequate or there is reason to believe the claimant is malingering.¹¹

ANALYSIS

It is not disputed that appellant sustained a hearing loss.¹² The issue is whether his hearing loss was caused or aggravated by exposure to noise while working as a coal mine inspector. The Board finds the case is not in posture for a decision.

The employing establishment advised that appellant was exposed to differing levels of noise between 83.8 and 115.5 decibels for approximately four to six hours a day, three to four days per week during his employment from 1999 through 2005.¹³ It supplied a preemployment audiogram dated November 25, 1998 revealing hearing loss levels of 15, 15, 15 and 50 decibels in the left ear and 10, 15, 20 and 10 decibels in the right ear at 500, 1000, 2000 and 3000 Hz, respectively. The Office referred appellant to Dr. Kavanagh, a Board-certified otolaryngologist, for a second opinion evaluation regarding whether his hearing loss was related to noise exposure in his federal employment. Dr. Kavanagh diagnosed an asymmetrical sensorineural hearing loss. He stated that appellant's workplace exposure was sufficient in intensity and duration to have caused a hearing loss; however, the asymmetry of the hearing loss made it unlikely that the loss was due to noise exposure. Dr. Kavanagh advised that appellant had heart disease and smoking, risk factors that predisposed him to vascular disease which could explain the mild hearing loss progression. Audiometric testing, showed hearing levels of 15, 25, 20 and 30 decibels in the right ear and 20, 20, 70 and 75 decibels in the left ear at 500, 1000, 2000 and 3000 Hz, respectively. Dr. Kavanagh concluded that, more likely than not, appellant did not sustain a significant noise-induced hearing loss due to his federal employment.

¹⁰ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.8(a) (September 1995); *Luis M. Villanueva*, 54 ECAB 666 (2003).

¹¹ See *Luis M. Villanueva, id.*

¹² The American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*) (5th ed. 2001) evaluates hearing loss by averaging hearing levels at 500, 1000, 2000 and 3000 Hz and subtracting a 25 decibel fence. The remaining amount is then multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss. Applying this formula to Dr. Kavanagh's audiogram results, appellant sustained 31.9 percent hearing loss in his left ear or a 5.3 percent binaural hearing loss. See A.M.A., *Guides* (5th ed. 2001) at 247-50. See also *J.H.*, 60 ECAB ____ (Docket No. 08-2432, issued June 15, 2009).

¹³ It is generally accepted that hearing loss may result from prolonged exposure to noise levels above 85 decibels. Acoustic trauma may, however, result from decibel levels below 85 decibels if exposure is sufficiently prolonged. Whether the employment-related noise exposure was sufficiently prolonged to result in acoustic trauma is a medical question and should be resolved by a Board-certified otolaryngologist. See *R.B.*, 60 ECAB ____ (Docket No. 08-1662, issued December 18, 2008).

Dr. Schultz, a Board-certified otolaryngologist, provided a review of appellant's history of noise exposure while working in mines since 1974. He found that appellant sustained a bilateral high frequency sensorineural hearing loss, worse in the left ear, compatible with noise-induced hearing loss due to his history of occupational noise exposure. Dr. Schultz also provided audiograms showing a bilateral hearing loss.

The Board finds a conflict in medical opinion between Dr. Schultz and Dr. Kavanagh regarding the cause of appellant's hearing loss. Dr. Kavanagh did not attribute appellant's hearing loss to noise exposure in his federal employment. Dr. Schultz found that appellant's hearing loss was noise-induced resulting from his duties as a mine inspector. Both physicians are Board-certified otolaryngologists and their opinions regarding causation are of virtually equal weight and rationale.¹⁴ Section 8123(a) provides that, if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.¹⁵ The case will be remanded for the Office to refer appellant for an impartial medical examination on the issue of whether his hearing loss was caused by noise exposure in his federal employment.¹⁶

CONCLUSION

The Board finds that the case is not in posture.

¹⁴ See *M.S.*, 58 ECAB 328 (2007).

¹⁵ 5 U.S.C. § 8123(a); *Alfred R. Anderson*, 54 ECAB 179 (2002).

¹⁶ See *B.C.*, 58 ECAB 111 (2006).

ORDER

IT IS HEREBY ORDERED THAT the January 28, 2008 decision of the Office of Workers' Compensation Programs be set aside. The case is remanded for further proceedings consistent with this decision.

Issued: June 29, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board