

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of LOUIS E. BROWN and DEPARTMENT OF JUSTICE,  
FEDERAL BUREAU OF INVESTIGATION, Washington, D.C.

*Docket No. 96-600; Submitted on the Record;  
Issued June 9, 1998*

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DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,  
BRADLEY T. KNOTT

The issue is whether appellant sustained a ratable hearing loss causally related to factors of his federal employment.

This is the fifth appeal in this case.<sup>1</sup> The Board's decisions and orders dated June 23, 1989 and December 30, 1985 set forth the prior facts and history of this case.<sup>2</sup> In the most recent appeal,<sup>3</sup> by decision and order dated April 10, 1995, the Board set aside the May 27, 1993 decision of the Office, by which the Office determined that appellant's noise-induced hearing loss was related to his federal employment, but was a nonratable hearing loss. The Board found that the opinion of Dr. Samuel L. Messing, a Board-certified otolaryngologist, selected to resolve a conflict in medical opinion, was not entitled to special weight as the report of Dr. Messing did not comply with the Office's standardized procedures for determining hearing loss and was,

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<sup>1</sup> See Docket No. 96-2334, issued April 10, 1995 Docket No. 92-648, issued October 22, 1992 Docket No. 89-764, issued June 23, 1989 Docket No. 86-18, issued December 30, 1985.

<sup>2</sup> On April 6, 1983 appellant, then a 57-year-old special agent, filed a notice of occupational disease and claim for compensation benefits alleging that as a result of his employment he sustained a hearing loss and tinnitus. On September 19, 1985 the Office of Workers' Compensation Programs accepted appellant's claim for a nonratable hearing loss. Appellant appealed the decision and the Board remanded the case by decision dated December 10, 1985. In a January 19, 1989 decision, the Office denied appellant's claim on the grounds that the weight of the medical evidence established that appellant a nonratable hearing loss and that appellant's subsequent hearing loss was sustained after the cessation of occupational noise exposure and, therefore, was not related to his employment. By decision dated June 23, 1989, the Board found a conflict in medical opinion on the issues of causal relationship and which audiogram to use in calculating appellant's hearing loss. The Board indicated that the Office should refer appellant, the case record and a statement of accepted facts to an impartial medical specialist for a reasoned opinion as to whether appellant had a ratable hearing loss causally related to facts of his employment to be followed by a *de novo* decision.

<sup>3</sup> Docket No. 93-2334, issued April 10, 1995.

therefore, not based upon a proper factual and medical background. The Board stated that the Office should refer appellant to a new impartial medical specialist for an examination and evaluation of appellant's hearing loss in accordance with the standards established under the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. The Board stated that the impartial medical specialist should determine the appropriate audiogram to use in calculating appellant's employment-related hearing loss and provide medical rationale supporting the selection of that audiogram and whether appellant had any ratable hearing loss causally related to factors of his federal employment and also whether any progression of hearing loss since his last occupational noise exposure could be attributed to his employment.

Upon remand of the case, the Office, by letter dated May 23, 1995 referred appellant to Dr. Jeffrey H. Kerner, a Board-certified otolaryngologist, for an impartial examination and evaluation of appellant in order to resolve the conflict in medical opinion evidence as to whether appellant had sustained a ratable hearing loss causally related to factors of his employment.

In a report dated September 8, 1995, Dr. Kerner stated that he had examined appellant and copies of medical records and he noted that in the statement of accepted facts the Office had accepted that appellant had sustained a noise-induced hearing loss and tinnitus. He also noted that the case had been remanded to determine the appropriate audiogram to be used in calculating appellant's employment-related hearing loss and to provide medical rationale supporting the selection of that audiogram, whether appellant had a ratable hearing loss causally related to factors of his federal employment and whether any progression of hearing loss since his last occupational noise exposure could be attributed to his employment. Dr. Kerner noted that pure tone testing on June 8, 1995 revealed a essentially moderate sloping to profound sensorineural hearing loss bilaterally. He stated that past audiological opinions had stated that the most appropriate audiological evaluation to use was the one dated March 1, 1983, since it was performed closest to the date of retirement. Dr. Kerner stated that the 1983 test results revealed a mild nonratable high frequency sensorineural hearing loss with a noise-induced configuration. He noted that subsequent audiological evaluations had revealed a progressive sensorineural hearing loss in the absence of any additional occupational noise exposure. Dr. Kerner stated:

“I would have to agree that [appellant's] hearing loss in 1983 was nonratable. However, it has been documented in the book *Occupational Hearing Conservation* by Maurice Miller and Carol Silverman, that ‘exposure to noise may increase the severity of hearing impairment secondary to presbycusis. Individuals who have been exposed to loud noise on their jobs may show accelerated hearing loss with age, as compared to those who were not exposed, or those who wore adequate hearing protection.’ Therefore, it is likely that [appellant's] progressive sensorineural hearing loss is due in part to his occupational noise exposure and probably to a greater extent than one would determine just by looking at the 1983 audiogram. This observation is strengthened by the fact that [appellant's] hearing loss as of [June 1995] is worse than one would expect strictly due to presbycusis.”

In an undated memorandum, Laurie Hain, Ph.D., an audiologist, noted that she had reviewed appellant's case in 1991 using a audiogram obtained in 1983 and that the results of that evaluation showed a mild high frequency sensorineural hearing loss with a configuration consistent with noise-induced hearing loss. She stated that the loss was unratable and that it was her opinion that the 1983 audiogram was the most appropriate one upon which to base the degree to which noise exposure during appellant's federal employment was causally related to his hearing loss as it was obtained closest in time to the time of retirement. Dr. Hain noted that any later audiograms would demonstrate the combined effect of hearing loss related to employment as well as to other facts such as presbycusis and that, in fact, audiograms from 1986 and 1988 did show deterioration of hearing. Dr. Hain stated that she disagreed with Dr. Kerner who opined that the progression of the hearing loss was due to in part to appellant's occupational noise exposure.

By letter dated September 15, 1995, to Dr. Kerner, the Office noted that an audiologist, had not agree with his opinion that appellant's progressive hearing loss was due in part to occupational noise exposure. The Office noted that Dr. Kerner had made reference to information from a book titled *Occupational Hearing Conservation* in his evaluation of appellant. The Office asked Dr. Kerner to explain if the situation described in the book had occurred in appellant's specific case and, if so, within what degree of medical certainty.

The record shows that no response was received from Dr. Kerner.

By decision dated September 22, 1995, the Office denied appellant's claim on the grounds that the weight of the medical evidence did not establish that appellant sustained a ratable hearing loss due to his federal employment.

The Board finds that this case is not in posture for a decision.

In its April 10, 1995 decision, the Board stated that the Office should refer appellant to a new impartial medical specialist for an examination and evaluation of appellant's hearing loss in accordance with the standards established under the A.M.A., *Guides*. The Board stated that the impartial medical specialist should determine the appropriate audiogram to use in calculating appellant's employment-related hearing loss and provide medical rationale supporting the selection of that audiogram and whether appellant had any ratable hearing loss causally related to factors of his federal employment and also whether any progression of hearing loss since his last occupational noise exposure could be attributed to his employment.

In a situation where the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from such specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original report.<sup>4</sup>

In his September 8, 1995 report, Dr. Kerner, the Board-certified otolaryngologist and impartial medical specialist to whom the Office referred appellant, stated his opinion that

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<sup>4</sup> Nancy Lackner (*Jack D. Lackner*), 40 ECAB 232, 238 (1988); *Harold Travis*, 30 ECAB 1071, 1078 (1979).

appellant's progressive hearing loss since he left his federal employment was due in part to the occupational noise exposure and he referenced a medical text. However, he did not sufficiently explain the application of the information in the medical text to appellant's situation.<sup>5</sup> Thus, his opinion is in need of clarification and elaboration. The Office apparently made an attempt to obtain a supplementary report from Dr. Kerner and then denied appellant's claim. If the Office was unable to obtain a supplementary report from Dr. Kerner, it should have referred appellant to a new impartial medical specialist for resolution of all the issues set forth in the Board's April 10, 1995 decision.

Regarding the report of the audiologist, Dr. Hain, the Board has held that an audiologist is not a physician as defined in the Federal Employees' Compensation Act<sup>6</sup> and, therefore, a report from an audiologist is of no probative value on the issue of causal relationship.<sup>7</sup>

In order to resolve the continuing conflict in the medical opinion, the case will be remanded to the Office for referral of the case record and appellant to an appropriate impartial medical specialist for resolutions of all the issues set forth in the Board's April 10, 1995 decision.<sup>8</sup> After such further development as the Office deems necessary, a *de novo* decision should be issued.

The decision of the Office of Workers' Compensation Programs dated September 22, 1995 is set aside and the case is remanded for further development consistent with this decision of the Board.

Dated, Washington, D.C.  
June 9, 1998

Michael J. Walsh  
Chairman

Michael E. Groom  
Alternate Member

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<sup>5</sup> The Board held in *Adelbert E. Buzzell*, 34 ECAB 96 (1982) that it is not a *per se* rule that noise-induced hearing loss does not progress following cessation of occupational noise exposure, but indicated that such a conclusion must be based on a well-rationalized medical opinion.

<sup>6</sup> 5 U.S.C. §§ 8101-8193.

<sup>7</sup> *Howard P. Lane*, 36 ECAB 107 (1984).

<sup>8</sup> See *Harold Travis*, 30 ECAB 1071, 1078-79 (1979).

Bradley T. Knott  
Alternate Member