

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES D. CASTO and DEPARTMENT OF THE AIR FORCE, ELECTRONIC
SYSTEMS DIVISION, Hanscom, MA

*Docket No. 98-1134; Submitted on the Record;
Issued July 27, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly reduced appellant's compensation benefits effective May 8, 1987 based on its determination that appellant's actual earnings as owner and operator of Hub Cap Annie company fairly and reasonably represented appellant's wage-earning capacity; (2) whether the Office properly determined that appellant received an overpayment of compensation benefits in the amount of \$43,476.02 during the period May 8, 1987 through February 6, 1993; (3) whether the Office properly determined that appellant was not without fault in the creation of the overpayment in the amount of \$43,476.02; (4) whether the Office properly terminated appellant's monetary compensation benefits effective February 6, 1993 on the grounds that he no longer had any residuals or disability due to his accepted employment injury; and (5) whether the Office properly terminated appellant's medical benefits for his accepted employment-related emotional condition.

On September 7, 1985 appellant, then a 50-year-old logistics management specialist, filed a claim for an occupational disease (Form CA-2) alleging that on November 11, 1976 he first realized that his hearing loss and emotional condition were caused or aggravated by his employment. Appellant stopped work on June 3, 1985.

By decision dated June 23, 1987, the Office found the evidence of record sufficient to establish that appellant sustained bilateral hearing loss that was caused by his employment, but insufficient to establish that appellant's condition was compensable.

By letter dated August 8, 1988, the Office accepted appellant's claim for major depression as related to his hearing loss.

In a July 7, 1992 decision, the Office found that appellant had forfeited his right to compensation during the period May 8, 1987 through March 31, 1990 on the grounds that appellant failed to report his earnings as owner/operator of Hub Cap Annie.

In a July 8, 1992 decision, the Office reduced appellant's compensation benefits effective June 28, 1992 based on its determination that appellant's position as franchise owner/lessor of Hub Cap Annie as of April 1, 1990 fairly and reasonably represented appellant's wage-earning capacity pursuant to 5 U.S.C. § 8115.

In a July 17, 1992 letter, appellant requested an oral hearing before an Office representative regarding the Office's July 7 and 8, 1992 decisions.¹

In an August 18, 1992 letter, appellant stated that his medical condition had improved to the point that he wanted to return to work in his previous federal employment/position.

By letter dated September 4, 1992, appellant advised the Office that he would begin work at Hub Cap Annie effective September 8, 1992 for 20 hours per week at \$8.50 per hour.

By decision dated October 20, 1992, the hearing representative set aside the Office's July 7 and 8, 1992 decisions and remanded the case for further development of the record.

In a November 20, 1992 letter, the Office advised appellant to submit medical evidence establishing that his condition had become better and that he was able to resume his previous federal employment. Appellant did not respond. By letters dated January 5, 1993, the Office referred appellant along with medical records, a statement of accepted facts and a list of specific questions to Dr. Henry A. Selvey, a Board-certified psychiatrist, and Dr. James Leonard, a Board-certified otolaryngologist, to determine whether appellant had any continuing employment-related disability.

Dr. Selvey submitted a January 21, 1993 medical report finding that appellant did not have any psychiatric disability and that he could return to work. Dr. Leonard submitted a February 12, 1993 medical report finding that appellant had normal hearing in low frequencies and that appellant could return to his usual work as long as he used ear protection whenever he was in a noisy environment.

By memorandum dated February 23, 1993, the Office advised Dr. Selvey to provide the date appellant's depression ceased. In a supplemental report dated February 25, 1993, Dr. Selvey stated that appellant's condition ceased as of January 21, 1992.

In a March 16, 1993 decision, the Office found that a notice of termination should be issued because the medical evidence of record established that appellant's employment injuries ceased by January 21, 1992. The Office further found that since appellant failed to report his earnings, an overpayment occurred during the period March 1, 1990 through February 6, 1993. Finally, the Office found that, since appellant failed to acknowledge in his April 27, 1992 Form CA-1032 that he had worked during the past 15 months, he forfeited his right to compensation for the period January 27, 1991 through April 27, 1992.

¹ In another letter dated July 17, 1992, appellant stated that his son, James David Casto, owned Hub Cap Annie and that he owned the real estate where Hub Cap Annie operated. Appellant further stated he leased the real estate to his son for \$1,500.00 per month.

By letters dated March 19, 1993, the Office advised appellant that it had made a preliminary determination that an overpayment had occurred during the period March 1, 1990 through February 6, 1993 and January 27, 1991 through April 27, 1992. The Office also advised appellant that he was at fault in the creation of the overpayments. The Office then advised appellant of his appeal rights.

By letters dated April 3, 13 and 15, 1993, appellant requested an oral hearing before an Office representative.

In an October 5, 1993 decision, the hearing representative set aside the Office's March 16, 1993 decision and March 19, 1993 overpayment letters based on the Office's own motion to do so because the entire case record had not been received. Accordingly, the hearing representative remanded the case to the Office for proper assembly of the entire case record. The hearing representative ordered the Office to issue *de novo* decisions on these matters to protect appellant's appeal rights.

By decision dated January 4, 1994, the Office reissued its March 16, 1993 decision.

By decision dated May 17, 1994, the hearing representative remanded the case to the Office on the grounds that the case was not in posture for a hearing at that time regarding appellant's wage-earning capacity on or after May 8, 1987 and possible forfeiture of compensation benefits.

In a March 15, 1995 decision, the Office found the evidence of record sufficient to establish that appellant's disability resulting from his November 11, 1976 employment injury had ceased by and no later than January 21, 1992. The Office also found that compensation payments continued through February 6, 1993.

By decisions dated March 15, 1995, the Office adjusted appellant's compensation because the medical evidence of record established that he was no longer disabled due to his November 11, 1976 employment injury.

By letter dated March 16, 1995, the Office advised appellant that it had made a preliminary determination that an overpayment had occurred and that appellant was at fault in the creation of the overpayment. The Office also advised appellant of his appeal rights.

In an April 12, 1995 letter, appellant requested an oral hearing before an Office representative.

By decision dated June 19, 1995, the hearing representative set aside the Office's March 15, 1995 decisions and the March 16, 1995 overpayment letter and remanded the case to the Office.

On remand, the Office found, in an October 27, 1995 decision, that appellant's reemployment in the position of self-employed clerk at Hub Cap Annie fairly and reasonably represented his wage-earning capacity. The Office noted that appellant's position was effective

May 8, 1987. The Office also computed appellant's wage-earning capacity based on the principles espoused in the *Albert C. Shadrick* decision.²

By letter dated October 27, 1995, the Office advised appellant that it had made a preliminary determination that an overpayment had occurred during the period May 8, 1987 through November 30, 1992 and that he was at fault in the creation of the overpayment. The Office also advised appellant of his appeal rights.

By decision dated October 27, 1995, the Office found the evidence of record sufficient to establish that appellant's disability resulting from the November 11, 1976 employment injury ceased by and no later than January 21, 1992. In a November 15, 1995 letter, appellant requested an oral hearing.

By decision dated September 17, 1997, the hearing representative found that appellant's earnings as owner and operator of Hub Cap Annie effective May 8, 1987 fairly and reasonably represented his wage-earning capacity. The hearing representative noted that appellant elected to receive benefits from the Office of Personnel Management effective December 1, 1992, but that his compensation benefits were not terminated until February 7, 1993. The hearing representative, thus, found that the period of the overpayment included the period December 1, 1992 through February 6, 1993 noting that the overpayment for this period totaled \$1,613.21. The hearing representative, thus, modified the overpayment period to May 8, 1987 through February 6, 1993 and the amount of the overpayment to \$43,476.02 which included \$1,042.60 that was already recovered. The hearing representative found that appellant was at fault in the creation of the overpayment because he knew or reasonably should have known that, while he was employed, he was not entitled to compensation for total disability. The hearing representative determined that repayment of the overpayment was due in full. The hearing representative further found that the Office met its burden of proof in terminating appellant's compensation based on the medical reports of Drs. Leonard and Selvey. In order to clarify the record, the hearing representative modified the date of termination to February 6, 1993. Finally, the hearing representative found that appellant was not entitled to continuing medical compensation for the treatment of his emotional condition inasmuch as he failed to establish compensable factors of employment.³ Accordingly, the hearing representative affirmed as modified the Office's October 27, 1995 decisions and finalized the Office's October 27, 1995 preliminary overpayment determination.

The Board has duly reviewed the case record in this appeal and finds that the Office properly reduced appellant's compensation benefits effective May 8, 1987 based on its determination that appellant's actual earnings as owner and operator of Hub Cap Annie fairly and reasonably represented appellant's wage-earning capacity.

² 5 ECAB 376 (1953).

³ Although the hearing representative found in his September 17, 1997 decision that appellant was not entitled to medical benefits for his emotional condition, he found that appellant was entitled to continuing medical compensation for his employment-related hearing loss.

Once the Office accepts a claim and pays compensation, as here, it has the burden to justify termination or modification of compensation benefits.⁴ Pursuant to section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity is determined by the actual earnings received by an employee if the earnings fairly and reasonably represent his wage-earning capacity.⁵ The Board has stated that “[g]enerally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing that they do not fairly and reasonably represent the injured employee’s wage-earning capacity, must be accepted as such measure.”⁶

In the present case, the record establishes that appellant was the owner and operator of Hub Cap Annie effective May 8, 1987. Under the Office’s procedures, after a claimant has been working in a position for 60 days, the Office will make a determination as to whether the actual earnings fairly and reasonably represent the claimant’s wage-earning capacity.⁷

In this case, the Office determined that actual earnings did fairly and reasonably represent appellant’s wage-earning capacity, and there is no contrary evidence. There is, for example, no indication that the position was seasonal, temporary or less than full time.⁸ As noted above, wages earned are generally the best measure of wage-earning capacity. The Board, therefore, finds that appellant’s position of owner/operator fairly and reasonably represented his wage-earning capacity.

The Office determined that appellant’s actual earnings during the period May 8, 1987 until February 28, 1990 equaled \$41,430.00, based upon IRS documents of record. The Office then divided the amount of appellant’s “earnings” by the number of weeks during the period in question and obtained \$282.11 as the average weekly pay rate. This method of calculating the average weekly pay rate to determine the pay rate for actual earnings spanning a lengthy period of time is outlined in the Office procedure manual. The procedure manual states “where the Office learns of actual earnings that span a lengthy period of time (e.g., several months or more), the compensation entitlement should be determined by averaging the earnings for the entire period.”⁹

The Office thereafter used the formula for determining loss of wage-earning capacity based on actual earnings, developed in *Shadrick*, has been codified at 20 C.F.R. § 10.303. The

⁴ *Harold S. McGough*, 36 ECAB 332 (1984).

⁵ 5 U.S.C. § 8115(a).

⁶ *Gregory A. Compton*, 45 ECAB 154 (1993); *Clarence D. Ross*, 42 ECAB 556 (1991); *Floyd A. Gervais*, 40 ECAB 1045, 1048 (1989); *Hubert F. Myatt*, 32 ECAB 1994 (1981); *Lee R. Sires*, 23 ECAB 12 (1971).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (December 1993).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (July 1997).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(4) (June 1996).

Office calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the "current" pay rate.¹⁰ In this case, the Office properly used average weekly earnings of \$282.11 and a current pay rate for the date-of-injury job of \$956.67 per week to calculate a 29 percent wage-earning capacity. The pay rate at the time of injury, \$709.40, is multiplied by the wage-earning capacity percentage, and the resulting dollar amount, \$205.72, is subtracted from the pay rate at the time of injury to determine the loss of wage-earning capacity, which equals \$503.67. This amount is multiplied by the appropriate compensation rate, two-thirds in this case, totaling \$335.80. Applicable cost-of-living adjustments are added to total \$1,822.00 every four weeks.

The Board, therefore, finds that the Office properly determined that appellant's actual earnings represented his wage-earning capacity, and properly reduced his compensation according to the *Shadrick* principles.

The Board further finds that the Office properly determined that appellant received an overpayment of compensation benefits in the amount of \$43,476.02 during the period May 8, 1987 through February 6, 1993.

In the present case, the record reveals that appellant received compensation for temporary total disability during the period May 8, 1987 through February 6, 1993. The Office properly determined retroactively that appellant should have only received partial disability benefits during this time period due to his loss of wage-earning capacity. Therefore, an overpayment was created in the amount of \$43,476.02.

Additionally, the Board finds that the Office properly determined that appellant was not without fault in the creation of the overpayment in the amount of \$43,476.02.

Section 8129(a) of the Act provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled.¹¹ The only exception to this requirement is a situation which meets the test set forth as follows in section 8129(b): "[a]djustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience."¹² Thus, the Office may not waive the overpayment of compensation in this case unless appellant was without fault.¹³ In evaluation of whether appellant is without fault, the Office will consider whether appellant's receipt of the overpayment occurred because she relied on misinformation given by an official source within

¹⁰ 20 C.F.R. § 10.303(b). According to this section, current pay rate means the current pay rate for the job held at the time of injury.

¹¹ 5 U.S.C. § 8129.

¹² 5 U.S.C. § 8129(b).

¹³ *Harold W. Steele*, 38 ECAB 245 (1986).

the Office or another government agency which appellant had reason to believe was connected with administration of benefits as to the interpretation of the Act or applicable regulations.¹⁴

In determining whether an individual is at fault, section 10.320(b) of the Code of Federal Regulations provides in relevant part:

“An individual is with fault in the creation of an overpayment who:

- (1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or
- (2) Failed to furnish information which the individual knew or should have known to be material; or
- (3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.”¹⁵

In this case, the Office’s hearing representative applied the third standard -- appellant accepted a payment which he knew or should have known was incorrect. The Board finds that the Office’s hearing representative was correct in determining that appellant accepted a payment which he knew or should have known was incorrect inasmuch as he received compensation while employed at Hub Cap Annie and he was divorced from his wife during the overpayment period.

On April 27, 1992 appellant signed an April 27, 1992 Form CA-1032 instructing him to report any employment, including self-employment in the 15-month period prior to the date of the form. In this Form CA-1032, appellant indicated that he had not worked in the last 15 months. Although the Office may have been negligent in continuing to issue appellant checks for total disability after it was informed appellant had returned to work, this does not excuse appellant’s acceptance of such checks which he knew or should have been expected to know should have been returned to the Office.¹⁶

Further, in the April 27, 1992 Form CA-1032, appellant indicated that he was claiming additional compensation because of his dependent “ex-wife.” The record reveals that, by letter dated May 10, 1990, appellant advised the Office that he was granted a divorce from his wife on April 11, 1990. Under part B of this form regarding dependents, the following statement appeared:

“The basic rate of compensation is 66 percent of the applicable pay rate if there are no eligible dependents. Compensation is payable at 75 percent of the

¹⁴ 20 C.F.R. § 10.320(c)(1).

¹⁵ 20 C.F.R. § 10.320(b).

¹⁶ *Robert W. O’Brien*, 36 ECAB 541, 547 (1985).

applicable pay rate if there are one or more eligible dependents. You must therefore answer the questions below to ensure that your compensation is paid at the correct rate.”

The form also indicated that the signer of the form understood that he or she must immediately report to the Office any change in the status of claimed dependents and appellant signed and dated the forms. Although appellant advised the Office that he was granted a divorce on April 11, 1990, the manner in which he completed the April 27, 1992 Form CA-1032 shows that he understood or should have understood the circumstances under which augmented compensation could be claimed and that he received an incorrect payment based on his previous dependent status. Inasmuch as appellant completed the Form CA-1032 on April 27, 1992, over two years from the date of his divorce, the Board finds that appellant knew or should have been aware that he was still receiving compensation at an augmented rate after April 11, 1990.

Finally, with respect to recovery of an overpayment, the Board’s jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Act. Because appellant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to the Office’s recovery of an overpayment under the Debt Collection Act.¹⁷

The Board finds that the Office properly terminated appellant’s monetary compensation benefits effective February 6, 1993 on the grounds that he no longer had any residuals or disability due to his accepted employment injury.

Once the Office has accepted a claim and pays compensation, it has the burden of proof of justifying termination or modification of compensation benefits.¹⁸ After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.¹⁹

In terminating appellant’s compensation benefits, the Office relied on the second opinion medical reports of Dr. Selvey, a Board-certified psychiatrist, and Dr. Leonard, a Board-certified otolaryngologist.

Regarding appellant’s emotional condition, Dr. Selvey provided a history of appellant’s employment, medical treatment and family, a review of medical records, and his findings on mental examination in his January 21, 1993 medical report. In this medical report, Dr. Selvey opined that there was no psychiatric diagnosis and that appellant had no psychiatric disability. Dr. Selvey stated that, in the past, appellant had certain psychological conditions. He further stated that the etiological significance of appellant’s hearing loss had been severely over-

¹⁷ *Lewis George*, 45 ECAB 144 (1993).

¹⁸ *Curtis Hall*, 45 ECAB 316 (1994); *John E. Lemker*, 45 ECAB 258 (1993); *Robert C. Fay*, 39 ECAB 163 (1987).

¹⁹ *Jason C. Armstrong*, 40 ECAB 907 (1989).

represented since 1985. He then stated that it was more evident that appellant's depression was due to severe marital difficulty and reaching the age of 50. He then stated that the latter accounted for appellant's concern in 1985 about the possibility of having Alzheimer's. Dr. Selvey noted appellant's comment that his depression was an attempt to get his wife to take care of him. Dr. Selvey further noted the various emotions that resulted from appellant's interaction with the Office which continued at that time. Dr. Selvey explained that appellant's co-dependency upon his wife caused melancholic depression. Dr. Selvey noted that, since appellant decided to leave his wife, he realized that he could survive without her and was ready to give up his compensation. Dr. Selvey further noted that he did not agree with appellant that his medication made the difference in his condition and stated that not only did appellant leave his ex-wife, but he had a new girlfriend. Dr. Selvey concluded that appellant was doing great, that appellant's compensation should be terminated and that appellant should be returned to some job with the civil service. He further concluded that appellant's prognosis was excellent.

In a February 25, 1993 supplemental medical report, Dr. Selvey stated that appellant's condition ceased by January 21, 1992, approximately one year from the date of his interview when appellant stated that he started taking the drug Anafranil.²⁰

Concerning appellant's hearing loss, Dr. Leonard provided a history of appellant's hearing loss and his findings on physical examination in his February 12, 1993 medical report. Dr. Leonard diagnosed normal hearing in the low frequencies with moderate sensorineural hearing loss above 1,000 cycles per second with good speech reception thresholds bilaterally. He opined that appellant's present condition was probably aggravated by his employment factors, that appellant had no underlying medical problems and that appellant's condition was permanent. Dr. Leonard further opined that appellant should be able to return to his regular job as long as he used ear protection whenever he was in a noisy environment, there were no work restrictions as long as ear protection was worn in a noisy environment and that appellant needed annual audiograms. In an accompanying work restriction evaluation of the same date, Dr. Leonard indicated that appellant had no physical restrictions, that he needed to wear hearing protection in a noisy environment and that he could work eight hours per day.

The Board finds that the medical reports of Drs. Selvey and Leonard are rationalized, and based on an accurate factual and medical background.

On the contrary, the Board finds that the medical evidence submitted by appellant in support of his continued disability does not constitute rationalized medical evidence. An August 9, 1995 medical report of Dr. J.O. Shymal revealing appellant's hearing problem, medical, and family and social histories. Dr. Shymal noted his findings on physical examination. On audiometric examination, Dr. Shymal found that appellant had a moderate high frequency sensorineural hearing loss and that mild speech discrimination loss was noted but that it came up fairly quickly with mild amplification. Dr. Shymal failed to address a causal relationship between appellant's hearing loss and his November 11, 1976 employment injury.

²⁰ Dr. Selvey indicated in his January 21, 1993 medical report that appellant was doing excellent while taking the drug Anafranil and that he wanted to return to work.

An August 28, 1995 report of Sheri R. Lippman, an audiologist, noted appellant's complaints and medical treatment, and her findings on audiometric testing. She also noted her recommendation that hearing aids would help appellant. Ms. Lippman's report was accompanied by an August 24, 1995 audiogram. The Board has held that an audiologist is not a physician under the Federal Employees' Compensation Act.²¹ Therefore, Ms. Lippman's report does not constitute competent medical evidence regarding the issue of whether appellant has any continuing employment-related disability.

A January 8, 1996 medical report of Dr. Sheldon B. Cohen, a Board-certified psychiatrist, provided a history of appellant's medical treatment. Dr. Cohen opined that "[appellant's] depression, agitation, anxiety and insomnia were all exacerbated by his inability to successfully resolve the administrative problems with [the] Office." He noted appellant's future medical treatment. Dr. Cohen concluded that appellant's diagnosis remained unchanged from that of June 24, 1988, although the major depression was much improved. He failed to attribute appellant's emotional condition to compensable factors of employment under the Federal Employees' Compensation Act.²²

Dr. Cohen's medical report was accompanied by a June 24, 1988 medical report. In this report, Dr. Cohen noted appellant's medical treatment for his emotional condition and his family background. Dr. Cohen indicated appellant's comments regarding the cause of his condition. Specifically, Dr. Cohen indicated appellant stated that in June 1984 he left his most recent government job after working at it for nine months. Appellant stated that he had a nervous breakdown. Dr. Cohen further stated that this most recent job involved a new position which involved material and to some extent personnel management. Appellant also stated that he felt he was very poorly prepared for the job and that the government did not give him adequate training. Dr. Cohen stated that apparently appellant was previously obsessive, tidy and it was the loss of these attributes that undoubtedly contributed a lot to his development of depression. Dr. Cohen further stated that appellant was moderately depressed and was having great difficulty in coping with the separation from his wife, which he had tried to accept in a passive, martyrish manner. Dr. Cohen diagnosed major depression, recurrent with melancholia and organic mental disorder. He opined that appellant was totally and permanently disabled from performing his usual duties. He stated that "[t]he primary precipitant appears to be the hearing loss associated with exposure to jet aircraft noises. Both my clinical evaluation and Dr. Knopf's psychological evaluation reveal evidence of nonspecific organic brain disease, which may also be a factor in the precipitation of [appellant's] depression. (Either fact alone could lead to such a depression.)" Dr. Cohen concluded by noting appellant's future medical treatment. Dr. Cohen's opinion did not attribute appellant's emotional condition to a compensable factor of employment and it is speculative as to causal relationship inasmuch as he stated that the precipitant of appellant's total

²¹ See, e.g., *Herman L. Henson*, 40 ECAB 341 (1988); *Rubel R. Garcia*, 33 ECAB 1171 (1982); 5 U.S.C. § 8101(2).

²² The processing of a workers' compensation claim is an administrative function and as such is not compensable unless management has committed error or acted abusively. See *Joseph G. Cutrufello*, 46 ECAB 285, 294 (1994). Appellant has failed to submit any evidence establishing that the employing establishment committed error or acted abusively in processing his claim.

and permanent disability “appeared” to be his hearing loss and that nonspecific organic brain disease “may” also be a factor in the precipitation of appellant’s depression.

Appellant also submitted a January 15, 1997 medical report of Dr. Murray Kurtzberg, indicating a diagnosis of mild to moderately severe sensorineural hearing loss in his left ear and mild to severe sensorineural loss in his right ear. Dr. Kurtzberg stated that appellant had severe high frequency loss which made his speech become distorted and unclear in crowded and noisy situations. He concluded that this had a profound effect in social situations and dealing with women and children. He further concluded that appellant’s high frequency hearing loss reduced his ability to understand to 56 percent. Dr. Kurtzberg’s report was accompanied by a January 15, 1997 audiogram. Dr. Kurtzberg failed to address whether appellant had any continuing disability caused by his November 11, 1976 employment injury.

Inasmuch as the medical reports of Drs. Selvey and Leonard constitute the weight of the reliable, probative and substantial evidence in this case, the Board finds that the Office properly terminated appellant’s compensation benefits effective February 6, 1993 on the grounds that he no longer had any residuals or disability due to his accepted employment injury.

Finally, the Board finds that the Office properly terminated appellant’s medical benefits for his accepted employment-related emotional condition.

The Office, to terminate authorization for medical treatment, has the burden of establishing that appellant no longer has residuals of the employment-related condition that requires further medical treatment.²³

As discussed above, Dr. Selvey, in his January 21, 1993 medical report, provided a rationalized medical opinion negating a causal relationship between appellant’s emotional condition and his employment. Further, as discussed above, Dr. Cohen’s January 8, 1996 opinion that appellant continues to suffer from his emotional condition is not attributed to a compensable employment factor and is also speculative.

²³ *Jose Hernandez*, 47 ECAB 288 (1996).

The September 17, 1997 decision of the Office of Workers' Compensation Programs' hearing representative is hereby affirmed.

Dated, Washington, D.C.
July 27, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member