

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NORMA A. BLAIS and DEPARTMENT OF THE NAVY,
NAVAL UNDERSEA WARFARE CENTER, Keyport, WA

*Docket No. 00-2050; Submitted on the Record;
Issued June 19, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant met her burden of proof to establish that her hearing loss condition is causally related to her federal employment; and (2) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for reconsideration.

Appellant, then a 60-year-old retired electronic mechanic, filed a claim on June 10, 1997 alleging that her progressive hearing loss in both ears was due to factors of her employment.¹ She noted that she first became aware that the condition was related to her federal employment in April 1978. By decision dated December 18, 1998, the Office denied the claim on the basis that causal relationship had not been established. The Office attributed the weight of the medical evidence to Dr. Gregory Chan, a Board-certified otolaryngologist and Office referral physician.

By decision dated June 14, 1999, an Office hearing representative vacated the December 18, 1998 decision. He found that Dr. Chan's conclusion negating a causal relationship between the diagnosed condition and appellant's work factors lacked definitiveness and remanded the case so that Dr. Chan could provide a report clarifying his opinion on causal relationship.

By decision dated November 5, 1999, the Office determined that appellant's hearing loss was caused by her medical condition and was not related to employment noise exposure. The Office attributed the weight of the medical evidence to Dr. Chan's September 6, 1999 report. By letter dated December 1, 1999, appellant requested reconsideration. By decision dated December 29, 1999, the Office denied appellant's request for reconsideration. By decision dated December 17, 2000, the Office denied modification of its prior decision of November 5, 1999.

¹ The record reflects that appellant retired from federal employment on May 24, 1997.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.² As appellant filed her appeal with the Board on May 25, 2000, the only decisions properly before the Board are the Office's November 5, 1999 denial of her claim on the merits and the December 29, 1999 decision denying appellant's request for reconsideration.

The Office's December 17, 2000 decision was issued subsequent to May 25, 2000, the date that appellant filed an appeal with the Board. The Board and the Office may not have concurrent jurisdiction over the same issue in the same case.³ The December 17, 2000 decision was a review of the written record of the November 5, 1999 decision over which the Board has jurisdiction and the December 17, 2000 decision addressed the same issues now on appeal. The December 17, 2000 Office decision is, therefore, null and void.

The Board finds that the issue of whether appellant has established an employment-related hearing loss is not in posture for decision.

An employee seeking benefits under the Federal Employees' Compensation Act⁴ has the burden of establishing the essential elements of her claim, including that any disability or specific condition for which compensation is claimed is causally related to the employment injury.⁵

In a January 13, 1998 report, the Office audiology consultant, Donald M. Harvey, Ph.D., advised that this case was complex because of the mixture of ear pathologies. Appellant had worked in a variety of areas, some with and some without high level noise. The complicating factors were that appellant started having a conductive hearing loss early on which caused a fluctuating hearing loss. Appellant had also gone through cancer treatment which may or may not have affected her hearing. In addition, appellant has sensorineural loss, which may have been caused by noise exposure at work. The Office audiology consultant recommended that appellant be referred for an otological examination.

On February 2, 1998 the Office referred appellant to Dr. Stephen Habener, a Board-certified otolaryngologist. In a February 24, 1998 report, Dr. Habener reviewed a past medical history of middle ear disease, two surgeries for a perforated right eardrum, ovarian carcinoma with surgery and chemotherapy, various medications and hearing loss in appellant's family and results provided. An audiogram showed a mixed hearing loss, both sensorineural and conductive, in the right ear and, to a lesser extent, in the left ear. Dr. Habener indicated that because of appellant's middle ear disease and surgery, bone score changes occurred over the employment period. He noted that the record did not contain any documentation of sound pressure readings; only anecdotal evidence that appellant worked in loud noises. Appellant had

² 20 C.F.R. §§ 501.2(c); 501.3(d)(2).

³ *Douglas E. Billings*, 41 ECAB 880 (1990).

⁴ 5 U.S.C. §§ 8101-8193.

⁵ *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

been on toxic agents in the form of chemotherapy, had surgery to the right ear and was on blood pressure medication.

Based on his examination of appellant, audiology testing, and appellant's medical record, Dr. Habener opined that the threshold shifts in the left ear were not associated with noise exposure. In the right ear, the higher frequency shifts would be compatible with noise exposure. Dr. Habener also opined that there were multiple causes contributing to appellant's sensorineural and conductive hearing losses.

In a March 31, 1998 report, Dr. Harvey, the Office audiologist consultant, stated that the test results and Dr. Habener's evaluation were completely inconsistent with the record.

The Office then referred appellant to Dr. Chan for an evaluation. In an August 5, 1998 report, Dr. Chan opined that appellant's bilateral sensorineural hearing loss, moderate on the left and moderately severe on the right, and right tympanoplasty were not causally related to the claimed industrial injury. Dr. Chan stated that appellant's current hearing loss was not due to exposure at her federal workplace because her hearing loss configuration was not consistent with that due to chronic industrial noise exposure.

In a supplemental report of September 6, 1999, Dr. Chan stated that he based his opinion on the medical history and added that exposure to a 400-hertz noise level in a job environment would not have caused a high frequency sensorineural hearing loss. He stated that working in a laboratory where appellant was allegedly exposed to air pressure and machine noises was not enough to cause the type of hearing loss reported in the audiogram of July 29, 1998. Dr. Chan opined that this type of hearing loss was most consistent with appellant's medical condition, which was affected by her hypertension. He added that hypertension, usually caused by atherosclerotic cardiovascular disease, would contribute to hearing loss.

The Board finds that this case is not in posture for decision. Dr. Habener based his opinion that appellant's left ear hearing loss was not due to noise exposure, while the right ear hearing loss was due, in part, to noise exposure on his evaluation of the case record, examination of appellant and audiometric testing. The Office audiology consultant, Dr. Harvey, did not explain why he found the test results and Dr. Habener's resulting opinion to be inconsistent with the record.

Dr. Chan's opinion contains much of the same information and diagnoses of Dr. Habener's except that he found, on a-more-probable-than-not-basis, that there was no causal relationship to noise exposure at work and related appellant's hearing loss to her medical conditions. The Office failed to explain why Dr. Chan's report was entitled to greater weight than Dr. Habener's report, which attributed appellant's right ear condition partly to noise exposure. The Board finds that Drs. Chan and Habener each provided plausible reasons for their examination findings and conclusions. Dr. Chan found no causal relationship between appellant's hearing loss and her employment, while Dr. Habener found appellant's right ear condition causally related, in part, to employment factors.

Proceedings under the Act are not adversarial in nature nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office

shares responsibility in the development of the evidence and has the obligation to see that justice is done. Accordingly, once the Office undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.⁶

Accordingly, this case is remanded for further development, including a referral of appellant to an impartial specialist pursuant to section 8123 of the Act.⁷

The decisions of the Office of Workers' Compensation Programs dated December 29 and November 5, 1999 are hereby vacated and the case remanded for further development consistent with this opinion.

Dated, Washington, DC
June 19, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member

⁶ See *Robert F. Hart*, 36 ECAB 186 (1984); *Isidore J. Gennino*, 35 ECAB 442 (1983).

⁷ In view of the disposition of this case, the Board need not address whether the refusal of the Office, in its December 29, 1999 decision, to reopen appellant's case for further consideration of the merits of her claim constituted an abuse of discretion.