U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES A. ALDUINO and DEPARTMENT OF JUSTICE,
U.S. MARSHALS SERVICE, Buffalo, NY

Docket No. 02-1167; Submitted on the Record;
Issued December 10, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether appellant has met his burden of proof to establish that he sustained an employment-related loss of hearing in the left ear; and (2) whether appellant has more than a 15 percent monaural hearing loss in the right ear for which he received a schedule award.

On June 9, 2000 appellant, then a 49-year-old chief deputy U.S. Marshall, filed an occupational disease claim alleging that he sustained "substantial hearing loss in both ears" due to factors of his federal employment.[1] Appellant noted that in August 1994 he underwent a stapedectomy operation on his left ear which left him completely deaf in that ear.[2]

By letter dated September 6, 2000, the Office referred appellant, together with a statement of accepted facts, to Dr. Daniel J. Fahey, a Board-certified otolaryngologist, for a second opinion evaluation. Dr. Fahey obtained an audiogram on September 19, 2000. In a report of the same date, he reviewed the audiogram and noted:

> "[The audiogram] indicates that there is a slight suggestion of low-tone air-bone gap on the right ear, but a severe sensorineural hearing loss on the left side. Speech discrimination in the right ear was good, but none could be obtained in the left ear."

[1] Appellant previously filed a claim alleging that on October 23, 1991 he sustained continuous ringing in his ears after shooting live ammunition from a vehicle. On April 16, 1992 the Office of Workers' Compensation Programs denied appellant's claim on the grounds that he did not establish fact of injury.

[2] In a letter to the Office dated July 21, 2000, appellant indicated that he underwent a stapendectomy because the employing establishment did not, at that time, allow hearing aids.

Dr. Fahey concluded:

> "The history and physical on this man indicates that essentially the etiology of his hearing difficulties is one of otosclerosis. Despite the fact that he has had a significant noise exposure history, noise is not a factor in [appellant's] handicap but rather his disease of otosclerosis and the subsequent failure of surgery to improve things on the ear that had a conductive element much more marked on that side which was not able to be corrected."

In an accompanying form report, Dr. Fahey indicated that appellant's hearing loss was not related to his employment.

Upon review of Dr. Fahey's audiogram and report, an Office audiologist indicated that appellant had "a mild to moderate mixed hearing loss in the right ear and a profound sensorineural hearing loss in the left ear." He stated:

> "Given [appellant's] medical history of otosclerosis and surgery, the left hearing loss cannot be attributed to the workplace. Due to the mixed nature of the loss on the right side, the loss cannot be entirely caused by noise exposure, however, noise exposure during federal employment cannot be ruled out as a contributing factor to the cause of the sensorineural portion of the hearing loss in the right ear."

The Office audiologist concluded that appellant had a 15 percent ratable impairment of the right ear and a 100 percent ratable impairment of the left ear.

On November 8, 2000 the Office notified appellant that it had accepted his claim for hearing loss in the right ear. By decision dated December 19, 2000, the Office granted appellant a schedule award for a 15 percent permanent impairment of the right ear. The period of the award ran for 7.80 weeks from November 3 to December 27, 2000.

In a letter dated May 15, 2001, the Office informed appellant that he was not entitled to a schedule award for the left ear because his hearing loss on the left side was not related to his federal employment. The Office also resent a copy of its December 19, 2000 decision, which appellant contended he did not receive.

By letter dated September 10, 2001, appellant requested reconsideration of his claim. In support of his request, appellant submitted a report dated June 18, 2001 from Dr. Iris Danziger, a Board-certified otolaryngologist.

By decision dated February 27, 2002, the Office denied modification of its prior decision. The Office found that the report of Dr. Danziger was insufficient to outweigh the report of Dr. Fahey or the Office audiologist that appellant's hearing loss on the left side was not causally related to his employment.

The Board finds that appellant has not met his burden of proof to establish that he sustained an employment-related loss of hearing in the left ear.

An employee seeking benefits under the Federal Employees' Compensation Act[3] has the burden of establishing the essential elements of his or her claim, including the fact that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[4]

The evidence generally required to establish causal relationship is rationalized medical opinion evidence. The claimant must submit a rationalized medical opinion that supports a causal connection between his current condition and the employment injury. The medical opinion must be based on a complete factual and medical background with an accurate history of the claimant's employment injury and must explain from a medical perspective how the current condition is related to the injury.[5]

In this case, there is no dispute that appellant has a total loss of hearing in his left ear. However, there is no rationalized medical opinion supporting a causal relationship between the factors of employment identified by appellant and his left ear hearing loss. In a report dated July 28, 1994, Dr. Jeffrey B. Banyas, a Board-certified otolaryngologist, noted that appellant complained of "progressive left hearing loss over the last couple of years; this occurs on top of some prior hearing loss possibly related to his extensive .357 Magnum use." Dr. Banyas diagnosed "mixed hearing loss, likely secondary to otospongiosis." However, the finding that appellant had hearing loss in his left ear "possibly related" to his use of a firearm during the course of his federal employment is speculative in nature and thus of diminished probative value.[6]

On August 5, 1994 Dr. Banyas diagnosed otosclerosis and performed a left stapedectomy on appellant. He stated:

> "This 43-year-old U.S. Marshall has had progressive mixed hearing loss in the left ear. At least part of the sensorineural portion of his hearing loss may have been due to his weapons firing history. He did have a persistent 30-40 decibel conductive hearing loss on top of the sensorineural hearing loss."

Again, Dr. Banyas' finding that part of appellant's loss of hearing on the left side "may have been due" to weapons firing is speculative and equivocal in character and thus has little probative value.[7]

In a report dated June 18, 2001, Dr. Danziger related:

> "[Appellant] has a history significant for very loud noise exposure in his workplace. He first presented with complaints regarding his hearing in July 1994,

[3] 5 U.S.C. §§ 8101-8193.

[4] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[5] *John A. Ceresoli, Sr.*, 40 ECAB 305 (1988).

[6] *Connie Johns*, 44 ECAB 560 (1993).

[7] *Geraldine H. Johnson*, 44 ECAB 745 (1993).

> at which time he underwent an audiogram which revealed borderline hearing levels in his right ear with a high frequency loss and a mixed loss in his left ear with more pronounced hearing loss at the higher frequency in the left ear as well. He had excellent discrimination bilaterally. The borderline hearing levels which were evident at that time and high frequency loss in both ears may have been the result of noise exposure in his workplace as well. The conductive component in his left ear represented otosclerosis for which he subsequently underwent surgery."
>
> "My impression is that of [workplace] noise exposure, hearing loss with an additional component of conductive hearing loss secondary to otosclerosis."

Dr. Danziger's finding, however, that appellant's borderline hearing levels and bilateral high frequency hearing loss "may have been" due to noise exposure during the course of his employment is a speculative statement.[8] Further, Dr. Danziger did not provide any rationale for her findings. While the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, neither can such opinion be speculative or equivocal. Medical reports not containing rationale on causal relationship are entitled to little probative value and are generally insufficient to meet an employee's burden of proof.[9]

Moreover, the record contains evidence that appellant's hearing loss on the left side is not related to his employment. In a report dated September 19, 2000, Dr. Fahey a Board-certified otolaryngologist and Office referral physician, diagnosed a left-sided severe neurosensory hearing loss. He attributed appellant's hearing loss to his otosclerosis which he found was unrelated to his federal employment. The Board, therefore, finds that appellant has failed to meet his burden of proof to establish that he sustained hearing loss in the left ear due to employment factors.

The Board further finds that appellant has no more than a 15 percent monaural hearing loss in the right ear.

The Office evaluates industrial hearing loss in accordance with the standards contained in the American Medical Associations, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[10] 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.[11] Then, the "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 speech under everyday conditions.[12] The remaining

[8] *Jacquelyn L. Oliver*, 48 ECAB 232 (1996) (a physician's opinion that a breast implant "may have ruptured" during a work-related motor vehicle accident was a speculative statement and of diminished probative value).

[9] *Judith J. Montage*, 48 ECAB 292 (1997).

[10] A.M.A., *Guides* at 250 (5th ed. 2001).

[11] *Id*.

[12] *Id*.

amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.[13] 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.[14] The Board has concurred in the Office's adoption of this standard for evaluating hearing loss.[15]

The Office audiologist applied the Office's standardized procedures to the September 19, 2000 audiogram. Testing for the right ear at the frequency levels of 500, 1,000, 2,000 and 3,000 hertz revealed decibel losses of 40, 30, 35 and 35, respectively. These decibels were totaled at 140 and divided by 4 to obtain the average hearing loss of 35 decibels. The average loss was reduced by the 25 decibel fence to equal 10, which was multiplied by the established factor 1.5 to compute a 15 percent monaural loss for the right ear.

The Office audiologist further noted that appellant had a 100 percent loss in the left ear but that it was not related to noise exposure during federal employment. Accordingly, appellant has established no more than a 15 percent employment-related monaural loss of hearing in the right ear.

A schedule award under the Act is paid for permanent impairment involving the loss or loss of use of certain members of the body. The schedule award provides for the payment of compensation for a specific number of weeks as prescribed by statute.[16] With respect to schedule awards for hearing impairments, the Act provides that for a total, or 100 percent loss of hearing in one ear, an employee shall receive 52 weeks of compensation.[17]

In this case, appellant has a 15 percent loss of use of the right ear; consequently, he is entitled to 15 percent of 52 weeks of compensation, which is 7.80 weeks. The Office, therefore, properly determined the number of weeks for which appellant is entitled to compensation under the schedule award provisions of the Act.

[13] *Id*.

[14] *Id*.

[15] *Donald E. Stockstad*, 53 ECAB ___ (Docket No. 01-1570, issued January 23, 2002).

[16] 5 U.S.C. § 8107.

[17] 5 U.S.C. § 8107(c)(13)(A).

The decision of the Office of Workers' Compensation Programs dated February 27, 2002 is hereby affirmed.

Dated, Washington, DC
December 10, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member