

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GEORGE W. STARKS and DEPARTMENT OF THE ARMY,
FORT CAMPBELL, KY

*Docket No. 03-1066; Submitted on the Record;
Issued August 8, 2003*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant has met his burden of proof in establishing that he developed a hearing loss in the performance of duty.

On August 7, 2001 appellant, then a 51-year-old mobile equipment metal mechanic, filed a notice of occupational disease and claim for compensation (Form CA-2), alleging that he sustained permanent hearing loss while in the performance of duty. He stated that he became aware of his hearing loss in March 1998. Appellant did not stop work.

In an accompanying statement, appellant listed his history of employment, indicating that he had been exposed to excessive noise from tools and equipment beginning in 1989 and continued until the present time. He noted that he was issued ear-muffs and ear-plugs during the course of his employment and had surgery on his right ear in 1985 to correct a hearing problem and had been diagnosed as having calcium deposits in the left ear, which affected his hearing.

The employing establishment furnished the Office of Workers' Compensation Programs with copies of appellant's job description, employment records, employee medical reports and audiograms performed at the employing establishment. The audiograms from March 27, 1989 to April 18, 2001 revealed a gradual increase in hearing loss in the left ear. The employing establishment advised that appellant was exposed to high decibel noise for approximately 40 hours a week, which was generated from hammers, drills, grinders, wrenches, ratchets, metal shears, air sanders, needle guns, exhaust fans, paint booths, band saws, drill presses, soda blasters, staple guns, saws and compressors.

Appellant was referred for a second opinion examination to Dr. Phillip Klapper, a Board-certified otolaryngologist, for otological examination and audiological evaluation. The Office provided Dr. Klapper with a statement of accepted facts, available exposure information and copies of all medical reports and audiograms. In a report dated October 1, 2001, Dr. Klapper advised that he reviewed the records provided to him and performed an otologic evaluation of appellant and that audiometric testing had been conducted on the doctor's behalf the same day.

Testing at the frequency levels of 500, 1,000, 2,000 and 3,000 Hertz revealed the following: right ear 10, 15, 10, 20 decibels; left ear 45, 75, 80, 80 decibels. Dr. Klapper opined that appellant's hearing loss was present prior to his federal employment as he was diagnosed with otosclerosis of the right ear for which he had undergone a successful surgical procedure and diagnosed bilateral otosclerosis by history, which was not due to employment-related noise exposure. He concluded that appellant needed surgery on his left ear to correct the hearing loss.

By decision dated October 18, 2001, the Office denied appellant's claim for compensation under the Federal Employees' Compensation Act.¹ The Office found that the medical evidence was insufficient to establish that appellant's hearing loss was caused by employment factors.

In a letter dated November 1, 2001, appellant requested reconsideration and submitted a narrative statement indicating that he was first diagnosed with otosclerosis in 1985, when his hearing loss was 40 percent in the left ear and 60 percent in the right. He reiterated that the right ear surgery had been successful.

In a decision dated November 21, 2001, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted in support of the request for reconsideration was found to be immaterial in nature and insufficient to warrant merit review of the prior decision.

By letter dated August 27, 2002, appellant requested reconsideration of the Office decision and submitted a medical report from Dr. James O. Fordice, a Board-certified otolaryngologist, dated August 15, 2002, who concluded that it was reasonable to assume that appellant's profound hearing loss on the left was caused by otosclerosis but was also caused by work exposure.²

In a decision dated October 21, 2002, the Office modified the prior decision to indicate that appellant had been exposed to noise in the workplace. The Office, however, found the record insufficient to establish that he sustained a hearing loss caused by employment-related noise exposure.

¹ 5 U.S.C. §§ 8101-8193.

² Dr. Fordice noted a history of appellant's bilateral otosclerosis and right ear otosclerosis surgery. He indicated that the right ear surgery resulted in improvement of his hearing and noted that appellant had a long history of progressive hearing loss in both ears, which was worse on the left. Dr. Fordice noted that upon examination there was some scarring on the right side; with mild sensorineural hearing loss on the right side; and profound mixed hearing loss of the left with a large sensorineural component.

By letter dated November 7, 2002, appellant requested reconsideration and submitted a report from Dr. Fordice dated August 8, 2002 and a computerized tomography (CT) of the ear dated August 15, 2002.³

On January 8, 2003 an Office medical adviser reviewed Dr. Fordice's reports and concluded that appellant had bilateral otosclerosis. He noted that a comparison of the preemployment audiograms of 1988 and those performed on behalf of Dr. Klapper in 2001 did not show significant progression of hearing loss on the right. The medical adviser noted that significant progression did occur during the tenure with the federal government on the left and opined that most of the progression was due to worsening of otosclerosis, but noted that a component of the hearing loss due to employment-related noise exposure could not be ruled out.

In a memorandum dated January 14, 2003, the Office requested that the Office medical adviser clarify his opinion with respect to how noise exposure could not cause a significant progression of hearing loss of the right ear, which had no ratable loss, but could cause significant progression of hearing loss to the left ear, which had extensive hearing loss, when both ears were exposed to the same noise.

In a supplemental report dated January 15, 2003, the Office medical adviser noted that most of the progression of the hearing loss on the left was by far due to the worsening of otosclerosis and was not work related and that any contribution from noise exposure during appellant's federal employment was negligible.

In a decision dated January 27, 2003, the Office denied modification of the prior decision again finding that appellant failed to establish that his hearing loss was causally related to the accepted employment exposure to noise.

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

The Board finds that there is a conflict in medical opinion between the Office medical adviser and Dr. Fordice, appellant's treating physician, both of whom are Board-certified specialist in their respective fields. In his report dated August 15, 2002, Dr. Fordice opined that it was reasonable to assume that appellant's profound hearing loss on the left was caused by otosclerosis but was also caused by work exposure. By contrast, the Office medical adviser noted that in a report dated January 15, 2003 that most of the progression of the hearing loss on the left was by far due to the worsening of otosclerosis and was not work related and that any contribution from noise exposure during appellant's federal employment was negligible. Dr. Fordice has consistently supported that appellant's hearing loss was partially due to work-

³ Dr. Fordice noted that appellant had mild sensorineural hearing loss in the right ear; and profound mixed hearing loss with a large conductive component in the left ear. He noted that the findings were consistent with otosclerosis on the left with cochlear otosclerosis component. Dr. Fordice indicated that otosclerosis was an arthritis of the stapes plate and that the calcification process could extend into the cochlea, causing sensorineural hearing loss. The CT scan revealed no abnormality on the left and a prosthetic right stapes and changes in the right mastoid air cells raising the possibility of an old hemorrhage or infection.

related noise, while the Office medical adviser found that his hearing loss was primarily due to a worsening of his preexisting otosclerosis.⁴

Section 8123 of the Act⁵ provides that if there is a disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination.⁶

In view of the conflict in medical evidence, appellant and the case record should be examined by a Board-certified impartial medical specialist, who should be requested to submit a rationalized report regarding the extent of appellant's employment-related hearing loss. The Office should then make such further development of the case record as may be warranted and issue a *de novo* decision.⁷

The decisions of the Office of Workers' Compensation Programs dated January 27, 2003 and October 21, 2002 are set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Dated, Washington, DC
August 8, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

⁴ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.0700.30(3) (April 1993).

⁵ 5 U.S.C. § 8123(a).

⁶ *Shirley L. Steib*, 46 ECAB 39 (1994).

⁷ See *Carl Cutler*, 30 ECAB 891 (1979).