

**United States Department of Labor
Employees' Compensation Appeals Board**

JERRY L. BETRO, Appellant

and

**DEPARTMENT OF LABOR, OCCUPATIONAL
SAFETY & HEALTH ADMINISTRATION,
Sacramento, CA, Employer**

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**Docket No. 05-1193
Issued: January 3, 2006**

Appearances:

*Jerry L. Betro, pro se
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 9, 2005 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated February 8, 2005 which denied his hearing loss claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he sustained noise-induced hearing loss causally related to factors of his federal employment. On appeal, appellant also states that he is "providing rebuttal" to the Board's decision dated October 5, 2004, Docket No. 04-625.

FACTUAL HISTORY

This case has been before the Board on several prior occasions. In a decision issued October 4, 2004, the Board affirmed the Office's finding that appellant failed to establish that he sustained either multiple chemical sensitivity or a cervical condition causally related to factors of

his federal employment. The Board, however, found that his claim regarding noise-induced hearing loss was not in posture for decision. The case was remanded to the Office for doubling with a separate claim for an ear condition and employment-related hearing loss caused by frequent air travel.¹

The Office doubled Files No. 110120853 and 112009766 and referred appellant, together with a statement of accepted facts, to Dr. Stuart Gherini, Board-certified in otolaryngology, for a second opinion evaluation. In a December 22, 2004 report, he diagnosed right ear mild low frequency to moderately severe high frequency mixed hearing loss and left ear mild low frequency to severe high frequency mixed hearing loss. Dr. Gherini provided audiometric results and advised that appellant's sensorineural hearing loss was not due to occupational noise exposure, but that the conductive component of his hearing loss was employment related, explaining that the ear infections he had sustained left him with a large thin portion of the pars tensa on the right and a large central tympanic membrane perforation on the left which led to the conductive component of his hearing loss.

In a report dated January 26, 2005, an Office medical adviser agreed with Dr. Gherini's conclusion that appellant's hearing loss was not due to employment-related noise exposure, but was caused by damage to his tympanic membranes due to frequent employment-related travel. He reviewed Dr. Gherini's audiometric findings and advised that maximum medical improvement had been reached on December 22, 2004, noting that he was eligible for a schedule award and hearing aids.²

The record also contains a second opinion evaluation dated May 28, 2003, submitted by Dr. Appelblatt, a Board-certified otolaryngologist, under Office File No. 110120853. She provided examination findings and opined that appellant's hearing loss was caused by bilateral tympanic membrane perforations due to employment-related travel. In an April 29, 2004 report, Dr. Michael Kearns, also Board-certified in otolaryngology and an associate of Dr. Appelblatt, advised that appellant had conductive and sensorineural hearing loss. He stated that the conductive hearing loss was due to a perforation of the left tympanic membrane and some

¹ Docket No. 04-625 was adjudicated by the Office under File No. 112009766. Appellant also had three prior appeals to the Board, adjudicated by the Office under File No. 110120853. In a decision dated January 5, 2000, Docket No. 97-2123, the Board found that the Office improperly denied his request for reconsideration of a claim that he sustained an employment-related ear infection, an ear-drainage condition and hearing loss caused by frequent air travel. The Board remanded the case to the Office for determination on the issue of whether these conditions were caused or aggravated by factors of employment. On remand, the Office again denied the claim and following appellant's appeal to the Board, in a decision dated July 2, 2001, Docket No. 00-2564, the Board again remanded the case to the Office for referral to an appropriate medical specialist, to be followed by a *de novo* decision. On remand, the Office again denied the claim. Following appellant's third appeal to the Board, by decision dated February 14, 2003, Docket No. 02-903, the Board again remanded the case to the Office. The Board found that the second opinion evaluation relied upon by the Office was not responsive to the Board's July 2, 2001 remand order. Following remand, the Office again referred appellant for an appropriate medical evaluation and in a May 28, 2003 report, Dr. Nancy Appelblatt, a Board-certified otolaryngologist, advised that his hearing loss was caused by bilateral tympanic membrane perforations due to employment-related travel. On June 10, 2003 the Office accepted appellant's claim for aggravation of bilateral otitis media with resultant perforations of the bilateral tympanic membranes and secondary conductive hearing loss.

² The Office medical adviser also provided impairment calculations for appellant's hearing loss.

thickening and changes of the right tympanic membrane. Regarding the sensorineural hearing loss, Dr. Kearns stated that it was compatible “at least in part” with a noise-induced type, but concluded that the etiology could not be specifically ascertained.

By decision dated February 8, 2005, the Office found that appellant’s hearing loss was not caused by employment-related noise exposure.³

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees’ Compensation Act⁴ has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, 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. Regardless of whether the asserted claim involves traumatic injury or occupational disease, an employee must satisfy this burden of proof.⁵

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The medical opinion must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.⁶

Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.⁷ Rationalized medical evidence is medical evidence which includes a physician’s rationalized medical opinion on the issue of whether there is a causal relationship between the claimant’s diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.⁸ Neither the mere fact

³ The Board notes that, subsequent to this decision, on March 11, 2005 appellant filed a schedule award claim and the Office authorized hearing devices. The record before the Board does not contain a final decision regarding his entitlement to a schedule award.

⁴ 5 U.S.C. §§ 8101-8193.

⁵ *Gary J. Watling*, 52 ECAB 278 (2001).

⁶ *Solomon Polen*, 51 ECAB 341 (2000).

⁷ *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

⁸ *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.⁹

Office procedures set forth requirements for the type of medical evidence used in evaluating hearing loss. These include that the employee undergo both audiometric and otologic examination; that the audiometric testing precede the otologic examination; that the audiometric testing be performed by an appropriately certified audiologist; that the otologic examination be performed by an otolaryngologist certified or eligible for certification by the American Academy of Otolaryngology; that the audiometric and otologic examination be performed by different individuals as a method of evaluating the reliability of the findings; that all audiological equipment authorized for testing meet the calibration protocol contained in the accreditation manual of the American Speech and Hearing Association; that the audiometric test results include both bone conduction and pure tone air conduction thresholds, speech reception thresholds and monaural discrimination scores; and that the otolaryngologist report include: date and hour of examination, date and hour of employee's last exposure to loud noise, a rationalized medical opinion regarding the relation of the hearing loss to the employment-related noise exposure and a statement of the reliability of the tests.¹⁰ A physician conducting an otologic examination should be instructed to conduct additional tests or retests in those cases where the initial tests were inadequate or there is reason to believe the claimant is malingering.¹¹

ANALYSIS

Appellant noted on appeal that he was "providing rebuttal" to the Board's October 5, 2004 decision. Section 501.7(a) of the Board's procedures provides that a petition for reconsideration of a Board decision may be filed with the Board within 30 days from the date of issuance of its decision.¹² There is no evidence that appellant timely petitioned for reconsideration within 30 days of the Board's October 5, 2004 decision. That decision became formal following the expiration of 30 days.

The Board finds that appellant failed to meet his burden of proof to establish that he sustained a noise-induced employment-related hearing loss. Under Office File No. 110120853, on June 10, 2003, the Office accepted that he sustained aggravation of bilateral otitis media with resultant perforations of the bilateral tympanic membranes and secondary conductive hearing loss. The medical evidence of record supports this conclusion, but does not contain any opinion that appellant's hearing loss was caused by employment-related noise exposure.

In a May 28, 2003 report, Dr. Appelblatt opined that appellant's hearing loss was caused by injury to his tympanic membranes and this was accepted by the Office as employment related.

⁹ Dennis M. Mascarenas, 49 ECAB 215 (1997).

¹⁰ See Federal (FECA) Procedure Manual, Part 3 -- Requirements for Medical Reports, *Special Conditions*, Chapter 3.600.8(a) (September 1995); Luis M. Villanueva, 54 ECAB ____ (Docket No. 03-977, issued July 1, 2003).

¹¹ Luis M. Villanueva, *supra* note 10.

¹² 20 C.F.R. § 501.7(a).

She did not offer an opinion that his hearing loss was caused by noise exposure. Although Dr. Kearns advised that appellant's sensorineural hearing loss was compatible "at least in part," with a noise-induced type, he also concluded that the etiology could not be specifically ascertained. 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 relation are entitled to little probative value and are generally insufficient to meet a claimant's burden of proof.¹³ Dr. Kearns' opinion is, therefore, insufficient to establish that appellant's hearing loss was caused by employment-related noise exposure.

In a December 22, 2004 report, Dr. Gherini diagnosed bilateral mixed hearing loss and advised that appellant's sensorineural hearing loss was not due to noise exposure but that the conductive component of his hearing loss was employment related and the Office medical adviser agreed with his analysis.

The Board, therefore, finds that the medical evidence of record is insufficient to establish an employment-related noise-induced hearing loss. The issue of causal relationship is a medical one and must be resolved by probative medical evidence¹⁴ and the medical record before the Board does not contain a reasoned opinion that appellant's hearing loss was caused or aggravated by noise exposure in his federal employment.¹⁵

CONCLUSION

The Board finds that appellant has failed to meet his burden of proof to establish that he sustained a noise-induced hearing loss causally related to factors of his federal employment.

¹³ *Lois E. Culver (Clair L. Culver)*, 53 ECAB 412 (2002).

¹⁴ See *Jacqueline M. Nixon-Steward*, *supra* note 7.

¹⁵ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 8, 2005 be affirmed.

Issued: January 3, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board