

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

R.K., Appellant

and

DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Lebanon, PA, Employer

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**Docket No. 07-801
Issued: July 6, 2007**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 31, 2007 appellant filed a timely appeal from a November 13, 2006 decision of the Office of Workers' Compensation Programs denying 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 established that he sustained a hearing loss or tinnitus in the performance of duty.

FACTUAL HISTORY

This is the second appeal before the Board. In the prior appeal, the Board found the case was not in posture for a decision with respect to whether appellant had sustained a hearing loss

or tinnitus due to employment factors.¹ The Board found that a supplemental report was needed from the second opinion physician addressing the issue of whether appellant's high frequency hearing loss or tinnitus were related to noise exposure at work in July 2004. The Board set aside the Office decisions dated January 13, 2006 and August 9, 2005 and remanded the case for further development. The history of the case is contained in the Board's prior decision and is incorporated herein by reference.

Subsequent to the Board's decision, the Office requested a supplemental report from the second opinion physician, Dr. Clifford N. Steinig, an osteopath specializing in otolaryngology. In an October 23, 2006 supplemental report, Dr. Steinig stated:

“[B]ased on the evidence that is available to me, I cannot state with any degree of medical certainty that the high frequency hearing loss and tinnitus was related to the noise exposure. The only way I could tell if the hearing loss was secondary to the noise exposure is to have an audiometric study prior to the incident of July 2004. This is not available to us based on the information you have sent me. Again, as far as the tinnitus is concerned, the exposure to the loud noise might possibly have caused this, but this symptom, tinnitus, is purely subjective, and we can only go by what the patient is stating.... The only thing we can address is the hearing loss which really is not that bad and is bilateral. If it is bilateral, the question could certainly be raised as to why he does not have the tinnitus in both ears but only in the right side.”

By decision dated November 13, 2006, the Office denied the claim for compensation on the grounds that the medical evidence did not establish a causal relationship between the employment-related noise exposure and the claimed hearing loss and tinnitus.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act² has the burden to establish the essential elements of his 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 or condition for which compensation is claimed is causally related to the employment injury.³ Regardless of whether the asserted claim involves traumatic injury or occupational disease, an employee must satisfy this burden of proof.⁴

¹ Docket No. 06-1132 (issued September 6, 2006). On July 19, 2004 appellant, then a 39-year-old social worker, filed a traumatic injury claim alleging that on July 16, 2004 he sustained ringing in the ears and a hearing loss when he was exposed to a loud “fly” fan for hours.

² 5 U.S.C. §§ 8101-8193.

³ *Barbara R. Middleton*, 56 ECAB ___ (Docket No. 05-1026, issued July 22, 2005).

⁴ *Donald W. Wenzel*, 56 ECAB __ (Docket No. 05-146, issued March 17, 2005).

To establish a causal relationship between appellant's bilateral hearing loss and his employment, he must submit rationalized medical opinion evidence based on a complete factual and medical background supporting such a causal relationship. Rationalized medical opinion evidence is medical evidence which includes a physician's opinion on the issue of whether there is a causal relationship between the claimant's condition and the implicated employment factors.⁵ 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.⁶

The Office, however, is not a disinterested arbiter, but rather performs the role of adjudicator on the one hand and gatherer of the relevant facts and protector of the compensation fund on the other, a role that imposes an obligation on the Office to see that its administrative processes are impartially and fairly conducted.⁷ Although the claimant has the burden of establishing entitlement to compensation, the Office shares responsibility in the development of the evidence.⁸ Once the Office starts to procure medical opinion, it must do a complete job.⁹ The Office, thus, has the responsibility to obtain from its referral physician an evaluation that will resolve the issue in the case.¹⁰

ANALYSIS

In the prior appeal, the Board remanded the case to the Office to obtain a supplemental report from Dr. Steinig, the second opinion physician, that provides a clear opinion on whether he believed appellant's high frequency hearing loss or tinnitus was causally related to noise exposure at work in July 2004, based on the available evidence. On remand, the Office requested Dr. Steinig to provide a rationalized opinion as to whether appellant's hearing loss was employment related.

In denying appellant's claim, the Office relied upon Dr. Steinig's supplemental report to determine that appellant's federal employment was not the cause nor did it contribute to his hearing loss. In his October 23, 2006 supplemental report, Dr. Steinig indicated that he was unable to "state with any degree of medical certainty that the high frequency hearing loss and tinnitus was related to the noise exposure." He further noted that "exposure to the loud noise might possibly have caused" appellant's tinnitus or high frequency hearing loss. Dr. Steinig's opinion regarding the cause of appellant's hearing loss is speculative and equivocal in nature

⁵ *Kathryn E. Demarsh*, 56 ECAB ____ (Docket No. 05-269, issued August 18, 2005).

⁶ *Gary J. Watling*, 52 ECAB 278 (2001); *Gloria J. McPherson*, 51 ECAB 441 (2000).

⁷ *Peter C. Belking*, 56 ECAB ____ (Docket No. 05-655, issued June 16, 2005).

⁸ *Richard F. Williams*, 55 ECAB 343 (2004).

⁹ *Id.*

¹⁰ *Id.*; see also *Mae Z. Hackett*, 34 ECAB 1421 (1983); *Richard W. Kinder*, 32 ECAB 863 (1981) (in these cases the report of the Office referral physician did not resolve the issue in the case).

and, thus, of little probative value.¹¹ When the Office obtains an opinion from an Office referral physician, it has the responsibility to obtain an evaluation from the referral physician that resolves the issue involved in the case.¹² As Dr. Steinig's opinion is equivocal and does not resolve the issue of causal relationship, the Office should not have relied upon his opinion as a basis for denying appellant's claim for compensation. Accordingly, the Office did not properly discharge its responsibilities in developing the record.¹³ The case is remanded to the Office so that it may refer the claim file to another second opinion physician to ascertain whether appellant's hearing loss or tinnitus was causally related to his federal employment. After the Office has developed the case record to the extent it deems necessary, a *de novo* decision shall be issued.

CONCLUSION

The Board finds that this case is not in posture for a decision. The case will be remanded to the Office to secure a medical opinion that adequately addresses the causal relationship issues presented.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 13, 2006 is set aside and the case remanded for further proceeding consistent with the above opinion.

Issued: July 6, 2007
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

¹¹ *D.D.*, 57 ECAB ___ (Docket No. 06-1315, issued September 14, 2006); *Michael R. Shaffer*, 55 ECAB 386 (2004).

¹² *Richard F. Williams*, *supra* note 8.

¹³ *Id.*