

factors of his federal employment. He did not stop work. In a statement accompanying his claim, appellant stated:

“My illness started in the fall of 1997, while working twelve hours a day[,] midnight until noon, seven days a week for an extended stay working on the dredge boat. With long work hours and fatigue, I developed a bronchitis causing, at first, an echoing noise then leading into a permanent loud ringing (tinnitus) and deafness in my left ear....”

Appellant related, “I used ear plugs and avoided the engine room as much as possible. I believe the cool nights affected my respiratory systems which led to a chest cold (coughing) that developed into bronchitis which added pressure to my preexisting ear problem.” Appellant noted that in 1980, prior to his federal employment, he had lost his right hand and blew out his ear drums in a blast injury. Appellant underwent surgical reconstruction of his eardrums.

In a report dated September 29, 1997, Dr. Alan B. McDaniel, a Board-certified otolaryngologist, noted that appellant had been working the last few weeks around noisy equipment on a dredge. Appellant had a history of bronchitis two weeks earlier. He complained of hearing loss on the left side and “really loud left tinnitus.” Dr. McDaniel diagnosed left serous otitis media with middle ear effusion, hearing loss, tinnitus and a recent respiratory infection.

In a progress report dated October 16, 1997, Dr. McDaniel noted that an audiogram showed complete hearing loss on the left side. He noted that appellant’s eardrums were surgically repaired after being blown out in a blast injury. Prior to appellant’s loss of hearing in his left ear, he had bronchitis and a severe cough. Dr. McDaniel found that he “might have had a perilymphatic fistula caused by the blast which healed while he was on his back after the injury but left a weak repair. With all the coughing [he] was doing, he might have blown that weak spot out creating a significant perilymphatic fistula which could be responsible for this hearing loss.”

In a report dated October 6, 1999, Dr. McDaniel opined that appellant’s hearing loss resulted from severe coughing due to bronchitis. He noted that, while working long hours around noisy dredging equipment, he developed bronchitis and a cough. Dr. McDaniel asserted that appellant’s coughing from the bronchitis ruptured an already weakened membrane in the inner ear and resulted in hearing loss.

On September 29, 2004 the Office referred appellant to Dr. Donald Welsh, a Board-certified otolaryngologist, for a second opinion examination. In a report dated October 19, 2004, Dr. Welsh diagnosed sensorineural hearing loss due to noise exposure.

On November 5, 2004 the Office accepted appellant's claim for bilateral hearing loss.¹ By decision dated March 11, 2005, the Office granted him a schedule award for a 22 percent bilateral hearing loss.

On June 1, 2005 appellant filed an occupational disease claim alleging that he sustained tinnitus, stress and sleep deprivation due to factors of his federal employment. The Office merged appellant's June 1, 2005 occupational disease claim into file number 062119714. It determined that he was claiming tinnitus, stress and sleep deprivation as a consequence of his accepted employment injury in file number 062119714.

In a progress reports dated December 4, 2004 and March 8, 2005, received by the Office on July 29, 2005, Dr. McDaniel diagnosed disabling tinnitus, left anacusis, right mixed hearing loss and insomnia. In a report dated May 17, 2005, Dr. Roy J. Meckler, a Board-certified neurologist, indicated that he was treating appellant for a sleep disturbance caused by "incapacitating tinnitus."

By decision dated October 28, 2005, the Office denied appellant's claim for tinnitus, sleep deprivation and stress on the grounds that the medical evidence did not establish that it was causally related to the accepted work events. On November 28, 2005 he requested a review of the written record by an Office hearing representative. In a report dated November 29, 2005, Dr. McDaniel discussed appellant's history of injury to his right hand and both ears in an explosion. The physician stated, "The impulse force of the blast severely damaged his inner ears causing sensorineural hearing loss and symmetrical tinnitus in both ears. He subsequently suffered sudden and complete hearing loss in his left ear precipitated by prolong[ed] coughing caused by work-related bronchitis." Dr. McDaniel found that appellant's tinnitus had worsened and caused severe insomnia, increased insulin resistance and stress.

In a decision dated March 8, 2006, an Office hearing representative affirmed the October 28, 2005 decision. He found that the medical evidence did not attribute appellant's tinnitus, sleep deprivation and stress to his employment-related hearing loss.

On October 20, 2006 appellant requested reconsideration. An Office medical adviser reviewed the record on February 23, 2007. He determined that appellant's work hours and exposure to the climate while working on a dredge from August 17 to September 12, 1997 would not have caused bronchitis. The Office medical adviser asserted that the bronchitis may have resulted from cigarette smoking and allergic rhinitis.

¹ In letters dated November 3, 2004 and May 12, 2005, the employing establishment controverted the claim on the grounds that it was untimely. The employing establishment noted that appellant was last exposed to the factors to which he attributed his hearing loss on September 6, 1997 and further indicated that he attributed his deafness to bronchitis rather than noise exposure. In a November 2, 2004 electronic mail message, Rick Lewis, a supervisor, related that appellant notified him on April 30, 2004 that he ruptured an eardrum from a severe cough while working on the dredge from July 22 through September 5, 1997. Mr. Lewis also indicated that appellant may have told him that he had a cold during the July 22 through September 5, 1997 time period. In a June 7, 2005 response, the Office found that, as Mr. Lewis did not remember the entire conversation with appellant, his statement regarding whether the employing establishment had actual knowledge of his hearing loss at the time of his exposure was not credible. The Office also found that as the employing establishment issued earplugs to appellant while he worked on the barge it was aware that there may be a potential for hearing loss.

The Office found that a conflict arose between Dr. McDaniel and the Office medical adviser. It referred appellant to Dr. Robert W. Powell, a Board-certified internist, for an impartial medical examination. In a report dated April 25, 2007, Dr. Powell discussed appellant's history of developing a respiratory infection working on a dredge boat in 1997 as a timekeeper. He noted that he attributed his respiratory infection to working at night in cool, damp weather in August 1997. Appellant currently smoked cigarettes. Dr. Powell diagnosed moderate obstructive ventilatory defect due to pulmonary emphysema resulting from cigarette smoking and a history of hearing loss and tinnitus. He opined that appellant's work on a dredge boat in 1997 did not "cause or contribute to his developing bronchitis which caused him to cough which may have contributed to his hearing loss." Dr. Powell explained that respiratory and ear infections were due to bacteria and viruses "without contribution of climatic conditions."

By decision dated May 18, 2007, the Office denied modification of its October 28, 2005 decision.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act² 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 filed within the applicable time limitation; that an injury was sustained while 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.³ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.⁴

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;⁵ (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition;⁶ and (3) medical evidence establishing the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.⁷

The medical evidence required to establish causal relationship generally is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence, which

² 5 U.S.C. §§ 8101-8193.

³ *Tracey P. Spillane*, 54 ECAB 608 (2003); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁴ *See Ellen L. Noble*, 55 ECAB 530 (2004).

⁵ *Michael R. Shaffer*, 55 ECAB 386 (2004).

⁶ *Marlon Vera*, 54 ECAB 834 (2003); *Roger Williams*, 52 ECAB 468 (2001).

⁷ *Beverly A. Spencer*, 55 ECAB 501 (2004).

includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors.⁸ The opinion of the physician must be based on a complete factual and medical background of the claimant⁹ and must be one of reasonable medical certainty¹⁰ explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.¹¹

Section 8123(a) provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.¹² The implementing regulation states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.¹³

When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹⁴

ANALYSIS

The Office accepted that appellant sustained hearing loss due in part to noise exposure in the course of his federal employment. He additionally claimed that he sustained tinnitus as a result of a respiratory infection which developed when he worked on a dredge boat in August 1997.¹⁵ As a result of his respiratory infection, appellant sustained severe tinnitus and total deafness in his left ear. He experienced difficulty sleeping and stress due to the ringing in his ear.

The Office determined that a conflict arose between Dr. McDaniel, appellant's attending physician, and the Office medical adviser regarding whether he sustained bronchitis due to

⁸ *Conrad Hightower*, 54 ECAB 796 (2003); *Leslie C. Moore*, 52 ECAB 132 (2000).

⁹ *Tomas Martinez*, 54 ECAB 623 (2003); *Gary J. Watling*, 52 ECAB 278 (2001).

¹⁰ *John W. Montoya*, 54 ECAB 306 (2003).

¹¹ *Judy C. Rogers*, 54 ECAB 693 (2003).

¹² 5 U.S.C. § 8123(a).

¹³ 20 C.F.R. § 10.321.

¹⁴ *David W. Pickett*, 54 ECAB 272 (2002); *Barry Neutuch*, 54 ECAB 313 (2003).

¹⁵ The Office considered the employing establishment's contention that the claim was untimely but found that the employing establishment was aware of the potential for hearing loss as it provided appellant with hearing protection.

working on dredge boat which resulted in tinnitus, sleep deprivation and stress. It referred him to Dr. Powell for resolution of the conflict.

Where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹⁶ The Board finds that the opinion of Dr. Powell, a Board-certified internist selected to resolve the conflict in opinion, is well rationalized and based on a proper factual and medical history. On April 25, 2007 Dr. Powell reviewed appellant's medical and work history, including his history of a respiratory infection while working on a dredge boat as a timekeeper. He diagnosed a moderate obstructive ventilatory defect from pulmonary emphysema caused by cigarette smoking. Dr. Powell also diagnosed hearing loss and tinnitus. He found that appellant's work on a dredge boat did not "cause or contribute to his developing bronchitis which caused him to cough which may have contributed to his hearing loss." Dr. Powell provided rationale for his opinion by explaining that infections resulted from bacteria and viruses rather than climate conditions. As his report is detailed, well rationalized and based on a proper factual background, his opinion is entitled to the special weight accorded an impartial medical examiner. The Office, consequently, properly denied appellant's claim for tinnitus, stress and sleep deprivation.

CONCLUSION

The Board finds that appellant has not established that he sustained tinnitus, sleep deprivation and stress due to factors of his federal employment.

¹⁶ See *David W. Pickett, supra* note 14.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 18, 2007 is affirmed.

Issued: March 7, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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