

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

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**T.E., Appellant**

**and**

**DEPARTMENT OF HOMELAND SECURITY,  
FEDERAL AIR MARSHAL SERVICE,  
Charlotte, NC, Employer**

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**Docket No. 08-2326  
Issued: August 11, 2009**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Judge  
COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On August 25, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' May 27, 2008 and November 20, 2007 merit decisions denying his claim for disability compensation starting August 1, 2005. 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 was disabled on or after August 1, 2005.

**FACTUAL HISTORY**

On March 27, 2003 appellant, then a 39-year-old federal air marshal, filed an occupational disease claim alleging that his respiratory condition was caused by employment factors. He asserted that daily air travel in a closed plane with recycled air and exposure to sick

people caused his condition. The Office accepted that appellant sustained bronchitis, pharyngitis and fever. The case was given the file number xxxxxx522.

On February 25, 2004 Dr. Stanley Wilkins, an attending otolaryngologist, reviewed diagnostic testing which showed that appellant's sinuses were completely clear and his cranial nerves were normal. He advised that the type of hearing loss appellant had was indicative of noise exposure. Dr. Wilkins did not provide any work restrictions for appellant. On September 9, 2004 appellant had a fitness-for-duty examination that included a hearing test. He was found to be fit for duty.

On January 3, 2005 appellant filed a claim for recurrence of disability due to his accepted employment injuries. On April 6, 2006 the Office accepted his claim for medical treatment only. As appellant cited new factors of employment in the development of his recurrence claim, it advised him that the claim would be adjudicated as a new occupational disease claim. This claim was assigned case number xxxxxx300 and constitutes the present claim. The Office accepted this claim for allergic rhinitis.<sup>1</sup>

Appellant voluntarily resigned his federal employment effective July 29, 2005 and obtained employment with Liberty Mutual Insurance as an investigator on August 8, 2005. He indicated in his resignation letter that he wished to better utilize his education and experience.

On October 11, 2005 Dr. Ted Kunstling, an attending Board-certified internist, stated that appellant's symptoms of cough-variant asthma and rhino-sinusitis were well controlled. He noted that these symptoms had resolved and that no further treatment or follow-up was needed.

On January 20, 2006 appellant filed a Form CA-7, claim for compensation, claiming 54 percent wage loss beginning August 1, 2005. In a January 20, 2006 statement, he contended that he was unable to return to his position as a federal air marshal.

In a February 7, 2006 report, Dr. Wilkins that stated appellant had a 1.5 percent hearing loss in his right ear and 0 percent impairment of the left ear. He noted that appellant's speech reception threshold was within normal limits bilaterally. No work restrictions were given. On August 7, 2006 Dr. Kunstling stated that, when appellant was examined on May 25, 2006, his respiratory symptoms were well controlled. He noted that the examination had been normal and his pulmonary function testing had been normal.

In an October 5, 2006 decision, the Office terminated appellant's entitlement to medical benefits and wage-loss compensation. The decision noted that the termination was based on Dr. Kunstling's October 11, 2005 report.

On December 19, 2006 appellant sent an e-mail to an employing establishment representative regarding his efforts to be reinstated to his position as a federal air marshal. He stated that he was now fully recovered from his work-related illnesses and wanted to return to his prior duties. An e-mail response indicated that appellant would not be recommended for reinstatement.

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<sup>1</sup> The Office did not combine the two claim files.

Appellant disagreed with the Office's October 5, 2006 decision and requested an oral hearing before an Office hearing representative. In a May 14, 2007 decision, the Office hearing representative affirmed the October 5, 2006 decision. The Office hearing representative noted that appellant claimed that his work as a federal air marshal caused an injury to the Eustachian tube in his right ear resulting in a permanent loss of hearing in the right ear and tinnitus. The Office hearing representative noted that this claim had not been adjudicated by the Office and remanded this aspect of appellant's claim and the claim for wage-loss compensation beginning August 1, 2005.

On October 10, 2007 Dr. Robert Hosea, an otolaryngologist, who served as an Office referral physician, determined that appellant sustained hearing loss to his right ear as a result of factors of his federal employment. In a November 20, 2007 decision, the Office accepted appellant's claim for right neurosensory hearing loss.<sup>2</sup>

In a November 20, 2007 decision, the Office denied appellant's claim for wage loss from August 1 to October 25, 2005. It noted that Dr. Kunstling determined in 2004 that his cough due to bronchial hyperactivity had resolved. Appellant's annual fitness-for-duty examination on September 9, 2004 also found him to be fit for duty. The Office noted that appellant returned to full regular duty as a federal air marshal at that time, but on July 19, 2005 he submitted a letter of resignation from his position as a federal air marshal effective July 29, 2005. It found that on October 11, 2005 Dr. Kunstling stated that appellant's symptoms of cough-variant asthma and rhino-sinusitis were now well controlled and had resolved with no follow-up required.

Appellant disagreed with the November 20, 2007 decision and requested a hearing before an Office hearing representative. At the March 14, 2008 hearing, appellant's attorney argued that the accepted respiratory conditions disabled him from working as a federal air marshal beginning August 1, 2005. He contended that appellant resigned because he did not wish to sustain further injury and that appellant's hearing loss disqualified him from working as a federal air marshal. Appellant testified that he did not say anything about his health in his resignation letter as he was trying to be "politically correct" and protect his future.

In February 20 and 26, 2007 reports, Dr. Kunstling opined that, if appellant returned to his prior occupation in air travel that reexposed him to infections, the traveling public, low humidity and alterations in barometric pressure, then his symptoms would recur and he would be at risk for developing chronic progressive symptoms. In an August 22, 2007 report, Dr. Wilkins diagnosed chronic Eustachian tube dysfunction as well as intermittent serous otitis media. He stated:

"These conditions are indeed related to [appellant's] employment as an airline marshal. When he flies, he will sometimes get congestion in his ears as well as fullness and pressure. It is my opinion that [appellant] is more likely to get problems with serous otitis, especially if he flies a great deal. Also, if he flies with any type of cold or upper respiratory infection, it will make the condition worse."

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<sup>2</sup> On February 6, 2008 appellant received a schedule award for an 11 percent permanent impairment of his left ear.

On December 4, 2007 Dr. Stan Phillips, an attending otolaryngologist, asserted that appellant could not work in his position as a federal air marshal because of his barotraumas. He noted that the past medical history showed evidence that barotrauma occurred while appellant flew for his employment and this subsequently resulted in some hearing loss in his right ear. Dr. Phillips stated:

“The injury was obviously caused by [appellant’s] job and he was unable to pursue working with this type of situation due to the hazard to his health. This is well marked out in aggravation of medical condition, which describes workers’ compensation regulations. [Appellant] did suffer a work-related injury, which was essentially a permanent injury and since then he has been unable to be exposed to this type of work environment. I have seen dozens of air marshals in the regional area and at least three or four of these individuals, who have been unable to fly, have been compensated accordingly and I firmly believe that this is [appellant’s] situation.”<sup>3</sup>

A June 26, 2007 Merit Systems Protection Board decision noted that appellant filed an appeal alleging his rights to restoration following full recovery from a compensable injury were violated when his agency declined to reinstate him to his position as a federal air marshal after he resigned in July 2005. The decision noted that appellant confirmed at a prehearing conference that he was not alleging that his resignation was involuntary for any reason. It found that he did not show that his separation from the agency was the result of, or substantially related to, his compensable injury. The decision noted that the employing establishment documented that appellant was performing all his duties satisfactorily at the time he resigned and that he did not present any medical documentation stating that he could not fly.

Appellant’s supervisor, Robert Cozart, provided an April 10, 2007 statement in response to the March 15, 2007 hearing. He stated that appellant was not considered for restricted duty because there was no medical claim indicating that he could not perform his primary duties as a federal air marshal. Mr. Cozart noted that appellant resigned for personal and professional reasons and did not mention a medical reason for his resignation.

In a May 27, 2008 decision, the Office hearing representative affirmed the November 20, 2007 decision.

### **LEGAL PRECEDENT**

For each period of disability claimed, the employee has the burden of establishing that he was disabled as a result of the accepted employment injury. Whether a particular injury causes disability from employment is a medical issue which must be resolved by probative medical evidence.<sup>4</sup>

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<sup>3</sup> The record contains a similar report of Dr. Phillips dated October 29, 2007.

<sup>4</sup> See *Sandra D. Pruitt*, 57 ECAB 126 (2005).

The medical evidence required to establish a causal relationship between a claimed period of disability and an employment injury is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the compensable 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.<sup>5</sup>

### ANALYSIS

Effective July 29, 2005, appellant resigned from his job as a federal air marshal. His resignation was voluntary and he did not present any medical reason for his work stoppage at that time. Appellant later claimed that accepted employment conditions, allergic rhinitis and right neurosensory hearing loss, caused disability from his federal air marshal job starting August 1, 2005.<sup>6</sup>

The Board finds that appellant did not submit sufficient medical evidence to show that he is entitled to disability compensation starting August 1, 2005.

Appellant submitted the February 20 and 26, 2007 reports of Dr. Kunstling, an attending Board-certified internist, who opined that, if appellant returned to his prior occupation in air travel that reexposed him to infections, the traveling public, low humidity and alterations in barometric pressure, then his symptoms would recur and he would be at risk for developing chronic progressive symptoms. In an August 22, 2007 report, Dr. Wilkins, an attending otolaryngologist, stated that appellant had a diagnosis of chronic Eustachian tube dysfunction as well as intermittent serous otitis media. He stated that, when appellant flew, he would sometimes get congestion in his ears as well as fullness and pressure. It was Dr. Wilkins' opinion that appellant was more likely to get problems with serous otitis, especially if he flew a great deal. He stated that, if appellant flew with any type of cold or upper respiratory infection, it would make the condition worse.

The Board notes that these reports are of limited probative value on the relevant issue of the present case in that Dr. Kunstling and Dr. Wilkins did not provide opinions explaining why appellant was disabled from his federal air marshal job on or after August 1, 2005 due to his accepted conditions. Rather they speculated that appellant might become disabled sometime in the future if he returned to work in an occupation requiring air travel. However, it is well established that the possibility of future injury constitutes no basis for the payment of compensation.<sup>7</sup>

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<sup>5</sup> See *Carol A. Lyles*, 57 ECAB 265 (2005).

<sup>6</sup> The Office earlier accepted that appellant sustained bronchitis, pharyngitis and fever. Appellant did not claim disability beginning August 1, 2005 due to these conditions.

<sup>7</sup> *Gaeten F. Valenza*, 39 ECAB 1349, 1356 (1988).

On December 4, 2007 Dr. Phillips, an attending otolaryngologist, advised that appellant could not work in his position as a federal air marshal because of his barotraumas. He stated that appellant was injured on the job and was unable to “pursue working with this type of situation due to the hazard to his health.” Dr. Phillips stated, “This is well marked out in aggravation of medical condition, which describes workers’ compensation regulations. He did suffer a work-related injury, which was essentially a permanent injury and since then he has been unable to be exposed to this type of work environment.” This report, however, is of limited probative value as Dr. Phillips did not provide adequate medical rationale in support of his conclusion on causal relationship.<sup>8</sup> He did not describe the accepted work injuries in any detail or explain how they could have caused disability from the federal air marshal job on or after August 1, 2005. Nor did Dr. Phillips identify a specific period of disability. Moreover, his aggravation does not appear to be supported by the medical evidence. On October 11, 2005 Dr. Kunstling advised that appellant’s symptoms were well controlled and no further treatment was required.<sup>9</sup>

### CONCLUSION

Although appellant has submitted a detailed description of the history of his claim, it does not overcome the lack of medical evidence supporting causal relationship for the specific period of disability.

The Board finds that appellant did not meet his burden of proof to establish that he was entitled to disability compensation on or after August 1, 2005.

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<sup>8</sup> See *Leon Harris Ford*, 31 ECAB 514, 518 (1980) (finding that a medical report is of limited probative value on the issue of causal relationship if it contains a conclusion regarding causal relationship which is unsupported by medical rationale).

<sup>9</sup> When employment factors cause an aggravation of an underlying condition, the employee is entitled to compensation for periods of disability related to the aggravation. However, where the aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after the aggravation has ceased. See *Mary A. Moultry*, 48 ECAB 566 (1997).

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' May 27, 2008 and November 20, 2007 decisions are affirmed.

Issued: August 11, 2009  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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