



By letter dated August 17, 2006, the Office notified appellant of the deficiencies in his claim and requested that he provide additional information. In a letter of the same date, it also requested that the employing establishment provide information relating to appellant's employment-related noise exposure, including the location, sources and frequency and decibel levels of noise exposure.

In response, appellant submitted a statement alleging that sometime in the mid-1980s, while working at the Kansas City International Airport, he experienced a loud tone in his left ear from a Pax phone system and that his hearing had decreased during his employment over the past 29 years. He noted that, while he sustained a loss in both ears, his left ear sustained a greater loss.

Appellant summarized his federal employment history. He stated that from July 1977 to December 1992 he worked on environmental systems in facilities associated with several Kansas airports. During this time, appellant's noise exposure varied from day-to-day but some days were very noisy for several hours due to running engine generators, servicing centrifugal chillers, water pumps, air handlers and air compressors and working on navigational aids near the runways. Appellant estimated that he was exposed to two or more hours of moderate-to-high noise every day, although sometimes when repairing equipment associated with pneumatic controls, centrifugal chillers or engine generators the exposure could be six to eight hours per day for several days. From December 1992 to March 1999 he worked as an environment support unit supervisor at Kansas City International Airport, where he was exposed to the same noise levels in his prior position but less frequently. From March 1999 to December 2002 appellant worked in the Great Plains System Management Safety Office, where he was exposed to very loud noise in engine generator facilities and at facilities adjacent to runway facilities that could last more than an hour at a time. Beginning in December 2002, he served as a member of a technical support staff and, while much of his work was over the telephone, he visited to various airports when necessary. Appellant also served as a resident engineer from October 2005 until February 2006, where he was exposed to noise eight hours a day, five days a week, for nearly three months from three temporary air conditioning units. He alleged that these units added to the ambient noise from the RADAR equipment and was very irritating.

In a July 21, 2006 medical report, Dr. Gregory J. Mulcahy, a Board-certified otolaryngologist, noted appellant's complaints of hearing loss, especially in the left ear, dating back 10 years or more. He advised that appellant was exposed to significant occupational noise exposure during his 8-year employment in the Air Force and 20 years with the employing establishment. Appellant stated that back in the late 1980s he sustained acute left ear hearing loss due to a blast of noise in his ear and that his hearing has gradually and persistently worsened. He also reported faint tinnitus bilaterally, no family history of hearing loss and that he felt his working on a noisy project last year precipitated a worsening of his hearing. A tuning fork evaluation revealed that appellant lateralized to the right side and showed a positive Rinne evaluation bilaterally. Dr. Mulcahy summarized the results of an attached audiogram, finding that appellant had normal hearing up to 3,000 hertz (Hz), but then a sharp drop to about 50 decibels at 4,000 Hz and above. On the left side appellant had mixed hearing loss that was sensorineural in the low and mid frequencies around 40 decibels with a conductive component taking him down to 65 decibels in the lowest frequencies, with a little improvement and then a fairly severe high frequency drop afterward. The audiogram also revealed type A tymps, speech

recognition thresholds of 20 decibels on the right and 60 decibels on the left and 100 percent speech discrimination on the right and 76 percent on the left. Dr. Mulcahy diagnosed noise-induced sensorineural hearing loss bilaterally. He opined that appellant had a large, unusual conductive pattern on the left ear but there was no clear reason for conductive hearing loss.

On December 18, 2006 the Office referred appellant to Dr. Mark J. Maslan, a Board-certified otolaryngologist, for a second opinion evaluation. It prepared a statement of accepted facts addressing his federal work history and noise exposure commencing 1977. The Office stated that from 1977 to 1992 and from 1992 to 1999 appellant's noise exposure varied and that no hearing protection was worn other than earmuffs in the engine generator rooms. From 1999 to 2002 appellant was exposed to noise intermittently and that he wore earmuff or plugs and from 2002 to present he was sometimes exposed to noise, but was provided hearing protection.

On January 16, 2007 appellant was examined by Dr. Maslan. In a January 19, 2007 medical report, Dr. Maslan reviewed appellant's records and the June 2006 audiogram. He summarized appellant's 30-year employment with the employing establishment, stating that from 1977 to 1992 he worked around generators, centrifugal chillers, boilers and water pumps, as well as jet aircraft operations, however, none of his exposure was prolonged. Dr. Maslan reported that appellant would check the chillers for about a half an hour every morning and intermittently during the day for anywhere as long as an hour, but rarely for extended periods of time and that during these times he would not wear ear protection. An audiogram revealed essentially normal hearing in the right ear up to higher pitches where there was a definite decrease in hearing. Appellant's hearing went down to 50 decibels at 6,000 Hz. The audiogram further revealed poor function in the left ear with marked sensorineural hearing loss and marked speech discrimination. Dr. Maslan opined that neither appellant's history nor his hearing loss patterns were compatible with a noise-induced loss.

In a supplemental report dated January 29, 2007, Dr. Maslan diagnosed mild-to-moderate high frequency sensorineural hearing loss and tinnitus based on the January 16, 2007 examination. When asked whether appellant showed a sensorineural loss in excess of what would be normally predicated on the basis of presbycusis, Dr. Maslan answered no. Dr. Maslan answered "not applicable: when asked to provide all other relevant historical facts relating to the hearing loss, including emotional disorders, systemic disease, local infections, ototoxic drug usage or surgery. He opined that appellant's sensorineural hearing loss was not, in part or all, due to noise exposure encountered in his federal civilian employment. Dr. Maslan reiterated that neither appellant's history nor his hearing loss were compatible with noise-induced hearing loss.

The Office submitted appellant's case to an Office medical adviser. On February 1, 2007 the Office medical adviser reviewed the report of Dr. Maslan. He recommended that the Office not accept that appellant's audiometric abnormalities, as shown in the January 16, 2007 testing, were due to noise exposure in his civilian federal employment.

By decision dated February 7, 2007, the Office denied the claim, finding that appellant did not establish that his hearing loss resulted from the accepted employment factors. It found that neither appellant's history nor hearing loss patterns were compatible with noise-induced hearing loss. The Office reissued this decision on March 20, 2007 to protect appellant's appeal

rights, as the initial mailing containing the decision had been returned to the Office as undeliverable.

On March 14, 2008 appellant filed a request for reconsideration. He noted that he was providing prior audiograms and noise studies he obtained from a RADAR factory, where he worked for over three months from late 2005 until early 2006. Appellant contended that Dr. Maslan was incorrect in stating that he had not been exposed to much noise and that he spent many hours every day working in noisy environments. He mentioned that he spent six to eight hours a day, one to two days a week, servicing engine generators from 1977 to 1990, as well as several hours each week working alongside active taxiways and runways with large commercial jets constantly arriving and departing. Appellant also stated that he spent time every day from March through November maintaining the centrifugal chiller.

Appellant submitted 1979, 1982 and 1984 audiogram testing results, as well as a March 12, 1985 medical report from Dr. Pat A. Barelli, a Board-certified otolaryngologist, who noted his claims that he was exposed in September 1984 to noise due to a telephone system at his work and that he had progressive hearing loss and dizziness. Dr. Barelli stated that a recent March 4, 1985 audiogram showed consistent hearing loss, as compared with a February 1985 audiogram taken by the employing establishment. He diagnosed moderate neurosensory hearing loss with an undetermined cause and left, moderately severe tinnitus. Dr. Barelli further stated that a diagnostic scan was performed, ruling out acoustic neuroma or pathology of the brain or ear and opined that this finding supported the concept that appellant's hearing loss was viral or noise related in origin.

On March 31, 2008 the Office referred the record to the same Office medical adviser. In an April 5, 2008 medical report, the Office medical adviser stated that Dr. Maslan's medical reports explained why the Office could not accept that appellant sustained hearing loss due to noise exposure in his civilian employment. He found that none of the evidence submitted by appellant changed Dr. Maslan's finding that his pattern of hearing loss was not the pattern seen in noxious, noise-induced hearing loss. The Office medical adviser noted that appellant was not entitled to a schedule award due to hearing loss.

By decision dated May 7, 2008, the Office found that appellant did not submit sufficient factual and medical evidence to establish that he was exposed to hazardous noise levels for the length of time necessary to establish noise-induced hearing loss. It also found that the medical evidence did not support that he sustained noise-induced hearing loss due to exposure to hazardous noise levels during his civilian federal employment. The Office relied upon the Office medical adviser's April 5, 2008 report.

### **LEGAL PRECEDENT**

An employee seeking compensation under the Federal Employees' Compensation Act<sup>1</sup> has the burden of establishing the essential elements of his claim by the weight of the reliable,

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

probative and substantial evidence,<sup>2</sup> including that he is an “employee” within the meaning of the Act<sup>3</sup> and that he filed his claim within the applicable time limitation.<sup>4</sup> The employee must also establish that he sustained an injury in the performance of duty as alleged and that his disability for work, if any, was causally related to the employment injury.<sup>5</sup>

To establish that an injury was sustained in the performance of duty in a claim for occupational disease, an employee must submit: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.<sup>6</sup>

### ANALYSIS

The issue is whether appellant established that he sustained an employment-related hearing loss due to noise exposure during his federal employment. The Board finds this case is not in posture for decision.

In order to establish a compensable injury, appellant is required to establish that his hearing loss resulted from noise exposure during his employment.<sup>7</sup> He submitted a July 21, 2006 medical report from Dr. Mulcahy, who opined that appellant sustained noise-induced sensorineural hearing loss bilaterally and that he also had a large, unusual conductive hearing loss pattern on the left hear, with no reason for conductive hearing loss. Appellant also submitted a March 12, 1985 report from Dr. Barelli, who opined that his hearing loss was viral or noise related in origin.

The Office referred appellant to Dr. Maslan for a second opinion evaluation. On January 19, 2007 Dr. Maslan opined that neither appellant’s history nor his hearing loss patterns were compatible with noise-induced hearing loss. He repeated this finding in a January 29, 2007 medical report and further stated that appellant’s diagnosed mild-to-moderate high frequency sensorineural hearing loss and tinnitus were not caused by his noise exposure during his federal civilian employment. In medical reports dated February 1, 2007 and April 5, 2008, an Office medical adviser noted that causal relationship was not established based on Dr. Maslan’s findings.

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<sup>2</sup> *J.P.*, 59 ECAB \_\_\_ (Docket No. 07-1159, issued November 15, 2007); *Joseph M. Whelan*, 20 ECAB 55, 57 (1968).

<sup>3</sup> *See M.H.*, 59 ECAB \_\_\_ (Docket No. 08-120, issued April 17, 2008); *Emiliana de Guzman (Mother of Elpedio Mercado)*, 4 ECAB 357, 359 (1951); *see* 5 U.S.C. § 8101(1).

<sup>4</sup> *R.C.*, 59 ECAB \_\_\_ (Docket No. 07-1731, issued April 7, 2008); *Kathryn A. O’Donnell*, 7 ECAB 227, 231 (1954); *see* 5 U.S.C. § 8122.

<sup>5</sup> *G.T.*, 59 ECAB \_\_\_ (Docket No. 07-1345, issued April 11, 2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

<sup>6</sup> *See Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994).

<sup>7</sup> *See Leon Thomas*, 52 ECAB 202 (2001).

The Board finds that Dr. Maslan's medical opinion is of diminished probative value and an insufficient basis to support the Office's denial of appellant's claim.

Dr. Maslan opined that appellant's hearing loss patterns were incompatible with noise-induced hearing loss. However, he failed to provide a fully rationalized medical opinion explaining his conclusion. Dr. Maslan stated that appellant did not show a sensorineural loss in excess of what would be normally predicated on the basis of presbycusis. Further, where asked to comment on historical facts relevant to appellant's hearing loss, including emotional disorders, systemic disease, local infections, ototoxic drug usage, and surgery, Dr. Maslan answered "not applicable." It appears that he was, thereby, indicating that appellant's hearing loss was solely due to presbycusis. However, Dr. Maslan failed to provide a sufficient explanation of how he concluded that presbycusis was the cause of appellant's hearing loss. Presbycusis is defined as a progressive bilaterally symmetrical perceptive hearing loss occurring with advancing age.<sup>8</sup> Therefore, Dr. Maslan's opinion on causal relationship is of diminished probative value.<sup>9</sup>

Moreover, the Board finds that Dr. Maslan's opinion is of diminished probative value because it was based on an inaccurate factual background.<sup>10</sup>

In summarizing appellant's exposure to noise during his employment, Dr. Maslan only referred to the employment period from 1977 to 1992, where appellant worked without ear protection around generators, centrifugal chillers, boilers, water pumps and jet aircrafts. He noted that appellant checked the chillers for about half an hour every morning and intermittently during the day for anywhere as long as an hour, but that he was rarely exposed to noise for extended periods of time. The basis for Dr. Maslan's information regarding appellant's limited exposure is unclear, as the statement of accepted facts only stated that during this period of appellant's employment his noise exposure varied from day-to-day. Moreover, this description is inconsistent with appellant's statements regarding his exposure to noise from 1977 to 1992, as he alleged that he was exposed to two or more hours of moderate to high noise daily, although occasionally while repairing certain equipment the exposure could be from six to eight hours per day for several days.

Dr. Maslan failed to address appellant's exposure to varying levels of noise while working for the Federal Government from 1992 through present. The statement of accepted facts provided descriptions of appellant's positions and noise exposure during this time; however, it appears that the physician did not consider any exposure after 1992 when finding that appellant's history was incompatible with noise-induced hearing loss.

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<sup>8</sup> DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, 27<sup>th</sup> Edition (1988).

<sup>9</sup> See *Linda I. Sprague*, 48 ECAB 386 (1997); *Jennifer L. Sharp*, 48 ECAB 209 (1996).

<sup>10</sup> The Board notes that the Office procedure manual provides that it is generally accepted that hearing loss may result from prolonged exposure to noise levels above 85 decibels. Acoustic trauma may, however, result from levels below 85 decibels if exposure is sufficiently prolonged. The Office, therefore, does not request the claimant show exposure to injurious noise in excess of 85 decibels as a condition to approval of the claim. Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.8(a) (October 1990).

To assure that the report of a medical specialist is based upon a proper factual background, the Office provides information through the preparation of a statement of accepted facts. When a second opinion physician does not use the statement of accepted facts as the framework in forming his opinion, the probative value of the opinion is diminished or negated altogether.<sup>11</sup> As Dr. Maslan did not follow the statement of accepted facts, as he misstated appellant's employment-related exposure from 1977 to 1992 and failed to address appellant's employment after 1992.

It is well established that proceedings under the Act are not adversarial in nature, nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares the responsibility in the development of the evidence to see that justice is done.<sup>12</sup> As the Office undertook development of the evidence by referring appellant to a second opinion physician, it has the duty to secure an appropriate report addressing the relevant issues.<sup>13</sup> Because Dr. Maslan did not base his report on an accurate factual history and failed to provide a rationalized medical opinion to support his findings, the case will be remanded to the Office for further development of the medical evidence.

The Board further notes that the employing establishment did not provide any actual studies or evidence regarding appellant's duration and levels of exposure to hazardous noise during his federal employment. The Office initially requested this information from the employing establishment in an August 17, 2006 letter. However, it failed to follow through in its request despite the employing establishment's failure to respond. Because the levels and duration of exposure to hazardous noise is the type of evidence normally obtained from the employing establishment, the Office has a particular responsibility to develop this evidence.<sup>14</sup> On remand, the Office should make additional requests to the employing establishment and, if possible, make findings of fact concerning the noise level in the employing establishment and the length and period of such exposures.<sup>15</sup>

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<sup>11</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990).

<sup>12</sup> *Richard Kendall*, 43 ECAB 790 (1992); *Isidore J. Gennino*, 35 ECAB 442 (1983).

<sup>13</sup> When the Office refers a claimant for a second opinion evaluation and the report does not adequately address the relevant issues, the Office should secure an appropriate report on the relevant issues. *Ayanle A. Hashi*, 56 ECAB 234 (2004). See also *Mirna Cruz*, Docket No. 06-183 (issued April 5, 2006) (where the Board found that the second opinion physician's medical report was of little probative value and could not constitute a basis for denying the claim because it was not based on the statement of accepted facts. The Board remanded the case to the Office).

<sup>14</sup> See *Richard Kendall*, 43 ECAB 790 (1992); *Isidore J. Gennino*, 35 ECAB 442 (1983). See also *R.B.*, *supra* note 12 (where the Board remanded the case because the Office failed to obtain evidence from the employing establishment regarding the duration and levels of the claimant's noise exposure prior to denying his claim for hearing loss. The Office only sent one development letter to the employing establishment requesting noise survey reports and periods and sources of appellant's noise exposure. The employing establishment did not address these requests in its controversion of the claim).

<sup>15</sup> See *David Rossman*, 9 ECAB 454 (1957) (where the Board remanded the case finding that the record was devoid of evidence from the employing establishment and the claimant regarding the levels and length of noise exposure and, thus, was not in posture for decision regarding the claimant's claim for hearing loss).

**CONCLUSION**

The Board finds that this case is not in posture for a decision regarding whether appellant established that he sustained an employment-related hearing loss in the performance of duty.

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 7, 2008 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further proceedings consistent with this opinion.

Issued: July 20, 2009  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

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