

reflects that he received continuation of pay (COP) for the period from November 6 through 28, 1977. Appellant returned to work on November 29, 1977. His claim was treated as a "short-form closure" case. On November 27, 1984 the case was closed and the record was destroyed due to inactivity without being fully adjudicated.

On May 31, 2007 appellant filed a notice of recurrence alleging that he had sustained a significant hearing loss in his right ear due to the November 5, 1977 motor vehicle accident. He stated that, at the time of the injury, medical personnel had advised him that he sustained nerve damage in his right ear as a result of a skull fracture. On May 31, 2007 appellant also requested a schedule award.

In a letter dated October 29, 2007, the Office informed appellant that the information submitted was insufficient to establish his claim and allowed him 30 days to submit additional information, including records of medical treatment since the 1977 accident and a current physician's report, with a diagnosis and a rationalized opinion as to the cause of the diagnosed condition.

Appellant submitted numerous fitness-for-duty reports and audiograms performed by the employing establishment, medical personnel from February 2, 1976 to August 15, 2005. On April 17, 1979 Dr. Terry L. Kellenberger, a Board-certified family practitioner, reported that appellant had a history of a head injury in 1977, with an uneventful recovery. An August 1, 1984 audiogram reflected that appellant's hearing sensitivity was within normal limits bilaterally, but better on the left than the right. On October 27, 1988 Dr. Frank J. Santora, Jr. reported borderline hearing loss in the right ear. In reports dated October 17, 1989 to August 15, 1995, Dr. Richard Rydze noted that appellant had mild-to-moderate high-tone hearing loss, right greater than left. On January 7, 1999 Dr. William F. Feldner diagnosed moderate high-tone hearing loss in the right ear and mild high-tone loss in the left ear.

By decision dated February 14, 2008, the Office denied appellant's recurrence and schedule award claims. It accepted that appellant was involved in a motor vehicle accident on November 5, 1977. However, it found that appellant had not submitted "contemporaneous medical evidence to determine what diagnosed medical condition was sustained as a result of the motor vehicle accident" and therefore had failed to establish that the motor vehicle accident caused or contributed to his hearing loss condition. The Office also found that, as the case was not accepted for a hearing loss, appellant was not entitled to a schedule award.

On February 19, 2008 appellant requested reconsideration. He asserted his belief that his hearing loss was causally related to the accepted 1977 work injury. Appellant reported that, following the 1977 motor vehicle accident, he was advised by his physician that he would probably sustain some degree of nerve damage and resultant hearing loss in his right ear.

The record reflects that appellant filed an occupational disease claim on November 20, 2007 (File No. xxxxxx912) alleging that he sustained permanent bilateral hearing impairment as a result of nerve damage and 30-years of exposure to fire arms training. He submitted a March 12, 2008 audiogram, bearing an illegible signature.

In connection with appellant's occupational disease claim, the Office directed him to submit to a second opinion examination in order to determine whether his hearing loss was secondary to work-related noise exposure. In a March 5, 2008 report, Dr. Richard L. Barnes, a Board-certified osteopath specializing in otolaryngology, provided a history of injury. He indicated that appellant had sustained a skull fracture as a result of a November 5, 1977 motor vehicle accident. Appellant reported a cerebral spinal leak from his right ear. A review of the medical records reflected that he developed mild sensorineural hearing loss on the right after the temporal bone fracture. Examination revealed patent external auditory canals. Eardrums were intact and drum mobility was normal. Audiogram testing showed a mild-to-moderate right sensorineural hearing loss and mild high frequency left sensorineural hearing loss. Dr. Barnes opined that it was medically probable that the hearing loss was due to appellant's noise exposure during federal employment because the findings were consistent with noise-induced sensorineural hearing loss bilaterally. He noted, however, that there was an asymmetrical sensorineural hearing loss on the right, giving him a moderate hearing loss on the right. Dr. Barnes stated that this finding would be consistent with the temporal lobe fracture, which was sustained during appellant's federal employment.

On April 30, 2008 the Office accepted appellant's occupational disease claim (File No. xxxxxx912) for bilateral high frequency neurosensory hearing loss.

By decision dated June 24, 2008, the Office denied modification of its February 14, 2008 decision. It found that Dr. Barnes' report, which was submitted under a different case, did not provide any medical rationale supported by contemporaneous medical reports of the 1977 work injury and that no medical reports were submitted to establish that the hearing loss was a result of the November 5, 1977 motor vehicle accident. The Office also found that appellant was not entitled to a schedule award, since he had failed to establish that the November 5, 1977 work injury caused or contributed to his hearing loss.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.¹ The phrase "sustained while in the performance of duty" is regarded as the equivalent of the coverage formula commonly found in workers' compensation laws, namely, arising out of and in the course of employment.²

An employee seeking benefits under the Act has the burden of proof 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 specific condition for which compensation is claimed is

¹ 5 U.S.C. § 8102(a).

² This construction makes the statute effective in those situations generally recognized as properly within the scope of workers' compensation law. *Charles E. McAndrews*, 55 ECAB 711 (2004); *see also Bernard D. Blum*, 1 ECAB 1 (1947).

causally related to the employment injury.³ When an employee claims that he sustained a traumatic injury in the performance of duty, he must establish the fact of injury, consisting of two components, which must be considered in conjunction with one another. The first is whether the employee actually experienced the incident that is alleged to have occurred at the time, place and in the manner alleged. The second is whether the employment incident caused a personal injury and generally this can be established only by medical evidence.⁴

The claimant has the burden of establishing by the weight of reliable, probative and substantial evidence that the condition for which compensation is sought is causally related to a specific employment incident or to specific conditions of employment.⁵ An award of compensation may not be based on appellant's belief of causal relationship.⁶ Neither the mere fact 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 a causal relationship.⁷ Simple exposure to a workplace hazard does not constitute a work-related injury entitling an employee to medical treatment under the Act.⁸

Causal relationship is a medical issue, and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on whether there is a causal relationship between the claimant's diagnosed condition and the established incident or factor of employment. The opinion 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 established incident or factor of employment.⁹

ANALYSIS -- ISSUE 1

The Office accepted that appellant was a federal employee, that he timely filed his claim for compensation benefits and that the November 5, 1977 motor vehicle accident occurred as alleged in the performance of duty. The issue, therefore, is whether appellant has submitted sufficient medical evidence to establish that the employment incident caused an injury. The Board finds that this case is not in posture for decision regarding whether appellant sustained an injury in the performance of duty.

³ *Robert Broome*, 55 ECAB 339 (2004).

⁴ *Deborah L. Beatty*, 54 ECAB 340 (2003). See also *Tracey P. Spillane*, 54 ECAB 608 (2003); *Betty J. Smith*, 54 ECAB 174 (2002). The term "injury," as defined by the Act, refers to a disease proximately caused by the employment. 5 U.S.C. § 8101(5). See 20 C.F.R. §§ 10.5(q) and (ee), which defines occupational disease and traumatic injury, respectively.

⁵ *Katherine J. Friday*, 47 ECAB 591, 594 (1996).

⁶ *Dennis M. Mascarenas*, 49 ECAB 215, 218 (1997).

⁷ *Id.*

⁸ 20 C.F.R. § 10.303(a).

⁹ *John W. Montoya*, 54 ECAB 306 (2003).

An employee who claims benefits under the Act has the burden of establishing the essential elements of his claim. The claimant has the burden of establishing by the weight of reliable, probative and substantial evidence that the condition for which compensation is sought is causally related to a specific employment incident or to specific conditions of the employment. As part of this burden, the claimant must present rationalized medical opinion evidence, based upon a complete and accurate factual and medical background, establishing causal relationship.¹⁰ However, it is well established that proceedings under the Act are not adversarial in nature and, while the claimant has the burden of establishing entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.¹¹

The Office accepted that the November 5, 1977 accident occurred as alleged, but found that there was no medical evidence establishing that the accepted incident caused or contributed to his hearing loss. The Board finds, however, that the medical evidence of record supports that appellant sustained a work-related injury on November 5, 1977.

In a second opinion examination requested by the Office in conjunction with appellant's occupational disease case, Dr. Barnes diagnosed mild-to-moderate right sensorineural hearing loss and mild high frequency left sensorineural hearing loss. Dr. Barnes noted that appellant had sustained a skull fracture as a result of the November 5, 1977 motor vehicle accident and had experienced a cerebral spinal leak from his right ear. A review of the medical records reflected that appellant developed mild sensorineural hearing loss on the right after the temporal bone fracture. Dr. Barnes opined that it was medically probable that the hearing loss was due to appellant's noise exposure during federal employment, because the findings were consistent with noise-induced sensorineural hearing loss bilaterally. He noted, however, that there was an asymmetrical sensorineural hearing loss on the right, giving him a moderate hearing loss on the right. Dr. Barnes stated that this finding would be consistent with the temporal lobe fracture, which was sustained during appellant's federal employment. While his report does not fully explain how the November 5, 1977 traumatic injury caused or contributed to appellant's hearing loss, it supports his claim and is uncontroverted.

In its June 24, 2008 decision, the Office found that Dr. Barnes' report did not provide any medical rationale supported by contemporaneous medical reports of the 1977 work accident and that no medical reports were submitted to establish that the hearing loss was a result of the accident. However, the Board has held that, once it undertakes development of the record, it has the responsibility to do so in a proper manner.¹² Dr. Barnes' opinion was requested by and relied upon by, the Office in appellant's occupational disease claim, which was accepted for bilateral high frequency neurosensory hearing loss. If it requires clarification or further explanation as to his opinion on the existence of a causal relationship between the 1977 accident and appellant's hearing loss, then it should seek a supplemental report from Dr. Barnes, who examined appellant

¹⁰ See *Virginia Richard, claiming as executrix of the estate of Lionel F. Richard*, 53 ECAB 430 (2002); see also *Brian E. Flescher*, 40 ECAB 532, 536 (1989); *Ronald K. White*, 37 ECAB 176, 178 (1985).

¹¹ *Phillip L. Barnes*, 55 ECAB 426 (2004); see also *Virginia Richard*, *supra* note 10; *Dorothy L. Sidwell*, 36 ECAB 699 (1985); *William J. Cantrell*, 34 ECAB 1233 (1993).

¹² See *Melvin James*, 55 ECAB 406 (2004). See also *Henry G. Flores, Jr.*, 43 ECAB 901 (1992); *Charles J. Jenkins*, 40 ECAB 362 (1988).

and reviewed the entire medical record and statement of accepted facts. The Office's decision denying appellant's traumatic injury claim was based, in part, upon the fact that the record was devoid of contemporaneous medical evidence. However, the Board notes that the dearth of contemporaneous medical evidence was caused by the Office's destruction of the case record in 1984.

The remaining medical evidence of record also supports appellant's claim. He submitted numerous fitness-for-duty reports and audiograms performed by the employing establishment medical personnel from February 2, 1976 to August 15, 2005. Although these reports do not contain a rationalized opinion establishing a causal relationship between appellant's hearing loss and the 1977 motor vehicle accident, they do provide support for and are factually consistent with his claim that he developed a hearing loss in his right ear subsequent to the accepted incident.

The Board notes that, while none of the medical reports of record is completely rationalized, they are all consistent in indicating that he sustained an employment-related hearing loss due to the 1977 motor vehicle accident, and are not contradicted by any medical or factual evidence of record. While the reports are not sufficient to meet his burden of proof to establish his claim, they raise an uncontroverted inference between appellant's claimed condition and the accepted employment incident and are sufficient to require the Office to further develop the medical evidence and the case record.¹³ Therefore, the Board finds that the case must be remanded for further development of the medical evidence. On remand the Office shall obtain a rationalized opinion from a qualified physician as to whether appellant's current condition is causally related to the accepted incident and shall issue an appropriate decision in order to protect his rights of appeal.

In light of its ruling on the first issue, the Board finds that the case is not in posture for a decision on the schedule award issue.

CONCLUSION

The Board finds that this case is not in posture for decision as to whether or not appellant sustained an injury in the performance of duty, or whether he is entitled to a schedule award.

¹³ See *Virginia Richard*, *supra* note 10; see also *Jimmy A. Hammons*, 51 ECAB 219 (1999); *John J. Carlone*, 41 ECAB 354 (1989).

ORDER

IT IS HEREBY ORDERED THAT the June 24 and February 14, 2008 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further development consistent with this decision.

Issued: June 2, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board