



to factors of his federal employment. He did not stop work. OWCP assigned the claim file number xxxxxx660.

The record indicates that appellant had filed a prior claim for hearing loss, assigned file number xxxxxx687. In a decision dated June 26, 1996, issued in file number xxxxxx687, OWCP denied his hearing loss claim after finding that the medical evidence failed to establish that it was causally related to his employment.

On March 6, 2008 OWCP referred appellant to Dr. Craig Hertler, a Board-certified otolaryngologist, for a second opinion examination. In a report dated April 7, 2008, Dr. Hertler reviewed appellant's history of noise exposure at work and history of childhood ear infections, a mastoidectomy of the left ear in 1957, and the placement of a tube in the right eardrum. He noted that the statement of accepted facts (SOAF) did not clearly set forth appellant's work history with the employing establishment. Dr. Hertler diagnosed bilateral mixed conductive and neurosensory hearing loss. He attributed the conductive hearing loss, especially on the left side, to chronic otitis media, and surgery. Dr. Hertler reviewed audiometric testing obtained that date and opined:

“The majority of [appellant's] hearing loss is conductive in character and not related to noise exposure. The sensorineural loss seen is, in my opinion, in part due to noise exposure encountered in this [appellant's] federal civilian employment. I think with the degree of noise that he was exposed to, the duration, and the lack of any hearing protection for literally decades of operating heavy equipment is, on a more probable than not basis, likely to have caused some neurosensory loss.”

Dr. Hertler recommended the continued use of hearing aids bilaterally.

On May 15, 2008 OWCP accepted appellant's claim for bilateral hearing loss.

On September 10, 2008 OWCP requested that an OWCP medical adviser review the current case record and the record from the prior claim for hearing loss, file number xxxxxx687. In a report dated September 15, 2008, the medical adviser concurred with Dr. Hertler that appellant's sensorineural hearing loss was due in part to noise exposure during the course of his federal employment. He recommended authorizing hearing aids.

OWCP prepared an updated SOAF on September 29, 2008. It noted that appellant worked in the employing establishment from 1978 to 2006 as a heavy-duty truck driver, tractor operator, and truck driver foreman. On April 30, 2006 appellant began working as a foreman in an office, with low noise exposure.

The updated SOAF was provided to Dr. Hertler with the additional medical records. OWCP requested that he address whether noise exposure after June 13, 1996 caused any increase in hearing loss on the left side.

In a supplemental report dated October 3, 2008, Dr. Hertler noted that the SOAF indicated that appellant's noise exposure changed when he became a foreman such that he was in an office with little noise exposure. He found that his noise exposure from 1996 to 2006 was

sufficient to cause hearing loss. Dr. Hertler compared an audiogram dated November 13, 1995 to the April 7, 2008 audiogram obtained at the time of his examination. He concluded that the increase in appellant's left hearing loss after the November 13, 1995 audiogram resulted from conductive hearing loss due to chronic otitis media and surgery. Dr. Hertler concluded, "Simply stated [that] there is no worsening of [appellant's] hearing in the left ear at the frequency that would be most susceptible to a noise[-]induced hearing loss between 1995 and 2008. As a result, I do not think noise exposure caused a worsening of his hearing in the left ear subsequent to June 13, 1996."

On December 3, 2008 an OWCP medical adviser indicated that he did not have the audiograms relied upon by Dr. Hertler and thus could not comment on his conclusions.

In an internal memorandum dated December 16, 2008, OWCP noted that appellant had a prior hearing loss claim, file number xxxxxx687, with an injury date of June 11, 1994. It indicated that Dr. Hertler had found that the increase in the hearing loss in appellant's left ear between 1995 and 2008 was unrelated to employment. OWCP advised that it would rescind acceptance of left hearing loss.

On December 16, 2008 OWCP informed an OWCP medical adviser that the case had only been accepted for right hearing loss and asked that he provide an impairment rating for the right ear. In a report dated December 29, 2008, the medical adviser calculated the extent of appellant's impairment due to hearing loss on the right side.

On January 26, 2009 OWCP notified appellant of its proposed rescission of the acceptance of his claim for left hearing loss. It discussed his previous claim for hearing loss under file number xxxxxx687, which had been denied as the medical evidence had not established causal relationship. OWCP determined that the current claim, assigned file number xxxxxx660, was for noise exposure after June 26, 1996. It proposed rescinding appellant's accepted left-sided hearing loss as the medical evidence did not show worsening after 1996 due to noise exposure at work.

By decision dated January 29, 2009, OWCP granted appellant a schedule award for 36 percent permanent impairment for right hearing loss. The period of the award ran for 18.72 weeks from April 7 through August 16, 2008.

On May 23, 2013 an audiologist noted that appellant wanted to get a new pair of hearing aids.

In a letter dated March 26, 2014, OWCP advised a medical provider that appellant's claim was only accepted for right hearing loss.

In a report dated July 28, 2014, Dr. Benjamin D. Herring, who specializes in family medicine, diagnosed hearing loss in the left ear "consistent with a work[-]related hearing impairment." He noted that testing showed multiple ruptures of the tympanic membrane from overpressure bilaterally, but also showed a conductive component.

On February 9, 2015 appellant filed a claim for a schedule award. In response, OWCP provided him with a copy of its January 26, 2009 notice of rescission. It informed appellant that he had 30 days to respond to the proposed rescission.

On March 4, 2015 appellant's counsel asserted that his hearing loss had progressed without new exposure.

By decision dated March 23, 2015, OWCP rescinded acceptance of appellant's claim for left hearing loss. It found that Dr. Hertler's April 7, 2008 report established that the increase in hearing loss in his left ear after June 1996 was not due to noise exposure at work.

On March 30, 2015 appellant, through counsel, requested a telephone hearing. At the telephone hearing, held on September 30, 2015, counsel argued that OWCP had not met its burden of proof to justify rescission.<sup>2</sup>

By decision dated November 13, 2015, an OWCP hearing representative affirmed the March 23, 2015 decision.

### **LEGAL PRECEDENT**

Section 8128 of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or application.<sup>3</sup> The Board has upheld OWCP's authority to set aside or modify a prior decision and issue a new decision under section 8128 of FECA.<sup>4</sup> The power to annul an award, however, is not an arbitrary one and an award for compensation can only be set aside in the manner provided by the compensation statute.<sup>5</sup>

Workers' compensation authorities generally recognize that compensation awards may be corrected, in the discretion of the employing establishment and in conformity with statutory provision, where there is good cause for so doing, such as mistake or fraud.<sup>6</sup> It is well established that, once OWCP accepts the claim, it has the burden of justifying the termination or modification of compensation benefits.<sup>7</sup> Its burden of justifying termination or modification of compensation holds true where it later decides that it has erroneously accepted a claim of

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<sup>2</sup> In reports dated April 16 and June 17, 2014 and October 1, 2015, Dr. Bennett E. Barch, an otolaryngologist, treated appellant for left ear problems. His diagnosis included left otorrhea.

<sup>3</sup> 5 U.S.C. § 8128; *see also M.E.*, 58 ECAB 694 (2007).

<sup>4</sup> *John W. Graves*, 52 ECAB 160 (2000).

<sup>5</sup> *See* 20 C.F.R. § 10.610; *Cary S. Brenner*, 55 ECAB 739 (2004); *Stephen N. Elliott*, 53 ECAB 659 (2002).

<sup>6</sup> *L.C.*, 58 ECAB 493 (2007).

<sup>7</sup> *Andrew Wolfgang-Masters*, 56 ECAB 411 (2005).

compensation. In establishing that its prior acceptance was erroneous, OWCP is required to provide a clear explanation of its rationale for rescission.<sup>8</sup>

### ANALYSIS

On October 31, 2007 appellant filed an occupational disease claim alleging that he sustained bilateral hearing loss causally related to factors of his federal employment. He had a prior claim for hearing loss, assigned file number xxxxxx687. In a decision dated June 26, 1996, issued under file number xxxxxx687, OWCP denied appellant's hearing loss based on its finding that the medical evidence had not established that his hearing loss resulted from noise exposure at work.

In a report dated April 7, 2008, Dr. Hertler, an OWCP referral physician, diagnosed bilateral mixed conductive and neurosensory hearing loss. He attributed appellant's neurosensory hearing loss in part to noise exposure during the course of his federal employment. Dr. Hertler recommended the use of hearing aids. On September 15, 2008 an OWCP medical adviser agreed with Dr. Hertler's finding that appellant sustained sensorineural hearing loss as a result of noise exposure at work.

Based on Dr. Hertler's report, OWCP accepted the claim for bilateral hearing loss. It subsequently determined, however, that the current claim involved only noise exposure after June 1996, the date of the last merit decision denying appellant's prior hearing loss claim. OWCP requested that Dr. Hertler explain whether he sustained any increased hearing loss on the left side after June 1996 due to noise exposure at work. In a supplemental report dated October 3, 2008, Dr. Hertler found that appellant had not experienced any increase in hearing on the left side due to noise exposure after June 13, 1996.

On March 23, 2015 OWCP rescinded appellant's claim for left hearing loss based on Dr. Hertler's finding that the increase in hearing loss after June 13, 1996 was unrelated to noise exposure in the course of his federal employment.

The Board finds that OWCP has not met its burden of proof to rescind acceptance of appellant's claim. OWCP procedures provide for the doubling of a claim when a new injury is reported for an employee who previously filed an injury claim for a similar condition for the same part of the body.<sup>9</sup> While it combined the file numbers for the current claim, file number xxxxxx660, into the prior claim, xxxxxx687, it did not refer file number xxxxxx687 to Dr. Hertler for an opinion on whether noise exposure at work caused or contributed to appellant's hearing loss. Further, OWCP did not obtain an opinion from an OWCP medical adviser subsequent to Dr. Hertler's October 3, 2008 report discussing causation. On December 3, 2008 an OWCP medical adviser indicated that he could not address Dr. Hertler's conclusions in his October 3, 2008 report as he did not have the audiograms relied upon by the physician in reaching his findings. OWCP reopened appellant's claim under file number

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<sup>8</sup> See *Amelia S. Jefferson*, 57 ECAB 183 (2005); *Delphia Y. Jackson*, 55 ECAB 373 (2004).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *File Maintenance & Management*, Chapter 2.400.8(c) (February 2000).

xxxxxx660 and rescinded acceptance based on Dr. Hertler's supplemental opinion, but did not reconsider his doubled claim in its entirety. The Board, consequently, finds that OWCP failed to meet its burden of proof to rescind acceptance of appellant's claim for left hearing loss.

**CONCLUSION**

The Board finds that OWCP did not meet its burden of proof to rescind acceptance of appellant's claim for left hearing loss.

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 13, 2015 decision of the Office of Workers' Compensation Programs is reversed.

Issued: June 28, 2016  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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