

U.S. DEPARTMENT OF LABOR

OFFICE OF WORKERS' COMP PROGRAMS
PO BOX 8300 DISTRICT 50
LONDON, KY 40742-8300
Phone: (202) 693-0045

FEB 16 2010

Date of Injury:
Employee:

This decision supersedes the
decision issued on 01/27/10
which listed an incorrect case
number on the cover letter.

Dear Mr. :

This is in reference to your workers' compensation claim. Pursuant to your request for a hearing, the case file was transferred to the Branch of Hearings and Review.

A hearing was held on 11/19/2009. As a result of such hearing, it has been determined that the decision issued by the district office should be vacated and the case remanded to the district office for further action as explained in the enclosed copy of the Hearing Representative's Decision.

Your case file has been returned to the Jacksonville District Office. You may contact that office by writing to our Central Mail Room at the following address:

US DEPARTMENT OF LABOR
OFFICE OF WORKERS' COMP PROGRAMS
PO BOX 8300 DISTRICT 6 JAC
LONDON, KY 40742-8300

Sincerely,



Karen S. Hunt
Hearing Representative

PAUL H FELSER
FELSER LAW FIRM, P.C.
P O BOX 10267
SAVANNAH, GA 31412

U. S. Department of Labor
Office of Workers' Compensation Programs

DECISION OF THE HEARING REPRESENTATIVE

In the matter of the claim for compensation under Title 5, U S Code 8101 et seq. of _____, claimant, employed by the _____, claim number _____ The hearing was held on November 19, 2009, in Atlanta, Georgia.

The issue is whether the evidence establishes that the claimant has hearing loss caused or contributed to by exposure in his federal employment.

The _____ employed the claimant, _____ born _____, as a _____, for ten months in 1981, and from 1985 through 2005. On _____, the claimant filed a Form CA-2, Notice of Occupational Disease, claiming hearing loss due to exposure to noise in his federal employment. The claimant was last exposed on _____, and he was separated from federal employment on _____.

The claimant identified the sources of hazardous noise and noted that hearing protection was not issued until 1986 or 1987. The employing establishment confirmed that the claimant had been exposed to the alleged sources of hazardous noise and that such exposure at time exceeded 84 dBA. The Office also received copies of audiograms dated October 27, 1982, through August 29, 2005, obtained by the employing establishment. An August 20, 2002, medical report from Dr. _____ indicated that a permanent significant threshold shift had been confirmed.

The Officer referred the claimant, along with pertinent case records and a statement of accepted facts, for evaluation by an otolaryngologist and audiometric testing. The claimant was examined by _____, M.D., on March 24, 2008. The claimant underwent audiological testing on the same date. Dr. _____ provided a report of his examination and testing and indicated the audiometric studies done on August 29, 2005, demonstrated a bilateral hearing loss consistent with the claimant's history as compared with the audiogram of March 24, 2008. Dr. _____ opined that the claimant had bilateral, neurosensory hearing loss consistent with "acoustic trauma and presbycusis." Dr. _____ opined that the claimant had zero percent ratable bilateral hearing impairment using the audiometric findings of August 29, 2005. Dr. _____ indicated the sensory neural hearing loss had developed after the claimant left federal employment and the hearing loss noted on the audiogram of March 24, 2008, was not caused by exposure in the claimant's employment. An Office District Medical Adviser (DMA), _____, M.D., noted that he did not calculate a percentage impairment due to Dr. _____.

opinion that the claimant's bilateral sensorineural hearing loss was not due to exposure in his federal employment.

By decision dated April 29, 2008, the Office denied the claim on causal relationship grounds based on the opinion of Dr. . The claimant disagreed with that decision and he requested a review of the written record. By decision dated September 9, 2008, an Office hearing representative set aside the decision of April 29, 2008, and remanded the case for further development. The hearing representative noted that the statement of accepted facts did not contain necessary information regarding the nature of the accepted exposure, the date of last exposure, and any hearing protection provided in federal or private sector employment. The hearing representative found Dr. opinion of limited probative value as it was based on an inaccurate and incomplete factual and medical history based on the numerous employment audiograms which were not provided to and/or reviewed by Dr. . The hearing representative determined the Office improperly referred Dr. reports to a DMA for opinion on the issue of causal relationship rather than requesting clarification from Dr. . The Office was directed to amend the statement of accepted facts to include: the decibel level of exposure related to the accepted employment noise sources; the date of last exposure; hearing protection provided or lack thereof, in the claimant's federal and prior private sector employment; and, the dates of all audiogram results of record. The Office was to provide Dr. with the amended statement of accepted facts and all employment audiograms (from October 27, 1982, through August 29, 2005) and request that he provide an addendum report with additional opinion as to whether any newly reviewed audiogram demonstrated any hearing loss and whether or not any hearing loss was causally related to the accepted employment exposure of 1981 to 2005. The Office was to issue a *de novo* decision following all appropriate development. The decision of the hearing representative dated September 9, 2008, contains the relevant case history and discussion of evidence and same is incorporated herein by reference.

The Office created an addendum to the statement of accepted facts which was a chart of shop operations provided by the employing establishment. It noted operations in Shop 26A and 26B but did not indicate which exposure specifically applied to the claimant in each of the positions in which he was employed. This chart was apparently appended to the original statement of accepted facts, and the neither included a specific description of the accepted employment exposure accepted by the Office by nature, duration, frequency, and decibel level (the original statement of accepted facts indicated that *the claimant* [emphasis mine] noted he worked eight to ten hours a day in each job using specified tools but did not clearly and specifically state that the Office accepted such exposure and it did not provide any decibel levels or statement regarding the amount of noise). Further, neither the statement of accepted facts or addendum noted the dates of the audiograms of record for the period October 27, 1982, through August 29, 2005. The Office asked Dr. to provide "an additional opinion as to whether or not the newly reviewed audiogram demonstrates any hearing loss? And please advise whether or not such loss is causally related to the employment exposure between 1981 and 2005." Dr. was not asked to provide medical reasoning in support of his supplemental opinion.

Dr. [redacted] provided an undated addendum report which was received in the Office on November 12, 2008, which stated, in its entirety:

“The hearing loss, neurosensory, noted on the audiogram dated March 24, 2008 is not felt to be related to his employment between 1981 and 2005. At the end of his employment in August 2005, he had essentially normal hearing in the speech frequencies; he did manifest early hearing loss in the higher frequencies (4,000 Hertz) in a pattern consistent with acoustic trauma; the amount of hearing loss in 2005 was minimal as noted by the disability calculation of zero ”

By decision dated November 21, 2008, the Office again denied the claim on causal relationship grounds based on Dr. [redacted] opinion.

The claimant disagreed with the Office decision and by letter postmarked December 5, 2008, his attorney, Paul Felser, requested an oral hearing.

The hearing was held on November 19, 2009, in Atlanta, Georgia. Mr. Felser appeared on the claimant's behalf.

I noted that the hearing was actually on claim 06-2200493 and not under claim number 06-2170976 under which the hearing was assigned in the Office system. Mr. Felser argued regarding the reasons the Office decision was in error. He noted that Dr. [redacted] did not indicate he reviewed all relevant information and that Dr. [redacted] report was internally inconsistent in some regards.

Subsequent to the hearing Mr. Felser submitted a letter repeating and detailing his arguments along with documentation, most of which was previously of record. The new documentation included a report of audiometric testing of November 17, 2009.

I have reviewed the evidence and testimony of record and I find that the case is not in posture for a decision regarding the issue causal relationship.

An employee seeking benefits under the FECA 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 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 and/or specific condition for which compensation is claimed are causally related to the employment injury.¹

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; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical

¹ Elaine Pendleton, 40 ECAB 1143.

evidence establishing that 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. The medical evidence required to establish a causal relationship, generally, is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based upon 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.²

Medical opinions which are based on an incomplete or inaccurate factual background are entitled to little probative value in establishing a claim for compensation benefits³

The undated addendum to the March 4, 2008, statement of accepted facts consists of a chart provided by the employing establishment regarding exposure in Shops 26A and 26B. The statement of accepted facts notes the duration and frequency of tools which the claimant stated he used but does not make findings that such specific exposure is accepted as factual. Neither the statement of accepted facts nor this addendum described the specific employment exposure accepted by the Office by nature, duration, and frequency. Further, neither the statement of accepted facts nor the addendum noted the dates of the employment audiograms which should have been provided to the second opinion specialist. The Office's query to Dr. _____ for supplemental opinion referenced only a "newly reviewed audiogram" in the singular. There are of record 21 such audiograms of record from October 27, 1982, to August 29, 2005. It is not clear that the Office provided these to Dr. _____ or that he reviewed them in formulating his opinion. Dr. _____ did not compare the current audiometric findings to those at the beginning of the claimant's exposure, i.e., from the employment audiograms beginning in _____. There is not indication that Dr. _____ considered the employment audiograms which began when the claimant again began working for the employment establishment in 1982 or those performed at approximately yearly intervals following _____. Dr. _____ does not explain why the claimant's bilateral neurosensory hearing loss appears to have developed after 2005 when the employing establishment documented earlier hearing loss and a significant threshold shift in July, 2002. Dr. _____ indicated the employment related noise exposure was competent to have caused the claimant's hearing loss and opined the claimant's hearing loss was "consistent with acoustic trauma and presbycusis" although he concluded the claimant's hearing loss was not employment related. Dr. _____ did not explain the nature of the non-employment related "acoustic trauma" which contributed to the claimant's hearing loss. Dr. _____ supplemental report was also insufficiently rationalized and not based upon a complete and accurate factual and medical background.

² *Victor J. Woodhams*, 41 ECAB 345.

³ *Daniel J. Overfield*, 42 ECAB ____ (Docket No. 91-0321, issued June 25, 1991)

Dr. opinion is therefore not competent to constitute the weight of the medical evidence.

On remand, the Office should prepare a complete and accurate amended statement of accepted facts which clearly sets forth the information required by the Office's procedures and which includes a detailed description of the claimant's employment-related noise exposure (within as much specificity as possible regarding the decibel level of exposure related to the employment noise sources), the date of last exposure, comment regarding hearing protection provided or lack thereof, in the claimant's federal and prior private sector employment; and, the dates of all audiogram results of record, including the dates of the 21 employment audiograms from October 27, 1982, to August 29, 2005. The Office should then refer the claimant for a new second opinion evaluation and audiological testing by a Board-certified otolaryngologist pursuant to prescribed procedures. After any additional development deemed necessary, the Office should issue a new decision regarding the claimant's entitlement to benefits under the Act

Accordingly, the decision of the Office dated November 21, 2008, is hereby set aside and the case record is returned to the district office for actions as outlined above

DATED: **FEB 16 2010**

WASHINGTON, D.C.



KAREN S. HUNT
Hearing Representative
For
Director, Office of Workers'
Compensation Programs