

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

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M.S., Appellant )

and )

DEPARTMENT OF HOMELAND SECURITY, )  
CUSTOMS & BORDER PROTECTION, )  
New York, NY, Employer )

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**Docket No. 07-1465  
Issued: November 20, 2007**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On May 7, 2007 appellant filed a timely appeal from the March 7, 2007 decision of the Office of Workers' Compensation Programs denying modification of a schedule award for hearing loss. 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 established that he has increased hearing loss causally related to the accepted factors of his federal employment.

**FACTUAL HISTORY**

On May 14, 1980 appellant, then a 36-year-old retired special agent, filed a claim for binaural hearing loss arising out of his exposure to firearm noise from 1970 to 1976 in the performance of duty. His claim was accepted and, on January 7, 1986, the Office issued a schedule award for 47 percent binaural hearing loss. On June 15, 1989 appellant was awarded

additional compensation for a 1 percent binaural hearing loss, bringing his compensated hearing loss to 48 percent.

On August 23, 2004 appellant requested an increased schedule award.<sup>1</sup> On September 28, 2004 the Office informed him that his claim could not be evaluated without current medical evidence.

On October 19, 2004 Dr. Dan Moskowitz, a Board-certified otolaryngologist, stated that appellant had a history of exposure to firearms in the course of his federal duties. He reported that appellant had complained of hearing loss over many years and had bilateral tinnitus. Dr. Moskowitz stated that his examination revealed some cerumen impactions bilaterally and confirmed severe bilateral sensorineural hearing loss with marked discrimination changes. He recommended hearing aids. On November 27, 2004 Dr. Moskowitz stated that appellant's hearing loss and tinnitus appeared to be correlated to his exposure to firearm noise in his federal employment. He stated that audiometric tests performed on October 19, 2004 revealed severe profound hearing loss beyond the 48 percent for which he had previously been compensated. Appellant denied any history of noise exposure after leaving federal employment.

The Office provided the Office medical adviser, Dr. Ira Rothfeld, a Board-certified otolaryngologist, with Dr. Moskowitz's reports and audiometric tests. On March 2, 2005 Dr. Rothfeld stated that he agreed that appellant's hearing had deteriorated, but questioned the reliability of the October 19, 2004 audiogram, which showed a difference of more than 12 decibels between the pure tone and speech recognition scores. Dr. Rothfeld concurred with an audiologist who had reviewed appellant's case 14 years previously, who stated that noise-induced hearing loss will not progress in the absence of further acoustic trauma. He stated that appellant's increased hearing loss was likely the result of presbycusis, an aging process affecting the auditory nerves. Dr. Rothfeld noted that Dr. Moskowitz offered no etiology for appellant's increased hearing loss and opined that there was no causal relationship between the factors of appellant's federal employment and the subsequent deterioration of his hearing. He stated that there was therefore no need to calculate hearing loss percentage.

By decision dated March 15, 2005, the Office denied appellant's request for an increased schedule award based on Dr. Rothfeld's opinion.

On March 26, 2005 appellant requested an oral hearing. On June 22, 2005 the Office hearing representative found that the case was not in posture for a hearing and vacated the March 15, 2005 decision. He found that the Office should have referred appellant for a second opinion because the recent audiograms revealed increased hearing loss.

The Office referred appellant to Dr. Michael Scherl, a Board-certified otolaryngologist, for a second opinion examination. On November 11, 2005 Dr. Scherl conducted a review of appellant's medical history, in which he noted that appellant's 1981 audiometric testing provided reliable evidence of mild sensorineural hearing loss in the low and mid frequency ranges and severe loss in the high frequency ranges. He stated, however, that audiometric testing from 1983 and 1985, which revealed significant progression in hearing loss, might not be accurate because

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<sup>1</sup> Appellant submitted a claim for compensation, Form CA-7, on December 17, 2004.

there were inconsistencies between pure tone and speech reception thresholds. A 1988 audiometric test showed moderate sensorineural loss up to 2,000 cycles and severe loss above 2,000 cycles. Dr. Scherl stated that the audiometric examination performed in his office showed severe bilateral sensorineural hearing loss, especially above 2,000 cycles. He found that appellant's speech discrimination and reception threshold were better than expected based on his degree of hearing loss and his pure tone testing averages. Dr. Scherl noted that acoustic reflexes were present in appellant's right ear at 500, 1,000 and 2,000 cycles and in his left ear at 500 and 1,000 cycles. He stated that otoacoustic emission testing demonstrated near-normal hearing in the left ear and some loss in the right ear.

Dr. Scherl opined that appellant had significant hearing loss, but that his tests were not completely accurate and his cooperation was suspect. He noted that the presence of reflexes was inconsistent with his hearing levels, as were his pure tone, speech reception threshold, and speech discrimination scores. Dr. Scherl noted that the near-normal otoacoustic emission testing called into question the accuracy and etiology of appellant's high frequency hearing loss, as the findings would be expected to be much worse for hearing loss caused by noise exposure. He stated that appellant's hearing loss findings were more consistent with neurological loss rather than noise exposure loss and opined that the progression of appellant's hearing loss was unrelated to noise exposure during his federal employment. Dr. Scherl also opined that appellant's hearing thresholds were significantly better than the tests indicated.

On December 20, 2005 the Office sought clarification of his opinion. In a report dated January 19, 2006 Dr. Scherl stated that appellant's hearing loss progression was only partly related to noise exposure, which did not play a major role in the continued hearing deterioration.

On April 12, 2006 the Office provided Dr. Scherl's report to Dr. Rothfeld, the Office medical adviser. On May 6, 2006 Dr. Rothfeld concurred with Dr. Scherl's opinion that appellant's hearing loss progression was not related to acoustic trauma from appellant's federal employment. He stated that the currently accepted scientific studies indicated that there was no further deterioration of the acoustic nerve or its components following cessation of exposure to acoustic trauma. Dr. Rothfeld found that the progression of appellant's hearing loss in the prior 30 years was related to presbycusis, with some possible psychological overlay to account for the inconsistencies in the recent audiograms.

By decision dated June 8, 2006, the Office denied modification of appellant's schedule award on the basis of the medical opinions of Dr. Scherl and Dr. Rothfeld. On June 28, 2006 appellant requested an oral hearing.

By decision dated November 13, 2006, the Office hearing representative vacated the June 8, 2006 decision and remanded the case for further development. He found that Dr. Scherl provided an inconsistent opinion as to whether the progression of appellant's hearing loss was caused in any part by the accepted employment factors.

On November 29, 2006 the Office requested that Dr. Scherl clarify his medical opinion. In a report dated December 29, 2006, Dr. Scherl stated that appellant's significant hearing loss since 1988 was related to multiple factors, the vast majority of which were related to genetics and aging. He stated, however, that it was not unusual for people with severe and prolonged

exposure to noise to experience continued deterioration years afterwards. Dr. Scherl stated that it was conceivable that a very small amount of appellant's hearing loss progression was related to his prior noise exposure because dramatic noise exposure can be the cause of mild progression in hearing loss that would not have otherwise occurred, even years later.

On January 8, 2007 the Office provided Dr. Scherl's opinions and selections from appellant's medical history to a new Office medical adviser, Dr. Morley Slutsky, a Board-certified occupational medical specialist. On February 8, 2007 Dr. Slutsky stated that the majority of medical science did not support Dr. Scherl's finding that a small part of appellant's hearing loss progression could be related to his prior noise exposure. He opined that, because appellant's federally-induced hearing loss would stop at the same time as his noise exposure, the progression of appellant's hearing loss from 1977 was not due to his federal employment. Dr. Slutsky stated that he was unable to provide a diagnosis or functional hearing loss measurement because he did not have any historical audiograms or an accurate current audiogram.

On February 16, 2007 the Office provided Dr. Slutsky with appellant's entire case file. On February 22, 2007 Dr. Slutsky supplemented his report based on audiometric examinations from the 1970s and 1980s. He agreed that the diagnosis of noise-induced, high frequency employment-related hearing loss had been established. To determine appellant's permanent functional loss of hearing and the date of maximum medical improvement, Dr. Slutsky used an audiogram conducted on December 31, 1979 because it had good reliability and was the closest to appellant's last exposure to the acoustic trauma. He noted that he could not confirm whether the 1979 test was performed in accordance with the applicable sound and equipment, but he would presume that they had been performed to the clinical standards of the time. According to the 1979 audiometric test, appellant had no ratable hearing loss. Dr. Slutsky stated that later audiometric tests revealed significant changes in appellant's low frequency hearing, but that these changes were not related to appellant's federal employment.

By decision dated March 7, 2007, the Office denied appellant's claim for increased schedule award. The Office found that, as Dr. Scherl did not provide an exact rating for appellant's increased hearing loss and the Office medical adviser found that the change was unratable, the medical evidence did not establish that any basis for an additional schedule award.

### **LEGAL PRECEDENT**

A claimant under the Federal Employees' Compensation Act<sup>2</sup> may seek an increased schedule award if the evidence establishes that he or she sustained an increased impairment at a later date causally related to an employment injury. A claim for an increased schedule award may be based on new exposure or on medical evidence indicating the progression of an employment-related condition, without new exposure to employment factors, has resulted in greater impairment than previously calculated.<sup>3</sup> The Board has long recognized that, if a

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<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> *Rose V. Ford*, 55 ECAB 449 (2004).

claimant's employment-related hearing loss worsens in the future, the claimant may apply for an additional schedule award for any increased permanent impairment.<sup>4</sup>

Once the Office starts to procure a medical opinion, it must do a complete job. The Office has the responsibility to obtain from its referral physician an evaluation that will resolve the issue involved in the case.<sup>5</sup>

### ANALYSIS

The Board finds that this case is not in posture for a decision because the second opinion physician did not resolve the issues related to the cause and extent of appellant's increased hearing loss.

Dr. Scherl, a Board-certified otolaryngologist, stated that the audiometric examination performed in his office on November 11, 2005 showed severe bilateral sensorineural hearing loss, especially above 2,000 cycles. He found, however, that appellant's speech discrimination and reception thresholds were better than expected based on his degree of hearing loss and his pure tone testing averages, which indicated poor testing reliability. Dr. Scherl noted that several of appellant's previous audiometric tests also had poor reliability. He found that acoustic reflexes were present in both ears and that otoacoustic emission testing demonstrated near-normal hearing in the left ear and some loss in the right ear. Based on these findings, Dr. Scherl opined that appellant had significant hearing loss, but that the amount of the loss was unclear because of appellant's suspect cooperation and the unreliability of the test results. Dr. Scherl stated that the near-normal otoacoustic emission testing called into question the accuracy and etiology of appellant's high frequency hearing loss, because the findings would be expected to be much worse for hearing loss caused by noise exposure. He opined that appellant's hearing thresholds were significantly better than the tests indicated. Dr. Scherl stated that appellant's hearing loss findings were more consistent with neurological loss rather than noise exposure loss and that noise exposure did not play a major role in the continued hearing deterioration. When asked to clarify his opinion, he stated that the vast majority of appellant's hearing loss was due to genetics and aging, but that it was conceivable that a very small amount of the hearing loss progression was related to prior noise exposure. Dr. Scherl explained that dramatic noise exposure can cause mild progression in hearing loss years afterwards.

The Board finds that Dr. Scherl's opinion does not carry the weight of the medical evidence in this case because it is speculative as to whether any portion of appellant's increased hearing loss was caused by his federal noise exposure.<sup>6</sup> While the medical opinion of a physician supporting causal relationship does not have to reduce the cause or etiology of a

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<sup>4</sup> *Robert E. Cullison*, 55 ECAB 570 (2004).

<sup>5</sup> *Richard F. Williams*, 55 ECAB 343 (2004).

<sup>6</sup> The Board has held that if the evidence supports that an underlying condition was aggravated, precipitated, accelerated, the resultant disability is compensable regardless of the precise quantum or portion directly related to the federal employment. See *Henry Klaus*, 9 ECAB 333 (1957).

disease or condition to an absolute certainty, neither can such opinion be speculative or equivocal.<sup>7</sup>

The Board also finds that the Office improperly determined that Dr. Scherl's reports provided an accurate assessment of appellant's hearing impairment. Dr. Scherl stated that the reliability of several audiometric tests, including that of November 11, 2005, was poor, that appellant's cooperation was suspect, and that appellant probably had greater hearing thresholds than the tests indicated. However, the Office did not refer appellant for additional audiometric testing to address Dr. Scherl's concerns. The Board has held that when the reliability of audiometric tests is poor, the Office should instruct the referral physician to perform appropriate tests to determine the reason for testing inconsistency.<sup>8</sup> Because Dr. Scherl could not ascertain the accuracy of appellant's hearing impairment, his report cannot be used as the basis of a schedule award determination.

### CONCLUSION

The Board finds that this case is not in posture for a decision. The Office's second opinion physician has not yet resolved the issue of causation and has not determined appellant's current impairment level. On remand, the Office should refer appellant to a second opinion physician for further audiometric examination and an opinion on causal relationship.<sup>9</sup> Following this and such further development as the Office deems necessary, an appropriate decision should be issued.

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<sup>7</sup> *Ellen L. Noble*, 55 ECAB 530 (2004).

<sup>8</sup> *See Charles A. McNeely*, 40 ECAB 484 (1989).

<sup>9</sup> 5 U.S.C. § 8123(d) provides in pertinent part: "If an employee refuses to submit to or obstructs an examination, his right to compensation under this subchapter is suspended until the refusal or obstruction stops." *See also* 20 C.F.R. § 10.323.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated March 7, 2007 is set aside and remanded for action consistent with this decision.

Issued: November 20, 2007  
Washington, DC

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

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

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