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

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| **DOUGLAS FLEMING, Appellant** | ) | |
| **and** | ) | **Docket No. 04-329** |
| | ) | **Issued: November 2, 2004** |
| **DEPARTMENT OF LABOR, MINE SAFETY & HEALTH ADMINISTRATION, Pikeville, KY, Employer** | ) | |

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

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

### ***JURISDICTION***

On November 19, 2003 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated November 5, 2003 which denied that his additional hearing loss was sustained in the performance of duty. Under 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 has established entitlement to a schedule award based on an additional period of noise exposure in his federal employment.

### ***FACTUAL HISTORY***

Appellant, a mine safety special investigator, worked for the employing establishment from 1971 until 1985 and was thereafter off duty due to a back injury until July 22, 1996, when he returned to work. He noted that he became aware of his binaural hearing loss on March 2, 1982 when he filed his original occupational disease claim.

On December 14, 1992 the Office granted appellant a schedule award for a 10 percent binaural loss of hearing, for the period October 14, 1992 to March 2, 1993, for 20 weeks of compensation.[1] This schedule award covered appellant's occupationally-related hearing loss for exposure from 1971 though 1985.

On January 28, 2002 appellant, then 58 years old, filed another Form CA-2 claim for occupational disease, alleging that he sustained an additional loss of hearing causally related to hazardous noise exposure at work during the period July 22, 1996 to January 3, 2003.[2] Appellant claimed that he was exposed to noise at various surface and underground mining operations including surface areas or underground mines and preparation plants.

The employing establishment advised the Office that when appellant returned to work, he performed his duties in an office setting and performed no inspections or investigations in the mines, but rather interviewed workers about accidents in the mine office. The employing establishment advised that his exposure to mines and equipment would only be to the extent of parking his car and going into the mine office.

By letter dated July 9, 2003, the Office requested that appellant submit further information about his claim including information on his noise exposures, his work history, his history of claims for hearing loss, previous hearing problems, any noisy hobbies, medical treatment and previous audiograms. A similar letter was sent to appellant's employing establishment.

In response appellant provided the results of audiometric testing dated June 26, 2001 and September 23, 2002. The June 26, 2001 audiogram showed the following decibel threshold levels at the hearing frequencies of 500, 1,000, 2,000 and 3,000 cycles per second (cps): 15, 20, 50 and 70 on the right and 35, 30, 50 and 60 on the left, respectively. The September 23, 2002 audiometric testing results showed the following decibel threshold levels at the hearing frequencies of 500, 1,000, 2,000 and 3,000 cps: 15, 25, 55 and 75 on the right and 35, 45, 55 and 60 on the left, respectively.

These results were obtained in conjunction with the employing establishment's Hearing Conservation Program with the indices of trustworthiness sufficient for them to constitute new standard threshold shift baselines under the program for their respective years.[3]

Appellant also submitted a July 13, 2001 letter from Dr. D. Kevin Blackwell, an osteopathic physician specializing in family practice, which noted that under the employing

[1] File No. 11-0119518.

[2] Appellant identified the cause of his hearing loss as exposure to mining equipment and ventilation fans.

[3] Under the Hearing Conservation Program guidelines applicable to both federal and military employees, when an employee demonstrates a significant threshold shift of 10 decibels at any threshold level in an annual screening audiogram which persists through a series of follow-up audiograms performed under the auspices of the program, a new baseline audiogram is obtained that incorporates the persistent threshold shift, from which to measure change in subsequent annual screening audiograms. In appellant's case a new baseline audiogram was obtained for each year, 2001 and 2002, due to permanent annual threshold shifting. *See* 29 C.F.R. § 1910.95 (July 1, 2003) pp. 212-24.

establishment Hearing Conservation Program monitoring appellant had significant hearing loss in all frequencies and he recommended that he wear hearing protection and a hearing augmentation device. Dr. Blackwell did not identify a present worsening after 1996 of appellant's hearing loss, when compared with his earlier 1971-1985 audiograms or relate any additional hearing loss after 1996 to hazardous noise exposure after 1996, or to his pre-1996 hazardous noise exposure.

Appellant retired on January 3, 2003.

The employing establishment submitted a copy of appellant's position description. It did not include identification of any hazardous noise exposure.

On October 1, 2003 the Office prepared a statement of accepted facts which noted that appellant had a previously accepted claim for 10 percent bilateral hearing loss from 1971 through 1985 and it listed his recent exposures in and around mining sites, which, as of that date, were varied from one to two hours per day for an average of two days per week.

On October 10, 2003 an Office medical adviser recommended that the intervening audiograms be obtained for comparison for as thorough a data base as possible.

In a letter dated October 17, 2003, the Office again requested that appellant submit information about his previous health problems, hobbies which involved noise exposure, his employment history, his activities since 1985 and what safety devices were in use. Appellant was given 15 days to comply, however, nothing further was received.

By decision dated November 5, 2003, the Office denied appellant's claim finding that he had not met his burden of proof to establish that he sustained an injury in the performance of duty. The Office explained that as appellant did not submit a factual statement as requested, the evidence of record was insufficient to establish that his hearing loss was caused by his employment factors, especially since his exposure to noise was minimal following his return to work on July 22, 1996.

## ***LEGAL PRECEDENT***

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;[4] (2) a factual statement identifying the employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition;[5] and (3) medical 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.[6] The medical

[4] *See Ronald K. White*, 37 ECAB 176, 178 (1985).

[5] *See Walter D. Morehead*, 31 ECAB 188, 194 (1979).

[6] *See generally Lloyd C. Wiggs*, 32 ECAB 1023, 1029 (1981).

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

The mere fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two. Neither the fact that the disease became apparent during a period of employment, nor the belief of appellant that the condition was caused or aggravated by employment conditions is sufficient to establish causal relation.[7]

The Board has long recognized that if a claimant's employment-related hearing loss worsens in the future, he or she may apply for an additional schedule award for any increased permanent impairment. Furthermore, in hearing loss claims, a claim for an additional schedule award based on an additional period of exposure constitutes a new claim. The Board has also recognized that a claimant may be entitled to an award for an increased hearing loss, even after exposure to hazardous noise has ceased, if causal relationship is supported by the medical evidence of record. In this latter instance, the request for an increased schedule award is not deemed as a new claim.[8]

According to Office procedures, when a schedule award is paid before exposure terminates, no additional award will be paid for periods of less than one year from the beginning date of the last award or the date of the last exposure, whichever comes first. In hearing loss cases, in accordance with the Office procedure manual, Part 2 -- Chapter 2.808.7(a)(3)(A) and (B),[9] a claim for an additional schedule award will be based on an additional period of exposure. This constitutes a new claim and should be handled as such.[10] Thus, if a claimant requests review of a hearing loss schedule award, he or she must be asked to clarify whether the request is for review of the award or for additional compensation subsequent to the prior award. If the claimant is requesting additional compensation, the Office will inform the claimant that a new claim should be filed one year after the beginning of the last award or the date of last exposure, whichever occurs first.[11]

## ***ANALYSIS***

In this case, appellant noted that he had previously sustained an employment-related hearing loss causally related to his federal employment. He received a schedule award for a 10 percent permanent impairment due to hearing loss for the period October 14, 1992 to

[7] *See generally Charles E. Evans*, 48 ECAB 692 (1997); *Patrick H. Hall*, 48 ECAB 514 (1997).

[8] *Paul Fierstein*, 51 ECAB 381, 385 (2000).

[9] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.7(a)(3) (A) and (B) (August 2002).

[10] *See Stacey L. Walker*, 48 ECAB 353 (1997); *Henry Ross, Jr.*, 39 ECAB 373 (1988) and cases cited therein.

[11] *Id.*

March 2, 1993. Appellant stopped work due to a back injury and was supposedly away from a noisy environment from 1985 until July 22, 1996, when he returned to work as a safety specialist in a sedentary position until his retirement on January 3, 2003.

The Board notes that, appellant did not submit evidence of further hazardous noise exposure from 1996 until 2003, only recent audiometric testing results. These testing results allegedly demonstrated a greater loss of hearing than that previously determined. However, appellant did not provide any detailed information on his employment activities from 1985 until 1996 or data identifying any noise exposure during this period or information regarding his noise exposure during the period July 22, 1996 until he retired on January 3, 2003. The audiometric test results did not address any worsening on or after 1996 of appellant's hearing loss. The employing establishment noted that when appellant returned to work in July 1996, he performed his duties in an office setting and did not perform inspections or investigations in the mines themselves.

The new audiometric results submitted do not support any exposure to significant ongoing or continued hazardous noise exposure from 1996 until January 3, 2003. They do not establish a worsening of appellant's binaural loss of hearing, for which he had received a 10 percent schedule award. The Board finds that appellant failed to provide any factual evidence identifying the hazardous noise exposure, to which he attributed his worsening hearing from 1985 until 1996, or from 1996 until 2003.

The Board finds that there is no evidence of any new exposure to hazardous noise which caused an additional hearing loss, or a worsening of his hearing loss, due to his previously accepted exposure.

The Board finds that appellant has not met his burden of proof to establish entitlement to a schedule award based on an additional period of noise exposure in his federal employment.

## ***CONCLUSION***

Appellant has failed to meet his burden of proof to establish entitlement to a schedule award based on an additional period of noise exposure in his federal employment.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated November 5, 2003 is affirmed.

Issued: November 2, 2004
Washington, DC

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member