

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

A.S., Appellant

and

**DEPARTMENT OF HOMELAND SECURITY,
TSA-FEDERAL AIR MARSHAL SERVICE,
Egg Harbor, NJ, Employer**

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**Docket No. 12-1509
Issued: March 5, 2013**

Appearances:

*Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 3, 2012 appellant, through his attorney, filed a timely appeal of a February 22, 2012 Office of Workers' Compensation Programs' (OWCP) merit decision terminating his benefits. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUE

The issue is OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits.

On appeal, counsel argued that Dr. Alan A. Miller, the impartial medical specialist and a Board-certified otolaryngologist, did not find that appellant could return to his date-of-injury position without restriction.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On May 2, 2005 appellant, then a 34-year-old air marshal, filed a traumatic injury claim alleging a loss of hearing while flying in the performance of duty on April 28, 2005.

Dr. Paul B. Swanson, a Board-certified otolaryngologist, completed a report on March 24, 2006. After reviewing emergency room records, he diagnosed middle ear effusion as a result of flying and barotrauma. Dr. Swanson stated that appellant had eustachian tube dysfunction, as an underlying condition, which predisposed him to developing the middle ear effusion. He concluded that appellant's middle ear effusion associated with barotrauma was due to flying and a work-related condition.

By decision dated June 1, 2006, OWCP accepted appellant's claim for barotrauma and aggravations of eustachian tube dysfunction, barotitis and barotalgia due to his federal employment.

Dr. Thomas Willcox, a Board-certified otolaryngologist of professorial rank, completed a report on June 16, 2006. Appellant could not perform his usual duties as he could not fly. Dr. Willcox diagnosed eustachian tube dysfunction. He found that appellant had recovered from the barotrauma. Dr. Willcox stated, "However, in [appellant's] present condition I cannot release him to return to air travel because of his propensity towards barotrauma because of the underlying eustachian tube dysfunction." Appellant elected not to have tubes surgically placed in his ears.

Appellant filed a notice of recurrence of disability on July 30, 2007. He stated that following his April 28, 2005 employment injury, he was unable to fly on a regular basis. Appellant stopped work on August 4, 2007 and noted that the employing establishment was unwilling to accommodate his work-related injury. OWCP accepted his claimed recurrence of disability on August 7, 2007.

OWCP referred appellant for vocational rehabilitation services on August 8, 2007. In a report dated September 11, 2007, Dr. Willcox stated that appellant was allowed to fly on commercial aircraft as long as he either used Afrin Nasal Spray or Sudafed and used EarPlanes ear plugs or had tubes placed in his ears. Appellant returned to work on November 30, 2008 as a police officer for the University of Pennsylvania. His salary was \$40,000.00. On March 30, 2009 appellant took a job as a security officer with the Delaware Court System earning \$26,654.00 a year.

By decision dated July 22, 2009, OWCP reduced appellant's wage-loss benefits based on his earnings as a security officer with wages of \$544.62 a week. It found his earnings in the position fairly and reasonably represented his wage-earning capacity. OWCP revised appellant's wage-earning capacity determination on April 9, 2010 recalculating his earnings and wage-earning capacity effective April 9, 2010.

In a note dated July 28, 2010, Dr. Willcox stated that appellant had clear mobile tympanic membranes bilaterally. He diagnosed a history of barotrauma and eustachian tube dysfunction. Dr. Willcox stated that appellant's condition was stable.

On October 14, 2010 Dr. William M. Sheppard, a Board-certified otolaryngologist and OWCP second opinion physician, reviewed appellant's medical history. On physical examination, he found normal tympanic membranes. Dr. Sheppard diagnosed transient eustachian tube dysfunction. He stated, "I believe that [appellant] is okay to fly. Should he have significant problems, myringotomy tubes are always an option. There are no limitations upon any work whatsoever." Dr. Sheppard reported appellant's statement that the number of flights made by air marshals had significantly decreased from when he was making five flights a day. He concluded that appellant did not have any current work-related injury residual.

OWCP requested that Dr. Willcox review Dr. Sheppard's conclusions on January 6, 2011. Dr. Willcox replied on January 18, 2011 that appellant did not have any residuals from the work injury.

On February 23, 2011 OWCP proposed to terminate appellant's wage-loss compensation and medical benefits on the grounds that he had no residuals or disability for work due to his accepted employment injury.

On March 8, 2011 counsel noted that Dr. Sheppard mentioned that the number of flights made by air marshals had decreased significantly. He concluded that, based on Dr. Sheppard's report, appellant could not fly five times a day as he was at the time of his injury, but at most appellant could return to work with restrictions.

On March 22, 2011 Dr. Willcox noted appellant's history of eustachian tube dysfunction and flying between 200 and 250 flights yearly. He described appellant's barotrauma on April 28, 2005 and stated that since appellant had discontinued flying for the employing establishment he was asymptomatic. Dr. Willcox opined that appellant was not fit to return to work in his date-of-injury position due to his eustachian tube dysfunction. He explained the results of eustachian tube dysfunction and stated that appellant was at risk of developing barotrauma which could result in tympanic membrane rupture, hemotympanum, ossicular injury and inner ear injury resulting in permanent hearing loss, vertigo and chronic unsteadiness. Dr. Willcox stated that, if appellant were to return to his former position, he would be at risk for recurrence of barotrauma with the possibility of permanent, even disabling injury.

On March 23, 2011 Dr. Willcox found that appellant had mild-to-moderate right sensorineural hearing loss and moderate-to-moderately severe downsloping left mixed hearing loss. He stated that the etiology of the hearing loss was unclear, noting that while this loss may be related to the history of barotrauma there was no clear evidence of causation.

OWCP referred appellant to Dr. Miller for an impartial medical examination. In a report dated August 11, 2011, Dr. Miller reported appellant's history of injury and reviewed medical records. He found that appellant's tympanic membranes appeared normal and performed audiometric testing. Dr. Miller found that appellant had binaural hearing loss of 3.43 percent. He stated, "Based upon a review of the records and my history and examination, I do not feel that [appellant] at this time has any deficits or residuals from a work injury.... I believe he has fully recovered from his ear injury." Dr. Miller further noted that appellant had problems with eustachian tube dysfunction when flying and that if he did fly it was possible that he would have

barotrauma. He recommended that appellant have tubes placed in his ears if he flew to avoid barotrauma.

By decision dated August 26, 2011, OWCP terminated appellant's medical and wage-loss compensation benefits effective August 28, 2011 relying on Dr. Miller's report.

Counsel requested an oral hearing before an OWCP hearing representative on August 30, 2011. Appellant appeared at the oral hearing on December 6, 2011 and stated that he had no ear troubles before his employment. He testified that the number of flights he flew increased from two to four or five a day in 2004. Appellant described his ear pain and loss of hearing on April 28, 2005. He noted his reemployment. Appellant stated that he flew to Florida in 2009 using the Sudafed as recommended but still experienced ear pain.

By decision dated February 22, 2012, OWCP's hearing representative found that Dr. Miller's report was entitled to the special weight of the medical opinion evidence. She noted that he determined that appellant had no work-related residuals with normal hearing. The hearing representative found that Dr. Wilcox attributed appellant's disability for work due to his eustachian tube dysfunction, not the accepted work injury. She concluded that appellant's restriction on flying was a preventative measure and did not entitle him to wage-loss benefits.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.² After it has determined that an employee has disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.³ Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.⁴ To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.⁵

When there are opposing reports of virtually equal weight and rationale, the case will be referred to an impartial medical specialist pursuant to section 8123(a) of FECA which provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination and resolve the conflict of medical evidence.⁶ This is called a referee

² *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

³ *Id.*

⁴ *Furman G. Peake*, 41 ECAB 361, 364 (1990).

⁵ *Id.*

⁶ 5 U.S.C. §§ 8101-8193, 8123; *M.S.*, 58 ECAB 328 (2007); *B.C.*, 58 ECAB 111 (2006).

examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.⁷

In situations where there are opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.⁸

ANALYSIS

OWCP accepted appellant's claim for barotrauma, aggravations of eustachian tube dysfunction, barotitis and barotalgia due to his employment. Appellant was found totally disabled from continuing his employment at the employing establishment due to his inability to fly. His wage-loss compensation benefits were reduced on July 22, 2009, OWCP based on his earnings as a security officer.

Dr. Sheppard, an OWCP second opinion physician, diagnosed transient eustachian tube dysfunction on October 14, 2010 and stated that appellant was able to fly. He concluded that appellant did not have any current work-related injury residuals.

Appellant's attending physician, Dr. Willcox, also diagnosed eustachian tube dysfunction and found that appellant had recovered from the barotrauma. He opined that appellant could not return to his position as an air marshal because of his propensity towards barotrauma because of the underlying eustachian tube dysfunction. Dr. Willcox stated that appellant did not suffer any residuals from the work injury and, since appellant had discontinued flying for the employing establishment, he was asymptomatic. He found that appellant was not fit to return to work in his date-of-injury position due to his eustachian tube dysfunction. Dr. Willcox explained that, if appellant were to return to his former position, appellant would be at risk for recurrence of barotrauma with the possibility of permanent, even disabling injury.

OWCP properly found a conflict of medical opinion evidence between Drs. Willcox and Sheppard regarding appellant's ability to return to his date-of-injury position and referred him to Dr. Miller, pursuant to 5 U.S.C. § 8123(a).

Dr. Miller completed an impartial medical examination on August 11, 2011 reviewing appellant's history of injury and medical records. He performed a physical examination and found that appellant's tympanic membranes appeared normal and performed audiometric testing. Dr. Miller stated that appellant did not have any residuals from his work injury and had fully recovered. He noted that appellant had problems with eustachian tube dysfunction when flying and that if he did fly it was possible that he would have barotrauma. Dr. Miller recommended that appellant have tubes placed in his ears if he flew to avoid barotrauma.

⁷ R.C., 58 ECAB 238 (2006).

⁸ Nathan L. Harrell, 41 ECAB 401, 407 (1990).

When employment factors cause an aggravation of an underlying physical condition, the employee is entitled to compensation for the periods of disability related to the aggravation. However, when the aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after the aggravation has ceased.⁹ This holds true even if the employee is found medically disqualified because of the effect which employment factors might have on the underlying condition. In those cases, the disqualification of the employee is due to the underlying condition without any contribution by the employment.¹⁰

The Board finds that OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits. All three physicians agree that appellant's barotrauma had resolved and that he had no residuals of his accepted conditions. Dr. Miller, the impartial medical examiner, opined that appellant remained disqualified from return to the employing establishment due to the effect flying might have on his underlying eustachian tube dysfunction, his only restriction from working as an Air Marshal. The Board finds that his report constitutes the special weight of the medical evidence in this regard. The Board further finds that the weight of the medical opinion evidence from Dr. Miller establishes that the aggravation of appellant's underlying eustachian tube dysfunction had ceased when he stopped flying regularly. Under the facts of this case, appellant's disqualification for continued employment by the employing establishment is due to his underlying condition. There is no evidence that his condition was permanently aggravated by his federal employment. OWCP properly terminated appellant's compensation benefits.¹¹

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective August 28, 2011.

⁹ *Raymand W. Behrens*, 50 ECAB 221, 222 (1999).

¹⁰ *D.M.*, Docket No. 11-386 (February 2, 2012); *Marshall E. White*, 33 ECAB 1666 (1982).

¹¹ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the February 22, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 5, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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