In the Matter of the Compensation of
WILLIAM R. SHAW, Claimant
WCB Case No. 00-07616
ORDER ON REVIEW
Welch Bruun & Green, Claimant Attorneys
Reinisch Mackenzie Healey Et Al, Defense Attorneys

Reviewing Panel: Members Phillips Polich, Bock, and Biehl.[1] Member Phillips Polich concurs.

Claimant requests review of Administrative Law Judge (ALJ) Poland's order that upheld the self-insured employer's denial of claimant's occupational disease claim for bilateral hearing loss. On review, the issue is compensability.[2] We affirm.

FINDINGS OF FACT

Claimant worked as an aircraft mechanic from 1957 until he retired in 1992. He was exposed to loud noise on the job and he had yearly audiometric tests from 1975 through 1992.

Although claimant noticed hearing loss in the 1980's, he did not see a doctor for the problem until November 1997, five years after he retired. At that time, Dr. Dowsett, ear specialist, performed an audiogram and diagnosed sensorineural hearing loss and tinnitus.

On July 26, 2000, claimant filed a claim for bilateral hearing loss, which the employer denied.

CONCLUSIONS OF LAW AND OPINION

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[1] After consultation with the Department of Justice, this Board has chosen to exercise its right to issue orders as a panel of three pursuant to ORS 656.718(2) and (3).

[2] The employer asks us to strike claimant's references to a document that was not admitted at hearing. We do not reach the motion, because the result would be the same even if we considered the document and claimant's related arguments. *See e.g., Marvin H. Benz*, 53 Van Natta 266, 267 (2001) (100-decibel deduction for presbycusis in OAR 436-035-0250 "is applicable only at the extent of permanent disability stage, *i.e.*, after the claim has been determined compensable.").

To prove his occupational disease claim for bilateral hearing loss, claimant must establish that work exposure was the major contributing cause of the condition. *See* ORS 656.802. We consider the "claim" to consist of claimant's entire hearing loss, not just any portion that may be attributed to work exposure. *See Philip F. Taylor*, 51 Van Natta 898 (1999), *Henry F. Downs*, 48 Van Natta 2094, 2096 (1996).

Here, the medical evidence identifies multiple potential causes for claimant's hearing loss, including noise exposure at work, off-work hunting, and age-related loss. Therefore, causation is a complex question that must be resolved with persuasive medical evidence. *See Uris v. Compensation Department*, 247 Or 420 (1967); *Barnett v. SAIF*, 122 Or App 279, 283 (1993).

Drs. Hodgson, Lindgren, and Dowsett offered opinions regarding the cause of claimant's hearing loss. Dr. Hodgson opined that the majority of claimant's hearing loss was the result of age, gun use, and "medical causes." (Ex. 2-2; *see* Ex. 4-1). Dr. Lindgren opined that "more probably than not cumulative exposure to noise in the work place is the major cause of [claimant's] hearing loss *as of the last [employer's] audiogram in March 1992*." (Ex. 5-1-2) (emphasis added). Dr. Dowsett agreed with Dr. Lindgren. (Ex. 6).

Dr. Hodgson's opinion does not support the claim. And the opinions of Drs. Lindgren and Dowsett are insufficient to prove the claim, because they address the etiology of claimant's hearing loss as of, and no later than 1992, the year claimant retired (five years before claimant first saw a doctor for hearing loss[3] and eight years before he filed this claim). As we have previously explained, such evidence is insufficient, because a claimant may not rely on that portion of his disease that is (or may be) work-related to prove a claim for a hearing loss condition. *See Frederick C. Dulley*, 51 Van Natta 24, 25 (1999) (the claimant may not "extract" the portion of his hearing loss that was work-related as of retirement and rely on it to prove a later claim). Consequently, we agree with the ALJ that the claim fails under ORS 656.802.

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[3] Claimant first saw a doctor for hearing loss in November 1997. Consequently, November 1997 is the "onset" of his occupational disease. *See SAIF v. Cessnun*, 161 Or App 367 (1999); *Mikel T. Holbrook*, 52 Van Natta 838, *on recon* 52 Van Natta 1258 (2000).

ORDER

The ALJ's order dated July 17, 2001 is affirmed.

Entered at Salem, Oregon on May 23, 2002

Board Member Phillips Polich, concurring.

I agree with the majority that the claim is not compensable, because no medical evidence indicates that work exposure was the major contributing cause of claimant's overall hearing loss. In addition, I offer the following.

The employer asserts that the Board generally disfavors statistical analysis. Nonetheless, the employer contends that hearing loss cases are "unique," because we are required to rely on statistics to evaluate them under the Oregon Administrative Rules, specifically OAR 436-035-0250(4)(b).[4] Thus, the employer apparently takes the position that hearing loss cases differ from other workers' compensation cases and reliance on statistical analysis is appropriate in such cases, because the standards for determining permanent disability use statistical values to determine a deduction for age relating hearing loss.

I disagree, for several reasons. First, *each* case appealed to the Board is unique and hearing loss cases are not "more unique" than others. A diagnosis of hearing loss does not change the elements of a compensable claim or the nature of persuasive causation evidence.

Persuasive causation opinions *may* rely in part on statistical predictors. *See Seeley v. Sisters of Providence*, 179 Or App 723, 727-28 (2002) (although statistical evidence *alone* is insufficient to prove a claim, it does permit a causal inference, which may or may not ultimately be persuasive); *See, e.g., Michael V. Field*, 53 Van Natta 529 (2001) (Member Phillips Polich, dissenting) (arguing that opinions based on statistical information not necessarily applicable to the claimant

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[4] OAR 436-035-0250(4)(b) provides:

> "Hearing loss due to presbycusis shall be based on the worker's age at the time of the audiogram. Consult the Presbycusis Correction Values Table below. Find the figure for presbycusis hearing loss. Subtract this figure from the sum of the audiogram entries. These values represent the total decibels of hearing loss in the six standard frequencies which normally results from aging."

specifically); *Yolanda Enriquez*, 50 Van Natta 1507 (1998) (medical evidence grounded in statistical analysis unpersuasive because insufficiently directed to the claimant's particular circumstances); *Elizabeth Beairsto*, 47 Van Natta 750, 751 (1995) (Where physician discounted 21-year work exposure in favor of statistical "risk factors," opinion insufficiently explained); *compare Donald V. Ball*, 52 Van Natta 1819 (2000) (physician's opinion based in part on statistical studies not discounted, because it also considered the particular facts of the claimant's work injury).

Finally, statistics do not impact this case. Instead, the claim is not compensable because no medical evidence relates claimant's hearing loss—as of his 1992 retirement—to his work. As we have explained, the standards for evaluating permanent disability found in OAR Chapter 436 (including OAR 436-035-0250 and its "statistical basis") are applicable only at the extent of permanent disability stage; *i.e.*, *after* the claim has been determined compensable. *See Marvin H. Benz*, 53 Van Natta 266, 267 (2001), n.1, *supra*.