

State of New York  
Supreme Court, Appellate Division  
Third Judicial Department

Decided and Entered: June 27, 2024

CV-23-2014

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In the Matter of the Claim of  
ANDREW P. DeWOLF,  
Appellant,

v

WAYNE COUNTY et al.,  
Respondents.

MEMORANDUM AND ORDER

WORKERS' COMPENSATION  
BOARD,  
Respondent.

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Calendar Date: May 28, 2024

Before: Garry, P.J., Egan Jr., Lynch, Fisher and Powers, JJ.

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*Andrew P. DeWolf*, Lyons, appellant pro se.

*Hamberger & Weiss LLP*, Rochester (*Joseph P. DeCoursey* of counsel), for  
Wayne County and another, respondents.

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Garry, P.J.

Appeal from a decision of the Workers' Compensation Board, filed June 6, 2023,  
which ruled that claimant did not sustain a causally-related occupational disease and  
denied his claim for workers' compensation benefits.

Claimant worked in the field as an emergency medical technician for Wayne  
County for roughly 15 years. In August 2020, he filed a claim for workers' compensation

benefits, alleging that he sustained hearing loss due to prolonged exposure to workplace noise. Following a hearing, the Workers' Compensation Law Judge established the claim for occupational binaural hearing loss. Upon administrative appeal, the Workers' Compensation Board reversed, finding that claimant did not meet his burden of establishing a relationship between his injury and his employment by competent medical evidence, and disallowed the claim. Claimant appeals.<sup>1</sup>

We affirm. "To be entitled to workers' compensation benefits for an occupational disease, a claimant must establish a recognizable link between his or her condition and a distinctive feature of his or her occupation through the submission of competent medical evidence" (*Matter of Velez v Eger Health Care & Rehab Ctr.*, 217 AD3d 1095, 1096 [3d Dept 2023] [internal quotation marks and citations omitted]; *see Matter of Gandurski v Abatech Indus., Inc.*, 194 AD3d 1329, 1329 [3d Dept 2021]). "To this end, a medical opinion on the issue of causation must signify a probability as to the underlying cause of the claimant's injury which is supported by a rational basis" (*Matter of Mayette v Village of Massena Fire Dept.*, 49 AD3d 920, 922 [3d Dept 2008] [internal quotation marks and citations omitted]; *accord Matter of Sanchez v New York City Tr. Auth.*, 206 AD3d 1428, 1429 [3d Dept 2022]).

Claimant testified that he suffered hearing loss due to repeated exposure to loud siren and radio noise at work.<sup>2</sup> Claimant testified that he worked full time, sometimes in excess of 60 hours per week, but that he could not quantify how often he was exposed to loud noise. Claimant also could not quantify the decibel level of noise but he did testify that he could carry on a conversation in the vehicle with the siren on. Claimant also testified that he has hunted recreationally for the past 26 years without consistently wearing ear protection.

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<sup>1</sup> To the extent that claimant challenges the denial of his application for reconsideration and/or full Board review, he did not file a notice of appeal from that decision and, therefore, those issues are not properly before us (*see Matter of Petrillo v Comp USA*, 131 AD3d 1282, 1282 n [3d Dept 2015]).

<sup>2</sup> We decline claimant's request that we take judicial notice of information contained in certain documents and websites referred to for the first time on appeal (*see Fidelity Natl. Tit. Ins. Co. v Legend Abstract Corp.*, 171 AD3d 705, 706 [2d Dept 2019]; *Shon v State of New York*, 75 AD3d 1035, 1038 [3d Dept 2010]).

In support of his claim, claimant offered the medical narratives and deposition testimony of otolaryngologists Michael DeCicco and Benjamin Crane.<sup>3</sup> DeCicco examined claimant in May 2021 and diagnosed moderately severe to severe bilateral sensorineural hearing loss. DeCicco testified that, based upon the history that claimant provided, "there was a very good chance" that claimant's hearing loss was related to noise exposure at work. DeCicco also testified that he was not provided any information as to the decibel levels that claimant was exposed to nor the duration of the exposure and that he was not aware of claimant's use of firearms. Crane examined claimant in July 2021 and concluded that claimant's hearing loss was "likely related to noise exposure." Crane testified, however, that he did not have an opinion as to whether claimant's hearing loss was related to noise at work because claimant had two sources of noise exposure, "work and recreational[ ]." Crane further noted the lack of information regarding the level and duration of claimant's exposure to noise at work. Although Crane concluded that noise exposure at work "could have and I guess I believe it did" play a role in claimant's hearing loss, he added that, "as mentioned, I don't have the details on how much noise exposure it actually was." In light of the foregoing, we conclude that the Board acted within its authority in rejecting claimant's medical evidence of a causal relationship as speculative (*see Matter of Tucker v City of Plattsburgh Fire Dept.*, 153 AD3d 984, 988 [3d Dept 2017], *lv denied* 30 NY3d 906 [2017]; *Matter of Mayette v Village of Massena Fire Dept.*, 49 AD3d at 922). We note that the Board was entitled to reject claimant's medical evidence even though there was no other medical evidence presented on the issue of causation (*see Matter of Glowczynski v Suburban Restoration Co., Inc.*, 174 AD3d 1236, 1238 [3d Dept 2019]; *Matter of Bradley v US Airways, Inc.*, 58 AD3d 1043, 1045 [3d Dept 2009]).

Finally, contrary to claimant's contention that the Board lacked jurisdiction to decide his claim, the Legislature has granted the Board the sole "power to hear and determine all claims for compensation" (Workers' Compensation Law § 142 [1]; *see* NY Const, art I, § 18). Further, we reject claimant's contention that he was denied due process "[a]s the record reflects that [he] was afforded the opportunity to be heard at a meaningful time and in a meaningful manner" (*Matter of Spillers v Health & Hosp. Corp.*, 225 AD3d 1100, 1102 [3d Dept 2024] [internal quotation marks and citations omitted]; *see Matter of Narine v Two Bros. for Wholesale Chicken Inc.*, 198 AD3d 1040, 1044 [3d Dept 2021]).

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<sup>3</sup> Claimant's contention that the taking of the depositions of his medical experts telephonically was improper (*see* CPLR 3115 [b]) was waived by his failure to object at the time that the depositions were taken (*see* CPLR 3115 [b]; *Matter of Washington v Montefiore Hosp.*, 7 AD3d 945, 947-948 [3d Dept 2004]).

Claimant's remaining contentions, to the extent that they are properly before us, have been considered and found to be without merit.

Egan Jr., Lynch, Fisher and Powers, JJ., concur.

ORDERED that the decision is affirmed, without costs.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, slightly slanted style.

Robert D. Mayberger  
Clerk of the Court