U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALONZO SAENZ and DEPARTMENT OF JUSTICE, IMMIGRATION & NATURALIZATION SERVICE, Falfurrias, TX

Docket No. 97-2654; Submitted on the Record;
Issued August 12, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether appellant has established that he has a ratable hearing loss causally related to factors of his federal employment; and (2) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for a hearing.

On August 12, 1996 appellant, then a 55-year-old supervisory border patrol agent, filed an occupational disease claim, alleging that his hearing loss was employment related. In an accompanying statement, he alleged that traffic noise and qualification for firearms caused the condition. The Office referred appellant, along with the medical record and a statement of accepted facts, to Dr. Antonio Andrade, an otolaryngologist,[1] for evaluation including an audiogram. The case was then referred to an Office medical adviser to determine if appellant was entitled to a schedule award and, by decision dated March 7, 1997, the Office accepted that appellant sustained an employment-related hearing loss but was not entitled to a schedule award as his hearing loss was not ratable. In a letter postmarked April 8, 1997, appellant requested a hearing. By decision dated June 12, 1997, an Office hearing representative denied the request on the grounds that it had not been timely filed. The instant appeal follows.

The Board has reviewed the record and finds that appellant has not established a ratable hearing loss in this case.

Under section 8107 of the Federal Employees' Compensation Act and section 10.304 of the implementing regulations, schedule awards are payable for permanent impairment of specified body members, functions or organs.[2] Neither the Act nor the regulations specify the manner in which the percentage of impairment shall be determined.

---

[1] Dr. Andrade is Board eligible.

[2] 5 U.S.C. § 8107; 20 C.F.R. § 10.304.

The Office evaluates industrial hearing loss in accordance with the standards contained in the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) using the frequencies of 500, 1,000, 2,000 and 3,000 hertz (Hz). The threshold levels at each frequency are added and averaged to determine the estimated hearing level for speech. A "fence" of 25 decibels (dBs) is deducted since, as the A.M.A., *Guides* points out, losses below 25 dBs result in no impairment in the ability to hear everyday speech in everyday conditions. The remaining amount is multiplied by 1.5 to arrive at the percentage of monaural hearing loss. The Board has concurred in the Office's use of this standard for evaluating hearing losses for schedule award purposes.[3]

In the present case, the Office referred appellant for evaluation by Dr. Antonio Andrade, an otolaryngologist who, in a report dated January 17, 1997, rendered his findings. The accompanying audiogram reported that the decibel levels were 15, 10, 15 and 30 at the frequencies of 500, 1,000, 2,000 and 3,000 Hz for the right ear, and 20, 15, 20 and 30 at these frequencies on the left. The average decibel level for the right ear was, therefore, 17.5 (70 divided by 4) and 21.25 for the left ear (85 divided by 4).

As noted by an Office medical adviser in a memorandum dated March 7, 1997, after the fence of 25 decibels is deducted, no ratable hearing loss resulted in either the right or left ear. The record, therefore, indicates that although appellant has an employment-related hearing loss, it is not considered ratable under the appropriate standards used to determine ratability for schedule awards under the Act. The Office properly determined that appellant was not entitled to a schedule award in this case.

The Board further finds that the Office did not abuse its discretion in denying appellant's hearing request.

Section 8124(b) of the Act provides claimants under the Act a right to a hearing if they request a hearing within 30 days of an Office decision.[4] In its June 12, 1997 decision, the Office denied appellant's request for a hearing because it was untimely, stating that he was not, as a matter of right, entitled to a hearing since his request had not been made within 30 days of its March 7, 1997 decision. The Office noted that the matter had been considered in relation to the issue involved and indicated that appellant's request was denied on the basis that whether he sustained a ratable hearing loss could be addressed through a reconsideration application.

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[5] In the present case, appellant's request for a hearing postmarked April 8, 1997 was made 32 days after the date of issuance of the Office's prior decision dated March 7, 1997. Hence, the Office was correct in stating in its June 12, 1997

[3] *See Danniel C. Goings*, 37 ECAB 781 (1986).

[4] 5 U.S.C. § 8124(b).

[5] *Henry Moreno*, 39 ECAB 475, 482 (1988).

decision that appellant was not entitled to a hearing as a matter of right because his request was not made within 30 days of the Office's March 7, 1997 decision. While the Office also has the discretionary power to grant a hearing request when a claimant is not entitled to a hearing as a matter of right, the Office properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's request on the basis that the issue could be addressed through a reconsideration application.

The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deduction from established facts.[6] In the present case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's hearing request which could be found to be an abuse of discretion.

The decisions of the Office of Workers' Compensation Programs dated June 12 and March 7, 1997 are hereby affirmed.

Dated, Washington, D.C.
August 12, 1999

Michael J. Walsh
Chairman

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

[6] *See Daniel J. Perea*, 42 ECAB 214, 221 (1990).