U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES L. MOORE and DEPARTMENT OF THE AIR FORCE, TINKER AIR FORCE BASE, OK

Docket No. 00-1352; Submitted on the Record;
Issued July 23, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issues are: (1) whether appellant is entitled to a schedule award for permanent partial impairment as a result of the accepted employment-related condition; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing before an Office hearing representative.

On October 7, 1997 appellant, then a 49-year-old aircraft mechanic, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that he suffered from chronic sinusitis and allergic rhinitis after exposure to fuel in the performance of his federal employment. In support thereof, appellant also submitted numerous medical reports commencing in 1978 which documented his two-decade long treatment for chronic allergic respiratory difficulty, which was aggravated by exposure to any strong chemical fumes or odors, including jet fuel fumes.

On November 6, 1998 appellant filed a claim for a schedule award (Form CA-7). In support thereof, he submitted a medical report dated November 2, 1998 by Dr. Mark A. Woodward, a Board-certified family practitioner, wherein he opined that appellant suffered from chronic sinusitis aggravation and that it was his opinion that he suffered a permanent and total disability related to his loss of taste and smell. Dr. Woodward opined that appellant had a five percent impairment due to his lack of smell and a three percent impairment due to his lack of taste, for a total whole person impairment of eight percent.

On November 28, 1997 appellant's claim was accepted for chronic sinusitis aggravation.

In a decision dated November 18, 1998, the Office denied appellant an award under the schedule as section 8107 of the Federal Employees' Compensation Act[1] does not provide coverage for an impairment due to lack of smell.

---

[1] 5 U.S.C. §§ 8101-8193.

By letter dated January 7, 1999, appellant requested an oral hearing. In a decision dated May 7, 1999, the hearing representative set aside the Office's decision, finding it premature and remanded the case for further development of the medical evidence. The hearing representative reasoned that, while it was true that the regulations did not provide a schedule award for a loss or loss of use of the olfactory nerves, the Office did not consider appellant's entitlement for a schedule award for permanent partial impairment for loss of taste (a schedule award for the tongue.) The hearing representative also found that the Office failed to address the issue of whether appellant had residuals from the accepted employment injury in that the issue of whether appellant sustained a permanent or a temporary aggravation due to the exposure to fuel oils had not been fully addressed.

On July 6, 1999 the Office referred appellant to Dr. Richard Dawson, a Board-certified otolaryngologist, for a second opinion. In a medical report dated July 22, 1999, Dr. Dawson found that appellant had evidence of allergic rhinitis. He opined that the x-rays were not sufficient, and that a computerized tomography (CT) scan should be obtained of the sinuses. Dr. Dawson also recommended smell and taste testing. He noted that he could not rate any disability at this time because of a real lack of understanding as to how much his smell, taste and sinuses are actually impaired.

In a medical report dated September 1, 1999, Dr. Dawson reported that the results of the testing which he recommended showed anosmia with normal taste and postinflammatory processes of the paranasal sinuses as well as a deviated bony nasal septum. He advised appellant to stay away from jet fuel or other smelling substance that might be harmful to him. Dr. Dawson noted that a CT scan of the brain could be done to make sure that no brain tumor is responsible for his smell problem. He also recommended blood tests and food allergy testing. Dr. Dawson noted that appellant's chronic sinusitis was probably permanent and related to his allergies. He opined that the chemical problems are an aggravation due to his factor of employment, but that, if he is not exposed to the chemicals, this aggravation should not continue. Dr. Dawson recommended a three percent impairment of the whole person due to his lack of smell.

On September 29, 1999 the district medical adviser stated that he needed the report of the CT brain scan. On October 23, 1999 the district medical adviser noted that, although he still did not have a brain scan, there was sufficient evidence to indicate the chronic sinus disease as an etiological actor of the diminished taste ability. The district medical adviser noted that taste disturbance and paranasal sinus disease are not in the table of members that are to be considered for permanent partial impairment awards and, therefore, appellant was not eligible for an impairment award even though he has a condition that has been aggravated by his federal job.

In a decision dated October 27, 1999, the Office found that appellant was entitled to medical benefits for the effects of his aggravation of chronic sinusitis, but that he was not entitled to a schedule award.

By letter dated November 26, 1999, postmarked November 29, 1999 and received by the Office on December 3, 1999, appellant requested a hearing.

By order dated January 6, 2000, the Office denied appellant's request for a hearing as untimely. The Office also reviewed appellant's request under its discretionary authority, and

determined that the request was further denied for the reason that the issue in this case could be equally well addressed by requesting reconsideration from the district Office and submitting evidence not previously considered which established that appellant had a percentage of impairment which entitled him to a schedule award.

The Board finds that the Office properly denied appellant's request for a hearing before the Office hearing representative.

Section 8124(b) of the Act provides that a "claimant for compensation not satisfied with the decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[2] As section 8124(b) is unequivocal in setting forth the time limitations for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.[3] A request for either an oral hearing or a review of the written record must be submitted, in writing, within 30 days of the date of issuance of the decision.[4] Under the regulations implementing this section, the postmark of the request determines the date of the request.[5] Even when the hearing request is not timely, the Office has discretion to grant the hearing request and must exercise that discretion.[6]

In this case, the Office issued its decision that appellant was not entitled to a schedule award on October 27, 1999. By letter November 26, 1999, but postmarked November 29, 1999, appellant requested a hearing. By order dated January 6, 2000, the Office denied appellant's request for a hearing as untimely filed as it was not filed within 30 days of the decision. The Office also exercised its discretion in considering appellant's request, noting that it had considered the matter and determined that the issue in the case could be resolved through the reconsideration process by submitting evidence not previously considered, which could establish that an injury was sustained as alleged.

As stated above, a request for hearing is timely only if it was mailed, as determined by the postmark, within 30 days of the issuance of the district Office's decision, timeliness from the postmark.[7] In the instant case, appellant's request for hearing was postmarked November 29, 1999 and the decision was dated October 27, 1999. As appellant's 30 days within which to file an appeal would expire on November 27, 1999, and the postmark on his appeal was November 29, 1999, appellant's request for appeal was untimely. With regard to the exercise of

[2] 5 U.S.C. § 8124(b)(1).

[3] *Delmont T. Thompson*, 51 ECAB ___ (Docket No. 97-988, issued November 1, 1999); *Charles J. Prudencio*, 41 ECAB 499 (1990); *Ella M. Garner*, 36 ECAB 238 (1984).

[4] 20 C.F.R. § 10.616(a); *see also Marilyn Wilson*, 51 ECAB _____, Docket No. 98-401, (issued December 15, 1999).

[5] 20 C.F.R. § 10.616(a).

[6] *Lawrence C. Parr*, 48 ECAB 445, 451 (1997).

[7] Federal (FECA) Procedure Manual, Part 2, Claims, *Hearing and Review of the Written Record*, Chapter 2.1601.4 (June 1997).

the Office's discretion to grant a hearing even if the request is untimely, an abuse of discretion can be shown only through proof of manifest error, a manifestly unreasonable exercise of judgment, prejudice, partiality, intentional wrong or action against logic.[8] There is no evidence in the case record to establish that the Office abused its discretion in refusing to grant appellant's hearing request. The Board therefore finds that the Office properly denied appellant's request for a hearing on the grounds of untimeliness.

The Board further finds that the Office properly rejected appellant's claim for a schedule ward for his paranasal sinus disease, and loss of taste and smell.

The schedule award provision of the Act[9] and its implementing regulation[10] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform stands applicable to all claimants. The American Medical Association, *Guides to the Evaluation of Permanent Impairment* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses. A schedule award is not payable for the loss or loss of use, of a member, function or organ of the body not specifically enumerated in the Act or its regulations.[11]

The schedule provisions of the Act list the specific members and functions of the body for which a schedule award is payable; loss of taste and smell is not listed. The Act was amended effective September 7, 1974, permitting the Office to make a schedule award not only for a member of the body listed in the schedule but also for "any other important external or internal organ of the body," including the tongue.[12] However, there is no medical evidence which would indicate that appellant had a loss of function of the tongue. The regulations promulgated under section 8107 make no provision for a schedule award for the loss of taste or smell, or for paransasal sinus disease.[13]

[8] *See Sherwood Brown*, 32 ECAB 1847 (1981).

[9] 5 U.S.C. § 8107.

[10] 20 C.F.R. § 10.404.

[11] *Billie Sue Barnes*, 47 ECAB 478 (1996).

[12] *See Norman E. Jenson*, 36 ECAB 232 (1984).

[13] 20 C.F.R. § 10.404(a).

The decisions of the Office of Workers' Compensation Programs dated January 6, 2000 and October 27, 1999 are affirmed.

Dated, Washington, DC
July 23, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member