
In the Matter of the Compensation of
JON O. NORSTADT, Claimant
WCB Case No. 99-10123
ORDER ON REMAND
Cary et al, Claimant Attorneys
Johnson Nyburg & Andersen, Defense Attorneys

Reviewing Panel: Members Biehl and Lowell.

This matter is before the Board on remand from the Court of Appeals. *Norstadt v. Liberty Northwest Insurance Corp.*, 179 Or App 731 (2002). The court has reversed our prior order, *Jon O. Norstadt*, 52 Van Natta 1627 (2000), that affirmed an Administrative Law Judge's (ALJ's) order that dismissed claimant's hearing request seeking reclassification of his claim. Reasoning that the 1999 amendments to ORS 656.277 (which provide that a reclassification request for a nondisabling claim classification must be made within one year from the date of claim acceptance, rather than one year from the date of injury as set forth in the "pre-1999" version of the statute) were not retroactively applicable, we determined that the Hearings Division lacked authority to consider claimant's reclassification request. Concluding that the 1999 amendments to ORS 656.277 are retroactively applicable, the court held that we are authorized to consider the merits of claimant's reclassification request because the request was made within one year from the date of the insurer's claim acceptance. Consequently, the court has remanded.

FINDINGS OF FACT

We adopt the ALJ's findings of fact.

CONCLUSIONS OF LAW AND OPINION

In prior litigation, claimant was found to have a compensable hearing loss and Liberty Northwest Insurance Corporation (the insurer) was ultimately found responsible. On May 12, 1999, the insurer issued an acceptance of the hearing loss claim, classifying it as "nondisabling." On May 27, 1999, claimant wrote to the Workers' Compensation Division (WCD) and requested correction of the classification to "disabling." WCD treated the letter as a request for reclassification and denied the request for lack of jurisdiction because the request had not been made within one year from the date of injury as required by ORS 656.277(1) (1995), which was then in effect. Claimant requested a hearing,

but subsequently withdrew his request and it was dismissed without prejudice. Meanwhile, the 1999 Legislature amended ORS 656.277(1). The amended statute, which became effective on October 23, 1999, provided, in pertinent part:

“A request for reclassification by the worker of an accepted nondisabling injury that the worker believes was or has become disabling must be submitted to the insurer or self-insured employer. The insurer or self-insured employer shall classify the claim as disabling or nondisabling within 14 days of the request if the request is received within one year after the date of acceptance.”

Three days after the 1999 amendments became effective, claimant submitted a request for reclassification to the insurer. The insurer denied the request and claimant sought review by WCD. WCD ordered that the claim remain classified as nondisabling. Claimant requested a hearing. The ALJ found that the former version of ORS 656.277(1), rather than the 1999 amendments, applied to claimant’s reclassification request and dismissed claimant’s hearing request for lack of jurisdiction. On Board review, we affirmed, reasoning that the legislature did not express any intention that the amended statute be applied retroactively. *Norstadt*, 52 Van Natta at 1627. Claimant sought judicial review.

The court reversed. Due to the intervening litigation regarding the responsibility for claimant’s occupational disease claim, the court reasoned that he never had an opportunity to seek reclassification and, by the time the litigation was resolved, the period for requesting reclassification under the old law had expired. Citing *Rhodes v. Eckelman*, 302 Or 245, 248 (1986), the court observed that the usual rule of construction assumes the legislature “wanted remedial or procedural statutes to apply to pending cases.” Consequently, the court concluded that the 1999 amendments to ORS 656.277(1) applied to claimant’s reclassification request. Because claimant’s reclassification request was made within one year from the date of the insurer’s acceptance of his claim, the court held that we had authority to consider it.

Accordingly, consistent with the court’s holding, we address the merits of claimant’s reclassification request. The parties have submitted supplemental briefs on remand. Claimant contends that the 1995 amendments to ORS 656.005(7)(c) apply retroactively to this case. However, the court has already determined that the law in effect at the time of claimant’s injury in 1992 governs whether claimant’s hearing loss was disabling or nondisabling. *Norstadt*, 179 Or App at 735.

Accordingly, we apply the law in effect on March 11, 1992, the date of claimant's injury.

That law provided that a disabling injury was one that entitled the worker to compensation for disability or death. ORS 656.005(7)(c) (1990). *Former* OAR 436-30-045(5) (WCD Admin. Order 5-1992) was in effect at the time of claimant's injury. That rule provides:

“(5) A claim is disabling if any of the following conditions apply.

“(a) Temporary disability is due and payable;

“(b) If the worker is medically stationary within one year of the date of injury and the worker is entitled to an award of permanent disability under the standards developed pursuant to ORS 656.726;

“(c) The worker is not medically stationary, but there is a substantial likelihood that the worker will be entitled to an award of permanent disability under the standards developed pursuant to ORS 656.726 when the worker does become medically stationary;

“(d) The worker is released to and doing a modified job at reduced wages from the job at injury;

“(e) If the modified job the worker is released to and doing at he wage of job at injury no longer exists or a job offer is withdrawn. This includes but is not limited to termination of temporary employment, layoff, or plant closure.”

Here, because the record does not establish that temporary disability is due or payable, that claimant's condition is medically stationary, or that he is released to modified work, we find that the applicable subsection of the rule is subsection (c). It provides that the claim is disabling if:

“The worker is not medically stationary, but there is a substantial likelihood that the worker will be entitled to an award of permanent disability under the standards

developed pursuant to ORS 656.726 when the worker does become medically stationary.”

Accordingly, we examine the record to determine whether there is “a substantial likelihood” that claimant will be entitled to a permanent disability award.

Dr. Owens examined claimant on October 11, 1993. Dr. Owens found a binaural hearing loss of 34 percent. (Ex. 6).

Dr. Ediger, an audiologist, reviewed claimant’s 1986 and 1993 audiograms. Dr. Ediger explained that hearing tests done in 1986 indicated that claimant had 32.75 percent hearing loss in his right ear and 57.75 percent hearing loss in his left ear with a combined binaural hearing loss of 35.87 percent. In 1993, he had 30.75 hearing loss in his right ear and 59.5 percent hearing loss in his left ear, with combined binaural hearing loss of 34.34 percent. Hearing loss attributable to presbycusis appropriate to claimant’s age at the time each test was done was deducted by Dr. Ediger. Dr. Ediger opined that claimant’s hearing loss did not change from 1986 to 1993. (Ex. 16).

Dr. Owens agreed that there was probably no significant change in claimant’s hearing loss between 1986 and 1993 other than that attributable to presbycusis. (Ex. 18).

In its brief on remand, the insurer argues that hearing loss that preexisted claimant’s employment with the insured must be offset from the permanent disability that resulted from claimant’s exposure while it covered the risk. The insurer further contends that claimant would not be entitled to a permanent disability award under the standards because all of claimant’s hearing loss preexisted his exposure with its insured. The insurer asserts that claimant’s August 15, 1986 audiogram (performed during his first period of employment with its insured) serves as a pre-employment audiogram under the standards with respect to his second period of employment for the insured from October 16, 1991 to March 16, 1992.¹

¹ Claimant worked for the same employer (DCFP) at the time of the 1986 audiogram. However, at that time, DCFP was insured by a different insurer and claimant did not file a claim against that insurer. Therefore, claimant’s claim against DCFP related only to his second period of employment with this present insurer. (Ex. 19A-4). Claimant’s second period of employment with DCFP was from October 1991 to March 1992. DCFP was found responsible for claimant’s hearing loss with regard to its second period of employment.

Claimant argues that the disability rating standards require a “baseline audiogram obtained within 180 days of assignment to a high noise environment.” OAR 436-035-0250(2). Claimant contends that there was no baseline audiogram within 180 days of claimant’s second period of employment with the insured beginning in October 1991. We agree.

OAR 436-035-0250 (WCD Admin. Order 6-1992) provides:

“(2) Compensation may be given only for loss of normal hearing which results from an on-the-job injury or exposure. The following will be offset against hearing loss in the claim:

“(a) Hearing loss which existed before this injury or exposure, if adequately documented by a baseline audiogram obtained within 180 days of assignment to a high noise environment.”²

Here, the insurer contends that claimant’s 1986 audiogram serves as a preemployment audiogram with respect to claimant’s employment with the employer from October 1991 to March 1992. However, because the 1986 audiogram was not “obtained within 180 days of assignment to a high noise environment,” preexisting hearing loss cannot be offset against hearing loss in the claim under OAR 436-035-0250(2).

In any case, we conclude that claimant need not prove that he has actual permanent impairment that is ratable under the standards to establish a “substantial likelihood” that he would be entitled to an award of permanent disability. In this regard, in *SAIF v. Schiller*, 151 Or App 58, 63 (1997), *rev den* 326 Or 389 (1998), the court addressed ORS 656.005(7)(c)³ which provides that an injury is not disabling if no temporary benefits are due and payable, unless there is a “reasonable expectation” that permanent disability will result from the injury. The

² The most recent version of OAR 436-035-0250 (WCD Admin. 98-055) also contains the requirement of a baseline audiogram obtained within 180 days of assignment to a high noise environment. Accordingly, regardless of the version of the standards that applies to this claim, all potentially applicable versions of the standards contain the requirement that a baseline audiogram be obtained within 180 days of assignment to a high noise environment in order to offset preexisting hearing loss.

³ The definition of a disabling claim in ORS 656.005(7)(c) was not in effect at the time of claimant’s March 11, 1992 injury.

court held that the Board properly interpreted ORS 656.005(7)(c) to require proof of a current condition that could lead to a ratable impairment under the disability rating standards, not proof of a condition that is presently ratable under the standards in order to reclassify a claim from nondisabling to disabling. *See Aurelio Acevedo*, 52 Van Natta 1396 (2000).

We acknowledge that the “reasonable expectation” standard of ORS 656.005(7)(c) is different from the “substantial likelihood” standard that was in effect at the time of claimant’s injury. Nevertheless, we have held that the two standards require the same type of evidence that a permanent disability award was likely or expected. *Clifford E. Clark*, 47 Van Natta 2310 (1995). Thus, because the standards are similar, the court’s decision in *Schiller* supports our decision that claimant need not prove that there is specific ratable impairment in order to prove that his claim is disabling under the “substantial likelihood” standard.

Accordingly, based on the opinions of Drs. Owens and Ediger that claimant has permanent disability due to his hearing loss, we conclude that there is a substantial likelihood that claimant will be entitled to an award of permanent disability under the standards. Consequently, we conclude that claimant’s claim should be reclassified as disabling.

Claimant's attorney is entitled to an "out-of-compensation" fee for services at hearing, on review, on appeal and remand regarding the classification issue. ORS 656.386(2). Based on claimant's retainer agreement, claimant’s counsel is awarded an "out-of-compensation" fee equal to 25 percent of the increased temporary disability compensation, if any, created by this order, not to exceed \$1,050, to be paid by the insurer directly to claimant's counsel.⁴

⁴ In his supplemental reply brief on remand, claimant’s attorney requests an “out-of-compensation” attorney fee in the amount of 25 percent of permanent disability that results from reclassification.

However, we have previously held that where a claimant requests a hearing on a Director’s denial of reclassification, the “out-of-compensation” fee is limited to 25 percent of the increased temporary disability compensation. *Julie A. Johnson*, 48 Van Natta 29 (1996). Although the claimant in *Johnson* had requested that the attorney fee should also be based on permanent disability, we found that permanent disability benefits did not flow directly from reclassification. Moreover, we reasoned that we had no authority to award an attorney fee out of permanent disability compensation that neither an ALJ nor the Board had approved. Consistent with our holding in *Johnson*, we decline to award an “out-of-compensation” attorney fee payable out of future permanent disability benefits.

Accordingly, on remand, the ALJ's order dated June 8, 2000 is reversed. The December 7, 1999 Determination Order is modified to order that the claim be reclassified as disabling. Claimant's attorney is awarded an "out-of-compensation" attorney fee equal to 25 percent of the increased temporary disability compensation, if any, created by this order, not to exceed \$1,050, to be paid by the insurer directly to claimant's counsel.

IT IS SO ORDERED.

Entered at Salem, Oregon on October 11, 2002