
In the Matter of the Compensation of
JOHN G. SIMPSON, Claimant
WCB Case No. 01-03976
ORDER ON REVIEW
Welch Et Al, Claimant Attorneys
Steven T Maher, Defense Attorneys

Reviewing Panel: Members Biehl and Lowell.

The self-insured employer requests review of Administrative Law Judge (ALJ) Tenenbaum's order that reclassified claimant's hearing loss claim as disabling. On review, the issue is reclassification. We affirm.

FINDINGS OF FACT

We adopt the ALJ's findings of fact, except for the second full paragraph on page 2.

CONCLUSIONS OF LAW AND OPINION

In October 2000, the employer accepted claimant's occupational disease claim as nondisabling bilateral sensory neural hearing loss. (Ex. 4). Claimant requested reclassification.

The Director's Classification Review and Order affirmed the nondisabling classification. (Ex. 6). The order said there was no evidence that claimant was authorized any time loss due to the accepted condition. (Ex. 6-2). Moreover, the order relied on claimant's October 10, 2000 audiogram to find that he did not have a ratable hearing loss, reasoning that the audiogram was "documented by the carrier to have been conducted in a 'controlled setting' according to the rules (*i.e.* no noise exposure within 14 hours of the test), as required by OAR 436-035-0250(3)(b)." (*Id.*)

The ALJ found no evidence to support the Director's conclusion that the October 10, 2000 audiogram was performed in a "controlled setting," and no evidence whether or not two other audiograms were conducted in a "controlled setting." After reviewing the medical evidence, the ALJ concluded that it was more likely than not that claimant had sustained a ratable permanent hearing loss and the claim should be reclassified as disabling.

The employer argues that the preponderance of medical evidence establishes there is no ratable hearing loss. The employer contends that, within a few short weeks, claimant's test results ranged from zero to 1.5 percent in each ear and, therefore, it is difficult to conclude that there is a ratable loss. In addition, the employer asserts that the parties did not challenge the Director's conclusion that Dr. Hodgson's test was performed in a controlled setting and the employer argues that, by addressing that issue, the ALJ inappropriately shifted the burden of proof to the employer.

Claimant contends that the Board should defer to claimant's attending physician and rely on July 18, 2000 and October 2, 2000 audiograms to find that he has sustained a ratable permanent hearing loss. Claimant acknowledges that he has the burden of proof, but contends that the ALJ correctly found no reason to credit Dr. Hodgson's audiogram results over the other two audiograms.

ORS 656.005(7)(c) provides:

“A ‘disabling compensable injury’ is an injury which entitles the worker to compensation for disability or death. 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 parties agree that claimant is not entitled to any temporary disability benefits. Therefore, the claim classification issue depends on whether there is a “reasonable expectation” that permanent disability will result from the hearing loss condition.

In *SAIF v. Schiller*, 151 Or App 58, 62 (1997), *rev den* 326 Or 389 (1998), the court interpreted ORS 656.005(7)(c) and explained:

“When considered together, the text and context [of ORS 656.005(7)(c)] show that the ‘reasonable expectation’ provision requires an evidentiary link between the actual, current condition and a potential, statutorily defined condition. That evidentiary burden does not, however, require evidence of a specific and actual impairment as defined by statute or rule, because under the ‘reasonable expectation’ provision, which

concerns an event that has not yet occurred, that kind of proof does not yet exist.” (Footnote omitted).

The court concluded that, in order to reclassify a claim from nondisabling to disabling, ORS 656.005(7)(c) requires proof of a current condition that could lead to a ratable impairment under the impairment standards, not proof of a condition presently ratable under the standards. *Id.* at 63.

OAR 436-035-0250(1) explains that certain information “shall be provided by the attending physician or reviewed and commented on by the attending physician, pursuant to OAR 436-035-0007(13) and (14), to *value* work related hearing loss[.]” (Emphasis supplied). Although OAR 436-035-0250 pertains to *valuing* hearing loss, ORS 656.005(7)(c) does not require evidence of a specific and actual impairment as defined by statute or rule. *Schiller*, 151 Or App at 62.

The Director’s order relied on the October 10, 2000 audiogram performed at Dr. Hodgson’s office to find that claimant did not have a ratable hearing loss, reasoning that the audiogram was “documented by the carrier to have been conducted in a ‘controlled setting’ according to the rules (i.e. no noise exposure within 14 hours of the test), as required by OAR 436-035-0250(3)(b).” (Ex. 6-2). OAR 436-035-0250(3) pertains to audiogram requirements for valuing work-related hearing loss, and subsection (b) provides that “[t]est results will be accepted only if they come from a test conducted at least 14 consecutive hours after the worker has been removed from significant exposure to noise.” As the court explained in *Schiller*, however, proof that a current condition is presently ratable under the standards is not required for purposes of determining whether there is a “reasonable expectation” of permanent disability. *Schiller*, 151 Or App at 63. Instead, ORS 656.005(7)(c) requires proof of a current condition that could lead to a ratable impairment under the standards.

In construing ORS 656.005(7)(c) and determining whether a compensable injury is disabling, we require expert medical opinion indicating that a permanent disability award is likely or expected. *Lester B. Lewis*, 51 Van Natta 778, 779 (1999).

On July 18, 2000, Dr. Lewis reported that claimant had a problem with background noise and female voices and had experienced a gradual hearing loss. (Ex. 1-1). He explained that claimant had a high frequency sensorineural hearing loss “consistent with noise exposure actually with recovery at the higher frequencies and greatest at 3,000 to 4,000 Hz.” (*Id.*) Dr. Lewis said that claimant

had a “precipitous drop off at 2,000 Hz to 3,000 and I think this is going to be tough to aid but he’ll need something with a frequency response curve that’s pretty abrupt between 2,000 and 3,000 Hz.” (*Id.*)

Dr. Hodgson examined claimant in October 2000 on behalf of the employer and concluded that claimant’s work exposure was the major contributing cause of his hearing loss. (Ex. 3-3). He explained:

“The configuration of the hearing test is indicative of noise-induced hearing loss. There may [be] some element of age in the test, but the high tone recovery is usually absent when age is a major problem. He does have the typical high tone recovery of noise induced hearing loss.” (*Id.*)

Although Dr. Hodgson concluded that claimant did not have a “ratable” hearing loss based on the October 10, 2000 audiogram (Ex. 3-4), that is not the issue before us. Instead, the issue is whether the medical evidence establishes that there is a reasonable expectation that permanent disability will result from claimant’s hearing loss condition.

Based on the opinions of Drs. Lewis and Hodgson, we find that claimant’s hearing loss could lead to a ratable impairment under the standards. Dr. Lewis found that claimant had a high frequency sensorineural hearing loss consistent with noise exposure and he explained that claimant had a “precipitous drop off at 2,000 Hz to 3,000” that he thought would be “tough to aid.” (Ex. 1-1). Dr. Hodgson found that, although there may be some element of age in claimant’s test, he had the typical high tone recovery of noise induced hearing loss. (Ex. 3-3). We conclude that the medical evidence establishes that claimant’s hearing loss could lead to a ratable impairment and there is a reasonable expectation that permanent disability will result from that condition. We agree with the ALJ that the claim should be reclassified as disabling.

Claimant's attorney is entitled to an assessed fee for services on review. ORS 656.382(2). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant's attorney's services on review is \$1,000, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant’s counsel’s statement of services and claimant’s

respondent's brief), the complexity of the issue, and the value of the interest involved.

ORDER

The ALJ's order dated November 19, 2001 is affirmed. For services on review, claimant's attorney is awarded \$1,000, payable by the employer.

Entered at Salem, Oregon on July 12, 2002