

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ALFREDO ESQUIVEL and DEPARTMENT OF THE AIR FORCE,  
SAN ANTONIO AIR LOGISTICS CENTER, KELLY AIR FORCE BASE, TX

*Docket No. 98-2021; Submitted on the Record;  
Issued February 28, 2000*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly rescinded its acceptance of appellant's claim for hearing loss and vacated its granting of a schedule award.

The Board finds that the Office improperly rescinded appellant's acceptance of his bilateral hearing loss condition and vacated its granting of a schedule award for a two percent bilateral loss of hearing.

In the instant claim, the Office accepted on October 28, 1997 that appellant had sustained bilateral sensorineural hearing loss in the course of his federal employment. On December 8, 1997 the Office granted appellant a schedule award for a two percent permanent impairment for bilateral loss of hearing.

By letter dated December 15, 1997, appellant requested reconsideration of the amount of the schedule award. He requested a review of the written record.

By decision dated June 4, 1998, the hearing representative rescinded acceptance of appellant's hearing loss claim and vacated the schedule award, finding in a review of the evidence of record previously before the Office, that the evidence did not support that appellant sustained a bilateral hearing loss during the period of his federal employment. The hearing representative found that appellant's preemployment audiogram which had been submitted to the record on June 5, 1996 when compared to his most recent audiogram which had been submitted to the Office on that same date did not demonstrate that appellant had sustained a worsening of his bilateral hearing. The hearing representative also reevaluated the second opinion Board-certified otolaryngologist's July 19, 1996 opinion, which was submitted to the record on October 31, 1996, and found that the second opinion physician, Dr. Gerald Laursen, opined that appellant's hearing loss was not due to his federal employment. The hearing representative additionally reviewed the Office medical adviser's February 27, 1997 opinion that there had been no real change in appellant's audiogram from his preemployment physical and that he

agreed with Dr. Laursen. The hearing representative concluded that a careful and thorough review of the evidence of record clearly failed to support that appellant sustained a loss of hearing causally related to his federal employment.

In order to rescind prior acceptance of a claim, the Office must establish that its prior acceptance was erroneous through new or different evidence.<sup>1</sup>

In *Daniel E. Phillips*,<sup>2</sup> the Board held that, in order to rescind its prior acceptance of a claim, the Office “must establish that its prior acceptance was erroneous through new or different evidence and that it is not merely second guessing the initial set of adjudicating officials.”<sup>3</sup> In *Roseanna Brennan*,<sup>4</sup> the Board indicated that the Office was obliged to introduce “new evidence, legal arguments and rationale which justify its rescission” of the prior acceptance of a claim.<sup>5</sup> More recently, in *Beth A. Quimby*,<sup>6</sup> the Board stated that, in order “to justify a rescission of acceptance of a claim, the Office must show that it based its decision on new evidence, legal argument and/or rationale.”

In this case, the Office predicated its June 4, 1998 rescission of acceptance and vacation of schedule award on the hearing representative’s reevaluation of evidence previously submitted to the record and considered by the Office. As this evidence was already before the Office at the time of its acceptance of appellant’s claim, it cannot form the basis for a subsequent rescission.<sup>7</sup>

The Office does not meet its burden of proof to rescind an acceptance by showing that its acceptance may have been erroneous. Based upon new or different evidence, the Office must establish that it is “not merely second guessing the initial set of adjudicating officials.”<sup>8</sup> It has not done so in this case. The Board, therefore, finds that the Office did not meet its burden of proof to rescind its acceptance of appellant’s claim.

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<sup>1</sup> *Alphonso Walker*, 42 ECAB 129 (1990); *Laura J. Womack*, 42 ECAB 528 (1991).

<sup>2</sup> 40 ECAB 1111, 1118 (1989); *petition for recon. denied*, 41 ECAB 201 (1989).

<sup>3</sup> *Id.* at 1117-18 (1989).

<sup>4</sup> 41 ECAB 92 (1989); *petition for recon. denied*, 41 ECAB 371 (1990).

<sup>5</sup> *Id.* at 92, 96 (1989).

<sup>6</sup> 41 ECAB 683, 688 (1990).

<sup>7</sup> *See Alfonso Walker*, *supra* note 1.

<sup>8</sup> *Id.*; *see also Roseanna Brennan supra* note 4.

Accordingly, the decision of the Office of Workers' Compensation Programs dated June 4, 1998 is hereby reversed.

Dated, Washington, D.C.  
February 28, 2000

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member

Bradley T. Knott  
Alternate Member