U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 16-0053

STEPHEN MAGLIONE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: Aug. 11, 2016
	)	
APM TERMINALS	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Granting Employer's Motion for Summary Decision of William J. King, Administrative Law Judge, United States Department of Labor.

Matthew S. Sweeting, Tacoma, Washington, for claimant.

Marcin M. Grabowski (Bauer Moynihan & Johnson, LLP), Seattle, Washington, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Granting Employer's Motion for Summary Decision (2015-LHC-00485) of Administrative Law Judge William J. King rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant filed a claim alleging he sustained a hearing loss as a result of his occupational exposure to noise, including exposure on his last day of covered work with employer on March 9, 2001. Claimant previously filed a claim for total disability benefits against multiple employers for orthopedic injuries sustained in work accidents on June 20, 1998 and April 16, 2000. That claim was resolved in 2005 through an approved Section 8(i) settlement agreement, 33 U.S.C. §908(i); claimant received a lump sum payment of $200,000 to release the four named employers from all liability relating to those injuries.[1] Claimant officially retired from the waterfront in 2003; however, between April 2000 and March 9, 2001, claimant worked very few days as a longshoreman and did not work at all after March 9, 2001.

Claimant filed his claim for hearing loss benefits on April 24, 2014, based on an audiogram administered by Dr. Rand on April 15, 2014, reflecting a 12 percent binaural impairment, including tinnitus, or a 9.37 percent binaural impairment without tinnitus. Employer voluntarily paid claimant permanent partial disability benefits based on the 9.69 percent binaural impairment found by its expert, Dr. Randolph, and an average weekly wage of $272.71; employer also furnished medical benefits. A dispute, however, arose over the appropriate permanent impairment rating,[2] as well as claimant's average weekly wage and corresponding compensation rate.[3] The case was referred to the Office of Administrative Law Judges (OALJ) for adjudication.

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[1]The record reflects that claimant was working for Container Stevedoring Corporation (CSC) at the time of his June 20, 1998 accident and for Jones Washington Stevedoring Company (Jones) at the time of his April 16, 2000 accident. The four employers divided the lump sum settlement payment as follows: CSC - $75,000; Jones - $65,000; employer - $50,000; and Stevedoring Services of America - $10,000.

[2]Specifically, claimant sought benefits based on the 12 percent permanent impairment rating provided by Dr. Rand.

[3]Claimant sought an average weekly wage of $1,490.35 (compensation rate of $901.28) based on his actual earnings at the time of his April 16, 2000 work injuries, while employer advocated for an average weekly wage of $272.71 (compensation rate of $181.81) based on his earnings in the year immediately preceding his last day of covered work with employer prior to his determinative audiogram, i.e., March 9, 2001. Employer, however, also asserted that claimant's hearing loss should be subsumed in the 2005 approved settlement of his prior claim, in which claimant alleged he was permanently totally disabled as a result of his April 16, 2000 work injuries. *See* Employer's Notice of Controversion dated May 9, 2014.

Prior to the scheduling of a hearing, employer filed a motion for summary decision with the administrative law judge on the ground that claimant had, through employer's voluntary payment, already received all of the permanent partial disability benefits owed him under the Act for his work-related hearing impairment. Claimant opposed employer's motion. The administrative law judge granted employer's motion for summary decision and, thus, denied claimant's claim for additional benefits.

On appeal, claimant challenges the administrative law judge's decision to grant employer's motion for summary decision and to deny his claim for additional benefits. Employer responds, urging affirmance. Claimant has filed a reply brief.

Claimant contends that the administrative law judge erred in denying his claim for additional hearing loss benefits, based on his finding that claimant had no average weekly wage on March 9, 2001, the date of claimant's last occupational exposure to noise and, thus, suffered no loss of earning capacity as a result of his hearing loss. In this regard, claimant maintains that neither party proposed an average weekly wage of zero for claimant as of the date of his last exposure to injurious noise on March 9, 2001. Moreover, contrary to the administrative law judge's implicit finding, claimant contends the Section 8(i) settlement of his prior claims resulting from the June 1998 and April 2000 work injuries was not for permanent total disability. Claimant further contends the administrative law judge's decision improperly "extinguished all benefits including medical benefits and compensation for the permanent impairment resulting from the exposure at work to injurious levels of noise." Cl. Brief at 7.

In determining whether to grant a party's motion for summary decision, the administrative law judge must determine, after viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the moving party is entitled to summary decision as matter of law. *Morgan v. Cascade General, Inc.*, 40 BRBS 9 (2006); *see also O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55 (2d Cir. 2002); *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *Buck v. General Dynamics Corp.*, 37 BRBS 53 (2003); *Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1 (1990); 29 C.F.R. §18.72 (2015). In this case, the administrative law judge found that the uncontroverted evidence shows that claimant, by virtue of his prior orthopedic injuries, had no earning capacity or average weekly wage as of March 9, 2001.[4] He, therefore,

[4]The administrative law judge relied on the PMA wage records, claimant's deposition testimony, and the "Agreed Statement of Facts" in the parties' settlement application to conclude that claimant worked only five days after his April 2000 injuries in order to retain benefits from the ILWU-PMA fund and that claimant was not capable of actual work. Decision and Order at 5.

granted employer's motion for summary decision and denied claimant's claim for additional hearing loss benefits because claimant had no loss in wage-earning capacity due to the hearing loss. For the reasons stated below, we must vacate the administrative law judge's grant of summary decision in favor of employer.

In this case, employer sought summary decision based on its position that it had voluntarily paid claimant all the compensation to which he was entitled for his hearing impairment under Section 8(c)(13) of the Act, 33 U.S.C. §908(c)(13). *See* Emp. Mot. for Sum. Judgment dated June 5, 2015, at 10. Employer averred that claimant's average weekly wage "is $272.71 per week based on claimant's earnings in the 52 weeks" prior to his last day of work on March 9, 2001. *Id.* at 5-8. Employer also contended that claimant was not entitled to additional benefits for tinnitus because Dr. Rand did not follow the proper impairment rating protocol in assessing that condition. *Id.* Claimant responded to employer's motion for summary decision by asserting that there are genuine issues of material fact on both the average weekly wage and extent of hearing impairment issues. Cl. Opp. to Emp. Mot. for Sum. Judgment at 6-7. Claimant maintained that his evidence supports a higher average weekly wage and higher impairment rating than those upon which employer's voluntary payment of benefits was based and that there is a genuine issue of material fact regarding his entitlement to benefits based on an impairment rating inclusive of tinnitus. *Id.* at 5-6.[5] Despite the parties' respective positions, the administrative law judge granted employer's motion for summary decision on the independent finding that claimant, at the time of his last exposure to injurious noise on March 9, 2001, suffered no loss of wage-earning capacity from his hearing loss.

We cannot affirm this finding. Section 18.72 of the OALJ Rules, 29 C.F.R. §18.72 (2015),[6] which provides the framework for summary decisions, states that the administrative law judge may issue a "Decision independent of the motion," but only after giving notice and an opportunity to respond. Section 18.72(f) states:

[5]Claimant asserted that his average weekly wage should be calculated by either averaging his earnings for the five-year period prior to 2000, the year in which he was injured, resulting in an average weekly wage of $1,202.21, or by utilizing the lowest of his annual earnings during that five-year period, resulting in an average weekly wage of $1,007.94.

[6]These rules were recently amended, with the final regulations becoming effective on June 18, 2015. 80 Fed. Reg. 28768, 28780 (May 19, 2015). The amended rules thus are applicable to this claim because the administrative law judge's decision was issued on September 17, 2015.

(f) Decision independent of the motion. After giving notice and a reasonable time to respond, the judge may:

(1) Grant summary decision for a nonmovant;

(2) Grant the motion on grounds not raised by a party; or

(3) Consider summary decision on the judge's own after identifying for the parties material facts that may not be genuinely in dispute.

In view of Section 18.72(f), we must vacate the administrative law judge's decision granting employer's motion for summary decision and remand the case. The administrative law judge erroneously granted employer's motion for reasons "independent of the motion," without first giving the parties notice and the opportunity to respond to this particular position. As claimant correctly contends, neither party asserted that claimant had no average weekly wage as of March 9, 2001. Rather, each party proposed an average weekly wage calculation under Section 10(c) of the Act, 33 U.S.C. §910(c), as of March 9, 2001.[7] On remand, the administrative law judge may rule on employer's motion for summary decision on the grounds specifically raised by employer and opposed by claimant, in accordance with law.[8] 29 C.F.R. §18.72; *see, e.g., Walker v. Todd Pac. Shipyards*, 47 BRBS 11 (2013), *vacating in pert. part on recon.*, 46 BRBS 57 (2012); *Smith v. Labor Finders*, 46 BRBS 35 (2012); *Irby v. Blackwater Security Consulting, LLC*, 41 BRBS 21 (2007); *B.E. [Ellis] v. Electric Boat Corp.*, 42 BRBS 35 (2008); *Buck*, 37 BRBS 53. However, alternatively, the administrative law judge may issue a "decision independent of the motion," provided he gives the parties "notice and a reasonable time to respond" to the grounds identified by the administrative law judge.[9] 29 C.F.R. §18.72(f).

[7]In this respect, the administrative law judge erred in drawing the inference against claimant, the non-moving party, that he was totally disabled due to the fact that no party introduced vocational evidence into the record. *See* Decision and Order at 5. The parties could not anticipate that such would be necessary for the administrative law judge to rule on the motion before him.

[8]The administrative law judge found that the issue concerning claimant's degree of impairment involved a genuine issue of fact. *See* Decision and Order at 6. Thus, if that issue becomes a "material" fact based on the proceedings on remand, an evidentiary hearing would be required. *Walker v. Todd Pac. Shipyards*, 47 BRBS 11 (2013), *vacating in pert. part on recon.*, 46 BRBS 57 (2012).

[9]Furthermore, we note that the administrative law judge's decision is in error to the extent that it precludes medical benefits for claimant's hearing loss. Claimant is

In this respect, it appears that the administrative law judge's denial of benefits is based, in part, on a finding that claimant was already totally disabled as of March 9, 2001, although the legal framework is not articulated in the administrative law judge's decision. A claimant may not concurrently receive a scheduled permanent partial disability award for one injury and a total disability award for another injury, as claimant cannot receive compensation greater than that for total disability.[10] *See, e.g., Rupert v. Todd Shipyards Corp.*, 239 F.2d 273 (9th Cir. 1956); *Johnson v. Del Monte Tropical Fruit Co.*, 45 BRBS 27 (2011); *Thornton v. Northrop Grumman Shipbuilding, Inc.*, 44 BRBS 111 (2010); *B.S. [Stinson] v. Bath Iron Works Corp.*, 41 BRBS 97 (2007). In a case in which the claimant sustains two injuries, one of which is totally disabling and the other which would result in a scheduled award, the claimant can receive scheduled benefits only where he is able to show that the permanently partially disabling injury occurred prior to the onset of total disability. Under such circumstances, the claimant may only recover scheduled benefits accruing between the onset of partial disability and the onset of total disability.[11] *See Stinson*, 41 BRBS at 98-99.

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entitled to medical benefits for a work-related condition not addressed by the 2005 settlement, as long as he establishes that treatment is necessary for his work-related injury; such entitlement is not predicated on the existence of a compensable disability. *See, e.g., Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993); *Hoey v. Owens-Corning Fiberglas Corp.*, 23 BRBS 71 (1989).

[10]To the extent the administrative law judge's order is premised on claimant's failure to establish that he had a loss in wage-earning capacity due to his hearing loss, such a finding is in error. A claimant's entitlement to a scheduled award, absent total disability, is premised solely on the degree of permanent physical impairment and not on a loss in wage-earning capacity. *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980).

[11]In *Hoey*, 23 BRBS 71, the Board held that a claimant was precluded from receiving disability benefits for work-related stomach cancer pursuant to Section 8(c)(23), 33 U.S.C. §908(c)(23), because he had settled pursuant to Section 8(i) his claim for work-related asbestosis and the settlement agreement stated that the claimant was permanently totally disabled. In this case, claimant contends in his brief to the Board that the settlement agreement was not for permanent total disability benefits. Claimant may raise this contention before the administrative law judge on remand.

Accordingly, the administrative law judge's Decision and Order Granting Employer's Motion for Summary Decision is vacated and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge