U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 21-0158

RONALD ECKHOFF	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 7/25/2023
HUNTINGTON INGALLS INCORPORATED AVONDALE OPERATIONS	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Tracy A. Daly, Administrative Law Judge, United States Department of Labor.

Robert O'Dell, Vancleave, Mississippi, for Claimant.

Traci Castille (Franke & Salloum, PLLC) Gulfport, Mississippi, for Self-Insured Employer.

BEFORE: BUZZARD, ROLFE and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Tracy A. Daly's Decision and Order on Remand (2017-LHC-00444) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (Act).[1] We

[1] The Benefits Review Board's processing of this case was substantially delayed due to the COVID-19 pandemic which impacted the Board's ability to obtain records from

must affirm the ALJ's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). This case is before the Benefits Review Board for the second time.

Claimant is a retiree who experiences hearing loss. He worked with Continental Can Company from 1966 until 1978, and he worked four weeks in 1981 as a gouger for Ingalls Shipbuilding. Thereafter, he worked in other, non-longshore, industries until retiring in 2010. In 2015, an audiogram indicated he has 8.4% bilateral hearing loss.[2]

In the initial Decision and Order, ALJ Daly found Claimant established a prima facie case for his hearing loss claim and was entitled to the Section 20(a) presumption, 33 U.S.C. §920(a). 2018 Decision and Order (2018 D&O) at 13. He determined Employer rebutted the presumption with Claimant's testimony that hearing tests in 1990 and 1995 indicated no hearing loss, and with a note in Claimant's 2013 Initial Medicare Annual Wellness Visit report indicating he "did not have any difficulty hearing or understanding conversations or the television when others did not." *Id*. at 16. Specifically, the note in question is found in the "History of the Present Illness" section of the report, wherein the nurse reported Claimant's answers to a variety of intake questions and states: "[t]he patient has not had difficulty hearing or understanding conversations or the television or the radio when others do not." EX 6 at 54.

Having found rebuttal, the ALJ then weighed the evidence as a whole and found Claimant only partially credible because of inconsistencies in his testimony regarding when he noticed hearing loss as well as inconsistencies regarding his duties while working for Employer. *Id*. at 10. The ALJ gave less weight to Audiologist Marianne Towell's opinion because while the audiogram she administered on September 17, 2015, indicated an overall 8.4% bilateral hearing loss, she later testified she could not attribute the hearing loss to Claimant's work for Employer nor could she determine if Claimant's work for Employer

---

the Office of Administrative Law Judges and the Office of Workers' Compensation Programs. By Order dated April 21, 2022, the Board dismissed Claimant's appeal. Upon receiving the reconstructed record from the district director, the Board reinstated the appeal by Order dated April 12, 2023.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit because the alleged injury occurred in Pascagoula, Mississippi. 33 U.S.C. 921(c); *see Roberts v. Custom Ship Interiors*, 35 BRBS 65, 67 n.2 (2001), *aff'd*, 300 F.3d 510, 36 BRBS 51(CRT) (4th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003); 20 C.F.R. 702.201(a).

contributed to it. The ALJ found Claimant did not "carry his burden of persuasion to establish by a preponderance of the evidence that his hearing impairment was caused or aggravated by his employment with Employer" and denied benefits. *Id*. at 18.

On Claimant's appeal, the Board vacated the ALJ's rebuttal finding, concluding Claimant's testimony about alleged hearing tests he underwent in 1990 and 1995 was too vague to constitute rebuttal. It remanded the case for the ALJ to determine if Claimant's statement, recorded in Dr. Larry Henderson's 2013 intake report, that he did not have difficulty hearing or understanding conversations or the television or radio "when others did not" is, by itself, sufficient to rebut the presumption. *Eckhoff v. Huntington Ingalls Inc*., BRB No. 19-0031 (Aug. 6, 2019), slip op. at 4 (Board Remand). In the event the ALJ found rebuttal on remand, the Board affirmed the ALJ's determination that Claimant did not establish he suffers from work-related hearing loss based on the record as a whole. *Id.* at 5.

In his 2020 Decision and Order on Remand (2020 D&O), the subject of this appeal, the ALJ found Employer rebutted the Section 20(a) presumption with the note in Dr. Henderson's 2013 intake report. As the Board had already affirmed the denial of benefits in the event the ALJ found the presumption rebutted, the ALJ reinstated his remaining findings and again denied benefits. Claimant appeals the ALJ's decision on remand.

On appeal, Claimant contends the ALJ erred in addressing evidence outside the scope of the Board's remand order to find Employer rebutted the presumption.[3] He also asserts the ALJ should have found his hearing loss constitutes a work-related condition, determined the extent of his disability, and awarded benefits. Additionally, Claimant argues even if there is no compensable hearing loss, he is entitled to medical benefits, in particular, hearing aids. Employer responds, urging affirmance of the ALJ's decision on remand.

Claimant contends the ALJ erred in considering evidence outside of the scope of the Board's remand order. Specifically, Claimant states the ALJ did not base his rebuttal decision solely on the note in Dr. Henderson's 2013 intake report and consideration of anything outside of that note is error. We reject Claimant's argument.

Having held Claimant's testimony about allegedly undergoing hearing tests in the 1990s was insufficient to rebut the Section 20(a) presumption, the Board stated that "the note in [C]laimant's 2013 medical records" is the "only remaining evidence" that could

[3] He phrases the argument as: "That the administrative law judge erred in considering evidence outside of direction of the Board on remand on the issue of rebuttal of the Section 20(a) presumption." Cl. Brief at 7-8.

rebut the presumption. It ordered the ALJ to "reconsider whether this note in [C]laimant's medical records alone constitutes substantial evidence to rebut the Section 20(a) presumption." *Eckhoff*, slip op. at 4.

On remand, however, Claimant moved to reopen the record to permit the admission of supplemental evidence related to Dr. Henderson's report. The ALJ granted the motion, and Claimant submitted CX 18, which consists of two additional medical notes from visits with Dr. Henderson in December 2019, postdating the Board's decision remanding the claim to the ALJ to reconsider the 2013 note. The first, dated December 17, 2019, noted Claimant's statements that he had suffered from hearing loss for a "long duration" and that he had incorrectly reported he did not suffer from hearing loss in 2013 because he misunderstood the question. The second, dated December 18, 2019, includes Dr. Henderson's "History Addendum" whereby he appended to the 2013 note: "Pt states that he answered no hearing loss when asked by nurse because he interpreted [it] to mean any recent change in hearing and that is not what he was here for. Has had long term hearing loss from exposure to loud noises on job in the past." CX 18 at 6; 2020 D&O at 2-3.

The ALJ also accepted as EX 11 Employer's additional evidence on remand, specifically Dr. Henderson's March 16, 2020, deposition transcript wherein he recalled adding the "History Addendum" at Claimant's request. He also stated Claimant did not report any hearing loss or difficulty hearing during any medical evaluation between 2007 and 2019, and if Claimant had, it would be documented. EX 11 at 7-11, 21.

As the ALJ admitted supplemental evidence at the parties' requests, Claimant's challenge to the ALJ's consideration of evidence "outside the scope" of the Board's remand order is flawed. The ALJ "shall inquire fully into the matters at issue and shall receive in evidence the testimony of witnesses and any documents which are relevant and material to such matters." 20 C.F.R. §702.338. While he could have restricted the scope of the remand proceedings to the terms of the Board's remand order, *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT) (9th Cir. 1993), *aff'g and modifying McDougall v. E.P. Paup Co.*, 21 BRBS 204 (1988), it is axiomatic the ALJ has significant discretion in admitting evidence. *Hughes v. Bethlehem Steel Corp*., 17 BRBS 153, 155 n.1 (1985). Therefore, we reject Claimant's argument that the supplemental evidence is outside the scope of remand and affirm the ALJ's conclusion that the 2019 addendum to the 2013 note has minimal evidentiary value, because Dr. Henderson's deposition testimony indicates Claimant did not report any hearing loss to him until 2019. 2020 D&O at 8.

Claimant also alleges the 2013 note is not substantial evidence because it compares his hearing capabilities to "others" and there is no evidence that he listened to television or the radio with anyone else, or conversed with anyone other than his wife and medical

professionals.[4] But Claimant has not explained why the lack of such additional evidence undermines the ALJ's finding that the 2013 note itself is substantial evidence rebutting causation because it "correctly captures Claimant's answer to the nurse's question and accurately documents that he did not report any difficulty hearing" as of 2013, long after he had ceased his longshore work. 2020 D&O at 9; *see Ceres Gulf, Inc. v. Dir., Office of Worker's Comp. Programs [Plaisance],* 683 F.3d 225, 231, 46 BRBS 25, 29(CRT) (5th Cir. 2012) ("all [employer] must do is advance evidence to throw factual doubt on the prima facie case. Having produced substantial evidence, the employer then casts the duty on the ALJ to weigh all the record evidence.").

Finally, we reject Claimant's assertion that the ALJ errantly based his rebuttal finding on additional previously admitted evidence in contravention of the Board's remand instructions to consider the 2013 note. The ALJ did not consider previously admitted evidence until after he specifically found the 2013 report rebuts the presumption, stating that other "non-excluded" evidence also supports his decision. 2020 D&O at 9. The evidence bolstered the ALJ's conclusion that the record as a whole contains no support for finding Claimant had a work-related hearing condition.[5]

Consequently, we find no error in the ALJ's assessment of the evidence and affirm his finding that Employer rebutted the presumption, as well as his reinstated finding that Claimant did not establish a work-related injury.[6]

---

[4] Moreover, Claimant's one conclusory sentence at the end of his argument, Cl. Brief at 11, asserting the 2013 intake information "is certainly not substantial evidence of some cause of the Claimant's hearing loss other than industrial noise" erroneously presumes Employer must assert an alternate cause in order to rebut. *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000) (an employer need not prove another agency of causation to rebut the presumption); *Plappert v. Marine Corps Exch.*, 31 BRBS 109 (1997), *aff'g on recon. en banc* 31 BRBS 13 (1997) (one-sentence "argument" is not adequate briefing).

[5] We reject Claimant's assertion that the ALJ held him to a higher standard of having to know exactly when his hearing loss occurred. The ALJ's statement surmising Claimant should have known about any work-related hearing loss shortly after his employment with Employer in 1981 is part of his paragraph where he stated rebuttal is "bolstered by the lack of treatment." 2020 D&O at 9. That is, the ALJ noted the factual doubt on causation because Claimant sought no treatment or testing until 34 years after his employment ended.

[6] As there is no work-related injury, we need not address Claimant's remaining contentions.

Accordingly, we affirm the ALJ's Decision and Order on Remand.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge