U.S. Department of Labor

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

BRB No. 16-0493

ARTHUR FORD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SSA TERMINALS, LLC	)	
	)	DATE ISSUED: Mar. 28, 2017
and	)	
	)	
HOMEPORT INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

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

V. William Farrington, Jr. (Farrington & Thomas, L.L.C.), New Orleans, Louisiana, for claimant.

Alan J. Chang (Bruyneel Law Firm, LLP), San Francisco, California, for employer/carrier.

Before: BOGGS, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order Granting Respondent's Motion for Summary Decision (2016-LHC-00083) 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).

On May 5, 1995, claimant underwent audiometric testing which showed a binaural hearing loss of 37.81 percent. He continued to work until he sustained a work-related right hand or thumb injury on December 20, 2002. Claimant was not employed after this date. On June 7, 2004, claimant, his several longshore employers and their mutual carrier, Homeport Insurance Company (Homeport), submitted a joint Application for Approval of Settlement Pursuant to Section 8(i) of the Act, 33 U.S.C. §908(i).

The parties agreed to settle claims for traumatic work injuries claimant sustained on January 24 and April 22, 1993, April 14, 1996 and December 20, 2002, and for cumulative trauma to claimant's hips and knees through January 17, 2001. The parties also agreed to settle the claim for hearing loss demonstrated on the April 9, 1995 audiogram, as well as for any loss claimant sustained through his last day of work on December 20, 2002; the parties acknowledged that no formal claim had been filed for any hearing loss claimant sustained through December 20, 2002. The settlement agreement provided for claimant to discharge the employers and Homeport from liability for disability and medical benefits as stated therein, in exchange for $175,000.[1] Having determined that the settlement was neither inadequate nor procured by duress, Administrative Law Judge Torkington approved the Section 8(i) settlement agreement on July 15, 2004.

Claimant underwent a second audiogram on May 9, 2015, which showed "severe hearing loss." On June 11, 2015, claimant filed a claim for hearing loss sustained as a result of occupational exposure to "injurious noise exposure" up through December 2002, his last day of work. Employer, on February 26, 2016, filed with Administrative Law Judge King (the administrative law judge) a motion for summary decision, contending that the work-related hearing loss demonstrated on the 2015 audiogram was compensated by the parties' 2004 settlement. Claimant, in his response, maintained that his current claim for hearing loss was not resolved by the 2004 settlement.

The administrative law judge granted employer's motion for summary decision. He found the June 2004 settlement application raised a claim for all hearing loss through claimant's last day of work on December 20, 2002, and that a claim for such a loss was in existence when the parties' settlement agreement was approved. The administrative law judge found that the parties' Section 8(i) settlement resolved this claim. The administrative law judge thus denied claimant's 2015 claim for additional hearing loss benefits.

[1]The parties did not settle the claim relating to claimant's December 20, 2002 right hand/thumb injury.

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

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 a 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); 29 C.F.R. §18.72 (2015). In addition, the trier-of-fact must draw all inferences in favor of the non-moving party. *O'Hara,* 294 F.3d at 61; *Morgan,* 40 BRBS 9. If a rational trier-of-fact might resolve the issue in favor of the non-moving party, summary decision must be denied. *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

Claimant contends the administrative law judge erred in finding that his 2015 claim for hearing loss was encompassed in the approved 2004 Section 8(i) settlement agreement. Claimant avers that his claim for hearing loss encompassing the period from May 5, 1995 through December 20, 2002, was not a "claim in existence" prior to June 2015, when claimant actually filed a claim, and thus, was not resolved by the 2004 settlement. Claimant notes that the parties explicitly recognized in the settlement agreement that no claim had been filed with regard to any hearing loss caused by work-related noise exposure between 1995 and his last day of work in December 2002. Thus, claimant contends that the 2015 claim is viable because it was not settled. We reject claimant's contention and affirm the administrative law judge's decision based on the unique facts of this case.

Section 8(i) of the Act, 33 U.S.C. §908(i), provides that the parties may settle "any claim for compensation under this chapter." Where a claimant seeks to terminate his compensation claim for a sum of money, the Section 8(i) settlement procedures, as delineated in the Act's implementing regulations, must be followed.[2] *See, e.g., Henson v. Arcwel, Corp.*, 27 BRBS 212 (1993); 20 C.F.R. §§702.241-702.243. The implementing

[2]Section 8(i), 33 U.S.C. §908(i), is the only means for compromising an employer's obligation to pay benefits under the Act, creating an exception to Section 15(b), 33 U.S.C. §915(b) ("No agreement by an employee to waive his right to compensation under this chapter shall be valid"), and to Section 16, 33 U.S.C. §916 (no assignment, release, or commutation of compensation or benefits is valid except as provided in the Act).

regulations state that "the settlement application shall be a self-sufficient document which can be evaluated without further reference to the administrative file." 20 C.F.R. §702.242(a); *see generally Norton v. National Steel & Shipbuilding Co.*, 25 BRBS 79 (1991), *aff'd on recon. en banc,* 27 BRBS 33 (1993) (Brown, J. dissenting). The regulations require "a brief summary of the facts of the case to include: a description of the incident, a description of the nature of the injury to include the degree of impairment and/or disability . . . ," 20 C.F.R. §702.242(a), as well as "the reason for the settlement, and the issues which are in dispute, if any." 20 C.F.R. §702.242(b)(2).

The parties may settle only claims in existence. *See J.H. [Hodge] v. Oceanic Stevedoring Co.*, 41 BRBS 135 (2008); *Cortner v. Chevron Int'l Oil Co., Inc.*, 22 BRBS 218 (1980); 20 C.F.R. §702.241(g). Section 702.241(g) provides:

> An agreement among the parties to settle a claim is *limited to the rights of the parties and to claims then in existence*; settlement of disability compensation or medical benefits shall not be a settlement of survivor benefits nor shall the settlement affect, in any way, the right of survivors to file a claim for survivor's benefits.

20 C.F.R. §702.241(g) (emphasis added); *see Clark v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 121 (1999) (McGranery, J., concurring) (no claim in existence for right knee injury at time of settlement for injuries to back, left knee and left groin); *Cortner*, 22 BRBS 218 (no right to survivor's benefits during claimant's lifetime, so cannot settle survivor's claim in disability compensation settlement agreement). Once approved, the effect of a Section 8(i) settlement is to completely discharge the employer's liability for the claimant's injuries that are the subject of the settlement. 33 U.S.C. §908(i)(3); 20 C.F.R. §702.243(b); *see, e.g., Diggles v. Bethlehem Steel Corp.*, 32 BRBS 79 (1998).

The administrative law judge found that: 1) the written language of the settlement agreement "clearly asserts" claimant's right under the Act to compensation for any hearing impairment as of December 20, 2002; and 2) while the agreement distinguishes between two hearing loss claims, i.e., the claim based on the 1995 audiogram and the "unfiled" claim for the hearing loss through December 20, 2002, the settlement document "expresses the clear intent of claimant to resolve" both claims. Order Granting Motion for Summary Decision at 4-6. In reaching this conclusion, the administrative law judge found that subsection A of the settlement agreement, entitled "TERMS AND CONDITIONS OF THE SETTLEMENT," stated the settlement "is intended to and does settle all of the claimant's claims for benefits," including "13-93791 (D/I 4/9/95) [which constitutes the claim for hearing loss based on the May 5, 1995 audiogram]" and "D/I 12/20/02 – hearing loss (no claim yet filed)." EX 2 at 5. Additionally, the administrative

law judge found significant the statements made by the parties in subsection C, entitled "TERMS OF THE SETTLEMENT," in which the parties agreed:

> 3. The settlement settles the liability for injuries to any part of the body other than the right hand/thumb/finger. . . .
>
> 4. The settlement settles **any claim for hearing loss** by any of the Homeport insureds.
>
> * * *
>
> 6. The proceeds of the settlement are allocated as follows:
>
> a. $82,500 for the hearing loss claim, of which $9,000 is allocated to medical care.

EX 2 at 6-7 (emphasis added). In this respect, the administrative law judge found merit in employer's position that the dollar value of the settlement for claimant's hearing loss, $82,000, exceeded the value of the 1995 hearing loss claim alone.[3] Order Granting Motion for Summary Decision at 2 n. 2. The administrative law judge also found there was no question that claimant, as of the time of the 2004 settlement agreement, could have established a prima facie case under Section 20(a), 33 U.S.C. §920(a), that his hearing loss as of December 20, 2002, was work-related, based on the nature of the noise at claimant's work place. *Id.* at 6. The administrative law judge thus concluded that the claim for hearing loss that existed as of claimant's last day of work, i.e., December 20, 2002, was an actual "claim in existence" and was resolved by the 2004 Section 8(i) settlement agreement. Thus, the administrative law judge found that a claim for benefits based on the 2015 audiogram is precluded.

The Board and the courts have held that a "claim" need not be on a particular form in order to satisfy the requirements of Section 13, 33 U.S.C. §913. Any writing will suffice as long as it discloses an intention to assert a right to compensation. *Avondale Industries, Inc. v. Alario*, 355 F.3d 848, 37 BRBS 116(CRT) (5th Cir. 2003); *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998); *Bingham v. General Dynamics Corp.*, 14 BRBS 614 (1982). The parties' settlement agreement clearly asserts a right to compensation for hearing loss based on exposure

[3]With regard to compensation, the value of claimant's 1995 hearing loss claim is, at most, $57,540.77, i.e., 75.62 weeks (37.81 percent of 200 weeks) x $760.92 (which represents the maximum compensation rate at the time of the May 1995 audiogram). *See* 33 U.S.C. §908(c)(13).

through claimant's last day of work on December 20, 2002.[4] EX 2. We thus affirm the administrative law judge's finding that the 2004 settlement document included a claim for hearing loss through December 20, 2002. *See generally Jones Stevedoring Co. v. Director, OWCP [Taylor]*, 133 F.3d 683, 31 BRBS 178(CRT) (9th Cir. 1997).

The plain words of the 2004 agreement also support the administrative law judge's finding that the claim for hearing loss due to work exposure to noise through December 2002 was "in existence" at the time of the settlement. Claimant's hearing loss based on work-related noise exposure was complete as of the date of his last exposure, i.e., December 20, 2002, at the latest. *See Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 26 BRBS 151(CRT) (1993). The specific terms of the agreement indicate the parties' intent to settle "any claim for hearing loss," including any loss claimant may have experienced after his May 5, 1995 audiogram through his last day of work on December 20, 2002. The parties' settlement agreement referred to the December 20, 2002 "date of injury" and the "unfiled claim" for hearing loss and expressly stated the parties were settling this claim. The representations in the parties' settlement agreement regarding claimant's claim for hearing loss encompassing the period between the May 5, 1995 audiogram and his last day of work with employer are sufficient for the administrative law judge to have concluded that a claim for any increased hearing loss after May 1995 was "in existence" at the time the parties executed their settlement agreement and was settled by the parties.[5] Consequently, on the facts of this case, the

[4]Claimant's assertion that the settlement could not have applied to his hearing loss as of December 20, 2002, because employer did not provide an exit audiogram and there was nothing to show claimant's actual binaural hearing loss as of that date is without merit. A claim for hearing loss benefits need not be accompanied by an audiogram. *Craig, et al v. Avondale Industries, Inc.*, 35 BRBS 164 (2001) (decision on recon. *en banc*), *aff'd on recon. en banc,* 36 BRBS 65 (2002), *aff'd sub nom. Avondale Industries, Inc. v. Alario*, 355 F.3d 848, 37 BRBS 116(CRT) (5th Cir. 2003). Moreover, claimant cannot collaterally attack the settlement at this juncture by contending it lacked supporting evidence. *See generally Jeschke v. Jones Stevedoring Co.*, 36 BRBS 35 (2002).

[5]In contrast, in *Clark v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 121 (1999) (McGranery, J., concurring), the Board reversed the administrative law judge's finding that claimant's awareness of a work-related right knee injury at the time he entered into a settlement for other injuries precluded his seeking medical benefits for that right knee injury, stating that claimant's awareness was irrelevant because the claim for that condition had not yet been filed. Notably, moreover, the settlement document in that case did not mention a right knee injury. In this case, claimant's work-related hearing loss was complete as of the date he stopped working, *see Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 26 BRBS 151(CRT) (1993), the settlement document

administrative law judge's finding that the 2004 approved settlement agreement resolved all claims for hearing loss arising out of claimant's occupational noise exposure through his last day of work on December 20, 2002, is affirmed as it is rational, supported by substantial evidence, and in accordance with law.[6] *Poole v. Ingalls Shipbuilding, Inc.*, 27 BRBS 230 (1993); *Kelly v. Ingalls Shipbuilding Inc.*, 27 BRBS 117 (1993). We, therefore, affirm the administrative law judge's grant of summary decision for employer. *See generally B.E. [Ellis] v. Electric Boat Co.*, 42 BRBS 35 (2008).

Accordingly, the administrative law judge's Order Granting Respondent's Motion for Summary Decision is affirmed.

SO ORDERED.

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JUDITH S. BOGGS
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge

references an "unfiled" claim for hearing loss due to noise exposure through claimant's last day of work for employer, and the parties expressly settled this claim.

[6]In light of this disposition, we need not address claimant's alternative contention that his 2015 hearing loss claim complied with the notice and filing provisions of Sections 12 and 13 of the Act, 33 U.S.C. §§912, 913.