U.S. Department of Labor

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

BRB No. 16-0577

JAMES W. LAHEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GEORGIA-PACIFIC CORPORATION	)	
	)	
and	)	
	)	
ACE AMERICAN INSURANCE COMPANY	)	DATE ISSUED: May 11, 2017
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Order Granting Disability Benefits and Medical Care of William Dorsey, Administrative Law Judge, United States Department of Labor.

Richard A. Mann (Brownstein Rask, L.L.P.), Portland, Oregon, for claimant.

Norman Cole (Sather, Byerly & Holloway), Portland, Oregon, for employer/carrier.

Barry H. Joyner (Nicholas C. Geale, Acting Solicitor of Labor; Maia Fisher, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Order Granting Disability Benefits and Medical Care (2012-LHC-01105, 2012-LCH-01106) of Administrative Law Judge William Dorsey 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 began working for employer in 1967 as a tugboat mechanic where he was exposed to loud noise. In 1995, employer paid claimant for a 29.5 percent binaural hearing loss, and claimant was fitted with his first hearing aids. In May 1998, after employer divested itself of its tugboat operations, claimant began working as a parts-man. Claimant's duties required him to work alongside mechanics who used tools such as air wrenches, compressed air tools, and grinders. He also fueled lift-trucks and was subjected to the maximum revving of their engines. Order at 3-5, 61; Cl. Br. at 1-4; Emp. Br. at 2. Claimant testified that he wore his hearing aids every day but he did not wear hearing protection regularly. He would adjust or turn his hearing aids off if he was subjected to noise, but was reluctant to turn the hearing aids off or wear hearing protection when he needed to communicate with co-workers. Tr. at 48-49.

In November 2000, claimant's audiogram revealed a 48.1 percent noise-induced hearing loss, and employer paid benefits for that loss, receiving a credit for the amount it paid earlier. In 2004, claimant underwent an audiogram which revealed that speech sounded garbled to him and he had over 73 percent loss. In 2006, he had over 80 percent hearing loss, and by 2008, claimant's binaural hearing loss had reached 100 percent, and he was a candidate for cochlear implants. JXs 47, 50-51, 65, 78-79, 118. Claimant notified employer he was seeking benefits for his hearing loss in June 2009. JX 91. Following a July 2010 audiogram, also showing a 100 percent loss, claimant filed a formal claim for compensation seeking disability and medical benefits. JXs 98-99, 118. Claimant retired from work in February 2013, last working on November 16, 2012. Order at 3-5, 61; Cl. Br. at 1-4; Emp. Br. at 2. Claimant underwent left cochlear implant surgery in January 2013. Due to vertigo, which took over one year to resolve, claimant had not undergone the right-side surgery as of the date of the hearing. CX 17 exh. 4; Tr. at 66-69.

The administrative law judge invoked the Section 20(a), 33 U.S.C. §920(a), presumption that claimant's additional hearing loss after November 2000 is related to his

exposure to noise at work, and found that employer rebutted it. Order at 38-41. On the record as a whole, the administrative law judge found claimant established that his 100 percent hearing loss is due, at least in part, to work-related noise exposure after November 2000. The administrative law judge awarded claimant permanent partial disability benefits for a 100 percent binaural hearing loss, subject to employer's credit for benefits already paid. He also found that employer is liable for a Section 14(e), 33 U.S.C. §914(e), assessment of $11,036.81, medical benefits, including the cochlear implant surgeries, and interest. The administrative law judge denied employer's request for Section 8(f), 33 U.S.C. §908(f), relief. Order at 52-54, 56, 62, 65. Employer appeals the administrative law judge's Order. Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond. Employer filed a reply brief.

Employer contends it is not liable for disability or medical benefits for claimant's increased hearing loss after November 6, 2000, because this hearing loss is not work-related. Employer asserts that claimant was not exposed to injurious noise after that date, and it was erroneous for the administrative law judge to conclude that claimant's hearing aids amplified occupational noise to injurious levels. To support its position, employer submitted a number of dosimetry measurements it performed at its facilities; it asserts the results establish that noise in the vicinity of claimant's work generally was below the 85 dB threshold and, therefore, was not injurious. JXs 137-138, 142-148. Employer also relies on the opinion of Dr. Dolan, Ph.D., CCC-A, who stated there was a genetic cause for claimant's progressive hearing loss after November 2000 because the changes were reflected in lower frequencies, whereas noise-induced loss is shown in the upper frequencies. Dr. Dolan also stated that claimant had control over the sound coming through his hearing aids, such that he could turn them off or down as needed. EX 150 at 6-10. Further, employer relies on the opinions of Drs. R.S. Hodgson and R.A. Hodgson, both medical doctors, that it is unlikely that claimant's hearing aids caused additional hearing loss because hearing aids have volume limits to prevent further damage. CX 15 at 86-87; EX 109 at 33. They also believed claimant's hearing loss was due to a genetic cause, that the audiograms after 2000 reflected loss that was not noise-related, and that claimant's continued exposure to noise below 85 dB and momentary exposure to noise above that level was not injurious. Tr. at 198-199, 207-215, 234, 241-242. Employer asserts it was irrational for the administrative law judge to rely on the opinions of Dr. Lipman, M.D., and Dr. Swanstrom, Au.D., given the evidence it submitted.

Once the Section 20(a) presumption relating a claimant's harm to his employment accident or working conditions has been invoked and rebutted, as here, the presumption drops from the case, and the causation issue must be decided on the record as a whole.[1]

[1] The administrative law judge found that employer rebutted the Section 20(a) presumption with its noise surveys showing that claimant was not exposed to time-weighted noise averages above 85 dB. He also found that the opinions of Drs. Dolan,

Duhagon v. Metropolitan Stevedore Co., 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). On the record as a whole, the claimant bears the burden of establishing, by a preponderance of the evidence, a causal relationship between his employment exposures and his injury. *Moore*, 126 F.3d 256, 31 BRBS 119(CRT).

In this case, the administrative law judge thoroughly discussed the relevant evidence on the record as a whole. With regard to the noise surveys, he found they may tend to show that claimant was exposed to noise levels at work averaging less than 85 dB; nevertheless, he gave them less weight because no dosimeter readings were taken of claimant, and the surveys represented only limited periods of time. Order at 8, 11, 43.[2] Thus, the administrative law judge rationally found the noise surveys were of limited value and not dispositive, and that other factors had to be addressed to determine whether claimant was exposed to injurious noise at work after 2000. *Id.* at 8-13, 42-44; *see generally Damiano v. Global Terminal & Container Service*, 32 BRBS 261 (1998).

The administrative law judge found that the sound amplification provided by claimant's hearing aids played a role in the further deterioration of his hearing. Order at 44.[3] The administrative law judge relied on Dr. Swanstrom's testimony and the manufacturers' specifications of claimant's hearing aids from both 2000 and 2011 to find that hearing aids, while generally designed not to damage hearing further, could, based on

---

R.S. Hodgson, and R.A. Hodgson that the hearing loss claimant demonstrated in the audiograms after 2000 was unlike typical noise-induced loss because it was rapid and affected the lower frequencies. Order at 40-41.

[2] The administrative law judge found the noise surveys "akin to dipping a five-gallon bucket in the ocean, and declaring that the absence of fish in the bucket proves there are no fish in the ocean." Order at 43.

[3] The administrative law judge noted the opinions of Michael Krause, an industrial hygienist, that claimant was exposed to noise exceeding 85 dB during his work as a parts-man, especially when he worked in/near the lift-trucks, and that amplification from claimant's hearing aids contributed to his hearing loss. Order at 15-18, 44-45; CX 9. Despite the acknowledgement, the administrative law judge appears to have found that the assumptions made by all the industrial hygienists of record, including Mr. Krause, regarding, for example, claimant's exposures and use of hearing protection, are "too fragile." Thus, as he had no way of knowing whether the assumptions were accurate, he was not persuaded they were valid. Order at 44-45.

the programmed amplification for each user, produce sounds that are higher than the injurious threshold level. Order at 21-25, 45; CX 16. While the administrative law judge considered part of Dr. Swanstrom's testimony about the hearing aids from 2000 to be inconsistent,[4] he credited her initial explanation of claimant's 2000 hearing aids and how they worked, as well as her testimony regarding his hearing aids from 2011. Using the specification charts she referenced, the administrative law judge determined that sounds are boosted by certain amounts to help an individual hear them. Consequently, some of that amplification resulted in claimant hearing sounds at the hearing aids' maximum outputs which exceeded the 85 dB threshold. Order at 23-25. Based on this evidence, and the fact that claimant's hearing was so poor his hearing aids had to boost sounds even more for him to hear them, the administrative law judge concluded that claimant was exposed to occupational noise which played a role in claimant's hearing loss after 2000. *Id.* at 49-52.

Further, the administrative law judge's finding is supported by the opinion of Dr. Lipman, an otolaryngologist and claimant's expert who examined claimant in 2010. Order at 50, 52. While Dr. Lipman agreed with the other professionals that claimant has substantial hearing loss due to a genetic factor or something other than work-related noise,[5] he concluded that noise of injurious levels between 1995 and 2008 was one of the causes of claimant's hearing loss. That is, although there is a genetic component, that loss is superimposed on a noise-induced loss. Dr. Lipman explained that his opinion is based on "the configuration of the audiograms . . . taken between 1989 and 2004 which clearly show a progression in the bilateral high tone inner ear hearing loss, fully in keeping with noise exposure. . . ." CX 5. Although Dr. Lipman did not address claimant's hearing aids other than to say claimant's hearing loss as of 2010 was too severe for hearing aids to help, his opinion that noise-induced loss contributed to claimant's hearing loss after 2000 was based on the results of the audiograms, up to and including the 2004 audiogram. *Id.*; JXs 47, 60, 118.

[4] The administrative law judge found that Dr. Swanstrom's testimony as to the meanings of the lines on the graphs representing claimant's hearing aid specifications was confusing and conflicted with her earlier testimony as to what the lines meant. As he found her earlier testimony more reliable and understandable, he credited the part of her testimony that made sense to him, in conjunction with the manufacturers' specifications. Order at 21-25. It is solely within the discretion of the administrative law judge to accept or reject all or any part of any testimony according to his judgment. *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969).

[5] No doctor explained what that genetic reason is – they stated only that it does not look like noise-induced or age-related loss.

The administrative law judge is entitled to determine the weight to be accorded to the evidence of record, to address the credibility and sufficiency of any testimony, and to choose from among reasonable inferences. *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010). The Board may not reweigh the evidence or substitute its opinion for that of the administrative law judge. *Id.*; *Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994). Consequently, we reject employer's assertion that the administrative law judge should have credited and given greater weight to its evidence. Although claimant's hearing loss has a genetic or non-noise-induced component, the administrative law judge found there was at least some post-2000 loss at the higher frequencies, indicating loss due to noise exposure. Order at 46-52. The opinions of Drs. Lipman and Swanstrom support the administrative law judge's findings that claimant established he sustained a noise-related hearing loss after November 2000 and that his use of hearing aids while working contributed to that loss. *Director, OWCP v. Vessel Repair, Inc.* [*Vina*], 168 F.3d 190, 33 BRBS 65(CRT) (5th Cir. 1999) (compensability rests on whether work exposure is a cause of the resultant disability; it need not be the sole cause).

Moreover, as the administrative law judge found, the fact that claimant has an unspecified genetic hearing loss does not aid employer. Even if such loss is treated as an intervening injury for which employer would not be liable, and the intervening injury combined with the work-related condition to result in greater disability, there is no evidence establishing the percentage of impairment related solely to the genetic condition. Absent evidence apportioning claimant's impairment between his genetic/non-noise-related hearing loss and his work-related loss, employer is liable for the hearing loss in its entirety. *Plappert v. Marine Corps Exchange*, 31 BRBS 109, *aff'g on recon. en banc* 31 BRBS 13 (1997); Order at 52-53. Therefore, we affirm the administrative law judge's finding that claimant's hearing loss after November 2000 is, at least in part, work-related and noise-induced, and that employer is liable for disability benefits for claimant's additional hearing loss after November 2000 in its entirety, subject to a credit for prior payments. *Id.*

In light of our affirmance of the administrative law judge's finding that claimant's hearing loss is work-related, we reject employer's assertion that the administrative law judge erred in awarding claimant medical benefits for his hearing loss. Treatment is compensable even though it is due only partly for a work-related condition. *Kelley v. Bureau of Nat'l Affairs*, 20 BRBS 169 (1988). Accordingly, we affirm the award of medical benefits, including the cost of the cochlear implants.

As we have affirmed the administrative law judge's award, we will address the remaining issues raised by employer. First, employer contends the administrative law judge erred in awarding claimant an additional assessment under Section 14(e) of $11,036.81 instead of $10,582.49. Claimant elects to forego the time and cost of

checking the calculations and tendering an argument on the matter. Cl. Br. at 10. Therefore, because claimant does not oppose employer's calculation of the Section 14(e) assessment, we modify the administrative law judge's award to reflect employer's liability for a Section 14(e) assessment in the amount of $10,582.49 instead of $11,036.81.

Next, employer contends the administrative law judge erred in denying Section 8(f), 33 U.S.C. §908(f), relief by finding that the audiograms it submitted as evidence of claimant's pre-existing loss do not comport with 20 C.F.R. §702.441.[6] Specifically, citing *G.K.* [*Kunihiro*] *v. Matson Terminals, Inc.*, 42 BRBS 15 (2008), *aff'd sub nom. Director, OWCP v. Matson Terminals, Inc.*, 442 F. App'x 304 (9th Cir. July 12, 2011); *R.H.* [*Harris*] *v. Bath Iron Works Corp.*, 42 BRBS 6 (2008), employer asserts that the audiogram showing a pre-existing permanent partial disability for purposes of Section 8(f) need not meet the presumptive evidence standard if it is otherwise valid and reliable.[7] Consequently, employer asserts that the case must be remanded for further consideration of its evidence in this regard. The Director agrees that the case must be remanded on the grounds cited by employer.

In addressing whether employer satisfied the elements for Section 8(f) relief, the administrative law judge stated he has no way of knowing the qualifications of the person who performed the 2006 audiogram, and he could not determine whether the 2004 and 2006 audiometers were properly calibrated. Order at 64-65; *see* 20 C.F.R. §702.441(b)(1), (d). Therefore, he found employer did not establish that claimant had a

[6] Section 702.441 of the regulations requires audiograms to meet certain criteria in order to be "presumptive" of the degree of hearing loss. To be "presumptive evidence" of hearing loss, the audiogram must have been administered by a licensed or certified audiologist, the employee must have received a copy of it within 30 days of the examination, and there must not be a contrary probative audiogram (meeting the same standards) at the same time. 20 C.F.R. §702.441(b). For determining pre-employment hearing loss, the audiogram must be dated prior to employment or within 30 days of the first work-related noise exposure. 20 C.F.R. §702.441(c). For determining hearing loss under the Act, evaluators must use the AMA *Guides* and the audiometer must be calibrated to national standards. 20 C.F.R. §702.441(d).

[7] The Board held that the reference to Section 702.441 in Section 702.321(a)(1) of the regulations, 20 C.F.R. §702.321(a)(1), is too broad to require a "presumptive" audiogram to establish entitlement to Section 8(f) relief. "Presumptive" audiograms meet the criteria in 20 C.F.R. §702.441(b)(1)-(3), but audiograms that do not meet those requirements may still be used to establish the degree of pre-existing hearing loss. *Kunihiro*, 42 BRBS at 20; *Harris*, 42 BRBS at 9-10; 20 C.F.R. §702.441(c), (d).

pre-existing permanent partial disability, as required for Section 8(f) relief. Order at 64-65. Although the Director disagrees with the holdings in *Kunihiro* and *Harris*, Dir. Br. at 4 n.9, he acknowledges that the administrative law judge's finding does not comport with the law. Thus, the Director agrees that, if the award of benefits is affirmed, the Board should vacate the denial of Section 8(f) relief and remand the case for the administrative law judge to reconsider that issue. In light of our affirmance of the administrative law judge's award to claimant of disability benefits for his increased hearing loss, we vacate the denial of Section 8(f) relief and remand the case for further consideration of this issue, in accordance with the appropriate law, as well as the remaining elements for Section 8(f) relief, if reached. *Kunihiro*, 42 BRBS at 20; *Harris*, 42 BRBS at 9-10.

Accordingly, the administrative law judge's Order Granting Disability Benefits and Medical Care is modified to reflect employer's liability for a Section 14(e) assessment of $10,582.49. The denial of Section 8(f) relief is vacated, and the case is remanded for further consideration of that issue. In all other respects, the administrative law judge's Order Granting Disability Benefits and Medical Care is affirmed.

SO ORDERED.

_____
BETTY JEAN HALL, Chief
Administrative Appeals Judge

_____
RYAN GILLIGAN
Administrative Appeals Judge

_____
JONATHAN ROLFE
Administrative Appeals Judge