U.S. Department of Labor

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

BRB No. 16-0620

JOSEPH A. PEGRAM	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: May 5, 2017
HUNTINGTON INGALLS INDUSTRIES, INCORPORATED	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Dana Rosen, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna Klein Camden, LLP), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2005-LHC-01724) of Administrative Law Judge Dana Rosen 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 was hired by employer as a welder in 1973, but began working as a tool keeper in 1977. From 1973 to 1984, claimant's jobs were included in employer's Hearing Conservation Program, which required claimant to wear hearing protection and undergo audiometric screenings. Tr. at 23. In 1984, claimant's tool keeper position

changed such that it was classified as a "non-production job" and claimant was no longer included in the Hearing Conservation Program. *Id*. At this time, employer administered an audiogram which demonstrated no ratable hearing loss.[1] CX 3 at 2.

Claimant testified that after 1984 he was assigned to Building 222, where he would report before traveling to metal issue stations throughout the shipyard to repair "air tools." Tr. at 23. Claimant stated that it was not noisy in all the metal shacks, but the ones on the aircraft carriers were very noisy as there were blowers generating loud noise on either side of the shacks. *Id*. at 55. He further testified that his repair work exposed him to loud noise when testing grinders, needle guns, and K1 hammers; he wore hearing protection during these activities. *Id*. at 29-34. After the late 1990s, claimant no longer repaired tools as part of his tool keeper position, but continued to issue tools from the metal issue stations. *Id*. at 34. In 2007 and 2008, while working aboard an aircraft carrier, claimant stated he was exposed to injurious noise from blowers outside the shack as he had to leave the service window open to service 300-400 welders daily. *Id*. at 36. After 2008, claimant worked at different metal issue stations, including one located in the production area of the Steel Production Facility, which exposed him to shrill warning beeps from JLG machines and noise from cranes driving and lowering plates. *Id.* at 36-38. Due to a shoulder injury in 2010 or 2011, claimant began working on the second floor of Building 222 in the "parts facility," but some days he drove a truck, transporting welders around the shipyard. Claimant stated that it was quiet in the parts facility, but he was exposed to shipyard noise while driving the truck. *Id*. at 39-40. Claimant also stated that, for the six months preceding the January 26, 2016 hearing, he worked on the first floor of Building 222, repairing stud guns. *Id*. at 39. Claimant stated that he was exposed to loud noise when testing the stud guns and when other people in the shop would grind or beat hammers, though he also stated that he wore hearing protection when testing stud guns and whenever he would hear other people in the shop make noise. *Id*. at 41.

[1] The 1984 audiogram demonstrated no ratable impairment; however, there was a borderline normal threshold at 4000Hz and 6000Hz. EX 2 at 2.

Claimant did not undergo any audiometric screenings between 1984 and 2014. In 2014, claimant began experiencing hearing difficulties and sought an evaluation by Dr. Queen, an ear, nose and throat specialist. Tr. at 48. Based on an April 3, 2014 audiogram, Dr. Queen diagnosed claimant with a 61.4 percent binaural hearing loss. CX 1. Claimant filed a claim for benefits under the Act, which employer controverted.[2]

Based on the April 2014 audiogram and claimant's testimony of exposure to loud noise at work, the administrative law judge invoked the Section 20(a), 33 U.S.C. §920(a), presumption, that claimant's hearing loss is work-related. Decision and Order at 28-29; CX 1; Tr. at 28-34, 36-41, 55. The administrative law judge found that employer presented substantial evidence rebutting the presumption with the opinion of Dr. Dennie, AuD., employer's audiologist, that claimant's hearing loss is not work-related because claimant did not work in noise-designated areas after 1984.[3] Decision and Order at 29; EX 2; Tr. at 74-75. On the record as a whole, the administrative law judge found claimant's testimony regarding exposure to injurious noise unpersuasive as it was contradicted by the testimonies of claimant's colleagues, Johnny Walker, Mark Sink, and Dion Smith, stating that claimant's post-1984 jobs were not in noise-designated areas and did not expose him to injurious noise. Decision and Order at 32, 34; CXs 8, 9; EX 1. Further, the administrative law judge found the opinion of claimant's medical expert, Dr. Kalafsky, that claimant's hearing loss is work-related, entitled to "very little weight" because it is equivocal and inconsistent with the absence of exposure to injurious noise since 1984.[4] *Id.* at 35-36; CX 10. Finding that the opinions of Dr. Dennie and Mr.

---

[2] Employer stipulated that claimant has a 61.4 percent binaural hearing loss but disputed that it is work related. JX 1.

[3] Dr. Dennie stated that employer regularly conducts noise studies and dosimetries to determine which areas to designate as high noise areas for inclusion in the Hearing Conservation Program. Tr. at 75. She stated that areas with noise levels at or exceeding an eight-hour time weighted average of 85 dB are designated as high noise areas and require hearing protection. *Id*. at 88. She further stated that the studies are done regularly to assure the Program is comprehensive and the information is current. *Id*. at 75.

[4] Dr. Kalafsky reviewed claimant's audiograms and the employment notes indicating that claimant did not work in noise-designated areas after 1984. Although Dr. Kalafsky attributed claimant's hearing loss "at least partly" to noise exposure at the shipyard, he stated that,

> The confounding portion of the patient's case is the noise exposure history. The patient states that the repair shop was in fact a noisy environment during the repair of the tools. The repair areas did not qualify as a noise

Brown, employer's industrial hygienist,[5] are well reasoned and documented, and that the October 2014 dosimetry did not show exposure to noise exceeding OSHA permissible limits, the administrative law judge found that claimant failed to establish that his hearing loss is work-related. *Id.* at 34, 37. Therefore, the administrative law judge denied the claim for disability and medical benefits.

Claimant appeals the denial of benefits, contending that the administrative law judge erred in weighing the evidence on the record as a whole. Employer responds, urging affirmance.

Once, as here, the Section 20(a) presumption is invoked and rebutted, the presumption drops from the case and the administrative law judge must weigh all of the relevant evidence and resolve the issue of causation based on the record as a whole with claimant bearing the burden of persuasion. *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). Claimant asserts that, on the record as a whole, the administrative law judge erred in failing to credit his testimony of exposure to injurious noise at work, which claimant alleges is corroborated by the testimony of Mr. Sink and Mr. Walker. Claimant contends that, in finding otherwise, the administrative law judge mischaracterized the testimony of Mr. Sink and Mr. Walker. Claimant also asserts that the administrative law judge erred in finding the October 2014 dosimetry testing, and the opinions of Mr. Brown and Dr. Dennie entitled to any weight, because they are premised on an incorrect belief concerning the degree of claimant's

---

> environment so [employer] did not provide annual audiograms to employees in this area.
>
> The issue of noise exposure for [claimant] appears to be his personal history of noise exposure as related by [claimant] to me in my office. He feels that there was exposure to noise in the repair area. Noise measurements from the Shipyard have not supported [claimant]'s claim. The Shipyard has supplied him with a hearing aid at this point in time.

CX 10 at 2.

[5] Mr. Brown testified that OSHA requires hearing protection where noise exposure equals or exceeds a time weighted average of 85 dB, though 90 dB "is the permissible exposure level [under OSHA,]" and that employer automatically places workers in its Hearing Conservation Program at 85 dB. He stated that claimant's October 2014 dosimetry demonstrated that claimant was exposed to noise measuring an eight-hour time-weighted average of 66.2 dB, which is well within OSHA permissible limits. EX 3 at 32.

noise exposure. For the reasons that follow, we reject claimant's contentions and affirm the administrative law judge's decision.[6]

Claimant correctly states that his testimony and that of Mr. Sink are consistent on the points that: 1) claimant's job duties as a tool keeper required him to work at metal issue stations throughout the shipyard, including those aboard ships; 2) claimant repaired some tools in Building 222; and, 3) claimant repaired and tested needle guns at the metal issue stations and the testing briefly generates a loud noise which requires hearing protection. Tr. at 26, 29-34; CX 8 at 5-6. As the administrative law judge found, however, Mr. Sink's opinion conflicts with that of claimant as to whether these activities exposed him to injurious noise. Mr. Sink testified that the metal issue stations are not high noise areas and that claimant's repair work did not expose him to excessive noise.[7] Decision and Order at 32; CX 8 at 7, 12. Further, Mr. Sink testified that claimant always wore hearing protection when necessary and when testing equipment. Decision and Order at 32; CX 8 at 16. Contrary to claimant's assertion, the administrative law judge rationally found that Mr. Sink's testimony does not support claimant's assertions that he was exposed to injurious noise while working in the metal issue stations, or in repairing or testing needle guns. *See Pittman Mech. Contractors, Inc. v. Director, OWCP [Simonds]*, 35 F.2d 122, 28 BRBS 89(CRT) (4th Cir. 1994); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Hess]*, 681 F.2d 938, 14 BRBS 1004 (4th Cir. 1982).

Similarly, claimant correctly asserts that his testimony and that of Mr. Walker are consistent on the points that: 1) claimant's duties as a tool keeper required him to work out of various metal issue stations around the shipyard; 2) the areas outside the metal issue stations aboard ships are high noise areas that require hearing protection; 3) on some days, claimant's duties included transporting welders by truck to work stations throughout the shipyard; and, 4) claimant's current duties include repairing stud guns, the testing of which generates a "pop" noise. Tr. at 23, 34, 36, 39-40; CX 9 at 9-10, 13-14, 20. Although claimant alleges he was exposed to injurious noise in the metal issue stations aboard ships, in driving around the shipyard, and in repairing and testing stud guns, substantial evidence supports the administrative law judge's finding that Mr.

[6] We affirm as unchallenged on appeal the administrative law judge's findings that employer rebutted the Section 20(a) presumption and that Dr. Kalafsky's opinion is entitled to little weight on the record as a whole. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

[7] Claimant's current foreman, Mr. Smith, confirmed that claimant's tool keeper position does not require him to wear hearing protection while working in Building 222. EX 1.

Walker testified that claimant's post-1984 jobs did not expose claimant to "high noise." Decision and Order at 33; CX 9 at 9, 18; *see Simonds*, 35 F.2d 122, 28 BRBS 89(CRT). While Mr. Walker confirmed that injurious noise was present aboard ships outside of the metal issue stations as well as in production areas, he specifically testified that nothing about claimant's duties exposed him to high noise, as one was not exposed to the outside noise inside the metal issue station, and that claimant's driving responsibilities did not expose him to injurious noise because the production areas by which claimant drove were off in the distance.[8] Decision and Order at 32-33; CX 9 at 9-10, 20. Moreover, Mr. Walker stated that claimant's work repairing stud guns does not take place in a high noise area, the "pop" noise that is generated while testing stud guns lasts only three seconds, and claimant wears hearing protection while performing the testing.[9] Decision and Order at 33; CX 9 at 13-14. Contrary to claimant's assertion, therefore, the administrative law judge rationally found Mr. Walker's testimony inconsistent with claimant's testimony of exposure to injurious noise at work. *Simonds*, 35 F.2d 122, 28 BRBS 89(CRT).

As claimant's testimony regarding injurious noise exposure is contradicted by that of his colleagues, the administrative law judge rationally found it unpersuasive. *See Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *see also Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). The administrative law judge also rationally relied on the fact that claimant's jobs after 1984 were not part of the Hearing Conservation Program because they did not expose employees to noise exceeding an eight-hour time weighted average of 85 dB. Thus, the administrative law judge rationally found that claimant failed to establish that he was exposed to injurious noise levels after 1984, and we affirm her consequent finding that claimant's hearing loss is not work-

[8] Although Mr. Walker confirmed that claimant would be exposed to what was going on outside the service window while servicing a customer, he also stated that "there wasn't a lot of production work going on outside of that window in most stations," and "generally, it was just a line of customers getting material." CX 9 at 7-8. Mr. Walker additionally stated that even if there was production work outside the window, "there is a requirement of 15 to 25 foot away from that window that we don't have any arcing or welding going on. . . . You don't want to have all the noise at the window when they're trying to do a transaction." *Id*. at 20-21.

[9] Claimant's current foreman, Mr. Smith, confirmed that claimant's position as a tool keeper does not require him to wear hearing protection when driving the personnel transportation truck throughout the shipyard. EX 1.

related as it is supported by substantial evidence.[10] *See generally Hice v. Director, OWCP*, 48 F. Supp. 2d 501 (D. Md. 1999). We, therefore, affirm the denial of benefits.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

_____
BETTY JEAN HALL, Chief
Administrative Appeals Judge

_____
GREG J. BUZZARD
Administrative Appeals Judge

_____
RYAN GILLIGAN
Administrative Appeals Judge

[10] Contrary to claimant's assertion, the record reflects that Dr. Dennie addressed claimant's noise exposure throughout the totality of his work history. *See* n. 3, *supra*. Although claimant asserts that noise exposure below the OSHA threshold minimum may be injurious, claimant points to nothing in the record supportive of this position, and the administrative law judge was not obligated to draw this inference. *See Ceres Gulf, Inc. v. Director, OWCP [Plaisance]*, 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012); *see also Damiano v. Global Terminal & Container Service*, 32 BRBS 261 (1998). Therefore, as claimant bears the burden of persuasion on the record as a whole, we reject, as moot, his assertions that the October 2014 dosimetry and the opinion of Dr. Brown are not determinative of an absence of injurious noise exposure throughout claimant's work history. *Moore*, 126 F.3d 256, 31 BRBS 119(CRT). The administrative law judge accurately observed that this evidence does not support a finding of exposure to noise in excess of OSHA permissible limits.