BRB No. 07-0874

| | | |
|---|---|---|
| L.W.<br><br>Claimant<br><br>v.<br><br>MATSON TERMINALS, INCORPORATED<br><br>Self-Insured Employer-Respondent<br><br>DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR<br><br>Petitioner | ) | DATE ISSUED: 04/29/2008<br><br>DECISION and ORDER |

Appeal of the Decision and Order Awarding Benefits and the Order Denying Director's Motion for Reconsideration of Russell D. Pulver, Administrative Law Judge, United States Department of Labor.

Matthew W. Boyle (Gregory F. Jacob, Solicitor of Labor; Allen H. Feldman, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order Awarding Benefits and the Order Denying Director's Motion for Reconsideration (2006-LHC-0546) of Administrative Law Judge Russell D. Pulver 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).[1] We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are 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 worked as a mechanic and then as a heavy-equipment mechanic for employer from 1951 until his retirement in 1993, and he was exposed to harmful noise. Between 1983 and 1991, he underwent eight audiometric evaluations. He also underwent audiometric evaluations in 2004 and 2005. All of the audiograms revealed some degree of noise-induced hearing loss. Decision and Order at 3-4. The administrative law judge credited only the 1991 and 2005 audiograms, which revealed a 0.3 percent impairment and a 17.8 percent impairment, respectively. He found that claimant continued to be exposed to noise after 1991 until his retirement in 1993 and, because there was no audiogram upon retirement, the best measure of claimant's work-related hearing loss occurred in 2005. Decision and Order at 14. Based on this evidence, the administrative law judge awarded claimant benefits for a 17.8 percent binaural hearing impairment. He also awarded employer relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). Decision and Order at 14-15. The administrative law judge denied the Director's motion for reconsideration of the award of Section 8(f) relief. The Director appeals the administrative law judge's decision to award Section 8(f) relief. Employer has not filed a brief in response.

The Director contends the administrative law judge erred in awarding employer Section 8(f) relief. Specifically, the Director espouses two arguments: 1) the 1991 audiogram, on which the administrative law judge relied to establish claimant's pre-existing hearing loss, does not comply with the regulations at 20 C.F.R. §§702.321(a)(1), 702.441; and 2) employer failed to establish that claimant's pre-existing hearing loss rendered his ultimate disability materially and substantially greater than it would have been absent the pre-existing condition. We reject the Director's initial contention for the reasons stated in *R.H. v. Bath Iron Works Corp.*, __ BRBS __, BRB No. 07-0739 (Mar. 28, 2008). However, we reverse the administrative law judge's award of Section 8(f) relief on the latter ground.

[1]The administrative law judge also issued an Errata Order correcting his calculation of benefits, a denial of employer's motion for reconsideration which challenged his taking judicial notice of public records establishing that the industrial audiograms were not administered by licensed individuals, and an order awarding an attorney's fee to claimant's counsel. None of these orders is challenged on appeal.

Section 8(f) shifts the liability to pay compensation for permanent disability from an employer to the Special Fund established in Section 44 of the Act. 33 U.S.C. §§908(f), 944. An employer may be granted Special Fund relief, in a case where a claimant is permanently partially disabled, as here, if it establishes that the claimant had a manifest pre-existing permanent partial disability and that his current permanent partial disability is not due solely to the subsequent work injury and "is materially and substantially greater than that which would have resulted from the subsequent work injury alone." 33 U.S.C. §908(f)(1); *Marine Power & Equip. v. Dep't of Labor [Quan]*, 203 F.3d 664, 33 BRBS 204(CRT) (9th Cir. 2000); *Director, OWCP v. Todd Shipyards Corp. [Ashley]*, 625 F.2d 317, 12 BRBS 518 (9th Cir. 1980). In a hearing loss case, if an employer establishes entitlement to Section 8(f) relief, then the employer is liable for the lesser of 104 weeks of benefits or the amount of compensation due for the extent of loss due to the subsequent injury, and the Special Fund is liable for the remainder. *Machado v. General Dynamics Corp.*, 22 BRBS 176 (1989); *Epps v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 1 (1986); *Reggiannini v. General Dynamics Corp.*, 17 BRBS 254 (1985); *see also Dubar v. Bath Iron Works Corp.*, 25 BRBS 5 (1991).

In this case, claimant's 1991 audiogram revealed a 0.3 percent binaural impairment, and his 2005 audiogram revealed a 17.8 percent binaural impairment. The administrative law judge found that "taken together" the two audiograms establish that claimant's "hearing impairment became materially and substantially greater over the course of his employment." Decision and Order at 15. Consequently, the administrative law judge held employer liable for a 17.5 percent impairment and the Special Fund liable for the remaining 0.3 percent impairment. *Id.* In his decision on reconsideration, the administrative law judge rejected the Director's argument that a binaural impairment of 0.3 percent does not satisfy the "materially and substantially greater" criterion because it constitutes only 1.7 percent of the entire loss. Order at 3. Rather, the administrative law judge relied on *Skelton v. Bath Iron Works Corp.*, 27 BRBS 28 (1993), to demonstrate that the Board has permitted Special Fund relief in a case where the Special Fund's liability was for a small percentage of impairment.[2] Although the administrative law judge agreed that the Director's position contained some logic, he declined to deny Section 8(f) relief merely because the pre-existing percentage of hearing loss was small, stating that to do so would undermine the purposes of Section 8(f) and cause confusion as to "how 'material and substantial' a pre-existing condition must be. . . ." Order at 3.

[2]In *Skelton*, of the total 28.1 percent hearing loss, employer was held liable for a 25.3 percent impairment and the Special Fund was liable for the additional 2.8 percentage points. The Director did not specifically argue that claimant's pre-existing loss did not meet the "materially and substantially greater" standard, and the Board thus did not address that issue.

We agree with the Director that the administrative law judge's award of Section 8(f) relief cannot be affirmed on the facts of this case. The Act requires that the pre-existing condition must have contributed to the claimant's ultimate permanent partial disability and that the pre-existing condition must have rendered the ultimate disability "materially and substantially greater than that which would have resulted from the subsequent work injury alone." 33 U.S.C. §908(f). Accordingly, it was erroneous for the administrative law judge to award Section 8(f) relief because the two audiograms considered together demonstrated that claimant's "hearing impairment became materially and substantially greater over the course of his employment." That is not what the "materially and substantially greater than" standard requires. Rather, the pre-existing hearing loss must "materially and substantially" increase the resulting impairment. *Quan*, 203 F.3d 664, 33 BRBS 204(CRT). Additionally, as the Director stated, the administrative law judge erred in relying on *Skelton*, as that case is distinguishable. In *Skelton*, the Special Fund was held liable for benefits for a 2.8 percent impairment, which equated to 11 percent of the claimant's total impairment. In the instant case, claimant's pre-existing condition measured by his 1991 audiogram is 0.3 percent binaural impairment, or 1.7 percent of his ultimate impairment. While the Board permitted Special Fund relief in a case where the pre-existing disability constituted 11 percent of the claimant's ultimate disability, it does not follow that employer is entitled to relief where the pre-existing disability is a mere 1.7 percent of the ultimate disability.[3] As the Director argues, the pre-existing condition accounts for 1.7 percent of claimant's impairment, making 98.3 percent of the total impairment the result of the subsequent work injury. It is unreasonable to state that such a small percentage of impairment makes the disability "materially and substantially greater" than the disability caused by the subsequent work injury alone. *Quan*, 203 F.3d 664, 33 BRBS 204(CRT). Because it is clear the standard has not been met in this case, we need not determine what percentage of impairment would satisfy the "materially and greater than" standard. As employer has not satisfied the "materially and substantially greater" standard necessary for the contribution element and Section 8(f) relief, we reverse the administrative law judge's award of Section 8(f) relief.[4]

[3]The administrative law judge mistakenly compared the 1.7 percent of claimant's ultimate disability here with the 2.8 percent impairment for which the Special Fund was liable for benefits in *Skelton*.

[4]We need not remand the case for further consideration of the remaining audiograms because the administrative law judge provided rational reasons for determining they are unreliable measures of claimant's hearing loss.

Accordingly, the administrative law judge's award of Section 8(f) relief is reversed, and we modify his decision to reflect that employer is liable for claimant's entire 17.8 percent binaural hearing impairment. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge