U.S. Department of Labor

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

BRB No. 16-0603

MELVIN ROY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
COOPER/T. SMITH, INCORPORATED	)	
	)	
Self-Insured Employer-Respondent	)	
	)	DATE ISSUED: May 18, 2017
RYAN WALSH, INCORPORATED/SSA GULF	)	
	)	
and	)	
	)	
HOMEPORT INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Robert E. Thomas (Farrington & Thomas, LLC), New Orleans, Louisiana, for claimant.

John L. Duvieilh (Jones Walker, LLP), New Orleans, Louisiana, for Cooper/T. Smith, Incorporated.

Traci Castille (Franke & Salloum, PLLC), Gulfport, Mississippi, for Ryan-Walsh, Incorporated and Homeport Insurance Company.

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

PER CURIAM:

Claimant appeals the Decision and Order (2015-LHC-1381) of Administrative Law Judge Lee J. Romero, Jr., 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 worked as a longshoreman in the Port of Houston, Texas, for at least 20 years until 1991, when he retired. Tr. at 14-15. During his career, he worked at the Port of Houston for Cooper/T. Smith, Inc. (Cooper), Ryan Walsh, and Ports of America. Claimant's last day of work was for Cooper on September 11, 1991. Claimant could not remember the name of the ship he worked on that day nor could he recall the type of work he did, but when asked if he worked in the hold of a ship with pipes, steel, and coil, and if it was noisy, claimant answered, "yes." Tr. at 15. Claimant's second to last day of work, on September 10, 1991, was for Ryan Walsh and claimant testified that he worked on "pipes." *Id.* at 18. Claimant testified that he did not return to work at any time after 1991. *Id.* at 17.[1]

On April 5, 2012, claimant underwent an audiogram at Heights Audiology and Hearing Aids in Houston, Texas, and reported that he had difficulty understanding people when speaking to them in person or on the telephone and in "locating sound." CX 2 at 1. A letter report signed by Dr. Paula Watson, AuD., stated that claimant reported that his work as a longshoreman had exposed him to loud tools, machinery, heavy equipment, and environmental noises.[2] *Id.* The report states claimant's assertion that he was not provided ear protection for the duration of his employment. The report also states claimant reported experiencing tinnitus. *Id.*

Dr. Watson's letter summarized the results of claimant's audiometric testing and gave her opinion on the cause of his hearing loss. She stated that the audiogram showed that the tympanometric results were within normal limits but the pure tone air conduction

[1] Claimant's initial claim filed in 2012 was against only Cooper. Claimant acknowledged filing a claim against Ryan Walsh/SSA because West Gulf Maritime Association and Social Security records indicated that claimant allegedly worked for Ryan Walsh for one day, February 23, 1997, earning $158.44. Claimant stated that he did not return to work after retiring in 1991, but he did recall working for both Ryan Walsh and Cooper during his career.

[2] The letter report itself is undated, but the letter report and the audiogram bear a fax date stamp of April 10, 2012. CX 2.

revealed a "bilateral mild to moderate sensorineural hearing loss."[3] Claimant's bone conduction results also demonstrated sensorineural hearing loss. Dr. Watson's letter further stated,

> Hearing losses with this type of configuration are the outcome of excessive exposure to loud noises. According to current AMA guidelines the percentage of loss is 31.9% in the left ear and 28.1% in the right ear with a 33.8% binaural impairment, which includes 5% for tinnitus. Mr. Roy has a significant hearing impairment that can be expected to interfere with his communication abilities. Mr. Roy does have a noise induced hearing loss that will benefit from hearing amplification.

CX 2 at 1. The letter went on to recommend that claimant receive "digital behind-the-ear hearing aids at the cost of $2000 per aid." *Id.*

In his decision, the administrative law judge generally found claimant's testimony to be credible, in particular his testimony that his last day of work occurred on September 11, 1991. Decision and Order at 10. However, the administrative law judge also stated that he could not accord significant probative value to claimant's testimony regarding his overall working conditions on his last day of employment with Cooper on September 11, 1991 "because his testimony was vague and, at times, he could not recall any factual details about his working conditions." *Id.* The administrative law judge specifically noted that claimant's testimony on direct examination differed somewhat from his responses on cross-examination because on cross, he could not remember what he was doing on the ship on his last day, whereas, on direct, when asked if he worked in the hold with pipes, steel, and coil and if it was "noisy," claimant answered simply, "yes." *Id.*

The administrative law judge found that claimant's 2012 audiogram was not presumptive evidence of a hearing loss under 20 C.F.R. §702.441 because the audiogram was signed by Vicki H. Flynn while the accompanying report was authored by Paula Watson and, therefore, the administrative law judge stated he was unable to determine who actually administered the audiogram. Decision and Order at 10. He further noted that the record is devoid of Ms. Flynn's and Dr. Watson's professional credentials nor had either of them testified as to the reliability of the audiogram. He concluded that, for these reasons, he could not accord the audiogram substantial probative value. *Id.* at 14.

[3] Claimant's April 5, 2012 audiogram was signed by Vicki H. Flynn, audiologist. CX 2 at 3.

Nonetheless, the administrative law judge went on to state that claimant "arguably" established that he suffered a hearing impairment because of his own credible, subjective complaints of symptoms. Decision and Order at 14. He concluded, however, that claimant did not establish the second element of a prima facie case, i.e., that conditions existed at work which could have caused the harm. He found claimant's "vague and limited testimony regarding his occupational noise exposure to be of little probative value." *Id.* The administrative law judge specifically noted that when asked if it was noisy, claimant only answered, "yes," but provided no details about the extent or nature of the noise.

The administrative law judge concluded that the record supported only a finding that "Claimant had no demonstrable or identifiable hearing impairment until 2012" because although Dr. Watson concluded that claimant's hearing impairment was due to "excessive exposure to loud noises," there was no evidence to show that this occurred during the course and scope of his employment. He found that claimant had not sustained "his burden of establishing that he had a measurable, ratable hearing impairment at the time he left covered employment with Cooper on September 11, 1991, or for that matter, with Walsh in 1997." Decision and Order at 15.

The administrative law judge further noted that the only mention of tinnitus was in Dr. Watson's letter, and that claimant did not testify that he experienced tinnitus or that it interfered with his hearing or activities of daily living. Decision and Order at 15. The administrative law judge concluded, therefore, that claimant had failed to establish that he suffers from any compensable impairment due to his alleged tinnitus. Thus, the administrative law judge denied the claim for benefits because he found that claimant did not establish that he suffered a work-related injury. *Id.*

Claimant appeals the administrative law judge's denial of benefits. Cooper and Ryan Walsh each filed a response brief, urging affirmance.

In order to establish a claim for entitlement to benefits, a claimant must first make a prima facie case by showing that: (1) he suffered a harm; and (2) a condition of the workplace could have cause, aggravated, or accelerated the harm. *See Ceres Gulf, Inc. v. Director, OWCP [Plaisance]*, 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012). Once a prima facie case has been established, Section 20(a) of the Act applies to presume that claimant's injury is work-related. 33 U.S.C. §920(a); *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003).

With regard to the "harm" element of his prima facie case, claimant contends that the administrative law judge erred in not according the audiological report any probative weight. We agree that administrative law judge's conclusion that the audiogram is not

entitled to any probative weight is not supported by the evidence in the record. The regulation at 20 C.F.R. §702.441(b) provides that an audiogram shall be presumptive evidence of the amount of hearing loss on the date administered if the following requirements are met: (1) the audiogram was administered by a licensed or certified audiologist, by a physician certified by the American Board of Otolaryngology, or by a technician, under an audiologist's or physician's supervision; (2) the licensed or certified audiologist or otolaryngologist must ultimately interpret and certify the results of the audiogram; and (3) the accompanying report must set forth the testing standards used and provide an evaluation of the reliability of the testing results.[4] The audiogram also must not be contradicted by another audiogram of equal probative value made at the same time. 20 C.F.R. §702.441(b).

The administrative law judge discounted the value of claimant's audiogram because it was signed by Vicki Flynn while the letter report was signed by Paula Watson, making it unclear who conducted the audiogram, and because "the record is devoid of Ms. Flynn's and Ms. Watson's audiological credentials." Decision and Order at 13. These conclusions are inaccurate. The signature line on the letter states that Paula Watson is an "Au.D.-CCC-A," i.e., that she is a Doctor of Audiology with a Certificate of Clinical Competence in Audiology. CX 2 at 2. The signature line on the audiogram states that Vicki Flynn is an Audiologist.[5] *Id.* at 3. Both Dr. Watson and Ms. Flynn work at Heights Audiology, according to the signature line on the letter report and the letterhead of the audiological report; the administrative law judge could draw the inference that Ms. Flynn administered the audiogram under the supervision of Dr. Watson, as permitted under 20 C.F.R. §702.441. *Id.* at 2-3. In addition, Dr. Watson's report describes the method used to evaluate claimant's hearing loss and the audiogram itself stated its reliability was "fair." CX 2. In addition, there are no other audiograms of record, and thus the 2012 audiogram is uncontradicted. From this evidence, the administrative law judge could conclude that the audiogram is presumptive of the degree of claimant's hearing loss.

Even assuming, arguendo, that the audiogram does not meet the criteria of 20 C.F.R. §702.441, the Board has held that an audiogram that does not meet all the criteria to be presumptive evidence of hearing loss may be used to establish hearing loss if an administrative law judge determines that it is otherwise reliable and probative. *See G.K. [Kunihiro] v. Matson Terminals, Inc.*, 42 BRBS 15 (2008), *aff'd mem. sub nom. Director,*

[4] 20 C.F.R. §702.441 also requires that the employee be provided the audiogram and a report at the time it was administered or within 30 days thereafter.

[5] We note that, while there is no other evidence in the record corroborating Dr. Watson's or Ms. Flynn's credentials, employers have not challenged their credentials.

OWCP v. Matson Terminals, Inc., 442 F. App'x 304 (9th Cir. 2011); *Steevens v. Umpqua River Navigation*, 35 BRBS 129 (2001). Because the administrative law judge's reasoning to support his conclusion that the audiogram is not entitled to probative weight is contrary to law and unsupported by the evidence in the record, we must vacate his decision and remand the case for the administrative law judge to reconsider the reliability of the audiogram as it relates to the harm element of claimant's prima facie case.

Claimant also assigns error to the administrative law judge's conclusion that he failed to establish the second element of the prima facie case, i.e., that conditions existed at work which could have caused the harm. We agree with claimant that the administrative law judge did not address all the relevant evidence in the record to determine whether the evidence is sufficient to establish a prima facie case. The administrative law judge addressed only claimant's hearing testimony, noting that it was "vague and limited" and further stating that "uncorroborated testimony by a discredited witness is insufficient to establish the second element of a prima facie case. . . ." Decision and Order at 14. The administrative law judge did not address Dr. Watson's report wherein she stated that "[claimant] reported that various job sites exposed him to loud tools, machinery, heavy equipment and environmental noises. Mr. Roy was not provided ear protection for the duration of his employment." CX 2 at 1. Dr. Watson's letter also stated that hearing losses such as claimant's "are the outcome of excessive exposure to loud noises." *Id.* This evidence, if credited, could establish that claimant was exposed to injurious noise that *could have* caused his hearing loss. *See generally Albina Engine & Machine v. Director, OWCP [McAllister]*, 627 F.3d 1293, 44 BRBS 89(CRT) (9th Cir. 2010). Therefore, we remand this case for reconsideration of whether claimant met the working conditions element of his prima facie case.

We further note that the administrative law judge incorrectly stated that "[t]he burden is on Claimant to prove causation for his hearing loss by a preponderance of the record evidence." Decision and Order at 14. In doing so, the administrative law judge appears to have conflated the establishment of a prima facie case with the standard for establishing entitlement to benefits after the Section 20(a) presumption has been invoked and rebutted by substantial evidence. At the initial stage of establishing a prima facie case sufficient to invoke the Section 20(a) presumption, a claimant has to establish only: (1) that he suffered harm; and (2) that conditions existed at work, or an accident occurred at work, that *could have* caused, aggravated, or accelerated the condition. *See Port Cooper/T. Smith Stevedoring Co., Inc. v. Hunter*, 227 F.3d 285, 287, 34 BRBS 96(CRT) (5th Cir. 2000) (emphasis added.) Claimant is not required to affirmatively prove that his work in fact caused or aggravated the harm in order to be entitled to the Section 20(a) presumption. *See Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). It is only required that claimant's theory as to how the injury occurred must go beyond "mere fancy." *See Sinclair*, 23 BRBS at 152. Because the

administrative law judge did not discuss all the relevant evidence in the record, we vacate his finding that claimant did not establish a prima facie case and remand the case for reconsideration of that issue.[6] *See Ramsay Scarlett & Co., [Fabre]*, 806 F.3d 327, 331, 49 BRBS 87, 88(CRT) (5th Cir. 2015) (stating that the low burden required to establish a prima facie case may be satisfied with evidence that is "more than a scintilla" and "might cause a reasonable person to accept the ALJ's fact finding.").

Finally, claimant ascribes error to the administrative law judge's conclusion that, although claimant had a hearing impairment as of 2012, he failed to establish that he had a measurable hearing impairment at the time he left covered employment with either Cooper or Ryan Walsh. Decision and Order at 15. Citing *Bruce v. Bath Iron Works*, 25 BRBS 157 (1991), the administrative law judge found there is no evidence in the record to project claimant's hearing loss retroactively to his employment with either Cooper or Ryan Walsh.

We agree with claimant that the administrative law judge must reconsider this finding as well. The Board has previously held that in cases of retirees alleging occupational hearing loss, it is not required that claimants "recreate the precise extent of their hearing loss at the date their covered longshore employment terminated." *Labbe v. Bath Iron Works Corp.*, 24 BRBS 159, 162 (1990). Rather, in the absence of credible evidence regarding the extent of claimant's hearing loss at the time he leaves covered employment, the administrative law judge may evaluate all the relevant evidence of record to determine the extent of the claimant's work-related hearing loss. *Id.; see also Dubar v. Bath Iron Works Corp.*, 25 BRBS 5 (1991). The Board's decision in *Bruce*, 25 BRBS 157 is not to the contrary. In *Bruce*, the claimant last worked in covered employment in 1953. There was no evidence of claimant's work-related hearing loss at that time. In 1968, the claimant underwent audiometric testing. This audiogram showed either a 0 percent or a 6.5 percent hearing loss, depending on how the equipment had been calibrated. The administrative law judge found this audiogram, rather than a 1984 audiogram, to be more probative of the degree of the hearing loss caused by covered employment as it was performed closer in time to when claimant left covered employment in 1953. Because the evidence did not definitively establish that claimant had any hearing loss in 1968, the Board affirmed the administrative law judge's finding that claimant did not establish he had a measurable hearing loss in 1953. *Id.*, 25 BRBS at 160.

[6] If the Section 20(a) presumption is invoked, the burden shifts to employer to rebut it with substantial evidence that claimant's hearing loss is not work-related. *See Ceres Gulf, Inc. v. Director, OWCP [Plaisance]*, 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012).

Although benefits were denied in *Bruce*, it does not stand for the proposition that a claimant *must* establish the degree of loss he had at retirement in order to establish a compensable hearing loss. *See, e.g.*, *Steevens*, 35 BRBS at 132-133 (claimant left covered employment in 1975; Board affirmed award based on 1998 audiograms rather than those administered in 1985 and 1992); *Dubar*, 25 BRBS at 8 (affirming the administrative law judge's award based on an audiogram administered 17 years after claimant left covered employment); *Labbe*, 24 BRBS at 162 (affirming award based on 1986 audiogram where claimant left covered work in 1963; administrative law judge rationally discredited 1967 audiogram). Here, the administrative law judge's finding that the 2012 audiogram is insufficient to establish claimant had a work-related hearing loss at the time of retirement is tainted because the administrative law judge did not address all the evidence relevant to whether a prima facie case was established. If claimant establishes a prima facie case, the Section 20(a) presumption applies to presume that the hearing loss shown on the audiogram is work-related. 33 U.S.C. §920(a). On remand, the administrative law judge must address all the relevant evidence to determine whether claimant successfully established a prima facie case. If the administrative law judge concludes on remand that a prima facie case has been established, the administrative law judge is directed to address any other remaining issues.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is vacated and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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GREG J. BUZZARD
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge