U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 22-0065

ROBERT L. WILLIAMS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
M.T.C. EAST d/b/a PORTS AMERICA, INCORPORATED	)	
	)	
	)	
and	)	
	)	DATE ISSUED: 4/06/2023
PORTS INSURANCE COMPANY, INCORPORATED	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of Appeal of the Decision and Order Awarding Benefits and Cancelling Hearing of Jonathan C. Calianos, Administrative Law Judge, United States Department of Labor.

Erin Brownfield Raley (Raley & Raley PC), Savannah, Georgia, for Claimant.

Brian P. McElreath and Cassandra L. Sereta (Lueder, Larkin & Hunter, LLC), Mount Pleasant, South Carolina, for Employer/Carrier.

Before: GRESH, Chief Administrative Appeals Judge, BOGGS and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Jonathan C. Calianos's Decision and Order Awarding Benefits and Cancelling Hearing (2021-LHC-00429) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (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 applicable law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant sustained a binaural hearing loss while working for Employer. He received an audiogram from audiologist Dr. Gabriel Pitt showing the results of his evaluation on May 20, 2020. CX B. Dr. Pitt assessed a binaural hearing impairment of 53.8%.[1] CX B at 2. Claimant subsequently filed a claim for benefits on June 26, 2020.[2] CX D at 2. At Employer's request, Claimant attended a second audiological evaluation on October 13, 2020, administered by Dr. Cori Palmer. Joint Exhibit (JX) B. Dr. Palmer determined Claimant suffered 38.8% hearing impairment. Employer Brief (Emp. Br.) at 4; JX G at 3.

On September 10, 2021, Claimant filed a Motion for Summary Decision with the ALJ, which Employer opposed. Both pleadings contained attached evidence to support their respective positions. On October 13, 2021, the ALJ held a telephonic hearing on the motion. Bench Decision Transcript (HT) at 1; Decision and Order (D&O) at 1. The ALJ summarily concluded the facts are not in dispute, and he seemingly suggested Employer raised questions regarding frequency differentials between the two audiograms, Dr. Pitt's use of the 5th Edition of the American Medical Association (AMA) *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*) rather than the 6th Edition to calculate impairment, the adequacy of Dr. Pitt's proof of calibration for the May 2020

[1] Claimant's brief reports Dr. Pitt's assessment at 53.75%. Cl. Brief at 2. The ALJ used 53.75% impairment when he averaged the audiograms to arrive at a 46.3% impairment. HT at 4, 6. We will use Dr. Pitt's actual assessment of 53.8% in this opinion. CX B at 2. However, it is of no consequence as the calculation difference is irrelevant, and the parties appear to have agreed the average is 46.3%. HT at 6.

[2] Because Claimant's injury occurred in Savannah, Georgia, this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. 33 U.S.C. §921(c); *see Roberts v. Custom Ship Interiors*, 35 BRBS 65, 67 n.2 (2001), *aff'd*, 300 F.3d 510, 36 BRBS 51(CRT) (4th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003); 20 C.F.R. 702.201(a).

audiogram, and the extent of Claimant's hearing impairment. HT at 4-6. The ALJ then stated the use of the 5th Edition was not a problem because the versions are "essentially the same" "[s]o it's a distinction without a difference." *Id.* at 5. He also baldly concluded the doctors were equally qualified, and that averaging the two audiograms is reasonable without identifying any law, so he found no disputed issues remaining, granted Claimant's motion for summary decision, and awarded benefits based on the averaged hearing impairment percentages. *Id.* at 4-8. In a "Decision and Order Awarding Benefits & Cancelling Hearing" dated October 18, 2021 (D&O), the ALJ incorporated his bench decision, set forth his various conclusions, and cancelled the hearing. D&O at 1-3. In so doing, the ALJ did not cite to any law or properly identify any evidence in either his bench decision or his written order.

Employer appeals, contending the ALJ erred in granting Claimant's motion for summary decision. It asserts the decision should be reversed because the ALJ did not construe the facts in the light most favorable to it, the non-moving party. Emp. Br. at 9. Moreover, Employer contends there are several genuine issues of material fact in dispute which preclude granting summary decision: the validity and presumptive value of the May 2020 audiogram; the use of the 5th Edition of the AMA *Guides* and its impact on the validity of the May 2020 audiogram; and the differing results of the May and October audiograms. Emp. Br. at 11, 14, 20. Claimant responds, urging affirmance.

In determining whether to grant a party's motion for summary decision, the ALJ 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 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 Elec., Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *R.V. [Villaverde] v. J. D'Annunzio & Sons*, 42 BRBS 63 (2008), *aff'd sub nom. Villaverde v. Director, OWCP*, 335 F. App'x 79 (2d Cir. 2009); *Buck v. General Dynamics Corp.*, 37 BRBS 53 (2003); *Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1 (1990); 29 C.F.R. §18.72. A fact is "material" if it "might affect the outcome of the suit under the governing law." *O'Hara*, 294 F.3d at 61. An issue of fact is "genuine" where "the evidence is such that a reasonable [factfinder] could return a verdict for the nonmoving party." *Id.*

To defeat a motion for summary decision, the non-moving party must present "specific facts" showing there exists "a genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd., v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). If the ALJ *could* find for the non-moving party, or if it is necessary to weigh evidence or make credibility determinations on the issue presented, summary decision is inappropriate. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248 (1986) ("By its very terms, this standard

provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact."). Review of an order on summary judgment is *de novo*. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 465 n.10 (1992); *Melton v. Abston*, 841 F.3d 1207, 1219 (11th Cir. 2016).

Without addressing Employer's contentions regarding summary decision, we cannot affirm the ALJ's decision because we find it fundamentally does not satisfy the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §554, making it effectively unreviewable. Adjudications of claims arising under the Act are subject to the APA, 33 U.S.C. §919(d), and the APA requires every decision contain "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law or discretion presented on the record." 5 U.S.C. § 557(c)(3)(A). Additionally, the implementing regulation under the Act states: "The compensation order shall contain appropriate findings of facts and conclusions of law with respect thereto[] and shall be concluded with one or more paragraphs containing the order." 20 C.F.R. §702.348. An ALJ, therefore, must adequately detail the rationale behind his decision and specify the law and evidence upon which he relied. *Gelinas v. Electric Boat Corp.*, 45 BRBS 69 (2011); *see Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988).

During the telephonic hearing on summary decision, the ALJ noted and summarily dismissed the issues of material fact Employer raised. HT at 4-5. The ALJ also seemingly concluded both audiograms were valid but failed to explain the rationale for this determination. *Id.* at 6. His D&O summarily incorporated his factual findings from the hearing without appropriate cites to the record and without providing any further context or analysis for his decision, and he failed to provide any authority at all during the hearing or in his subsequent D&O to justify or support his decision that Claimant was entitled to summary decision. The ALJ's failure to provide an appropriate level of rationale, analysis, or explanation behind his determinations makes it impossible for the Board to apply its standard of review and violates the APA. *Ballesteros*¸ 20 BRBS 184; *Frazier v. Nashville Bridge Co.*, 13 BRBS 436, 437 (1983) (it is the ALJ's responsibility to fully evaluate the relevant evidence and provide some level of detail in his rationale to enable the reviewing body to accurately assess the decision).

Accordingly, as the ALJ did not adequately address the relevant evidence or discuss it in view of relevant case law, we vacate the ALJ's Decision and Order Awarding Benefits and Cancelling Hearing and remand the case for further proceedings and explanation.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge