U.S. Department of Labor

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

BRB No. 20-0073

ROBERT GILBERT	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
ELECTRIC BOAT CORPORATION	)	
	)	
Self-Insured	)	DATE ISSUED: 05/22/2020
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Granting Employer's Motion for Summary Decision and the Order Denying Director's Motion for Reconsideration of Jerry R. DeMaio, Administrative Law Judge, United States Department of Labor.

Peter D. Quay (Law Office of Peter D. Quay, L.L.C.), Taftville, Connecticut, for self-insured employer.

William M. Bush (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, 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: BOGGS, Chief Administrative Appeals Judge, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order Granting Employer's Motion for Summary Decision and the Order Denying Director's Motion for Reconsideration (2019-LHC-00099; 2019-LHC-01175) of Administrative Law Judge Jerry R. DeMaio rendered on a claim filed pursuant to 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 for employer in Groton, Connecticut, from 1977 until he was laid off in 1998; employer rehired claimant in 1999. In 1990, claimant filed a claim for compensation for work-related hearing loss. Employer voluntarily paid claimant $20,719.81 (54.7 weeks x $378.79 per week) for his 27.35 percent binaural hearing loss. In 1999, before resuming work, claimant underwent an audiogram that revealed a 39.0625 percent binaural hearing loss. He continued to work for employer and, in 2016, underwent two additional hearing tests.

Claimant filed a claim for compensation in July 2016, and employer filed an application for Section 8(f), 33 U.S.C. §908(f), relief in November 2016. In October 2018, the district director denied employer's application; employer sought referral to an administrative law judge. The parties compromised the results of the 2016 audiograms and agreed claimant has 74.8 percent binaural hearing loss. Thus, on November 19, 2018, employer paid claimant $117,600.35 (149.6 weeks x $924.60 per week = $138,320.16; minus $20,719.81 for the 1990 claim).[1] In April 2019, employer moved for summary decision in favor of its Section 8(f) application. The Director conceded employer's entitlement to Section 8(f) relief. The administrative law judge awarded employer Section 8(f) relief for claimant's pre-existing 39.0625 percent hearing loss, accepted employer's calculations, and ordered the Special Fund to reimburse employer $81,370.38.[2] Decision and Order at 1.

[1] The parties agreed claimant's average weekly wage at the time of his 2016 injury was $1,386.90.

[2] This amount reflects the following: compensation of $72,234.38 for the 39.0625 percent pre-existing hearing loss (78.125 weeks x $924.60 per week); minus a credit of $20,719.81 for employer's prior payment; plus $29,855.81 in "differential benefits" to account for the difference between the compensation rate paid for the original 27.35 percent hearing loss and the 2016 compensation rate (54.7 weeks x $545.81 per week) ($545.81 = $924.60 - $378.79).

The Director filed a motion for reconsideration, disputing the reimbursement calculation and contending the Special Fund's liability to employer is only $51,514.57. The administrative law judge denied the motion. He stated his calculations are "subject to verification and adjustment by the Director[,]" and the Director could work with employer to agree on the correct figure. Order at 1-2. The Director appeals the reimbursement calculation, and employer responds, urging affirmance. The Director filed a reply brief.

Under Section 8(c)(13)(B) of the Act, 33 U.S.C. §908(c)(13)(B), and the aggravation rule, a claimant is entitled to compensation for the full extent of his hearing loss at his average weekly wage on the date of last exposure. *See Blanchette v. Director, OWCP*, 998 F.2d 109, 27 BRBS 58(CRT) (2d Cir. 1993); *Newport News Shipbuilding & Dry Dock Co. v. Fishel*, 694 F.2d 327, 15 BRBS 52(CRT) (4th Cir. 1982); *Morgan v. General Dynamics Corp.*, 15 BRBS 107 (1982); *see also Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 26 BRBS 151(CRT) (1993). The parties agreed claimant is entitled to $138,320.16 for the totality of his 74.8 percent work-related binaural hearing loss. To avoid a double recovery, the amount due claimant is subject to a dollar-for-dollar credit for any amounts previously paid. *Director, OWCP v. Bethlehem Steel Corp*. [*Brown*], 868 F.2d 759, 22 BRBS 47(CRT) (5th Cir. 1989).

Section 8(f) of the Act shifts liability to pay compensation for permanent disability or death 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 the claimant had a manifest pre-existing permanent partial disability and his current permanent partial disability is not due solely to his 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). In a hearing loss case, if an employer establishes entitlement to Section 8(f) relief, its liability is limited to the lesser of 104 weeks of benefits or the amount of compensation due for the subsequent injury, and the Special Fund is liable for the pre-existing injury. 33 U.S.C. §908(f);[3] *Blanchette*, 998 F.2d 109, 27 BRBS 58(CRT);

[3] Section 8(f)(1), 33 U.S.C. §908(f)(1), states:

> In any case in which an employee having an existing permanent partial disability suffers injury, the employer shall provide compensation for such disability as is found to be attributable to that injury based upon the average weekly wages of the employee at the time of the injury. * * * If following an injury falling within the provisions of subsection (c)(1)-(20) of this section, the employee has a permanent partial disability and the disability is found not to be due solely to that injury, and such disability is materially and substantially greater than that which would have resulted from the

Director, OWCP v. General Dynamics Corp. [Krotsis], 900 F.2d 506, 23 BRBS 40(CRT) (2d Cir. 1990); *Balzer v. General Dynamics Corp.*, 22 BRBS 447 (1989), *aff'd on recon. en banc*, 23 BRBS 241 (1990) (Brown, J., dissenting); *Risch v. General Dynamics Corp.*, 22 BRBS 251 (1989); *Epps v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 1 (1986).

Employer and the Director agree the administrative law judge properly held the Special Fund liable for claimant's pre-existing 39.0625 percent binaural impairment. Consequently, employer is liable for benefits for claimant's remaining 35.7375 percent hearing loss that occurred after 1999 (74.8 percent – 39.0625 percent). It is liable for the full amount of the subsequent injury because 71.475 weeks (35.7375 percent x 200 weeks) is less than the 104 weeks prescribed in Section 8(f). As employer paid claimant benefits for the entire 74.8 percent impairment, the issue concerns the amount the Special Fund must reimburse employer. The Director contends the Special Fund's liability to employer is $51,514.57. Employer contends the administrative law judge properly ordered the Special Fund to reimburse it $81,370.38.[4]

The dispute is more easily resolved. Claimant has been paid in full, $138,320.16, for his 74.8 percent hearing impairment, representing 149.6 weeks of benefits at his 2016 compensation rate of $924.60. 33 U.S.C. §908(c)(13)(B). Employer and the Director agree the Special Fund is liable for claimant's pre-existing 39.0625 percent impairment which entitled him to $72,234.38 (78.125 weeks x $924.60). Therefore, employer is liable for compensation for the subsequent 35.7375 percent hearing loss or $66,085.78 (71.475

> subsequent injury alone, the employer shall provide compensation for the applicable period of weeks provided for in that section for the subsequent injury, or for one hundred and four weeks, whichever is the greater, except that, in the case of an injury falling with the provisions of subsection (c)(13) of this section, the employer shall provide compensation for the lesser of such periods.

[4] We reject employer's assertion that the Director improperly raised the reimbursement calculation for the first time in a motion for reconsideration. While the Director did not challenge employer's Motion for Summary Decision requesting Section 8(f) relief, she conditioned her concession by stating: "Section 8(f) relief is expressly conditioned on this Court making valid findings. . . ." Dir. Letter (dated Aug. 5, 2019). *See generally Anderson v. Yusen Terminals, Inc.*, 50 BRBS 23 (2016); *Lewis v. Sunnen Crane Service, Inc.*, 34 BRBS 57 (2000); *Stewart v. Bath Iron Works Corp.*, 25 BRBS 151 (1991).

weeks x $924.60).[5] As employer has paid claimant $138,320.16 for his full hearing loss, the Special Fund must reimburse employer $72,234.38.

No more is necessary. Typically, when Section 8(f) applies in a hearing loss case, the Special Fund is entitled to a credit in the amount the employer paid for a pre-existing hearing loss against its liability, which prevents the claimant from a double-recovery for his loss. *See Blanchette*, 998 F.2d at 116, 27 BRBS at 71(CRT); *Brown*, 868 F.2d at 763-764, 22 BRBS at 50(CRT). This double-recovery danger is absent here because claimant has been paid in full and is entitled to nothing further. Any amount the Special Fund must pay will reimburse employer. Consequently, *Brown*, which created the "Fund-first" credit, and *Blanchette*, which adopted it, are distinguishable.[6]

In their calculations, both employer and the Director apply a credit of $20,719.81 against the Special Fund's liability and assert the administrative law judge accurately did the same. We do not agree. Their calculations look like this: $72,234.38 - $20,719.81 = $51,514.57. The Director contends this is the limit of the Special Fund's liability to employer; employer asserts this is only the first part of the equation. If we were to accept the Director's contention, the Special Fund would reimburse employer for only 55.716 weeks of the 149.6 weeks of benefits it paid to claimant ($51,514.47 ÷ $924.60 = 55.716 weeks), which is short of the 78.125 weeks for which the Special Fund is liable due to claimant's pre-existing impairment.[7] *See* discussion, *supra*. This results in employer paying benefits for a portion of claimant's pre-existing hearing loss, contrary to Section 8(f). Therefore, application of any Fund-first credit in this case is not in accordance with law, and we reject the Director's contention to limit the Special Fund's liability to

[5] 0.748 x 200 weeks = 149.6 weeks; 0.390625 x 200 weeks = 78.125 weeks; 0.357375 x 200 weeks = 71.475 weeks. 33 U.S.C. §908(c)(13)(B).

[6] Although the employees in both cases suffered only work-related injuries and had no pre-existing non-work-related disabilities, which is the factual situation here, they are different with respect to credit entitlement because, in those cases, the Special Fund paid benefits to the *claimants*. *Blanchette*, 998 F.2d 109, 27 BRBS 58(CRT); *Brown*, 868 F.2d 759, 22 BRBS 47(CRT). This distinction also applies to the case employer cites, *R.H. [Harris] v. Bath Iron Works Corp.*, 2006-LHC-02034 (Mar. 2, 2007), *aff'd*, 42 BRBS 6 (2008). Here, the Special Fund must reimburse employer as no further benefits are owed to claimant.

[7] Limiting the Special Fund's liability to $51,514.57 increases employer's liability to 93.884 weeks of benefits ($86,805.59); this is well above the 71.475 weeks ($66,085.78) which accounts for the subsequent 35.7375 percent hearing loss.

$51,514.57. *See generally Balzer*, 23 BRBS 241.

Having applied the $20,719.81 credit to the Special Fund's liability in its calculations, employer recognized it was left with a shortfall and attempted to recover the "differential." The administrative law judge agreed. While employer's calculation of the difference between what claimant received in 1990 and what he is entitled to for that same 27.35 percent hearing loss in 2016, $29,855.81, is correct, including it to reach a total reimbursement of $81,370.38 results in a windfall to employer because the pre-existing 39.0625 percent the Special Fund is liable for *includes* the pre-existing 27.35 percent loss. Adding the "differential" to the Special Fund's liability, excluding any credit, results in reimbursing employer for the 27.35 percent impairment (54.7 weeks) at a rate of $1,470.41 ($924.60 + $545.81) per week plus compensation for the additional 11.7125 percent loss (23.425 weeks x $924.60 per week). The inclusion of the differential in this manner reduces employer's liability by requiring the Special Fund to pay for a portion claimant's subsequent injury.[8] This, too, is contrary to law. *Blanchette*, 998 F.2d at 113, 27 BRBS 66(CRT).

Instead, the proper way to allocate liability is to ignore the initial $20,719.81 payment for purposes of calculating the Special Fund's liability. Because employer paid claimant in full, that initial payment affected only the amount of additional compensation it needed to pay. To assess its responsibility following claimant's second hearing loss claim, employer took a credit of $20,719.81 for the amount it previously paid against the total $138,320.16 it owed for a successive injury to a scheduled body part. *Strachan Shipping Co. v. Nash*, 751 F.2d 1460, 1468, 17 BRBS 29, 35(CRT) (5th Cir. 1985). Therefore, employer properly applied the *Nash* extra-statutory credit and paid claimant $117,600.35.

As the positions of employer and the Director are erroneous, we reject them. As the administrative law judge's determination of the amount of the Fund's liability is also erroneous, we modify it using the calculation we set forth above: the Special Fund is liable for claimant's pre-existing 39.0625 percent hearing loss, which equates to $72,234.38 (78.125 weeks x $924.60). Employer paid claimant his benefits in full and is now entitled

[8] Were we to use the administrative law judge's calculation (subtract the credit and add the differential), the Special Fund would pay $81,370.38 ($72,234.38 - $20,719.81 + $29,855.81). This amounts to 88 weeks of benefits ($81,370.38 divided by $924.60), reducing employer's liability to 61.6 weeks.

to $72,234.38, which reimburses it for claimant's entire pre-existing hearing loss.[9] Any further credit is unnecessary, and inclusion of an additional "differential" is duplicative.

Accordingly, we modify the administrative law judge's Decision and Order Granting Employer's Motion for Summary Decision and the Order Denying Director's Motion for Reconsideration to reflect the Special Fund is liable to employer for $72,234.38 for claimant's 39.0625 percent pre-existing hearing loss.[10]

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

[9] We can show the calculation another way: $72,234.38 = $20,719.81 (54.7 weeks x $378.79 per week) + $29,855.81 (54.7 weeks x $545.81 per week difference) + $21,658.76 (23.425 weeks x $924.60 per week). This equation correctly applies employer's "differential" payment.

[10] In light of our decision which corrects the administrative law judge's award to an enforceable sum certain, we need not address the remaining issues on appeal.