U.S. Department of Labor

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

BRB No. 20-0255

THOMAS MONNENS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TEMCO, LLC	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	DATE ISSUED: 10/30/2020
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Lara D. Merrigan (Merrigan Legal), Sausalito, California, and Matthew Sweeting, Tacoma, Washington, for Claimant.

George J. Nalley, Jr., and Andrew J. Miner (Nalley and Dew, PLC), Metairie, Louisiana, and Matthew Malouf (Bauer Moynihan & Johnson, LLP), Seattle, Washington, for Employer/Carrier.

Before: BUZZARD, ROLFE and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Richard M. Clark's Decision and Order Awarding Benefits (2018-LHC-00948) 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 was 68 years old at the time of the hearing on March 27, 2019. Tr. at 51. He worked for Cargill, Incorporated (Cargill) at its grain transfer facility from September 1968 to November 1969 and from April 1972 through 2005. *See* Tr. at 51; CX 2 at 5-8; EX 12 at 186, 201. Claimant began working for Employer in 2005 as the assistant plant manager at its grain export facility. Tr. at 22, 52. He had audiograms conducted by Cargill from 1981 to 2004, and by Employer, or at his own expense, from 2007 to 2009, and from 2011 to 2014. CX 3 at 37-39, 43-47, 49, 61-62; EXs 5 at 67-71; 12 at 201. These audiograms showed progressive hearing loss. Claimant first purchased bilateral hearing aids in 2007, at his own expense and without filing a claim, which he replaced in 2011 and 2014. Tr. at 91; CX 3 at 52, 60. He retired from Employer on July 31, 2015. *See* Tr. at 51.

Claimant had his hearing tested on October 18, 2017, which showed a binaural hearing loss of 36.3 percent under the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*). Decision and Order at 36; *see* CX 3 at 68. He filed a claim under the Act on October 20, 2017, which Employer controverted.

The administrative law judge found Claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), that his employment for Employer contributed to his hearing loss, and that Employer rebutted the presumption based on the opinion of Dr. Alan Langman that Claimant's increased hearing loss after April 2005 is not due to his work for Employer. Decision and Order at 25-26.

After analyzing the record evidence as a whole, the administrative law judge concluded "it is more likely than not that Claimant's employment at [Employer] contributed in some way to his hearing loss." Decision and Order at 33. He rejected Employer's interpretation of the dosimetry tests and Dr. Langman's opinion and thus

awarded Claimant compensation for a 36.3 percent binaural hearing impairment. *Id*. at 36. He also awarded Employer Section 8(f) relief.[1] 33 U.S.C. §908(f).

On appeal, Employer challenges the administrative law judge's finding that noise exposure at its grain facility contributed to Claimant's hearing loss documented in October 2017. Claimant responds, urging affirmance.[2] Employer filed a reply brief.

Employer contends the administrative law judge committed legal error by placing on it the burden to prove an alternate cause for the progression of Claimant's hearing loss. It also alleges he committed factual errors by finding Dr. Langman's testimony not credible and by interpreting the dosimetry testing as showing the possibility of work-related hearing loss at its facility.

Once the Section 20(a) presumption relating a claimant's harm to his employment accident or working conditions has been invoked and rebutted, as here, the presumption drops from the case, and the causation issue must be decided on the record as a whole. *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *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). On the record as a whole, the claimant bears the burden of establishing, by a preponderance of the evidence, a causal relationship between his employment exposures and his injury. *Moore*, 126 F.3d 256, 31 BRBS 119(CRT).

The administrative law judge found the May 2004 audiogram, which was nearest in time to the beginning of Claimant's employment for Employer in 2005, showed a 12.5 percent binaural impairment under the AMA *Guides* and Claimant's first post-retirement audiogram in October 2017 showed a 36.3 percent binaural impairment under the AMA *Guides*. He found the 2017 audiogram is "the best evidence of Claimant's hearing changes

[1] The administrative law judge rejected Employer's contention that the claim was not timely filed. Decision and Order at 22-23; *see* 33 U.S.C. §913. Pursuant to Section 8(f), he found Employer's liability limited to 13.8 weeks, based on the April 22, 2014 audiogram, which showed a 29.4 percent binaural impairment. Decision and Order at 38; CX 3 at 59. The Special Fund was found liable for the remaining 58.8 weeks of compensation at the maximum compensation rate of $1,377.02. The parties stipulated to an average weekly wage of $2,096. *Id.*

[2] The Director, Office of Workers' Compensation Programs, filed a letter brief stating she would not participate in this appeal unless specifically requested to do so by the Board.

through the whole period of the TEMCO employment."[3] Decision and Order at 28; *see* CX 3 at 18, 67-68. He determined the audiograms conducted during the period Claimant worked for Employer "indicate the worsening occurred during the time that Claimant was at TEMCO." *Id*.

The administrative law judge rejected Employer's reliance on dosimetry testing it conducted at its facility on January 30, and October 4, 2018, after Claimant retired, allegedly showing Claimant's work would have exposed him only to non-injurious noise. The test results were generated by placing microphones on five supervisory employees whose work duties are similar to Claimant's and measuring their sound exposure. *See* Decision and Order at 10-11; EXs 10, 16. The administrative law judge found this testing does not account for Claimant's specific work duties of engaging in periodic extended weekly inspections of Employer's facility and more extended monthly inspections.[4] He found the dosimetry testing confirmed the lay testimony that certain areas of Employer's facility were "very loud" to "dangerously loud." Decision and Order at 30; *see* Tr. at 30-32, 55-59, 63; EXs 10 at 100-101, 107, 111-113, 155-156, 173-174; 16 at 242, 249-255. He determined Claimant was not in noisy areas all day, or even on a consistent basis most days, but "on some days he was in these areas for extended periods." Decision and Order at 30.

The administrative law judge found Claimant's intermittent use of hearing protection, which would have provided a roughly 15-16 decibel reduction in noise exposure, is not conclusive evidence his hearing loss is not work-related because some of the dosimetry readings were quite high, Claimant did not always wear hearing protection, and there likely were occasions when Claimant was supervising repairs or explaining maintenance, which required the removal of his hearing protection. Decision and Order at 30; *see* Tr. at 89-90, 117-120; CX 5 at 179-180. He determined there is no convincing evidence of a genetic cause for Claimant's hearing loss. Considering Dr. Langman's testimony that age-related hearing loss ordinarily begins in one's 60s, the administrative law judge found that while age could explain Claimant's hearing loss from age 65 to 68

[3] If the hearing loss is work-related, a retired claimant is entitled to benefits for the totality of his hearing loss, unless there is creditable evidence of the extent of the loss at the time he left covered employment. *Steevens v. Umpqua River Navigation*, 35 BRBS 129 (2001); *Labbe v. Bath Iron Works Corp.*, 24 BRBS 159 (1991).

[4] Claimant was required to linger in an area after discovering a problem in order to investigate and give instructions to co-workers, and was responsible to supervise repairs, which were occasionally required in confined spaces. Decision and Order at 29-30; *see* Tr. at 23-28, 38, 41, 54-57, 81-82, 85-87.

after he retired, age alone is not a sufficient explanation for the large increase in loss during his employment, noting Claimant was 55 to 65 while working for Employer.[5] Decision and Order at 31; *see* Tr. at 106; CX 3 at 54; EX 13 at 223-225. The administrative law judge rejected Employer's contention that an unknown factor caused the post-2004 increase in Claimant's hearing loss and found "far more convincing" and "more likely than not" Claimant's work over approximately 34 years for Cargill, 10 years for Employer, and ageing contributed to the extent of his hearing loss in October 2017. Decision and Order at 33. Accordingly, the administrative law judge found "weighing all of the evidence and the documented history of loss, the best inference is that the exposures at TEMCO played a role as well." *Id*. He concluded Claimant has a compensable hearing loss for which Employer is liable.

We reject Employer's contention the administrative law judge improperly allocated the burden of proof by finding Claimant's employment with Employer is the only plausible explanation for the extent of his increased hearing loss from 2005 to 2015. In his decision, the administrative law judge stated the applicable law that Claimant bears the ultimate burden of persuasion on the causation issue. Decision and Order at 25 (citing *Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT)). Moreover, after weighing the relevant evidence, his conclusion that the evidence is "far more convincing" and establishes on a "more likely than not" basis that Claimant's work for Employer contributed to the progression of his hearing loss from a 12.5 percent to a 36.3 percent impairment establishes the administrative law judge properly placed the burden of proof on Claimant as the proponent. *See generally Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001).

Employer also alleges error in the administrative law judge's rejection of Dr. Langman's opinion and the dosimetry testing. The administrative law judge found Dr. Langman's opinion that Claimant's work "could not" have caused any hearing loss "worthy of little weight." Decision and Order at 21; Tr. at 111. He determined "Dr. Langman did not approach this case in an objective manner and seems to have been driven to reach conclusions favorable to Respondents, and to state those conclusions in whatever manner suggested by [Employer's] counsel." Decision and Order at 21. The administrative law judge found Dr. Langman's initial opinion undermined by his inaccurate understanding of Claimant's work duties as visiting the plant fewer than 10

[5] The administrative law judge also found Claimant's noise exposure prior to working for Employer at Cargill's grain transport facility, consisting of riding a motorcycle for three months in 1973, military service in a color guard from 1970 to 1972, and hunting from childhood through the 1990s, does not explain the progression of his hearing loss after he began working for Employer in 2005. Decision and Order at 31-32; *see* Tr. at 113-114.

times a year, rather than the actuality of Claimant's having an office at Employer's facility where he reported to work daily. *Id*. at 19-20; EX 13 at 223-225. The administrative law judge found that, at the hearing, Dr. Langman was "somewhat evasive" and "cagey" in explaining the source of the inaccurate description of Claimant's work duties; he learned only at the hearing of Claimant's work in confined spaces and around rail cars and he did not know the extent of Claimant's noise exposure at these times. Decision and Order at 20; Tr. at 128-131, 137-138. The administrative law judge determined Dr. Langman's objectivity and judgment is undermined by his first having relied on Employer's counsel's representation of Claimant's job duties, rather than obtaining the information from Claimant at his examination, and because his causation opinion remained unchanged upon learning of Claimant's actual job duties at the hearing; instead, Dr. Langman changed the basis for his opinion to the dosimetry testing. Decision and Order at 20; Tr. at 111; EX 14 at 227. The administrative law judge found Dr. Langman's opinion that Claimant's hearing loss is not work-related undermined by the evidence of Claimant's noise exposure at Employer's facility, noting the dosimetry testing is "at best an approximation" of that exposure, inconclusive and not supportive of Dr. Langman's opinion.[6] Decision and Order at 20.

In evaluating Employer's dosimetry testing, Dr. Langman relied on the Occupational Safety and Health Administration and Washington State allowable time-weighted average (TWA) of 90 decibels (dB) over an eight–hour day and a 5dB exchange rate. Tr. at 104-105. This exchange rate is used in calculating the TWA by factoring in periodic noise exposure over 90dB. *Id.* at 109-110. The National Institute for Occupational Safety and Health (NIOSH) measures the safe amount of noise exposure as 85dB and uses

[6] The administrative law judge also found Dr. Langman's judgment questionable based on his willingness to agree with Employer's counsel's suggestion that Claimant's hunting, military service and three months of riding a motorcycle could have caused Claimant's pre-employment hearing loss without any evidence of the intensity of Claimant's noise exposure from these activities, whereas he opined that Claimant's 10 years of working for Employer in a grain elevator caused no hearing loss. Decision and Order at 21. The administrative law judge determined that part of Dr. Langman's rationale for his opinion was illogical for he opined, without further explanation, that evidence showing an increase in Claimant's binaural hearing loss while working for Employer "confirmed" his conclusion the hearing loss was not work-related. *Id*. The administrative law judge found this conclusion "begs the question" in that "[t]he crucial premise in the argument for the conclusion that there just *must* have been some unknown other cause to explain the hearing loss was that the work at TEMCO could not cause hearing loss." *Id*. The administrative law judge found Dr. Langman "pronounce[d] his premise confirmed by the inference made only based on that same premise." *Id*.

a 3dB exchange rate. *Id.* at 132-133. The lower exchange rate results in a higher TWA than does the 5dB exchange rate. *See* CX 5 at 143-147.

The administrative law judge determined that using the NIOSH standard would "markedly" change the implications of Employer's dosimetry testing. Decision and Order at 29. The TWA of the five management personnel tested ranged from 71.3dB to 83.3dB using a 5db exchange rate calculation and from 80.7dB to 92.3dB using a 3dB exchange rate calculation. EX 10 at 87. The administrative law judge permissibly found that, given the dispute over the proper methodology for interpreting Employer's dosimetry testing, the testing shows "at least a genuine possibility" that noise exposure at Employer's facility could have contributed to Claimant's hearing loss given he did not wear hearing protection at all times. Decision and Order at 29; Tr. at 115.

The administrative law judge, as the fact-finder, is entitled to determine the weight to accord to the evidence of record, address the credibility and sufficiency of any testimony, and draw reasonable inferences from the evidence. *See Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *see also Suarez v. Serv. Employees Int'l, Inc.*, 50 BRBS 33 (2016). Moreover, the administrative law judge is not bound to accept the opinion or theory of any particular medical examiner. *Walker v. Rothschild Int'l Stevedoring Co.*, 526 F.2d 1137, 3 BRBS 6 (9th Cir. 1975). The administrative law judge rationally found questionable Dr. Langman's knowledge of Claimant's actual noise exposure and his reliance on the dosimetry testing; therefore, he permissibly did not give any weight to Dr. Langman's opinion. *See Ogawa*, 608 F.3d at 648, 44 BRBS at 48(CRT).

In weighing the evidence of work-related hearing loss as a whole, the administrative law judge determined the dosimetry testing confirmed the lay testimony that areas of Employer's facility were "very loud" to "dangerously loud" and that "on some days [Claimant] was in these (noisy) areas for extended periods." Decision and Order at 31. The administrative law judge found it likely that Claimant's use of hearing protection would not have eliminated all harmful noise exposure because he did not always wear hearing protection. *Id*. at 30-31; *see* EX 12 at 194; *see generally 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 permissibly relied on "the documented history of loss," which increased from 12.5 percent to 29.4 percent from 2004 to 2014 while he worked for Employer. The administrative law judge stated, "[c]orrelation is not causation, but it can be powerful evidence when the employment could have contributed and when there are no other likely causes." Decision and Order at 28.

The Board is not empowered to reweigh the evidence even if it is susceptible to other findings and inferences, and must accept the administrative law judge's rational inferences and findings of fact when supported by the record. *See, e.g.*, *Duhagon*, 169 F.3d

615, 33 BRBS 1(CRT); *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 25 BRBS 85(CRT) (9th Cir. 1991); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988). Therefore, as it is rational and supported by substantial evidence of record, we affirm the administrative law judge's finding that Claimant established his work for Employer contributed to his hearing loss and the consequent award of benefits. *Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT); *Rhine v. Stevedoring Services of America*, 596 F.3d 1161, 44 BRBS 9(CRT) (9th Cir. 2010); *see also Ceres Marine Terminals, Inc. v. Director, OWCP*, 848 F.3d 115, 50 BRBS 91(CRT) (4th Cir. 2016); *Service Employees Int'l, Inc. v. Director, OWCP*, 595 F.3d 447, 44 BRBS 1(CRT) (2d Cir. 2010); *Cooper/T. Smith Stevedoring Co., Inc. v. Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT) (5th Cir. 2002); *Meehan Serv. Seaway Co. v. Director, OWCP*, 125 F.3d 1163, 31 BRBS 114(CRT) (8th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998).

Accordingly, we affirm the administrative law judge's Decision and Order Awarding Benefits.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge