BRBS Commentary October 2021

Claimant's Right to Select Audiologist Affirmed by Benefits Review Board

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On July 30, 2021, in *Jones v. Huntington Ingalls Incorporated (Ingalls Operations)*, 55 BRBS 1 (2021), the Benefits Review Board issued a published split decision reconsidering and reversing in part its earlier 2017 published decision, 51 BRBS 29 (2017). The Board now holds that an audiologist is a "physician" within the meaning of 20 C.F.R. § 702.404 such that an injured worker is permitted his initial choice of audiologist pursuant to Section 7(b) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 907(b). The decision reversed the Board's prior holding to the contrary and also vacated the initial order remanding the case to the district director. The case is significant, for hearing loss cases, as well as for other cases where the BRB construes statutory and regulatory provisions and also clarifies the respective roles for district directors and administrative law judges in matters involving medical issues.

Background

Clarence Jones worked approximately six years for Ingalls as a sheet metal mechanic in a noisy environment. He stopped work due to a knee injury and later underwent testing for his hearing. Jones' audiologist found a 17% binaural hearing loss. Jones alleged that this loss resulted, at least in part, from heavy aspirin ingestion which was part of his treatment for the knee injury and thus was work-related. In response to his claim for benefits, Ingalls had Jones examined by its own consulting audiologist who reported zero binaural hearing impairment. Nevertheless, both audiologists recommended hearing aids. In agreeing to pay for hearing aids, Ingalls directed Jones to schedule an appointment with Gulf Coast Audiology in Pascagoula, MS restricting its authorization for Jones to obtain his hearing aids from only this third audiology practice, nearer to his home (and presumably with lower costs than others).

Jones sought a hearing before an administrative law judge. The ALJ found that Jones' hearing loss was not noise-induced and that he had no ratable hearing impairment. Overlooking or disregarding a stipulation by the parties that Jones was entitled to hearing aids, the ALJ also denied medical benefits.

The First Board decision

Jones appealed to the Board. With regard to medical benefits, Jones asserted his entitlement to hearing aids was established by the parties' stipulations. Jones also argued that the ALJ should have made a finding as to which audiologist is to dispense the hearing aids based only on whether the choice was reasonable. Ingalls agreed that it authorized hearing aids but contended that a claimant should not be permitted to dictate where the hearing aids are purchased. Jones replied that he, and not employer, had the right to choose his audiologist, and the distance to the facility should not result in his choice being found to be unreasonable by the ALJ.

As a preliminary matter, the Board reversed the ALJ's denial of medical benefits. Finding that the ALJ accepted the parties' stipulations which established that employer accepted liability for medical benefits and authorized claimant to get hearing aids and that the ALJ gave no notice or explanation as to why he later "rejected" those stipulations, the Board held that claimant is entitled to the stipulated medical benefits for his hearing loss. It was irrelevant whether the record evidence could support the stipulated fact regarding causation; the stipulation itself settled that issue.[1]

With respect to the audiologist dispute, first the Board noted as a general matter that a claimant's entitlement to medical benefits is governed by Section 7 of the Act, 33 U.S.C. § 907, and the Secretary of Labor and his designees, the district directors, have exclusive authority to actively supervise a claimant's medical care. 33 U.S.C. § 907(b), (c); 20 C.F.R. § 702.407.[2] And, although disputes over factual matters, such as whether authorization for treatment was

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[1] It is also well established that a claimant need not have a ratable hearing impairment in order to be entitled to medical benefits. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163 (5th Cir. 1993).

[2] Section 7(b) of the Act provides that a claimant has "the right to choose an attending physician authorized by the Secretary to provide medical care. . . ." 33 U.S.C. § 907(b). Section 702.404 of the regulations states in relevant part: "The term *physician* includes doctors of medicine (MD), surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law . . . Naturopaths, faith healers, and other practitioners of the healing arts which are not listed herein are not included within the term 'physician' as used in this part." 20 C.F.R. § 702.404 (emphasis in original).

requested by the claimant, whether the employer refused the request for treatment, or whether a physician's report was filed in a timely manner, are within an ALJ's authority, see e.g., *Weikert v. Universal Maritime Service Corp.*, 36 BRBS 38; *Sanders v. Marine Terminals Corp.*, 31 BRBS 19 (1997) (Brown, J., concurring); *Toyer v. Bethlehem Steel Corp.*, 28 BRBS 347 (1994) (McGranery, J., dissenting); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989), the issue presented here did not involve a disputed factual matter. Thus, the question of which audiologist should treat the claimant was not for the ALJ to decide.

Next, the Board cited its prior holding that claimants do not have a statutory right to select their own pharmacy or provider of prescriptions, as pharmacies are not included in the definition of "physician" contained in 20 C.F.R. § 702.404, and thus are not encompassed within Section 7(b)'s right to choose a physician. *Potter, et al. v. Elec. Boat Corp.*, 41 BRBS 69 (2007). Analogizing audiologists to pharmacists, the Board then held that audiologists are also not included among those defined as "physicians" under 20 C.F.R. § 702.404. Accordingly, a claimant had no right to select the audiologist of his choice as he would with a physician. Because the selection of an audiologist who will dispense hearing aids falls within the "character and sufficiency" of medical care, the issue concerning the selection of an audiologist is delegated to the district director. Accordingly, the Board remanded the case to the district director to address the details of claimant's audiological care. *Jones v. Huntington Ingalls, Inc.*, 51 BRBS 29 (2017).

Motion for Reconsideration

The claimant sought reconsideration by the Board. 20 C.F.R. § 802.407. The Director and an amicus brief filed by the Workers' Injury Law and Advocacy Group (WILG) supported reconsideration. The Director contended that close scrutiny of 20 C.F.R. § 702.404 and the application of general principles of statutory and regulatory interpretation brought audiologists comfortably within the regulatory definition of "physician." While the Board deliberated over the reconsideration motion for almost four years, Administrative Appeals Judge Ryan Gilligan, a member of the panel which rendered the initial decision, resigned from the Board and was substituted on the panel by Administrative Appeals Judge Greg J. Buzzard. When the Board ruled on July 30, 2021, AAJs Buzzard and Rolfe, over the dissent of Chief Administrative Appeals Judge Boggs, granted the motion.

The Board's Decision on Reconsideration

In a comprehensive decision examining the history and purpose of the choice of physicians under the LHWCA as well as the definition of that term, the panel majority concluded that as a matter of statutory construction, audiologists are appropriately considered "physicians" within the meaning of Section 7(b). That conclusion results in a LHWCA claimant having the choice to select his audiologist.

The Board reasoned that this construction fulfilled congressional intent as expressed by the 1984 statutory amendments to LHWCA Section 8(c)(13)(C), 33 U.S.C. § 908(c)(13)(C). The majority explicitly rejected the dissent's suggestion that the regulatory history of Section 702.404 and its historic relationship to the DOL's administration of the Federal Employees' Compensation Act (FECA) or the definition of "physician" under the Black Lung Benefits Act could overcome the history and structure of the LHWCA statutory and regulatory provisions. In particular, the Board placed significance on Congress' recognition in 8(c)(13)(C)that audiograms "shall be presumptive evidence of the amount of hearing loss sustained . . . [if, but] only if (i) such audiogram was administered by a licensed or certified audiologist or a physician who is certified in otolaryngology . . . ."

The Board began by recognizing that an injured employee's initial choice of physician plays a vital role in compensation claims with lasting implications for the treatment of work injuries, and, taking its cues from the Larson treatise on workers' compensation, that physician choice balances two important values. First, it supports "the confidential nature of the doctor-patient relationship" and the "desirability of the patient's trusting the doctor." 8 Lex K. Larson and Thomas A. Robinson, Larson's Workers' Compensation Law § 94.02[2] (2018). Second, it promotes "the maximum standards of rehabilitation by permitting the compensation system to exercise continuous control of the nature and quality of medical services from the time of injury." *Id.* With the 1972 Amendments, Pub. L. 92-576, October 27, 1972, 86 Stat. 1251, 1254, Congress amended LHWCA Section 7(b), 33 U.S.C. § 907(b), to provide that the "employee shall have the right to choose an attending physician authorized by the Secretary to provide medical care under this chapter as hereinafter provided." *See also* 20 C.F.R. § 702.403. When the statute was further amended in 1984, hearing loss was explicitly distinguished from other injuries in several respects. H.R. Conf. Rep. 98-1027, 98th Cong, 2nd Sess. 1984, 1984 U.S.C.C.A.N. 2771, 2778 (Sept. 14, 1984) (the 1984 Longshore Amendments).In particular, the 1984 Amendments afforded special status to audiograms and accorded them presumptive evidentiary

weight regarding the amount of hearing loss sustained if: 1) "administered by a licensed or certified audiologist or a physician certified in otolaryngology;" 2) the results of the test are given to the injured employee at the time the test is administered; and 3) there are no contrary audiogram results from the same time. 33 U.S.C. § 908(c)(13)(C).

As with many crucial terms used in the LHWCA, the Act does not define "physician" for the purposes of 33 U.S.C.§ 907(b). The Board noted that it also fails to define the term "physician" in any of the thirty-three other instances the term is used in four sections of the Act. *See* 33 U.S.C. §§ 907, 908(c)(13)(C), 919, 928. However, Section 702.404 of the regulations, 20 C.F.R. § 702.404, does define physician, and does so broadly. Accordingly, it was necessary for the Board to scrutinize the regulation as well as to consider the legislative history of 33 U.S.C. § 908(c)(13)(C).

The Board closely traced the origins and history for both the regulation and the statute. The Board found it notable that audiologists and otolaryngologists are the only medical providers Congress named by specialty in the Act. It concluded that the legislative history of amended Section 8(c)(13)(C) confirms the importance Congress placed on the medical expertise of audiologists. Both the Senate and the House Committees recognized the importance of audiograms in initially diagnosing and treating hearing loss. The Senate bill considered audiograms in general to have "special status" and be "conclusive evidence of hearing loss." And, although the House version afforded audiograms presumptive weight only if a certified audiologist or physician, whom the House deemed "competent medical personnel" administered it, the congressional conference committee incorporated audiometric testing procedures consistent with those required by hearing conservation programs pursuant to the Occupational Safety and Health Act. H.R. Conf. Rep. 98-1027, 98th Cong., 2nd Sess. 1984, 1984 U.S.C.C.A.N. 2771, 2778. The Board majority panel deemed it significant that Occupational Safety and Health Administration (OSHA)considers audiologists equal with otolaryngologists and other physicians for the treatment of hearing loss. *See* OSHA Std. Interp. 1910.95(G)(3) (2016) (2016 WL 6440727) (letter clarifying OSHA's position regarding the "term 'physician' as it pertains to OSHA's audiometric testing program") (OSHA Std. Interp.).

In addition to establishing the amount of disability compensation owed to an employee under Section 8, an audiologist's determination of hearing loss significantly impacts a claimant's other rights under the Act, such as entitlement to employer-paid medical care for that injury, 33 U.S.C. § 907(a), and setting the timing for when a claimant must file his claim for disability and medical benefits. Sections 12 and 13 commence the running of time limits when a claimant first receives an audiogram "which indicates . . . a loss of hearing." 33 U.S.C. § 908(c)(13)(D); *see* 33 U.S.C. §§ 912 (requirement to notify employer of an injury within 30 days), 913 (claim must be filed within one year of awareness of injury). *See Vaughn v. Ingalls Shipbuilding, Inc.*, 28 BRBS 129 (1994) (en banc), *aff'g on recon.* 26 BRBS 27 (1992).

Reading the text and legislative history of LHWCA Sections 907(b) and 908(c)(13)(C) together, the Board found that the purposes of each would be better served by finding audiologists to be "physicians." The panel was persuaded that Section 907(b)'s objective of allowing greater patient choice obviously applied to otolaryngologists as doctors of medicine and that reasoning applied with equal force to audiologists who are qualified by their education, training, and state licensure to perform the same diagnostic tests and provide the same corrective treatment for hearing loss. Given the same need for confidentiality and trust, and in light of the special status afforded audiologists Congress noted in amending Section 8(c)(13)(C), the Board concluded that the legislative history establishes Congress intended audiologists to be included as "attending physician[s]" under Section 907(b).

Turning to the language of 20 C.F.R. § 702.404 itself, the Board agreed with the Director's argument that plain language establishes that its list of certain medical practitioners is not intended to be exclusive of other professionals than those expressly enumerated. As a general matter the word "includes" is a term of enlargement, not of limitation, and is not all-embracing or exhaustive but connotes only an illustrative application of a general principle. Thus, while "physicians" listed in 702.404 gives an idea of its scope, that list is inclusive, not exclusive. Further, the Director contended that audiologists are like the medical professionals listed as included within the regulatory definition of "physician" (podiatrists, clinical psychologists, optometrists, and chiropractors). They are licensed by the state of Mississippi, are viewed by Congress and OSHA as equivalent to otolaryngologists, their duties are akin to those professionals who qualify as physicians, and they engage in conventional medical treatment. WILG argued that what an audiologist does with respect to a person's hearing is essentially identical to what an optometrist does with respect to a person's vision, *i.e.*, audiologists perform medical testing, diagnose hearing loss, prescribe hearing aids, and fit

and administer hearing aids. Because optometrists are considered physicians within 20 C.F.R. §702.404, audiologists should also be. The panel majority agreed and consequently held that claimants should have a free right to choose their audiologist under LHWCA section 907(b).

Finally, the Board considered it at least relevant and perhaps important that OWCP, the administrator of the LHWCA, had a long history of administering the Act by equating audiologists with physicians who specialize in otolaryngology for the treatment of hearing loss. The DOL's Longshore Procedure Manual instructs that audiograms are presumptive evidence of the amount of hearing loss sustained if they are administered by a certified audiologist, physician, or a qualified technician under their supervision. DLHWC Proc. Manual 3-0401, para. 3(7)(1).

As a result, the Board was receptive to the Director's argument that "[a]lthough 20 C.F.R. § 702.404 was never formally amended to include audiologists as physicians, the fact that the Longshore Program has long accorded to their audiograms the same deference as those of physicians, indicates that the Director has considered audiologists' reliability and expertise to be the same as physicians."

The Board summarized:

> Reading the term "physician" to include audiologists for purposes of Section 7(b)best harmonizes the Act. It would be inconsistent for Congress to equate the two professions for diagnosing hearing loss in one section — triggering statutes of limitations in two others — but to permit a claimant to choose only an otolaryngologist to provide medical care in yet another.

55 BRBS at 6.

Moreover, the Board found persuasive the Director's point that if the initial decision denying claimants the right to choose their own audiologist stood, claimants nevertheless remain fully entitled to choose an otolaryngologist to diagnose, evaluate, measure and treat hearing loss. And, it could be expected otolaryngologists would frequently refer claimants to audiologists for audiograms and fitting of hearing aids. The end result will force employers to pay for services rendered from both otolaryngologists and audiologists in the same case thereby increasing the overall cost of medical care liability for employers.

The Impact of the Jones Decision's Conclusion that Claimants may Choose their Audiologist

In practical terms, the Board's decision that audiologists qualify as "physicians" under the LHWCA means not only that claimants have the right to select an audiologist of their choice to provide medical treatment but also that the claimant's chosen audiologist can determine the presumptive amount of hearing loss. Rather than being able to compel claimants to attend only a hearing test performed by an audiologist chosen by the employer (as overseen by the district director), one consequence of *Jones* would seem to be that employers must also allow claimant's chosen audiologist to dispense the hearing aids prescribed by the claimant's audiologist. The *Jones* decision appears to control future disputes regarding whether hearing aids may only be dispensed by the claimant's chosen audiologist or whether employers and carriers will be able to control costs by seeking to provide recommended hearing aids at a lower price dispensed by a different source. Post-*Jones*, employers and carriers seem unlikely to prevail on the position that hearing aids are more analogous to the provision of a product like prescription medicines than classic medical treatment suitable to be furnished only by the treating physician selected by the claimant.