U.S. Department of Labor

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

BRB No. 16-0690

CLARENCE W. JONES, JR. Claimant-Petitioner v. HUNTINGTON INGALLS, INCORPORATED (INGALLS OPERATIONS) Self-Insured Employer-Respondent	)	DATE ISSUED: Oct. 10, 2017 DECISION and ORDER

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

Isaac H. Soileau, Jr., and Ryan A. Jurkovic (Soileau & Associates, LLC), New Orleans, Louisiana, for claimant.

Traci Castille (Franke & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

Before: BOGGS, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order and the Order Denying Motion for Reconsideration (2015-LHC-00606) 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 began working as a sheet metal mechanic for employer in 2003. He testified that he worked in a noisy environment. Tr. at 18-19. During his employment,

he underwent audiometric testing which revealed zero percent hearing loss.[1] EX 9. Claimant sustained a work-related knee injury in 2009, and he has not worked since.[2] In 2014, at the urging of his wife, claimant underwent an audiological evaluation conducted by Dr. McLain. On April 30, 2014, Dr. McLain stated that claimant had a 17.2 percent noise-induced binaural sensorineural hearing loss and needed hearing aids. CXs 17-18. Employer sent claimant for a second opinion on September 26, 2014, and Dr. McGill's evaluation revealed a binaural impairment of zero percent. Although Dr. McGill agreed claimant is a candidate for amplification, he stated that any change in claimant's hearing since he left the shipyard is probably not noise-related.[3] EX 7. Claimant filed a claim for benefits based on Dr. McLain's opinion.

The parties agreed to a number of stipulations, which the administrative law judge summarized, accepted, and incorporated into his decision. Decision and Order at 7-8. On the issue of causation, the administrative law judge found that "the parties do not dispute that Claimant suffers from a sensorineural hearing loss and that he was exposed to work place noise. . . ." *Id.* at 30. Nevertheless, he stated, "the burden is on Claimant to prove on the basis of the record as a whole that his hearing loss was caused or aggravated by his work for Employer, and to what extent he has suffered a hearing loss." *Id.* Weighing the evidence of record as a whole,[4] the administrative law judge found that claimant's hearing loss is not noise-induced and that he does not have a ratable hearing impairment.[5] *Id.* at 34. Therefore, he concluded that claimant is not entitled to disability

[1] The evaluations occurred on February 23, 2004 (baseline), April 13, 2005, September 5, 2006, and July 8, 2008. EX 9.

[2] Claimant and employer reached a Section 8(i), 33 U.S.C. §908(i), settlement for the knee injury, and their agreement was approved by the administrative law judge in 2012. EX 17.

[3] Dr. McGill reported that claimant took aspirin for pain for his knee injury; he informed claimant that large doses of aspirin can cause hearing loss. EX 7.

[4] The administrative law judge relied upon the discrepancies in reports and testimony from claimant regarding the onset date of his hearing loss and found that claimant's hearing loss became evident well after he last worked for employer. He also relied on the opinions of Drs. McLain and McGill that hearing loss can be caused by ototoxic drugs, claimant's daily use of aspirin, and the audiograms reflecting zero percent hearing impairment. Decision and Order at 33-34; CX 18; EXs 7, 9.

[5] Although the administrative law judge found the audiograms of Drs. McLain and McDill credible and equally probative, he found they are contradictory and stated it would be improper to average the results because one of the audiograms revealed zero

or medical benefits for his hearing loss. *Id.* at 35. The administrative law judge denied claimant's motion for reconsideration.

Claimant appeals the administrative law judge's decisions, contending he erred in denying disability and medical benefits. With regard to disability benefits, claimant asserts his hearing loss is work-related because employer did not rebut the Section 20(a), 33 U.S.C. §920(a), presumption that his hearing loss is related to the medication (aspirin) he took for his work-related knee injury, and he submitted credible evidence of a 17.2 percent hearing loss. With regard to medical benefits, claimant asserts his entitlement to hearing aids is established by the parties' stipulations. Claimant also contends the administrative law judge should have made a finding as to which audiologist is to dispense the hearing aids. Employer responds, standing by its agreement to authorize hearing aids and taking no position on claimant's Section 20(a) causation contention. Employer asserts, however, that claimant should not be permitted to dictate where the hearing aids are purchased. In reply, claimant states that the stipulations established his hearing loss is work-related. Additionally, claimant asserts he, and not employer, should choose his audiologist, and the distance to the facility should not result in his choice being found to be unreasonable by the administrative law judge.[6]

Stipulations

The parties in this case submitted a number of stipulations to the administrative law judge, which he accepted, although he did not report them verbatim in his decision. Decision and Order at 7-8. Specifically, claimant and employer agreed, inter alia:

> 2. Hearing loss in course and scope of employment: disputed as to whether there is a ratable loss; accepted as hearing loss for which hearing aids are recommended and liability for hearing aids accepted by [employer]
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> 3. Exposure to workplace noise which could have caused hearing loss: yes,

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percent impairment, which is probative evidence that a disability does not exist at all. Decision and Order at 34-35 n.23 (citing *Ceres Marine Terminals, Inc. v. Green*, 656 F.3d 235, 45 BRBS 67(CRT) (4th Cir. 2011)).

[6] Section 702.403 of the regulations, 20 C.F.R. §702.403, states that an employee has the right to choose an attending physician but cautions that "[g]enerally 25 miles from the place of injury, or the employee's home is a reasonable distance to travel, but other pertinent factors must also be taken into consideration." Claimant interprets this 25-mile "limit" as a limit on reimbursement of mileage rather than a limit on reasonableness of choice.

but degree of work-related loss, if any, is disputed

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13. Medical Benefits: no medical benefits have been paid, but [employer] has accepted liability for medical benefits and has authorized Claimant to schedule an appointment with Gulf Coast Audiology in Pascagoula, MS for a hearing aid fitting

14. Unresolved issues presented for resolution:
(a) Causation, nature and extent/degree of compensable hearing impairment, if any;
(b) Scope of medical/audiological benefits under Section 907

JX 1. The administrative law judge interpreted these stipulations as establishing "certain prerequisites of a prima facie case," but found that claimant has "the burden of proving the extent of his disability" as well as the burden of proving a causal relationship between any hearing loss and his work for employer. Decision and Order at 29-30. The administrative law judge found that claimant did not bear his burden. Thus, he concluded that claimant's hearing loss is not noise-related or work-related, and he denied both disability and medical benefits. *Id.* at 34-35.

Claimant asserts that the parties' stipulations established the work-relatedness of his hearing loss. In response, employer contends that that issue is moot because employer stands by its stipulation authorizing the hearing aids. As a general rule, the Board will not review a factual issue raised on appeal where the facts were stipulated before the administrative law judge. *Brown v. Maryland Shipbuilding & Drydock Co.*, 18 BRBS 104 (1986). Stipulations made by parties are binding upon those who enter into them. *Suarez v. Service Employees Int'l, Inc.*, 50 BRBS 33 (2016); *Littrell v. Oregon Shipbuilding Co.*, 17 BRBS 84 (1985). Stipulations are offered in lieu of evidence, need not be established by record evidence, and may be relied upon to establish an element of the claim. *Mitri v. Global Linguist Solutions*, 48 BRBS 41 (2014); *Ramos v. Global Terminal & Container Services, Inc.*, 34 BRBS 83 (1999).

We agree with claimant that the administrative law judge erred in denying medical benefits. The administrative law judge accepted the parties' stipulations which established that employer accepted liability for medical benefits and authorized claimant to get hearing aids. In denying medical benefits, the administrative law judge gave no notice or explanation as to why he later "rejected" the stipulations.[7] *Dodd v. Newport*

[7] The stipulation accepting liability for medical benefits is not contrary to law, as parties may stipulate to an employer's liability therefor. *Compare with Aitmbarek v. L-3*

News Shipbuilding & Dry Dock Co., 22 BRBS 245 (1989); *Beltran v. California Shipbuilding & Dry Dock*, 17 BRBS 225 (1985); *Misho v. Dillingham Marine & Manufacturing*, 17 BRBS 188 (1985); *Phelps v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 325 (1984); *Grimes v. Exxon Co., USA*, 14 BRBS 573 (1981); *Erickson v. Crowley Maritime Corp.*, 14 BRBS 218 (1981). Moreover, whether the record evidence could support the fact stipulated, i.e., causation, is not relevant to the acceptance of the stipulation. *Mitri*, 48 BRBS 41; *Ramos*, 34 BRBS 83; *Brown v. Maryland Shipbuilding & Drydock Co.*, 18 BRBS 104, 107-108 (1986); *see also Vander Linden v. Hodges*, 193 F.3d 268, 279-280 (4th Cir. 1999).[8] Therefore, in light of the parties' stipulations, we reverse the administrative law judge's denial of medical benefits. *Weikert v. Universal Maritime Service Corp.*, 36 BRBS 38 (2002); *Davison v. Bender Shipbuilding & Repair Co., Inc.*, 30 BRBS 45 (1996). Claimant is entitled to the stipulated medical benefits for his hearing loss.

Choice of Audiologist

As claimant is entitled to hearing aids for his hearing loss, we next address his contentions that he is permitted his choice of audiologist and that the administrative law judge need only decide whether his choice is reasonable.[9] Employer asserts that

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Communications, 44 BRBS 115 (2010) (stipulations that are contrary to the Act are not binding); *Puccetti v. Ceres Gulf*, 24 BRBS 25 (1990) (same); *McDevitt v. George Hyman Constr. Co*., 14 BRBS 677 (1982) (a stipulation cannot be accepted where it evinces an incorrect application of the law).

[8] In *Vander Linden*, 193 F.3d at 279-280, the United States Court of Appeals for the Fourth Circuit stated:

> a stipulation, by definition, constitutes "[a]n express waiver made . . . preparatory to trial by the party or his attorney conceding for the purposes of trial the truth of some alleged fact . . . *the fact is thereafter to be taken for granted; so that the one party need offer no evidence to prove it and the other is not allowed to disprove it* . . . . It is, in truth, a substitute for evidence, in that it does away with the need for evidence." 9 Wigmore, Evidence § 2588, at 821 (Chadburn 1981) (emphasis added). *See* 2 McCormack on Evidence § 254 (West 1992) (stipulations "have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact").

[9] In this case, claimant was evaluated by Dr. McLain at her office which is over 100 miles from claimant's house, and he wishes to obtain his hearing aids from her. Claimant testified that relatives live in the vicinity of her office, and he is there

audiologists, like pharmacists, *Potter v. Electric Boat Corp.*, 41 BRBS 69 (2007), are not "physicians" within the meaning of the Act and claimant is not entitled to his choice thereof as a matter of law. We reject claimant's contentions, as he has not raised an issue to be addressed by the administrative law judge, and he has not shown that he is entitled, by statute or regulation, to choose an audiologist.

A claimant's entitlement to medical benefits is governed by Section 7 of the Act. 33 U.S.C. §907. Active supervision of a claimant's medical care is performed by the Secretary of Labor and his designees, the district directors. 33 U.S.C. §907(b), (c); 20 C.F.R. §702.401 *et seq.*[10] Disputes over factual matters, such as whether authorization for treatment was 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 administrative law judge's authority to resolve. *Weikert*, 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 does not involve a factual matter for the administrative law judge.

Section 702.407 provides:

> The Director, OWCP, through *the district directors and their designees, shall actively supervise the medical care* of an injured employee covered by the Act. Such supervision shall include:
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> * * *
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> (b) The determination of the necessity, character and sufficiency of any medical care furnished or to be furnished the employee, including whether the charges made by any medical care provider exceed those permitted under the Act;

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frequently, so it is not out of the way. Tr. at 31, 35-36; *see* n.6, *supra*. Employer, however, has authorized claimant to obtain hearing aids from an audiologist nearer to his home.

[10] For example, under Section 7(b), the district director has the authority to change a claimant's physician at the claimant's request, or at the employer's request if the change is in the interest of the employee. *Jackson v. Universal Maritime Service Corp.*, 31 BRBS 103 (1997) (Brown, J., concurring); 20 C.F.R. §702.406. Under Section 7(d)(2), 33 U.S.C. §907(d)(2), only the district director may excuse a doctor's failure to file a timely first report of treatment if it is in the interest of justice. *Toyer v. Bethlehem Steel Corp.*, 28 BRBS 347 (1994) (McGranery, J., dissenting).

* * *

> (d) The further evaluation of medical questions arising in any case under the Act, with respect to the nature and extent of the covered injury, and the medical care required therefor.

20 C.F.R. §702.407 (emphasis added). Moreover, 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) (emphasis added). Section 702.404 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). Audiologists are not among those defined as a "physician" such that a claimant has the right to his free choice.

In *Potter*, the Board stated that with respect to medical benefits, "there are purely legal and/or discretionary issues that remain within the purview of the district director, with the right of direct appeal to the Board." *Potter*, 41 BRBS at 72. The Board concluded that, in raising the issue of choosing a pharmacist, the claimants did not raise an issue of fact to be addressed by the administrative law judge. Further, the Board held that "neither Section 7(b) of the Act nor its implementing regulation provides claimants with the right to select a pharmacy or provider of prescription medication." *Id.* at 71; *see* 33 U.S.C. §907(b); 20 C.F.R. §702.404. Therefore, it stated:

> the issues raised fall within the district director's supervision of claimants' medical care, as they concern the 'character and sufficiency of any medical care furnished or to be furnished the employee.' 20 C.F.R. §702.407(b). As claimants are not afforded their choice of pharmacy as a matter of right and as the district director supervises claimants' medical care, we hold that the issues raised by claimants in these cases are properly addressed by the district director, with the right of direct appeal to the Board.

Potter, 41 BRBS at 72 (internal footnote omitted) (citing *Jackson v. Universal Maritime Service Corp.*, 31 BRBS 103 (1997) (Brown, J., concurring)). Accordingly, the Board

remanded the cases[11] to the district director for further consideration. *Potter*, 41 BRBS at 72.

As with pharmacists, claimants do not have a statutory or regulatory right to choose their own audiologists. 33 U.S.C. §907(b); 20 C.F.R. §702.404. For the reasons stated in *Potter*, we hold that the issue of the selection of an audiologist concerns the "character and sufficiency" of a medical service and, therefore, falls within the scope of issues to be addressed by the district director, not the administrative law judge. *Potter*, 41 BRBS at 72; 20 C.F.R. §§702.404, 702.407(b); *McCurley v. Kiewest Co.*, 22 BRBS 115 (1989). Accordingly, we remand this case to the district director to address the details of claimant's audiological care.

Disability Benefits

Claimant contends the administrative law judge erred in denying disability benefits for his hearing loss. The audiograms of record, EXs 7, 9, administered while claimant was employed, revealed zero percent hearing impairment. The administrative law judge found there is no evidence of hearing loss until 2014 when claimant was evaluated by Dr. McLain, which is five years after his employment in ended. However, also in 2014, Dr. McGill's evaluation revealed claimant had zero percent hearing loss. The administrative law judge noted that both Dr. McLain and Dr. McGill stated that the audiogram most reflective of any permanent impairment is the one that demonstrates the lowest loss. Decision and Order at 34. The administrative law judge also found the two 2014 audiograms "wholly credible and equally probative" of the degree of claimant's hearing loss. The administrative law judge found, under these circumstances, that claimant did not meet his burden of establishing that he has a hearing impairment and he denied benefits. *Id.*

We affirm this finding. It is well established that an administrative law judge is entitled to determine the weight to be accorded to the evidence of record. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). In weighing the evidence, the administrative law judge noted that Drs. McLain and McGill are licensed certified audiologists, their audiometers were properly calibrated, the tests performed were accurate, and the results were reliable. Decision and Order at 12, 15-22, 34; CXs 17-18; EX 19. Thus, substantial evidence supports finding the two 2014 audiograms both credible and equally probative, and the administrative law judge did not err in so finding. *See generally ITO Corp. v. Director, OWCP*, 883 F.2d 422, 22 BRBS 126(CRT) (5th Cir. 1989); *Miffleton v. Briggs Ice Cream Co.*, 12 BRBS

[11] *Potter* is the lead case in a group of consolidated cases.

445 (1980), *aff'd*, 659 F.2d 252 (D.C. Cir. 1981) (table) (Board may not re-weigh the evidence); Decision and Order at 34. Moreover, the administrative correctly found that a claimant does not meet his burden of establishing he is impaired when one of two equally probative audiograms demonstrates zero impairment. *Ceres Marine Terminals, Inc. v. Green*, 656 F.3d 235, 45 BRBS 67(CRT) (4th Cir. 2011).[12] This is particularly true here, where substantial evidence in the form of testimony from the two audiologists specifically supports finding that the audiogram showing the least amount of hearing loss is the better evidence. CX 18 at 63-64; EX 19 at 62; *see also* EXs 13-15. Therefore, as the administrative law judge's finding that claimant is not entitled to disability benefits for his hearing loss is rational, supported by substantial evidence, and in accordance with law, we affirm that finding.[13] *Davison*, 30 BRBS 45.

[12] In *Green*, the court held that averaging a zero percent audiogram with an equally probative one demonstrating a ratable loss runs afoul of the Supreme Court's decision in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994), in which the Court invalidated the "true doubt" rule. If an administrative law judge finds evidence in equipoise, such as here, the claimant has not met his burden of establishing the compensability of his claim. *Greenwich Collieries*, 512 U.S. at 281, 28 BRBS at 48(CRT).

[13] 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, 27 BRBS 14(CRT) (5th Cir. 1993). Given the parties' stipulation that employer is liable for hearing aids and the administrative law judge's finding that claimant has no ratable hearing impairment, we need not address further any contentions concerning the administrative law judge's causation findings.

Accordingly, the administrative law judge's denial of medical benefits is reversed. The case is remanded to the district director for supervision of claimant's medical care. In all other respects, the Decision and Order and the Order Denying Motion for Reconsideration are affirmed.

SO ORDERED.

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JUDITH S. BOGGS
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge