U.S. Department of Labor

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

BRB No. 14-0313

DONNIE GARNER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HUNTINGTON INGALLS INCORPORATED - AVONDALE OPERATIONS	)	DATE ISSUED: Apr. 10, 2015
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Clement J. Kennington, 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 M. Castille (Franke & Salloum), Gulfport, Mississippi, for self-insured employer.

Before: HALL, Acting Chief Administrative Appeals Judge, McGRANERY and BUZZARD, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2013-LHC-01194) of Administrative Law Judge Clement J. Kennington 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 supported by substantial evidence, are rational, and are in accordance with the law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant filed a claim for a hearing loss which, he indicates, occurred over the

course of his work for employer from October 29, 2007 to May 20, 2010.[1] Claimant's work as a master electrician consisted of performing a variety of electrical duties in naval vessel engine and machinery rooms, where the noise levels were high, prompting him to wear hearing protection provided by employer. Claimant underwent four in-house audiograms administered by employer on October 22, 2007, September 17, 2008, October 9, 2008, and September 19, 2009, all of which showed a flat hearing loss inconsistent with noise exposure.[2] Nonetheless, claimant stated that he noticed a gradual hearing loss, culminating in an episode at work when he was reprimanded for not responding to a fire alarm which he explained he had not heard. Following this incident, employer sent claimant first to Dr. Scheuermann. Employer stipulated that his audiogram of November 4, 2010, showed claimant sustained a 45 percent binaural hearing impairment.[3] Then employer sent claimant to Dr. Seidemann, who, following an audiogram dated February 10, 2011, reflecting a zero percent binaural hearing loss, opined that claimant's hearing was completely within normal limits in each ear. The discrepancy in this testing led the district director to schedule claimant for testing with Dr. Irwin, a Board-certified otolaryngologist. Dr. Irwin, who administered an audiogram on September 9, 2011, which revealed normal to near normal hearing, opined that claimant's audiogram dated February 10, 2011, most clearly represented claimant's hearing level.[4] On October 12, 2012, claimant saw Dr. Hagen who performed an audiogram which revealed a 71 percent binaural hearing impairment, followed by a brain

[1]Claimant's last physical day of work for employer occurred on May 20, 2010. He was terminated by employer on June 2, 2010.

[2]These tests included notations that claimant was suspected of exaggeration and recommendations for further testing.

[3]While employer stipulated that the test showed a 45 percent binaural hearing impairment under the American Medical Association *Guides to the Evaluation of Permanent Impairment*, employer argues that the absence of any objective testing, i.e., the absence of bone conduction testing, indicated that there was no way to determine whether the impairment reflected in the test was conductive or noise-induced.

[4]Dr. Irwin observed that claimant demonstrated exaggerated responses to conversational speech. He thus concluded that the September 9, 2011 audiogram and speech testing results were unreliable and invalid due to claimant's inappropriate responses. Nonetheless, Dr. Irwin relied on his objective testing of claimant, i.e., physical examination and an otoacoustic emission test which showed normal to near normal hearing, to find that the February 10, 2011 audiogram, showing a zero percent binaural impairment, best represented claimant's hearing level, relatively close in time to his last work for employer.

stem audiometry which showed a 62.2 percent binaural hearing loss, which Dr. Hagen stated was sensorineural in nature.

In his Decision and Order, the administrative law judge found that claimant invoked the Section 20(a) presumption, 33 U.S.C. §920(a), that his hearing loss is work-related, but that employer established rebuttal thereof. On weighing the evidence as a whole, the administrative law judge found that claimant did not establish that he sustained any hearing impairment as a result of his work for employer. Accordingly, he denied the claim for benefits.

On appeal, claimant challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance. Claimant filed a reply brief.

Claimant contends that the administrative law judge erred by relying on the opinions of Drs. Seidemann and Irwin, instead of that of Dr. Scheuermann, in concluding that claimant did not establish a work-related hearing loss. Claimant specifically maintains that employer should have been bound by the opinion of Dr. Scheuermann, to whom employer first sent claimant. Claimant asserts that the administrative law judge erred in allowing employer to pursue the additional opinions of Drs. Seidemann and Irwin merely because it disagreed with the findings of Dr. Scheuermann, its initial physician of choice.

Initially, we reject claimant's contentions pertaining to employer's procurement of an audiogram from Dr. Seidemann and the district director's decision to schedule claimant for testing with Dr. Irwin. Contrary to claimant's position, there is nothing which mandates that an employer be bound by the opinion of its initial examining physician, in this case Dr. Scheuermann.[5] Thus, employer was permitted to seek the additional opinion of Dr. Seidemann. Additionally, Section 7(e) of the Act states, in relevant part, that:

> In the event that medical questions are raised in any case, the Secretary shall have the power to cause the employee to be examined by a physician employed or selected by the Secretary. . . .

[5]We further note that the report which Dr. Scheuermann filed in conjunction with the November 4, 2010 audiogram did not provide any specific opinion as to whether the measured 45 percent bilateral hearing loss was noise-induced or work-related. CX 12.

33 U.S.C. §907(e); *see* 20 C.F.R. §702.408.[6] In this case, based on the discrepancy between the results obtained by Dr. Scheuermann and Dr. Seidemann, claimant was referred to Dr. Irwin by the district director, not employer, in compliance with the Act and its accompanying regulation. *See generally Augillard v. Pool Co.*, 31 BRBS 62 (1997). Moreover, we note that Section 7(e) states that "[a]ny party who is dissatisfied with such report may request a review or reexamination of the employee by one or more different physicians employed or selected by the Secretary." 33 U.S.C. §907(e). There is no evidence that claimant, despite being dissatisfied with the report of Dr. Irwin, availed himself of this provision. Claimant, instead, opted to pursue further testing in October 2012, with Dr. Hagen, more than 24 months after claimant stopped working for employer and 18 months after Dr. Irwin issued his report. Consequently, claimant has not asserted any valid rationale to support his position that the administrative law judge erred by including the reports of Drs. Seidemann and Irwin in his consideration of whether claimant's hearing loss is work-related pursuant to Section 20(a). *See generally Jackson v. Ceres Marine Terminals, Inc.*, 48 BRBS 71 (2014).

[6]Section 702.408 states:

> In any case in which medical questions arise with respect to the appropriate diagnosis, extent, effect of, appropriate treatment, and the duration of any such care or treatment, for an injury covered by the Act, the Director, OWCP, through the district directors having jurisdiction, shall have the power to evaluate such questions by appointing one or more especially qualified physicians to examine the employee, or in the case of death to make such inquiry as may be appropriate to the facts and circumstances of the case. The physician or physicians, including appropriate consultants, should report their findings with respect to the questions raised as expeditiously as possible. Upon receipt of such report, action appropriate therewith shall be taken.

Where the claimant establishes a prima facie case and Section 20(a) applies to relate the injury to the employment, as here, the employer can rebut this presumption by producing substantial evidence that the injury is not related to the employment. *Ceres Gulf, Inc. v. Director, OWCP [Plaisance]*, 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012); *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003); *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). The employer's burden is one of production, not persuasion; once the employer produces substantial evidence of the absence of a causal relationship, the Section 20(a) presumption is rebutted. *Id.* If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole, with claimant bearing the burden of persuasion. *Id.; see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 257, 28 BRBS 43(CRT) (1994); *Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

The administrative law judge found that employer rebutted the Section 20(a) presumption by presenting the opinions of Dr. Seidemann and Dr. Irwin, which, the administrative law judge found, "showed no hearing impairment or loss during claimant's employment with employer." Decision and Order at 12. Specifically, as the administrative law judge found, the audiogram administered by Dr. Seidemann on February 10, 2011, reflected a zero percent binaural impairment under the AMA *Guides to the Evaluation of Permanent Impairment*; Dr. Seidemann opined that claimant's hearing was completely within normal limits at all frequencies in each ear. EX 6. Additionally, the administrative law judge found that Dr. Irwin stated that otoacoustic emissions testing of claimant dated September 9, 2011, "was within normal limits in both ears;" Dr. Irwin opined that "it seems likely that the audiogram of February 11, 2011, most closely represents [claimant's] level of hearing." CXs 14, 17 at 14, 85-86; EX 9. As the opinions of Drs. Seidemann and Irwin, that claimant has normal hearing levels, constitute such relevant evidence as a reasonable mind might accept as adequate to support a finding that claimant did not sustain any hearing loss as a result of his work-related exposure to noise, we affirm the administrative law judge's finding that employer rebutted the Section 20(a) presumption in this case. *Plaisance*, 683 F.3d 225, 46 BRBS 25(CRT).

We also reject claimant's contention that the administrative law judge erred in evaluating the evidence as a whole. It is well-established that the Board cannot reweigh the evidence or substitute its opinion for that of the administrative law judge, but must accept the administrative law judge's weighing of the medical evidence if it is rational. *See Mendoza v. Marine Pers. Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). In this case, the administrative law judge found that the February 10, 2011 audiogram showing a zero percent binaural hearing loss, and corresponding reports of Drs.

Seidemann and Irwin, wherein each opined that claimant's hearing, as of that date, was normal, are better supported by the objective testing.[7] The administrative law judge, therefore, rationally credited the opinions of Drs. Seidemann and Irwin over the contrary opinions of Drs. Scheuermann and Hagen, to conclude that claimant did not sustain any hearing impairment as a result of his work for employer. As this finding is rational and within his discretion as the fact-finder, the denial of the claim for disability and medical benefits is supported by substantial evidence and is therefore affirmed.[8] *Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22(CRT) (5th Cir. 1994); 33 U.S.C. §907(a).

[7]Specifically, the administrative law judge found that Dr. Seidemann based his opinion on objective impedance or tympanometry testing, as well as objective bone and air conduction testing, all of which resulted in normal findings, EX 6, and that Dr. Irwin's evaluation of claimant included objective otoacoustic emissions testing, which likewise produced "normal" results, EX 15 at 14-18. In contrast, the administrative law judge found no evidence that Dr. Scheuermann performed any objective testing in conjunction with the November 4, 2010 audiogram. *Id.* at 24. Furthermore, the administrative law judge rejected Dr. Hagen's testing, which included an objective component, because it was conducted more than 2.5 years after claimant last worked for employer and thus, was rationally determined to be an invalid assessment of claimant's hearing loss as of his last day of work for employer in May 2010. *See Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 26 BRBS 151(CRT) (1993) ("[T]he injury is complete when the exposure ceases.").

[8]In light of this disposition, we need not address claimant's contention that the administrative law judge erred in evaluating his testimony regarding his hearing loss and wage loss.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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GREG J. BUZZARD
Administrative Appeals Judge