U.S. Department of Labor

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

BRB No. 19-0031

RONALD ECKHOFF	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HUNTINGTON INGALLS INCORPORATED	)	DATE ISSUED: 08/06/2019
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Tracy A. Daly, Administrative Law Judge, United States Department of Labor.

Robert E. O'Dell, Vancleave, Mississippi, for claimant.

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

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

GILLIGAN, Administrative Appeals Judge:

Claimant appeals the Decision and Order (2017-LHC-00444) of Administrative Law Judge Tracy A. Daly 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 from November 5 to December 4, 1981. He testified that he started in flame gouging and then moved to arc gouging, which he characterized as

"extremely noisy." Tr. at 24-25. He was not provided with hearing protection. *Id.* at 26. He left this employment because he found a better job and has not worked in any noisy conditions since that time. *Id.* at 20, 41.

Claimant underwent a hearing exam with Dr. Marianne Towell, Au.D., in September 2015 and reported he was exposed to noise at employer's facility in a shipyard. EX 10 at 8-9. Based on claimant's audiogram, Dr. Towell diagnosed claimant with an 8.4 percent binaural impairment that was "consistent with [his] reported history of occupational noise exposure." CX 9. She recommended that claimant obtain hearing aids. EX 10 at 34. Dr. Towell stated the impairment rating was accurate as of the date of the audiogram but she could not assess what claimant's impairment might have been at any time prior to September 2015. *Id.* at 29. She stated claimant's employment with employer was a likely contributing cause to his hearing loss. *Id.* at 44-45.

Claimant filed a claim for benefits for his hearing loss. The parties stipulated that claimant's working conditions involved potentially injurious noise levels but they did not stipulate that the noise caused or contributed to claimant's hearing loss. The administrative law judge found that claimant was only partially credible, noting a number of inconsistencies between his deposition and hearing testimony in relation to the onset of his hearing loss and his employment duties with employer. Decision and Order at 10. He concluded that claimant established a prima facie case that he suffers from a hearing impairment and that conditions at his work with employer could have caused his impairment. *See id.* at 13. Thus, he applied the Section 20(a) presumption. 33 U.S.C. §920(a).

He found employer rebutted the Section 20(a) presumption by producing substantial evidence that claimant's noise exposure was not injurious, citing two other hearing "tests" claimant "passed" after he left his employment with employer,[1] the notes of claimant's treating physician, Dr. Henderson, that claimant did not have any difficulty hearing in 2013, and Dr. Towell's statement that she did not know the percentage of impairment due to claimant's work for employer. *See* Decision and Order at 16-17. In weighing the evidence as a whole, the administrative law judge concluded that claimant did not establish his hearing loss is work-related. *See id.* at 18-19. Therefore, the administrative law judge denied the claim for benefits.

[1] Sometime between 1990 and 1995, claimant testified he was given a "hearing test" by his then-employer, where someone claimant believed was a doctor stood behind him and asked "can you hear me now," and "if you could hear him, you passed your test." Tr. at 34. At some later point, he testified he also passed a hearing test administered by another employer using a portable hearing booth in a van. *Id.* at 37. There is no other evidence of these tests in the record.

Claimant appeals the administrative law judge's decision. Employer filed a response brief, urging affirmance. Claimant filed a reply brief.

Where, as here, a claimant has invoked the Section 20(a) presumption to link an injury to his employment, the burden shifts to employer to rebut the presumption by producing substantial evidence that the injury was not caused by claimant's working conditions. *Ceres Gulf, Inc. v. Director, OWCP [Plaisance]*, 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012). Substantial evidence is defined as "that relevant evidence—more than a scintilla but less than a preponderance—that would cause a reasonable person to accept the fact-finding." *Id.* 683 F.3d at 228, 46 BRBS at 27(CRT). If an employer succeeds in rebutting the presumption, it falls out of the case and claimant bears the burden of showing that his injury was caused by his working conditions based on the record as a whole. *Bis Salamis, Inc. v. Director, OWCP [Meeks]*, 819 F.3d 116, 50 BRBS 29(CRT) (5th Cir. 2016). It is sufficient if employment exposures contributed to claimant's hearing loss. *See Director, OWCP v. Vessel Repair, Inc. [Viña]*, 168 F.3d 190, 33 BRBS 65(CRT) (5th Cir. 1999); *Mowl v. Ingalls Shipbuilding, Inc.*, 32 BRBS 51 (1998). 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. *Labbe v. Bath Iron Works Corp.*, 24 BRBS 159 (1991).

The administrative law judge found that employer rebutted the Section 20(a) presumption based on hearing tests claimant testified he passed between 1990 and 1995, as well as the note in Dr. Henderson's medical records. EX 6 at 54; *see* n.1, *supra*. The administrative law judge also relied on Dr. Towell's statement that she was unable to determine what percentage of claimant's hearing impairment was attributable to his work. On appeal, claimant challenges the administrative law judge's finding that employer rebutted the Section 20(a) presumption. We agree with claimant that the administrative law judge's rebuttal finding cannot be affirmed.

We conclude the administrative law judge erred in finding that the "hearing tests" about which claimant testified rebut the Section 20(a) presumption. The hearing tests themselves are not in the record and claimant's extremely vague description of these tests is legally insufficient to constitute substantial evidence of the absence of any hearing loss or of a causal relationship between claimant's current hearing loss and his employment with employer. *See Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993) (A claimant need not have a ratable hearing impairment under the AMA *Guides* in order to be entitled to medical benefits for a work-related loss); *see also Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000).

In addition, the administrative law judge erred in relying on Dr. Towell's statement that she could not determine what percentage of claimant's hearing loss is attributable to his work for employer to rebut the presumption. Dr. Towell's statement also is legally insufficient to rebut because it does not sever the causal connection between claimant's hearing loss and his employment as she opined that claimant's loss is consistent with his reported history of noise exposure with employer. *See Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004) (An opinion that supports causation cannot rebut the Section 20(a) presumption); *Donnell v. Bath Iron Works Corp.*, 22 BRBS 136 (1989). Therefore, we reverse the finding that this evidence is sufficient to rebut the Section 20(a) presumption.

The only remaining evidence which may rebut the Section 20(a) presumption is the note in claimant's 2013 medical records. Dr. Henderson's intake nurse wrote "The patient has not had difficulty hearing or understanding conversations or the television or radio when others do not." EX 6 at 54. While we note that the sentence is confusingly worded, the administrative law judge stated that "it can be reasonably inferred that Claimant specifically denied experiencing any hearing loss to Dr. Henderson." Decision and Order at 16.[2]

The United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, has held that an employer's burden on rebuttal is only to "advance evidence to throw factual doubt on the prima facie case." *Plaisance,* 683 F.3d at 231, 46 BRBS at 29(CRT). The Section 20(a) presumption "may be rebutted by negative evidence if the evidence is sufficiently specific to sever the potential connection between a particular injury and a job-related accident." *Holmes v. Universal Mar. Serv. Corp.*, 29 BRBS 18, 21 (1995). We remand the case for the administrative law judge to reconsider whether this note in claimant's medical records alone constitutes substantial evidence to rebut the Section 20(a) presumption.[3] If the administrative law judge finds it is not sufficient rebuttal

[2] The administrative law judge stated that because Dr. Henderson was claimant's treating physician, it is likely that he would have been "well-aware of Claimant's hearing limitations" and to make notes about it. Decision and Order at 18 n.9. The administrative law judge also noted claimant's deposition testimony that he had never had a discussion with Dr. Henderson about his ears or hearing. *Id.*

[3] The treatment note is dated October 2013. EX-6. The audiogram on which claimant bases his claim for hearing loss was taken in September 2015. Whether a reasonable person could find the note, standing alone, is sufficiently specific to "throw factual doubt" on claimant's assertion that his employment in 1981 caused at least a portion of his hearing loss is initially reserved for the administrative law judge to decide and adequately explain. *Plaisance* 683 F.3d at 229, 231, 46 BRBS at 29(CRT) (In determining

evidence, however, claimant's hearing loss is work-related as a matter of law. *See Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988).

Assuming, arguendo, the administrative law judge finds on remand that employer presented substantial evidence to rebut the Section 20(a) presumption, we address claimant's contentions regarding the administrative law judge's weighing of the evidence as a whole. Once the Section 20(a) presumption has been rebutted, it falls from the case and claimant bears the burden of persuasion to establish that his condition is work-related by a preponderance of the evidence in the record as a whole. *Meeks*, 819 F.3d 116, 50 BRBS 29(CRT); *see Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

We affirm the administrative law judge's conclusion that claimant did not establish he suffers from a work-related hearing loss based on the record as a whole. The administrative law judge noted that claimant's employment with employer lasted for only four weeks in 1981 and the evidence establishes only that claimant suffers from a ratable hearing impairment in 2015, more than 30 years after he left his employment with employer. He found Dr. Towell's opinion that claimant's hearing loss is related to his 1981 employment entitled to "minimal probative value."[4] Decision and Order at 17. This conclusion is based on Dr. Towell's admitted failure to ask claimant about the length of his employment with employer or the types of machinery he used there.[5] She stated she based her opinion of causation on OSHA regulations, but also admitted she is not familiar with OSHA regulations. EX 10 at 45, 48-49. The administrative law judge also found Dr. Towell did not provide any well-reasoned explanation for her opinion that that claimant's hearing loss was likely due in part to his exposure to noise at employer's facility. Decision and Order at 18. He also found that the note in Dr. Henderson's records does not establish the work-relatedness of claimant's hearing loss. *Id.*

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whether an employer rebuts the Section 20(a) presumption "the ALJ, not the BRB" is "entitled to assess the relevance and credibility" of evidence; moreover, "the ALJ's decision need not constitute the sole inference that can be drawn from the facts.").

[4] In this respect, we note that evidence can be both legally insufficient to rebut the Section 20(a) presumption and factually insufficient to establish the existence of a causal relationship on the record as a whole.

[5] Dr. Towell stated claimant told her on the telephone that he was exposed to loud noise at employer's shipyard. EX 10 at 8-9.

The administrative law judge's conclusion that claimant did not establish the work-relatedness of his hearing loss is supported by substantial evidence.[6] He is entitled to determine the sufficiency of the medical evidence in terms of its underlying rationale. *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995). The Board is not empowered to reweigh the evidence or draw other inferences from it. *Meeks*, 819 F.3d 116, 50 BRBS 29(CRT). The administrative law judge permissibly found Dr. Towell's causation opinion unsupported and insufficient to support claimant's claim of a causal relationship between this 2015 hearing loss and his 1981 injury. *See Cooper/T. Smith Stevedoring Co., Inc. v. Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT) (5th Cir. 2002). Similarly, the administrative law judge permissibly rejected claimant's unsupported contention that the note in Dr. Henderson's records was somehow mistaken. Decision and Order at 18 n.8. Therefore, the denial of benefits on the record as a whole is affirmed if the administrative law judge finds that employer produced substantial evidence to rebut the Section 20(a) presumption. *Victorian v. International-Matex Terminals*, 52 BRBS 35 (2018).

[6] The administrative law judge rejected claimant's testimony that he first noticed problems with his hearing in the late 1970s or early 1980s. Decision and Order at 18. We reject claimant's assignment of error to the administrative law judge's finding that he was only "partially credible." *Id.* at 10. It is well established that the administrative law judge as the fact-finder has the prerogative to assess the credibility of witnesses and the Board will not overturn the administrative law judge's credibility determinations unless they are patently unreasonable. *Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22(CRT) (5th Cir. 1994). The administrative law judge was entitled to compare claimant's deposition testimony with his hearing testimony in order to judge his credibility and the findings that there are material inconsistencies between the two are not unreasonable.

Accordingly, we vacate the administrative law judge's finding that employer rebutted the Section 20(a) presumption and remand the case for further proceedings consistent with this opinion. In the event the administrative law judge again finds the Section 20(a) presumption rebutted, the denial of benefits is affirmed.

SO ORDERED.

RYAN GILLIGAN
Administrative Appeals Judge

I concur:

JONATHAN ROLFE
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, dissenting:

I agree with my colleagues that the administrative law judge erred in finding that employer rebutted the Section 20(a) presumption based on the non-record "hearing tests" claimant allegedly passed and Dr. Towell's statement that she could not specifically allocate which portion of claimant's hearing loss is due to his work for employer. However, I additionally would hold that the only remaining evidence pertaining to rebuttal, a statement from an intake nurse during claimant's 2013 physical with Dr. Henderson, is legally insufficient by itself to rebut the presumption.

This single note states that "[t]he patient has not had difficulty hearing or understanding conversations or the television or radio when others do not." EX 6 at 54. As the majority indicates, the wording of this note is confusing. To say that claimant does not have difficulty hearing "when others do not" tells us little about the extent of claimant's hearing loss. Moreover, the statement does not, as the administrative law judge found, "cast significant doubt on [c]laimant's assertion that he suffers from a hearing impairment." Decision and Order at 10. The only medical expert to provide an opinion on the issue, Dr. Towell, diagnosed claimant with an 8.4 percent binaural impairment based on an uncontradicted audiogram and concluded that claimant's "hearing loss pattern and type is consistent with [his] reported history of occupational noise exposure." CX 9. Thus, while

the cause of claimant's impairment might be disputed, it cannot reasonably be argued that he has no hearing loss at all.

Put simply, a statement that claimant did not have difficulty hearing the television or conversations is not evidence that he did not have *any* hearing loss at the time of his 2013 visit to Dr. Henderson. Nor is it proof that he does not currently have hearing loss or that his longshore employment did not cause his injury. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 1083, 4 BRBS 466, 477 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976) (negative or circumstantial evidence must be "specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event"); *Jones Stevedoring Co. v. Paglia*, 454 F. App'x 603, 605 (9th Cir. 2011) ("That [claimant] . . . did not notice any significant hearing problems until several years after [his] retirement is not, by itself, sufficient to rebut the §20(a) presumption."). Because the intake nurse's notation is not substantial evidence of the absence of any hearing impairment at all or of a causal relationship between claimant's hearing loss and his employment, it is legally insufficient to rebut the Section 20(a) presumption. *See, e.g., Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *see also Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004).

As employer did not produce any evidence legally sufficient to rebut the Section 20(a) presumption, I would hold as a matter of law that claimant established a causal relationship between his hearing loss and his longshore employment, *see Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000), and remand the case for the administrative law judge to address the extent of his compensable hearing impairment. *Labbe v. Bath Iron Works Corp.*, 24 BRBS 159 (1991).

GREG J. BUZZARD
Administrative Appeals Judge