U.S. Department of Labor

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

BRB No. 18-0579

LON S. KEY	)	
	)	
Claimant-Petitioner	)	
	)	DATE ISSUED: 02/26/2019
v.	)	
	)	
ELECTRIC BOAT CORPORATION	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision Granting Motion for Summary Decision of Jerry R. DeMaio, Administrative Law Judge, United States Department of Labor.

Scott N. Roberts (Law Office of Scott Roberts, LLC), Groton, Connecticut, for claimant.

Jeffrey E. Estey, Jr. (McKenney, Quigley & Clarkin, LLP), Providence, Rhode Island, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2018-LHC-00951) of Administrative Law Judge Jerry R. DeMaio 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 worked for employer from 1973 until he retired on October 12, 2016. He underwent audiometric testing at employer's behest on October 11, 2016, which revealed a 5.625 percent right-sided monaural impairment. A licensed audiologist administered the testing under the guidelines of 29 C.F.R. §1910.95(g).

Claimant filed a claim for benefits for his hearing loss on August 28, 2017. He underwent additional audiometric testing on November 8, 2017, which revealed a 13.69 percent binaural impairment. Claimant also underwent testing on February 5, 2018, which revealed a 9.31 percent binaural impairment. CX 6. On April 22, 2018, employer voluntarily paid claimant benefits for the 5.625 percent monaural hearing impairment shown on the October 2016 audiogram. Claimant sought additional benefits for his hearing loss based on the 2017 and 2018 audiograms.

Employer filed a motion for summary decision with the administrative law judge, contending it had already compensated claimant the full amount of the hearing impairment attributable to his employment and that claimant is not entitled to any further benefits. Claimant did not file an objection to the motion but did file exhibits. Decision Granting Motion for Summary Decision at 1. The administrative law judge found the October 2016 audiogram met the criteria under 20 C.F.R. §702.441 for presumptive evidence of the degree of hearing loss and that no contrary audiograms were taken within six months of the October 2016 audiogram. *See id.* at 3. Because claimant retired at the time the audiogram was administered and employer paid claimant benefits for the hearing loss demonstrated on that audiogram, the administrative law judge concluded that claimant was fully compensated for his work-related hearing loss and granted employer's motion.

Claimant appeals, contending the administrative law judge erred because a genuine issue of material fact remains as to the extent of his hearing loss. He also contends that employer is required to pay an additional assessment under Section 14(e), 33 U.S.C. §914(e), for its untimely payment of compensation. Employer filed a response brief, urging affirmance of the administrative law judge's decision and contending that claimant is not permitted to raise the Section 14(e) issue for the first time on appeal.

In determining whether to grant a motion for summary decision, a fact-finder must review the evidence in the light most favorable to the non-moving party and decide whether any issues of material fact prevent a decision as a matter of law. *See Morgan v. Cascade General, Inc.*, 40 BRBS 9 (2006); 29 C.F.R. §18.72. Section 8(c)(13)(C) of the Act, which governs hearing loss, states that an audiogram shall be presumptive evidence of the amount of hearing loss on the date administered, provided: (1) a licensed or certified audiologist administered the audiogram; (2) the employee was provided the audiogram and the report within 30 days of the time it was administered; and (3) no one produces a contrary audiogram of equal probative value performed at the same time. 33 U.S.C. §908(c)(13)(C).

The regulation at 20 C.F.R. §702.441(b) clarifies that a contrary audiogram performed at the "same time" means within six months, if, as here, the noise exposure has ended. 20 C.F.R. §702.441(b).[1] Hearing loss "occurs simultaneously with the exposure to excessive noise … [and] the injury is complete when the exposure ceases." *Bath Iron Works v. Director, OWCP*, 506 U.S. 153, 165, 26 BRBS 151, 154(CRT) (1993).

Claimant contends that an issue of fact remains as to the extent of his hearing loss because the 2017 and 2018 audiograms show he suffers from a greater impairment to his hearing than the audiogram on which employer paid benefits. We disagree. The

[1] Section 702.441(b) states:

> (b) An audiogram shall be presumptive evidence of the amount of hearing loss on the date administered if the following requirements are met:
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> (1) The audiogram was administered by a licensed or certified audiologist, by a physician certified by the American Board of Otolaryngology, or by a technician, under an audiologist's or physician's supervision, certified by the Council of Accreditation on Occupational Hearing Conservation, or by any other person considered qualified by a hearing conservation program authorized pursuant to 29 CFR 1910.95(g)(3) promulgated under the Occupational Safety and Health Act of 1970 (29 U.S.C. 667). Thus, either a professional or trained technician may conduct audiometric testing. However, to be acceptable under this subsection, a licensed or certified audiologist or otolaryngologist, as defined, must ultimately interpret and certify the results of the audiogram. The accompanying report must set forth the testing standards used and describe the method of evaluating the hearing loss as well as providing an evaluation of the reliability of the test results.
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> (2) The employee was provided the audiogram and a report thereon at the time it was administered or within thirty (30) days thereafter.
>
> (3) No one produces a contrary audiogram of equal probative value (meaning one performed using the standards described herein) made at the same time. "Same time" means within thirty (30) days thereof where noise exposure continues or within six (6) months where exposure to excessive noise levels does not continue. . . .

20 C.F.R. §702.441(b).

administrative law judge rationally found the audiogram administered in October 2016 met the standards of 20 C.F.R. §702.441(b) to be accepted as a presumptive measurement of the extent of claimant's compensable hearing loss. Neither the November 2017 nor the February 2018 audiogram was taken within six months of claimant's retirement and the audiogram employer administered in October 2016. Claimant did not present any evidence questioning the validity of the October 2016 audiogram.

Because aging may cause hearing loss to worsen during retirement, an employer can protect itself by providing "employees with an audiogram at the time of retirement and thereby freezing the amount of compensable hearing loss attributable to the claimant's employment." *Bath Iron Works*, 506 U.S. at 165, 26 BRBS at 154(CRT). Claimant's work-related noise exposure ceased with his employment on October 12, 2016 and employer administered an exit audiogram to "freeze" the extent of claimant's compensable hearing loss. Employer paid claimant for the 5.625 percent monaural impairment the test revealed. The administrative law judge thus correctly found that no genuine issue of material fact remains. *See generally B.E. [Ellis] v. Electric Boat Corp.*, 42 BRBS 35 (2008). We therefore affirm the administrative law judge's grant of summary decision and the denial of additional disability benefits.

We must remand this case, however, for the administrative law judge to address claimant's argument that he is entitled to an additional assessment under Section 14(e) of the Act. Employer asserts that claimant raises the Section 14(e) issue for the first time on appeal because claimant did not file an objection to employer's motion for summary decision. Employer's argument is without merit. Claimant's LS-18 Pre-Hearing Statement noted the Section 14(e) assessment as one of the issues to be decided. CX 5. In addition, the assessment under Section 14(e) is mandatory and may be raised at any time. *See Scott v. Tug Mate, Inc.*, 22 BRBS 164 (1989); *McKee v. D.E. Foster Co.*, 14 BRBS 513 (1983).

Section 14(b) of the Act states that the first installment of compensation is due on the fourteenth day after the employer has been notified or has knowledge of the injury. 33 U.S.C. §914(b). Section 14(e) states that an employer is liable for a 10 percent assessment for failure to pay compensation when it is due unless the employer timely files its notice of controversion. 33 U.S.C. §914(e). Employer argues that it is not liable for an additional assessment under Section 14(e) because it was not aware of a potential hearing loss "injury" until claimant filed his LS-201 notice of injury and LS-203 claim forms on August 24, 2017. Employer states that it timely filed its LS-207, notice of controversion, on September 7, 2017. Employer paid claimant compensation for his hearing loss on April 2, 2018. EX B of Emp. Mot. for Summ. Dec.

Contrary to employer's assertion, issues of material fact remain as to whether an additional assessment is due under Section 14(e). An employer possesses the requisite

knowledge for Section 14(e) purposes if it knows of the injury and a reasonable possibility of liability such that further investigation is warranted under Section 12(d)(1), 33 U.S.C §912(d)(1). *See McGarey v. Electric Boat Corp.*, 47 BRBS 29 (2013). For cumulative hearing loss injuries, an employer does not have knowledge for Section 14(e) purposes until it is aware of the full extent of the hearing loss. *Id.* The duty to controvert arises upon knowledge of injury and not a specific claim for benefits. *See Bailey v. Newport News Shipbuilding & Dry Dock Co*., 39 BRBS 11 (2005).

In this case, claimant filed a "Report of Work Injury" with employer as to his hearing loss on April 1, 2015, CX 2, and underwent an audiogram at employer's behest in October 2016, showing that he suffered from measurable hearing loss. We therefore remand this case for the administrative law judge to address when employer was notified or had knowledge of claimant's injury for purposes of Section 14(b) and whether claimant is entitled to additional compensation pursuant to Section 14(e). *McGarey*, 47 BRBS 29; *see also Robirds v. ICTSI Oregon, Inc.*, __ BRBS __, No. 17-0635 (Jan. 28, 2019) (en banc) (Boggs, J., concurring).

Accordingly, we affirm the Decision Granting Motion for Summary Decision as to the extent of claimant's work-related hearing loss and remand the case for further consideration consistent with this decision.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge