U.S. Department of Labor

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

BRB No. 16-0337

ALPHONSE SAMSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: Jan. 5, 2017
ELECTRIC BOAT CORPORATION	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Colleen A. Geraghty, Administrative Law Judge, United States Department of Labor.

Mary Ann Violette and Robert P. Audette (Audette, Cordeiro & Violette), East Providence, Rhode Island, for claimant.

Edward W. Murphy (Morrison Mahoney L.L.P.), Boston, Massachusetts, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2015-LHC-01410) of Administrative Law Judge Colleen A. Geraghty 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 was employed as a shipfitter for employer from 1980 until 1994 and again from 2002 until 2014. As a shipfitter, he was exposed to noise, and he first began wearing hearing aids in 1994. Based on a compromise of audiometric readings in 2011,

employer paid claimant compensation for a 15.6 percent binaural hearing loss.[1] 33 U.S.C. §908(c)(13); CX 4; EXs 1-4. Between 2011 and 2014, when claimant retired for other reasons, claimant continued his work in noisy environments. A January 2015 audiogram revealed a binaural impairment of 22.2 percent, and the audiologist, Dr. Uchmanowicz, concluded the increased binaural impairment is related to noise exposure during claimant's additional years of employment. CX 3. Claimant filed a claim for benefits for his additional hearing loss.

The administrative law judge found that claimant's testimony and Dr. Uchmanowicz's report establish claimant's prima facie case relating the additional hearing loss to claimant's employment, and he invoked the Section 20(a), 33 U.S.C. §920(a), presumption. Decision and Order at 8; CX 1. However, the administrative law judge found that employer rebutted the presumption with the opinions of Drs. Sells and Lesnik who opined that neither of claimant's ears has additional hearing loss, as the 2015 audiometric results are essentially the same as those from 2011, and that any increased loss in the right ear that claimant might have is not noise-related. Decision and Order at 8-9; EX 6 at exh. 2; EX 7 at exh. 3. In weighing the evidence as a whole, the administrative law judge acknowledged the doctors' agreement that the 5 dB variability among the tests indicates that claimant's test results are essentially the same, and that claimant has not shown he suffered additional work-related hearing loss between 2011 and 2015. Accordingly, the administrative law judge denied the claim for benefits. Decision and Order at 9-10. Claimant appeals the denial of benefits, and employer responds, urging affirmance.

In determining whether an injury is work-related, a claimant is aided by the Section 20(a) presumption which is invoked only after he establishes he sustained a harm and conditions existed or an accident occurred at his place of employment which could have caused the harm. *Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008); *Bath Iron Works v. Brown*, 194 F.3d 1, 33 BRBS 162(CRT) (1st Cir. 1999); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Once the claimant establishes a prima facie case, as here, the burden shifts to the employer to rebut the presumption. The employer's burden on rebuttal is one of production, not persuasion; it is an "objective test," and the determination of whether the employer has produced sufficient evidence is a legal judgment and is not dependent on credibility. However, the employer cannot satisfy its burden of production simply by submitting any "evidence"

[1] The administrative law judge issued an order remanding the case to the district director because the parties informed him via conference call that they had resolved the case. They agreed to compromise the two binaural impairment ratings of 18.4 percent and 12.8 percent, employer would pay claimant benefits for the 15.6 percent impairment, and medical benefits would remain open. Order (June 20, 2012) (2012-LHC-01023).

whatsoever; it must be substantial evidence that a reasonable mind would accept as evidence of the non-work-relatedness of the injury. *Bath Iron Works Corp. v. Fields*, 599 F.3d 47, 44 BRBS 13(CRT) (1st Cir. 2010); *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *see Rainey*, 517 F.3d 632, 42 BRBS 11(CRT). If the presumption is rebutted, it drops from the case and the fact-finder must evaluate all of the relevant evidence and reach a decision based on the record as a whole, with the claimant bearing the burden of persuasion. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

Claimant contends the administrative law judge erred in finding that employer rebutted the Section 20(a) presumption. Specifically, claimant asserts that the opinions of Drs. Lesnik and Sells do not constitute substantial evidence rebutting the presumption as they are "based on speculation and not fact," Pet. Rev. at 2, as the doctors were not provided with noise surveys and did not visit the production areas, and employer did not establish that the noise in those areas was at non-hazardous levels. Employer asserts in response that the doctors established that claimant does not have additional hearing loss; therefore, the denial of benefits should be affirmed.[2]

In 2011, Mary Kay Uchmanowicz, Au.D., stated that claimant's October 24, 2011 audiogram revealed a 15 percent impairment in his right ear and a 35.6 percent impairment in his left ear, for a binaural impairment of 18.4 percent. EX 3. In 2015, she stated that claimant's January 15, 2015 audiogram shows a 20.6 percent impairment in his right ear and a 30 percent impairment in his left, for a binaural impairment of 22.2 percent. CX 1. Dr. Uchmanowicz stated in her deposition that claimant's left ear has not deteriorated but has not "improved," as, on any day, there is a 5 dB standard deviation of error in audiometric results. CX 3 at 37; *see G.K. [Kunihiro] v. Matson Terminals, Inc.*, 42 BRBS 15 (2008), *aff'd mem. sub nom. Director, OWCP v. Matson Terminals, Inc.*, 442 F.App'x 304 (9th Cir. 2011). Janet Sells, Au.D., stated that claimant's December 5, 2011 audiogram showed a 9.4 percent impairment in his right ear and a 30 percent impairment in his left ear, resulting in a binaural impairment of 12.8 percent. Given the standard deviation of 5 dB, Dr. Sells explained that these are essentially the results Dr. Uchmanowicz obtained in 2011. EX 7 at exh. 4. In 2015, Dr. Sells stated that claimant's April 13, 2015 audiogram demonstrates a 13.1 percent impairment in claimant's right ear and a 30 percent impairment in claimant's left ear, for a binaural impairment of 15.9

[2] Employer also asserts that the administrative law judge may have erred in invoking the Section 20(a) presumption because claimant does not have any additional hearing loss. We reject this contention because the audiogram on which claimant based his claim for additional benefits demonstrates a 22.2 percent binaural loss, which is greater than the 15.6 percent loss for which he was previously paid. *See generally Bath Iron Works Corp. v. Fields*, 599 F.3d 47, 44 BRBS 13(CRT) (1st Cir. 2010).

percent. She stated that these readings are also within 5 dB of the results Dr. Uchmanowicz recorded in 2015. Dr. Sells concluded that claimant's left ear impairment has not changed since 2011 and that the slight increased impairment in his right ear, which is not statistically different from the 2011 reading, is not due to noise exposure because the change is not bilateral and is not shown at 3000 Hz, which is a level sensitive to noise exposure. EX 7 at exh. 3. In reviewing claimant's audiograms, Dr. Lesnik, an otolaryngologist, stated that claimant's right ear hearing "appears to be relatively unchanged from 2011 through 2015" and his left ear hearing improved. Dr. Lesnik concluded that claimant's employment between 2011 and 2014 did not cause, hasten or contribute to claimant's hearing loss, which probably was due to presbycusis. EX 6 at exh.2.

Contrary to claimant's assertions, the opinions of Drs. Lesnik and Sells, stating that claimant does not have additional hearing loss or the loss he has is not due to work-related noise exposure, constitute substantial evidence rebutting the Section 20(a) presumption. The doctors are not required to visit the work areas or to rely on noise surveys to substantiate their medical opinions. *See, e.g., Ceres Gulf, Inc. v. Director, OWCP [Plaisance]*, 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012). Accordingly, we affirm the administrative law judge's finding that employer rebutted the Section 20(a) presumption. *Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000).

Moreover, the administrative law judge's finding that claimant's additional hearing loss is not work-related is supported by substantial evidence on the record as a whole. The administrative law judge credited the opinions of all three professionals that there has been no additional loss of hearing in claimant's left ear, and the opinions of Drs. Lesnik and Sells that the 2015 right ear results are within the 5 dB test/retest variability, making the right ear hearing loss essentially the same as it was in 2011. Decision and Order at 9-10; *Kunihiro*, 42 BRBS 15. The administrative law judge gave less weight to Dr. Uchmanowicz's opinion that claimant has additional hearing loss due to noise exposure at work because she did not address the possibility that the loss was due to the test/retest variability. Decision and Order at 10. Therefore, the administrative law judge found that claimant failed to establish that he suffered an additional work-related hearing loss. Decision and Order at 10.

The administrative law judge is entitled to determine the weight to be accorded to the evidence of record, to address the credibility and sufficiency of any testimony and medical evidence, and to make the choice from among reasonable inferences. *See Sprague v. Director, OWCP*, 688 F.2d 862, 15 BRBS 11(CRT) (1st Cir. 1982). The administrative law judge's finding that claimant does not have an additional work-related hearing loss is rational and supported by substantial evidence. Therefore, it is affirmed. *Coffey*, 34 BRBS 85.

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

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge