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| RUSSELL E. HARFORD |) | |
| |) | |
| Claimant-Petitioner |) | |
| |) | |
| v. |) | |
| |) | |
| BATH IRON WORKS CORPORATION |) | |
| |) | |
| Self-Insured |) | |
| Employer-Respondent |) | DATE ISSUED: |
| |) | |
| |) | |
| DIRECTOR, OFFICE OF WORKERS' |) | |
| COMPENSATION PROGRAMS, UNITED |) | |
| STATES DEPARTMENT OF LABOR |) | |
| |) | |
| Respondent |) | DECISION AND ORDER |

Appeal of the Decision and Order Awarding Benefits and Decision on Motion for Clarification of Martin J. Dolan, Jr., Administrative Law Judge, United States Department of Labor.

Marcia J. Cleveland (McTeague, Higbee, Libner, MacAdam, Case & Watson), Topsham, Maine, for claimant.

Cathy S. Roberts (Thompson & Bowie), Portland, Maine, for self-insured employer.

Janet R. Dunlop (Judith E. Kramer, Acting Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: STAGE, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and LAWRENCE, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits and Decision on Motion for Clarification (90-LHC-253) of Administrative Law Judge Martin J. Dolan, Jr., rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in

1984, 33 U.S.C. §921(b)(5)(1988) .

Act, as amended, 33 U.S.C. §901 et seq. (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965); 33 U.S.C. §921(b) (3).

Claimant was exposed to injurious noise while working for employer as a hull insulator from 1952 until July 31, 1989, when he retired.¹ Claimant first consulted an otolaryngologist, Dr. Damion, during his hospitalization for respiratory problems in January 1989. In his January 31, 1989 report, Dr. Damion diagnosed an acoustic neuroma, a benign tumor, in claimant's left ear. Dr. Damion deposed that the audiogram he performed on claimant on January 31, 1989, revealed a mild to moderate sloping high frequency sensorineural hearing loss on the right, and a moderate to severe sloping high frequency sensorineural hearing loss on the left. He further deposed that claimant's hearing loss in the right ear was likely due to noise exposure in the workplace, and that the hearing loss in his left ear was likely due to noise exposure and his acoustic neuroma. An audiogram performed on November 30, 1989, by the Pine Tree Society for Handicapped Children and Adults revealed a 35.6 percent binaural hearing loss under the American Medical Association Guides to the Evaluation of Permanent Impairment (3d ed. 1988) (AMA Guides). Claimant filed a claim under the Act for binaural hearing loss on May 10, 1989.

The administrative law judge found that claimant's claim was timely, that claimant suffered a 35.6 percent binaural hearing loss related to his employment based on the November 1989 audiogram and that claimant's date of awareness was December 1, 1989, the date he received this audiogram.² Relying on Ingalls Shipbuilding, Inc. v. Director, OWCP, 898 F.2d 1088, 23 BRBS 61 (CRT) (5th Cir. 1990), aff'g in part and rev'g in part Fairley v. Ingalls Shipbuilding, Inc., 22 BRBS 184 (1989) (en banc), in which

¹The administrative law judge mistakenly refers to the date of retirement as June 31, 1989 in the Decision and Order Awarding Benefits.

²The administrative law judge relied on the November 30, 1989 audiogram because he found that the January 19, 1989 audiogram conducted by Dr. Damion did not comport with Section 908(c)(13)(E), 33 U.S.C. §908(c)(13)(E), in that it failed to record a measurement of claimant's hearing loss at 3000 hertz and did not specifically link claimant's hearing loss to noise exposure at his place of employment. The administrative law judge's crediting of the November 30, 1989 audiogram is not challenged on appeal.

the United States Court of Appeals for the Fifth Circuit held that all retirees should be compensated under Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23), regardless of the nature of their occupational disease, the administrative law judge determined that claimant was a voluntary retiree. Converting the 35.6 percent binaural hearing loss revealed on the November 1989 audiogram to a 12 percent whole person impairment under the AMA Guides, the administrative law judge awarded claimant compensation pursuant to Section 8(c)(23).³ Crediting employer's wage statement, the administrative law judge determined that claimant's average weekly wage under Section 10(a), 33 U.S.C. §910(a), was \$731.45 based on his actual earnings during the 52-week period prior to March 1, 1989. He further determined that employer was liable for claimant's compensation benefits as a self-insurer since claimant received injurious noise exposure while working for employer subsequent to August 31, 1988, when it assumed coverage.⁴

The administrative law judge also found that employer was entitled to Section 8(f), 33 U.S.C. §908(f), relief. On January 3, 1991, the administrative law judge issued a Decision in response to claimant's Motion For Clarification in which he attempted to better explain the liability of employer and the Special Fund for claimant's compensation payments. In his Decision on Motion For Clarification, the administrative law judge stated that permanent partial disability benefits were to be paid to the claimant for a 12 percent whole person impairment pursuant to Section 8(c)(23) based on an average weekly wage of \$731.45 commencing December 1, 1989, with 2.73 percent to be paid by the self-insured employer, and the remaining 9.27 percent to be paid by the Special Fund.⁵

³Section 8(c)(23) provides in pertinent part that compensation for a permanent partial disability claim for which the average weekly wage is determined under Section 10(d)(2), 33 U.S.C. §910(d)(2), shall be two-thirds of the average weekly wage multiplied by the percentage of the impairment as determined by the AMA Guides. 33 U.S.C. §908(c)(23). A claimant's average weekly wage is calculated pursuant to Section 10(d)(2), 33 U.S.C. §910(d)(2)(1988), if claimant is a retiree with an occupational disease which does not immediately result in death or disability. 33 U.S.C. §910(i).

⁴Employer was insured by Commercial Union Insurance Company from January 1, 1963 through February 28, 1981, by Liberty Mutual Insurance Company from March 1, 1981 through August 31, 1986, and by Birmingham Fire Insurance Company from September 1, 1986 through August 31, 1988, when it became self-insured.

⁵In a Supplemental Decision and Order, the administrative law judge awarded an attorney's fee in the amount of \$2,261.20 including costs.

On appeal, citing Brown v. Bath Iron Works, 24 BRBS 89 (1990), aff'd on other grounds, 942 F.2d 811, 25 BRBS 30 (CRT) (1st Cir. 1991), and Labbe v. Bath Iron Works, 24 BRBS 159 (1991), claimant contends that the administrative law judge erred in calculating his award of benefits under Section 8(c)(23) rather than Section 8(c)(13), 33 U.S.C. §908(c)(13). Claimant contends that there is nothing in the language of Section 8(c)(23) or the legislative history which suggests that retirees are exempt from having their permanent partial disability compensation calculated based on the extent of the percentage loss of the affected body part. Alternatively, claimant contends that he was not a retiree at the time his hearing loss became manifest and that in any event, he did not voluntarily retire but was forced to leave the work force due to cancer, another work-related condition for which a claim has been filed but not yet adjudicated.

Director responds that the administrative law judge erred in applying Section 10(i), 33 U.S.C. §910(i)(1988), to ascertain the time of claimant's injury as Section 10(i) only applies to a claim for compensation for disability due to an occupational disease which does not immediately result in death or disability. Director asserts that because noise-induced hearing loss results in immediate permanent physical impairment, the "time of injury" for purposes of determining claimant's average weekly wage in occupational hearing loss cases is the date of claimant's last injurious exposure to noise and that the retiree provisions of the 1984 amendments, 33 U.S.C. §902(10), 908(c)(23), 910(d)(12)(1988), accordingly do not apply.⁶ Employer responds, urging affirmance.

The United States Supreme Court's recent decision in Bath Iron Works Corp. v. Director, OWCP, U.S. , 61 U.S.L.W. 4049 (U.S. Jan. 13, 1993), is dispositive of the issues presented in this case. In Bath Iron Works, the Supreme Court held that hearing loss claims, whether for current workers or retirees, are claims for a scheduled injury and must be compensated under Section 8(c)(13) rather than Section 8(c)(23). Accepting the argument made by Director in the present case, the Court reasoned that in hearing loss cases, the injury occurs simultaneously with the exposure to excessive noise, and therefore hearing loss is an occupational disease which does immediately result in disability.

Since Sections 10(i) and 10(d)(2) thus do not apply, Section 8(c)(23) is also inapplicable to hearing loss injuries.

⁶In an Order dated March 11, 1992, the Board noted that the Director's Motion for Expedited Review had been rendered moot by the issuance of the United States Court of Appeals for the First Circuit's decision in Bath Iron Works v. Director, OWCP, 942 F.2d 811 (1st Cir. 1991).

Accordingly, pursuant to the Supreme Court's holding in Bath Iron Works, we vacate the administrative law judge's award of hearing loss benefits under Section 8(c)(23). Since the administrative law judge's finding that claimant suffered a 36.5 percent binaural hearing loss under the AMA Guides based on the November 30, 1989 audiogram is unchallenged, we modify the award to reflect that claimant is entitled to receive permanent partial disability benefits in the amount of \$487.58 (66 2/3 percent of \$731.45) per week for 73 weeks (36.5 percent of 200) weeks pursuant to Section 8(c)(13)(B).

In light of our modification of the award of benefits, the award of Section 8(f) relief must also be modified. Section 8(f), as amended in 1984, limits employer's liability in hearing loss claims to the lesser of 104 weeks or the extent of the hearing loss attributable to the subsequent injury. See Machado v. General Dynamics Corp., 22 BRBS 176 (1989) (Brown, J., concurring); 33 U.S.C. §908(f) (1988). In awarding Section 8(f) relief, the administrative law judge determined that claimant had a pre-existing hearing loss of 27.5 percent based on an audiogram performed by employer on November 13, 1984. Since the administrative law judge's finding of the amount of claimant's pre-existing hearing loss is unchallenged on appeal, we modify the administrative law judge's award of Section 8(f) relief to reflect that employer is to pay claimant benefits in the amount of \$457.58 per week for 18 (9 percent of 200) weeks, and the Special Fund is to pay claimant \$457.58 per week for the remaining 55 weeks he is entitled to benefits.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Decision on Motion for Clarification are vacated to the extent that benefits were awarded under Section 8(c)(23). The award of benefits is modified to reflect that claimant is entitled to compensation for a 35.6 binaural hearing loss pursuant to Section 8(c)(13). The award of Section 8(f)

relief is also modified to reflect that employer is to pay claimant's compensation for 18 weeks, and that the Special Fund is to pay compensation for the remaining 55 weeks of claimant's entitlement to benefits. The Decision and Order and Decision on Motion for Clarification are otherwise affirmed.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge

