U.S. Department of Labor

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

BRB No. 14-0328

MEDRICK LUCKETT	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
AMERICAN SUGAR REFINING, INCORPORATED	)	
	)	
and	)	
	)	
ACE AMERICAN INSURANCE COMPANY	)	DATE ISSUED: June 23, 2015
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Larry W. Price, Administrative Law Judge, United States Department of Labor.

John J. Rabalais, Janice B. Unland and Gabriel E.F. Thompson (Rabalais Unland), Covington, Louisiana, for employer/carrier.

Ann Marie Scarpino (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (2011-LHC-01218) of Administrative Law Judge Larry W. Price 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 law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This case is before the Board for the second time. To recapitulate, claimant worked for employer as a longshoreman for approximately 10 years prior to being told, following a May 27, 2009 audiogram, that he had a binaural hearing impairment. CX 22 at 143. Claimant testified that he was exposed to extremely loud noise only while working for employer.[1] Tr. at 45. Employer controverted the claim, and it also requested Section 8(f) relief. 33 U.S.C. §908(f).

The administrative law judge found that claimant is entitled to benefits payable by employer for his work-related hearing loss.[2] 33 U.S.C. §§907(a), 908(c)(13). The administrative law judge denied employer's request for Section 8(f) relief as untimely filed, pursuant to Section 8(f)(3). 33 U.S.C. §908(f)(3). Specifically, the administrative law judge found, based on claimant's September 17, 2010 deposition testimony about his diabetes, high blood pressure, and prior eye surgery, that employer should have reasonably anticipated the liability of the Special Fund by the time of the informal conference on October 19, 2010.

Employer appealed the administrative law judge's decision to the Board. In its decision, the Board affirmed the administrative law judge's findings that claimant established he has a work-related hearing loss and that employer is the responsible employer. The Board vacated the administrative law judge's denial of Section 8(f) relief pursuant to Section 8(f)(3). The Board stated that under applicable case law, the Section 8(f)(3) bar applies only when the employer could have reasonably anticipated that it had a claim for Section 8(f) relief, not merely when it was aware that the claimant's work injury was permanent or that the claimant had a pre-existing condition. Because the administrative law judge did not apply case precedents in determining that employer should have reasonably anticipated the liability of the Special Fund while the claim was

[1]Claimant testified he was exposed to loud noise in other work situations, but not noise of the same degree. Tr. at 45.

[2]The administrative law judge awarded claimant permanent partial disability benefits for a 13.8 percent binaural loss, based on an average weekly wage of $115.08. 33 U.S.C. §§908(c)(13), 910(c). The administrative law judge also found that claimant is entitled to digital hearing aids and any other reasonable medical treatment.

before the district director merely because it was aware that claimant had pre-existing diabetes, the Board remanded the case for the administrative law judge to more fully address this issue. *Luckett v. American Sugar Refining, Inc.*, BRB No. 13-0143 (Sept. 25, 2013). In this regard, the Board also noted the response of the Director, Office of Workers' Compensation Programs (the Director), that claimant had undergone an audiogram at its facility in 2006, which demonstrated a hearing loss, and that employer, therefore, was aware at the time of the informal conference that Section 8(f) relief could apply on that basis. Although the Director did not raise this basis for barring Section 8(f) relief before the administrative law judge, the Board stated that the administrative law judge could consider the Director's contention on remand. *Id*. at 12 n.13. The Board denied employer's motion for reconsideration on December 4, 2013.[3]

On remand, the administrative law judge again concluded that employer's request for Section 8(f) relief is barred by Section 8(f)(3) because employer could have reasonably anticipated the liability of the Special Fund prior to the district director's consideration of the claim. Specifically, the administrative law judge found that employer had listed Section 8(f) as a potential issue on its LS-207 Notice of Controversion form, and that, at claimant's deposition, which was held prior to the informal conference, employer was aware of, and questioned claimant about, his pre-existing diabetes. The administrative law judge found that, despite this knowledge, employer chose not to have claimant or his medical records examined by a doctor even though it was provided that opportunity by the district director. Additionally, the administrative law judge found that, "[E]mployer also knew of claimant's 2006 audiogram showing a pre-existing hearing loss." Decision and Order on Remand at 4. Thus, the administrative law judge concluded that employer had sufficient knowledge such that it should have filed an application for Section 8(f) relief while the claim was before the district director.

On appeal, employer again challenges the administrative law judge's finding that it could have reasonably anticipated the liability of the Special Fund prior to the district director's consideration of the claim. The Director responds, urging affirmance of the administrative law judge's finding that employer's claim for Special Fund relief is barred by Section 8(f)(3).

[3]Employer appealed the Board's decision to the United States Court of Appeals for the Fifth Circuit. The court dismissed the appeal for lack of a final order, stating that employer could appeal the decision once a final order issues. *American Sugar Refining, Inc. v. Director, OWCP*, No. 14-60075 (5th Cir. May 7, 2014); *see* 33 U.S.C. §921(c).

Section 8(f)(3),[4] and its implementing regulation 20 C.F.R. §702.321,[5] respectively require an employer to present a request and an application for Section 8(f) relief to the district director prior to his consideration of the claim; failure to do so bars the payment of benefits by the Special Fund unless the employer demonstrates that it could not have reasonably anticipated that the Special Fund's liability would be at issue while the case was before the district director. An employer can reasonably anticipate the applicability of Section 8(f) relief if the claimant has a permanent impairment and the employer reasonably knows that the case might meet the legal requirements for Section 8(f) relief. *Wiggins v. Newport News Shipbuilding & Dry Dock Co.*, 31 BRBS 142 (1997). Whether employer could have reasonably anticipated the liability of the Special Fund while the claim was pending before the district director is a factual determination to be addressed by the administrative law judge. *Director, OWCP v. Vessel Repair, Inc. [Vina]*, 168 F.3d 190, 33 BRBS 65(CRT) (5th Cir. 1999); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Elliot]*, 134 F.3d 1241, 31 BRBS 215(CRT) (4th Cir. 1998); *Bath Iron Works Corp. v. Director, OWCP [Bailey]*, 950 F.2d 56, 25 BRBS 55(CRT) (1st Cir. 1991).

Employer contends it timely filed its application for Section 8(f) relief after it obtained a medical opinion linking claimant's hearing loss to his pre-existing diabetes. Employer avers that it did not obtain this opinion prior to referral of the claim to the Office of Administrative Law Judges (OALJ) on March 30, 2011, because claimant unreasonably refused its request to undergo expert examination in Baton Rouge while the case was pending before the district director. Employer argues that Section 8(f)(3), therefore, cannot bar its request for Section 8(f) relief.

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[4]Section 8(f)(3), 33 U.S.C. §908(f)(3), states:

> Any request, filed after September 28, 1984, for apportionment of liability to the special fund established under section 944 of this title for the payment of compensation benefits, and a statement of the grounds therefore [sic], shall be presented to the deputy commissioner prior to the consideration of the claim by the deputy commissioner. Failure to present such request prior to such consideration shall be an absolute defense to the special fund's liability for the payment of any benefits in connection with such claim, unless the employer could not have reasonably anticipated the liability of the special fund prior to the issuance of a compensation order.

[5]Section 702.321(a)(1) requires a "fully documented application" to implement the "statement of the grounds" required by Section 8(f)(3), and it prescribes the contents of the application. 20 C.F.R. §702.321(a)(1).

The record in this case shows that claimant underwent audiometric testing at employer's facility on March 8, 2006, showing a pre-existing hearing loss. CX 20 at ex. E. Claimant was deposed on September 17, 2010, at which time, employer's counsel questioned him about the medication he takes for diabetes and hypertension. EX C at 52, 68-69. Claimant testified that he went to Baton Rouge to see Dr. Gianoli at employer's request, but apparently was not examined at that time; he was reluctant to fill out paperwork because he "didn't know what [he] was going to be signing." *Id.* at 73.[6] At the informal conference on October 19, 2010, employer requested that the district director order claimant to submit to an expert medical examination in Baton Rouge. Claimant objected to driving from his home in the New Orleans area for an examination in Baton Rouge. The district director agreed with claimant's objection in light of the number of specialists available to conduct an examination in the New Orleans area. CX 14 at 2. The district director reasoned that a claimant generally is required to choose a treating physician within 25 miles of his home, 20 C.F.R. §702.403; therefore, the district director stated that it was unreasonable for employer to require claimant to drive approximately 90 miles from his home for an examination. The district director stated that employer rejected his recommendation that claimant be examined by a specialist in the greater New Orleans area. CX 15. Employer filed a motion to compel this medical examination after the case was transferred to the OALJ. The administrative law judge granted the motion to compel the examination, and Dr. Gianoli examined claimant in Baton Rouge on November 29, 2011. CX 4. Employer thereafter obtained Dr. Gianoli's medical report linking claimant's hearing loss, at least in part, to his pre-existing diabetes, and it filed an application for Section 8(f) relief on May 30, 2012.[7]

We reject employer's contention that these facts demonstrate that it could not have reasonably anticipated the liability of the Special Fund while the case was pending before the district director. Employer was aware, prior to the informal conference, that claimant had undergone audiometric testing at its facility in 2006. The record shows that employer conducted an in-house audiogram of claimant in 2006, which was later

[6]At this deposition, claimant's counsel indicated that claimant's refusal to sign the paperwork was on the advice of counsel because claimant's counsel was not able to review the paperwork beforehand. He also noted that he would object if employer again sought to have claimant examined in Baton Rouge due to its "unreasonable distance" from New Orleans. EX C at 73-74.

[7]In addition, employer introduced into evidence a report from Dr. Marks, claimant's chosen physician, who also linked claimant's hearing loss, in part, to his diabetes. EX 13-B. Dr. Marks's office is in the New Orleans area. He examined claimant on April 12, 2012. CX 8.

interpreted by Drs. Gianoli and Marks as showing a minimal hearing loss.[8] CXs 19 at 77-79, 20 at 36-40, 173; EXs 4, 12 at 63-66; *see also* CX 9. Employer also was aware, prior to claimant's deposition and the informal conference, that claimant has diabetes. Further, prior to the informal conference, employer stated on its LS-207 form that one of the reasons it was controverting the claim was "Section 8(f) relief." EX 2; *see* Decision and Order at 20; Decision and Order on Remand at 3. Although employer avers that its inability to have claimant examined in Baton Rouge excuses its failure to file a documented application for Section 8(f) relief until after the claim was referred to the administrative law judge, employer does not challenge the administrative law judge's finding that it was afforded the opportunity by the district director to have an expert evaluation of claimant in the New Orleans area in order to develop its claim.[9]

The administrative law judge found, based on employer's knowledge of the prior audiogram, claimant's diabetes, and its listing of Section 8(f) relief as a reason for controverting the claim, that employer could have reasonably anticipated and "in fact did anticipate" the liability of the Special Fund, but that it "failed to timely act on that information." Decision and Order on Remand at 3. Based on its knowledge of claimant's claim for a permanent hearing loss and claimant's pre-existing diabetes, the administrative law judge rationally found that employer had a duty to undertake further discovery in order to timely file a documented Section 8(f) application. *Vina*, 168 F.3d 190, 33 BRBS 65(CRT); *Bailey*, 950 F.2d 56, 25 BRBS 55(CRT); *Cajun Tubing Testors, Inc. v. Hargrave*, 951 F.2d 72, 25 BRBS 109(CRT) (5th Cir. 1992). Although the district director denied employer's request to have claimant submit to an examination in Baton Rouge as being unreasonable, this determination by the district director cannot excuse

[8]Dr. Marks opined that this audiogram showed a zero percent left ear impairment and a three percent right ear impairment. Dr. Gianoli stated that this audiogram showed a .85 percent binaural impairment. Claimant was also examined on May 27, 2009, by Daniel Bode, a board-certified audiologist. Mr. Bode testified at his deposition that the results of the 2006 audiogram were similar to those he obtained. CX 22 at 146-150, 163. Mr. Bode testified that the 2009 audiogram showed a 9.4 percent noise-induced hearing loss and a total hearing loss of 13.4 percent after accounting for tinnitus. CX 22 at 141-143.

[9]Further, employer has not contended that the district director abused his discretion in finding, at the time of the informal conference, that it was unreasonable to require claimant to travel beyond the greater New Orleans area for examination. *See generally* 20 C.F.R. §702.407; *Jackson v. Universal Maritime Serv. Corp.*, 31 BRBS 103 (1997).

employer's failure to timely schedule a medical examination in the New Orleans area prior to the transfer of the case to the OALJ, or to seek from the district director an extension of time to file its application for Section 8(f) relief. 20 C.F.R. §702.321(b)(2); *Cajun Tubing Testors*, 951 F.2d 72, 25 BRBS 109(CRT); *Bailey*, 950 F.2d at 58-59, 25 BRBS at 59-60(CRT). That employer did not obtain a medical report linking claimant's hearing loss to his pre-existing diabetes until after the case was referred to the OALJ does not nullify its "reasonable anticipation" of the Special Fund's liability prior to referral. In this regard, the administrative law judge rationally found the First Circuit's decision in *Bailey* most instructive. *See* Decision and Order on Remand at 3. In *Bailey*, the employer contended that it could not have filed a timely application for Section 8(f) relief because "evidence essential to [its] application was unavailable. . . ." The administrative law judge, the Board, and the court, each rejected this contention because employer "possessed other information" such that employer could have reasonably anticipated the liability of the Special Fund.[10] The court stated:

> Unless the law tolerates a "see no evil, speak no evil, hear no evil" approach, the ALJ and the Benefits Review Board, in assessing the medical worth of this wealth of information, could factually conclude that Employer-Carrier could have reasonably anticipated the probable liability of the special fund. The legal conclusion, to the same effect, if not compelled, is likewise correct.

Bailey, 950 F.2d at 59, 25 BRBS at 62(CRT). The administrative law judge's determination in this case that employer could have reasonably anticipated the liability of the Special Fund prior to the district director's consideration of the claim is rational, supported by substantial evidence, and in accordance with law. As employer failed to timely file an application for Section 8(f) relief, we affirm the administrative law judge's conclusion that the absolute defense of Section 8(f)(3) applies to bar employer's claim for Section 8(f) relief.[11] *Id.; see also Newport News Shipbuilding & Dry Dock Co. v. Firth*, 363 F.3d 311, 38 BRBS 1(CRT) (4th Cir. 2004); *Wiggins*, 31 BRBS 142.

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[10]The court noted that the employer knew the employee had a pre-existing lung impairment which contributed to his death, through medical records in its possession. *Bailey*, 950 F.2d at 59, 25 BRBS at 62(CRT).

[11]We also agree with the Director that the Section 8(f)(3) bar is applicable based solely on employer's awareness of the 2006 audiogram. The administrative law judge arguably found the Section 8(f)(3) bar applicable on this basis, and employer did not appeal this finding. Decision and Order on Remand at 4; *Scalio v. Ceres Marine Terminals*, 41 BRBS 57 (2007). Irrespective of any contribution from claimant's pre-existing diabetes to his hearing impairment, the 2006 in-house audiogram establishes that claimant had pre-existing hearing loss such that employer could have reasonably

Accordingly, the administrative law judge's Decision and Order on Remand 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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GREG J. BUZZARD
Administrative Appeals Judge

anticipated the liability of the Special Fund. *See generally R.H. [Harris] v. Bath Iron Works Corp.*, 42 BRBS 6 (2008); *Emery v. Bath Iron Works Corp.*, 24 BRBS 238 (1991), *vacated on other grounds mem. sub nom. Director, OWCP v. Bath Iron Works Corp.*, 953 F.2d 633 (1st Cir. 1991); *Risch v. General Dynamics Corp.*, 22 BRBS 251 (1989).