U.S. Department of Labor

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

BRB No. 15-0219

GARY J. AUBERT, SR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
AMERICAN SUGAR REFINING, INCORPORATED	)	DATE ISSUED: Mar. 3, 2016
	)	
	)	
and	)	
	)	
ACE AMERICAN INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Petitioners	)	
	)	DECISION and ORDER

Appeal of the Decision and Order on Second Remand of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Arthur J. Brewster and Jeffrey P. Briscoe, Metairie, Louisiana, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order on Second Remand (2010-LHC-1395) of Administrative Law Judge Lee J. Romero, Jr., 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).

This hearing loss case is before the Board for the third time. To reiterate, claimant worked as a longshoreman for various employers for 22 years. Following a June 29, 2009 audiogram, claimant filed a claim against employer for a work-related noise-induced hearing loss. Prior to this audiogram, claimant's last day of longshore work was for employer on June 27, 2009. Prior to this date, however, claimant performed longshore work for Ports of America from June 22 through June 26, 2009. In his initial decision, the administrative law judge found that: working conditions existed at employer's facility that could have caused claimant's hearing loss, such that claimant is entitled to the Section 20(a), 33 U.S.C. §920(a), presumption relating his hearing loss to his employment; employer did not rebut the presumption with substantial evidence; and employer was the last covered employer to expose claimant to injurious stimuli prior to the June 2009 audiogram. Thus, the administrative law judge held employer liable for claimant's 7.95 percent binaural hearing loss.[1] Decision and Order at 30; *see* 33 U.S.C. §908(c)(13).

Employer appealed, and the Board vacated the award of benefits. *Aubert v. American Sugar Refining, Inc.*, BRB No. 11-0828 (Aug. 14, 2012) (unpub.). The Board stated the administrative law judge had not addressed evidence offered to show that claimant was not exposed to injurious noise at employer's facility on June 27, 2009. Accordingly, the Board remanded the case for the administrative law judge to reconsider all evidence relevant to invocation of the Section 20(a) presumption and to a determination of the employer liable for claimant's benefits. In this latter regard, the Board noted that, although the administrative law judge did not utilize the 2003 audiogram for purposes of determining the timeliness of claimant's claim or extent of claimant's disability, he should, if necessary, address employer's assertion that claimant's hearing loss did not progress after the 2003 audiogram. *Id*., slip op. at 7 n. 7.

In his decision on remand, the administrative law judge again invoked the Section 20(a) presumption and found that employer did not rebut it. Finding that employer was the last covered employer to expose claimant to injurious noise prior to the 2009 audiogram, the administrative law judge again held employer liable for benefits for claimant's 7.95 percent binaural hearing loss. Decision and Order on Remand at 13.

Employer appealed, and the Board again vacated the award of benefits. *Aubert v. American Sugar Refining, Inc.*, BRB No. 13-0449 (June 16, 2014) (unpub.). The Board

[1] The administrative law judge averaged the results of claimant's June 2009 audiogram (11.7 percent) and June 2010 audiogram (4.2 percent).

affirmed the administrative law judge's invocation of the Section 20(a) presumption,[2] and the finding that employer was the last employer for which claimant worked prior to the June 29, 2009, audiogram. *Id*. slip op at 5. The Board vacated the administrative law judge's finding that employer did not rebut the Section 20(a) presumption. The Board stated that the administrative law judge had not addressed employer's contention that the March 2003 audiogram establishes that claimant's employment on June 27, 2009, did not contribute to his hearing loss and erred in rejecting Dr. Gianoli's opinion on the ground that "it is irrelevant that Claimant may not have actually sustained a distinct aggravation of his work injury working for Employer on June 27, 2009." *Aubert*, BRB No. 13-0449, slip op. at 6. The Board, citing *Ceres Gulf, Inc. v. Director, OWCP [Plaisance]*, 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012), explained that, with respect to an employer's burden on rebuttal in a hearing loss case in which the responsible employer is at issue, an employer can demonstrate it is not liable because the claimant's injury was not actually caused or aggravated by his employment; thus, the correct inquiry on the facts of this case with respect to rebuttal is whether employer produced substantial evidence that claimant's hearing loss was not actually caused or contributed to by his employment on June 27, 2009. *Aubert*, BRB No. 13-0449, slip op. at 6-7. Thus, the Board remanded the case for the administrative law judge to reconsider the March 2003 audiogram and Dr. Gianoli's opinion. *Id*. at 7-8. In so doing, the Board directed that if the Section 20(a) presumption is rebutted, the administrative law judge must weigh all the relevant evidence as a whole to determine whether claimant established his hearing impairment is related to his employment with employer on June 27, 2009. *Id*. at 8.

In his Decision and Order on Second Remand, the administrative law judge again considered employer's rebuttal evidence. The administrative law judge found that the 2003 audiogram showed a lower level of hearing loss than the 2009 audiogram; therefore, it did not rebut the presumption that claimant's employment on June 27, 2009, contributed to his hearing loss. Decision and Order on Second Remand at 13. The administrative law judge, however, found that Dr. Gianoli's opinion "throws factual

[2] Employer challenged only the administrative law judge's finding that claimant established the working conditions element of his prima facie case. The Board affirmed the administrative law judge's finding in light of the testimony of Mr. Bode and Dr. Gianoli that noise in excess of 85 decibels can cause hearing loss and that noise levels most likely exceeded 85 decibels if employees had to shout to be heard; claimant's credited testimony that he had to shout to be heard while working inside the hold of the barge; employer's 2008 and 2009 sound level surveys indicating longshoremen were exposed to 86.3 and 89.5 decibels of noise; and the administrative law judge's rational inference that claimant's earplugs offered him no discernible reduction in noise exposure as none of the experts could state with certainty the level of reduction provided by improperly inserted earplugs. *Aubert*, BRB No. 13-0449, slip op at 4-5.

doubt" on claimant's prima facie case, as he opined that even if claimant did not wear earplugs on June 27, 2009, the exposure did not contribute to his hearing loss because it was of insufficient duration to have caused a permanent threshold shift in hearing. Thus, the administrative law judge found Dr. Gianoli's opinion rebuts the Section 20(a) presumption. Weighing the record as a whole, the administrative law judge found that claimant established that his hearing loss is related, at least in part, to his employment on June 27, 2009, as claimant demonstrated he suffered an occupational noise-induced hearing loss for which the 2009 audiogram is determinative, claimant established exposure to injurious noise levels while working for employer on June 27, 2009, that could have contributed to his hearing loss, and employer was the last covered employer to expose claimant to injurious noise levels prior to the 2009 audiogram. Decision and Order on Second Remand at 15, 18. The administrative law judge therefore found employer liable for claimant's 7.95 percent hearing loss. *Id*. at 18. Employer appeals the administrative law judge's decision, and claimant responds, urging affirmance.

Initially, employer asserts the administrative law judge erred in finding claimant established a prima facie case such that the Section 20(a) presumption applies. The Board fully addressed employer's contentions in this regard in its prior decisions, and there is no basis for finding that the law of the case doctrine should not apply; the Board's holdings constitute the law of the case. *See, e.g., Kirkpatrick v. B.B.I., Inc.*, 39 BRBS 69 (2005); *Schaubert v. Omega Services Industries*, 32 BRBS 233 (1998). Consequently, we reject employer's assertions of error. Section 20(a) applies to presume claimant's hearing loss is related to his employment with employer on June 27, 2009. *Aubert*, BRB No. 13-0449, slip op. at 5; *see also Ramsay Scarlett & Co. v. Director, OWCP*, 806 F.3d 327, 49 BRBS 87(CRT) (5th Cir. 2015).

Once the Section 20(a) presumption relating a claimant's injury to his employment has been invoked, the employer can rebut this presumption by producing substantial evidence that the claimant's hearing loss was not actually caused or contributed to by the employment. *Plaisance*, 683 F.3d 225, 46 BRBS 25(CRT); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). If the Section 20(a) presumption is rebutted, it falls from the case, and the claimant bears the burden of establishing by a preponderance of the evidence the work-relatedness of his harm. *Plaisance,* 683 F.3d 225, 46 BRBS 25(CRT); *see also Albina Engine & Machine v. Director, OWCP [McAllister]*, 627 F.3d 1293, 44 BRBS 89(CRT) (9th Cir. 2010) (in asbestosis case with multiple employers, Section 20(a) analysis applies to each); *Universal Maritime Corp. v. Moore,* 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997).

Employer contends its evidence establishes that claimant was not exposed to injurious noise during his employment on June 27, 2009, which is the date of claimant's last employment prior to the determinative audiogram. Employer contends Dr. Gianoli's testimony concerning the 2003 audiogram establishes that claimant's hearing loss did not

worsen after the date of the 2003 audiogram and, therefore, also establishes that claimant's employment on June 27, 2009, did not actually cause or contribute to claimant's compensable hearing loss. The administrative law judge found claimant's hearing loss worsened after the 2003 audiogram, based on Mr. Bode's testimony that the 2009 audiogram demonstrated a "permanent threshold shift," or increase, in claimant's hearing loss at several frequencies. Decision and Order on Second Remand at 12-13; CX 16 at 86-88. Further, although Dr. Gianoli characterized the 2003 and 2009 audiograms as "virtually identical" and "substantially similar," the administrative law judge found that Dr. Gianoli conceded the 2009 audiogram demonstrated a threshold shift in hearing under OSHA standards. Decision and Order on Second Remand at 12-13; EX 10 at 52, 77. Thus, the administrative law judge rationally found that the 2003 audiogram revealed a lesser hearing loss than the 2009 audiogram, *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991), and that the older audiogram therefore does not preclude a finding of a causal connection between claimant's employment on June 27, 2009, and his hearing loss.[3] *See Roberts*, 30 BRBS 229. As such, the administrative law judge rationally determined that the 2003 audiogram does not rebut the presumption that claimant's hearing loss is related to his employment with employer.[4] *See Plaisance*, 683 F.3d at 231, 46 BRBS at 29(CRT); *Ronne*, 932 F.2d at 840, 24 BRBS at 143(CRT).

[3] As the administrative law judge rationally determined that the 2003 audiogram does not rebut the Section 20(a) presumption, we reject employer's assertion that it may be determinative of claimant's disability. *See Port of Portland v. Director, OWCP [Ronne]*, 932 F.2d 836, 840, 24 BRBS 137, 143(CRT) (9th Cir. 1991). Additionally, to the extent employer asserts the 2010 audiogram may be determinative of the last responsible employer, we reject this assertion. As the Board previously noted, the record reflects that the 2010 audiogram demonstrated a lesser hearing loss than the 2009 audiogram, thereby making this case similar to *Roberts v. Alabama Dry Dock & Shipbuilding Corp.*, 30 BRBS 229 (1997), in that any noise exposure between the two audiograms could not have contributed causally to the compensable hearing loss. *Aubert*, BRB No. 11-0828, slip op. at 7.

[4] The administrative law judge additionally found claimant's hearing worsened after the 2003 audiogram because claimant developed tinnitus. Decision and Order on Second Remand at 13. Employer correctly notes that, in so finding, the administrative law judge did not address claimant's July 2010 testimony indicating that he may have had tinnitus at the time of the 2003 audiogram. EX 7 at 31. However, as substantial evidence supports the administrative law judge's finding that the 2009 audiogram demonstrated a threshold shift in claimant's hearing after the 2003 audiogram, any error the administrative law judge may have made in also finding claimant's hearing loss worsened because he developed tinnitus is harmless.

Employer next asserts that, although the administrative law judge properly found Dr. Gianoli's opinion rebuts the Section 20(a) presumption,[5] he erred in weighing the evidence as a whole. Specifically, employer asserts the administrative law judge failed to place the burden of persuasion on claimant and that the evidence of record does not establish that claimant's employment on June 27, 2009, contributed to his hearing loss.

In weighing the record as a whole, the administrative law judge characterized claimant's burden as "Claimant must only prove, at the least, that conditions at work could have caused, aggravated, or contributed to his hearing loss," Decision and Order on Second Remand at 15, which is the standard for establishing a prima facie case. *See generally Ramsay Scarlett & Co.*, 806 F.3d 327, 49 BRBS 87(CRT). Implicit in the administrative law judge's characterization of claimant's burden, however, is that, in a hearing loss case in which the responsible employer is at issue, once the claimant establishes the compensability of his claim, the "last employer rule" allocates liability to the last covered employer to expose claimant to injurious noise that could have contributed causally to the disability evidenced on the determinative audiogram. *Avondale Industries, Inc. v. Director, OWCP [Cuevas]*, 977 F.2d 186, 26 BRBS 111(CRT) (5th Cir. 1992); *see also Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955). It is the burden of the employer claimed against to establish that it is not the responsible employer, *i.e.*, that it did not expose claimant to actually injurious noise or that a subsequent employer exposed claimant to injurious noise. *Cuevas*, 977 F.2d 186, 26 BRBS 111(CRT); *Susoeff v. The San Francisco Stevedoring Co.*, 19 BRBS 149 (1986); *see also Todd Pacific Shipyards Corp. v. Director, OWCP [Picinich]*, 914 F.2d 1317, 24 BRBS 36(CRT) (9th Cir. 1990).

In this case, the administrative law judge considered the record as a whole and set forth substantial evidence supporting his findings that claimant demonstrated he suffered a compensable hearing loss and that employer is liable for benefits as the last covered employer to expose claimant to injurious noise. Specifically, as it is uncontested that claimant's audiograms demonstrate a noise-induced hearing loss, claimant was exposed to injurious noise levels with various longshore employers over 22 years, and both medical experts of record attribute claimant's hearing loss to his longshore work, CX 15

[5] Dr. Gianoli opined that claimant's employment on June 27, 2009, could not have contributed to claimant's hearing loss because the equation for injurious noise exposure is "noise level plus duration," and even if claimant did not wear hearing protection for his entire shift on June 27, 2009, the duration of his exposure was insufficient to cause a threshold shift in hearing. CX 15 at 15-17, 86. The administrative law judge found Dr. Gianoli's opinion "throws factual doubt" on claimant's prima facie case and, therefore, rebuts the Section 20(a) presumption. Decision and Order on Second Remand at 14; *see Plaisance*, 683 F.3d at 231, 46 BRBS at 29(CRT).

at 56; CX 16 at 53, the administrative law judge rationally found claimant suffered an occupational noise-induced hearing loss. *See Plaisance*, 683 F.3d 225, 46 BRBS 25(CRT); *see also Mijangos*, 948 F.2d 941, 25 BRBS 78(CRT).

With respect to whether claimant's employment on June 27, 2009, caused or contributed to claimant's hearing loss, although Dr. Gianoli opined that even if claimant was exposed to 85-89 decibels of noise over an eight-hour shift, the duration of such exposure was insufficient to cause injury, the administrative law judge found the preponderance of evidence established that claimant, in fact, was exposed to injurious noise on June 27, 2009. Decision and Order on Second Remand at 15-16, 18. In so holding, the administrative law judge referenced his findings with respect to claimant's establishing his prima facie case. He additionally observed that employer's noise-level surveys showed a "tractor"[6] pulling an empty load outside employer's facility emitted 101 decibels of noise, claimant testified that he worked within a few feet of a bulldozer inside the hold of the barge on June 27, 2009, Mr. Bode testified that exposure to 101 decibels of noise would be injurious within a very short period of time,[7] and claimant's incorrectly inserted earplugs provided no discernible reduction in noise exposure.[8] *Id*. at 16 (emphasis in original); Tr. at 92; CX 10 at 10. As the record reflects claimant worked a full day with employer on June 27, 2009,[9] and as Dr. Gianoli's opinion does not

[6] Employer's noise surveys do not define "tractor" or specify a particular type of tractor. However, without specific reference to how the term is used in the noise surveys, employer states that a "tractor" "would have been either a bulldozer or a bobcat." Emp. Br. at 22.

[7] Specifically, Mr. Bode testified that, "with someone that's exposed to extreme [noise] levels, they have to be there for a very short period of time as opposed to the 85 [decibel noise level], which is time weighted over a full eight-hour shift," because injurious noise is measured on a logarithmic scale; "as the sound level raises incrementally every 3 dB, there will be a [decreasing] shift in time, whether it be from eight hours to four hours, four hours to two hours, two hours to an hour and 35 minutes, et cetera;" and exposure to 101 decibels of noise is "pretty serious" as compared to 85 decibels of noise. CX 16 at 106-107.

[8] The Board previously affirmed this finding as rational. *Aubert*, BRB No. 13-0449, slip op. at 5. As it constitutes law of the case, we reject employer's assertions that claimant's use of ear plugs reduced his noise exposure to non-injurious levels. *See Kirkpatrick*, 39 BRBS 69; *Schaubert*, 32 BRBS 233.

[9] The record reflects claimant worked a seven-hour shift with an additional one hour for lunch on June 27, 2009. CX 1 at 2.

contradict Mr. Bode's testimony with regard to 101 decibels of noise being injurious,[10] the administrative law judge rationally determined on the record as a whole that claimant was exposed to injurious noise while working for employer on June 27, 2009. *See Plaisance*, 683 F.3d 225, 46 BRBS 25(CRT); *Cuevas*, 977 F.2d 186, 26 BRBS 111(CRT); *see also Mijangos*, 948 F.2d 941, 25 BRBS 78(CRT). As employer was the last covered employer to expose claimant to injurious noise levels prior to the 2009 audiogram,[11] there is a rational connection between claimant's compensable hearing loss and employment with employer on June 27, 2009, and the administrative law judge rationally found employer is liable for benefits. Decision and Order on Second Remand at 18; *see Cuevas*, 977 F.2d 186, 26 BRBS 111(CRT); *Ronne*, 932 F.2d 836, 24 BRBS 137(CRT); *see also Picinich*, 914 F.2d 1317, 24 BRBS 36(CRT). Consequently, we affirm the administrative law judge's responsible employer determination and the award of benefits. *See Plaisance*, 683 F.3d 225, 46 BRBS 25(CRT).

Lastly, we reject employer's remaining arguments with respect to application of the last employer rule. It is outside the Board's scope of review to change the last

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[10] Dr. Gianoli testified as follows during his deposition:

> Q: Do you consider exposure to 90 dB on an eight hour time-weighted basis to be injurious noise?
>
> A: Again, it goes to, you know, one single day is not enough, but over a series of days it can be injurious.
>
> Q: Do you consider exposure to 100 dB on an eight hour time-weighted basis to be injurious noise?
>
> A: It's getting closer. I mean, the louder you make it, the less time you need for it to be injurious to your ears.
>
> Q: We're going to get to that in a minute, Doctor. Do you consider 110 [dB] to be injurious noise on an eight hour exposure?
>
> A: You know, at some point it will [be injurious] and it varies depending on individuals and their susceptibility to noise. . . .

CX 15 at 49-50.

[11] The Board previously affirmed this finding, and it constitutes the law of the case. *Aubert*, BRB No. 13-0449, slip op. at 8; *see Kirkpatrick*, 39 BRBS 69; *Schaubert*, 32 BRBS 233. We, therefore, reject employer's assertions of error in this regard.

employer rule or to apply a rule that provides a more equitable approach to compensation. The last employer rule came about as an administratively feasible option for allocating liability in occupational disease cases, while effectuating the beneficent purpose of the Act. In *Cardillo*, 225 F.2d 137, the original responsible employer hearing loss case, the United States Court of Appeals for the Second Circuit observed that prior to the passage of the Act, an employer representative suggested that the Act should contain a provision limiting the proportion of the total award for which an employer could be liable, to the same ratio as the extent of the damage done during the period worked for that employer. *Id.*, 225 F.2d at 145. However, Congress declined to amend the Act, with the understanding that, absent such a provision, a "last employer" would be liable for the full amount recoverable, even if, medically, the injury would, in all probability, not be fully attributable to that 'last employment.' *Id*. Therefore, as the last employer rule apportions liability in a fundamentally equitable manner, in that all employers will be the last employer a proportionate share of the time, *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979), we reject employer's assertion that it is against public policy to hold it liable for claimant's hearing loss on the ground that it takes precautionary measures to protect its employees from hearing loss. *See Susoeff*, 19 BRBS 149.

Accordingly, the administrative law judge's Decision and Order on Second 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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JONATHAN ROLFE
Administrative Appeals Judge