U.S. Department of Labor

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

BRB No. 15-0237

CHARLES W. BAILEY Claimant-Petitioner v. HUNTINGTON INGALLS INDUSTRIES, INCORPORATED Self-Insured Employer-Respondent	)	DATE ISSUED: Mar. 7, 2016 DECISION and ORDER

Appeal of the Decision and Order of Dana Rosen, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna, Klein, Camden, LLP), Norfolk, Virginia, for claimant.

Christopher R. Hedrick (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

Before: BOGGS, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2014-LHC-00487) of Administrative Law Judge Dana Rosen 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 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. 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 February 1964 to December 2004. Tr. at 24. Claimant testified that he worked as a burner for approximately 25 years, where he was exposed to noise from chippers and carbon arc welders, and he then worked approximately five years inventorying tools throughout the shipyard. *Id*. at 24-26. Thereafter, claimant worked as a delivery driver at the shipyard for approximately 10

years preceding his retirement.[1] In 1989, claimant underwent an audiometric evaluation and employer agreed that claimant had a minimal hearing loss, for which it paid him $213.37 in compensation benefits for a .313 percent hearing loss. JX 1 at 2. Claimant underwent another audiometric evaluation in 1996, which showed a mild asymmetrical hearing loss, but the audiogram was not interpreted under the AMA *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*). *See* 33 U.S.C. §908(c)(13)(E). Claimant did not receive an audiometric evaluation when he retired in 2004. However, when he had his hearing tested on June 7, 2013, the audiogram demonstrated a 10 percent binaural hearing loss under the AMA *Guides*. CX 11 at 4. Claimant filed a claim for compensation and medical benefits under the Act.

In her decision, the administrative law judge found that claimant established he has a hearing loss, but that, as a delivery driver, he did not establish that he was exposed to injurious noise that could have caused the hearing loss. Decision and Order at 10-11. Thus, the administrative law judge did not invoke the Section 20(a) presumption. 33 U.S.C. §920(a). Alternatively, the administrative law judge found that employer rebutted the presumption based on the deposition testimony of Dr. Tyson. *Id*. at 12-13. The administrative law judge concluded that claimant also failed to show, based on the record as a whole, that he has a work-related hearing loss. Accordingly, the administrative law judge denied the claim.

On appeal, claimant challenges the administrative law judge's findings that he is not entitled to the Section 20(a) presumption and, alternatively, that employer rebutted the presumption. Employer responds, urging affirmance of the administrative law judge's findings and the denial of the claim.

We affirm the administrative law judge's finding that employer rebutted the Section 20(a) presumption, assuming, arguendo, the Section 20(a) presumption was properly invoked.[2] Once the Section 20(a) presumption is invoked, the burden shifts to

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[1] Claimant testified that, as a delivery driver, he delivered mail, boxes, and equipment, and drove personnel, throughout the shipyard. Tr. at 35-36, 40-41, 52-54.

[2] Thus, we need not address claimant's contention that the administrative law judge erred in finding that the Section 20(a) presumption is not applicable. *See generally Burson v. T. Smith & Son, Inc.*, 22 BRBS 124 (1989). We note, however, that the administrative law judge erroneously limited her consideration to claimant's noise exposure in his last ten years of employment. As claimant had a compensable hearing loss in 1989 and the 1996 audiogram was not interpreted under the AMA *Guides*, the administrative law judge should have considered all of claimant's alleged exposure after the 1989 audiogram. *See generally Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 26 BRBS 151(CRT) (1993).

employer to rebut it with substantial evidence that claimant's injury is not related to his employment exposures. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). In this case, therefore, employer must produce substantial evidence that claimant's hearing loss was not caused, aggravated or contributed to by his employment exposure to noise. *See Newport News Shipbuilding & Dry Dock Co. v. Fishel*, 694 F.2d 327, 15 BRBS 52(CRT) (4th Cir. 1982); *see also Port of Portland v. Director, OWCP* [*Ronne I*], 932 F.2d 836, 24 BRBS 137(CRT) (9th Cir. 1991).

The administrative law judge found that employer rebutted the Section 20(a) presumption based on the opinion of Dr. Tyson that he cannot attribute any amount of claimant's hearing loss to his employment and that claimant's 2013 audiogram showed an age-related hearing loss. Decision and Order at 12; *see* EX 9 at 16. In this regard, the administrative law judge discussed Dr. Tyson's deposition testimony that claimant's 1996 uninterpreted audiogram demonstrating a mild hearing loss showed more hearing loss in the left ear than in the right ear. Dr. Tyson stated, therefore, that he would expect any subsequent noise-induced hearing loss to remain proportionally unequal in each ear. The 2013 audiogram, however, instead showed a symmetrical hearing loss in both ears, which he stated is consistent with age-induced hearing loss. EX 9 at 17. The administrative law judge permissibly found Dr. Tyson's opinion to constitute substantial evidence sufficient to rebut the Section 20(a) presumption. *Moore*, 126 F.3d at 263, 31 BRBS at 123(CRT) (evidence "casting doubt" on causative link sufficient to rebut the Section 20(a) presumption); *see also 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. Moreover, we affirm the administrative law judge's denial of the claim because claimant does not appeal the administrative law judge's finding that claimant did not establish that he has a work-related hearing loss based on the record as a whole. *See generally Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge