U.S. Department of Labor

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

BRB No. 16-0509

PAUL CARPENTIER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: Mar. 9, 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.

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

Keith A. Cardoza, Jr. (McKenney, Quigley, Izzo & Clarkin, LLP), Providence, Rhode Island, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2015-LHC-01651) 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 has worked as a welder for employer since 1976. Following a May 10, 2011 audiogram, employer voluntarily paid claimant benefits for a noise-induced 7.05 percent binaural hearing loss and provided him with hearing aids.[1] HT at 21; EX

5. On May 5, 2014, Dr. Uchmanowicz conducted a second hearing evaluation, which demonstrated a 13.8 percent binaural hearing loss. CX 1. She opined that claimant's increased hearing loss since 2011 is related to his noise exposure during his work for employer. *Id.* On October 6, 2014, upon employer's request, Dr. Sells conducted a hearing evaluation, which demonstrated a 7.2 percent binaural hearing loss. EX 2. She opined that the slight progression in claimant's hearing loss over the past few years was limited to his right ear only and, thus, she concluded that it is not due to noise exposure. *Id.*

Based on Dr. Uchmanowicz's 2014 audiogram, claimant filed a claim for a 13.8 percent binaural hearing loss. Specifically, claimant alleged that "his three additional years of employment at [employer's facility] are causally related" to the additional hearing loss he sustained between 2011 and 2014. HT at 17. Employer denied the claim.[2] The administrative law judge found, based on Dr. Uchmanowicz's opinion, that claimant established a prima facie case relating his additional hearing loss to his employment exposure to noise at work. However, the administrative law judge also found that Dr. Sells's opinion rebuts the Section 20(a) presumption. 33 U.S.C. §920(a); Decision and Order at 9-10. Weighing the evidence as a whole, the administrative law judge found that claimant's increased hearing loss since 2011 is limited to claimant's right ear only and is not the result of his work exposures with employer. *Id.* at 12. As claimant did not establish by a preponderance of the evidence a causal relationship between his increased hearing loss and his employment, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's findings that employer rebutted the Section 20(a) presumption and that, on the record as a whole, his increased hearing loss between 2011 and 2014 is not related to his work with employer. Employer responds, urging affirmance of the administrative law judge's decision.

Claimant first contends the administrative law judge erred in finding Dr. Sells's opinion sufficient to rebut the Section 20(a) presumption. Claimant asserts that Dr.

[1] The May 10, 2011 audiogram, administered by Mary Kay Uchmanowicz, Au.D, revealed an 8.8 percent binaural impairment. At employer's request, claimant underwent a second audiogram on June 13, 2011, administered by Janet P. Sells, Au.D, which revealed a 5.3 percent binaural impairment. CX 1. The parties averaged the results of the May 10, and June 13, 2011 audiograms to arrive at the 7.05 percent binaural hearing impairment. *See* Decision and Order at 8.

[2] Alternatively, employer filed an application for relief pursuant to Section 8(f), 33 U.S.C. §908(f).

Sells's opinion is flawed because she did not take a sufficient history from claimant as to his specific work activities and exposure to noise, and she did not provide an explanation as to the possible cause of claimant's worsening hearing.

Where, as in this case, it is undisputed that claimant is entitled to the benefit of the Section 20(a) presumption, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's hearing loss is not due to his work-related exposure to noise. *See Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *Bath Iron Works Corp. v. Director, OWCP* [*Harford*], 137 F.3d 673, 32 BRBS 45(CRT) (1st Cir. 1988); *Bath Iron Works Corp. v. Director, OWCP* [*Shorette*], 109 F.3d 53, 31 BRBS 19(CRT) (1st Cir. 1997). If the administrative law judge finds employer has rebutted the Section 20(a) presumption, it falls out of the case and the administrative law judge must weigh all of the relevant evidence and resolve the causation issue on the record as a whole, with claimant bearing the burden of persuasion. *See Bath Iron Works Corp. v. Brown*, 194 F.3d 1, 33 BRBS 162(CRT) (1st Cir. 1999); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

As Dr. Sells stated that the increase in claimant's hearing loss from 2011 to 2014 is not attributable to his continued work with employer, the administrative law judge rationally found employer rebutted the presumption with this opinion. *Harford*, 137 F.3d 673, 32 BRBS 45(CRT); *Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000). Moreover, contrary to claimant's contention, employer need not establish another agency of causation in order to rebut the Section 20(a) presumption.[3] *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2002). As Dr. Sells's opinion constitutes substantial evidence of the absence of a causal connection between claimant's increased hearing loss and his noise exposure at work, we affirm the administrative law judge's finding that the Section 20(a) presumption is rebutted. *Harford*, 137 F.3d 673, 32 BRBS 45(CRT); *Coffey*, 34 BRBS 85; *Davison v. Bender Shipbuilding & Repair Co.*, 30 BRBS 45 (1996).

Claimant next contends the administrative law judge erred in failing to find, on the record as a whole, that a causal connection exists between his increased hearing loss and his work for employer. Claimant maintains that his undisputed testimony regarding his

[3] Claimant's contention that Dr. Sells's opinion lacks a proper foundation and is equivocal is without merit. First, Dr. Sells evinced a general understanding of claimant's work environment by recognizing that claimant "as a welder [was] exposed to a great deal of noise." EX 3 at 34, 38. Second, while Dr. Sells stated that, absent additional examination and testing, she could not provide the cause for claimant's slightly diminished hearing between 2011 and 2014, she unequivocally opined that the change in claimant's hearing is not due to noise exposure. *Id.* at 17, 19-20, 48, 49.

regular exposure to loud noise during his entire career for employer, and specifically between 2011 and 2014, coupled with Dr. Uchmanowicz's opinion that the worsening in claimant's hearing since 2011 is causally related to continued noise exposure at employer's facility, constitutes substantial evidence establishing that claimant's increased hearing loss between 2011 and 2014 is work-related.

It is well-established that the administrative law judge is entitled to assess the credibility of all witnesses and to determine the weight to be accorded to the evidence of record. *See, e.g., Bath Iron Works Corp. v. U.S. Dept. of Labor* [*Knight*], 336 F.3d 51, 37 BRBS 67(CRT) (1st Cir. 2003); *Bath Iron Works Corp. v. Director, OWCP* [*Hutchins*], 244 F.3d 222, 35 BRBS 35(CRT) (1st Cir. 2001). Moreover, the Board must accept the administrative law judge's factual findings and inferences which are supported by the record, and may not disregard her findings merely on the basis that the evidence also permits other inferences. *Id.; see also Harford*, 137 F.3d at 675, 32 BRBS at 46(CRT); *Shorette*, 109 F.3d at 56, 31 BRBS at 21(CRT).

Addressing the evidence as a whole, the administrative law judge first found that claimant did not experience a worsening of hearing in his left ear.[4] Decision and Order at 11. Dr. Uchmanowicz attributed claimant's additional right-sided hearing loss to work-related noise exposure from 2011 to 2014, *see* CX 1, while Dr. Sells opined that the additional loss in the right ear cannot be attributed to noise exposure. *See* EX 2. Reviewing the underlying bases for each audiologist's opinion, the administrative law judge found more persuasive Dr. Sells's opinion that any increase in claimant's hearing loss is not the result of noise exposure with employer between 2011 and 2014.[5] *Id.* The

[4] This finding, which is not challenged on appeal, is based on Dr. Uchmanowicz's concession that the difference in the left ear loss demonstrated in the 2011 and 2014 audiograms is within the 5 dB "test-retest" variability, *see* CX 3 at 32-33, and the audiometric results of Dr. Sells, which are the same in the left ear in both 2011 and 2014. *See* EXs 1; 2; 3 at 22; *see, e.g., 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).

[5] The administrative law judge credited Dr. Sells's supporting documentation which consisted of the following observations: claimant wore hearing protection during the three-year period; his hearing loss occurred in low frequencies and not the higher frequencies associated with noise-induced hearing loss; if the loss was caused by noise exposure, one would expect both ears to be affected; and claimant is of an age where some loss in hearing from the aging process can be expected. Decision and Order at 11-12; *see* EXs 2; 3 at 17, 19-20, 48. The administrative law judge acknowledged Dr. Uchmanowicz's explanations for why claimant's increased right ear hearing loss is noise-induced, i.e., his being right-handed and occasionally taking out only his right ear plug to

administrative law judge thus found that the increase in claimant's right ear hearing loss is not the result of his work for employer.

The administrative law judge rationally weighed the conflicting evidence and her conclusions are supported by substantial evidence of record. *Knight*, 336 F.3d at 56, 37 BRBS at 70(CRT); *Hutchins*, 244 F.3d at 231, 35 BRBS at 40-41(CRT). Claimant asks the Board to reweigh the evidence, which it is not empowered to do. *Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994). Therefore, we affirm the administrative law judge's finding that claimant did not establish by a preponderance of the evidence that his increased hearing loss was caused by his noise exposure at work. *See Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001). Consequently, we affirm the denial of benefits.

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

SO ORDERED.

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BETTY JEAN HALL
Administrative Appeals Judge

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GREG J. BUZZARD
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge

converse with co-workers, but found Dr. Sells's explanations to be more plausible. Decision and Order at 11; *see* CX 3 at 31-33.