U.S. Department of Labor

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

BRB No. 17-0304

MOSES REID, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HUNTINGTON INGALLS, INCORPORATED	)	DATE ISSUED: Oct. 6, 2017
	)	
	)	
Self-Insured Employer-Respondent	)	
	)	
	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Tracy A. Daly, Administrative Law Judge, United States Department of Labor.

Jeffrey P. Briscoe and Arthur J. Brewster (The Brewster Law Firm, LLC), Metairie, Louisiana, for claimant.

Traci Castille (Franke & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2015-LHC-01359) of Administrative Law Judge Tracy A. Daly 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 worked for employer as a shipfitter in 1988 and 1989. He operated grinders, chippers, and mauls in the holds of vessels. Tr. at 30. Claimant testified that

employer provided in-ear hearing protection. *Id.* at 31. Claimant has not worked since 2001.[1] *Id.* at 33.

Claimant underwent audiometric testing at Associated Hearing on March 27, 2014. Claimant filled out a form wherein he indicated that he first started noticing hearing difficulties 10 years prior, had difficulty hearing people speak and hearing on the telephone, and often had to ask people to repeat themselves. JX 4 at 18. Claimant informed the examiner that he was constantly exposed to loud noises in his job as a shipfitter. *Id.* at 17.

The audiogram was administered by Dr. Alaina Johnson, a licensed audiologist. Dr. Johnson concluded that according to current American Medical Association guidelines, claimant has a 38.1 percent binaural hearing impairment, with a 41.2 percent impairment of his left ear and 37.5 percent impairment of his right ear. JX 4 at 10. She recommended that claimant obtain hearing aids. *Id.*

Dr. Johnson testified by deposition, explaining that the air and bone conduction tests demonstrate that claimant's hearing loss is sensorineural, and is thus due to noise exposure. CX 2 at 11-12. Dr. Johnson conceded that it was possible that claimant's age at the time of the audiogram (68 years old) had affected his hearing loss but that it was impossible to quantify this effect. *Id.* at 12-13. Dr. Johnson further testified that, given claimant's employment history, it was more likely than not that at least half of the hearing loss claimant had as of March 2014 would have existed prior to 1989 and that his work up through this time more likely than not contributed to his hearing loss. *Id.* at 19. She stated that the shape and configuration of the audiogram led her to the conclusion that claimant's hearing loss was due to noise exposure. *Id.* at 24-25. However, Dr. Johnson admitted that there were other things that could have resulted in an audiogram of the same configuration, such as age-related hearing loss or hearing loss caused by ototoxic medications. *Id.* at 33-34. She also stated that there was no way she could tell from the information available to her what percentage of claimant's hearing loss would be attributable to claimant's one year of employment with employer or to determine what claimant's hearing would have been like in 1989. *Id.* at 28-29.

Claimant filed a claim in 2014 for benefits for a work-related 19.05 percent hearing loss, one-half of the loss demonstrated on the 2014 audiogram. The administrative law judge deemed claimant's testimony to be only "moderately credible,"

[1] Claimant worked as a fitter for other shipyards prior to working for employer. Employer does not dispute that it is claimant's last maritime employer. Claimant's employment before and after his covered work also entailed jobs such as driving dump trucks and cement mixers.

citing a number of inconsistencies as to when he first noticed his hearing problems.[2] Decision and Order at 11. The administrative law judge also found Dr. Johnson's deposition testimony only partially persuasive because Dr. Johnson testified that she did not know the exact noise levels that cement or dump trucks produce or what the attenuation value is for the average industrial hearing protection device. *Id.* The administrative law judge emphasized that Dr. Johnson admitted that she did not have "any objective data" to corroborate her opinion that half of claimant's hearing impairment would have been present in 1989. *Id.* (citing CX 2 at 39-40).

The administrative law judge found claimant entitled to the benefit of the Section 20(a) presumption that his hearing loss is due to noise exposure at employer's workplace, but concluded that employer produced substantial evidence to rebut the Section 20(a) presumption that claimant's hearing loss was caused or aggravated by his exposure to noise at employer's shipyard. In particular, the administrative law judge cited Louisiana Department of Public Safety and Corrections documents detailing claimant's commercial driver's license (CDL) application and subsequent renewal. The administrative law judge noted that on April 12, 2011, claimant indicated on his CDL renewal application that he did not have a history of an ear disorder or loss of hearing and the medical examiner indicated that claimant could hear a "whispered voice" from six feet away in both ears without the use of a hearing aid. Decision and Order at 17 (citing JX 8 at 12-13). The administrative law judge also noted that 1992, 1996, and 2000 medical examinations found claimant's hearing to be normal. Decision and Order at 17 (citing JX 8 at 27, 33, 43). On weighing the evidence as a whole, the administrative law judge concluded "Claimant failed to sustain his burden to show he had a measurable, ratable hearing impairment at the time he left covered employment with Employer in 1989." *Id.* at 19. The administrative law judge found that Dr. Johnson failed to substantiate her opinion that noise exposure at employer's shipyard contributed to claimant's hearing loss. Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's denial of benefits. Employer filed a response brief, urging affirmance. Claimant filed a reply.

Claimant first contends the administrative law judge erred in finding that the Louisiana Department of Public Safety records concerning claimant's CDL applications

[2] The administrative law judge noted, for example, that claimant reported to Dr. Johnson that he noticed hearing problems 10 years prior but testified at the hearing that he first noticed them 15 to 20 years ago. Decision and Order at 11 (citing CX 2 at 26; Tr. at 35). The administrative law judge also noted that both statements are inconsistent with the Louisiana Department of Public Safety and Corrections records, which indicate that claimant's hearing was normal as recently as 2011. *Id.*

constitute substantial evidence to rebut the Section 20(a) presumption. Claimant asserts that the "whisper" hearing test conducted for the CDL application lacks any scientific value and cannot be relied on as substantial evidence.

Once, as here, claimant invokes the Section 20(a) presumption that his injury is work-related, the burden shifts to the employer to rebut it with substantial evidence of the absence of a connection between the injury and the employment. *See Port Cooper/T. Smith Stevedoring Co. Inc. v. Hunter*, 227 F.3d 285, 288, 34 BRBS 96, 97(CRT) (5th Cir. 2000). To rebut the Section 20(a) presumption, employer must produce substantial evidence that "throws factual doubt" on the prima facie case. *Ceres Gulf, Inc. v. Director, OWCP [Plaisance]*, 683 F.3d 225, 231, 46 BRBS 25, 29(CRT) (5th Cir. 2012). Employer need not produce "the degree of evidence which satisfies the [administrative law judge] that the requisite fact [(non-causation)] exists, but merely the degree which *could* satisfy the reasonable factfinder." *Bath Iron Works Corp. v. Fields*, 599 F.3d 47, 55, 44 BRBS 13, 17(CRT) (1st Cir. 2010) (quoting *Allentown Mack Sales, Inc. v. NLRB*, 522 U.S. 359, 377 (1998)) (emphasis in original).

In finding the Section 20(a) presumption rebutted, the administrative law judge relied on claimant's CDL applications indicating that claimant did not suffer from hearing loss as of 2011, many years after his covered employment ceased, and medical examinations in 1992, 1996, and 2000 indicating claimant had normal hearing. Although, as claimant contends, the record does not provide information about the methodology used in the "whisper" test conducted for the purposes of the CDL application,[3] we are satisfied that it was within the administrative law judge's discretion to rely on the "whisper" test together with other evidence to find that employer produced substantial evidence to rebut the Section 20(a) presumption. *See Plaisance*, 683 F.3d 225, 46 BRBS 25(CRT).

In this case, the administrative law judge relied on not only the "whisper" test from claimant's 2011 CDL application, but also on claimant's medical examinations in 1992, 1996, and 2000, all of which indicated that claimant did not have ear disease or injury and that his hearing was normal. *See* Decision and Order at 17 (citing JX 8 at 27, 33, 43).[4] All of this evidence is relevant to the onset of claimant's hearing loss, as the

[3] The CDL form filled out by a medical examiner states that the applicant "Must first perceive forced whisper voice" from more than five feet, with or without hearing aids. Claimant heard the "forced whisper" at six feet without hearing aids. JX 8 at 13.

[4] A CDL medical examination on November 11, 1992 states that claimant had normal hearing in both ears. JX 8 at 43. A CDL medical examination on April 11, 1997, states that claimant had "20/20" hearing in both ears. *Id.* at 33. A CDL medical examination on January 13, 2000 indicated that claimant met the "FW5" test (forced

United States Supreme Court has stated that occupational hearing loss is an injury which "occurs simultaneously with the exposure to excessive noise" and that "the injury is complete when the exposure ceases." *Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 165 (1993). Dr. Johnson also confirmed that generally, once the exposure to noise is discontinued, there is no further progression of hearing loss as a result of that noise exposure. CX 2 at 35-36. The administrative law judge's finding that the CDL document and medical reports constitute substantial evidence rebutting the Section 20(a) presumption that claimant's hearing loss is due to noise exposure in 1988 and 1989 is supported by substantial evidence and, therefore, is affirmed. *See Plaisance*, 683 F.3d 225, 46 BRBS 25(CRT); *see also Bruce v. Bath Iron Works Corp.*, 25 BRBS 157 (1991) (claimant's burden to establish extent of hearing loss at the time he left covered employment).

Once the Section 20(a) presumption has been rebutted, it falls out of the case and the administrative law judge must weigh all the evidence in the record to determine whether the injury is due to claimant's employment exposures. Claimant bears the burden of persuasion to establish that his condition is work-related by a preponderance of the evidence. *See Bis Salamis, Inc. v. Director, OWCP [Meeks]*, 819 F.3d 116, 50 BRBS 29(CRT) (5th Cir. 2016). In this regard, claimant assigns error to the administrative law judge's decision to discount Dr. Johnson's testimony as to the cause of his hearing loss. Claimant argues that the administrative law judge erred by requiring Dr. Johnson to provide objective evidence to substantiate her expert opinion. We disagree. The administrative law judge discounted Dr. Johnson's opinion that at least some of claimant's hearing loss is likely due to claimant's work through his last covered employment because she admitted there could be other causes for claimant's hearing loss and she could not differentiate how much, if any, of claimant's hearing loss is related to claimant's age, his use of Vicodin, or his employment. Decision and Order at 19 (citing CX 2 at 25, 33). The administrative law judge also noted that Dr. Johnson conceded that the March 2014 audiogram could not be used to determine claimant's degree of hearing impairment in July 1989 when he left covered employment. *Id.* (citing CX 2 at 34).[5]

The administrative law judge has the discretion to determine the weight to be accorded to the evidence of record. *See Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d

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whisper from five feet), with no ear disease or injury. *Id.* at 27. Each report is signed by a physician.

[5] The administrative law judge also found that inconsistencies between the documentary evidence and claimant's testimony as to when he first noticed his hearing problems, *see* n. 2, *supra*, undermined claimant's claim that he suffered hearing loss as far back as 1989. Decision and Order at 19.

498, 29 BRBS 79(CRT) (5th Cir. 1995). The administrative law judge provided a rational basis for declining to give probative weight to Dr. Johnson's opinion that at least half of claimant's hearing loss would have existed by his last day of work for employer and that noise exposure contributed to the hearing loss. The administrative law judge's finding that claimant failed to establish by a preponderance of the evidence that his hearing loss is due to his work for employer in 1988-89 is rational, supported by substantial evidence and in accordance with law. *See Holmes v. Universal Maritime Service Corp.*, 29 BRBS 18 (1995); *see generally Bruce*, 25 BRBS at 159. Therefore, 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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JUDITH S. BOGGS
Administrative Appeals Judge

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GREG J. BUZZARD
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge