U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 20-0237

JACK B. BOWRON	)	
	)	
Claimant-Petitioner	)	
	)	DATE ISSUED: 11/24/2020
v.	)	
	)	
JONES STEVEDORING COMPANY	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of Decision and Order of Steven B. Berlin, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for Claimant.

James P. McCurdy and Elana L. Charles (Lindsay Hart, LLP) Portland, Oregon, for self-insured Employer.

Before: ROLFE, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals Administrative Law Judge Steven B. Berlin's Decision and Order (2016-LHC-01689) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (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 applicable 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 Benefits Review Board for the second time. Claimant worked as a longshoreman for various employers in the Coos Bay, Oregon, area from 1956 until retiring on December 16, 1992. Claimant's first audiogram, administered on April 24, 1991, resulted in Dr. Tate's rating Claimant's hearing impairment as zero percent

bilaterally. Claimant's subsequent audiograms, administered on May 28, 2008, and August 26, 2009, revealed a binaural hearing loss of 27.5 and 22.81 percent, respectively. The administrative law judge found Claimant established a prima facie case of work-related hearing loss, Employer rebutted the Section 20(a) presumption, 33 U.S.C. §920(a), and Claimant did not establish he sustained a work-related hearing loss based on the record as a whole. The administrative law judge thus denied Claimant's claim for benefits.

Claimant appealed the administrative law judge's Decision and Order, challenging the finding that he did not sustain a work-related hearing loss. The Benefits Review Board affirmed the denial, concluding that finding was rational and supported by substantial evidence of record. *Bowron v. Jones Stevedoring Co.*, BRB No. 13-0366 (Feb. 5, 2014) (unpub.).

Claimant filed a timely motion for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, asserting a new report authored by Dr. Lipman establishes a mistake in fact as to the validity of Claimant's April 24, 1991 audiogram, and thus the work-relatedness of his hearing loss.[1] Claimant asserted that since his April 24, 1991 audiogram is invalid, the administrative law judge erred in failing to accept either the May 28, 2008 or August 26, 2009 audiogram to determine the extent of his hearing loss.[2]

In his Decision and Order addressing the parties' motions, the administrative law judge found Dr. Lipman's testimony neither credible nor persuasive, and he therefore concluded Claimant failed to establish a mistake in fact in the prior decision. Decision and

---

[1] In his initial Decision and Order, the administrative law judge concluded Claimant's April 24, 1991 audiogram, which did not establish a ratable impairment, is valid. The Board found this determination rational since Dr. Tate, a licensed otolaryngologist, supervised the audiogram, reviewed the results, and opined they were valid. *See Bowron*, slip op. at 3 n.3. Additionally, the Board rejected Claimant's contention that this audiogram could not be relied on because the measurement at the 2000 Hz level is not valid; the administrative law judge properly found no evidence that the 1991 audiogram was missing results at any of the mandatory testing levels, only that the results at that level were "unexpected." *Id.* (citing *Green-Brown v. Sealand Services, Inc.*, 586 F.3d 299, 43 BRBS 57(CRT) (4th Cir. 2009)).

[2] Employer filed a cross-motion seeking sanctions against Claimant. The administrative law judge denied Employer's motion for sanctions, Decision and Order at 20-22, and the resolution of that motion has not been appealed.

Order at 7 – 20. Consequently, the administrative law judge denied Claimant's motion for modification.

On appeal, Claimant challenges both the administrative law judge's finding that his April 24, 1991 audiogram is valid and his consequent denial of benefits. Employer responds, urging affirmance.

Section 22 of the Act provides the only means for changing otherwise final decisions; modification is permitted based on a mistake of fact in the initial decision or a change in claimant's physical or economic condition. *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). Under Section 22, the administrative law judge has broad discretion to correct mistakes of fact "whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *see also Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459 (1968). If the claimant's hearing loss is work-related, a retired claimant is entitled to benefits for the totality of his hearing loss, unless there is credible evidence of the extent of the loss at the time he left covered employment. *Labbe v. Bath Iron Works Corp.*, 24 BRBS 159 (1991).

Claimant contends he presented credible evidence sufficient to establish his April 24, 1991 audiogram is invalid and should be disregarded and, as a result, he is entitled to permanent partial disability benefits based on his later audiograms. We reject Claimant's contentions.

In seeking modification, Claimant relied on Dr. Lipman's opinions in a January 18, 2016 report and in his testimony at the 2018 formal hearing that the difference between Claimant's zero dB reading on the right and 15 dB reading on the left at the 2000 Hz level in his April 24, 1991 audiogram is significant enough to render that level's reading invalid. *See* JX 5; Nov. 15, 2018 Tr. at 36 – 39. Thus, Claimant contends the 1991 audiogram cannot be credited and he is entitled to benefits based on one of his later audiograms.[3]

The administrative law judge addressed Dr. Lipman's opinion at length, finding it neither credible nor persuasive. *See* Decision and Order at 7 – 20. He concluded: Dr. Lipman misrepresented the status of his medical licensure and his continued learning activities, *id.* at 9 – 10, 18; he relied on a 1989 statement by the American College of Occupational Medicine addressing noise-related hearing loss after acknowledging this

[3] To the extent Claimant reiterates his contention that the 1991 audiogram is "missing" a reading at the 2000 Hz level due to its allegedly anomalous result, we again reject it. *See* n.1, *supra.*

statement had been revised and updated in 2018, *id.* at 10 -11, 18; he erroneously stated Claimant's results at the 2000 Hz level represented the only asymmetrical readings in Claimant's 1991 audiogram,[4] and then reluctantly acknowledged all three of Claimant's audiograms contained asymmetrical results. *Id.* at 11 – 13. Additionally, the administrative law judge specifically gave more weight to Dr. Tate's opinion in a June 8, 2010 letter where he stated a nurse performed Claimant's April 24, 1991 audiogram "under [his] supervision and guidance," and "the audiogram was reliable and accurate." *Id.* at 15; *see* JX 7. Thus, the administrative law judge concluded Dr. Lipman's credibility was substantially limited and Claimant did not establish that the 2000 Hz reading on the right in his April 24, 1991 audiogram was erroneous. Decision and Order at 17 – 20. The administrative law judge concluded Claimant's 1991 audiogram is the best measure of his work-related hearing loss and denied the claim as that audiogram does not show a measurable impairment.

It is well established that the administrative law judge is entitled to weigh the medical evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiner. *See Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47 (CRT) (9th Cir. 2010); *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Jones Stevedoring Co. v. Director, OWCP* [*Taylor*], 133 F.3d 683, 31 BRBS 178(CRT) (9th Cir. 1997); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Moreover, it is impermissible for the Board to reweigh the evidence or to substitute its views for those of the administrative law judge; thus, his findings may not be disregarded merely on the basis that other inferences also could be drawn from the evidence. *See Newport News Shipbuilding & Dry Dock Co. v. Winn*, 326 F.3d 427, 37 BRBS 29(CRT) (4th Cir. 2003); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). The administrative law judge fully discussed Dr. Lipman's testimony, and provided rational bases for declining to credit it and for finding Claimant's April 24, 1991 audiogram valid. As the administrative law judge's decision is rational and supported by substantial evidence, we affirm the determination that Claimant

[4] Dr. Lipman opined the 2000 Hz reading on the right of 0 is invalid because the reading on the left is 15 dB and any variance in ratings "beyond or in excess of five decibels" would suggest there might be an error. *See* Nov. 15, 2018 Tr. at 113. Dr. Lipman acknowledged, however, that if Claimant's reading on the right was symmetrical to that on the left, that is 15 dBs, Claimant's 1991 audiogram would still document a zero percent impairment. *Id.* at 169. Moreover, the administrative law judge found use of Dr. Lipman's 5 dB differential standard, if applied to all of Claimant's audiograms, could invalidate the others as well due to the asymmetries in Claimant's two subsequent audiograms. Decision and Order at 13 and n.8.

did not establish his April 24, 1991 audiogram is invalid and the consequent denial of Claimant's motion for modification of the prior denial of benefits.

Accordingly, we affirm the administrative law judge's Decision and Order.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge