U.S. Department of Labor

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

BRB No. 17-0659

KEVIN NEMITZ	)	
	)	
Claimant	)	
	)	
v.	)	DATE ISSUED: Aug. 10, 2018
	)	
WASHINGTON UNITED TERMINALS	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

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

Raymond H. Warns, Jr. (Holmes Weddle & Barcott, P.C.), Seattle, Washington, for employer/carrier.

Jeffrey S. Goldberg (Kate S. O'Scannlain, Solicitor of Labor; Maia S. Fisher, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order (2016-LHC-00408) of Administrative Law Judge Steven B. Berlin 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 commenced longshore employment in 2007 and, throughout his career, was exposed to loud noise. Between January 6, 2007 and October 6, 2014, claimant underwent five audiometric examinations. Following his October 6, 2014 audiogram, which revealed a binaural hearing loss of 40.69 percent, claimant filed a claim for benefits under the Act.[1] On August 6, 2015, employer submitted an application for Section 8(f) relief. 33 U.S.C. §908(f). In 2016, employer joined SSA Terminals to this claim, contending that SSA was the last employer to expose claimant to noise prior to claimant's December 10, 2014 audiogram.

In his Decision and Order, the administrative law judge awarded claimant permanent partial disability benefits payable by employer for a 40.69 percent binaural work-related hearing loss established by the audiogram conducted on October 6, 2014. 33 U.S.C. §908(c)(13)(B). The administrative law judge denied employer's request for Section 8(f) relief, finding that employer did not establish the existence of a pre-existing hearing loss.

On appeal, employer challenges the administrative law judge's denial of its request for Section 8(f) relief. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's decision. Employer has filed a reply brief.

Employer contends the administrative law judge erred in determining that claimant's December 4, 2010 audiogram is unreliable and consequently insufficient to satisfy the pre-existing permanent partial disability element necessary for Section 8(f) relief. In response, the Director asserts that the administrative law judge rationally weighed

[1] Claimant underwent a sixth audiometric examination on December 10, 2014.

the evidence and found that the December 4, 2010 audiogram suffered from deficiencies great enough to render it insufficiently reliable and probative for employer to carry its burden of proof for Section 8(f) entitlement.

Section 8(f), 33 U.S.C. §908(f), limits an employer's liability for permanent disability benefits if employer proves that claimant had a manifest, pre-existing permanent partial disability which combined with the subsequent work injury to result in a disability that is "materially and substantially greater than that which would have resulted from the subsequent injury alone." If these prerequisites are met in a hearing loss case, employer's liability for compensation under Section 8(c)(13) is limited to the lesser of 104 weeks or the number of weeks attributable to the subsequent injury. *See* 33 U.S.C. §908(f)(1); *R.H. [Harris] v. Bath Iron Works*, 42 BRBS 6 (2008), *recon. denied*, BRB No. 07-0739 (Sept. 19, 2008); *Skelton v. Bath Iron Works Corp.*, 27 BRBS 28 (1993).

Employer relied only on claimant's December 4, 2010 audiogram in support of its contention that it established the existence of a hearing loss sufficient to satisfy the pre-existing permanent partial disability element for Section 8(f) relief. *See* Emp. Trial Br. at 17. The administrative law judge determined that the December 4, 2010 audiogram relied on by employer contained deficiencies that in combination persuaded him that it was not reliable and probative. Decision and Order at 18 – 19. He found that:

1) The audiogram provides no indication that the examiner tested for air and bone conduction;

2) There is insufficient evidence regarding whether the audiometer complied with calibration requirements;

3) There is no information as to whether the room in which the exam took place complied with the requirements for the absence of background noise;

4) The qualifications of the examiner are not clearly documented; and

5) There is no information as to whether the appropriate medical criteria were used for pure-tone testing.

Id. at 18. Thus, the administrative law judge concluded that the December 4, 2010 audiogram is insufficiently reliable to establish a pre-existing hearing loss[2] and employer therefore is not entitled to Section 8(f) relief. *Id.* at 19.

[2] Employer does not challenge the administrative law judge's finding that the December 4, 2010, audiogram did not meet the standard of presumptive evidence of

We reject employer's contention that the administrative law judge erred in failing to take into consideration the January 6, 2007 and December 8, 2010 audiograms as support for the reliability of December 4, 2010 audiogram. Employer contends that the January 6, 2007 audiogram "demonstrates claimant likely had preexisting hearing loss to some degree as of January 2007," such that it validates the loss shown on the later audiogram. Emp. Br. at 17. The administrative law judge found that no party asserted that claimant's January 6, 2007 audiogram was valid, nor did any party rely on it to establish any degree of hearing loss.[3] *See* Decision and Order at 3, 19 n.30. Similarly, the administrative law judge found that employer did not rely on claimant's December 8, 2010 audiogram in support of its request for Section 8(f) relief. *See id.* at 19 n.30. On these facts, the administrative law judge did not err in declining to address the January 6, 2007 or December 8, 2010 audiograms in relation to employer's request for Section 8(f) relief.

Employer next contends the administrative law judge erred in not addressing the testimony of Dr. Langman and claimant which, employer avers, supports the reliability of the December 4, 2010 audiogram. Contrary to employer's argument, Dr. Langman did not address the reliability of the results obtained by the December 4, 2010 audiogram. Rather, as the administrative law judge acknowledged, Dr. Langman testified that the "pattern" reflected on the December 4, 2010 audiogram is "generally consistent" with subsequent audiograms.[4] Decision and Order at 4, citing CX 7 at 65. Because Dr. Langman did not offer an opinion on the reliability of the December 4, 2010 audiogram, employer has not established error in the administrative law judge's failure to credit his opinion for that purpose. Moreover, while the administrative law judge credited claimant's testimony as suggesting that his December 4, 2010, evaluation was performed in a "sound-proof room,"[5]

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hearing loss pursuant to 20 C.F.R. §702.411(b)(1-3). However, an audiogram not meeting these criteria may establish a hearing loss if it is otherwise reliable and probative. *See G.K [Kunihiro] v. Matson Terminals, Inc.*, 42 BRBS 15 (2008), *aff'd sub nom. Director, OWCP v. Matson Terminals, Inc.*, 442 F. App'x 304 (9th Cir. 2011); *Harris*, 42 BRBS 6.

[3] Employer acknowledges that claimant's January 6, 2007 audiogram, apparently taken at the commencement of claimant's longshore employment, "lacks information regarding the audiometer and its calibration and, thus, likely does not on its own represent evidence of preexisting hearing loss or the extent of that loss." Emp. Br. at 17.

[4] Dr. Langman stated that the pattern was consistent because it showed greater impairment in claimant's right ear. CX 7 at 65.

[5] Claimant did not explicitly state that the December 4, 2010 audiogram was performed in a sound-proof room. He testified that the October 6, 2014 audiogram at Dr.

see Decision and Order at 4, he also accurately found that the audiogram itself provides no information as to whether the room complied with the requirements for the absence of background noise. *Id.* at 18; *see* JX 1.5 (December 4, 2010 audiometric evaluation). Employer has not identified any error in the administrative law judge's conclusion that the audiogram's lack of information about the noise conditions of the examination renders the audiogram less reliable.[6]

As the Board stated in *Harris*:

> The key question relating to hearing loss for purposes of Section 8(f) relief as well as establishing the extent of hearing loss in adjudicating any other aspect of the claim is whether there is sufficient probative evidence, applying the AMA *Guides* and procedures of Section 702.441(d), to establish the extent of a claimant's permanent loss of hearing at a particular point in time. Such determinations are squarely within the purview of the administrative law judge, and [his] findings on such matters must be affirmed if they are rational and supported by substantial evidence.

Harris, 42 BRBS at 10. Employer has not established reversible error in the administrative law judge's evaluation of the only audiogram employer relied on to meet its burden of proof for Section 8(f) relief. As the administrative law judge discussed at length the December 4, 2010 audiogram, and his determination that this audiogram is insufficiently reliable to establish a pre-existing hearing loss is rational and supported by substantial evidence, we affirm the denial of Section 8(f) relief. *See Dubar v. Bath Iron Works Corp.*, 25 BRBS 5 (1991); *see generally Hundley v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 254 (1988).

Langman's office involved "putting on headphones in a sound-proof room," which is "similar to what went on" at his December 4, 2010 audiogram. *See* Cl. Dep. at 58 – 59.

[6] Further, although the administrative law judge found that any one of the five identified deficiencies "brings into doubt the reliability of [the December 4, 2010] audiogram," his ultimate conclusion regarding its lack of reliability was based on his finding that "some, most, or all of [the deficiencies] combined leave the audiogram insufficiently reliable to establish pre-existing hearing loss." Decision and Order at 19.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge