

U.S. Department of Labor

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



BRB No. 18-0462

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| DWARF CANNON |) | |
| |) | |
| Claimant-Petitioner |) | |
| |) | |
| v. |) | DATE ISSUED: 11/26/2018 |
| |) | |
| HUNTINGTON INGALLS |) | |
| INCORPORATED, PASCAGOULA |) | |
| OPERATIONS |) | |
| |) | |
| Self-Insured |) | |
| Employer-Respondent |) | DECISION and ORDER |

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

Dwarf Cannon, Liberty, Mississippi.

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

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

PER CURIAM:

Claimant, appearing without counsel, appeals the Decision and Order (2015-LHC-01942) 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 started working for employer as a testing technician in November 2005. Tr. at 16-17. At the time claimant was hired, he underwent an entry-level hearing test that showed he did not have a hearing impairment. As a testing technician, claimant used instruments to test electrical currents and voltages on existing vessels and vessels under construction. After about 11 months with employer, he started working as an electrical instructor and supervisor. When claimant worked on vessels in the shipyard, he testified he was exposed to noise in all areas throughout the ship and stated that the engine rooms, where he worked about 50 percent of the time when he was on vessels, were “very loud.” *Id.* at 22-24. Employer provided claimant with foam inserts for his ears.

Claimant stopped working in April 2009, when he was placed on “long-term disability,” due to vision problems, until he was terminated in November 2010.¹ Claimant has not worked or been exposed to loud noises since that time. He testified he was not sure when he first noticed a hearing problem but that since leaving his employment, his hearing has been “fading gradually” and he experiences a constant ringing in his ears that keeps him up at night. Tr. at 32-33.

While claimant worked for employer, he underwent three additional audiograms in 2006, 2007, and 2008, each of which showed that claimant’s hearing was normal in both ears. EX 11. After claimant left employment, he underwent three additional audiograms in July 2013, December 2014, and October 2015. Audiologist Jorge Martinez conducted the December 2014 audiogram and found that claimant’s hearing was normal in both ears but he diagnosed claimant with subjective tinnitus and “unspecified hearing loss” based on claimant’s reported symptoms. EX 13 at 9. In June 2015, claimant was examined by Dr. Jason Guillot, an ear, nose, and throat physician, who performed an objective test that did not reveal tinnitus. EX 18 at 3. He referred claimant to Dr. Moises Arriaga, who diagnosed claimant with Meniere’s disease, of which tinnitus is a common symptom. Dr. Guillot stated that there is no relationship between noise exposure and Meniere’s disease. *Id.* at 5 (p.20), 8 (p.29). Dr. Guillot explained that Meniere’s disease is an inner ear disorder that is caused by a fluid imbalance in the inner ear and results in symptoms commonly described as tinnitus and hearing loss.

Claimant filed a claim for hearing loss benefits under the Act. The administrative law judge found that claimant timely provided notice of the alleged injury to employer and timely filed his claim. Decision and Order at 12. He concluded, however, that claimant failed to establish a prima facie case because he did not establish he sustained a “harm” because all the audiograms of record demonstrate claimant has normal hearing thresholds

¹ Claimant was told that he could no longer work after he was diagnosed with Best disease, an eye condition.

with a zero percent impairment rating. *Id.* at 15. The administrative law judge further found there is no evidence that claimant’s tinnitus is work-related and noted that, under the Sixth Edition of the American Medical Association *Guides for the Evaluation of Permanent Impairment* (AMA *Guides*), tinnitus alone is not compensable. *Id.* The administrative law judge accordingly denied the claim for benefits.

Claimant, without benefit of counsel, submitted to the administrative law judge a document titled “My Appeal for Reconsideration.”² The administrative law judge advised claimant that it was not a valid motion for reconsideration. *See* Emp. Br. at 1. Thereafter, claimant filed this appeal. Employer filed a response brief, urging affirmance of the denial of benefits.

Because claimant is acting without the assistance of counsel, we will address all findings adverse to claimant, namely the administrative law judge’s finding that claimant did not establish that he suffered a harm and therefore failed to establish a prima facie case.

A claimant must make a prima facie case that his claim is compensable by offering evidence that: (1) he suffered a harm and (2) a condition of the workplace could have caused, aggravated, or accelerated the harm. *Bis Salamis, Inc. v. Director, OWCP [Meeks]*, 819 F.3d 116, 50 BRBS 29(CRT) (5th Cir. 2016). The evidence to establish a prima facie case is a “low burden” and requires only evidence that is “more than a scintilla” that “might cause a reasonable person to accept the [administrative law judge]’s fact finding.” *Ramsay Scarlett & Co. v. Director, OWCP*, 806 F.3d 327, 331, 49 BRBS 87, 88(CRT) (5th Cir. 2015).

In this case, claimant alleged that he suffers hearing loss and tinnitus as a result of his working conditions. The administrative law judge acknowledged claimant’s testimony that he suffers from hearing loss, but found that “[t]he totality of audiological evidence in this case indicates claimant does not suffer from hearing loss.” Decision and Order at 13. This finding is supported by substantial evidence as all the audiograms in the record demonstrated claimant’s hearing in both ears was normal. *See* EX 11 at 1-5; EX 12 at 8-12; EX 13 at 8-9; EX 14 at 14-15; EX 15 at 1. In the absence of evidence that claimant has a ratable hearing impairment under the AMA *Guides*, he is not entitled to disability benefits. 33 U.S.C. §908(c)(13)(E); *Davison v. Bender Shipbuilding & Repair Co.*, 30 BRBS 45 (1996). Claimant’s subjective belief that he has a hearing loss is legally

² Claimant’s “Appeal for Reconsideration” stated that he was not contesting that he has no disability rating for hearing loss. He only contested that employer and his audiologist were obligated to document and inform him that he has Meniere’s disease and tinnitus.

insufficient to support an award of benefits. Therefore, we affirm the denial of benefits for hearing loss.

The administrative law judge also acknowledged that claimant was diagnosed with Meniere's disease, one symptom of which is tinnitus. However, the administrative law judge noted Dr. Guillot's deposition testimony that there is no relationship between noise exposure and Meniere's disease. EX 18 at 5 (p.20), 8 (p.29). In addition, the administrative law judge accurately noted that, under the *AMA Guides*, a diagnosis of tinnitus alone, without a measurable hearing loss, is not sufficient to establish a ratable impairment. Decision and Order at 15, citing *AMA Guides* at §11.2b (p. 249). Therefore, the administrative law judge denied the claim based on tinnitus as well. This finding is supported by substantial evidence and accords with law, and is affirmed. *See Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000).

In this case, there is no objective evidence that claimant has a ratable hearing impairment or that his tinnitus could be related to noise exposure at work. The administrative law judge's finding that claimant did not establish his prima facie case for benefits under the Act is rational, supported by substantial evidence in the record, and in accordance with law. *See Meeks*, 819 F.3d 116, 50 BRBS 29(CRT); *Mackey v. Marine Terminals Corp.*, 21 BRBS 129 (1988). We therefore affirm the administrative law judge's denial of benefits.³

³ To the extent that claimant's appeal is based on his assertion that he should be compensated because his audiologists and employer were obligated to inform him of the diagnosis of Meniere's disease, we note that this is not a claim which may be compensated under the Act.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge