U.S. Department of Labor

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

BRB No. 15-0039

JOHN ALDEN, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: Sept. 21, 2015
ELECTRIC BOAT CORPORATION	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Jonathan C. Calianos, Administrative Law Judge, United States Department of Labor.

Amity L. Arscott (Embry and Neusner), Groton, Connecticut, for claimant.

Edward W. Murphy (Morrison Mahoney LLP), Boston, Massachusetts, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits (2013-LHC-01923) of Administrative Law Judge Jonathan C. Calianos 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 findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, a voluntary retiree,[1] suffers from a permanent respiratory condition as a

[1]Claimant retired on October 11, 2011. The parties do not dispute the categorization of claimant as a voluntary retiree.

result of his occupational exposures to asbestos, dust, and fumes over the course of his 40-plus years of work with employer. Claimant was hospitalized in December 2010 for symptoms of pneumonia. At that time, Dr. Goccia allegedly informed claimant that he had work-related "emphysemas changes," prompting claimant to file a claim under the Act. HT at 53, 62. Claimant was subsequently treated by Dr. Duhig, a pulmonary specialist, for chronic bronchitis. CX 3.

In December 2012, subsequent to his retirement, claimant began treating with Dr. Matarese, who diagnosed chronic asthmatic bronchitis causally related to claimant's asbestos exposure with employer. CX 6. Based on a pulmonary function test (PFT) conducted, pre-retirement, by Dr. Duhig on May 23, 2011, Dr. Matarese opined on March 19, 2013, that claimant had a 17 percent lung impairment under the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*), on the date of his October 2011 retirement. *Id.* However, noting that his own PFTs of claimant showed improvement in claimant's condition from December 6, 2012 to December 9, 2013, Dr. Matarese subsequently rated claimant's lung impairment, as of the December 9, 2013 PFT, at six percent under the AMA *Guides*. *Id.* Employer's expert, Dr. Teiger, diagnosed claimant with chronic bronchitis due to his occupational exposures. EX 6. Dr. Teiger opined that claimant reached maximum medical improvement as of June 4, 2013, with a five percent lung impairment rating under the AMA *Guides*. *Id.*

In his decision, the administrative law judge awarded claimant permanent partial disability benefits pursuant to Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23), from March 19, 2013, for a six percent respiratory impairment. Specifically, the administrative law judge found that the date of claimant's injury is March 19, 2013, as this is the date he first became aware of the relationship between his disease, his disability, and his employment. Accordingly, as the date of injury under Section 10(i), 33 U.S.C. §910(i), is more than one year after claimant's retirement in October 2011, the administrative law judge applied the National Average Weekly Wage (NAWW), as of March 19, 2013, to calculate claimant's benefits, commencing from that "date of injury." 33 U.S.C. §910(d)(2)(B).

On appeal, claimant challenges the administrative law judge's date of injury/onset of disability finding and the application of the NAWW in the calculation of his benefits.[2] Employer responds, urging affirmance.

[2]The administrative law judge's finding that claimant has a six percent permanent impairment as a result of his work-related respiratory condition is affirmed, as it is unchallenged on appeal. *See generally Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

Onset Date

Claimant contends that the administrative law judge's finding that March 19, 2013, is the date of onset of his disability is not supported by substantial evidence or in accordance with law. Claimant asserts that the medical evidence, in conjunction with his testimony regarding his ongoing respiratory difficulties, establishes he had a permanent impairment of his lungs at the time he retired. Thus, as he retired on October 11, 2011, claimant maintains that his disability benefits should commence on October 11, 2011, rather than March 19, 2013.

Pursuant to Section 2(10) of the Act, 33 U.S.C. §902(10), "disability" in the case of a voluntary retiree, such as claimant, is defined as a permanent impairment under the AMA *Guides.* Thus, in order to obtain benefits pursuant to Section 8(c)(23), a retiree must establish that he has an impairment under the AMA *Guides* and that the impairment is permanent.[3] 33 U.S.C. §§902(10), 908(c)(23), 910(d)(2); *Morin v. Bath Iron Works Corp.*, 28 BRBS 205 (1994); *Carver v. Ingalls Shipbuilding, Inc.*, 24 BRBS 243 (1991). The Board has held that the onset date for benefits awarded under Section 8(c)(23) necessarily is the date the impairment became permanent.[4] *Barlow v. Western Asbestos Co.*, 20 BRBS 179 (1988); 33 U.S.C. §906.

The administrative law judge found that, on March 19, 2013, Dr. Matarese assigned claimant a 17 percent permanent lung impairment rating based on the May 23, 2011 PFT. CX 2. The administrative law judge, however, found that Dr. Matarese's retroactive permanent impairment rating is insufficient to establish a date of injury as of claimant's October 11, 2011 retirement, because claimant did not establish that he was aware of the impairment at that time, as required by Section 10(i). Finding no evidence that establishes claimant's awareness of a permanent impairment prior to Dr. Matarese's March 19, 2013 medical report, the administrative law judge concluded that claimant's

[3]Section 8(c)(23) provides for an award based on the percentage of permanent impairment "as determined under the *Guides* referred to in Section 2(10)." Section 2(10) defines the term "disability," for purposes of such awards as "permanent impairment, determined (to the extent covered thereby) under the guides to the evaluation of permanent impairment promulgated and modified from time to time by the American Medical Association, ..." *See also* 20 C.F.R §702.601(b); *Donnell v. Bath Iron Works Corp.*, 22 BRBS 136 (1989).

[4]In contrast, the average weekly wage of a voluntary retiree is determined as of the date of awareness of the relationship between the employment, the disease and the disability. 33 U.S.C. §910(d)(2), (i); *see Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989); *see* discussion, *infra*.

entitlement to permanent partial disability benefits under Section 8(c)(23) commenced on that date, rather than on the date of claimant's retirement in 2011.

We agree with claimant that the administrative law judge's analysis regarding the date of onset is not in accordance with law. Contrary to the administrative law judge's finding, the date of awareness under Section 10(i) is not controlling in determining the onset of disability date, as an employee may be permanently impaired prior to being "aware" as that term is used in the Act. *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989); *Barlow*, 20 BRBS at 179. Moreover, the Board has held that later medical reports may be used to establish that the claimant had a permanent impairment at an earlier time. *See, e.g., Tucker v. Thames Valley Steel*, 41 BRBS 62 (2007), *aff'd mem.,* 303 F.App'x 928 (2d Cir. 2008); *Alexander v. Triple A Machine Shop*, 32 BRBS 40 (1998), *decision after remand* 34 BRBS 34 (2000), *rev'd on other grounds sub nom. Alexander v. Director, OWCP*, 297 F.3d 805, 36 BRBS 25(CRT) (9th Cir. 2002). Therefore, we vacate the administrative law judge's finding that claimant's benefits under Section 8(c)(23) commenced on March 19, 2013, and we remand the case for further consideration. *Barlow*, 20 BRBS 179. The administrative law judge must re-evaluate the evidence of record to determine the date upon which claimant's respiratory impairment became permanent without regard to claimant's awareness of any permanent impairment.[5]

Average Weekly Wage

Claimant also contends that the administrative law judge erred in using the NAWW in effect in March 2013 pursuant to Section 10(d)(2)(B) to calculate his average weekly wage, instead of using his actual wages prior to retirement under Section 10(d)(2)(A). Section 10(i) of the Act states that for purposes of calculating average weekly wage:

> [W]ith respect to a claim for disability or death due to an occupational disease which does not immediately result in death or disability, the time of injury shall be deemed to be the date on which the employee or claimant

[5]We note that the fact that Drs. Teiger and Matarese stated that claimant's pulmonary function improved subsequent to the 2011 testing, EX 6, Dep. at 19-20; CX 6, Dep. at 21-22, and that the later PFTs may be a better indication of the actual extent of claimant's impairment do not preclude the administrative law judge from finding that claimant had a permanent impairment at an earlier date. Dr. Matarese stated that claimant's work-related chronic asthmatic bronchitis has been a permanent condition since 2010. CX 6, Dep. at 10-11, 13-15; *see generally Ponder v. Kiewit Sons' Co.*, 24 BRBS 46 (1990).

> becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability.

33 U.S.C. §910(i). Section 10(d)(2), 33 U.S.C. §910(d)(2), details the average weekly wage to be employed in occupational disease cases where the time of injury determined under Section 10(i) is within one year of voluntary retirement or is more than one year after retirement. *See Rajotte v. General Dynamics Corp.*, 18 BRBS 85 (1986). Section 10(d)(2)(A) specifies that if the employee's time of injury occurs within the first year of voluntary retirement, the average weekly wage shall be one fifty-second part of his average annual earnings during the 52-week period preceding retirement. 33 U.S.C. §910(d)(2)(A). Section 10(d)(2)(B) provides that, when a retiree's disability becomes "manifest" more than one year after his retirement, his average weekly wage is to be based upon the NAWW applicable at the "time of his injury" as determined under Section 10(i). 33 U.S.C. §910(d)(2)(B).

In this case, the administrative law judge found that claimant did not become fully aware of the relationship between his employment, his disease and his permanent impairment until March 19, 2013, which is more than one year after his October 11, 2011 retirement. In reaching this conclusion, the administrative law judge stated that "there is no evidence that establishes that [claimant] was aware of a permanent condition prior to Dr. Matarese's March 19, 2013 medical report" in which Dr. Matarese stated that claimant had a 17 percent impairment based on the May 2011 PFT. Decision and Order at 7. As that date was more than one year after claimant's retirement, the administrative law judge used the applicable NAWW to calculate claimant's average weekly wage pursuant to Section 10(d)(2)(B).

We agree with claimant that the administrative law judge did not fully assess the relevant evidence regarding claimant's date of awareness under Section 10(i). In addition to the evidence the administrative law judge relied on, claimant testified that he became aware of having an occupational disease, i.e., emphysematous changes in his lungs related to his work for employer, when he was hospitalized in 2010. HT at 53, 63. Claimant's December 7, 2010 chest CT scan revealed "mild emphysematous changes." CX 3 at 9-10. The 2010-2011 office notes of Dr. Duhig document claimant's respiratory condition.[6] CX 3. Moreover, while claimant acknowledged that he "never really

[6]Dr. Duhig's office notes indicate that claimant was seen on August 18, 2010, November 23, 2010, and November 22, 2011. CX 3. At each visit, claimant reported he had dyspnea. At the initial visit, Dr. Duhig diagnosed claimant with "chronic obstructive pulmonary disease chronic bronchitis pattern," while in the subsequent two visits, Dr. Duhig diagnosed "pulmonary interstitial/infiltrative disorders." *Id.* The record also contains reports from claimant's visits to Westerly Urgent Care on January 9 and April

discussed [an impairment rating] with my physicians," he stated that he was aware that he "had a problem" as far back as the 2010 hospitalization. HT at 56. Claimant testified he has needed medication for his symptoms since that time.[7] HT at 59, 61, 64, 66-67. Claimant underwent three PFTs pre-dating his 2011 retirement. CX 3 at 11-13. However, only the August 25, 2010 PFT includes a contemporaneous interpretation. Dr. Duhig stated this test showed a "mild restrictive defect by spirometry that was noted to be normal by the more accurate helium dilution lung volumes;" none of the three PFTs includes an impairment rating. *Id.*

As the administrative law judge did not discuss evidence that could support a finding that claimant was aware, or should have been aware, that he had a permanent impairment from his occupational respiratory disease prior to March 2013, we vacate the administrative law judge's finding that claimant's average weekly wage should be calculated by using the NAWW in effect on March 19, 2013, and we remand for reconsideration of this issue. *See generally Lewis v. Todd Shipyards Corp.*, 30 BRBS 154 (1996) (in an occupational disease case involving a voluntary retiree, the filing period under Sections 12 and 13 does not begin to run until claimant is aware or should have been aware that a permanent impairment exists);[8] *Maes v. Barrett & Hilp*, 27 BRBS 128 (1993) (Section 13 statute of limitations does not begin until claimant is aware, or should have been aware, of the relationship between occupational disease and medical disability); *Lombardi v. General Dynamics Corp.*, 22 BRBS 323 (1989) (in case under Section 8(c)(23), voluntary retiree not aware for purposes of Section 13 until he was aware that his work-related condition resulted in permanent medical impairment). A "permanent" impairment is one that is long-lasting or indefinite, as opposed to a condition that merely awaits a normal healing period. *See, e.g., Pittsburgh & Conneaut Dock Co. v. Director, OWCP*, 473 F.3d 253, 40 BRBS 73(CRT) (6th Cir. 2007); *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969).

12, 2010. CX 5. At the initial visit, claimant was diagnosed with sinusitis and at the latter he was diagnosed with bronchitis and sinusitis. *Id.*

[7]Claimant stated that he has been taking his medications, Proair, Advair, Claritin, and a nasal spray called Flonase, "since I started seeing Dr. Duhig," in 2010 "shortly after Dr. Goccia had told me what I had." HT at 59, 61, 64. Upon questioning by the administrative law judge, claimant reiterated that he has had essentially the same symptoms, difficulty breathing and production of phlegm, since his hospitalization in 2010. *Id.* at 66-67.

[8]The text of Section 10(i) is identical to that in Sections 12(a) and 13(b)(2) with respect to a claimant's "awareness" in an occupational disease case. 33 U.S.C. §§910(i), 912(a), 913(b)(2).

If, on remand, the administrative law judge determines that claimant's "date of injury" under Section 10(i) occurred within one year of his retirement, he should modify claimant's compensation rate to reflect the parties' stipulated figure of $1,295.20. 33 U.S.C. §910(d)(2)(A); Decision and Order at 2; *see also* ALJX 9; HT at 15-16; *Alexander*, 32 BRBS 40; *Coughlin v. Bethlehem Steel Corp.*, 20 BRBS 193 (1987). If the "date of injury" is more than one year after retirement, the administrative law judge should again use the appropriate NAWW. 33 U.S.C. §910(d)(2)(B).

Accordingly, the administrative law judge's findings regarding the date of injury under Section 10(i) and the date of onset of disability are vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the administrative law judge's decision is affirmed.

SO ORDERED.

_____
JUDITH S. BOGGS
Administrative Appeals Judge

_____
RYAN GILLIGAN
Administrative Appeals Judge

_____
JONATHAN ROLFE
Administrative Appeals Judge