BRB No. 93-1905

BOBBY JAMES HOUSEKNECHT)
)
Claimant-Petitioner)
)
v.)
) DATE ISSUED: _____
INGALLS SHIPBUILDING,)
INCORPORATED)
)
Self-Insured)
Employer-Respondent) DECISION and ORDER

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

Mitchell G. Lattof, Sr. (Lattof & Lattof, P.C.), Mobile, Alabama, for claimant.

Before: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (88-LHC-3644) of Administrative Law Judge A.A. Simpson, Jr., 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 worked as a pipefitter for employer during the years 1966, 1967, and 1977 to 1980. Claimant testified that he was exposed to load noises during this time period and that he worked around chippers, grinders, sandblasters, and gougers. Claimant filed a claim for benefits under the Act based on the result of a July 11, 1987, audiometric evaluation, which revealed a 7.5 percent hearing impairment in the left ear and a zero percent impairment in the right ear, for a binaural loss of 1.25 percent. Employer filed its Notice of Controversion on July 12, 1988.

In his Decision and Order, the administrative law judge found that claimant has a 1.5 percent binaural hearing impairment. However, the administrative law judge also found that as the narrative report of the audiologist was not written until over twenty months after the administration of the audiometric evaluation, the audiogram has no presumptive weight and claimant has failed to sustain

his burden of establishing the existence of a measurable hearing impairment at the time he left employment at Ingalls Shipbuilding. *See* Decision and Order at 2.

On appeal, claimant contends that the administrative law judge erred in failing to invoke the Section 20(a) presumption that his hearing loss is work-related, 33 U.S.C. §920(a), and that the administrative law judge erred in relying on Section 702.441 of the regulations, 20 C.F.R. §702.441, to give no weight to the only audiogram of record. In addition, claimant contends that once he established that he was exposed to injurious stimuli, it was the employer's burden of proof to establish that his hearing loss is not work-related or that a subsequent maritime employer exposed him to injurious stimuli. Employer has not responded to this appeal.

We are unable to affirm the denial of benefits in this case, as the administrative law judge's decision is not supported by substantial evidence or in accordance with applicable law. Initially, the administrative law judge did not apply the proper legal standards on the issues of causation and the responsible employer. The question of causation deals solely with whether claimant's hearing loss is related to noise exposure in his employment as a whole, rather than to employment with a specific employer. The responsible employer rule comes into play once causation is established and is a judicially-created rule for allocating liability among successive employers in cases where an occupational disease develops after prolonged exposure to injurious conditions. *See Travelers Insurance Co. v. Cardillo*, 225 F.2d 137, 144-45 (2d Cir. 1955), *cert. denied*, 350 U.S. 913 (1955). It is well-established that the employer responsible for paying benefits in an occupational disease case such as hearing loss is the last covered employer to expose claimant to injurious stimuli prior to the date he becomes aware that he is suffering from an occupational disease arising out of his employment. *See id.*; *see also Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 16 BRBS 13 (CRT)(9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984). In an occupational disease case, a distinct aggravation of an injury need not occur for an employer to be held liable as the responsible employer; exposure to injurious stimuli is all that is required. *See generally Good v. Ingalls Shipbuilding, Inc.*, 26 BRBS 159, 163 n.2 (1992).

In the present case, claimant contends that the administrative law judge erred in relying on Section 702.441 of the regulations to give no weight to the audiogram in finding that the Section 20(a) presumption was not invoked. The administrative law judge found that claimant failed to establish a measurable hearing impairment at the time he left work at employer's facility because the audiologist's report is dated 20 months later than the audiogram and claimant's testimony regarding later exposure to noise is not credible.

Claimant has the burden of proving the existence of a harm and that working conditions existed which could have caused the harm in order to establish a *prima facie* case under Section 20(a). *See Noble Drilling Co. v. Drake*, 795 F.2d 478, 19 BRBS 6 (CRT)(5th Cir. 1986). The administrative law judge found that the Section 20(a) presumption was not invoked inasmuch as the narrative report of the audiologist was not written until March 30, 1989, over twenty months after the administration of the audiogram. Decision and Order at 2. Section 702.441(b) provides the requirements needed in order for an audiogram to be given presumptive weight of the amount of claimant's hearing loss.[1] Contrary to the administrative law judge's finding, this section does not

[1]Section 702.441(b) provides that an audiogram shall be given presumptive weight regarding the

provide that an audiogram is to be rejected if it does not meet these requirements; rather, the audiogram may still have probative value as to claimant's hearing loss. Moreover, the regulation is relevant to the degree of claimant's hearing loss and not the cause of it. Furthermore, in determining the extent of impairment, the exact degree of work-related impairment at the time of the last covered "exposure" need not be ascertained and, in the absence of credible evidence of record regarding the extent of the claimant's hearing loss at the time he left covered employment, the administrative law judge may rely on other evidence in determining the extent of the claimant's compensable hearing loss. *See Dubar v. Bath Iron Works Corp.*, 25 BRBS 5 (1991); *Labbe v. Bath Iron Works Corp.*, 24 BRBS 159 (1991); *cf. Bruce v. Bath Iron Works Corp.*, 25 BRBS 157 (1991)(administrative law judge was specifically instructed on remand to determine the extent of claimant's work-related hearing loss from 1951 until he began work at employer's non-covered facility in 1953 and rationally found later results could not be factored back).

In the present case, there is one uncontradicted audiogram of record that has been interpreted as showing that claimant has a 7.5 percent monaural or a 1.25 percent binaural impairment, which is possibly work-related. *See* Cl. Ex. 7. In addition, the record contains data collected from Ingalls Shipbuilding during the time that claimant was employed there that indicates a harmful decibel level of noise. *See* Cl. Ex. 6. Therefore, we hold that the Section 20(a) presumption is invoked as a matter of law. *See Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 316, 318 (1989). As there is no evidence of record that establishes that noise exposure during the course of claimant's employment did not cause, aggravate, or contribute to his hearing loss, rebuttal of the Section 20(a) presumption cannot be established. Accordingly, on these facts, we hold that causation is established as a matter of law and the case is remanded to the administrative law judge for a finding on the extent of claimant's impairment. *See generally Bell Helicopter International, Inc. v. Jacobs*, 746 F.2d 1342, 17 BRBS 13 (CRT)(8th Cir. 1984).

As claimant's hearing loss is work-related, the last employer to expose him to potentially injurious stimuli is liable as the responsible employer; an actual causal relationship between claimant's hearing loss and that employment is not necessary. *See Lustig v. Todd Pacific Shipyards Corp.*, 20 BRBS 207 (1988), *aff'd in pert. part and rev'd in part sub nom. Lustig v. U.S. Dept. of Labor*, 881 F.2d 593, 22 BRBS 159 (CRT)(9th Cir. 1989). It is employer's burden of proof to establish that it is not the responsible employer, by showing that the employee was exposed to injurious stimuli while performing work covered under the Act for a subsequent employer. *See Avondale Industries, Inc. v. Director, OWCP*, 977 F.2d 186, 26 BRBS 111 (CRT)(5th Cir. 1992); *General Ship Service v. Director, OWCP*, 938 F.2d 960, 25 BRBS 22 (CRT)(9th Cir. 1991). *See also Lins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 62 (1992); *Susoeff v. The San Francisco Stevedoring Co.*, 19 BRBS 149 (1986).

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amount of the hearing loss if it meets the following requirements: 1) it is administered by a licensed or certified audiologist; 2) the employee was provided the audiogram and a report thereon at the time it was administered or within 30 days thereafter; and 3) there is no contrary audiogram of equal probative value. 20 C.F.R. §702.441(b).

In the instant case, the administrative law judge reviewed claimant's testimony regarding subsequent exposure and found that as claimant's testimony was not credible, claimant had not established that he was not exposed to noise after he left work at employer's facility until the date of the audiogram. However, it is not claimant's burden of proof to establish the last employer to expose him to potentially injurious stimuli; rather, employer may establish that it is not the responsible employer by showing that the employee was exposed to injurious stimuli while performing work covered under the Act for a subsequent employer. *Susoeff*, 19 BRBS at 151. Therefore, we vacate the administrative law judge's finding that claimant has not established that Ingalls Shipbuilding is the last maritime employer of record and remand the case to the administrative law judge for further consideration. On remand, the administrative law judge should reconsider the responsible employer issue in light of all of the relevant evidence, placing the burden of proof on the employer consistent with *Avondale Industries* and *Susoeff*.[2] *See Lins,* 26 BRBS at 65.

[2]In addition, the administrative law judge should note on remand that in *Tanner v. Ingalls Shipbuilding, Inc.*, 2 F.3d 143, 27 BRBS 113 (CRT)(5th Cir. 1993), the United States Court of Appeals for the Fifth Circuit held that where claimant has a measurable occupational hearing loss in only one ear, his compensation should be calculated on a monaural basis pursuant to Section 8(c)(13)(A). 33 U.S.C. §908(c)(13)(A).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is vacated, and the case is remanded for reconsideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge