

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-049

RONALD LEIDELMEYER,
Claimant - Respondent,

v.

NBC NEWS and ELECTRIC INSURANCE COMPANY,
Employer/Insurer – Petitioners.

Appeal from an February 26, 2015 Compensation Order on Remand by
Administrative Law Judge Mark W. Bertram
AHD No. 10-279B, OWC No. 645170

(Decided August 4, 2015)

Robert G. Blackford for the Claimant
W. John Vernon for the Employer

Before HEATHER C. LESLIE, MELISSA LIN JONES, and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

HEATHER C. LESLIE for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

The background and facts as outlined by the Compensation Order on Remand under appeal are uncontested by the parties and are as follows:

Claimant was working for NBC News as a camera operator at the Atlanta Summer Olympics on July 27, 1996 when a bomb exploded near him with shrapnel striking him in the back of his head. In addition to the shrapnel wounds, Claimant also complained of hearing loss. Claimant filed a claim for permanent partial disability benefits for loss of hearing in both ears and for a disfigurement award.

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In a January 16, 2013 Compensation Order (CO), Claimant's request for permanent partial impairment for loss of hearing in both ears was denied, but he was granted an award of \$250.00 for disfigurement to his head. Claimant filed an appeal with the Compensation Review Board (CRB) challenging the decision to deny him permanent partial disability benefits. In an April 18, 2013 Decision and Remand Order (DRO), the CRB determined the Administrative Law Judge (ALJ) did not properly analyze the record evidence when, after finding Claimant did show he had sustained some degree of permanent hearing loss in part of the audible spectrum, she denied the claim on the basis that he did not prove impairment of the full hearing spectrum.

On remand, the ALJ reevaluated the evidence and determined that Claimant sustained a 55% loss of hearing in the right ear and a 60% loss in the left ear. After adding an additional 5% impairment to each ear for ongoing tinnitus, the ALJ granted Claimant a schedule award for permanent partial impairment due to loss of hearing at 60% for the right ear and 65% for the left ear. In addition, the ALJ ruled that insofar as each ear was rated separately, compensation under the schedule would be paid for 52 weeks for each ear, as opposed to 200 weeks for loss of hearing to both ears. Both parties filed a timely application for review (AFR) and an opposition.

Leidelmeyer v. NBC News, CRB No. 13-147, AHD No. 10-279B (April 29, 2014)(hereinafter DRO)(footnotes omitted).

In the DRO, the CRB concluded the ALJ made a determination on Claimant's hearing loss that was not supported by the substantial evidence in the record as the ALJ had misinterpreted the medical evidence in the record, specifically determining "HL" meant "hearing loss" and not "hearing level" when analyzing Claimant's exhibit 3. The CRB stated:

It is undisputed that Claimant has some degree of hearing loss. There is nothing in the record to suggest that the measurement of Claimant's hearing level in decibels equates to the percentage of hearing loss sustained. Given that the ALJ has found both Claimant's and Employer's impairment ratings to be problematic, the ALJ is instructed again to evaluate the evidence in order to arrive at an impairment rating that complies with the test established in *Jones*.

DRO at 6.

A Compensation Order on Remand (COR) was issued on February 26, 2015. In that COR, the ALJ determined Claimant was entitled to a 45% permanent partial disability award for a loss of hearing to both ears. Employer's current appeal followed.

In the current appeal, Employer argues that the ALJ's award is arbitrary, capricious, and not supported by the substantial evidence in the record and not in accordance with the law. Employer further argues the ALJ erred in rejecting Employer's evidence.

THE STANDARD OF REVIEW

The scope of review by the Compensation Review Board (“CRB”) is limited to making a determination as to whether the factual findings of the appealed Compensation Order are based upon substantial evidence in the record and whether the legal conclusions drawn from those facts are in accordance with applicable law. Section 32-1521.01(d)(2)(A) of the District of Columbia Workers’ Compensation Act, as amended, D.C. Code § 32-1501 to 32-1545, (“Act”). Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

DISCUSSION AND ANALYSIS

Employer argues the ALJ’s award of permanent partial disability benefits is arbitrary, capricious and not supported by the substantial evidence in the record, as according to the Employer, Claimant did not present any evidence to support a disability rating. Employer further argues the ALJ’s analysis was flawed as it is not supported by the evidence nor in accordance with the Act. We disagree.

As Employer acknowledges, the ALJ noted Dr. Mark Soltany’s March 8, 2012 report, quoting the following paragraph:

"In the years that followed, (*the 1996 blast*) Mr. Leidelmeyer became aware of a hearing loss that has also been associated with the sound blast. The hearing loss pattern was initially found to be an upper and high-frequency loss of approximately forty percent and equal in both ears. Since that time, the hearing loss has progressed further and *now is approximately sixty percent loss of hearing in the upper, mid, and high frequencies...* My impression is that Mr. Leidelmeyer has evidence of downsloping bilateral sensorineural hearing loss of a severe degree." (*Emphasis added*) (CE 1).

COR at 5-6.

The ALJ, utilizing Dr. Soltany’s opinion, then looked to Claimant’s exhibit 3 to determine what percentage of hearing loss Claimant may suffer from. Specifically:

Evaluating Claimant’s hearing loss, Dr. Soltany begins his narrative describing the loss at the 3000Hz level and ends the narrative at the 8000Hz level. (CE 11). CE 3 is the February 7, 2012 audiogram. Comparing CE 11 and CE 3 side by side, I deduce that 3000Hz to 8000Hz is the mid to high frequency levels Dr. Soltany refers to when he opines Claimant has lost 60% of his hearing capability in these ranges (upper mid range to high range).

The graphed frequency levels in CE 3 can logically be broken down into three quadrants of frequency level - low, mid and high. Using the graphs in CE 3, I make reasonable inferences that lower level hearing frequency would begin at 250 Hz as this is where charting on the graph begins. Claimant has no loss of

hearing at that level, or "low frequency level." 3000Hz is higher mid-range frequency as this is where Dr. Soltany begins his discussion of Claimant's mid frequency hearing loss. 8000Hz is where the charting ends and is the high frequency level Dr. Soltany discusses as Claimant's high frequency hearing loss.

Using the three quadrant analysis and Dr. Soltany's reports, Claimant has no hearing level loss in one quadrant; but, has a 60% hearing level loss spread over two of the quadrants. Each quadrant encompasses 33 1/3% of the audiogram graph which represents the hearing levels at issue in this case. It is my determination then that Claimant has a 60% hearing loss over 66 2/3 % of the hearing levels. This equates to a 40% hearing level loss of both ears. (CE 1; CE 11).

An opposing argument could be made that perhaps the percentages should be lower - since the hearing level loss begins at the upper mid-level. If it is said by Claimant's evidence that Claimant has approximately a sixty percent loss of hearing in the upper mid, and high frequencies in both ears, it stands to reason with no evidence to the contrary that Claimant has retained a 40% capability in the same range - and no loss of hearing in the lower ranges. Claimant retains a significant degree of hearing capability albeit with permanent ringing in his ears and severe degradation of upper mid and high frequency hearing. While the rationalization that Claimant retains a significant hearing capability might be more relevant to a worker that does not rely as much on their hearing as Claimant does, Claimant suffers from a significant degraded ability to perform his work as a result of hearing loss.

Based on the record evidence, Claimant has lost 60% hearing of both ears at the mid and high frequency levels. I therefore find Claimant has a 40% permanent partial disability of both ears and this disability significantly reduces Claimant's ability to perform his job as compared to his pre injury level.

COR at 7. (Footnotes omitted.)

Employer first argues the ALJ's "three quadrant analysis" is not based on any methodology in the medical community and is arbitrary and not supported by any evidence in the record. Employer specifically argues that the analysis is contrary to the AMA Guides as it may be "inferred from the guides that hearing loss at lower frequencies is more disabling than hearing loss at higher frequencies." We reject this argument.

While utilizing the term "quadrant" may be confusing and inaccurate, it is clear by the analysis above that the ALJ is dividing the graph in CE 3 into three sections representing low, medium, and high frequency levels. Utilizing this graph and Dr. Soltany's opinion that the Claimant suffered a 60% loss of hearing at the upper, mid and high frequencies, the ALJ determined Claimant suffered from a 40% permanent partial disability of both ears, or 2/3 of 60%.

Employer urges us to “infer” from the AMA guides that a hearing loss at high frequency levels, such as the Claimant suffers from, is less disabling than hearing loss at lower frequency levels.¹ Employer has attached several documents to its appeal in support of this argument, including several pages of AMA guides. Employer has not submitted any Motion to Re-Open the Record detailing any reason why the medical documents should be admitted. It is well settled in this jurisdiction that reopening of the evidentiary record for the receipt of additional evidence is only appropriate upon a showing of unusual circumstances, and then only if it is determined that the evidence is material and relevant. *Woodfork v. WMATA*, CRB No. 09-033, AHD No. 08-344, (April 13, 2009) quoting *Young v. D.C. Dept. of Employment Services*, 681 A.2d 451, 456 (D.C. 1996). The additional documents will not be considered by this Panel.

Thus, any inference Employer urges us to take is speculation and without further explanation or evidence, we find the ALJ’s rationale to be supported by the evidence submitted. As the ALJ noted in Footnote 3,

Contrary to Claimant's Counsel's closing arguments that Dr. Soltany gave an overall rating of 60% to each ear, Dr. Soltany is clear that the 60% is in reference to loss of hearing in the upper, mid and high frequencies. It appears no depositions were taken in this case which might have provided some clarity with regards to the scant medical reports in evidence. Nonetheless, this Tribunal can only consider the record evidence.

COR at 6-7.

Moreover, the ALJ did address Employer’s argument that the ultimate award should be lower based upon hearing loss at the upper ranges, stating,

An opposing argument could be made that perhaps the percentages should be lower - since the hearing level loss begins at the upper mid-level. If it is said by Claimant's evidence that Claimant has approximately a sixty percent loss of hearing in the upper mid, and high frequencies in both ears, it stands to reason with no evidence to the contrary that Claimant has retained a 40% capability in the same range - and no loss of hearing in the lower ranges. Claimant retains a significant degree of hearing capability albeit with permanent ringing in his ears and severe degradation of upper mid and high frequency hearing. While the rationalization that Claimant retains a significant hearing capability might be more relevant to a worker that does not rely as much on their hearing as Claimant does, Claimant suffers from a significant degraded ability to perform his work as a result of hearing loss.

COR at 8.

¹We note that the word “disability” and “impairment” are used somewhat interchangeably in the filings in this case. This interchangeability can at times be problematic, given that in some instances the distinctions can have legal significance.

We decline to follow Employer's argument. What the Employer is asking us to do is to reweigh the evidence in its favor, inferring a lower result based upon evidence not submitted into evidence, a task we will not do. As we stated above, the CRB is constrained to uphold a Compensation Order that is supported by substantial evidence, such as the case *sub judice*.

Employer argues further that the ALJ should have utilized the five factors outlined in D.C. Code 32-1508(3)(u-i) when determining permanent disability. As part of his analysis, the ALJ stated:

Effective April 16, 1999, five factors were included in the Act, as supplements to the AMA Guides, for consideration in determining disability ratings. Those factors are (1) pain, (2) weakness, (3) atrophy, (4) loss of endurance, and (5) loss of function. In making determinations of nature and extent of permanent disability under the schedule of the D.C. Code, as amended, § 32-1508, the fact finder is not bound by the opinions of evaluating physicians. *Negussie v. D.C. DOES*, 915 A.2d 391 (2007).²

Although each of the five factors do not explicitly apply to the instant case, where each factor can be synthesized to the instant case it is. In addition, I have at a minimum taken into consideration in rendering my decision the following: Claimant's proximity to the blast, Claimant's age, his now auditory deficit and loss of hearing levels, continuous ringing in his ears and, his co-workers must raise their voices when communicating with Claimant on the job. Further, I take into consideration Claimant's testimony that he has difficulty hearing certain noises through his equipment; noises Claimant must filter out in order to ensure a proper work product. Claimant's hearing condition affects his ability to do his job as his co-workers essentially assist Claimant whether consciously or not. (*citations omitted*).

COR at 4-5.

It is clear from the above, contrary to the Employer's argument, that the ALJ did take into consideration the five factors enunciated in 32-1508. We reject Employer's argument.

Next, Employer argues that the ALJ's conclusion that Claimant is entitled to an additional 5% for tinnitus is arbitrary and not supported by the evidence. On this point, the ALJ stated,

Without finding conclusively that the AMA guidelines referenced by Dr. Soltany place a maximum disability for tinnitus at 5%, I find Dr. Soltany's reference to the guidelines persuasive. Dr. Soltany's description of Claimant's tinnitus and how it affects Claimant on the job is compelling. Dr. Soltany describes the condition as making Claimant's work extremely difficult. (CE 11 p.2). As such, I award the Claimant an additional five-percent (5%) permanent partial disability of both ears for tinnitus.

² Also effective on April 16, 1999, "the periods of compensation set forth in subparagraphs (A) through (S) of this paragraph shall each be reduced by a proportion of 25% of the stated period of weeks, rounded upward to the nearest whole week." D.C. Code 32-1508(V)(iii).

COR at 8.

A review of CE 11 supports the ALJ's conclusion above wherein Dr. Soltany opined that "the AMA guidelines will count a maximum disability for tinnitus, no matter how severe, at five percent." Employer's argument that a finding for disability of an additional 5% in each ear is not supported by the substantial evidence in the record is contrary to Dr. Soltany's opinion that a 5% impairment to each ear is warranted, no matter the severity. We affirm the ALJ's conclusion that Claimant is entitled to an additional 5% to each ear based upon his tinnitus.

We next address Employer's argument that the ALJ's basis for rejecting Dr. Dettelbach's opinion was arbitrary and not supported by the substantial evidence. In rejecting the opinion of Dr. Dettelbach, the ALJ stated:

While I consider Dr. Dettelbach's opinions, I reject them as evidence of the level of Claimant's hearing impairment. Dr. Dettelbach reports the Claimant calculates at a 0% hearing impairment in the right ear and a 4% hearing impairment in the left ear. All of the reports and audio tests in evidence prove a significant hearing degradation in both ears.

I also discount Dr. Dettelbach's report wherein he equates a 3dB of hearing loss due to age for two reasons. First, there is no evidence that Claimant ever suffered any hearing loss prior to the bombing and second, Dr. Dettelbach does not make this 3dB loss opinion to a reasonable degree of medical certainty or probability. I also discount Dr. Dettelbach's report of a 3% impairment to both ears for Claimant's tinnitus as he sets forth no rationale as to how he reached his 3% impairment rating. Dr. Soltany's evaluation of Claimant is more credible and backed up by the evidence.

COR at 7.

In support of its argument that the above analysis is in error, Employer relies upon several records attached to the appeal, which as noted above will not be taken into consideration. Employer points this panel to no record based reason why the ALJ's rejection of Dr. Dettelbach is in error. Having weighed the two IME opinions, the ALJ found more persuasive the opinion of Dr. Soltany, concluding his opinions are more in line with the evidence submitted. We affirm this conclusion and as Dr. Dettelbach's opinion was rejected, Employer's argument that his reports should be accorded more weight as more in line with the Act and AMA guides (again relying heavily on documents not admitted) is moot.

Finally, Employer argues that "if the ALJ disagrees with the methodology articulated in the AMA Guides and the Act, he should request additional evidence and/or schedule a new hearing." Employer's argument at 15. Per footnote 1, Employer had an opportunity to request a new Formal Hearing in response to the new ALJ's Order to Show Cause as to why the ALJ could not decide the case as the prior ALJ had left the agency before rendering a decision. Employer could have then submitted additional evidence it deemed relevant but instead, Employer did not

respond to the Order or object in anyway. Regardless, as we are affirming the COR, Employer's argument is rendered moot.

CONCLUSION AND ORDER

The February 26, 2015 Compensation Order on Remand is supported by the substantial evidence in the record and in accordance with the law. It is AFFIRMED.

So Ordered.