

OPINION ENTERED: June 4, 2012

CLAIM NO. 201101347

BASHIR ADEN

PETITIONER

VS. APPEAL FROM HON. JONATHAN R. WEATHERBY, JR.,
ADMINISTRATIVE LAW JUDGE

NTH WORKS
and HON. JONATHAN R. WEATHERBY, JR.,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION VACATING
AND REMANDING

* * * * *

BEFORE: ALVEY, Chairman; STIVERS and SMITH, Members.

ALVEY, Chairman. Bashir Aden ("Aden") seeks review of the order entered January 31, 2012, by Hon. Jonathan R. Weatherby, Jr., Administrative Law Judge ("ALJ"), dismissing his hearing loss claim against NTH Works ("NTH"). Aden also appeals from the orders on reconsideration entered February 22, 2010 and March 20, 2012.

On appeal, Aden argues the ALJ misconstrued controlling precedent and applied an incorrect standard in dismissing the claim for failure to establish a *prima facie* case. Aden also argues the ALJ erred in failing to clarify whether the dismissal was with or without prejudice. We vacate and remand.

Aden filed a Form 103, Application for Resolution of Hearing Loss Claim, on October 12, 2011, alleging he sustained a work-related hearing loss on August 30, 2010 from working around "large and loud machinery" since April 2007. In support of his claim, Aden filed the results of a hearing test conducted August 30, 2010, by HearSafe Group Companies, Inc., who had performed testing at NTH's request. That test demonstrated Aden had a mild hearing loss in the left ear, and a moderately severe hearing loss in the right ear.

Also in support of his claim, Aden filed reports of Dr. Kenneth L. Silk dated October 12, 2010, January 25, 2011, and, March 1, 2011. In the October 12, 2010 report, Dr. Silk stated the following:

My impression is that of **mild high-frequency hearing loss bilateral**. The high frequency acoustic notch pattern would suggest either a concussive or noise-induced etiology to that loss.

Currently no amplification is necessary. I advised noise precautions, and I have asked him to provide his previous audiograms for review so as to compare with current audiometric data.

. . .

In essence, my impression is that of high frequency **mild sensorineural hearing loss with an acoustic notch patten bilaterally right slightly greater than left.** This loss is not disabling at the present time and speech reception levels of 15 db should allow adequate function with on[sic] need for aiding. Because of the pattern of this loss and his noise exposure, I have cautioned him in terms of noise protections so as to not add to the current pattern of loss described.
(Emphasis added)

In the January 25, 2011 report, Dr. Silk stated the following:

With an interpreter present an audiogram was done. His responses were unreliable and not repeatable as detailed by the audiologist's report of today's date. In the past, he has had responses ranging from moderately severe loss to normal and has had normal OAEs.

At this point, I am unable to accurately ascribe an answer to the question of what his true organic hearing level is. I suggested an ABR be done at our Springs office. We will have him come in with an interpreter again for that examination.

Finally in his report dated Mach 1, 2011, Dr. Silk stated the following:

Otoacoustic showed hearing at 20 decibels. **Because of the possible high-frequency hearing loss, right greater than left, we have asked him to avoid louder damaging noise and use noise protection whenever exposed in the workplace or otherwise.** I suggested a recheck of his audiogram in 1 year or as needed. I have explained possible etiologies of genetic hearing loss or noise-induced or combinations of those two.
(emphasis added)

On December 22, 2011, NTH filed a motion to dismiss the claim arguing the medical documentation attached with the application did not indicate a hearing loss, and a *prima facie* case had not been made. Further, NTH argued even if a hearing loss was present, Aden failed to establish the loss is related to his employment.

A scheduling order was issued on January 12, 2012, setting a Benefit Review Conference on May 16, 2012, in Louisville, Kentucky. NTH filed a Form 111-HL, Hearing Loss Notice of Claim Denial or Acceptance, on January 20, 2012 asserting Aden did not allege a hearing loss arising out of his employment, did not give due and timely notice to the employer, and did not meet his burden of establishing the required elements of a compensable hearing loss injury.

In his order entered January 31, 2012, the ALJ stated as follows:

The Defendant having filed a Motion to Dismiss on the basis that the Plaintiff has failed to make a *prima facia*[sic] case that that[sic] the medical report does not support a hearing loss and/or a connection as between the alleged hearing loss and the nature of the work and the Administrative Law Judge having reviewed the pleadings,

IT IS HEREBY ORDERED and ADJUDGED that a *prima facia*[sic] case has not been made and that the Application for Benefits is hereby DISMISSED.

Aden filed a petition for reconsideration on February 10, 2012 asserting the ALJ erred in dismissing the claim. Aden cited the audiograms stating mild to moderately severe hearing loss, serve to establish a *prima facie* case. Aden filed a supplemental petition for reconsideration on February 13, 2012 to which he attached the first report of injury dated February 4, 2011 wherein he alleged the employer admitted he had a hearing loss detected during annual hearing tests.

In his order entered February 22, 2012, the ALJ stated as follows:

This matter comes before the undersigned Administrative Law Judge upon the Petition for Reconsideration filed by the plaintiff as well as the response filed thereto by the defendant/employer. Plaintiff seeks reconsideration of an Order dismissing his hearing loss claim for failure to state a *prima facie* case. As the defendant/employer points out, several

medical notes from Dr. Kenneth Silk were attached to the Claim Application. In an October 12, 2010 visit, Dr. Silk concluded that the plaintiff had a mild high-frequency hearing loss that did not rise to the level of being disabling. He recommended the use of ear protection and specifically stated that no amplification was necessary at that time.

The plaintiff was also seen in Dr. Silk's office on January 11, January 25 and March 1, 2011. Dr. Silk was unable to this [sic] ascribe an organic hearing level to the plaintiff in either of the January visits due to "difficulties with understanding the test or compliance." Dr. Silk therefore ordered an involuntary test to be conducted and saw the plaintiff again on March 1 in order to discuss those results. Dr. Silk noted on the March 1 visit that there had been no changes in the hearing of the plaintiff. He concluded by saying "His hearing is thought to be good with possibly a high-frequency hearing loss although exacting or adequate pure tone responses are not repeatable and are thought to be unreliable."

KRS 342.7305(4) creates a rebuttable presumption of a work-related hearing impairment when audiograms and other testing reveal a pattern of hearing loss compatible with that caused by hazardous noise exposure. Plaintiff has failed to establish a pattern of hearing loss through the use of audiograms or other testing as the statute requires because as Dr. Silk stated, the results of such tests are either inconclusive or show no disabling hearing loss. Consequently, the Petition for Reconsideration is DENIED.

Aden filed a second petition for reconsideration on March 2, 2012 alleging the ALJ applied an incorrect standard in denying his petition for reconsideration. Aden argued, as he does on appeal, the applicable regulations do not provide for motions to dismiss. Aden also argued, again as he does on appeal, the order dismissing the claim was unclear as to whether the dismissal was with or without prejudice.

In his order entered March 20, 2012, the ALJ stated as follows:

This matter comes before the undersigned Administrative Law Judge upon the Second Supplemental Petition for Reconsideration filed by the Plaintiff as well as the response filed thereto by the Defendant. Plaintiff again seeks reconsideration of an Order dismissing his hearing loss claim for failure to state a *prima facie* case. 803 KAR 25:010(7)(1)(d) requires that an Application for Resolution of a Hearing Loss Claim contain "One medical report describing the hearing loss which is the basis of the claim." Plaintiff filed a medical report indicating the presence of inconsistent hearing levels between the left and right ears and suggesting the possibility of a medical problem as the cause. The Plaintiff was then referred to a hearing loss specialist in order to further opine on the Plaintiff's hearing. That specialist, Dr. Silk, repeatedly concluded that there were no reliable testing results that yielded a disabling hearing loss on the part of the Plaintiff. Dr. Silk went so far as to express dismay that

the Plaintiff continued to complain of hearing loss over a two-year period when he could document no testing result consistent with his complaints.

As the Plaintiff points out, KRS 342.7305(4) creates a rebuttable presumption of a work-related hearing impairment when audiograms and other testing reveal a pattern of hearing loss compatible with that caused by hazardous noise exposure. Plaintiff has failed to establish any disabling hearing loss as the medical evidence provided is inconclusive to that point.

Consequently, the Supplemental Petition for Reconsideration is DENIED.

As the claimant, Aden bore the burden of proof and the risk of non-persuasion on all elements of the claim. See Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). As trier of fact, the ALJ is the gatekeeper and arbiter of the record both procedurally and substantively. For purposes of KRS Chapter 342, it has long been accepted the ALJ has the authority to control the taking and presentation of proof in a workers' compensation proceeding in order to facilitate the speedy resolution of the claim and to determine all disputes in a summary manner. Dravo Lime Co., Inc. v. Eakins, 156 S.W.3d 283 (Ky. 2005); Yocum v. Butcher, 551 S.W.2d 841 (Ky. App. 1977); Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991); Searcy v. Three Point Coal Co., 134 S.W.2d 228, 231 (Ky. 1939).

When filing an injury claim, the regulations require, "[a] medical opinion establishing a causal relationship between the work-related events or the medical condition which is the subject of the claim." 803 KAR 25:010(5)(1)(d)2. A hearing loss claim, however, only requires, "[o]ne medical report describing the hearing loss which is the basis of the claim and, if a psychological condition is alleged, an additional report establishing the mental impairment or disorder." 803 KAR 25:010(7)(1)(d).

We believe the filing of medical evidence establishing some degree of hearing loss is required when pursuing a hearing loss claim. While we disagree with Aden's argument that the ALJ is precluded from dismissing a claim at this stage of litigation, we find it significant the audiogram performed at NTH's request on August 30, 2010 established Aden had a mild hearing loss in the left ear, and a moderately severe loss of hearing in the right ear. Likewise, although he did not state the hearing loss was as significant as that stated in the hearing test performed at NTH's request on August 30, 2010, Dr. Silk opined some degree of hearing loss was present.

We believe Aden satisfied the regulatory requirement and the ALJ erred in dismissing his hearing loss claim. We therefore vacate and remand the ALJ's opinion and

orders on reconsideration. On remand, the ALJ shall issue a scheduling order and conduct all proceedings necessary for resolution of this claim, including a referral for a university hearing loss evaluation pursuant to KRS 342.315. We express no opinion herein regarding the viability of Aden's claim or whether he may ultimately prevail on the merits. However, we believe the records attached with the Form 103 are sufficient to allow him to proceed with the litigation of his claim.

Accordingly, the ALJ's order dismissing entered January 31, 2012, and his orders on reconsideration issued February 22, 2012, and March 20, 2012 are hereby **VACATED** and **REMANDED** for the ALJ to conduct proceedings consistent with the views expressed in this opinion.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON CHRISTOPHER EVENSEN
6011 BROWNSBORO PK BLVD, #A
LOUISVILLE, KY 40207

COUNSEL FOR RESPONDENT:

HON WARD BALLERSTEDT
333 GUTHRIE GREEN, STE 203
LOUISVILLE, KY 40202

ADMINISTRATIVE LAW JUDGE:

HON JONATHAN R WEATHERBY JR
2780 RESEARCH PARK DRIVE
LEXINGTON, KY 40511