U.S. Department of Labor

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

BRB No. 16-0223

REGINALD JOHNSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED: Dec. 19, 2016
NORFOLK SOUTHERN RAILWAY COMPANY	)	
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Dana Rosen, Administrative Law Judge, United States Department of Labor.

Robert E. Walsh (Rutter Mills LLP), Norfolk, Virginia, for claimant.

Christopher R. Hedrick (Mason, Mason, Walker & Hedrick, P.C.), for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2014-LHC-01554) of Administrative Law Judge Dana Rosen 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 alleged that he injured his back on April 4, 2014, while moving an oxygen cart during the course of his employment for employer as an operator/oiler. He notified employer that day of the injury, although he continued working in his usual job until April 22, 2014. Claimant was examined by his family physician, Dr. Santacruz, on April 23, 2014, who referred him to Dr. Wardell, an orthopedic surgeon. Dr. Wardell

prescribed physical therapy and kept claimant off work until August 11, 2014. Employer referred claimant to a work hardening program before allowing him to resume work on September 2, 2014. Claimant sought benefits for the period he was off work. Employer challenged the compensability of the claim for benefits and whether Dr. Wardell's treatment was reasonable and necessary.

In her decision, the administrative law judge found claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), that his back condition is related to the employment incident, which employer did not rebut. Alternatively, based on the record evidence as a whole, the administrative law judge found claimant established that his back condition is related to the work incident. The administrative law judge found that claimant is entitled to compensation for temporary total disability, 33 U.S.C. §908(b), from April 23 to September 1, 2014, and medical benefits.

On appeal, employer challenges the administrative law judge's finding that it did not rebut the Section 20(a) presumption and the award of disability compensation and medical benefits. Claimant responds, urging affirmance.

In order to be entitled to the Section 20(a) presumption, a claimant must establish a prima facie case by showing that he sustained a harm and that an accident occurred or working conditions existed which could have caused or aggravated the harm. *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996). Where, as here, the claimant has established his prima facie case, the burden shifts to the employer to present substantial evidence that the claimant's injury was not caused or aggravated by the work injury. *Holiday*, 591 F.3d 219, 43 BRBS 67(CRT). If the presumption is rebutted, it no longer controls, and the issue of causation must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

Employer contends that the administrative law judge, in analyzing rebuttal under Section 20(a), violated the Administrative Procedure Act, 5 U.S.C. §557 (APA), by not addressing: claimant's ability to continue working from April 4 to April 22, 2014; claimant's statements to supervisors that he could continue working; and, the lack of objective examination findings by Dr. Santacruz on April 23, 2014. Employer did not allege, in its post-hearing brief to the administrative law judge, that claimant's ability to continue working and the lack of objective findings by Dr. Santacruz support rebuttal of the presumption. *See generally Johnston v. Hayward Baker*, 48 BRBS 59 (2014). Moreover, by itself, this negative evidence is insufficient to rebut the presumption. The administrative law judge found that Dr. Santacruz diagnosed a lower back strain and that

Dr. Wardell opined that lumbar injury can worsen with time when the individual continues working. The administrative law judge also credited the testimony of claimant and his brother that claimant tried to keep working, with his brother's assistance, despite his back pain.[1] Decision and Order at 23-24; *see Ramsey Scarlett & Co. v. Director, OWCP* [*Fabre*], 806 F.3d 327, 49 BRBS 87(CRT) (5th Cir. 2015); *Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994). Employer also does not challenge the administrative law judge's alternative finding, based on the record as a whole, that claimant sustained a work-related back injury.[2] Therefore, any error in the administrative law judge's finding that employer did not rebut the Section 20(a) presumption is harmless.[3] *See Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007); *see also Kier v. Bethlehem Steel Corp.*, 16 BRBS 125 (1984). Accordingly, we affirm the administrative law judge's finding that claimant sustained a work-related back injury.

Employer also asserts that the administrative law judge violated the APA in determining claimant's entitlement to disability compensation because she failed to address the opinions of Drs. Santacruz, Baddar and Green that claimant's injury should not have resulted in any disability. *See* EXs 1 at 1; 5 at 2; 10 at 24-25.

Disability is defined under the Act as the "incapacity because of injury to earn wages which the employee was receiving at the time of the injury in the same or any other employment." 33 U.S.C. §902(10). In order to establish a prima facie case of total disability, claimant must prove that he is unable to perform his usual work due to the

[1] In addressing the record evidence as a whole, the administrative law judge addressed the supervisors' testimony. She rationally found that these men are not medical professionals and that claimant's statements to them do not disprove that claimant sustained a back injury at work. Decision and Order at 28.

[2] In this regard, the administrative law judge rationally found Dr. Wardell's opinion that claimant's back injury is related to the incident at work is the more credible evidence. It is within the administrative law judge's discretion to credit Dr. Wardell's opinion and the administrative law judge's conclusion is supported by substantial evidence. Decision and Order at 28-29; *see generally Young v. Newport News Shipbuilding & Dry Dock Co.*, 45 BRBS 35 (2011); *Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994).

[3] Employer does not challenge the administrative law judge's finding that the opinions of Drs. Baddar and Greene do not rebut the Section 20(a) presumption.

work injury. *See Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988).

Although the administrative law judge summarily rejected the opinions of Drs. Baddar, Green and Santacruz in her disability and medical benefits analysis, she fully discussed them in finding that claimant's back injury is related to the work incident. Decision and Order at 29-31. The administrative law judge referred to the opinions of Drs. Baddar and Green as the "poorly reasoned and poorly substantiated" opinions of non-examining physicians. *Id.* at 25. Specifically, the administrative law judge found that Dr. Baddar provided no explanation for his opinion that the reported work injury, resulting from claimant's pushing an approximately 300-pound oxygen cart, resulted in "no disability." Decision and Order at 29; *see* Tr. at 24; CXs 5 at 1; 7 at 2. The administrative law judge found that Dr. Green did not sufficiently explain why the absence of an MRI or CT scan suggests that claimant sustained a "minor and self-limiting injury and would not lead to disability." Decision and Order at 29-30. The administrative law judge found that Dr. Santacruz is an internist specializing in nephrology and that his reasons for not deferring to the opinion of Dr. Wardell, the orthopedist to whom he referred claimant, are inconsistent, unpersuasive and "are given little weight."[4] *Id.* at 30-31. Accordingly, as the administrative law judge addressed these physicians' opinions and provided a valid basis for rejecting them, the administrative law judge's decision does not violate the APA. *See generally Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001); *Williams v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 61 (1985).

Moreover, contrary to employer's contention, the administrative law judge's award of disability and medical benefits is supported by substantial evidence of record. The administrative law judge rationally credited the opinion of Dr. Wardell that claimant was disabled until August 11, 2014, and claimant's testimony that employer did not permit him to return to work until September 2, 2014, after a work-hardening program. Decision and Order at 32; Tr. at 35-39. Dr. Wardell prescribed physical therapy for claimant during his period of disability, which, he stated, was "reasonable and necessary to successfully treat this injury."[5] CX 7 at 2; 33 U.S.C. §907(a). The Board is not

[4] The administrative law judge gave "little weight" to Dr. Santacruz's July 2015 checking of the "no" box that Dr. Wardell's treatment was not related to the work injury or reasonable and necessary and to his October 2015 deposition testimony that claimant's period of disability should have been shorter that than that prescribed by Dr. Wardell. *See* EXs 10 at 18; 11.

[5] Drs. Baddar and Greene opined that the length of the physical therapy was excessive because claimant suffered only a "twinge" soft-tissue injury. EXs 1, 5.

empowered to reweigh the evidence, but must accept the rational inferences and findings of fact of the administrative law judge that are supported by the record. *See Newport News Shipbuilding & Dry Dock Co. v. Winn*, 326 F.3d 427, 37 BRBS 29(CRT) (4th Cir. 2003); *Pittman Mechanical Contractors, Inc.*, 35 F.3d 122, 28 BRBS 89(CRT); *see also Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994). Accordingly, we affirm the award of disability compensation and medical benefits.

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

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge