U.S. Department of Labor

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

BRB No. 15-0230

SHARON P. CANIELY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED: Feb. 11, 2016
CERES MARINE TERMINALS, INCORPORATED	)	
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order – Granting Benefits of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Charlene A. Morring (Montagna Klein Camden, LLP), Norfolk, Virginia, for claimant.

Lawrence P. Postol (Seyfarth Shaw, LLP), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order – Granting Benefits (2013-LHC-01208) of Administrative Law Judge Alan L. Bergstrom 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).

On the afternoon of December 1, 2012, claimant was working for employer as a longshoreman when she hit the inside of her left knee with a 10-15 pound iron twist lock while removing it from a crane. EXs 2; 3; 23 at 12, 15. Claimant testified that she felt pain but not enough to stop working, EX 23 at 15; she reported the incident to employer

that day. EX 2. Later that evening, claimant went to the hospital. EX 12 at 1. She complained of left medial knee pain, which she rated as a six on a scale of zero to ten. *Id.* at 1, 3. Claimant was diagnosed with a "left knee contusion," prescribed Motrin and Vicodin, and released.[1] *Id.* at 2. Claimant took nine days off from work after the accident, but returned to her full-duty work on December 10, 2012, and worked until December 16, 2012. EX 24. On December 17, 2012, due to continued left knee pain aggravated with walking, claimant treated with Dr. Wardell, an orthopedic surgeon. CX 11 at 45; EX 13 at 1. Dr. Wardell observed mild swelling and medial joint line tenderness; he diagnosed "internal derangement [of the] left knee," for which he prescribed physical therapy. *Id.* Dr. Wardell excused claimant from work as he felt she was unsafe to return to work because of her knee symptoms. CX 11 at 21; EX 13 at 1. Due to ongoing pain, claimant underwent an MRI on February 26, 2013, which showed "articular cartilage damage over the medial femoral condyle, medial tibial plateau and medial meniscus tear." EX 13 at 2. Claimant underwent arthroscopic knee surgery with Dr. Wardell in April 2013. *Id.* at 29. She continued to treat with Dr. Wardell, and she returned to full-duty work on June 20, 2013. EXs 23 at 23-24; 24.

Employer initially accepted the injury as compensable and paid claimant temporary total disability benefits beginning December 17, 2012. Employer terminated those benefits on January 29, 2013, relying on the January 28, 2013 opinion of Dr. Ross, who stated that claimant could return to work and that there was no relationship between claimant's knee complaints and the work-related incident. EXs 1; 14 at 8. Employer filed a notice of controversion on January 30, 2013, contesting the nature and extent of claimant's injury and disability. EX 8.

Claimant argued before the administrative law judge that her left knee symptoms and torn meniscus were causally related to the December 1, 2012, work incident. She alternatively claimed that her work aggravated a preexisting knee condition. Employer argued that, even if claimant suffered a work-related injury on December 1, 2012, the injury resolved, and the incident did not cause claimant's subsequent meniscal tear and resulting disability. The administrative law invoked the Section 20(a), 33 U.S.C. §920(a), presumption based on claimant's credible complaints of pain, the diagnoses of a left knee contusion and meniscal tear, and Dr. Wardell's opinion attributing claimant's knee condition to the December 2012 work incident. The administrative law judge found employer did not rebut the presumption as the opinions of its experts, Drs. O'Connell and Ross, are entitled to "decreased probative weight." Decision and Order at 29-31. Thus, the administrative law judge found claimant established the compensability of her injury as a matter of law. *Id.* Finding that claimant established she could not perform her usual

[1] The hospital report noted there was no swelling, and an x-ray of her knee was negative.

employment between December 17, 2012, and June 19, 2013, that employer did not offer any evidence of suitable alternate employment, and that the medical care provided and directed by Dr. Wardell was reasonable and necessary, the administrative law judge awarded claimant temporary total disability benefits from December 17, 2012 through June 19, 2013, and medical benefits. 33 U.S.C. §§907, 908(b); Decision and Order at 36-37. On appeal, employer challenges the administrative law judge's findings as to invocation and rebuttal of the Section 20(a) presumption. Claimant responds, urging affirmance.

Employer first contends the administrative law judge erred in finding that claimant established a prima facie case relating her medial meniscus tear to the December 2012 work accident. Specifically, employer contends Dr. Wardell's opinion is insufficient to invoke the Section 20(a) presumption because Dr. Wardell did not review the December 1, 2012 hospital report, and his opinion is based on the mistaken beliefs that claimant twisted her left knee during the work incident, she did not have prior knee problems, and her pain prevented her from working after December 1, 2012.

In order to be entitled to the Section 20(a) presumption linking her injury to her employment, a claimant must establish a prima facie case. The claimant is not required to show an actual causal connection between the harm and her work accident or working conditions. Rather, she need only establish that she suffered a harm and that either a work-related accident occurred or that working conditions existed which could have caused the harm or aggravated a pre-existing condition. *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *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); *see also Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 24 BRBS 75(CRT) (D.C. Cir. 1990). In this case, the administrative law judge found claimant established a harm to her left knee based on her credible complaints of pain and diagnoses of a left knee contusion and medial meniscus tear[2] and an accident at

[2] We reject employer's assertion that the administrative law judge failed to address claimant's credibility. The administrative law judge explicitly rejected employer's assertion that claimant, generally, is not credible in light of the fact that many of the alleged inconsistent statements that employer pointed to are "words or statements in forms completed by people other than the Claimant," Decision and Order at 28; EX 18, and employer does not challenge this finding. *See Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007). Further, the administrative law judge found claimant's complaints of pain to be credible as they are "generally consistent with the medical evidence of record." Decision and Order at 28. As claimant was diagnosed with a left knee contusion on the date of injury, Dr. Ross noted claimant reported an onset of progressive knee pain approximately one week after the injury, and Dr. Wardell

work on December 1, 2012, in which she struck her knee with a twist lock.[3] Decision and Order at 28. As Dr. Wardell explained that a direct blow to the knee can cause a meniscus tear, and a meniscus tear may have delayed onset of symptoms that can progress over the course of days and weeks, the administrative law judge rationally found that claimant established a prima facie case relating her injury to her work accident.[4] *See Champion v. S & M Traylor Bros.*, 690 F.2d 285, 15 BRBS 33(CRT) (D.C. Cir. 1982); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990); *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968); CX 11 at 13, 27, 29. We therefore affirm the administrative law judge's invocation of the Section 20(a) presumption. *Moore*, 126 F.3d 256, 31 BRBS 119(CRT).

Employer next challenges the administrative law judge's finding that it did not rebut the Section 20(a) presumption. Employer contends the opinions of Drs. Ross and O'Connell constitute substantial evidence rebutting the Section 20(a) presumption, as both physicians opined that claimant's meniscus tear was not caused by the December 1, 2012 work accident.[5] CX 30; EXs 21, 29. Employer also contends the administrative

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explained that a torn meniscus can result in a delayed onset of progressive symptoms, substantial evidence supports the administrative law judge's finding. CXs 3, 7, 11; *see Pittman Mech. Contractors, Inc. v. Director, OWCP [Simonds]*, 35 F.2d 122, 28 BRBS 89(CRT) (4th Cir. 1994); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Hess]*, 681 F.2d 938, 14 BRBS 1004 (4th Cir. 1982).

[3] The administrative law judge found that employer did not dispute the occurrence of an accident at work on December 1, 2012. Decision and Order at 28; CXs 3, 7.

[4] We reject employer's assertion that the administrative law judge's Decision and Order fails to comport with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A). The administrative law judge provided a detailed summary of the medical evidence of record, Decision and Order at 5-26, and he sufficiently explained the rationale underlying his conclusions and specified the evidence upon which he relied. The administrative law judge's findings comply with the requirements of the APA. *See, e.g., Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001).

[5] Dr. Ross opined that claimant's knee condition was caused by naturally occurring degenerative changes due to osteoarthritis. EX 29. Dr. O'Connell opined that claimant's meniscal tear was a preexisting degenerative tear due to normal wear and tear and to claimant's obesity. EX 30 at 9-10, 13-16.

law judge used an improper standard by evaluating the probative value of these opinions at the rebuttal stage.

Upon invocation of the Section 20(a) presumption, the burden shifts to the employer to rebut it with substantial evidence that the claimant's condition was not caused or aggravated by her employment. *See Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009). An employer's burden on rebuttal is one of production and not persuasion. The credibility of the witnesses and contrary evidence are not weighed at this stage, and an employer need only produce "substantial evidence," which is "such relevant evidence as a reasonable mind might accept as adequate" to support a conclusion that the claimant's injury was not work-related. *Moore*, 126 F.3d at 262, 31 BRBS at 123(CRT) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)); *see also Ceres Gulf, Inc. v. Director, OWCP [Plaisance]*, 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012); *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 651, 44 BRBS 47, 50(CRT) (9th Cir. 2010).

In this case, the administrative law judge did not determine whether the opinions of Drs. O'Connell and Ross satisfy employer's burden of producing "substantial evidence to the contrary" such that the Section 20(a) presumption is rebutted. Instead, he found them entitled to "decreased probative weight" based on the physicians' underlying rationales. Specifically, the administrative law judge found Dr. O'Connell's opinion "unpersuasive" because it was based on hypothetical probabilities unrelated to claimant's specific situation and internally inconsistent. Decision and Order at 29-30. Similarly, the administrative law judge found Dr. Ross's opinion "unpersuasive" because it was not supported with any facts and was derived from a false factual premise. *Id*. at 30-31. As the administrative law judge erroneously assessed the persuasiveness of employer's evidence at rebuttal, we must vacate the finding that employer did not rebut the Section 20(a) presumption and remand the case for consideration of this issue consistent with law.[6] *Moore*, 126 F.3d at 262, 31 BRBS at 123(CRT); *Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT).

On remand, the administrative law judge must address whether the opinions of Drs. O'Connell and Ross constitute substantial evidence such that a reasonable mind could accept either opinion as supportive of a conclusion that claimant's knee condition was not caused or aggravated by her work accident on December 1, 2012. *Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (employer's evidence must address aggravation if such a

[6] The administrative law judge's error is not harmless, in that he did not determine the weight to be accorded to employer's evidence in relation to claimant's evidence, based on a consideration of the evidence as a whole. *See, e.g., Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 651, 44 BRBS 47, 50(CRT) (9th Cir. 2010).

claim was made). If the administrative law judge finds that the Section 20(a) presumption is rebutted, it no longer controls, and the issue of causation must be resolved on the evidence of record as a whole, taking into account all relevant evidence, with claimant bearing the burden of persuasion. *See Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). If the administrative law judge finds the Section 20(a) presumption is not rebutted, then claimant's injury is work-related as a matter of law. *Holiday*, 591 F.3d 219, 43 BRBS 67(CRT).

Accordingly, the administrative law judge's Decision and Order – Granting Benefits is vacated, and the case is remanded for further consideration consistent with this decision.

SO ORDERED.

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JUDITH S. BOGGS
Administrative Appeals Judge

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GREG J. BUZZARD
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge