U.S. Department of Labor

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

BRB No. 16-0242

JACK KELLISON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DUTRA GROUP	)	
	)	DATE ISSUED: Feb. 22, 2017
and	)	
	)	
SEABRIGHT INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

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

Lara D. Merrigan (Merrigan Legal), San Rafael, California, Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C., and Eric A. Dupree and Paul R. Myers, Coronado, California, for claimant.

Barry W. Ponticello and Renee C. St. Clair (England Ponticello & St. Clair), San Diego, California, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits (2012-LHC-01641) of Administrative Law Judge Jennifer Gee 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 sustained cumulative orthopedic and respiratory injuries, as well as a hearing loss, during his last period of maritime work for employer, which commenced on January 18, 2010, and ended on November 19, 2010.[1] Claimant worked for employer as a pile driver until he was promoted, on or about May 24, 2010, to yard foreman at employer's Pier 102 project. Claimant described his pile driving work for employer as "hard or heavy" and "very physical," HT at 50-53, 65-67, as it included the handling of heavy rigging, climbing on and off the pile, and jumping between barges and skiffs. HT at 284. Claimant stated that his job as a yard foreman, in which he was responsible for managing the yard/staging area for the project, was less physical, and generally entailed supervising other employees in the yard, preparing rigging to fly materials from the yard to the work site via a crane or forklift, and moving material and supplies via forklift from a finished area of the pier to the next work area. Claimant stated that throughout his work with employer, he was regularly exposed to loud noises and noxious construction fumes and dust. He worked for employer until November 19, 2010, when he was released as part of a force reduction layoff. Claimant stated he would have continued working for employer if given the option. HT at 111, 304. He, thereafter, unsuccessfully looked for work until February 2011, when he applied for a union retirement, which was approved in April 2011.

Claimant filed a claim for benefits under the Act against employer on July 26, 2011, seeking compensation for cumulative trauma injuries to his shoulders, knees, left hip, low back and neck, as well as for hearing loss and his chronic obstructive pulmonary disease (COPD), alleging that his work for employer contributed to, aggravated and/or accelerated his underlying orthopedic and respiratory conditions, and his hearing loss.[2]

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[1]Claimant's medical history, preceding his work for employer, includes at least nine prior work injuries, some non-work-related accidental injuries and several general medical conditions. EX 5. Claimant's work injuries include: a fractured right forearm, fractured left wrist, amputation of the tip of the left thumb, a cut to the left ring finger with defect, left shoulder pain, crush injury to right long and index fingers, ankle sprains, back injuries, and crushing injuries to his right foot. *Id.* Claimant's non-work injuries include: a car accident resulting in a nose fracture and probable neck injury, a left shoulder injury when children jumped on him in a pool, a car accident resulting in fractured ribs, slipping in the bathtub and injuring ribs, and right shoulder and elbow injuries. *Id.* Moreover, claimant has been diagnosed with bronchitis, chronic obstructive pulmonary disease, and hypertension. *Id.*

[2]Claimant also filed claims against two prior longshore employers, Vortex Marine Construction (Vortex), and ACC West Coast, Incorporated (ACC). Specifically, claimant sought compensation from Vortex for cumulative trauma to his knees, hips, shoulders, back and neck, for hearing loss and for COPD, and from ACC for those injuries, plus

Employer controverted the claim and the case was forwarded to the Office of Administrative Law Judges for a formal hearing.

In her decision, the administrative law judge found that claimant is entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), that all of his orthopedic and respiratory conditions are related to his work for employer, and that employer established rebuttal thereof.[3] Addressing the evidence as a whole, the administrative law judge found claimant did not meet his burden of showing that his work for employer caused, aggravated, accelerated, and/or contributed to his overall orthopedic and respiratory conditions. The administrative law judge, however, found that claimant's hearing loss is work-related. Pursuant to these findings, the administrative law judge awarded claimant compensation for an 18 percent binaural hearing impairment, 33 U.S.C. §908(c)(13), and medical benefits for his hearing loss, 33 U.S.C. §907, but denied all benefits relating to claimant's orthopedic and respiratory conditions. Employer's motion for reconsideration on the hearing loss issue was denied.

On appeal, claimant challenges the administrative law judge's findings that his orthopedic and respiratory conditions are not work-related, and the consequent denial of benefits for these injuries.[4] Employer responds, urging affirmance of the administrative law judge's decision.

Orthopedic Injuries

With respect to his orthopedic injuries, claimant contends that the administrative law judge's analysis of the causation evidence is not in accordance with the aggravation standard espoused by the United States Court of Appeals for the Ninth Circuit in *Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse Co.* [*Price*], 339 F.3d 1102, 37 BRBS 89(CRT) (9th Cir. 2003), *cert. denied*, 543 U.S. 940 (2004). Claimant maintains that the administrative law judge's requirement that claimant produce "some

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injuries to his toes. Claimant settled his claims against Vortex and ACC for $18,000 and $20,000, respectively. HT at 281-282; *see also* EX 1.

[3]The administrative law judge found that claimant established he has lumbar disc disease, cervical disc disease, degenerative changes in both shoulders, bilateral knee arthritis, and left hip bursitis. The administrative law judge also found that claimant has COPD, predominately in the form of chronic bronchitis.

[4]We affirm, as unchallenged on appeal, the administrative law judge's award of benefits for claimant's work-related hearing loss. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

evidence that actually shows that the activity in question had some effect on the current injury," Decision and Order at 75, is "nonsensical" given that claimant's evidence in this case is "almost identical" to the evidence submitted by the claimant in *Price*, and deemed legally sufficient to establish causation by the Ninth Circuit in that case. *See* Cl. Pet. for Rev. at 53-54. Claimant adds that it was irrational for the administrative law judge to credit Dr. Greenfield's opinion that claimant's employment did not contribute to his orthopedic conditions over the contrary opinion of Dr. Stark because only Dr. Stark's opinion evinces a correct understanding of the record and a proper application of the aggravation rule.

Once, as here, the Section 20(a) presumption, 33 U.S.C. §920(a), is invoked and rebutted, it drops out of the case, and the administrative law judge must weigh all of the evidence relevant to the causation issue, with the claimant bearing the burden of proving that his injuries are work-related. *See Hawaii Stevedores, Inc. v. Ogawa,* 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010)*; Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). Under the aggravation rule, when the employment injury aggravates, exacerbates or combines with a prior condition, the entire resulting disability is compensable. The relative contribution of the pre-existing condition and the aggravating injury are not weighed for purposes of this particular injury. *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966).

Claimant's theory of causation, i.e., that he need only show that his work for employer *could* have caused or aggravated his orthopedic conditions, is incorrect. Contrary to claimant's contention, the cases on which he relies in support of his position, most notably *Price*, 339 F.3d 1102, 37 BRBS 89(CRT), are not relevant to the causation issue in this case. *Price* did not involve the issue of whether the claimant's injury/condition was work-related but instead involved the issue of allocating liability for that work-related injury/condition among multiple employers/carriers through application of the last employer rule.[5] *See Price*, 339 F.3d at 1105, 37 BRBS at 91(CRT) ("Here, the parties agree that Price's injury was caused by cumulative trauma. The parties disagree on how the applicable standard [regarding the "last responsible employer"] should have been applied."). The administrative law judge set forth and applied the correct analysis in terms of the Section 20(a) presumption for determining whether an injury is causally related to employment. Decision and Order at 62-64. Specifically, she determined that claimant established his prima facie case, thus entitling him to the Section 20(a)

[5]Application of *Price*, 339 F.3d 1102, 37 BRBS 89(CRT) to this case, as claimant advocates, would inappropriately place the burden of persuasion on employer to establish whether or not claimant sustained a work-related injury/condition. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 257, 28 BRBS 43(CRT) (1994).

presumption that his orthopedic conditions are related to his work for employer, and that employer rebutted the presumption. *Id.* at 64-74. She then analyzed the relevant evidence as a whole to determine whether claimant met his burden of establishing that his orthopedic injuries are, in fact, work-related by presenting "some evidence that actually shows that the activity in question [claimant's work for employer] had some effect on the current injury." Decision and Order at 75; *see Ogawa*, 608 F.3d at 561, 44 BRBS at 50(CRT); *see also Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT); *see also Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT). Consequently, we reject claimant's contention that the administrative law judge applied an incorrect standard in resolving the causation issue.

Weighing the evidence as a whole, the administrative law judge thoroughly discussed claimant's testimony, the evidence of treatment for his orthopedic conditions prior to, during, and after his work for employer, and the conflicting opinions of Drs. Stark and Greenfield, in terms of each of claimant's alleged orthopedic injuries. Decision and Order at 64-77. In weighing this evidence, the administrative law judge rationally found, for "three primary reasons,"[6] that claimant's testimony is "of generally low credibility" such that she would "treat [claimant's] testimony very skeptically when not confirmed by other evidence." Decision and Order at 35-37; *see Cordero v. Triple A Machine Shop,* 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied,* 440 U.S. 911 (1979).

The administrative law judge also gave greater weight to Dr. Greenfield's opinion that there is no evidence that claimant sustained any orthopedic injury while working for employer, EXs 5, 22, than to Dr. Stark's opinion that the degenerative changes he observed in claimant's orthopedic conditions were aggravated and accelerated by the arduous work he performed with employer because Dr. Greenfield, in contrast to Dr. Stark, "relied more heavily on the medical records."[7] Decision and Order at 42. The

[6]The administrative law judge rationally accorded diminished weight to claimant's testimony, when it was not in accord with other evidence that can be trusted, because: 1) claimant, though not a malingerer, "has a poor historical memory and lied or omitted things on occasion in the course of these [medical] evaluations," and Dr. Stark's statement that while claimant was a credible historian he tended to be imprecise, Decision and Order at 35-36; 2) claimant "has behaved dishonestly in collecting public benefits," *id.* at 36; and 3) claimant, at the hearing, "admitted that he had lied in [the three] depositions [conducted in this case about his criminal past]," *id.* (citing HT at 354); *see also* HT at 408-409. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

[7]Contrary to claimant's contention, Dr. Greenfield's report expresses an accurate representation of claimant's work duties with employer. Dr. Greenfield stated that his

administrative law judge found that in light of her finding that claimant's credibility is suspect, Dr. Greenfield is on "better footing because he was more skeptical of claimant's reports." *Id.* She further found that Dr. Greenfield's opinion is premised on the lack of contemporaneous evidence that claimant's orthopedic conditions were deteriorating, i.e., there is no evidence of medical treatment or restrictions for any orthopedic condition, or any evidence of progressive pain reported to any physicians, during claimant's work for employer. *Id.* The administrative law judge also found that claimant was laid off for economic reasons and did not exhibit any orthopedic symptoms until May 2011, six months after he stopped working for employer; by this time, claimant had begun an exercise regimen that he continued after he had a heart attack in June 2011. *Id.* at 43.

The Board is not empowered to reweigh the evidence and must accept the rational inferences and findings of fact of the administrative law judge that are supported by the record. *See, e.g., Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988). The administrative law judge, after reviewing the relevant evidence, rationally found that claimant did not carry his burden of establishing aggravation, contribution or even symptomology during or in the months following claimant's work for employer. The administrative law judge concluded that the "natural conclusion is that those activities played no part in the etiology of his current [orthopedic] injuries," which did not manifest themselves until many months after claimant stopped working and at a time when other circumstances existed that could have caused claimant's pain. Decision and Order at 77. The administrative law judge rationally rejected claimant's implication that the mere fact of his engaging in arduous labor compels the conclusion that this work, in fact, contributed to claimant's orthopedic conditions. *Id.* at 76. As the administrative law judge's findings are rational and supported by substantial evidence of record, we affirm the administrative law judge's conclusion that claimant did not establish that his present orthopedic conditions are related to his work for employer.

Chronic Obstructive Pulmonary Disease

With respect to his COPD claim, claimant contends the administrative law judge incorrectly applied an accidental injury standard rather than the occupational disease standard that, claimant contends, would result in the conclusion that employer is liable

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opinions were based on his understanding that claimant's work for employer involved two to three months of normal pile driving work and six months of what claimant described as "gravy work" as a yard supervisor. EX 5. Dr. Greenfield added that his opinion would remain the same even if claimant had worked the entire period as a pile driver because claimant did not report any injuries, ask for modified duty, or seek any medical care during his period of employment or for several months thereafter. EX 22.

for his COPD. Specifically, claimant contends employer cannot rebut the Section 20(a) presumption because, as the undisputed last covered employer to expose claimant to stimuli which had the potential to cause, accelerate, and/or aggravate his underlying COPD, it is liable as a matter of law for disability and medical benefits for claimant's COPD.[8] Claimant further contends that Dr. Bressler's opinion is, in contrast to the administrative law judge's finding, insufficient to meet employer's burden to rebut the Section 20(a) presumption.

Once, as in this case, the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence that the employee's injury was not caused, aggravated, or accelerated by the conditions of his employment. *See Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT)*; Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT); *Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998). The testimony of a physician given to a reasonable degree of medical certainty that no relationship exists between an injury and an employee's employment is sufficient to rebut the presumption. *See O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has held that an employer's burden on rebuttal is to produce "evidence specific and comprehensive enough to sever the potential connection between the disability and the work environment." *Ramey*, 134 F.3d at 959, 31 BRBS at 210(CRT) (internal citation omitted). The inquiry at rebuttal concerns "whether the employer submitted evidence that could satisfy a reasonable fact finder that the claimant's injury was not work-related." *Ogawa*, 608 F.3d at 651, 44 BRBS at 50(CRT). Thus, the employer's burden on rebuttal is one of production only. The weighing of conflicting evidence or of the credibility of evidence "has no proper place in determining whether [employer] met its burden of production." *Id.*

Claimant's contention that in order to rebut the Section 20(a) presumption employer must produce substantial evidence demonstrating either: 1) that the employee was not exposed to injurious stimuli in sufficient quantities at its facility to have the potential to cause his disease; or 2) the employee was exposed to injurious stimuli while working for a subsequent covered employer, is incorrect. The administrative law judge correctly observed that claimant's suggested analysis pertains to situations where the

[8]The cases cited by claimant in support of his position that employer, as the last covered employer to expose him to disease-causing conditions, is liable for the entirety of his benefits, e.g., *New Orleans Stevedores v. Ibos*, 317 F.3d 480, 36 BRBS 93(CRT) (5th Cir. 2003), *rev'g in pert. part* 35 BRBS 50 (2001), *cert. denied*, 540 U.S. 1141 (2004), *Lustig v. U.S. Dept. of Labor*, 881 F.2d 593, 22 BRBS 159(CRT) (9th Cir. 1989), and *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955), are responsible employer cases, not causation cases, and thus, are not relevant in this case. *See* discussion, *infra*.

work-related nature of the disease is not in dispute and the issue involves application of the responsible employer rule to determine which of the claimant's employers is liable for his work-related condition. *See* n. 8, *supra*. In this case, the administrative law judge applied the appropriate standard for rebuttal where the issue is the cause of claimant's medical condition, i.e., whether employer produced substantial evidence that exposures from claimant's work with employer did not cause or contribute to his COPD, recognizing that employer's burden on rebuttal is one of production, rather than persuasion. As the administrative law judge found, Dr. Bressler's opinion that claimant's exposures while working for employer did not exacerbate or contribute to his pre-existing chronic bronchitis/COPD and that claimant's current pulmonary condition is non-industrial, RX 7, is sufficient to rebut the Section 20(a) presumption.[9] *Ogawa*, 608 F.3d at 651, 44 BRBS at 50(CRT); *O'Kelley*, 34 BRBS 39. We therefore affirm the administrative law judge's finding that employer rebutted the Section 20(a) presumption that claimant's COPD was work-related.

Claimant alternatively contends he established that his COPD is related to his work for employer based on the record as a whole. Claimant avers that the administrative law judge erred by crediting Dr. Bressler, who claimant alleges failed to consider the evidence regarding claimant's work exposures and did not provide any scientific basis for his opinion, over Dr. Harrison, who claimant contends applied the correct legal standard and exhibited an accurate understanding of the facts in determining that there is a causal connection between claimant's work for employer and his COPD. Moreover, claimant contends that the administrative law judge erred as a matter of law by requiring claimant to show that a particular exposure with employer caused his injury. Claimant thus asserts that since there is no medical opinion stating that claimant was not exposed to potentially injurious stimuli during his work for employer, the Board should reverse the administrative law judge's finding that claimant's COPD is not work-related.

Claimant's contentions repeatedly and incorrectly conflate responsible employer law with causation law as it relates to claimant's burden of proof in a case where the issue is whether claimant's harm is work-related. *See generally Zeringue v. McDermott, Inc.*, 32 BRBS 275 (1998). It is precisely claimant's burden to show on the record as a whole that his exposures with employer in fact caused his injury because he is the

[9]Contrary to claimant's contention, the administrative law judge's characterization of claimant's COPD as a cumulative trauma injury rather than an occupational disease is irrelevant to the causation issue in this case because she applied the proper law. Moreover, as the administrative law judge correctly pointed out, the cases upon which claimant relies in furtherance of this position are inapposite to this case as they either involve statute of limitations issues under Sections 12 and 13 of the Act, 33 U.S.C. §§912, 913, or they are cases in which the work-related nature of the disease was not in dispute.

proponent of this factual proposition. *Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT); *Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *see also Ogawa*, 608 F.3d at 651, 44 BRBS at 50(CRT). The administrative law judge correctly discussed the evidence in terms of whether claimant established "by a preponderance of the evidence that hypothetical industrial exposures to some variety of potentially harmful fumes did, in fact, cause, contribute to, aggravate, or accelerate his COPD." Decision and Order at 82. Weighing the evidence, the administrative law judge rationally credited the statements of Mr. O'Sullivan and Mr. Lindsey over claimant's testimony to find that the air quality at employer's worksite was "quite good" and that "any *potential* exposures would have been light." Decision and Order at 82 (emphasis in original); *see generally Goldsmith*, 838 F.2d 1079, 21 BRBS 30(CRT).

The administrative law judge also discussed the opinions of Drs. Harrison and Bressler, addressing the sufficiency of each opinion first in terms of their credentials and the underlying bases of their conflicting reports, Decision and Order at 44-47, and then again in addressing the cause of claimant's respiratory conditions based on the evidence as a whole, *id.* at 80. The administrative law judge stated that while both Dr. Harrison and Dr. Bressler are "generally credible," their opinions on causation are speculative based on the "thin record" in this case. Thus, the administrative law judge concluded that the ultimate determination regarding causation "cannot rest simply on finding one expert or the other more credible, as both are credible and both are limited in the basis for their opinions." *Id.* at 47. The administrative law judge thus concluded that claimant did not establish, by a preponderance of the evidence, that his work for employer caused, contributed to, aggravated or accelerated his COPD.[10] In reaching this conclusion, the administrative law judge relied on: the credited testimony that the air quality at employer's worksite was good and that the potential exposure to injurious fumes was light; the lack of evidence showing that claimant suffered any sort of aggravation of his COPD while with employer; and the limited medical record indicating that claimant's condition was better than could have been expected while claimant worked for employer.[11] As these findings are rational and supported by substantial evidence, they

[10]The administrative law judge's treatment of the opinions of Drs. Harrison and Bressler is tantamount to finding that the expert opinion evidence regarding any aggravation of claimant's COPD is, at best, in equipoise and therefore insufficient to carry claimant's burden of persuasion on the issue of causation. *Greenwich Collieries*, 512 U.S. at 276, 281, 28 BRBS at 46, 48(CRT); *see Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996).

[11]The administrative law judge found it significant that claimant's medical history demonstrated that while he would periodically have flare-ups or aggravations of his respiratory conditions, there is no credible evidence that claimant sustained any of those flare-ups or aggravations during his time with employer or shortly thereafter. Rather, the

must be affirmed. *Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT). Consequently, we affirm the administrative law judge's finding that claimant did not establish that his COPD was caused, aggravated, or accelerated by his work for employer.

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

SO ORDERED.

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GREG J. BUZZARD
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge

administrative law judge found the record contains evidence that claimant's flare-ups, which claimant described as having started in 2008 and occurring once or twice per year from that point, preceded and post-dated his work with employer, without any need for some sort of medical care of that condition by claimant between January 2010 and June 2011, i.e., during the entire period of claimant's work for employer, and the first six months thereafter. The administrative law judge found that the medical records, in this regard, indicate that in terms of respiratory health, "claimant appears to be doing *better* while at [employer] than he did both before and after." Decision and Order at 81.