U.S. Department of Labor

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

BRB No. 16-0281

MARC CELLA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CARGOTEC SERVICES USA	)	
	)	DATE ISSUED: Feb. 7, 2017
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

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

Robert H. Madden, Seattle, Washington, for claimant.

Craig K. Connors (Bauer Moynihan & Johnson LLP), Seattle, Washington, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits (2013-LHC-000007, 00008) of Administrative Law Judge Christopher Larsen 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, a crane maintenance electrician, allegedly sustained work-related injuries to his left knee, right shoulder, and low back on April 29, 2011, and to his neck,

right shoulder, and low back on May 18, 2011. Claimant, who has a history of prior injuries,[1] also suffers from a pre-existing metabolic disorder known as Glycogen Storage Disease Type V, or McArdle's disease, whereby he cannot turn glycogen, a fuel for muscles, into energy. Claimant stated that he was first diagnosed with this disease in the 1970s and that, while he experienced occasional flare-ups of symptoms, they never prevented him from working.

Following the April 29, 2011 work incident, Dr. Dagher, an orthopedist, on May 5, 2011, diagnosed a right shoulder strain, already resolved, and released claimant to full-duty work without restrictions. Claimant returned to his usual work on May 10, 2011. Claimant stated that, on May 18, 2011, Ken Clinton, who works for a different employer that shares workshop space with employer, entered the shop area and put claimant in a headlock while he was seated. The two started wrestling as claimant stood up and shortly thereafter Mr. Clinton released claimant from the headlock. Claimant finished his shift without complaint of injury. That evening, however, he went to the emergency room with complaints of a migraine headache accompanied by pain in his neck, right shoulder and low back. Claimant was diagnosed with a cervical paraspinal muscular strain and non-specific headache. On May 19, 2011, claimant advised employer he would not return to work, and he has not, since, returned to work.

On May 26, 2011, Dr. Dagher diagnosed claimant with a cervical strain, a lumbar strain, a right shoulder strain, and aggravation of an industrial shoulder condition. Dr. Dagher initially removed claimant from all work for May 26-27, 2011, placed him on modified duty from May 27 through July 10, 2011, and believed that claimant could return to full-duty work by July 11, 2011. Claimant, however, returned to Dr. Dagher on July 6, 2011, seeking an extension of modified duty so he could see his neurologist, Dr. Connolly. He also sought an opinion from Dr. Dagher tying the "perceived flare" of his McArdle's disease to his work accidents, a position which Dr. Dagher stated he could not support. EX 10. Dr. Dagher, however, extended claimant's modified duty through August 10, 2011, with a return to full-duty on August 11, 2011. Dr. Connolly, who examined claimant on July 7, 2011, for complaints of neck discomfort, stated that claimant's general neurological exam was normal. Dr. Connolly, nonetheless, continued

[1]Claimant fractured his leg in a motorcycle accident in 1980, EX 11, and he fractured his elbow while on a ship, sometime prior to working for employer. HT at 86. Claimant also sought treatment from Dr. Connolly, who is Board-certified in neurology and internal medicine, in May 2008, December 2010 and again in February 2011, and with Dr. Dagher, in March 2011, for aches and pains, mostly pertaining to his back and right shoulder, due to several non-work related accidents. CXs 13, 17.

claimant on total disability status first from August 5 to December 5, 2011, and then through June 5, 2012. CX 13.

Claimant also was examined by Dr. Brooks, an orthopedic surgeon, on July 14, 2011, by Dr. Bays, a doctor of osteopathic medicine, on May 21, 2013 and August 26, 2014, and by Dr. Kirshner, a neurologist, on May 30, 2013. Dr. Brooks diagnosed cervical degenerative disc disease, arthritis, C6-7 disc protrusion, foraminal stenosis, and "symptom magnification," and opined that claimant could return to work without any need for further physical therapy. EX 11. Drs. Bays and Kirshner each concluded: claimant's work-related injuries, consisting of temporary strains of his lumbar and cervical spine and right shoulder, had completely resolved by August 11, 2011, and were not preventing him from returning to full-duty work; claimant's current medical condition represents the natural and unavoidable progression of his McArdle's disease; and claimant's present McArdle's disease symptoms were not, in any way, caused by, or linked to, his work-related injuries. EXs 16 and 21.

Employer voluntarily paid claimant temporary total disability benefits from May 5-9, 2011, and from May 19 through August 11, 2011. 33 U.S.C. §908(b). Claimant filed claims seeking temporary total disability benefits from May 19, 2011 through December 28, 2014, and ongoing permanent total disability benefits from December 29, 2014, based on the work injuries he sustained on April 29 and May 18, 2011, as well as an alleged permanent aggravation of his pre-existing McArdle's disease due to his May 18, 2011 work injuries. Employer controverted the claims and the case was forwarded to the Office of Administrative Law Judges for a formal hearing.

In his decision, the administrative law judge found claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), that his neck, right shoulder, low back conditions, as well as the permanent aggravations of his McArdle's disease and C6-7 cervical radiculopathy, are work-related. The administrative law judge found that employer rebutted the presumption by producing evidence that none of claimant's present symptoms are related to the work accidents of April 29 and May 18, 2011. Weighing the evidence as a whole, the administrative law judge concluded that claimant did not establish that his present orthopedic conditions are related to the work incidents, or that the work incidents permanently aggravated his McArdle's disease. Accordingly, the administrative law judge awarded claimant temporary total disability benefits from May 19 through August 11, 2011, and medical benefits relating to claimant's work-related neck, right shoulder and low back strains.

On appeal, claimant challenges the administrative law judge's findings that the work accidents resulted only in temporary injuries to his neck, right shoulder and low back which completely resolved by August 11, 2011, and did not permanently aggravate

his McArdle's disease.[2] Claimant also challenges the administrative law judge's finding that claimant's work-related orthopedic injuries reached maximum medical improvement as of August 11, 2011. Employer responds, urging affirmance of the administrative law judge's decision. Claimant has filed a reply brief.

Claimant contends that his continuing neck and shoulder problems are related to his May 18, 2011 work accident, either as a direct result of that incident or due to an aggravation of his underlying osteoarthritic condition. Claimant avers that certain statements made by Drs. Brooks and Bays support his position and belie their overall opinions that his symptoms are not due to the work incidents.[3] Claimant further asserts that the administrative law judge erred by rejecting the opinion of his treating neurologist, Dr. Connolly, merely because the administrative law judge characterized claimant as an unreliable historian prone to exaggeration. Claimant asserts that, pursuant to *Amos v. Director, OWCP*, 153 F.3d 1051 (1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir.), *cert. denied*, 528 U.S. 809 (1999), the reasonable opinion of his treating physician, Dr. Connolly, tying his present condition and symptoms to his May 18, 2011 work accident, is entitled to greatest weight and, thus, establishes that claimant's present neck and shoulder conditions are work-related.

Once the Section 20(a) presumption, 33 U.S.C. §920(a), is invoked, the employer may rebut it by producing substantial evidence that the claimant's work accidents did not cause, accelerate, aggravate, or contribute to the injury. 33 U.S.C. §920(a); *Duhagon v.*

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[2]We reject claimant's contention that the administrative law judge erred by not addressing a claim for work-related headaches pursuant to Section 20(a) of the Act, 33 U.S.C. §920(a). Claimant's May 23, 2011 and March 20, 2012 claims for compensation did not raise headaches as an injury for which he sought compensation. CXs 1-2. Moreover, claimant's attorney, at the formal hearing, did not raise any claim for headaches relating to the May 18, 2011 work incident. *See* HT at 18; *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982) (the administrative law judge is not required to address, and employer is not required to defend, a claim that is not made); *Johnston v. Hayward Baker*, 48 BRBS 59 (2014) (Board will not address an issue which has not been properly raised before the administrative law judge).

[3]Claimant alleges that Dr. Brooks's report and testimony supports a causal relationship between the neck injury and the work incident because it indicates the possibility that claimant's C6-7 disc protrusion may be the result of "prior trauma." Additionally, claimant contends that Dr. Bays conceded that the May 18, 2011 work accident at least temporarily aggravated his neck and shoulder conditions.

Metropolitan Stevedore Co., 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999). When the employer produces substantial evidence that the claimant's injury is not work-related, the Section 20(a) presumption 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 related to the work incidents. *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

In weighing the evidence, an administrative law judge may give special weight to a treating physician's opinion, *see Amos*, 153 F.3d 1051, but he is not required to credit such an opinion where there is contrary, probative evidence in the record.[4] *See Monta v. Navy Exchange Service Command*, 39 BRBS 104 (2005). The administrative law judge is tasked with weighing the evidence and drawing inferences and conclusions based on that evidence. *Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT). The Board may not reweigh the evidence, *Miffleton v. Briggs Ice Cream Co.*, 12 BRBS 445 (1980), *aff'd*, 659 F.2d 252 (D.C. Cir. 1981), or disregard an administrative law judge's finding merely because other inferences could have been drawn from the evidence. *Pittman Mech. Contractors, Inc. v. Director, OWCP* [*Simonds*], 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994); *see also Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994).

In this case, after having found the Section 20(a) presumption established and rebutted, the administrative law judge addressed claimant's alleged C6-7 radiculopathy in terms of the record in its entirety. He assessed claimant's credibility and weighed the conflicting medical opinions as to the cause of claimant's present cervical symptoms. The administrative law judge, having rationally found claimant's testimony entitled to "little evidentiary weight," Decision and Order at 14-17;[5] *see Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979), accorded diminished weight to the opinion of Dr. Connolly because he

[4]Unlike the situation in *Amos*, the issue here does not concern the choice between two reasonable courses of treatment such that a treating physician may have more insight. *Amos*, 153 F.3d at 1054, 32 BRBS at 147(CRT). In any event, the administrative law judge must, in weighing a treating physician's opinion, consider its underlying rationale, as well as the other medical evidence of record. *See Brown v. Nat'l Steel & Shipbuilding Co.*, 34 BRBS 195 (2001); *see also Monta v. Navy Exch. Serv. Command*, 39 BRBS 104 (2005).

[5]The administrative law judge rationally found that claimant's credibility is suspect because the evidence demonstrates he is prone to exaggeration and made inconsistent and unsubstantiated reports of symptoms. Decision and Order at 14-17.

relied upon claimant's self-reported symptoms, which, according to Drs. Kirschner, Bays, and Brooks, are inconsistent with the symptoms of C6-7 radiculopathy. The administrative law judge, instead, credited the opinions of Drs. Kirschner, Bays, and Brooks that claimant's C6-7 disc protrusion and alleged cervical radiculopathy are not related to either of his work accidents or to the temporary cervical strain/sprain claimant sustained as a result of the May 18, 2011 work incident. As claimant's complaints of continuous C6-7 pain and Dr. Connolly's opinion are the only evidence of record linking claimant's current cervical pain to the prior work injuries, and as the administrative law judge reasonably found this evidence to be unpersuasive, we affirm his finding that claimant did not carry his burden of establishing, based on the record as a whole, that his cervical radiculopathy is related to the work injuries. *Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT); *Hice v. Director, OWCP*, 48 F.Supp. 2d 501 (D. Md. 1999). Similarly, as the credited opinions of Drs. Dagher, Kirschner, Bays, and Brooks state that claimant's work-related shoulder strain would have completely resolved, with claimant returning to his "baseline," within about three months of that injury, EXs 10, 11, 13; EX 26 at 90-91, and/or that claimant's present right shoulder issues are not related to any work activity, EX 19, we reject claimant's contention that the administrative law judge erred in finding that his present shoulder condition is not work-related. *Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT); *Hice*, 48 F.Supp. 2d 501.

Claimant next contends the administrative law judge erred in finding that the May 18, 2011 work accident did not permanently aggravate his McArdle's disease. Claimant avers that, in reaching his conclusion, the administrative law judge improperly required him to prove that, pathologically, his McArdle's disease was worsened by the work injuries. Citing *Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981), and *Bath Iron Works Corp. v. Fields*, 599 F.3d 47, 44 BRBS 13(CRT) (1st Cir. 2010), claimant maintains that he established that the May 18, 2011 incident worsened his symptoms and hastened the natural progression of his McArdle's disease.

If a work-related injury contributes to, combines with, or aggravates a pre-existing condition, the entire resultant condition is compensable. *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966). This rule applies not only where the underlying condition worsens but also where the work incident causes the claimant's underlying condition to become symptomatic. *Gardner*, 640 F.2d 1385, 13 BRBS 101; *Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986). However, if the claimant's disability is due solely to the natural progression of a prior non-work-related injury or condition, the employer is not liable for the disabling condition. *See generally Lamon v. A-Z Corp.*, 46 BRBS 27 (2012), *vacating on recon.* 45 BRBS 73 (2011).

In weighing the conflicting evidence regarding whether there is any causal connection between claimant's work injuries and his pre-existing McArdle's disease, the administrative law judge rationally credited the opinions of Drs. Kirschner and Bays, as

bolstered by that of Dr. Dagher, who found no causal connection between claimant's present McArdle's symptoms and his work injuries, over the contrary opinion of Dr. Connolly, because, unlike Dr. Connolly, they "did not base their opinions on the reports of an unreliable witness," i.e., claimant's statements regarding his symptoms. Decision and Order at 21. Additionally, the administrative law judge noted, as argued by claimant, that both Drs. Bays and Kirschner acknowledged that claimant may have experienced a flare-up of McArdle's symptoms due to the May 18, 2011 incident. The administrative law judge found, however, that both physicians stated that those symptoms would have subsided well before August 11, 2011.[6] EX 26, Dep at 94; EX 27 at 25-26. Moreover, the administrative law judge found it compelling that claimant "does not explain why his May 18, 2011, injuries would permanently aggravate his McArdle disease," given that claimant stated that his prior flare-ups had resolved after no more than two weeks, and because his prior, non-work-related injuries had no effect on his McArdle's disease. Decision and Order at 21. Consequently, as substantial evidence in the form of the credited opinions of Drs. Dagher, Bays, and Kirschner, supports the administrative law judge's finding that claimant did not carry his burden of proof to show that his injuries permanently aggravated his McArdle's disease, that finding is affirmed. *Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT).

Claimant further contends the administrative law judge erroneously concluded that his work-related low back, right shoulder, and neck strains fully resolved by August 11, 2011. Claimant maintains that the opinions of Drs. Dagher, Bays, and Kirschner, upon which the administrative law judge relied, are not well-reasoned. Claimant asserts, in contrast, that the continued treatment recommendations of his treating physicians, i.e.,

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[6]Dr. Bays opined that "once those [work-related strains/sprains of right shoulder, low back and neck] conditions had resolved, so inside of the three months, there would be no further problems or manifestations associated with the work exposure, and then [claimant] would be back to baseline with respect to his preexisting McArdle's disease." EX 26 at 94. Dr. Kirschner stated that "I can think of no mechanism whereby [claimant's neck strain, shoulder strain, and low back strain] could worsen this underlying condition, which is a metabolic disorder involving a specific muscles enzyme." EX 27 at 25-26. *Gardner,* 640 F.2d 1385, 13 BRBS 101, is distinguishable because, in that case, substantial evidence supported the conclusion that the claimant's disabling symptoms were due to his working conditions, even if the underlying condition was not permanently affected. *Fields*, 599 F.3d 47, 44 BRBS 13(CRT), addressed the issue of whether employer produced substantial evidence to rebut the Section 20(a) presumption that claimant's underlying condition *and* his symptomatology were due to the work injury. In contrast, this case involves claimant's burden to prove the work-relatedness of his condition/symptoms, and substantial evidence supports the administrative law judge's finding that he did not carry this burden.

Drs. Connolly, Vogelgesang, McKay, and Manista, directly conflict with the administrative law judge's determination that claimant reached maximum medical improvement on August 11, 2011.

The administrative law judge's finding, based on the opinions of Drs. Dagher, Bays, and Kirschner, that claimant's work injuries fully resolved by August 11, 2011, is supported by substantial evidence. Dr. Dagher, in his July 6, 2011 report, stated that he anticipated a return to full-duty work for claimant as of August 11, 2011, and added, by that time "I plan to declare [claimant] at maximum medical improvement and he is expected to have returned to his baseline preinjury status." EX 10. In his report dated May 21, 2013, Dr. Bays opined that claimant would have reached maximum medical improvement and returned to baseline, with regard to the April 29, 2011 work injuries by May 5, 2011, and with regard to all of his work-related injuries, within a three-month period of time from the May 18, 2011 work incident. EX 13. At his deposition, Dr. Bays reiterated that claimant's work-related condition "would have resolved within approximately three months after that injury." EX 26 at 90-91. In particular, Dr. Bays stated that maximum medical improvement would be approximately August 11, 2011, without any work restrictions or limitations imposed as a result of the workplace injuries.[7] *Id.* at 93. Dr. Kirschner, in his report dated May 30, 2013, generally opined that claimant's work-related medical conditions had reached maximum medical improvement, and more specifically he stated that those work injuries should have "resolved approximately one month after their occurrence," without the need for further treatment or for the imposition of any physical restrictions.[8] EX 19.

The administrative law judge is entitled to weigh the evidence and to draw reasonable inferences therefrom. *Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT). The administrative law judge, after a thorough consideration of the opinions of Drs. Dagher, Bays, and Kirschner, including the underlying bases of their opinions, Decision and

[7]Dr. Bays explained that claimant would reach maximum medical improvement for his work-related injuries by August 11, 2011, because claimant sustained "a minor, very mild lumbar sprain/strain that resolved inside of a week and a cervical sprain/strain that resolved within three months. And perhaps a temporary exacerbation of a pre-existing right shoulder strain or sprain that resolved within one week." EX 26 at 94. In short, Dr. Bays felt that claimant was, by August 11, 2011, "back to where he was" before either of his two work accidents. *Id.* at 143.

[8]Dr. Connolly's disability form, dated July 26, 2012, appears to support a finding that claimant, at that time, had no restrictions from his work-related strains, because his imposition of restrictions was because of claimant's McArdle's disease. CX 14.

Order at 4-5, 10-12, 20-21, 23-24, rationally credited those opinions over the contrary opinion of Dr. Connolly that claimant's work injuries contributed to the progression of his McArdle's disease. As the "more persuasive" opinions of Drs. Dagher, Bays, and Kirschner support the administrative law judge's finding that claimant's work-related injuries to his low back, right shoulder and neck resolved by August 11, 2011,[9] Decision and Order at 23, that determination is affirmed. *See generally Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9 (2001), *aff'd mem.*, 32 F. App'x 126 (5th Cir. 2002).

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[9]The fact that claimant continued to receive treatment after August 11, 2011, from Drs. Vogelgesang (November 2011), McKay (February 2012), and Manista (March 2012), does not demonstrate error in the finding that claimant's *work-related* injuries had resolved. These physicians do not relate claimant's continuing treatment to the work injuries.