U.S. Department of Labor

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

BRB No. 16-0381

WADAH BAZZI	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
APPLIED INSURANCE TECHNOLOGIES	)	
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	DATE ISSUED: Mar. 6, 2017
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Paul R. Almanza, Administrative Law Judge, United States Department of Labor.

Wadah Bazzi, Dearborn, Michigan.

Michael Marmer (Samuelsen, Gonzalez, Valenzuela & Brown, LLP), San Pedro, California, for employer/carrier.

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

PER CURIAM:

Claimant, appearing without the assistance of counsel, appeals the Decision and Order Denying Benefits (2013-LDA-00464) of Administrative Law Judge Paul R. Almanza 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). In an appeal by a claimant

without legal representation, we will review the administrative law judge's findings of fact and conclusions of law to determine 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). If they are, they must be affirmed.

Claimant, who worked variously as a linguist, translator, and cultural advisor, alleges that his kidney cancer was caused by chemical exposure during his deployments in Kuwait and Iraq between 2002 and 2005. Claimant was first deployed to Kuwait in late 2002, remaining there at different camps until August 2003. Tr. at 61. He was deployed to Iraq by a different contractor from October 2003 until April 2004, living at various camps in Iraq. *Id.* Finally, he was deployed by employer to Balad Air Base in Iraq from February 2005 to September 2005. *Id.* at 64. At each of these camps, garbage on the base was disposed of by burning. *Id.* at 57, 59-60, 62-63. Claimant testified that he usually lived in tents located not far from the burn pits, and that he could smell the smoke from the burn pits while in his tents and while working around the bases, although he could not remember specifically how frequently he could smell the smoke from the burn pits.[1] *Id.* at 57, 63, 69. He described the smell of the smoke as being "[t]o the best of my recollection as, it's like close to plastic, wires, stuff like that, and sometimes it's weird too." *Id.* at 57.

Claimant was diagnosed with kidney cancer, specifically transitional cell carcinoma, in late 2011. Tr. at 70; CX 14 at 10-12 (Rogers Dep.). In January 2012, claimant had surgery to remove his right kidney and other cancerous areas around his bladder. Tr. at 72. Claimant continues to have problems with his urinary tract and he meets with his oncologist, Dr. Greg Rogers, every six months to monitor the situation. Tr. at 72-73. Claimant underwent another surgery in February 2013 to remove two benign tumors in his bladder. Tr. at 74.

Claimant filed a claim for medical and disability benefits under the Act, asserting that his kidney cancer was caused by his exposure to the burn pit smoke.[2]

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[1] Claimant did not work in the burn pits nor did he work for any company that worked in garbage disposal on the bases. Tr. at 76.

[2] In 2005, Claimant was diagnosed with post-traumatic stress disorder, among other conditions, after surviving several IED explosions. He settled his claims under the Act for those injuries (OWCP No. 02-145111). Tr. at 46. Employer argued that it should receive a credit for the benefits it had already made under the previous settlement towards any benefits awarded in this case. Tr. at 47. However, as the administrative law judge denied claimant's claim for benefits in this case, the issue of whether employer would be entitled to a credit for the prior settlement was not addressed.

In his decision, the administrative law judge found that claimant was entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), based on claimant's testimony that he smelled fumes from the burn pits in Kuwait and Iraq and Dr. Rogers's testimony that exposure to the burn pit smoke could have caused kidney cancer. The administrative law judge further found that employer submitted substantial evidence to rebut the presumption based on a medical opinion by Dr. Paul Grodan that claimant's kidney cancer was not caused by his exposure to burn pit smoke during his deployments. On weighing the evidence as a whole, the administrative law judge concluded that claimant failed to establish that his kidney cancer was caused by his exposures and, accordingly, he denied the claim for benefits. Decision and Order at 19.

Claimant appeals the administrative law judge's denial of benefits. Employer filed a response brief urging affirmance.

In order to invoke the Section 20(a) presumption of causation, claimant must make a prima facie case by showing: (1) that he suffered harm; and (2) that an accident occurred or working conditions existed that could have caused, aggravated, or accelerated the harm. *See Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 287, 34 BRBS 96, 97(CRT) (5th Cir. 2000). Here, the administrative law judge found that claimant established a prima facie case based on his testimony regarding his exposure to burn pit smoke and Dr. Rogers's opinion that chemical exposure from the burn pits increased claimant's risk of developing cancer.

Once the Section 20(a) presumption is invoked, the burden shifts to the employer to rebut it with substantial evidence that claimant's condition was not caused or aggravated by his employment exposures. *See Port Cooper/T. Smith Stevedoring Co.*, 227 F.3d at 288, 34 BRBS at 97(CRT). Substantial evidence is "that relevant evidence—more than a scintilla but less than a preponderance—that would cause a reasonable person to accept the fact-finding." *See Ceres Gulf, Inc. v. Director, OWCP [Plaisance]*, 683 F.3d 225, 228, 46 BRBS 25, 27(CRT) (5th Cir. 2012). In this case, the administrative law judge found rebuttal established based on the opinion of Dr. Grodan that claimant's kidney cancer was not caused by his exposure to burn pit chemicals during his deployments. Dr. Grodan stated that, in order for chemical exposure to lead to kidney cancer, there must be a longer-term exposure than claimant was subjected to and there was not enough time between claimant's work exposure and the kidney cancer diagnosis in 2011 for the tumor to have grown as large as it was at the time of the diagnosis. Decision and Order at 14; EX 1 at 4-7. This opinion constitutes substantial evidence of the absence of a relationship between claimant's kidney cancer and his burn pit exposures. *See Ceres Gulf, Inc. [Plaisance]*, 683 F.3d at 232, 46 BRBS at 29(CRT). Accordingly, we affirm the administrative law judge's finding that Dr. Grodan's opinion rebuts the Section 20(a) presumption.

Once the Section 20(a) presumption is rebutted, claimant bears the burden of establishing that his condition is work-related based upon a weighing of the evidence in the record as a whole. *See Suarez v. Service Employees Int'l Inc.*, 50 BRBS 33, 36 (2016); *see also Bis Salamis, Inc. v. Director, OWCP [Meeks]*, 819 F.3d 116, 127, 50 BRBS 29, 35(CRT) (5th Cir. 2016). The claimant retains the ultimate burden of persuasion by the preponderance of the evidence—"if the evidence is evenly balanced, the claimant loses." *Id.*, 819 F.3d at 127, 50 BRBS at 35(CRT).

In his decision, the administrative law judge weighed the evidence and addressed the respective weight to be accorded the medical opinions of Dr. Rogers and Dr. Grodan. The administrative law judge noted that Dr. Rogers admitted claimant did not tell him how close he lived to the burn pits or "what extent [claimant's] exposures were." Decision and Order at 17; CX 14 at 25. The administrative law judge further noted that Dr. Rogers was asked a hypothetical question asking him to assume that claimant worked in Iraq and Kuwait for about 20 to 24 months within a three-year period, that he was exposed at various times to a variety of chemicals, and that the exposures "probably occurred daily." Decision and Order at 15-16. The administrative law judge specifically emphasized that Dr. Rogers's response to the hypothetical was that "it would be reasonable to assume that [the exposure to chemicals] increased his risk. To what extent it increased his risk, I don't know." *Id.* at 16 (quoting CX 14 at 23). The administrative law judge concluded that Dr. Rogers's opinion was entitled to little weight because the facts in the record did not establish the conditions set forth in the hypothetical and that "the hypothetical almost certainly grossly overstated Claimant's exposure to burn pit smoke."[3] *Id.* The administrative law judge recognized that Dr. Rogers is claimant's treating physician but concluded that "[a]s the facts Dr. Rogers relied upon in rendering his opinion came from other sources besides Claimant, his treatment of Claimant does not render his opinion concerning the cause of Claimant's kidney cancer more probative than that of a non-treating expert." *Id.* at 17.

The administrative law judge also discussed the weight to be given Dr. Grodan's opinion, noting that Dr. Grodan had inaccurately assumed that claimant's chemical exposure was limited to the February-September 2005 period when claimant worked for employer and had failed to account for approximately nine months of potential exposure

[3] The administrative law judge found that claimant's testimony does not establish that his chemical exposures occurred on a daily basis. Claimant could not recall how often he could smell the burn pit smoke, nor could he recall how far his living quarters were from the burn pits. Tr. at 57, 62; Decision and Order at 16. The administrative law judge also noted Dr. Rogers based his opinion, in part, on the U.S. Air Force assessment of burn pits at Balad Air Base between January and April 2006—a time period during which claimant was not at the base. Decision and Order at 17.

in 2003 and approximately two months of potential exposure in 2004. *Id.* at 19. The administrative law judge concluded, however, that because of the lack of evidence in the record establishing the intensity, frequency, or duration of claimant's exposure to burn pit smoke, Dr. Grodan's opinion was only minimally less probative. The administrative law judge found that "Dr. Grodan's opinion as to causation, while not free from weakness, rests on a sounder premise than does that of Dr. Rogers and is thus better reasoned." Decision and Order at 19. The administrative law judge, therefore, gave Dr. Grodan's opinion greater weight.

Claimant specifically contests the administrative law judge's decision not to accord greater weight to Dr. Rogers's opinion regarding the cause of claimant's kidney cancer. The Board is not empowered, however, to reweigh the evidence; the Board may only review the administrative law judge's decision to determine if it is supported by substantial evidence and in accordance with the law. *See Port Cooper/T. Smith Stevedoring Co., Inc.*, 227 F.3d at 287, 34 BRBS at 97(CRT). In giving greater weight to Dr. Grodan's opinion than to Dr. Rogers's opinion, the administrative law judge reasoned that Dr. Rogers based his opinion of the cause of claimant's kidney cancer on facts that were not established or otherwise unsupported by the evidence in the record.[4] The administrative law judge recognized that claimant's testimony and recollections concerning his exposure to burn pit smoke were vague and unspecific, and thus did not establish the intensity, frequency, or duration of claimant's exposure. Tr. at 57-62-63; Decision and Order at 16.

We decline to disturb the administrative law judge's weighing of the evidence. It is well-established that an administrative law judge, as the fact-finder, has the authority to weigh the evidence in the record and, moreover, that he is not required to accept the opinion of any particular medical examiner. *See Bis Salamis [Meeks]*, 819 F.3d at 126, 50 BRBS at 37(CRT); *see also Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 500-501, 29 BRBS 79, 80-81(CRT) (5th Cir. 1995) ("The ALJ determines the weight to be accorded to evidence and makes credibility determinations. Moreover, where the testimony of medical experts is at issue, the ALJ is entitled to accept any part of an expert's testimony or reject it completely.") (internal citations omitted). In this case, the

[4] The administrative law judge noted that the "main weakness" in Dr. Grodan's opinion is that he underestimated the duration of claimant's exposure. Decision and Order at 19. Because the administrative law judge found claimant's doctor's opinion merited little probative value and claimant bears the ultimate burden of persuasion, the administrative law judge permissibly concluded that claimant still failed to meet his burden, regardless of the deficiencies in Dr. Grodan's opinion. *Id.; see generally Bis Salamis, Inc. v. Director, OWCP [Meeks]*, 819 F.3d 116, 127, 50 BRBS 29, 35(CRT) (5th Cir. 2016).

administrative law judge's decision rationally found that Dr. Rogers's opinion cannot support the conclusion that claimant's cancer was caused by his exposure to burn pit smoke and that Dr. Grodan's opinion is entitled to greater weight. The administrative law judge thoroughly set forth his reasoning and the facts in the record that led to his decision. Therefore, as it is supported by substantial evidence, we affirm the administrative law judge's determination that, based on the record as a whole, claimant failed to establish a causal link between his kidney cancer and his exposure to chemicals from burn pit smoke. *See Ceres Gulf, Inc. [Plaisance]*, 683 F.3d at 232, 46 BRBS at 29(CRT). Thus, we affirm the denial of disability and medical benefits.

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

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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RYAN GILLIGAN
Administrative Appeals Judge