U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 17-0477

STEVE BUSSANICH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PORTS AMERICA	)	DATE ISSUED: Mar. 27, 2018
	)	—
and	)	
	)	
PORTS INSURANCE COMPANY INCORPORATED	)	
	)	
	)	
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, and Paul Delay (Thompson & Delay Law Firm), Seattle, Washington, for claimant.

Russell A. Metz (Metz & Associates, P.S.), Seattle, Washington, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits (2015-LHC-00557) 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).

On December 1, 2013, claimant sustained a work-related injury to his neck when he was struck by a turnbuckle. Immediately following this incident, claimant was transported to a local hospital for medical treatment and was diagnosed with a minor head injury and cervical strain. Claimant has not returned to work since his injury.

In her Decision and Order, the administrative law judge determined that claimant sustained a temporary work-related cervical strain on December 1, 2013, which neither permanently aggravated nor exacerbated his pre-existing degenerative disc disease. The administrative law judge further found that claimant established his prima facie case of total disability, that employer established the availability of suitable alternate employment as of March 21, 2014, and that claimant's work-related cervical strain resolved on October 17, 2014. Accordingly, the administrative law judge awarded claimant temporary total disability benefits from December 1, 2013 through March 20, 2014, temporary partial disability benefits from March 21 through October 17, 2014, and medical expenses. 33 U.S.C. §§908(b), (e), 907.

On appeal, claimant challenges the administrative law judge's denial of his claim for ongoing benefits under the Act, specifically asserting the administrative law judge erred in concluding that claimant's work injury did not permanently aggravate his pre-existing degenerative disc condition and result in disability. Employer responds, urging affirmance of the administrative law judge's decision in its entirety. Claimant filed a reply to employer's brief.

Where, as in this case, an employer rebuts the Section 20(a), 33 U.S.C. §920(a), presumption, 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.[1] *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

[1] The administrative law judge invoked the Section 20(a) presumption based on findings that claimant sustained a cervical injury when he was struck by a turnbuckle during the course and scope of his employment with employer, *see* Decision and Order at 32–34, and that employer rebutted the presumption with the testimony of Dr. Burns. *Id.* at 34–35. As these specific findings are not challenged on appeal, they are affirmed. *See Scalio v. Ceres Marine Terminals*, 41 BRBS 57 (2007).

entire resulting disability is compensable. *See Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966).

Claimant challenges the administrative law judge's consideration of the evidence of record "as a whole." Claimant contends the administrative law judge erred in using a "piecemeal method of analysis," requiring claimant to prove causation by "clear and convincing" evidence rather than merely by a "preponderance of the evidence."[2] *See* Cl. Br. at 18. After considering claimant's contentions of error and reviewing the administrative law judge's decision in its entirety, we reject claimant's assertion.

In *Greenwich Collieries*, the Supreme Court stated that, under Section 7(c) of the Administrative Procedure Act, 5 U.S.C. §556(d), the proponent of a rule or order has the burden of persuasion under the preponderance of the evidence standard. *Greenwich Collieries*, 512 U.S. at 277-278, 28 BRBS at 46-47(CRT). The Board has defined the preponderance of the evidence standard as "the greater weight of the evidence, or evidence which is more credible and convincing to the mind." *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171, 173 (1996) (quoting Black's Law Dictionary (5th ed. 1979)). The standard is thus met when one party's evidence is "more convincing to the trier of fact than opposing evidence" and when the existence of a fact is more probable than not:

> The burden of showing something by a "preponderance of the evidence". . . "simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence.'" . . . Before any such burden can be satisfied in the first instance, the factfinder must evaluate the raw evidence, finding it to be sufficiently reliable and sufficiently probative to demonstrate the truth of the asserted proposition with the requisite degree of certainty.

Santoro, 30 BRBS at 174, citing *Concrete Pipe & Products of Calif., Inc. v. Constr. Laborers Pension Trust for Southern Calif.*, 508 U.S. 602, 622 (1993). Thus, contrary to claimant's contention, the administrative law judge is entitled to evaluate each piece of evidence to ascertain whether it individually or with other evidence is "sufficiently reliable and probative" to meet claimant's burden of persuading the administrative law judge that is physical harm is related to the work accident. *Id*.

[2] In this regard, claimant avers that the administrative law judge erroneously examined each piece of claimant's evidence individually in order to assess its sufficiency to establish a causal relationship.

In her Decision and Order, the administrative law judge fully addressed each medical opinion discussing claimant's degenerative disc condition, *see* Decision and Order at 9-13, 15-19, 33-43, and found claimant's evidence insufficient to establish that the December 1, 2013, work-related cervical sprain permanently aggravated his pre-existing degenerative condition. *Id.* at 41-43. In arriving at this determination, the administrative law judge found that although Dr. Huseby, a pulmonologist and claimant's primary care physician who referred claimant to other physicians for treatment, opined that claimant's December 1, 2013 work-injury exacerbated his degenerative disc disease symptoms, he further testified that, because he is not a specialist in the area of neck injuries, he would defer to a specialist with regard to claimant's neck condition. *Id.* at 24, 35; CX 8 at 7-8. Consequently, the administrative law judge concluded that his opinion was outweighed by a specialist with regard to the causal relationship between claimant's pre-existing cervical condition and his work injury. Decision and Order at 35. Dr. Yang, claimant's neurologist, likewise testified on direct examination at his deposition that claimant's work injury "very likely" aggravated claimant's pre-existing degenerative changes. *Id.* at 36; CX 9 at 5. However, the administrative law judge found his opinion similarly unconvincing because: 1) Dr. Yang did not definitively offer an opinion as to the permanent or temporary nature of the aggravation; 2) he did not adequately explain the basis for his opinion; and 3) on cross-examination, Dr. Yan's opinion demonstrated the equivocal and uncertain nature of his opinion. Decision and Order at 41-43; *see* n.4, *infra*. Consequently, the administrative law judge found that claimant did not meet his burden of establishing that his December 1, 2013, work injury permanently aggravated his degenerative cervical condition.[3]

We reject claimant's challenge to the administrative law judge's weighing of this medical evidence. It is well established that the administrative law judge is entitled to weigh the medical evidence and draw her own inferences therefrom and is not bound to accept the opinion or theory of any particular medical examiner. *See Ogawa*, 608 F.3d at 650, 44 BRBS at 49 (CRT); *Duhagon*, 169 F.3d at 618, 33 BRBS at 3(CRT); *Jones Stevedoring Co. v. Director, OWCP* [*Taylor*], 133 F.3d 683, 31 BRBS 178(CRT) (9th Cir. 1997); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Moreover, it is impermissible for the Board to reweigh the evidence or to substitute its views for those of the administrative law judge; thus, the administrative law judge's findings may not be disregarded merely on the basis that other inferences also could have been drawn from the evidence. *See Newport News Shipbuilding & Dry Dock Co. v. Winn*, 326 F.3d 427, 37 BRBS 29(CRT) (4th Cir. 2003);

[3] With regard to Dr. Ren, a physical and medical rehabilitation specialist, the administrative law judge found that as she offered no opinion on the issue of causation, her records provided no support for claimant's position that his degenerative cervical condition is work-related. Decision and Order at 35-36.

Mijangos v. Avondale Shipyards, Inc., 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). In this case, the administrative law judge fully discussed the relevant evidence and provided a rational basis for finding the opinions of Drs. Huseby and Yang are not sufficient to establish that claimant's underlying cervical condition was permanently aggravated by the work injury.[4] As the administrative law judge's decision is rational, supported by substantial evidence, and in accordance with law, we affirm her determination that claimant did not meet his burden of establishing by a preponderance of the evidence that his cervical condition is related to the work accident. *See Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT); *Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000); *Santoro*, 30 BRBS 171; *see also Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT).

[4] Claimant correctly notes that a physician's opinion need not be "unequivocal" in order to constitute "substantial evidence." *See generally Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). However, the administrative law judge rationally declined to rely on the testimony of Dr. Yang. While he answered affirmatively to claimant's counsel's questions regarding whether work trauma "more likely than not" aggravated claimant's pre-existing condition, he then, "in his own words," testified on cross-examination that "[w]e do not know exactly what caused [claimant's condition to worsen] . . . it could be potentially . . . various reasons[.]". He further explicitly acknowledged the possibility that claimant's condition "could be the natural progression of an underlying problem." Decision and Order at 42-43 citing CX 9 at 10-11. Thus, claimant has not established error in the administrative law judge's finding that Dr. Yang's opinion is equivocal and not definitive.

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