U.S. Department of Labor

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

BRB No. 16-0494

ANTHONY K. WALLACE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TARTAN TERMINALS, INCORPORATED	)	DATE ISSUED: May 4, 2017
	)	
and	)	
	)	
AMERICAN LONGSHORE MUTUAL ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Jason Schultz and Jeffrey K. Gordon (Berman, Sobin, Gross, Feldman & Darby, L.L.P.), Lutherville, Maryland, for claimant.

Heather H. Kraus (Semmes, Bowen & Semmes), Baltimore, Maryland, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2015-LHC-00250) of Administrative Law Judge Larry S. Merck 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 was injured while working for employer on September 25, 2010. He filed a claim for injuries to his left arm, left leg, back, left hip, and left knee. The claim was consolidated with a 2012 claim against Ceres Marine Terminals for a November 2011 back injury. The claims for the back injuries went to a hearing, and the parties stipulated that claimant had a compensable back injury but disputed which employer was liable. Ultimately, Administrative Law Judge Henley found, and the Board affirmed, that Ceres is liable for disability and medical benefits related to claimant's back condition following the November 2011 incident. *Wallace v. Tartan Terminals, Inc.*, BRB Nos. 14-0124/A (Nov. 20, 2014), *aff'd sub nom. Ceres Marine Terminals, Inc. v. Director, OWCP*, 612 F. App'x 188 (4th Cir. 2015); Decision and Order at 2. The claim for a left arm/shoulder injury remained open. *Intercounty Construction Corp. v. Walter*, 422 U.S. 1, 2 BRBS 3 (1975).

Claimant then sought medical benefits for his left shoulder condition, contending it is due to the 2010 work accident. Administrative Law Judge Merck (the administrative law judge) found that claimant established a prima facie case relating his current shoulder condition to the 2010 work accident and that employer submitted substantial evidence rebutting the Section 20(a), 33 U.S.C. §920(a), presumption.[1] Decision and Order at 3, 18-19; JX 1.[2] Finding claimant credible, and giving greater weight to the opinions of treating physicians Gordon and Pollak, the administrative law judge, on the evidence as a whole, found that claimant established that his left shoulder condition, and the need for surgery, is related to the 2010 work accident. Decision and Order at 22-23, 29. The administrative law judge found that employer failed to establish claimant sustained any permanent aggravation or intervening injury to his left shoulder subsequent to the 2010 work injury. Concluding that there was no break in the causal chain, and that claimant's current shoulder condition is the result of the natural progression of his 2010 injury, he held employer liable for medical benefits including the recommended shoulder surgery. *Id.* at 29. Employer appeals the award, and claimant responds, urging affirmance. Employer has filed a reply brief.

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[1] In February 2015, Ceres was joined to the proceedings; Ceres disputed the occurrence of any shoulder injury as a result of the November 2011 accident. The administrative law judge found that Ceres rebutted the Section 20(a) presumption that claimant's shoulder injury was caused or aggravated by the 2011 incident at Ceres. Decision and Order at 3, 19. Employer does not challenge the finding that there was no intervening injury to claimant's left shoulder at Ceres in 2011, and it notes that the issues it raises on appeal now do not involve Ceres. Emp. Br. at 2 n.1.

[2] JX refers to the Joint Exhibit; CX refers to claimant's exhibits; TX refers to Tartan's exhibits (employer herein); and EX refers to Ceres' exhibits.

Employer contends the administrative law judge erred in finding that claimant's current left shoulder condition, which requires surgery, is related to his 2010 work injury. Employer contends there is not substantial evidence of record to support the finding that claimant's current shoulder condition is due to the 2010 accident, as Dr. Pollak did not opine that claimant's current shoulder condition is related to the 2010 accident. Specifically, employer asserts: 1) the absence of shoulder complaints establishes that any shoulder injury due to the 2010 incident had resolved; 2) Dr. Gordon did not see claimant after 2011, so his opinion could not relate the 2010 injury to the current condition; and 3) Dr. Cohen concluded there is no causal relationship between claimant's shoulder condition and the 2010 injury. In addition, employer contends the administrative law judge erred in finding that claimant's fall in the shower in 2013 is not the intervening cause of claimant's current shoulder condition.

It is undisputed that claimant injured his left arm/shoulder while working for employer on September 25, 2010. JX 1; Tr. at 25. On October 15, 2010, claimant's second visit with Dr. Gordon, claimant described his September fall as involving "landing on his left wrist, jamming his entire arm." Claimant told Dr. Gordon he had pain immediately, and "continue[d] to have significant pain through the left shoulder." An x-ray showed no fracture. Dr. Gordon diagnosed a left rotator cuff strain related to the September 2010 accident.[3] CX 1; TXs 5-6. Claimant then saw Dr. Becker on October 27, 2010, due to pain in his left arm. Dr. Becker stated that claimant was negative for rotator cuff testing and that his current symptoms had subsided; nevertheless, he recommended physical therapy. TX 3. Dr. Gordon followed-up with claimant on November 5, 2010, noting no change from the previous visit and again diagnosing a left shoulder rotator cuff strain. CX 1; TX 7.

After the appointment on November 5, 2010, with Dr. Gordon, there is no mention of claimant's left rotator cuff condition in a doctor's report until November 6, 2012, when Dr. Ludwig, claimant's back surgeon, summarily noted in his evaluation prior to surgery

[3] On claimant's first visit with Dr. Gordon, September 30, 2010, he complained only of pain in his back, left hip, and left knee, and he made no mention of a shoulder injury. CX 1; TX 5. Claimant later explained that he did not notice right away that his shoulder hurt because his primary concern was for his back and ability to walk. EX 83 at 6-10, 12; Tr. at 36. Moreover, claimant stated he was being treated for pain in his back, and the medications helped his shoulder. TX 75 at 40-41. The administrative law judge credited claimant's explanation. Decision and Order at 20-21, 29. Thereafter, despite claimant's testimony that he had consistently mentioned his shoulder pain at his follow-up appointments with Dr. Gordon, the administrative law judge found this was not reflected in the medical reports. Decision and Order at 20; TXs 5-27; Tr. at 25.

that claimant would see a doctor for his left shoulder problem.[4] TX 45. The next note regarding claimant's shoulder is in Dr. Ludwig's post-operative report, dated March 19, 2013, when he identified in his "problems list" that claimant had "[p]ain in joint, shoulder region" and "[d]isorders of bursae and tendons in his shoulder region, unspecified." CX 4; TX 51.

Beginning with Dr. Pollak's report of August 27, 2013, CX 5; TX 52, claimant's left shoulder pain became the focus of the medical reports. X-rays that day revealed degenerative changes. TX 53. The shoulder MRI, performed on September 17, 2013, by Dr. Staniford, and later reviewed by both Drs. Pollak and Hasan, revealed a possible small partial tear, mild fluid, arthritic changes, and rotator cuff tendinosis, but no evidence of a full-thickness tear.[5] CXs 5-7; EX 79; TXs 55, 58. Dr. Pollak's reports thereafter initially indicated claimant's shoulder was improving with therapy; however, on November 19, 2013, Dr. Pollak reported that claimant had a "slip and fall" in the shower approximately two weeks earlier, and his shoulder pain became substantially worse.[6] Due to claimant's pain, Dr. Pollak referred claimant to Dr. Hasan. CXs 5-6; EX 79; TXs 56, 58, 60, 77. Dr. Hasan confirmed that the September 2013 imaging showed a partial thickness tear, and he advised surgery. CX 6. Both Drs. Hasan and Pollak reported that claimant stated he had lived with the shoulder pain since the September 2010 injury and that it was getting progressively worse. CXs 5-6; EX 79. As of January 2015, Dr. Pollak reported that shoulder surgery had not yet been approved. CX 5.

[4] Employer cites two medical reports that mention claimant's shoulder. It avers they establish that any injury claimant may have sustained in September 2010 had resolved, and that the administrative law judge erred in not addressing this evidence. We reject employer's assertion of error. The two reports, TXs 8, 24, were generated by claimant's physical therapy and family doctors, in November 2010 and August 2011, respectively, during follow-up visits for claimant's back pain. Although both reports summarily indicated that claimant's shoulders, TX 8, and "limbs," TX 24, had normal motion and/or strength on evaluation, neither report specifically discussed claimant's rotator cuff condition. *See*, *e.g.*, TX 76 at 21 (Dr. Pollak stated: "A lot of people with degenerative shoulders are completely asymptomatic.").

[5] This is the only MRI of record, contrary to the administrative law judge's suggestion that there were several.

[6] Claimant testified at the hearing that he did not tell Dr. Pollak the pain was substantially worse after this incident. Tr. at 46. Rather, claimant explained that the "slip and fall" in the shower was not really a "fall" because, when his knee gave out, he merely "sat down" on the edge of the tub and braced himself against the wall with his right arm. He stated he was more concerned how this would affect his back condition. Tr. at 36.

Dr. Pollak stated in his deposition that the underlying cause of claimant's left shoulder condition is the progression of a degenerative condition. CX 9 at 35-38; TX 76 at 35-38. Although he did not have an opinion to a "reasonable degree of medical certainty" as to what may have aggravated claimant's underlying condition, he stated with a "reasonable degree of medical probability" that the shower fall in 2013 was an aggravating factor that contributed to the condition, and that, "assuming the absolute veracity of [claimant's] reports, then it's more likely than not that the injury with [employer] led to and contributed to his current problem." CX 9 at 39, 43-44, 63; TX 76 at 39, 43-44, 63; *see also* CX 5. Further, Dr. Pollak stated that, while he could not determine the accuracy of claimant's reporting of his condition, he saw no reason to believe that claimant was not being truthful. CX 9 at 63; TX 76 at 63.

On May 20, 2014, Dr. Cohen evaluated claimant at employer's request for a determination of the cause of his left shoulder pain. Dr. Cohen stated he was unable to relate the current/ongoing shoulder symptoms to the 2010 injury because, from the reports, it appeared it was a simple strain which resolved by November 5, 2010, and there was a significant gap in the reporting of any shoulder complaints to doctors. He concluded claimant's left shoulder problems are due to the progression of degenerative rotator cuff disease, unrelated to the September 2010 accident. TX 1. At his deposition, Dr. Cohen reiterated his opinion that claimant's left shoulder condition is due to the natural progression of degenerative rotator cuff disease and is not related to the 2010 fall, as any shoulder injury from that fall had resolved. He also stated that the 2013 fall in the shower was a proximate cause of the current condition. TX 77 at 17, 24, 29, 42, 51-53, 64.

Once the Section 20(a) presumption relating a claimant's harm to his employment accident has been invoked and rebutted, as here, the presumption drops from the case, and the causation issue must be decided on the record as a whole. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). On the record as a whole, the claimant bears the burden of establishing, by a preponderance of the evidence, a causal relationship between the work accident and his injury. *Moore*, 126 F.3d 256, 31 BRBS 119(CRT). When a claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, the employer is liable for the entire resulting disability and for medical expenses due to both injuries if the subsequent injury is the natural and unavoidable result of the original work injury. However, if the subsequent progression of the condition is not a natural or unavoidable result of the work injury, but is the result of an intervening event, the employer is relieved of liability for disability attributable to the intervening event. *See generally Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000); *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989); *Colburn v. General Dynamics Corp.*, 21 BRBS 219 (1988). In order to be relieved of liability for an

otherwise compensable injury, the employer bears the burden of establishing that claimed condition is due to an intervening event. *See Jones v. Director, OWCP*, 977 F.2d 1106, 26 BRBS 64(CRT) (7th Cir. 1992); *Shell Offshore v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998); *James*, 22 BRBS 271.

We agree with employer that Dr. Gordon did not treat claimant after 2011 and did not proffer any opinion on the cause of claimant's current shoulder condition. Dr. Gordon's reports serve to establish that claimant did, indeed, have a shoulder injury as a result of the September 2010 work accident, thereby supporting the parties' stipulation. Decision and Order at 2, 22; CX 1; TXs 6-7.

However, we reject employer's assertion that the record lacks evidence tying claimant's current shoulder condition to the work injury. The administrative law judge gave greatest weight to Dr. Pollak's opinion due to the duration, nature, and extent of his relationship with claimant. Decision and Order at 22-23; *Young v. Newport News Shipbuilding & Dry Dock Co.*, 45 BRBS 35 (2011). Although Dr. Pollak stated that he could not verify the accuracy of claimant's statements, he testified that claimant was consistent in his complaints and appeared to be truthful in tying his shoulder pain to the 2010 injury. Moreover, the administrative law judge credited Dr. Pollak's opinion that claimant's shoulder condition is a degenerative one to which both the September 2010 injury and the 2013 fall in the shower contributed. Decision and Order at 22-23; CXs 5, 9 at 39, 63-64; TXs 52, 76 at 39, 63-64; EX 72.

With respect to whether claimant's 2013 fall in the shower caused the need for shoulder surgery and thus constitutes an intervening event which severs employer's liability for medical benefits, the administrative law judge concluded that employer did not establish that the fall was "an entirely separate event" that caused claimant's current shoulder problem. Decision and Order at 25-26. Indeed, the record establishes that, prior to the 2013 shower fall, claimant's x-rays revealed degenerative disease and the MRI identified a partial rotator cuff tear. CXs 4-5, 7; TXs 51-57. The administrative law judge gave less weight to employer's expert, Dr. Cohen, rejecting employer's assertion that Dr. Cohen's opinions regarding the significance of the gap in claimant's reporting of shoulder complaints and his increased pain after the shower fall undermine claimant's credibility regarding his continued pain and symptoms. Further, the administrative law judge found that Dr. Cohen did not attribute claimant's current left shoulder condition to the 2013 fall alone; rather, he opined that the cause of claimant's current shoulder condition was progressive degenerative rotator cuff disease and stated that the 2013 shower fall was the "most proximate" cause.[7] Decision and Order at 23-26; TXs 1, 77 at

[7] The administrative law judge correctly stated that Dr. Pollak identified the shower fall as an "aggravating factor" that "contributed" to claimant's condition, as

29, 52-53. The administrative law judge permissibly concluded from this opinion that even if the 2013 fall exacerbated claimant's shoulder degeneration, the causal connection to the work injury is not severed. Thus, the administrative law judge concluded that employer did not establish that claimant's current left shoulder condition and the need for surgery are due solely to the 2013 fall in the shower. *Director, OWCP v. Vessel Repair, Inc.* [*Vina*], 168 F.3d 190, 33 BRBS 65(CRT) (5th Cir. 1999) (compensability rests on whether the work injury is a cause of the disability; it need not be the sole cause); *Plappert v. Marine Corps Exch.*, 31 BRBS 13, *aff'd on recon. en banc*, 31 BRBS 109 (1997) (employer bears burden of apportioning condition between work injury and subsequent non-work-related injury).

The administrative law judge is entitled to determine the weight to be accorded to the evidence of record, to address the credibility and sufficiency of any testimony, and to choose from among reasonable inferences. *Newport News Shipbuilding & Dry Dock Co. v. Cherry*, 326 F.3d 449, 37 BRBS 6(CRT) (4th Cir. 2003); *Moore*, 126 F.3d 256, 31 BRBS 119(CRT). The Board may not reweigh the evidence and must affirm the administrative law judge's findings of fact if they are rational and supported by substantial evidence. *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96(CRT) (4th Cir. 1994). The administrative law judge permissibly credited Dr. Pollak's opinion over that of Dr. Cohen. *Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994). Dr. Pollak's opinion constitutes substantial evidence on the record as a whole for the finding that claimant's current shoulder condition, which was documented prior to the 2013 fall in the shower, is related at least in part to the 2010 work injury. *Ceres Marine Terminals, Inc. v. Director, OWCP*, 848 F.3d 115, 50 BRBS 91(CRT) (4th Cir. 2016); *Young*, 45 BRBS at 38-39. Moreover, the administrative law judge rationally concluded that employer's evidence does not establish that the fall in the shower is the sole cause of the current shoulder condition for which surgery is necessary. *See generally Emery*, 228 F.3d 513, 34 BRBS 91(CRT). Therefore, we affirm the administrative law judge's finding that employer is liable for medical benefits for claimant's left shoulder condition.

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opposed to its being the "last contributing cause," as employer asserts. Decision and Order at 25-26; TX 76 at 38-39; TX 77 at 24-25.

Accordingly, the administrative law judge's Decision and Order 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