U.S. Department of Labor

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

BRB No. 16-0185

CLAYTON L. SIZER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ELECTRIC BOAT CORPORATION	)	DATE ISSUED: Oct. 12, 2016
	)	
Self-Insured Employer-Respondent	)	
	)	
ACE USA/ESIS	)	
	)	
Carrier-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and the Order Denying Carrier's Motion for Reconsideration of Timothy J. McGrath, Administrative Law Judge, United States Department of Labor.

Stephen C. Embry (Embry and Neusner), Groton, Connecticut, for claimant.

Edward W. Murphy (Morrison Mahoney LLP), Boston, Massachusetts, for self-insured employer.

Lucas D. Strunk (Strunk Dodge Aiken Zovas, LLC), Rocky Hill, Connecticut, for carrier.

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

PER CURIAM:

Carrier (ACE) appeals the Decision and Order Awarding Benefits and the Order Denying Carrier's Motion for Reconsideration (2014-LHC-01552) of Administrative Law Judge Timothy J. McGrath 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 first worked for employer (EBC) as an outside machinist, building and refurbishing submarines, from 1969 through 1972. During his employment, claimant was exposed to significant amounts of dust, fibers, and airborne particulates, including asbestos.[1] Tr. at 23-24. In 2002, claimant returned to work for employer as an outside machinist.[2] *Id*. at 25-26. Claimant testified that working conditions in 2002 were much cleaner than when he had previously worked for employer. *Id*. at 41. However, he was exposed to some grinding dust, Refrasil (a silicone-based insulation), every-day work chemicals such as Simple Green and Isopropanol, and boat paints upon his return to employer's facility. *Id*. at 26-27, 33-38, 48. Although claimant was part of an "asbestos team" charged with removing material believed to contain asbestos, he used gloves, a zero gravity bag, and a containment bag to prevent exposure and does not believe he was exposed to asbestos during this employment. *Id*. at 43-44.

Claimant began experiencing pulmonary problems in 2010. Tr. at 19-20. Subsequently, he was diagnosed with pulmonary disease; doctors attributed this disease only to smoking, only to asbestos exposure, or to a combination of smoking and environmental exposures.[3] *See* CXs 1, 5, 6; EXs 1, 3. Asserting that his pulmonary condition is related to his occupational exposures to asbestos and other pulmonary irritants, claimant sought medical benefits under the Act for a work-related pulmonary disease. 33 U.S.C. §907.

Claimant testified that his work environment during both periods of employment contained asbestos and other dusts, fumes, and toxins. Therefore, as all doctors diagnosed claimant with a lung disease and agreed that exposure to asbestos and other occupational dust, fumes, and toxins are potentially injurious, the administrative law

[1] In 1972, claimant left employer and became a police officer, a position he held until 2002. Tr. at 25. Claimant does not believe he was exposed to asbestos or other pulmonary irritants while working as a police officer. *Id*.

[2] EBC has been self-insured since 1973. During claimant's first period of employment, EBC was insured by ACE.

[3] Claimant testified that he was born in 1948 and began smoking cigarettes in 1964. He stated he smoked heavily while he was in Vietnam from 1966 through 1969, and has since quit and restarted smoking multiple times. Claimant stated that, generally, he did not smoke more than one pack per day. Tr. at 20, 29-30.

judge invoked the Section 20(a) presumption, 33 U.S.C. §920(a), linking claimant's pulmonary disease to both periods of employment. As Dr. Teiger attributed claimant's pulmonary impairment solely to cigarette smoking and not to exposure to asbestos or other occupational irritants, the administrative law judge found that employer rebutted the presumption of causation with respect to both periods of employment. Decision and Order at 13-14.

Noting that there are two potentially liable carriers in this case as EBC was insured by ACE during claimant's first period of employment but was self-insured during the latter employment period, the administrative law judge addressed, on the record as a whole, whether claimant established a work-related injury in each period of employment. Finding that claimant was not exposed to asbestos and did not establish he had a work-related pulmonary injury or aggravation of a prior condition in his post-2002 employment, the administrative law judge found that self-insured EBC is not the responsible carrier. The administrative law judge found that the preponderance of evidence establishes that claimant suffers from both pleural changes due to asbestos exposure and a pulmonary impairment due to the synergistic effects of smoking and exposures to asbestos and other occupational pulmonary irritants from 1969-1972. As ACE was on the risk during claimant's last occupational exposure that caused or contributed to claimant's pulmonary conditions, the administrative law judge found ACE liable for medical care necessitated by claimant's pulmonary conditions. Decision and Order at 14-17.

Subsequently, ACE filed a motion for reconsideration, asserting the administrative law judge erred in requiring it to establish that claimant suffered an actual harm or aggravation during his second tenure with EBC and that it needed to establish only that claimant was exposed to injurious stimuli.[4] ACE thus contended that because claimant had exposure to injurious stimuli during his second period of employment with employer, the self-insured employer is liable for claimant's medical benefits. By Order dated December 8, 2015, the administrative law judge denied ACE's motion for reconsideration. In so doing, the administrative law judge summarily stated, "[w]hile I carefully considered the parties' arguments, particularly Carrier's, there was neither sufficient evidence to demonstrate that [c]laimant was exposed to injurious stimuli during his second stint at Electric Boat, nor case law that persuaded me to alter my initial scrutiny of the facts." Order at 2.

ACE appeals the administrative law judge's finding it to be the responsible carrier in this case. Specifically, ACE asserts the administrative law judge improperly applied a causation test to each of claimant's periods of covered employment. ACE asserts that

[4] Claimant argued in support of ACE's position.

self-insured EBC should have been held to be the responsible carrier because it was on the risk during claimant's last period of exposure to injurious stimuli. Claimant responds in support of ACE's position. EBC responds, urging affirmance of the administrative law judge's finding that ACE is the liable entity.

We reject ACE's assertion that the administrative law judge erred in requiring claimant to establish he suffered a compensable injury due to his post-2002 employment. Under the Act, only those injuries "arising out of and in the course of employment" are compensable against an employer/carrier. 33 U.S.C. §902(2); *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). In this case, the parties disputed the issue of a causal relationship between claimant's pulmonary condition and his employment. *See* Decision and Order at 2; Tr. at 8, 14-15. An employer/carrier may not be held liable for a claimant's occupational disease if it is not work-related or if there is not "a rational connection" between the claimant's disease and the employment specific to that employer/carrier. *See generally Port of Portland v. Director, OWCP*, 932 F.2d 836, 840-841, 24 BRBS 137, 143-145(CRT) (9th Cir. 1991). Thus, on the facts of this case, as causation was at issue and claimant had two distinct periods of covered employment with non-covered work in between, the administrative law judge did not err in assessing whether claimant established he sustained a work-related injury in each period of covered employment. *See Albina Engine & Machine v. Director, OWCP*, 627 F.3d 1293, 44 BRBS 89(CRT) (9th Cir. 2010).

In determining whether an injury is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after he establishes a prima facie case. To establish a prima facie case, the claimant must show that he sustained a harm or pain and that conditions existed or an accident occurred at his place of employment which could have caused the harm or pain. *American Stevedoring, Ltd. v. Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996). Once, as in this case, the Section 20(a) presumption is invoked, the burden shifts to employer to produce substantial evidence that claimant's condition was not caused or aggravated by his employment. *Rainey v. Director, OWCP*, 517 F.3d 632, 634, 42 BRBS 11, 12(CRT) (2d Cir. 2008); *Marinelli*, 248 F.3d at 64-65, 35 BRBS at 49(CRT). If employer rebuts the Section 20(a) presumption, it no longer controls and the issue of causation must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *Rainey*, 517 F.3d at 634, 42 BRBS at 12(CRT); *Marinelli*, 248 F.3d at 65, 35 BRBS at 49(CRT); *Santoro v. Maher Terminal, Inc.*, 30 BRBS 171 (1996); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). If the claimant has a work-related occupational disease, the responsible carrier is the carrier that insured the employer at the time claimant was last exposed to injurious stimuli prior to the date on which he became aware that he had an occupational disease arising out of his employment. *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137, 145 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955); *see also General*

Dynamics Corp., Electric Boat Div. v. Benefits Review Board, 565 F.2d 208, 7 BRBS 831 (2d Cir. 1977).

The administrative law judge found the Section 20(a) presumption invoked because claimant has a pulmonary harm and was exposed to substances at employer's workplace that could have caused his harm.[5] Decision and Order at 13. The administrative law judge rationally found that Dr. Teiger's opinion, that claimant's pulmonary impairment is entirely attributable to claimant's smoking and is not at all due to his workplace exposures, rebuts claimant's prima facie case with respect to both periods of employment.[6] *See Rainey*, 517 F.3d at 634, 42 BRBS at 12(CRT); *Marinelli*, 248 F.3d at 65, 35 BRBS at 49(CRT); *see also Albina*, 627 F.3d 1293, 44 BRBS 89(CRT).

In weighing the evidence as a whole with respect to claimant's post-2002 employment, the administrative law judge found that claimant's testimony establishes that he was not exposed to asbestos during this period; therefore, claimant did not establish that his post-2002 employment caused or contributed to his pleural thickening.

[5] All three physicians of record diagnosed claimant with COPD/emphysema. CX 1 at 2-3; CX 5 at 14, 18; CX 6 at 9, 11; EX 1 at 4. Drs. Vora and DeGraff, respectively, also diagnosed pleural thickening and pleural plaques based on claimant's March 2013 CT scan. CX 1 at 2; CX 6 at 20. Dr. Teiger interpreted the CT scan as showing no evidence of asbestos-related diseases and did not comment as to the presence of pleural thickening or plaques. EX 3 at 16-17. However, all physicians agreed that pleural thickening and plaques are caused by asbestos exposure. CX 5 at 18; CX 6 at 26-27; EX 3 at 23.

[6] Dr. Teiger diagnosed emphysema and "reactive airway disease" due to cigarette smoking. EX 1 at 5; EX 3 at 11-13. Dr. Teiger further opined that claimant does not have any lung disease related to asbestos exposure as x-rays of claimant's chest taken between 2006 and 2010 show no evidence of pleural plaques, restrictive lung disease, or pulmonary fibrosis. EX 1 at 5; EX 3 at 16-17. Although there is some literature/"conjecture" that suggests asbestos can affect the small airways (emphysema), that is not Dr. Teiger's understanding or opinion. EX 3 at 29. With regard to other airborne pulmonary irritants, Dr. Teiger stated, "Dust in and of itself is not a worry to me. Organic compounds such as methyl ethyl ketone or trichloroethylene are known respiratory irritants . . . Some welding fumes are not lung irritants." EX 3 at 40-41. Dr. Teiger stated that "none [of claimant's disability] is due to his work at Electric Boat." EX 3 at 19.

Substantial evidence supports this finding as claimant testified that he used gloves, a zero gravity bag, and a containment bag to prevent exposure when working around asbestos. Tr. at 43-44; *see generally Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 28 BRBS 7(CRT) (2d Cir. 1993); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Further, although Dr. Vora opined that any occupational dust, toxins, paints or fumes could accelerate COPD, the administrative law judge rationally found Dr. Vora's opinion does not support a causal relationship between claimant's second period of employment and his pulmonary impairment as Dr. Vora also stated he could not assess whether claimant's exposure in this period was sufficient to cause injury.[7] Decision and Order at 15; CX 6 at 32-33. Therefore, as Dr. DeGraff also opined that claimant's post-2002 occupational exposure to gasses and dusts was not significant enough to affect lung function, and as the record contains no additional evidence linking claimant's pulmonary conditions to his post-2002 employment,[8] the administrative law judge rationally determined that claimant failed to establish a causal relationship between his post-2002

[7] Dr. Vora diagnosed emphysema due to smoking and COPD due primarily to cigarette smoke accelerated by occupational dust, fumes, and toxic exposures at work from 1969-1972. CX 6 at 16, 32-34. Based on a March 31, 2013 CT scan, Dr. Vora diagnosed pleural thickening and mild interstitial scarring due to asbestos exposure, and he opined that the combination of COPD and asbestos led to the presence of interstitial lung disease and loss of lung function. *Id.* at 11, 26, 29-31. Although claimant did not make Dr. Vora aware of his post-2002 occupational exposures, upon being asked to assume that during this employment claimant did not wear a respirator, occasionally did some grinding, worked near welders a couple time a year, and was exposed to paint and fumes, Dr. Vora stated: "I think any occupational dust, toxin, paints, fumes in conjunction with a prior existing COPD or ongoing smoking can . . . accelerat[e] COPD." *Id*. at 36.

[8] Dr. DeGraff diagnosed interstitial fibrosis and pleural plaques due to asbestos exposure based on the March 31, 2013 CT scan and claimant's exposure history. CX 5 at 18. Dr. DeGraff also diagnosed emphysema/small airways disease attributable to either smoking or asbestos exposure; however, he opined that claimant's lung disability is more likely due to asbestos exposure from 1969-1972 than to cigarette smoking based on the location of claimant's emphysema and the fact that his FEV_1 result remained relatively stable between 2005 and 2013 despite claimant's continuing to smoke. CX 1 at 2-3; CX 5 at 15, 18, 48. Dr. DeGraff stated that welding fumes, paint fumes, and grinding dust are harmful stimuli and are potentially harmful to the human frame, and that dust exposure can contribute to airway obstruction, though he opined that, based on claimant's deposition testimony, that claimant did not have "significant enough exposure to air and gases or dusts to cause impaired lung function" during his post-2002 employment. CX 5 at 21, 47, 56.

employment and his pulmonary conditions. *See generally Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001); *see also Albina*, 627 F.3d 1293, 44 BRBS 89(CRT). As claimant did not establish a compensable claim against self-insured employer, we affirm the administrative law judge's finding that it is not liable for claimant's medical benefits.

In weighing the evidence as a whole with respect to the relationship between claimant's 1969-1972 employment and his pulmonary condition, the administrative law judge rationally found claimant established that the pleural changes demonstrated on the March 2013 CT scan are due to his 1969-1972 occupational asbestos exposure as it is undisputed that claimant's exposure to asbestos during this period was significant, all of the doctors agreed that pleural thickening and plaques are caused by asbestos exposure, and Drs. Vora and DeGraff attributed claimant's pleural changes to his asbestos exposure during his 1969-1972 employment.[9] Moreover, all three physicians stated that claimant requires medical monitoring based on his history of asbestos exposure. *See Crawford v. Director, OWCP*, 932 F.2d 152, 24 BRBS 123(CRT) (2d Cir. 1991); *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 59 (1989) (claimant entitled to medical monitoring for non-disabling pleural plaques); CX 5 at 21; CX 6 at 11-12; EX 3 at 26-27.

With respect to whether claimant's COPD/emphysema is due to his work exposures from 1969-1972, the administrative law judge gave greater weight to the opinions of Drs. Vora and DeGraff than to that of Dr. Teiger, finding they account for claimant's exposure histories, are better explained, and are supported by the objective medical evidence including claimant's 2005-2013 pulmonary function studies and March 2013 CT scan. Decision and Order at 15-17; *see* n. 7-9, *supra*. Specifically, the administrative law judge found Dr. Teiger failed to explain how he eliminated claimant's significant occupational exposures as a potentially contributing cause of claimant's pulmonary impairment. *See* EX 3 at 19. By contrast, Drs. Vora and DeGraff explained that combined exposures to cigarette smoke and pulmonary irritants, such as asbestos, create a synergistic affect that hastens pulmonary impairment. Decision and Order at 16-17; CX 5 at 49; CX 6 at 26. Further, as claimant continued to smoke throughout his post-2002 employment but was not exposed to asbestos, and as his 2005-2013 pulmonary

[9] Dr. Teiger reviewed claimant's March 2013 CT scan during his April 2013 deposition. Although he read the CT scan as showing no evidence of fibrosis in the lung parenchyma, he conceded pleural plaques and thickening are caused by asbestos exposure and he stated no opinion as to whether the CT scan showed any such findings. EX 3 at 16-17, 23. As Drs. Vora and DeGraff believed the CT scan showed pleural changes consistent with asbestos exposure, substantial evidence supports the administrative law judge's finding that claimant established the existence of such pleural changes. Decision and Order at 15-17; *see Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT).

function studies showed a loss in FEV_1 consistent with age predictive values rather than a progressive increase in pulmonary impairment, the administrative law judge found the pulmonary function studies supported the conclusions of Drs. Vora and DeGraff that the pulmonary impairment occurred earlier and is not due to smoking alone.[10] Decision and Order at 16. The administrative law judge therefore rationally credited the opinions of Drs. Vora and DeGraff on the record as a whole. *See generally Gasparic*, 7 F.3d 321, 28 BRBS 7(CRT); *Hughes*, 289 F.2d 403. Consequently, as it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant's pulmonary conditions are causally related to his 1969-1972 employment. *Marinelli*, 248 F.3d at 65, 35 BRBS at 49(CRT). As ACE was on the risk during this period, we affirm the administrative law judge's finding that ACE is the carrier liable for claimant's medical benefits. *Cardillo*, 225 F.2d at 145; *see also Albina*, 627 F.3d 1293, 44 BRBS 89(CRT); *Port of Portland*, 932 F.2d 836, 24 BRBS 137(CRT).

[10] Dr. DeGraff explained that:

> Only a minority of cigarette smokers (approximately 20%) develop obstructive lung disease as a result of smoking, but once they develop airway obstruction, if they continue smoking, progression of the airway obstruction tends to accelerate. In [claimant's] case, the post bronchodilator FEV_1 relative to predicted has remained remarkably stabile [sic] from 2005 to 2013 indicating no change in the extent of airway obstruction, suggesting that his mild airway obstruction is not due to smoking.

CX 1 at 2. Dr. DeGraff reiterated this opinion during his deposition, in which he again explained claimant's pulmonary function studies do not support causation due solely to smoking, because "we do know that someone who has as much - - the mild presence of obstructive lung disease, we would expect that if he continued to smoke, that his lung function would deteriorate." CX 5 at 18.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Order Denying Carrier's Motion for Reconsideration are 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