U.S. Department of Labor

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

BRB No. 19-0486

VAN FITZGERALD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
COOPER/T. SMITH, INCORPORATED	)	
	)	DATE ISSUED: 04/15/2020
and	)	
	)	
AMERICAN LONGSHORE MUTUAL ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Van Fitzgerald, Houston, Texas.

Collin D. Seipel and Austen T. Gunnels (Brown Sims), Houston, Texas, for employer/carrier.

Before: BOGGS, Chief Administrative Appeals Judges, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (2015-LHC-00799) of Administrative Law Judge Patrick M. Rosenow rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). In an appeal by a claimant without the assistance of counsel, the Board 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. If they are, they must be affirmed. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On August 7, 2014, claimant fell in the course of his employment with employer. He completed his shift and subsequently worked for various employers through August 13, 2014. On August 14, 2014, claimant went to a local hospital where he was diagnosed with a left knee sprain and right thumb contusion. On September 5, 2014, claimant filed a claim for injuries to his hands, knees, left elbow and right thumb allegedly sustained in the fall. EX 1 at 1. On November 5, 2014, claimant amended his claim to add injuries to his right shoulder and head. *Id.* at 2. On April 7, 2015, claimant once again amended his claim, adding blurred vision, headaches, and memory problems allegedly related to the effects of work-related inhalation of fumes. *Id.* at 3.[1] Approximately eighteen physicians examined claimant for his various signs and symptoms. Decision and Order at 18 – 46.

The administrative law judge found claimant did not prove his case with regard to his alleged head or brain injury, nor did claimant establish his exposure to fumes while working for employer. The administrative law judge applied Section 20(a), 33 U.S.C. §920(a), to presume that claimant's multiple orthopedic complaints are related to his August 7, 2014 fall and found employer rebutted that presumption. He determined, based on the record as a whole, claimant's orthopedic complaints are not related to his fall at work. Accordingly, the administrative law judge denied claimant's claim for benefits.

On appeal, claimant, representing himself, challenges the administrative law judge's denial of his claim for benefits under the Act. Employer responds, urging affirmance of the administrative law judge's decision in its entirety. Claimant filed a reply brief.

Claimant bears the initial burden of establishing the existence of an injury or harm and a work-related accident or working conditions which could have caused his harm. *See Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Once claimant establishes this prima facie case, he is entitled to the Section 20(a) presumption, which links his harm to the work accident or working conditions. 33 U.S.C. §920(a); *see Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999).

[1] In this regard, claimant now alleged that exposure to fumes caused dizziness, which caused him to fall, as well as blurred vision, headaches and memory problems. *See* Decision and Order at 47.

As claimant has appealed without the assistance of counsel, we will address those findings of the administrative law judge which are adverse to him. We first address the administrative law judge's finding that claimant did not establish he sustained a brain or head injury, or adverse exposure to fumes on August 7, 2014. After discussing claimant's testimony at length, *see* Decision and Order at 5–14, the administrative law judge found his testimony and reports to his physicians to be "simply not credible and undeserving of any significant probative weight."[2] *Id.* at 48-50. With respect to his claim based on his alleged exposure to injurious fumes, the administrative law judge discounted claimant's testimony that he was overcome by fumes as it is wholly unsupported by any corroborating evidence. He also noted the absence of any evidence of claimant sustaining a specific inhalation injury. *Id.* at 54. The administrative law judge further found the medical opinions which relied on the accuracy of claimant's reports to be similarly unreliable. *Id.* at 50, 53. He credited the opinions of Drs. Hershkowitz, Johnstone, Melillo, and Yohman, each of whom opined claimant did not sustain a brain or head injury. *Id.* at 54. The administrative law judge concluded claimant failed to establish he was exposed to fumes while working for employer and that the weight of the probative medical evidence does not meet claimant's burden of proving he sustained a brain or head injury.[3] *Id.* at 53-55.

The administrative law judge applied the proper standard regarding claimant's burden to produce creditable evidence concerning the elements of his prima facie case. *Bis Salamis, Inc. v. Director, OWCP [Meeks]*, 819 F.3d 116, 127, 50 BRBS 29, 35-36(CRT) (5th Cir. 2016). Moreover, questions of witness credibility are for the administrative law judge as the trier-of-fact to determine and the Board may not interfere with the administrative law judge's rational credibility determinations. *Id.*, 819 F.3d at 130-131, 50 BRBS at 37-38(CRT). The administrative law judge gave ample, cogent reasons for

[2] The administrative law judge found claimant's description of his fall at work and subsequent symptoms depended on who he was talking to at the time and what alleged injury he was describing. Decision and Order at 48. He determined the record is replete with inconsistencies between claimant's testimony and the reports he related to the physicians who examined him, and that some of the physicians expressed concern about the accuracy of his subjective reports. *Id.* at 49. The administrative law judge also noted that some of claimant's treating physicians were in legal trouble for various reasons. *Id.* at 51.

[3] With regard to claimant's fall, the administrative law judge found the three witnesses to his fall contradicted his assertion that he struck his head and lost consciousness. Rather, the administrative law judge determined that the weight of the probative evidence supports the conclusion that claimant stumbled, fell forward to the ground, and caught himself on his hands and knees. *See* Decision and Order at 50.

doubting claimant's credibility concerning his alleged exposure to fumes, the severity of his fall and its medical consequences, as well as the credibility of his treating doctors. *See* Decision and Order at 53-54. Consequently, as they are rational, supported by substantial evidence, and in accordance with law, we affirm the administrative law judge's findings that claimant did not make his prima facie case with respect to his claims for the inhalation of fumes and head and brain injuries.

We next address the administrative law judge's findings with regard to claimant's orthopedic injuries. He found claimant suffered left knee and right thumb contusions in his fall on August 7, 2014, and that his fall could have aggravated his pre-existing orthopedic conditions.[4] Thus, the administrative law judge applied the Section 20(a) presumption to these conditions. *See* Decision and Order at 50, 52-53; *Hunter*, 227 F.3d at 288, 34 BRBS at 97(CRT).

The burden then shifted to employer to rebut the presumed causal connection with substantial evidence that claimant's injuries were not caused or aggravated by his fall. *See Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 287, 37 BRBS 35, 37(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003); *Hunter*, 227 F.3d at 288, 34 BRBS at 97(CRT). In order to rebut the Section 20(a) presumption, employer need not "prove the deficiency" in claimant's prima facie case; rather, "all it must do is advance evidence to throw factual doubt on the prima facie case." *Ceres Gulf, Inc. v. Director, OWCP [Plaisance]*, 683 F.3d 225, 231, 46 BRBS 25, 29(CRT) (5th Cir. 2012).

The administrative law judge found employer offered probative evidence sufficient to rebut the presumption. Specifically, in his extensive review of the medical evidence, the administrative law judge found Dr. Larrey opined claimant's osteoarthritis was not aggravated by his fall, Dr. Gabel opined claimant's carpal tunnel syndrome was unrelated to his fall, Dr. Johnstone opined claimant has no genuine illness, and Dr. Melillo opined claimant sustained no work-related injury or aggravation to his shoulders as a result of his fall and, additionally, claimant's bilateral knee arthritis, neck, and carpal tunnel conditions are similarly unrelated to his fall at work. As these medical opinions cast doubt on the presumed causal relationship between claimant's orthopedic injuries and his work-related fall, we affirm the administrative law judge's finding that employer rebutted the Section 20(a) presumption with regard to these conditions. *Plaisance*, 683 F.3d at 231, 46 BRBS at 29(CRT).

[4] The administrative law judge found claimant had prior diagnoses of bulging lumbar discs, a partial tear in his shoulder, and carpal and cubital tunnel syndromes. Decision and Order at 52.

If the administrative law judge finds the Section 20(a) presumption rebutted, the presumption no longer controls, and the issue of causation must be resolved based on the evidence of record as a whole, with claimant bearing the burden of persuasion. *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. 257, 28 BRBS 43(CRT) (1994). The administrative law judge weighed the relevant evidence as a whole and, after crediting the opinions of Drs. Larrey, Gabel, and Melillo, concluded claimant did not meet his burden of establishing his cervical and lumbar spine, shoulder, arm, hand, leg or knee conditions were either caused or aggravated by his work accident. Decision and Order at 53. As discussed, the administrative law judge found claimant's testimony and reports to his physicians to be incredible and he similarly discounted the medical opinions that relied on claimant's description of his fall and symptoms. *Id.* at 50. In contrast, the administrative law judge gave significant evidentiary weight to Dr. Larrey's opinion that claimant's August 7, 2014 fall resulted in only bilateral hand and knee contusions which resolved the same day as his work incident. EX 46. The administrative law judge found Dr. Gabel reached similar conclusions, opining that tests performed on claimant revealed typical age-related degenerative changes and that claimant's ulnar and medial nerve conditions are not related to his work-related fall. EXs 37, 48, 60. Dr. Melillo opined that claimant's shoulder condition, bilateral knee arthritis, neck, and carpal tunnel conditions are unrelated to his work fall. EXs 50, 61.

It is well-established that an administrative law judge is entitled to weigh the medical evidence and draw his own inferences therefrom. The Board is not empowered to reweigh it. *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46(CRT) (5th Cir. 1990). In this case, the evidence the administrative law judge credited is substantial and sufficient to establish that claimant's multiple orthopedic conditions are unrelated to his August 7, 2014 fall. Therefore, we affirm the administrative law judge's conclusion that claimant did not establish his orthopedic conditions were either caused or aggravated by his August 7, 2014 fall and, therefore, we affirm the denial of benefits. *Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001); *Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000); *Rochester v. George Washington Univ.*, 30 BRBS 233 (1997).

Accordingly, we affirm the administrative law judge's Decision and Order.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge