U.S. Department of Labor

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

BRB No. 20-0476

DAVID FRANZEN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GEORGIA-PACIFIC, LLC	)	
	)	DATE ISSUED: 04/28/2021
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Compensation and Benefits of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Richard A. Mann (Brownstein Rask, LLP), Portland, Oregon, for Claimant.

Stephen E. Verotsky (SBH Legal, LLP), Portland, Oregon, for Employer/Carrier.

Before: BOGGS, Chief Administrative Appeals Judge, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Richard M. Clark's Decision and Order Awarding Compensation and Benefits (2018-LHC-00835) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (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 applicable law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked for Employer as a warehouseman and barge unloader. His job consisted of driving a forklift to load and unload barges on the Willamette River. Tr. at 14-15. In order to unload products, Claimant drove over an "apron" connecting the barges to the dock, picked up a load, backed up, placed the cargo onto a cart in the elevator, and then backed up over the apron again. *Id.* at 15. He used his left arm to steer the forklift and often had to drive with his arm raised above shoulder height. *Id.* at 38-39. He also spent up to a third of his workday lifting up to 30 pounds. *Id.* at 17, 22-23, 53-55.

On April 23, 2007, Claimant injured his lower back while unloading trucks on the dock. Tr. at 23. Claimant was taken off work for six months; when he returned to work, he testified it was normal to have back pain on a daily basis but he continued to work through it. *Id.* at 24-25; CX 2 at 14-15. He filed a claim for benefits for his lower back injury in 2008. In June 2010, Claimant and Employer entered into an approved Section 8(i), 33 U.S.C. §908(i), settlement in which Employer agreed to pay Claimant $25,000 over two years to resolve his claim. EX 1 at 5.

Claimant subsequently reported a mild flare up in his back pain in 2010, with some numbness and tingling in his right anterior thigh. CX 6 at 48. In January 2017, Claimant experienced another flare up of pain in his lower back and right lower extremity. CX 6 at 48, 55-57. Dr. Rief, a chiropractor, treated Claimant and his pain returned to baseline after three weeks. *Id.* at 59; EX 31 at 150.

On September 11, 2017, Claimant suffered another injury to his lower back when he backed his forklift over the apron that connects the elevator and the barge. CX 2 at 8. Claimant felt a sharp pain in his back and, about 20 minutes later when he exited the forklift, he could not put any pressure on his right leg. Tr. at 26-27. He reported the incident to the elevator operator and was taken to an urgent care center, where he was diagnosed with a lumbar sprain.[1] CX 2 at 10; CX 5 at 31.

Claimant's back pain did not improve and, on March 13, 2018, Claimant saw Dr. Keenan, an orthopedic spine surgeon, and reported the pain after his 2017 injury was more

[1] Employer fired Claimant on February 14, 2018 for failing to report that he had been released to modified duty if available. EX 30 at 149.

severe than it had been before the incident. Claimant stated he suffered from constant and gradually worsening "midline and right-sided" lower back pain that radiated to his right buttock, anterior thigh, and shin. EX 31 at 150. Dr. Keenan diagnosed Claimant with likely L3-4 and L4-5 disc herniations and referred him for epidural steroid injections, with surgery as an option. *Id.* at 152-53.

Claimant also injured his left shoulder in the 1990s for which he received physical therapy but continued to work. Tr. at 31. Thereafter, Claimant's left shoulder continued to cause pain, which he attributed to cumulative trauma caused by more than 30 years of driving a forklift. *Id.* at 32-33. An MRI of his left shoulder taken on March 20, 2018 showed severe generalized rotator cuff tendinosis and areas of partial tearing in the supraspinatus, infraspinatus, and subcapularis tendons. CX 15 at 173. Claimant had left shoulder rotator cuff repair surgery on August 10, 2018. CX 14 at 166.

Claimant filed claims for the injuries to his lower back and left shoulder. The administrative law judge found Claimant credible and gave his testimony substantial weight. *See* Decision and Order at 19-20. He found Claimant established a prima facie case that his lower back condition was aggravated by his work incident on September 11, 2017, and that his working conditions caused a cumulative injury to his left shoulder. *See id.* at 26-27. The administrative law judge further found Employer rebutted the Section 20(a) presumption as to both Claimant's back and left shoulder injuries. *See id.* at 28-29.

In weighing the evidence as a whole, the administrative law judge concluded Claimant established he sustained a new work-related injury in September 2017 that aggravated his pre-existing back condition. *See* Decision and Order at 29. He rejected Employer's argument that the 2010 settlement barred this claim because he found there was a "distinct bump incident on September 11, 2017, that triggered the new back injury," Claimant's symptoms before the incident were mild and manageable, and Claimant experienced increased pain and new symptoms including numbness, tingling, and pain in his feet following the incident. *See id.* at 29-30. The administrative law judge also found the evidence as a whole establishes Claimant suffered a work-related cumulative trauma to his left shoulder. *See id.* at 33-35.

The administrative law judge accepted the parties' stipulation that Claimant has not reached maximum medical improvement for either his back or shoulder injury. *See* Decision and Order at 36. He further found Claimant established he is totally disabled because he cannot return to his former employment and Employer has not established any

suitable alternate employment.[2] *See id.* at 37. He therefore awarded ongoing temporary total disability benefits from September 11, 2017. *See id.* at 39.

Employer appeals the administrative law judge's decision, arguing first that the administrative law judge erred in finding Claimant sustained a new back injury in 2017 such that the 2010 settlement does not bar this claim for a lower back injury. Employer also contends the administrative law judge's finding that Claimant's left shoulder injury is work-related is not supported by the evidence. Claimant filed a response brief, urging affirmance of the administrative law judge's decision. Employer filed a reply brief.

Lower Back Injury

Employer challenges the administrative law judge's finding that the 2010 settlement does not bar the current claim for Claimant's lower back injury, arguing that both claims involve the same condition of degenerative changes at the L4-5 discs with nerve root involvement at L4 and L5. Employer contends Claimant's disabling back condition is due to the natural progression of his pre-existing back condition and consequently the 2010 settlement should bar his current lower back claim.

Section 8(i) of the Act provides that the parties may settle "any claim for compensation under this chapter." 33 U.S.C. §908(i). The parties may settle only claims in existence, as the regulation at Section 702.241(g) provides that a settlement agreement "is limited to the rights of the parties and to claims then in existence." 20 C.F.R. §702.241(g); *see J.H. [Hodge] v. Oceanic Stevedoring Co.*, 41 BRBS 135 (2008); *Cortner v. Chevron Int'l Oil Co., Inc.*, 22 BRBS 218 (1980). Once approved, the effect of a Section 8(i) settlement is to completely discharge the employer's liability for the claimant's injuries that are the subject of the settlement. 33 U.S.C. §908(i)(3); 20 C.F.R. §702.243(b). Claimant bears the burden of persuasion on the record as a whole to establish his condition is related to a new work injury in 2017, as the Section 20(a) presumption was invoked and rebutted. *See Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010).

The administrative law judge concluded the 2010 settlement does not bar the current lower back claim because Claimant sustained a new injury in 2017. *See* Decision and Order at 30. The administrative law judge gave greater weight to Dr. Kane's opinion that Claimant's 2017 bump incident bruised, scratched, or stretched his L4/L5 nerve root and thus aggravated his pre-existing back condition and caused it to become symptomatic. *See id.* (citing CX 25 at 364). He noted Dr. Radecki's opinion that Claimant did not suffer any

[2] Employer does not challenge these findings on appeal.

"specific injury event of a remarkable nature" in September 2017 and his current lower back condition is only a natural progression of his pre-existing condition. *See* CX 9 at 143-44. The administrative law judge discredited Dr. Radecki's opinion because it was undercut by his acknowledgment that Claimant "had a change in his body condition relative to the right L4 nerve root" in September 2017, which made Claimant's symptoms flare up beyond his usual symptoms. *See* Decision and Order at 31.

We reject Employer's contention of error as it amounts to little more than challenging the administrative law judge's credibility determination and his weighing of the evidence, which is within the administrative law judge's prerogative. *See Ogawa*, 608 F.3d at 648, 44 BRBS at 48(CRT). The Board will not interfere with an administrative law judge's credibility determinations unless they are inherently incredible or patently unreasonable. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). The administrative law judge was entitled to find Claimant a credible witness and thus accept his testimony as to the occurrence of the 2017 incident and its effect on his back pain. *See Todd Pacific Shipyards Corp. v. Director, OWCP [Picinich]*, 914 F.2d 1317, 24 BRBS 36(CRT) (9th Cir. 1990). The administrative law judge found Claimant's testimony that his symptoms and pain increased both in severity and in kind following his 2017 incident is consistent with his treatment records and his accounts of his 2017 incident to his doctors. *See* Decision and Order at 31, 33. Moreover, following his 2017 incident, Claimant was able to return to work after six months, restricted only to working no more than 10 hours a day and 40 hours a week. Tr. at 24; EX 1 at 3. In contrast, Dr. Kane, Claimant's treating physician, stated Claimant would be disabled from work as a result of his 2017 incident and back surgery might be necessary. CX 8 at 129; CX 25 at 367; EX 31 at 152-53.

We also reject Employer's contention that the administrative law judge erred by giving greater weight to Dr. Kane's opinion than to Dr. Radecki's. This amounts to a request that the Board reweigh the evidence, which we are not permitted to do. *See Rhine v. Stevedoring Servs. of Am.*, 596 F.3d 1161, 44 BRBS 9(CRT) (9th Cir. 2010). The administrative law judge found Dr. Kane's opinion better supported by its underlying documentation and entitled to greater weight based on his familiarity with Claimant's condition as his treating physician. *See generally Amos v. Director, OWCP*, 153 F.3d 1051, 32 BRBS 144(CRT) (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999). In addition, the administrative law judge permissibly discredited Dr. Radecki's opinion that Claimant's current back condition is the result of the natural progression of his pre-existing back condition, as he found it internally inconsistent and unpersuasive. Decision and Order at 21-22, 30-31; CX 9 at 143-44. As it is supported by substantial evidence, we affirm the administrative law judge's finding that Claimant's current lower back claim is due to his 2017 incident at work, which constitutes a new injury. *Abbott v. Dillingham Marine & Mfg. Co.*, 14 BRBS 453 (1981),

aff'd mem., 698 F.2d 1235 (9th Cir. 1982) (table). As a claim for his 2017 injury was not in existence at the time of the 2010 settlement, the administrative law judge properly found it does not bar the claim for his subsequent back injury. *Clark v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 121 (1999) (McGranery, J., concurring); 20 C.F.R. §702.241(g).

Left Shoulder Injury

Employer challenges the administrative law judge's finding that Claimant suffered a work-related cumulative trauma injury to his left shoulder. Having found Claimant established a prima facie case that his working conditions contributed to his shoulder injury and employer rebutted the Section 20(a) presumption, the administrative law judge concluded the evidence as a whole establishes Claimant's work activities contributed to and hastened his need for treatment for his left shoulder. The administrative law judge credited Claimant's credible testimony about his work activities; specifically, how he was required to drive for prolonged periods with his arm in greater than 60 degrees of flexion, which is associated with a greater risk of shoulder injury. *See* Decision and Order at 34. He also found the testimony of Mr. Katzen, the vocational expert, credible in his description of the physical demands of driving a forklift. *See id.* He gave probative weight to Dr. Kane's opinion that claimant's work activities contributed to and hastened the need for shoulder treatment because the position of Claimant's arm while working and the repetition of the work "would stress the shoulder." *See id.* at 34 (quoting CX 25 at 375). The administrative law judge discredited Dr. Radecki's opinion that Claimant's shoulder condition was the result of age and genetics, and not related to Claimant's work, because Dr. Radecki had only a superficial understanding of the nature of Claimant's work and did not actually know how Claimant was positioned while driving. *See id.* at 35 (citing CX 24 at 309-310).

We reject Employer's contention as it again asks the Board to reweigh the evidence. *See Rhine*, 596 F.3d 1161, 44 BRBS at 9(CRT). Employer has not identified any relevant evidence which the administrative law judge ignored or misconstrued. The administrative law judge thoroughly reviewed the medical evidence, summarized the doctors' opinions in some detail, and explained his reasons for giving greater weight to Dr. Kane's opinion as Claimant's treating physician. He permissibly found Dr. Kane's opinion persuasive and well-reasoned because it is supported by Claimant's treatment records and the doctor also clarified his own opinions when he misspoke. Decision and Order at 20-21. The administrative law judge rationally discounted Dr. Radecki's opinion because he did not have an accurate understanding of Claimant's work.[3] Because the administrative law

[3] The administrative law judge noted Dr. Radecki's opinion that Claimant's duties driving a forklift with his body twisted was not a risk to his back or shoulder is contradicted

judge's conclusion that Claimant suffered a work-related cumulative trauma injury to his left shoulder is supported by substantial evidence, it is affirmed. *Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT).

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

by the fact that following Claimant's 2007 incident, both Dr. Gross and Dr. Lorber stated that driving in reverse with his body twisted and operating a forklift was likely to exacerbate Claimant's conditions. *See* Decision and Order at 32.