U.S. Department of Labor

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

BRB No. 21-0427

RENE A. FUENTES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
OFFSHORE AIR AND REFRIGERATION[1]	)	
	)	DATE ISSUED: 02/15/2023
and	)	
	)	
TECHNOLOGY INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	DECISION and ORDER

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

W. Patrick Klotz (Klotz & Early), New Orleans, Louisiana, for Claimant.

Jeffrey I. Mandel (Juge, Napolitano, Guilbeau, Ruli, & Frieman), Metairie, Louisiana, for Employer/Carrier.

[1] Claimant's Petition for Review, as well as Employer/Carrier's Memorandum in Opposition to Claimant's Petition for Review, identified the Employer as Comm Engineering, Inc., and the Carrier as Amtrust Insurance Company of Kansas. These are incorrect parties, as the ALJ noted in his Decision and Order, and as the parties stipulated. Decision and Order (D&O) at 45-46; Hearing Transcript (HT) at 4-10. Consequently, the ALJ corrected the caption. D&O at 1.

Before: BOGGS, ROLFE, and JONES, Administrative Appeals Judges.

ROLFE and JONES, Administrative Appeals Judges:

Claimant appeals Acting District Chief Administrative Law Judge (ALJ) Patrick M. Rosenow's Decision and Order (2017-LHC-983) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (Act), as extended by the Outer Continental Shelf Lands Act, 43 U.S.C. §1301 *et seq*. (OCSLA). 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).

On January 21, 2019, Claimant was part of a five-person crew working for Employer on a drilling platform in the Gulf of Mexico.[2] Joint Exhibit (JX) 1; Decision and Order (D&O) at 9, 13. Claimant's role that day was safety rescue, which meant he was to remain on the platform deck and watch the rest of the crew as they worked on scaffolding over water to make sure everyone was tied off correctly and to initiate safety protocol if someone fell. D&O at 9, 14, 16, 19. However, that morning, the rig's safety supervisor gave permission for him to also carry bags of debris from the edge of the scaffolding upon which the rest of the crew was working to a large dumpster known as a "super sack," provided he continued to watch the crew by looking over his shoulder. *Id.* at 9, 13-14, 16, 18, 19. The walkway's distance between the edge of the scaffolding and the super sack was seven to ten feet and took only about three to four steps to cross; according to other crew members, it would have taken between one to four seconds to walk from the edge of the scaffolding to the super sack and another four to five seconds to dump the debris in the super sack and turn around. *Id.* at 13, 14, 16, 18. Claimant made three or four trips from the edge of the scaffolding to the super sack without incident; however, on his final trip, his co-worker handed him a bag, turned around to get another one, and by the time he turned back around to give it to Claimant, Claimant was face down on the ground. *Id.* at 17.

None of the other crew members witnessed how Claimant came to be on the ground because their backs were momentarily turned; there was nothing blocking their view of him as he walked to the super sack. D&O at 19. One crew member immediately got down

[2] Because the injury occurred off the coast of Louisiana, this case arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit. 33 U.S.C. §921(c); *Hon v. Director, OWCP*, 699 F.2d 441 (8th Cir. 1983). The parties stipulated Employer has paid benefits under the Louisiana Workers' Compensation Act.

off the scaffolding to check on Claimant and found him unresponsive. D&O at 17; Employer's Exhibit (EX) 34 at 44. Witnesses noted Claimant was lying on top of cylindrical cartridges[3] stacked next to the walkway; there was one under his head, one under his torso, and one to two under his feet. D&O at 14, 17, 19-20. The medic was called to the scene, and he noted a red mark and indentation on Claimant's forehead where it apparently had hit a cartridge. He testified Claimant was unresponsive, even to painful stimuli, and remained unresponsive while being transported to the infirmary. *Id.* at 21.

Claimant filed a claim seeking benefits for alleged injuries to his head, neck, back, both shoulders, and both knees as a result of the January 2019 workplace incident. JX 1; EX 3. The ALJ acknowledged the record established Claimant suffered a bodily harm, and his alleged fall could have caused the bodily harm. D&O at 48. However, according to the ALJ, before Claimant could invoke the Section 20(a) presumption of causation, 33 U.S.C. §920(a), he first had to prove, by a preponderance of the evidence, he fell as he alleged. D&O at 48.

The ALJ perceived only two possibilities as to how Claimant could have fallen and described them according to each party's argument. Either, as Claimant maintained, the cartridges stacked next to the walkway, which had been stationary for days, inexplicably appeared in his path, causing him to trip and fall, or, as Employer averred, Claimant staged the entire incident and feigned his unconsciousness. D&O at 51, 52. The ALJ found both positions problematic but weighed the evidence to determine which was more likely, i.e., whether Claimant could prove the accident occurred as he alleged. D&O at 49-52.

Because there were no witnesses to Claimant's actual fall, the ALJ deemed all evidence to be "circumstantial" and found Claimant's credibility to be "highly relevant." D&O at 48-49. Ultimately, he found Claimant lacked credibility due to inconsistent, uncorroborated, and conflicting statements throughout his testimony and reports to medical providers. *Id.* at 50. The ALJ then weighed the rest of the evidence and concluded while it was unlikely Claimant staged the entire accident and injury, his confirmed pre-existing medical conditions and total lack of credibility made that scenario "less unlikely than an unexplained force causing an obstacle that had remained in place for days to suddenly trip him." D&O at 52-53. As a result, "having reviewed the entire record," the ALJ found Claimant failed to carry his burden on "the evidentiary record as a whole" because he did

[3] The witnesses identified the long cylindrical objects as either "cartridges," "filters," "water filters," or "cylinders." D&O at 13, 16, 17, 19, 20. In the Decision and Order, the ALJ referred to the objects in question as either "insulation canisters" (D&O at 49, 51, 52) or "insulation cartridges" (D&O at 51). For the sake of consistency, we will refer to them simply as "cartridges."

not show it was more likely than not that he fell as alleged; therefore, he denied Claimant's claim. *Id.* at 53.

Claimant appeals, maintaining the ALJ erred by holding him to a higher standard of proof than required to invoke the Section 20(a) presumption. Employer responds, arguing substantial evidence supports a finding that Claimant could not invoke the Section 20(a) presumption, and that, alternatively, any error was harmless because the ALJ properly determined Claimant could not prevail on the record as a whole.

To the extent the ALJ's decision can be interpreted to hold Claimant did not invoke the Section 20(a) presumption, we agree the ALJ improperly held him to a higher standard of proof than the Act requires by making him prove not only that the accident occurred as he alleged, i.e., he tripped and fell over cartridges, but also that it was more likely than not that an "unexplained force" caused those cartridges to suddenly appear in his path. D&O at 48, 52-53. But we further agree with Employer that the lack of discussion of invocation and rebuttal is harmless in this instance, because the ALJ permissibly found Claimant lacked credibility and could not prove his claim on the record as a whole.

The Section 20(a) presumption applies to the issue of whether an injury is causally related to employment. 33 U.S.C. §920(a); *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *Noble Drilling Co. v. Drake*, 795 F.2d 478, 19 BRBS 6(CRT) (5th Cir. 1986); *see, e.g.*, *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 1082, 4 BRBS 466, 475 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976); *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968) (en banc); *Welding v. Bath Iron Works Corp.*, 13 BRBS 812 (1981). For Section 20(a) to apply, the claimant must establish a prima facie case by showing he suffered some harm or pain, and working conditions existed or an accident occurred which could have caused the harm or pain. *Bis Salamis, Inc. v. Director, OWCP [Meeks]*, 819 F.3d 116, 127, 50 BRBS 29, 36(CRT) (5th Cir. 2016); *Hunter*, 227 F.3d 285, 34 BRBS 96(CRT); *Kelaita v. Triple A Mach. Shop*, 13 BRBS 326 (1981). Once the claimant establishes his prima facie case, the Section 20(a) presumption applies to link the harm or pain with the claimant's employment. *Sea-Land Services, Inc., v. Director, OWCP* [*Ceasar*], 949 F.3d 921, 54 BRBS 9(CRT) (5th Cir. 2020); *Lacy v. Four Corners Pipe Line*, 17 BRBS 139 (1985); *Graham v. Newport News Shipbuilding & Dry Dock Co.*, 13 BRBS 336 (1981); *Kelaita*, 13 BRBS at 331.

Here the record contains uncontradicted objective evidence supporting Claimant's allegation that an incident occurred which had the potential to cause harm or pain: mere seconds passed between Claimant being handed a bag of debris and being discovered on

the ground unconscious;[4] several co-workers confirmed cartridges were found under Claimant's prone body;[5] the medic who arrived to the scene of the accident minutes after it happened testified there was a red indentation on Claimant's forehead, which he presumed was a result of hitting a cartridge;[6] the medic also testified he found Claimant unresponsive, even to painful stimuli;[7] and following investigation into the incident, Employer concluded Claimant tripped over the cartridges.[8]

The ALJ relied upon Claimant's lack of credibility to find he failed to show it was more likely than not the cartridges inexplicably appeared in his pathway after being stationary for days. But this is not Claimant's burden. Claimant must present evidence to support his allegation that an accident occurred, not how it occurred.

Critical to the ALJ's conclusion was his determination that Claimant lacked credibility. Credibility questions belong with the ALJ, as trier-of-fact, and therefore the Board must respect his evaluation of all testimony and not interfere with his credibility determinations unless they are "inherently incredible or patently unreasonable." *Cordero v. Triple A Mach. Shop*, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Phillips v. California Stevedore & Ballast Co.*, 9 BRBS 13 (1978). Additionally, the ALJ may make credibility determinations in evaluating whether a claimant invoked the Section 20(a) presumption. *Meeks*, 819 F.3d at 127, 50 BRBS at 36(CRT).[9] Nevertheless, to the extent the ALJ's decision can be interpreted to mean he found the Claimant failed to invoke the presumption, the ALJ erred in attributing more

[4] HT at 247, 524, 547; EX 6 at 1; EX 7b at 1; EX 7d at 1; EX 33 at 41; EX 34 at 44, 56.

[5] HT at 525-528; EX 6 at 2; EX 7a at 1; EX 33 at 42-43; EX 34 at 45-46.

[6] HT at 251, 277-278.

[7] HT at 254-255, 260-261, 269.

[8] EX 6 at 2.

[9] Because this case arises under the Fifth Circuit's jurisdiction, we are bound to follow the Fifth Circuit's interpretation on Section 20(a) invocation. *But see Rose v. Vectrus Systems Corporation*, 56 BRBS 27 (2022) (Decision on Recon. en banc) (a claimant's burden at invocation is one of production, not persuasion, in which credibility plays no role; whether a claimant's evidence "fails or carries the day is a matter to be resolved at step three of the causation analysis, when weighing the evidence based on the record as a whole, not at step one invocation").

weight to Claimant's lack of credibility about how the accident occurred rather than whether it occurred in the first place. The previous cases in which the Board affirmed an ALJ's reliance on the claimant's lack of credibility have instead centered around an accident's occurrence, not its cause: it was unwitnessed; the claimant's retelling of events was inconsistent; the event was physically impossible or directly contradicted by co-workers; it went unreported for a significant period of time; there was direct evidence of fraud; and/or there was no physical evidence of injury.[10]

This is not one of those cases. Here, the ALJ found Claimant to be incredible only with respect to "collateral" matters with "no direct relationship to the fall" (D&O at 50); he found Claimant to be "generally consistent" with respect to his description of the accident (*id.* at 49). Moreover, the record consists of corroborative and uncontradicted evidence supporting Claimant's assertion that he tripped over cartridges, despite the unwitnessed seconds it took Claimant to get from upright to prone: he was found lying face down, unresponsive (even to painful stimuli), with cartridges under his body, and an indentation in his forehead. In this respect, Claimant's theory as to how the accident occurred goes beyond "mere fancy," *Champion v. S & M Traylor Bros.*, 690 F.2d 285, 295 (D.C. Cir. 1982); *Wheatley*, 407 F.2d at 313; *see also Sinclair v. United Food & Commercial Workers*, 23 BRBS 148, 152 (1988), as corroborating evidence supports that some kind of accident, at least, occurred. *Addison v. Ryan-Walsh Stevedoring Co.*, 22 BRBS 32 (1989); *Frye v. Potomac Elec. Power Co.*, 21 BRBS 194 (1988); *Novak v. I.T.O. Corp. of Baltimore*, 12 BRBS 127 (1979).

In the face of this uncontradicted evidence, the ALJ erred in finding Claimant could not support his allegation that a workplace accident occurred, and in failing to apply the Section 20(a) invocation analysis. The evidence shows Claimant suffered a bodily harm to his head, back, neck, shoulder, abdomen, and hip, and Claimant has established evidence of an accident which could have caused his injuries and/or exacerbated his pre-existing conditions. D&O at 48, 52. Consequently, he has established a prima facie case and has invoked the Section 20(a) presumption. *Peterson v. Columbia Marine Lines*, 21 BRBS 299 (1988).

Nevertheless, the ALJ's failure to analyze whether Claimant invoked Section 20(a) constitutes harmless error, as he relied upon evidence that would have been sufficient to rebut the presumption. *Novak*, 12 BRBS at 130. In order to rebut the Section 20(a) presumption, the employer must produce substantial evidence of the lack of a causal nexus.

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[10] *See, e.g., Meeks*, 819 F.3d at 127, 50 BRBS at 36; *Hartman v. Avondale Shipyards*, 23 BRBS 201 (1990); *Mackey v. Marine Terminals Corp.*, 21 BRBS 129 (1988); *Bartelle v. McLean Trucking Co.*, 14 BRBS 166 (1981).

Ortco Contractors, Inc. v. Charpentier, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). To be substantial, the evidence must consist of facts, not speculation, and must be "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Rainey v. Director, OWCP*, 517 F.3d 632, 637, 42 BRBS 11, 14(CRT) (2d Cir. 2008) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)); *see also Conoco*, 194 F.3d at 687-88, 33 BRBS at 189(CRT).

Here, the ALJ weighed the evidence and concluded Claimant was unable to prove it was more likely than not he could have fallen as alleged. D&O at 48-53. In addition to Claimant's lack of credibility, the record contains testimony describing calm weather conditions on the date of the alleged accident,[11] indicating the cartridges were stacked neatly away from the walkway Claimant was traversing,[12] and confirming the cartridges failed to move during prior periods of heavy winds.[13] The ALJ also considered the medical evidence of Claimant's pre-existing conditions, finding it "at least as likely" that his disabling condition was a manifestation of his "naturally progressing symptoms." D&O at 52. As this evidence is contrary to Claimant's assertion that he suffered injury when a gust of wind blew the cartridges into his pathway, it constitutes substantial evidence sufficient to rebut the Section 20(a) presumption. *Novak*, 12 BRBS at 129-130. As the presumption would then drop from the case, any mistake the ALJ made regarding the applicability of the Section 20(a) presumption is harmless. *Id*. at 130. Moreover, the ALJ fully weighed the evidence and concluded Claimant could not prove, by a preponderance of the evidence, that he suffered a work-related injury. This conclusion is rational, supported by substantial

[11] HT at 515; EX 6 at 1; EX 33 at 29-30; EX 34 at 27.

[12] EX 33 at 50; EX 34 at 23.

[13] HT at 354, 500; EX 31 at 137; EX 33 at 38-40, 100; EX 34 at 51-52.

evidence, and based on credibility determinations that are neither inherently incredible nor patently unreasonable. *O'Keeffe*, 380 U.S. 359; *Cordero*, 580 F.2d at 1335, 8 BRBS at 747.

Accordingly, we affirm the ALJ's Decision and Order denying benefits.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring:

I concur with the majority's decision to affirm the ALJ's Decision and Order but respectfully disagree with the reasons for doing so. I do not believe the ALJ's failure to invoke the Section 20(a) presumption of compensability, 33 U.S.C. §920(a), was error. Rather, I would affirm the ALJ's Decision and Order denying benefits in light of his rational and supported conclusion that Claimant failed to prove he suffered an accident as alleged.

When a claimant alleges a workplace accident caused him injury, he must prove the accident did in fact occur before he can enjoy the benefit of the Section 20(a) presumption. *Kelaita v. Triple A Machine Shop*, 13 BRBS 326, 330 (1981). Here, although there was the appearance of an accident, the ALJ found the only direct evidence supporting the occurrence of the accident consisted of Claimant's own testimony, which was not credible. Decision and Order (D&O) at 50. As the ALJ noted, the inconsistencies and contradictions within Claimant's testimony applied to "almost every…subject" other than the fall itself, including the circumstances surrounding his discharge from the Navy,[14] the weather at the

[14] Hearing Transcript (HT) at 163; Employer's Exhibit (EX) 30 at 2; EX 31 at 16.

time of the incident,[15] the weight of the bags he was instructed to carry to the super sack,[16] his decision to seek treatment from a doctor upon his counsel's referral (despite being under the active care of several physicians for pre-existing conditions),[17] and his selective disclosures to all physicians.[18] *Id*. at 49-50. Moreover, Claimant "adamantly denied" suing the platform operator for his accident-related injuries, despite record evidence showing his counsel had filed a third-party suit on his behalf.[19] *Id*. at 50. The ALJ's determination that Claimant lacked credibility is supported by substantial evidence and is neither "inherently incredible nor patently unreasonable." *Cordero v. Triple A Mach. Shop*, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *see also Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 945, 25 BRBS 78, 81(CRT) (5th Cir. 1991). The ALJ permissibly relied upon Claimant's lack of credibility to find the accident did not occur as he alleged.[20]

Nevertheless, the ALJ also weighed the circumstantial evidence to determine whether it could support a finding that the accident occurred as Claimant alleged. D&O at 51-52. He rationally found it could not. *Sea-Land Services, Inc., v. Director, OWCP [Ceasar]*, 949 F.3d 921, 54 BRBS 9(CRT) (5th Cir. 2020); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963). Claimant's allegation that wind blew the canisters into his pathway was contradicted by evidence and testimony that the wind was calm on the day of the accident,[21] and that the canisters had previously remained in place despite heavier winds.[22] D&O at 51. Additionally, the ALJ found the testimony of Claimant's treating physicians, Dr. William Alden and Dr. F. Allen Johnston,

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[15] HT at 301, 358, 515; EX 6 at 1; EX 31 at 140; EX 33 at 29-30; EX 34 at 27.

[16] HT at 136, 519; EX 31 at 213, 248, 258; EX 34 at 19.

[17] HT at 126, 399-400; EX 15 at 42-54.

[18] Joint Exhibit (JX) 2 at 55-59, 75; JX 3 at 20, 22, 28, 29-30, 39, 55, 57-58.

[19] HT at 481-482; EX 32.

[20] This claim arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit, which has upheld an ALJ's credibility determinations in his initial evaluation of compensability. *Bis Salamis, Inc. v. Director, OWCP [Meeks]*, 819 F.3d 116, 127, 50 BRBS 29, 36(CRT) (5th Cir. 2016).

[21] HT at 357.

[22] HT at 354, 500; EX 31 at 137; EX 33 at 38-40, 100; EX 34 at 51-52.

undermined by their admitted reliance on Claimant's subjective reporting,[23] and found Dr. Johnston's vocal bias against insurance companies diminished the probative weight of his testimony.[24] *Id.* at 50-51. Although he found their testimony sufficient to establish Claimant suffered from pre-existing conditions that were potentially exacerbated by his fall, the weight of the credible circumstantial evidence failed to prove the accident occurred as Claimant alleged, but instead suggested it was "at least as likely" his injuries were "simply the naturally progressing symptoms of [his] pre-existing conditions." *Id.* at 51. As the ALJ's conclusions are supported by substantial evidence, *Ceasar*, 949 F.3d 921, 54 BRBS 9, and as his permissible credibility determinations are neither "inherently incredible or patently unreasonable," *Cordero*, 580 F.2d at 1335, 8 BRBS at 747, I would uphold the ALJ's decision that Claimant failed to prove an accident occurred as alleged, thereby rendering unnecessary the application of the Section 20(a) invocation analysis. Accordingly, I would affirm the ALJ's Decision and Order denying benefits in its entirety.

I also concur with my colleagues that the ALJ's determination merits affirmance if the Section 20(a) presumption were to be considered invoked.

JUDITH S. BOGGS
Administrative Appeals Judge

[23] JX 2 at 28-29, 60-62; JX 3 at 10-11, 32-33, 44, 46, 51, 57-58.

[24] JX 3 at 12, 25-26, 40.