U.S. Department of Labor

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

BRB No. 21-0633

KEVIN B. WEEKS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JAZ INDUSTRIES OF FLORIDA, LLC	)	
	)	DATE ISSUED: 02/06/2023
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD.	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna Klein Camden, L.L.P.), Norfolk, Virginia, for Claimant.

Megan B. Caramore (Vandeventer Black LLP), Norfolk, Virginia, for Employer and its Carrier.

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

PER CURIAM:

Claimant appeals Administrative Law Judge Paul C. Johnson, Jr.'s (ALJ) Decision and Order Denying Benefits (2019-LHC-01174; 2019-LHC-01197) rendered on claims

filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (Act). We must affirm the ALJ'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 reefer mechanic and refrigeration technician. On February 25, 2016, he tore the meniscus in his left knee while stepping on hoses while attempting to fuel gensets. Claimant subsequently underwent left knee partial medial meniscectomy surgery on April 26, 2016. Following the surgery, Claimant had a series of cortisone injections and returned to full time work on November 15, 2016. After returning to work, he continued receiving injections in his left knee.[1]

On December 14, 2016, Claimant went to his doctor, Dr. Arthur W. Wardell, and complained of pain in his left hip and right knee. Claimant stated he was favoring his left knee to prevent reinjuring it, which resulted in putting more pressure on his right knee. Hearing Tr. (TR) at 15-16. Following examination, Dr. Wardell diagnosed Claimant with a right knee strain. CX 18-7. On October 19, 2017, Claimant complained to Dr. Wardell about increasing pain in his right knee.[2] On November 2, 2017, Dr. Wardell recommended Claimant receive cortisone injections for his right knee, but Carrier did not authorize them. CX 18-22-24; Tr. 18. However, it authorized the treatment a few months later, and Claimant received an injection for his right knee pain on February 22, 2018. Tr. 18; CX 18-35.

Claimant sought authorization for more injections to both his left and right knees beginning in January of 2019. At that time, Claimant also continued to complain about his right knee pain, describing it hurt as if his meniscus was bothering him. Carrier authorized injections for Claimant's left knee but denied any for his right knee. Claimant filed two claims for benefits under the Act on April 16, 2019, one claiming his right knee injury was a result of repetitive trauma due to his working conditions and the other claiming his right

[1] Both Claimant and Employer agree Claimant's initial left knee injury was a compensable work-related injury. Employer paid Claimant temporary total disability benefits of $1,406 per week from February 26, 2016, to November 14, 2016. Employer also paid Claimant's medical benefits. Claimant's left knee condition reached maximum medical improvement (MMI) on March 1, 2017. Decision and Order (D&O) at 12.

[2] The record does not indicate any reports from Claimant of right knee pain between December 14, 2016 and October 19, 2017. CX 18.

knee injury was the consequence of his prior left knee injury.[3] CX 5. Employer controverted on the grounds that Claimant's right knee pain was the result of osteoarthritis rather than a work-related injury based on the medical opinions of Dr. Sheldon L. Cohn and Dr. Loel Z. Payne. EX 1; EX 3.

In his Decision and Order, the ALJ addressed Claimant's repetitive injury and consequential injury claims separately. He found Claimant was not entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), with respect to his repetitive injury claim because Claimant "did not attribute his right knee pain to the climbing, bending, and squatting required of him as a reefer technician" and Dr. Wardell's medical opinion did not explicitly attribute his right knee pain to repetitive trauma; therefore, Claimant did not show his conditions at work could have caused his right knee pain separately from his left knee injury. Decision and Order (D&O) at 14-15. The ALJ determined, however, Claimant was entitled to the Section 20(a) presumption that his right knee pain was consequential to his work-related left knee injury. D&O at 15. He found Employer rebutted the presumption, *id.*, and that, on the record as a whole, Claimant did not establish a causal connection between his right knee pain and his initial left knee injury. *Id.* at 16. To the contrary, the ALJ was more persuaded by Employer's evidence that Claimant's right knee pain was the result of degenerative osteoarthritis and denied his compensable consequential injury claim. *Id.*

Claimant filed a petition for review on November 4, 2021. On appeal, he challenges the ALJ's determination that his right knee pain was not caused by repetitive trauma or as a consequence of his accepted left knee injury, as well as the ALJ's standard for weighing the medical evidence as a whole. Claimant's Petition (Cl. Pet.) at 3. Employer responds, urging affirmance of the ALJ's decisions.

For the reasons stated below, we vacate the ALJ's determination with respect to Claimant's repetitive injury claim and remand the case for further consideration of the causation issue consistent with this decision; we affirm the ALJ's determination with respect to his consequential injury claim.

Repetitive Injury Claim: Section 20(a) Invocation/Aggravation

On appeal, Claimant contends the ALJ applied the wrong standard in concluding he failed to invoke the Section 20(a) presumption in his repetitive injury claim. In order to be

[3] Because Claimant's injury occurred in Virginia, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. 33 U.S.C. §921(c); *Hon v. Director, OWCP*, 699 F.2d 441 (8th Cir. 1983).

entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), a claimant must sufficiently allege: 1) he has sustained a harm; and 2) an accident occurred or working conditions existed which could have caused or aggravated the harm. *Rose v. Vectrus Systems Corporation*, 56 BRBS 27 (2022) (Decision on Recon. en banc); *see, e.g., Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *Brown v. I.T.T/Cont'l Baking Co.*, 921 F.2d 289, 24 BRBS 75(CRT) (D.C. Cir. 1990); *O'Kelley v. Dep't of the Army/NAF,* 34 BRBS 39 (2000). The claimant bears an initial burden of production in order to invoke the Section 20(a) presumption.[4] *Rose*, 56 BRBS at 36. Credibility plays no role in addressing whether a claimant has established a prima facie case. *Id.* at 37. In this regard, the Section 20(a) invocation analysis "does not require examination of the entire record, an independent assessment of witness' credibility, or weighing of the evidence." *Id.* Instead, the claimant need only "present some evidence or allegation that if true would state a claim under the Act."[5] *Id.* Consequently, if the claimant produces some evidence to support his prima facie case, he is entitled to the presumption that his injury is work-related and compensable. *Id.*

In addressing Claimant's invocation evidence, the ALJ concluded Claimant proffered only his own testimony as proof of his injury.[6] D&O at 14. Because Claimant stated his right knee pain was caused by favoring his left knee and did not attribute his right knee pain to the demands of his work – the climbing, bending, crawling, and squatting required of him working as a reefer technician – the ALJ found he did not establish working conditions to invoke the Section 20(a) presumption. *Id.* However, as Claimant argues, this amounts to holding him to a higher burden than what is legally required at the Section 20(a) invocation stage. Claimant does not have to affirmatively link his injury to his work, nor does he have to reach a legal or medical conclusion. *Rose*, 56 BRBS at 37; *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990); *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989) (a claimant is not required to produce affirmative medical evidence that the working conditions in fact caused his harm in order to establish his prima facie case).

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[4] "The burden of production or 'some evidence' standard which we have set forth here is a light burden – being no greater than an employer's burden on rebuttal – meant to give the claimant the benefit of the statutory framework." *Rose*, 56 BRBS at 38.

[5] "Whether the claimant's evidence fails or carries the day is a matter to be resolved at step three when weighing the evidence, not at step one invocation." *Rose*, 56 BRBS at 38.

[6] Claimant's testimony described his right knee injury as the result of limping and "giving into his left knee," which caused his right knee to hurt. TR at 16-17.

Based on the record, we agree with Claimant's position that he has met this burden and established a prima facie case with respect to his repetitive trauma claim. First, he demonstrated with sufficient evidence that he suffered an injury. He described his right knee pain beginning in December 2016, one month after he returned to full time work following his left knee injury, EX 7 at 10; TR at 14, and he submitted medical records from Dr. Wardell, his treating doctor, which indicated he repeatedly complained of right knee pain, was x-rayed, and was diagnosed with a knee sprain. CXs 18-31. The evidence here is enough to establish Claimant suffered an injury. *See, e.g., Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011) (determining that claimant's testimony regarding his back pain levels and job duties was sufficient to establish a Section 20(a) presumption).

Second, Claimant identified working conditions that could have caused his injury. During the hearing, he described his position as a reefer technician, both before and now, which requires him to climb up and down ladders to ships, to plug, unplug, and check the temperature of refrigeration boxes, to fuel gensets, to work 12 feet above the ground, and to climb 12-foot ladders to reach generators or read temperature gauges. TR at 12-14. Claimant also explained he often has to squat and work in awkward positions around drains or debris, and he spends six hours of his shift on his feet. *Id.* at 14-15. This undisputed testimony is enough to establish working conditions which could have caused his right knee injury. *See Hampton*, 24 BRBS 141 (a claimant is not required to introduce evidence that working conditions in fact caused the harm but that conditions existed which could have caused the harm). Thus, we reverse the ALJ's determination that Claimant did not meet his burden to invoke the Section 20(a) presumption with respect to his repetitive injury claim and remand the case for the ALJ to address the remaining steps in the causation analysis with respect to this claim.

Consequential Injury Claim

On appeal, Claimant also alleges the ALJ erred in weighing the evidence as a whole and finding he failed to prove his right knee sprain was a consequence of his left knee injury. Claimant specifically asserts his testimony and the medical evidence from Dr. Wardell provide substantial evidence for his position, and the ALJ erred in concluding his testimony is speculative and unpersuasive. *Id.* at 10. In response, Employer argues the ALJ did not err in giving more weight to its experts than to Claimant's medical evidence.

Where the Section 20(a) presumption is invoked and rebutted, as here for Claimant's consequential injury claim, the presumption drops from the case, and the ALJ must weigh the relevant evidence on the record as a whole with the claimant bearing the burden of persuasion. *Ceres Marine Terminals, Inc. v. Director, OWCP.*, 848 F.3d 115, 121 (4th Cir. 2016). Upon weighing the evidence, the ALJ determined Employer's doctors were more credible than Dr. Wardell, and their opinions deserved greater weight. The ALJ found the

letters from Drs. Payne and Cohn persuasive as both doctors examined Claimant, reviewed his medical records, and reviewed Dr. Wardell's treatment notes, to conclude Claimant's right knee pain was the result of degenerative osteoarthritis. D&O at 15. Additionally, the ALJ found Dr. Wardell's testimony was inconsistent as he changed his diagnosis from right knee strain consequential to Claimant's left knee injury between October 19, 2017, and May 28, 2019, to degenerative arthritis pain in response to Dr. Cohn's medical opinion on January 13, 2020, and then to a pathomechanical issue in Claimant's right knee created by favoring his left knee. D&O at 15-16; CX 17-2. Additionally, the ALJ found the medical literature attached to Dr. Wardell's January 2020 letter inexplicably addressed meniscal changes, though there is no evidence of a meniscus injury. The ALJ further determined Claimant's testimony lacked credibility because he could not identify a specific event where his right knee was injured but only figured it was related to favoring his left knee; the ALJ found the claim of injury from favoring his left knee "speculative and unpersuasive." D&O at 15.

It is well established that, as the trier-of-fact, the ALJ's findings may not be disregarded on the basis that other inferences may have been more reasonable. Rather, the Board must respect his evaluation of all testimony, including that of medical witnesses. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Furthermore, it is solely within the ALJ's discretion to accept or reject all or any part of any testimony according to his judgment. *Perini Corp. v. Heyde*, 306 F. Supp. 1321 (D.R.I. 1969). The Board will not interfere with credibility determinations unless they are inherently incredible or patently unreasonable. *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 543 (4th Cir.1988); *see also John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Moreover, it is impermissible for the Board to reweigh the evidence or to substitute its own views for those of the ALJ. *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982); *Miffleton v. Briggs Ice Cream Co.*, 12 BRBS 445 (1980), *aff'd*, 659 F.2d 252 (D.C. Cir. 1981) (table).

The ALJ's credibility determination is reasonable given an examination of the record. Despite Claimant's alternative explanations, the ALJ's noting the discrepancy in diagnoses between October 19, 2017 and May 28, 2019, as opposed to his response to Dr. Cohn's opinion on January 13, 2020, is a reasonable inference. CX 15; CX 17. Further, the ALJ's decision to place greater weight on the diagnoses from Dr. Payne and Dr. Cohn – both of whom examined Claimant, reviewed his medical records and imaging, and reviewed Dr. Wardell's treatment notes to determine Claimant's right knee pain is the result of degenerative osteoarthritis – constitutes substantial evidence in the record supporting the ALJ's decision. *See Marine Repair Servs., Inc. v. Fifer*, 717 F.3d 327, 334 (4th Cir. 2013). Therefore, we affirm the ALJ's denial of Claimant's consequential injury claim.

Accordingly, we reverse the ALJ's finding that Claimant did not invoke the Section 20(a) presumption with regard to his repetitive injury claim, and we remand the case for further consideration on causation consistent with this opinion. In all other respects, we affirm the ALJ's Decision and Order Denying Benefits.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge