U.S. Department of Labor

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

BRB No. 22-0043

ANDRES RODRIGUEZ	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DYNAMIC INDUSTRIES, INCORPORATED	)	
	)	
	)	DATE ISSUED: 02/28/2023
and	)	
	)	
ZURICH AMERICAN INSURANCE COMPANY	)	
	)	
	)	
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.

Andres Rodriguez, Corpus Christi, Texas, without representation.

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

BOGGS and BUZZARD, Administrative Appeals Judges:

Claimant, without representation, appeals Administrative Law Judge (ALJ) Paul C. Johnson Jr.'s Decision and Order Denying Benefits (2019-LDA-00691) 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*.[1] On appeal, Claimant generally challenges the ALJ's denial of benefits; therefore, the Benefits Review Board will review the findings adverse to him and address whether substantial evidence supports the Decision and Order (D&O) below. *See Pierce v. Elec. Boat Corp.*, 54 BRBS 27 (2020). In an appeal by a claimant without legal representation, we must affirm the ALJ's D&O if it is 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 scaffold builder. Hearing Transcript (TR) at 18.[2] On November 29, 2017, Claimant was building hanging scaffolding over water on offshore platform SP60C off the coast of Texas. TR at 21-22. As Claimant was balancing to install the last portion of the scaffolding, he claims he felt a pull at his groin. *Id*. at 22. He finished the scaffold and testified to reporting the incident to Eric Ferrington and Jesse Avila the day of the incident. *Id*. at 22. Thereafter, Claimant continued working for Employer and testified to averaging more than 100 hours per week from January 2018 until his last day on September 23, 2018. EX 14 at 65; TR at 28. Claimant presented text messages and phone logs from September 24, 2018, between himself and Mr. Avila regarding the alleged November 2017 incident, stating he was still experiencing pain to his left testicle. CX 7 at 2; TR at 21. Claimant first visited a physician for his pain on October 31, 2018; Dr. Michael Reyes diagnosed him with a unilateral inguinal hernia and performed surgery on November 6, 2018.[3] CXs 1, 3.

[1] The ALJ noted the Office of Administrative Law Judges inadvertently designated this case "LDA" though it does not arise under the Defense Base Act. Decision and Order (D&O) at 1, n.1; EX 13.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit because the injury occurred in Texas. 33 U.S.C. §921(c); *Hon v. Director, OWCP*, 699 F.2d 441 (8th Cir. 1983).

[3] Dr. Reyes, who examined Claimant in October 2018, did not determine what caused the hernia though he noted Claimant's assertion that it occurred when he was working by himself. His report indicates his initial diagnosis as "Possible Inguinal Hernia pt states it is painful." CX 1 at 1. Dr. Reyes noted Claimant's "situation in which his job offers 'Stop-Work Authority'" but Claimant said he was afraid to use that authority for fear of reprisal, and also Claimant's claim "that despite [being told there would be no reprisal] in practice this has not been the case." Dr. Reyes then took Claimant out of work until after surgery and recovery. *Id*.

In his decision dated October 6, 2021, the ALJ found Claimant did not establish a prima facie case linking his hernia to his work because he was not credible due to his varying iterations of how the alleged incident occurred as well as the lack of evidence contemporaneous with the alleged incident. The ALJ found Claimant did not invoke the Section 20(a) presumption and denied his claim. D&O at 18-22. He relied upon *Bis Salamis, Inc. v. Director, OWCP [Meeks]*, 819 F.3d 116, 50 BRBS 29(CRT) (5th Cir. 2016), and *Bolden v. G.A.T.X. Terminals Corp*., 30 BRBS 71 (1996), to support his credibility determination at the invocation stage. Claimant, without legal representation, appeals the denial of benefits. Employer has not responded.

In order to be entitled to the Section 20(a) presumption linking his injuries to his employment, a claimant must prove both: 1) he has sustained harm; and 2) the alleged accident occurred or working conditions existed which could have caused or aggravated the harm. *Meeks*, 819 F.3d 116, 50 BRBS 29(CRT); *see, e.g., Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *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). To rebut the Section 20(a) presumption, the employer must produce substantial evidence that the injury was not caused or aggravated by the employment. *Ceres v. Gulf, Inc. v. Director, OWCP [Plaisance],* 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012). If it does, 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. *Bourgeois v. Director, OWCP*, 946 F.3d 263, 53 BRBS 91(CRT) (5th Cir. 2020); *Universal Mar. Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997).

Claimant alleges injury in November 2017, but his first documented reporting of an injury was on September 24, 2018, in a text message to Mr. Avila. CX 7 at 2. Although the records established Claimant left the platform by helicopter the day of his alleged injury (EXs 3, 8-10), he did not see a medical provider immediately upon landing as Employer's injury policy requires (EX 6 at 3-5); Claimant continued working for Employer, more than 100 hours weekly and more than 1,400 overtime hours between November 29, 2017, and September 23, 2018 (EX 4); and Claimant's reporting in 2018 of the alleged injury from ten months prior coincided with his being reprimanded by Employer for his work performance for one of Employer's customers (EX 8). Additionally, the ALJ found Claimant's testimony was not credible because, while he stated he reported the incident immediately to his superior, there is no record of any report contemporaneous to the accident (EX 7), and his supervisor did not recall any such notice (EXs 7, 15; CX 8). Moreover, he testified to getting both a raise and an increase in hours following the alleged incident, which the records confirm (EXs 4-5), despite testifying he was unable to play with his 10-year old stepdaughter because of pain (TR at 28-30). He also testified he has been in pain since the incident, yet he signed a fit-for-work document for Employer in 2018

(EX 11). Based on these inconsistencies, the ALJ found the evidence "preponderates against" a finding that Claimant was injured in November 2017. D&O at 19-22. The ALJ specifically concluded: "in almost every relevant detail, [Claimant] was contradicted by other testimony, statements, documentary evidence, and lack of documentary evidence." D&O at 19. Thus, he found Claimant did not establish his prima facie case.

We need not address whether the ALJ erred by not invoking the Section 20(a) presumption in this case. Any such error would be harmless, as his ultimate determination that the evidence weighs against a finding that Claimant was injured at work comports with the law. *See Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 651-652, 44 BRBS 47, 51(CRT) (9th Cir. 2010) (ALJ's error in finding no rebuttal of the Section 20(a) presumption did not require remand because she "took into account all of the evidence" and her "ultimate conclusion" that the claim was compensable was supported by substantial evidence); *Reed v. The Macke Co.*, 14 BRBS 568 (1981).

First, even if we were to assume Claimant invoked the presumption, the record, and the ALJ's analysis thereof (albeit in the context of whether Claimant invoked the Section 20(a) presumption), reflects that Employer put forward substantial evidence "throw[ing] factual doubt on [Claimant's] prima facie case," and, therefore, rebutted the Section 20(a) presumption. *See Plaisance*, 683 F.3d at 231, 46 BRBS at 29(CRT); *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir. 2003), *cert. denied*, 540 U.S. 1056 (2003). The lack of any contemporaneous documentation to support an injury having occurred, the existence of contemporaneous documentation showing Claimant was removed from the platform for non-medical reasons, the evidence of substantial hours worked for several months following the alleged date of injury, and Mr. Avila's testimony disputing Claimant's testimony all serve to establish rebuttal evidence that throws doubt on Claimant's claims. With rebuttal evidence, the presumption falls from the case, and the matter must be addressed on the record as a whole.

Second, the ALJ provided valid reasons, set forth above, for finding Claimant's testimony that he was injured in an accident at work less credible than the other evidence of record indicating no such accident occurred. Questions of witness credibility are for the ALJ as the trier-of-fact, and the Board must respect his evaluation of all testimony. *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). It is 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." *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); *Roberson v. Bethlehem Steel Corp.*, 8

BRBS 775 (1978), *aff'd sub nom. Director, OWCP v. Bethlehem Steel Corp.*, 620 F.2d 60, 12 BRBS 344 (5th Cir. 1980).

Consequently, as the ALJ permissibly discredited Claimant's testimony that he was injured at work and gave greater weight to evidence indicating he was not injured as alleged, Claimant did not satisfy his ultimate burden to establish, by a preponderance of the evidence, that his injury is related to an accident at work. *See Victorian v. International-Matex Tank Terminals*, 52 BRBS 35 (2018), *aff'd sub nom. Inter'l-Matex Tank Terminals v. Director, OWCP*, 943 F.3d 278, 53 BRBS 79(CRT) (5th Cir. 2019); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998).

Accordingly, we affirm the ALJ's Decision and Order Denying Benefits.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONES, Administrative Appeals Judge, concurring:

I concur with the majority's decision to affirm the ALJ's denial of benefits. I write separately because I would affirm the ALJ's ruling that Claimant did not invoke the Section 20(a) presumption.

This case arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit. Under *Bis Salamis, Inc. v. Director, OWCP [Meeks]*, 819 F.3d 116, 50 BRBS 29(CRT) (5th Cir. 2016), an ALJ is permitted to evaluate a claimant's credibility when assessing whether he has established his prima facie case of a compensable injury and work conditions or events that have the potential to cause or contribute to the injury. In this case, given the ALJ's credibility assessment, substantial evidence supports the ALJ's conclusion that Claimant did not establish a November 2017 injury.

While I disagree with the Fifth Circuit's invocation standard, *see Rose v. Vectrus Systems Corp.*, 56 BRBS 27 (2022) (Decision on Recon. en banc), *Rose* specifically does

not apply in the Fifth Circuit because *Meeks* is controlling law. Therefore, I would apply *Meeks* and affirm the ALJ's decision.

MELISSA LIN JONES
Administrative Appeals Judge