U.S. Department of Labor

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

BRB No. 21-0210

PAUL E. MASSEY	)	
	)	
Claimant-Petitioner	)	DATE ISSUED: 07/19/2021
	)	
v.	)	
	)	
ELECTRIC BOAT CORPORATION	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Noran J. Camp, Administrative Law Judge, United States Department of Labor.

Scott N. Roberts (The Law Office of Scott Roberts, LLC), Groton, Connecticut, for Claimant.

Before: BUZZARD, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals Administrative Law Judge Noran J. Camp's Decision and Order Denying Benefits (2018-LHC-01512) 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, who had prior back injuries and has pre-existing degenerative disc disease, began working for Employer in 2009. On September 14, 2016, he injured his back while crawling backwards in a pipe on a submarine. TR at 24, 43. He felt back pain, sometimes radiating into his leg that persisted after this incident, especially with physical exertion. TR at 40-41; CXs 1-2. He was diagnosed with a muscle spasm and thoraco-

lumbar pain secondary to degenerative disc disease at T11-12 and L5-S1. CX 5 at 1-2. After being treated conservatively with physical therapy and non-prescription medication, Claimant underwent a microdiscectomy in August 2017 and a lumbar fusion in November 2018. CX 5. Claimant filed a claim for medical benefits from August 7 to 27, 2017, for his microdiscectomy and recovery, and temporary total disability and medical benefits from November 12, 2018, to March 27, 2019, for his lumbar fusion and recovery period. CXs 1, 4.

The administrative law judge found Claimant to be a credible witness who established a prima facie case relating his back condition to his employment incident. Decision and Order at 6, 9. He found Dr. Thomas Morgan's opinion that Claimant's work-related symptoms had resolved by December 2016 rebutted the Section 20(a), 33 U.S.C. §920(a), presumption.[1] Decision and Order at 10-11, 15; EXs 1-2, 5. On the record as a whole, the administrative law judge found Claimant did not satisfy his burden of persuasion because his evidence does not show his work injury necessitated his two surgeries. Decision and Order at 11, 16. Therefore, he denied the claim.

Claimant appeals the decision.[2] He contends the administrative law judge erred in finding he did not prove his claim by a preponderance of the evidence. Contrary to Claimant's contention, the administrative law judge's conclusion is supported by substantial evidence. Once the Section 20(a) presumption has been rebutted, as here, the question of a causal relationship must be decided on the record as a whole, with the claimant bearing the burden of establishing the work-relatedness of his injury by a preponderance of the evidence. *Marinelli v. American Stevedoring, Ltd.*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001); *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. 267, 28 BRBS 43(CRT) (1994). The Benefits Review Board may not reweigh the evidence but may assess only whether there is substantial evidence to support the administrative law judge's decision. *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *see also Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Calbeck v. Strachan Shipping Co.*, 306 F.2d

[1] Dr. Mark Palumbo reviewed Claimant's medical records in September 2018 and stated Claimant's work injury did not necessitate either surgery, as his injury did not aggravate or accelerate his underlying degenerative condition to an extent requiring surgery or any further treatment. EX 5. The administrative law judge found Dr. Palumbo's opinion was "roughly consistent" with Dr. Morgan's conclusion.

[2] Despite having requested and been granted additional time, Employer did not file a response brief.

693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *Miffleton v. Briggs Ice Cream Co.*, 12 BRBS 445 (1980), *aff'd*, No. 80-1870 (D.C. Cir. 1981).

Although the administrative law judge credited Claimant's testimony regarding his continuing symptoms, he rationally found it insufficient to establish *the cause* of those symptoms. *Perini Corp. v. Heyde*, 306 F. Supp. 1321 (D.R.I. 1969). Moreover, Claimant's testimony is the only evidence supporting his burden on causation: while he generally argues that his "voluminous" treatment records support his claim, Cl. Br. at 8-9, he has not identified any medical evidence from those records demonstrating his surgeries were related to his work injury, and the administrative law judge found neither of his treating physicians provided a "reasonably certain" opinion on causation.[3] Decision and Order at 16. Claimant bears the ultimate burden of persuasion, and the administrative law judge permissibly found he did not satisfy that burden through his unsupported testimony. *Heyde*, 306 F. Supp. 1321; *see generally Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001) (administrative law judge has discretion to weigh testimony when evaluating the evidence as a whole).

In light of our conclusion, we need not address Claimant's contentions regarding the administrative law judge's crediting of Dr. Morgan's opinion on the record as a whole. The persuasiveness of Dr. Morgan's opinion cannot be determinative because -- even if the administrative law judge fully discredited it -- Claimant could not satisfy his burden of proof. *See Greenwich Collieries*, 512 U.S. at 276, 281, 28 BRBS at 46, 48(CRT) (proponent of an order "has *both* the 'burden of proceeding with the introduction of evidence and the burden of proof"); *Ceres Marine Terminals, Inc. v. Green*, 656 F.3d 235, 241, 45 BRBS 67, 70(CRT) (4th Cir. 2011); *Santoro v. Maher Terminals, Inc.*, 30 BRBS

[3] Well before both surgeries, Dr. Mohammad Pasha stated Claimant's thoracolumbar pain as of October 2016 was due to his work-related injury. CX 5 at 1-2. He made no other statements regarding aggravation or causation as Claimant's treatment progressed. Dr. Michael Halperin acknowledged Dr. Pasha's statement but did not address the cause of Claimant's need for surgery other than to mention his symptoms due to his degenerative condition. CXs 5 at 116, 120; 9; 11 at 12; 18. When asked whether Claimant's symptoms had resolved between October 2016 and May 2017, Dr. Halperin stated only: "Well, if it had resolved we wouldn't have done surgery on him." CX 11 at 12. The administrative law judge gave no weight to Dr. Halperin's assumption that Claimant's symptoms were work-related, as "the bulk" of his reports and testimony addressed Claimant's degenerative symptoms and relieving them with surgery. Decision and Order at 13.

171 (1996). Therefore, we affirm the denial of benefits.[4] *Carswell v. E. Pihl & Sons*, 999 F.3d 18 (1st Cir. 2021) (claimants unable to establish their cancers were related to plutonium exposure at work); *Victorian v. International-Matex Tank Terminals*, 52 BRBS 35 (2018), *aff'd sub nom. International-Matex Tank Terminals v. Director, OWCP*, 943 F.3d 278, 53 BRBS 79(CRT) (5th Cir. 2019).

Accordingly, we affirm the Decision and Order Denying Benefits.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

[4] Should Claimant feel there has been a change in his condition or a mistake in the determination of a fact, Section 22 of the Act provides the opportunity to file a motion for modification of the administrative law judge's decision. 33 U.S.C. §922; 20 C.F.R. §702.373.