U.S. Department of Labor

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

BRB No. 21-0231

RUBEN PAREDES ZAPATA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSTELLIS GROUP/TRIPLE CANOPY, INCORPORATED	)	DATE ISSUED: 07/19/2021
	)	
and	)	
	)	
CONTINENTAL CASUALTY COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order and the Order Granting Claimant's Motion for Reconsideration of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

David C. Barnett (Barnett, Lerner, Karsen, Frankel & Castro, P.A.), Fort Lauderdale, Florida, for Claimant.

Krystal L. Layher (Brown Sims), Houston, Texas, for Employer/Carrier.

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

PER CURIAM:

Claimant appeals Administrative Law Judge Larry S. Merck's Decision and Order and his Order Granting Claimant's Motion for Reconsideration (2018-LDA-00029) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the Defense Base Act, 42 U.S.C.

§1651 *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 is a Peruvian citizen who worked for Employer in Iraq from July 2006 through October 2009. CX 2 at 34, 39. In his first and third years in Iraq, he worked at the Iraqi Ministry of Internal Affairs patrolling the entry gate; in his second year, he patrolled the entry gate at New Camp. *Id.* at 363-37. He testified that while he was working for Employer, a mortar fell and hit a metallic fence, activating an alarm, and he was required to run to the bunker and take shelter. *Id.* at 46-47. He also described other incidents involving mortars hitting nearby, including one that exploded in an office approximately five meters away, leaving him "dazed and confused." *Id.* at 52. He stated he often heard car explosions and mortar attacks and went to sleep wearing a helmet and vest for protection. *Id.* at 49-50.

Claimant testified that he left Iraq in 2009 in part because he had recently married and his wife did not want him to return to Iraq. After returning from Iraq, he first worked for a security company and then at a textile company; at the time of his deposition, he was self-employed, working odd jobs. CX 2 at 23-26, 33-34.

Claimant suffers from hearing loss and a type of facial paralysis called a myofascial spasm that developed after his work in Iraq. He believes the mortar attacks and explosions in Iraq could have contributed to his facial spasms.[1] He underwent surgery for the facial spasm in February 2016 but the spasms returned within a couple months of the surgery. He also testified that he has become irritable and impatient and does not sleep well because "any noise wakes [him] up." CX 2 at 43. He saw Ms. Montoya, a counselor, and Dr. Galli, a psychiatrist, both of whom diagnosed him with unspecified post-traumatic stress disorder (PTSD) due to his experiences in Iraq. CX 4 at 1; CX 6 at 1.

Claimant filed claims for compensation for hearing loss and PTSD.[2] The administrative law judge found Claimant established a prima facie case that he has PTSD

[1] Claimant did not file a claim for his facial spasms.

[2] Prior to filing closing briefs, the parties stipulated that Claimant's hearing loss is compensable. The administrative law judge's decision listed the stipulations but did not include an order awarding benefits for Claimant's hearing loss. Claimant filed a motion for reconsideration, which the administrative law judge granted. He amended his decision to award Claimant compensation for a 35 percent binaural hearing impairment. *See* Order

based on the diagnoses of Ms. Montoya and Dr. Galli and working conditions in Iraq which could have caused his PTSD, thereby entitling him to the Section 20(a) presumption, 33 U.S.C. §920(a). *See* Decision and Order at 14-15. He found, however, that Employer rebutted the presumption through the opinion of Dr. Morote, a psychologist, who examined Claimant, administered psychological tests and determined Claimant does not have a psychological injury. *See id.* at 15. On weighing the evidence as a whole, the administrative law judge gave greater weight to Dr. Morote's opinion, finding it to be more comprehensive and supported by objective testing. He concluded Claimant did not establish he has a compensable psychological condition. *See id.* at 17-18. He therefore denied benefits.

Claimant appeals the administrative law judge's decision, arguing the administrative law judge erred in finding Dr. Morote's opinion is sufficient to rebut the Section 20(a) presumption and is entitled to greater weight than those of Ms. Montoya and Dr. Galli. Employer filed a response in support of the denial of benefits. Claimant filed a reply brief.

In determining whether an injury is work-related, a claimant is aided by the Section 20(a) presumption, which is invoked after a claimant establishes that he sustained a harm or pain and that conditions existed or an accident occurred at his place of employment which could have caused the harm or pain. *American Stevedoring, Ltd. v. Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996). Once, as in this case, the Section 20(a) presumption is invoked, the burden shifts to the employer to produce substantial evidence that the claimant's condition was not caused or aggravated by his employment. *Rainey v. Director, OWCP*, 517 F.3d 632, 634, 42 BRBS 11, 12(CRT) (2d Cir. 2008); *Marinelli*, 248 F.3d at 64-65, 35 BRBS at 49(CRT). If the employer rebuts the Section 20(a) presumption, it no longer controls and the issue of causation must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *Rainey*, 517 F.3d at 634, 42 BRBS at 12(CRT); *Marinelli*, 248 F.3d at 65, 35 BRBS at 49(CRT); *Santoro v. Maher Terminal, Inc.*, 30 BRBS 171 (1996); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

Claimant first argues the administrative law judge erred in finding Employer rebutted the Section 20(a) presumption through Dr. Morote's opinion. We reject this contention. An employer's burden on rebuttal is one of production, not persuasion, so all an employer must do is submit "such relevant evidence as a reasonable mind might accept

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Granting Claimant's Motion for Reconsideration at 4. Claimant's hearing loss is not at issue on appeal.

as adequate" to support a finding that the claimant's injury is not work-related. *Rainey*, 517 F.3d at 637, 42 BRBS at 14(CRT). The presumption may be rebutted with evidence disproving the existence of the alleged injury. *See, e.g., Bourgeois v. Director, OWCP*, 946 F.3d 263, 53 BRBS 91(CRT) (5th Cir. 2020) (affirming the presumption was rebutted by a medical opinion stating the claimant did not suffer a labral tear to his right shoulder immediately following an accident at work and therefore the accident did not cause the claimant's later-discovered tear). In addition, it is well settled that a medical opinion of non-causation rendered to a reasonable degree of medical certainty is sufficient to rebut the presumption. *See O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000).

Dr. Morote stated unequivocally that Claimant has no current psychological or mental condition and did not report the usual symptoms associated with PTSD.[3] *See* EX 1 at 8-9; EX 2 at 23-25. Claimant's reliance on *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997), and *R.F. v. CSA, Ltd*, 43 BRBS 139 (2009), is unavailing as those cases are distinguishable.[4] In this case, there is not uncontradicted evidence that Claimant sustained some type of psychological injury because Claimant's diagnosis of PTSD is contradicted by Dr. Morote's opinion. *Compare Pietrunti*, 119 F.3d at 1043, 31 BRBS at 90-91(CRT) (where all the claimant's doctors and his medical records supported a finding that the claimant suffered from mental illness and was being prescribed medication for them). The administrative law judge permissibly found Dr. Morote's opinion is substantial evidence that a reasonable mind could accept as adequate to support a finding that Claimant does not have a psychological condition and therefore, his work for Employer did not cause a psychological injury. *Truczinskas v. Director, OWCP*, 699 F.3d 672, 46 BRBS 85(CRT) (1st Cir. 2012). We therefore affirm the administrative law judge's finding that Employer rebutted the Section 20(a) presumption.

In weighing the evidence as a whole, the administrative law judge found that neither Ms. Montoya's nor Dr. Galli's opinion is entitled to great weight because they are based

[3] Contrary to Claimant's argument, any issue over whether his alleged psychological condition prevents his return to overseas work in order to avoid recurrence is premature and irrelevant to the rebuttal inquiry. Moreover, Dr. Morote clearly stated that Claimant was not limited from returning to his overseas work by any psychological condition. *See* EX 1 at 9. In addition, Claimant misstates Dr. Galli's opinion in asserting he restricted Claimant from returning to work in a war zone as he did not impose any restrictions on Claimant's ability to work. *See* CX 6 at 1.

[4] In each of these cases, the claimants' doctors did not dispute that the claimants suffered from some psychological condition. *See Pietrunti*, 119 F.3d at 1043, 31 BRBS at 90-91(CRT); *R.F.*, 43 BRBS at 141.

entirely on Claimant's reporting of his own symptoms and not on any objective tests. He also noted that they each saw Claimant only once. *See* Decision and Order at 16. He further found their opinions are generally conclusory and not well documented because neither explained the significance of the diagnosis of "unspecified" PTSD. *See id.* at 17. In contrast, the administrative law judge determined Dr. Morote's opinion is entitled to probative weight because she addressed Claimant's background and his reported symptoms and explained why she did not diagnose Claimant with PTSD. She stated Claimant did not present the majority of symptoms for a PTSD diagnosis because he showed "no anxiety, no depression, no disassociation, no intrusive experiences, no – none of that PTSD symptoms either for acute or more chronic type." EX 2 at 35. The administrative law judge also noted that Dr. Morote's opinion is supported by the objective tests she administered which indicate Claimant does not suffer from a psychological condition. *See* Decision and Order at 17-18. He concluded the evidence as a whole does not support a finding that Claimant suffers from a psychological injury and therefore denied benefits. *See id.* at 18.

We affirm the administrative law judge's weighing of the evidence. To the extent Claimant challenges the administrative law judge's conclusion as "internally inconsistent" for concluding Claimant did not establish any injury after he found Claimant established the elements of his prima facie case, Claimant misapprehends his burden of proof. Claimant has to establish the essential elements of his case: injury and working conditions or accident. *See generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). The evidence relevant to these issues can be weighed in addressing Claimant's prima facie case, *see generally Bis Salamis, Inc. v. Director, OWCP [Meeks]*, 819 F.3d 116, 50 BRBS 29(CRT) (5th Cir. 2016), or after Employer rebuts the Section 20(a) presumption. Once the presumption has been rebutted, as it was here, Claimant is required to prove his case by a preponderance of the evidence. *See Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *Marinelli*, 248 F.3d at 65, 35 BRBS at 49(CRT); *Maher Terminals, Inc. v. Director, OWCP*, 992 F.2d 1277, 27 BRBS 1(CRT) (3d Cir. 1993), *aff'd sub nom. Director, OWCP v. Greenwich Collieries*, 512 U.S. 167, 28 BRBS 43(CRT) (1994). It is well established that the administrative law judge is entitled to evaluate and weigh the evidence of record and the Benefits Review Board may not reweigh it, 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). The administrative law judge is not required to accept the opinion of any medical expert but has the discretion to determine the weight to be accorded the opinions based on the expert's reasoning and the other evidence in the record. *See Mendoza v. Marine Personnel Co, Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *Perini Corp. v. Heyde*, 306 F. Supp. 1321 (D.R.I. 1969).

The administrative law judge discussed all the relevant evidence and explained his reasons for giving less weight to the opinions of Ms. Montoya and Dr. Galli and crediting Dr. Morote's opinion instead. He rationally determined that neither Ms. Montoya's nor Dr. Galli's opinion is entitled to great weight because they are based entirely on Claimant's reporting of his own symptoms and not on any objective tests. He acted within his discretion in according probative weight to Dr. Morote's opinion, deeming it to be well explained and supported by objective tests as well as Claimant's other medical records going back to 2010, which do not mention any psychological symptoms. His finding that the evidence does not establish that Claimant suffers from a psychological injury is rational and supported by substantial evidence. *See Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001). We therefore affirm the denial of benefits.

Accordingly, we affirm the administrative law judge's Decision and Order and Order Granting Claimant's Motion for Reconsideration.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge