U.S. Department of Labor

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

BRB No. 19-0400

PHETNAKHONSY BOUAPHA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DELTA MARINE INDUSTRIES	)	
	)	DATE ISSUED: 06/12/2020
and	)	
	)	
AMERICAN LONGSHORE MUTUAL ASSOCIATION LIMITED	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits In Part of Christopher Larsen, Administrative Law Judge, United States Department of Labor.

Phetnakhonsy Bouapha, Auburn, Washington.

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

PER CURIAM:

Claimant, appearing without representation, appeals the Decision and Order Awarding Benefits In Part (2018-LHC-00978, 2018-LHC-01006) of Administrative Law Judge Christopher Larsen rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). In an appeal by a claimant without representation by counsel, the Board will review the administrative law judge's decision to determine if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. If they are, they must be

affirmed. 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 fitter. He alleged he sustained a concussion and had post-concussion syndrome after fainting at work on December 20, 2012. CX 1 at 1-3. Claimant testified he fainted while being reprimanded by employer's metal hull superintendent, Ken Schoonover. Tr. at 42-44. He took leave for his symptoms under the Family Medical Leave Act (FMLA) from February 23 to April 19, 2013. Tr. at 49; EX 10 at 375. Upon returning to work, he was assigned light-duty as a grinder at his same rate of pay. Claimant then alleged he sustained an upper back/shoulder injury related to grinding. CX 1 at 6-7. He continued working for employer until he was laid-off on June 14, 2014. Tr. at 55, 58; CX 4 at 361. Claimant has since worked for various other employers. Tr. at 58, 61, 69.

In his decision, the administrative law judge determined claimant invoked the Section 20(a) presumption, 33 U.S.C. §920(a), for a psychological injury related to the December 2012 incident, but found claimant did not sustain any head trauma that could have caused a concussion or post-concussion symptoms. Decision and Order at 29-32. He found the reprimand by Mr. Schoonover and his assignment to light-duty work are legitimate personnel actions for which any resulting psychological harm is not compensable. *Id.* at 32-35.

The administrative law judge further found claimant entitled to the Section 20(a) presumption he sustained a harm to his upper back or right shoulder that could have been caused or aggravated by working for employer as a grinder, and employer did not rebut the presumption. Decision and Order at 36-38. He relied on the opinion of Dr. John Burns to find claimant's work injury resolved by the date he examined claimant on November 19, 2013, *id.* at 38-40, and claimant did not sustain any loss in wage-earning capacity prior to November 19, 2013.[1] The administrative law judge awarded claimant medical benefits for his upper back/shoulder injury, although he was unable to determine the compensable expenses for the injury because no medical bills or receipts were submitted to establish the associated treatment costs. *Id.* at 41-42. Claimant appeals the administrative law judge's decision. Employer has not responded to this appeal. As claimant is without legal representation, we will review the findings adverse to him.

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[1] The administrative law judge relied on the admission by claimant's counsel that claimant did not lose time after he returned to work on April 27, 2013, his finding that claimant was able to return to his usual employment as a fitter as of November 19, 2013, and his review of employer's payroll records indicating employer paid claimant his regular wages until he was laid off for economic reasons. Decision and Order at 40-41.

CAUSATION

In order to establish a prima facie case, claimant bears the burden of establishing the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused the harm. 33 U.S.C. §920(a); *Albina Engine & Machine v. Director, OWCP [McAllister]*, 627 F.3d 1293, 44 BRBS 89(CRT) (9th Cir. 2010); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *see U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). The Section 20(a) presumption applies only after these two elements are established. *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *Mackey v. Marine Terminals, Corp.*, 21 BRBS 129 (1988).

1. Head Trauma

The administrative law judge found claimant did not establish a head trauma that caused a concussion, or post-concussive syndrome, from his fainting at work on December 20, 2012. Decision and Order at 29. He determined the lack of objective medical evidence and the testimonial evidence belied claimant's testimony and his reports to medical providers of sustaining a bump or bruise on his head and hip pain following the incident. The administrative law judge further credited the deposition testimony of Mr. Schoonover, supported by three witnesses, that he caught claimant as he was falling and laid him on the ground without any impact to his head. *Id*. at 30; EXs 14 at 417-418; 15 at 429-431; 16 at 442-444; 17 at 459. The administrative law judge also relied on the initial physical findings recorded by the first responders and at the emergency room, which do not include any signs of trauma, and a normal EEG and brain MRI conducted in February 2013. Decision and Order at 30; CX 4 at 151-157, 207.

The United States Court of Appeals for the Ninth Circuit, in whose jurisdiction this case arises, adheres to an administrative law judge's credibility determinations unless they "'conflict with the clear preponderance of the evidence," or "are inherently incredible or patently unreasonable.'" *Ogawa*, 608 F.3d at 648, 44 BRBS at 48(CRT) (quoting *Todd Pac. Shipyards Corp. v. Dir.*, *OWCP*, 914 F.2d 1317, 1321, 24 BRBS 36, 42(CRT) (9th Cir. 1990)). Moreover, the Board is not empowered to reweigh the evidence and must accept the rational inferences and findings of fact of the administrative law judge that are supported by the record. *See*, *e.g.*, *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988).

It is not "inherently incredible or patently unreasonable" to discount claimant's testimony and rely on the contrary testimony of four witnesses and the absence of objective medical evidence to conclude claimant did not establish a prima facie case of sustaining a

head injury. Claimant thus failed to establish an essential element and we affirm the denial of benefits for his alleged head trauma as it is supported by substantial evidence. *Goldsmith*, 838 F.2d 1079, 21 BRBS 27(CRT); *Mackey*, 21 BRBS 129.

2. Psychological Injury

The administrative law judge found claimant established "psychological harm" after the December 20, 2012 incident. Decision and Order at 30. We affirm this finding as supported by the medical evidence. *Duhagon*, 169 F.3d at 618, 33 BRBS 2-3(CRT). Claimant asserted, however, only that Mr. Schoonover's reprimand in December 2012 and the change in his work to grinding, after he returned to work in April 2013 from his extended absence under the FMLA, caused or aggravated his psychological condition. Mr. Schoonover testified he called claimant into his office after receiving complaints from other employees and informed claimant he needed to be kinder, more respectful and considerate or else he would be terminated. Decision and Order at 31; EX 16 at 442-443. Mr. Schoonover also stated employer has a light-duty program for employees returning to work after an absence, and Robert Saul, claimant's supervisor, testified everyone on light-duty performs prefabrication tasks, and claimant was placed on light-duty because he reported a head trauma, precluding him from climbing ladders or using a lift. Decision and Order at 32, 35 n. 4; EXs 16 at 445; 17 at 457. Mr. Schoonover's reprimand and the change in claimant's job assignment to light-duty upon his return to work do not constitute "working conditions" to which the Section 20(a) presumption applies. Rather, as the administrative law judge properly found, each of these management decisions was a "legitimate personnel action" that cannot result in a compensable injury. Decision and Order at 32-35; *Pedroza v. Benefits Review Board*, 624 F.3d 926, 44 BRBS 67(CRT) (9th Cir. 2010).

Well-established law provides that a work-related psychological injury may be compensable. *See*, *e.g.*, *American Nat'l Red Cross v. Hagen*, 327 F.2d 559 (7th Cir. 1964); *R.F.* [*Fear*] *v. CSA, Ltd.*, 43 BRBS 139 (2009). A claimant is not required to show his working conditions were "unusually stressful" in order to satisfy the "working conditions" element for invocation of the Section 20(a) presumption in a psychological injury case. Even work-related stress that seems relatively mild may establish "working conditions," as the issue is the effect on the claimant and not on the general population. *See Konno v. Young Bros., Ltd.*, 28 BRBS 57 (1994) (depression); *see also Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988) (heart condition). If the psychological injury was caused by an accident at work or by specified working conditions, it is compensable. *Jackson v. Ceres Marine Terminals, Inc.*, 48 BRBS 71 (2014), *aff'd sub nom. Ceres Marine Terminals, Inc. v. Director, OWCP*, 848 F.3d 115, 50 BRBS 91(CRT) (4th Cir. 2016). However, an employer cannot be held liable for a psychological injury resulting from a "legitimate personnel action," as such an event is not a "working

condition" which can form the basis for a compensable injury. *Pedroza*, 624 F.3d 926, 44 BRBS 67(CRT); *Marino v. Navy Exch.*, 20 BRBS 166 (1988).

In *Marino*, the claimant worked for his employer from May 1974 until July 1982 as a food service supervisor. In late 1980 or early 1981, he was transferred to work in his employer's main office. On July 13, 1982, he was notified there would be a reduction-in-force and his job would be eliminated. Later that day, he blacked out while driving a work car. The claimant did not return to any employment thereafter and filed a claim for a work-related psychological injury. The administrative law judge found the act of informing the claimant of his layoff/termination caused the claimant's disabling psychological injury and awarded benefits. The Board reversed the award, stating:

> A legitimate personnel action or termination is not the type of activity intended to give rise to a worker's compensation claim. To hold otherwise would unfairly hinder employer in making legitimate personnel decisions and in conducting its business. Employer must be able to make decisions regarding layoffs without the concern that it will involve workmen's compensation remedies. If the reduction-in-force was improper, claimant has other remedies. We therefore vacate the award of benefits and hold that, if claimant's psychological condition arose wholly from his termination, the condition is not compensable.

Marino, 20 BRBS at 168. The Board remanded the case for the administrative law judge to consider whether general working conditions also played a role in the claimant's disability.

The Board addressed the issue of a "legitimate personnel action" again in *Sewell v. Noncommissioned Officers' Open Mess, McChord Air Force Base*, 32 BRBS 127 (1997) (McGranery, J., dissenting), *aff'd on recon. en banc*, 32 BRBS 134 (1998) (Brown and McGranery, JJ., dissenting). In *Sewell*, the claimant worked as a civilian bartender from 1976 until May 15, 1986. In 1986, she got a new supervisor who, according to the claimant, had a more aggressive management style than her former supervisor. The new supervisor found problems with the claimant's performance, disciplined her and, ultimately, terminated her. In 1987, the claimant was diagnosed with major depression caused by work stressors, including her termination, poor working conditions, and stress associated with her supervisor. Because the claimant's psychological condition did not relate solely to her termination, but also to her general working conditions, the Board held *Marino* was distinguishable and so applied the Section 20(a) presumption to the claim. *Sewell*, 32 BRBS at 135-136; *Sewell*, 32 BRBS at 131.

In *Pedroza*, 624 F.3d 926, 44 BRBS 67(CRT), the claimant, while unloading a ship, struck a 440-volt cable with his forklift and caused an explosion. He did not seek medical attention. One year after the incident, the claimant received a letter from his employer's department manager stating his negligence caused the incident. After reading the letter, the claimant sought medical attention and refuted the letter, complaining he was not being treated fairly after 25 years of service and his supervisor was hindering his ability to perform his job. After multiple letters and meetings discussing his job performance and work ethic, the claimant went on leave for three months. During this time, he sought treatment for psychological problems. While on a second term of leave as his physician advised, the claimant filed a claim for benefits for his psychological injuries. The administrative law judge denied benefits, finding the claimant's psychological problems stemmed from his disciplinary action in July 2000 and not his 1999 workplace incident. As claimant's psychological problems were not due to his work incident but to "legitimate personnel decisions," the Ninth Circuit held they were not compensable, affirming the *Sewell* and *Marino* holdings. *Pedroza*, 624 F.3d at 931-932, 44 BRBS at 70(CRT). "An interpretation contrary to this would create a trap for the 'unwary' employer and [would] undermine the interest of employers and employees alike." *Id.*, 624 F.3d at 931, 44 BRBS at 70(CRT). As both the Act and the *Marino-Sewell* doctrine establish a balance between the needs of employers and employees, the court concluded the claimant's psychological problems were not compensable as they were solely the result of legitimate personnel actions. *Id.*

In *Raiford v. Huntington Ingalls, Industries, Inc.*, 49 BRBS 61 (2015), the claimant experienced anxiety, sleep problems, and depression upon having his shift changed at work. The Board determined it reasonable to include shift changes as legitimate personnel actions. *Raiford*, 49 BRBS at 64. Accordingly, it held shift changes do not constitute a working condition to which the Section 20(a) presumption applies, and the administrative law judge properly found the claimant's shift change was a legitimate personnel action that cannot result in a compensable injury. *Id.* at 63.

In this case, the only causes of disability claimant alleged were his reprimand in December 2012 and, in view of his alleged head injury, the change in his working conditions to light-duty when he returned to work in April 2013, with no loss in pay. The administrative law judge properly found these were legitimate personnel actions under the law. *Pedroza*, 624 F.3d at 931-932, 44 BRBS at 70(CRT); *Raiford*, 49 BRBS at 64; *Marino*, 20 BRBS at 168. Thus, any psychological injury resulting from them is not compensable. *Id.* Consequently, as it is supported by substantial evidence and in accordance with law, we affirm the denial of disability and medical benefits for claimant's psychological condition.

DISABILITY

The employee has the burden of establishing the nature and extent of his disability. *Gacki v. Sea - Land Service, Inc.*, 33 BRBS 127 (1998); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1980). After finding claimant established a prima facie case for his upper back/shoulder injury, the administrative law judge determined the November 19, 2013 report of Dr. John Burns, stating there were no abnormal objective examination findings and any temporary symptoms related to claimant's grinding "would have long since resolved," undermined claimant's unsubstantiated testimony. Decision and Order at 39; *see* EX 20 at 501-502. He further found Dr. Burns's disability opinion supported by the findings of claimant's treating physicians, Drs. Robert Kaler and Maria Kaufman. Decision and Order at 39. Dr. Kaler examined claimant on June 18, 2013; he did not observe any abnormal objective findings, and opined claimant's condition was at maximum medical improvement and that he could perform full-duty work. CX 4 at 458, 477. Dr. Kaufman examined claimant on December 11, 2013. *Id*. at 326. She also noted no abnormal objective findings and concluded an MRI on December 24, 2013, demonstrated no evidence of internal derangement of claimant's right scapula. *Id*. at 326, 349. The administrative law judge found the only opinion supporting claimant's assertion of having an ongoing injury is from Dr. Debra Cherry, who opined in May 2014 that claimant had a chronic thoracic strain related to prolonged grinding. Decision and Order at 39; *see* CX 4 at 360-361. But the administrative law judge further noted Dr. Cherry's opinion on October 31, 2014, that claimant could work without restrictions and had no permanent impairment, and her records indicated "a significant portion of her treatment and work restrictions continuing through 2014 were based solely on Mr. Bouapha's subjective reports of pain." Decision and Order at 40; *see* CX 4 at 317-320, 352, 386.

He found claimant's testimony of having ongoing shoulder pain further undercut by his not seeking medical treatment since his last visit to Dr. Cherry on October 31, 2014, and his undertaking home improvement projects. Decision and Order at 40; CX 4 at 386; EX 7. He discounted claimant's acupuncture treatment by Mr. Qijian Ye, as his records stated claimant was treated for depression as well as shoulder pain. CX 4 at 893. Accordingly, the administrative law judge concluded claimant's upper back/shoulder injury from grinding resolved by the date of his visit to Dr. Burns on November 19, 2013. Decision and Order at 40 & n.7.

The administrative law judge has the discretion to weigh the evidence and the credibility of all witnesses, and to draw his own inferences. *Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT). In addition, an administrative law judge is not bound to accept the opinion of any particular medical examiner. *Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT); *Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000). The Board may not disregard an administrative law judge's findings merely because other inferences could have been

drawn from the evidence. *Rhine v. Stevedoring Services of America*, 596 F.3d 1161, 44 BRBS 9(CRT) (9th Cir. 2010). In light of the opinions of Drs. Burns, Kaler and Kaufman, and the lack of objective findings supporting his claim, the administrative law judge permissibly determined claimant's testimony of chronic sharp upper back/shoulder pain is not credible. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Accordingly, we affirm the administrative law judge's finding that claimant's upper back/shoulder disability resolved by November 19, 2013, as supported by substantial evidence.

Claimant alleges on appeal that he lost wages when he attended medical appointments during the period the administrative law judge found he was recovering from his upper back/shoulder injury. In this regard, claimant relies on a self-generated spreadsheet he submitted as evidence of his medical expenses and lost wages. *See* CX 8. Disability is "incapacity because of injury to earn the wages which the employee was receiving at the time of the injury in the same or any other employment." 33 U.S.C. §902(10). Therefore, a claimant must demonstrate an economic loss in conjunction with a physical or psychological impairment in order to receive a disability award. *See Keenan v. Director, OWCP*, 392 F.3d 1041, 38 BRBS 90(CRT) (9th Cir. 2004); *see also Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190 (1984).

The administrative law judge determined claimant did not sustain any economic loss from May 22 to November 19, 2013. Decision and Order at 40-41. He relied on the statement by claimant's counsel in his post-hearing brief that, after claimant's return to work in April 2013, "he appears to have not lost work/time through his layoff on June 14, 2014." Cl. Post-Hearing Br. at 19. Based on this admission and the payroll records[2] claimant submitted, the administrative law judge found claimant did not establish any loss of wage-earning capacity while he was recuperating from his work injury. Decision and Order at 41.

A review of the record shows claimant did not raise the existence of wage loss from May 22 to November 19, 2013, before the administrative law judge and, in fact, his counsel admitted there was no wage loss during this period. Accordingly, claimant waived this issue and cannot raise it for the first time on appeal.[3] *Robirds v. ICTSI Oregon, Inc.*, 52

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[2] The administrative law judge noted claimant submitted payroll records from June 30, 2013 to June 20, 2014, and daily time records from May 12, 2012 to June 14, 2014. Decision and Order at 41 n. 8; CX 2.

[3] Claimant may request Section 22 modification, 33 U.S.C. §922, of the administrative law judge's finding of no wage loss.

BRBS 79 (2019) (en banc) (Boggs, J., concurring); *Johnston v. Hayward Baker*, 48 BRBS 59 (2014).

Accordingly, we affirm the administrative law judge's Decision and Order Awarding Benefits In Part.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge