U.S. Department of Labor

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

BRB No. 19-0422

JUAN LUA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GULF COPPER AND MANUFACTURING CORPORATION	)	
	)	
	)	DATE ISSUED: 03/13/2020
and	)	
	)	
AMERICAN LONGSHORE MUTUAL ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

William G. Pulkingham (Rendon & Associates), Houston, Texas, for claimant.

Alan G. Brackett, Patrick J. Babin and Simone H. Yoder (Mouledoux, Bland, Legrand & Brackett, LLC), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2017-LHC-00611) of Administrative Law Judge Patrick M. Rosenow 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). 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 law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant injured his back on May 12, 2012, during the course of his employment for employer as a leadman. He underwent surgery on January 14, 2013, for a disc herniation at L5-S1. Dr. Francis opined claimant's back was at maximum medical improvement in July 2013; he released claimant for light-duty work for 30 days and full-duty thereafter. EX 26 at 14-15. Claimant returned to work on August 14, 2013, but left early, informing employer he was unable to perform light-duty work due to back pain. Claimant has not returned to work. Decision and Order at 6, 33.

Claimant was examined by Dr. Kaldis in September 2013, who diagnosed degenerative changes in the lumbar spine, and opined claimant reached maximum medical improvement on that date and could return to his regular duty. EX 28 at 3, 10. He was examined in November 2014 by Dr. Barrash, who referred claimant for a neuropsychological evaluation and reviewed surveillance video of claimant. EX 29 at 3, 7-8. Dr. Barrash opined claimant was at maximum medical improvement and could return to his usual employment. *Id*. at 8. Claimant was examined in March 2016 by Dr. Davila; he reported his back pain had never resolved but he had been doing much better until approximately March 2015 when the pain worsened and he developed radiating right leg pain. CX 51 at 2. A lumbar MRI conducted in April 2016 showed a recurrent disc herniation at L5-S1 and a 3.5 millimeter disc bulge at L4-5. EX 34 at 5.

Claimant sought benefits under the Act commencing August 14, 2013.[1] EX 18 at 7. Employer was insured by American Longshore Mutual Association (ALMA) at the time of the May 2012 work injury and by Signal Mutual Indemnity Association (Signal) when claimant returned to work in August 2013. CX 49 at 2. In a decision based on the parties' stipulations issued in April 2016, Administrative Law Judge Price awarded claimant half of the past-due temporary total disability compensation to which he could be found entitled from August 15, 2013 to February 2, 2016, and half of the $4,788.54 in medical expenses claimed.[2] EX 23 at 6. ALMA agreed to pay claimant continuing temporary total disability

[1] Employer paid all compensation and medical benefits owed prior to that date. Decision and Order at 4.

[2] ALMA agreed to pay compensation totaling $29,692.51 and Signal agreed to pay $10,000. CX 49 at 4. ALMA agreed to pay half of claimant's medical expenses.

compensation from February 2, 2016, and Signal was dismissed as a party with prejudice. *Id*.

ALMA terminated its compensation payments in April 2016 and the case was again referred to the Office of Administrative Law Judges. Thereafter, Judge Rosenow (the administrative law judge) approved a Section 8(i) settlement, 33 U.S.C. §908(i), dismissing Signal and closing the litigation between claimant and ALMA as to all liability prior to April 28, 2016, when claimant's compensation was terminated. Decision and Order at 2, 4; *see* March 12, 2019 Order Approving Partial Settlement. The issues left for adjudication between claimant and ALMA concerned, inter alia, whether claimant's current back problems are related to his work injury of May 12, 2012.

The administrative law judge found it undisputed that claimant has a recurrent disc injury at L5-S1 and a disc bulge at L4-5, which first became evident on the April 2016 MRI. The administrative law judge stated the parties disputed whether these lumbar disc conditions are the natural consequence of the May 2012 work injury, new injuries that occurred when claimant briefly returned to work in August 2013, or "new injuries or aggravations that resulted from activities unrelated to work," which arose after claimant stopped working in August 2013.[3] Decision and Order at 34. Assuming, arguendo, claimant's entitlement to the Section 20(a) presumption, 33 U.S.C. §920(a), he found Dr. Barrash's opinion rebuts it. *Id*. The administrative law judge then concluded claimant did

[3] It is unclear why the administrative law judge addressed whether employer could be liable for claimant's increased symptoms based on the theory that his condition was aggravated by his brief period of employment in August 2013 while Signal was on the risk. In the April 8, 2016 Decision and Order Based on the Stipulations of the Parties, Administrative Law Judge Price accepted the stipulations of claimant, ALMA and Signal "that the Claimant's return to work in August of 2013 did not aggravate or accelerate his condition or injury in any way." Stip. 28. This stipulation of fact was not subsequently modified and remains binding. Moreover, in his March 12, 2019, Order Approving Partial Settlement, the administrative law judge dismissed Signal from the proceedings pursuant to Section 8(i) of the Act, 33 U.S.C. §908(i). Thus, ALMA cannot be liable for any aggravating injury that occurred at work in August 2013. Therefore, if the new symptoms are not due to the May 12, 2012 injury, ALMA is not liable for benefits under the Act. *See generally Arnold v. Nabors Offshore Drilling, Inc*., 35 BRBS 9 (2001), *aff'd*, 32 F. App'x 126 (5th Cir. 2002).

not establish, on the record as a whole, that his current lumbar disc injuries at L4-5 and L5-S1 are related to the natural progression of his May 2012 work injury.

Claimant challenges the administrative law judge's findings that employer rebutted the Section 20(a) presumption and that he did not establish a compensable work injury based on the evidence as a whole.[4] Employer responds, urging affirmance. Claimant filed a reply brief and employer filed a sur-reply brief.

Claimant contends Dr. Barrash's opinion is insufficient to rebut the Section 20(a) presumption because it is speculative and equivocal as he does not attribute the recurrent herniation at L5-S1 and bulge at L4-L5 to a specific post-injury incident.[5] We reject this contention. Employer's burden on rebuttal is one of production, not persuasion; in order to rebut the Section 20(a) presumption, employer need only offer substantial evidence that "throws factual doubt" on claimant's prima facie case. *Ceres Gulf, Inc. v. Director, OWCP [Plaisance]*, 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012). Thus, contrary to claimant's contention, it is sufficient if employer's evidence states claimant's injury is not

[4] Claimant asserts the administrative law judge gave "short shrift" to the question of whether the Section 20(a) presumption applies to the entirety of the claimed injuries. Cl. Br. at 9. We reject this contention. The Section 20(a) presumption is a "procedural facilitating device" which shifts to employer the burden of producing substantial evidence of non-causation. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 262, 31 BRBS 119, 122-123(CRT) (4th Cir. 1997). The administrative law applied this burden-scheme. Thus, any error in his not explicitly invoking the Section 20(a) presumption is harmless. *See generally Suarez v. Service Employees Int'l, Inc*., 50 BRBS 33 (2016).

[5] As discussed in n. 3, *supra*, we need not address claimant's contention that the administrative law judge erred with respect to claimant's theory that his work in August 2013 aggravated his pre-existing condition. Claimant also challenges Dr. Barrash's hearing testimony, in which he stated claimant's current conditions are not related to the work accident, on the basis that it is contradicted by his July 2017 opinion, provided after he reviewed the April 2016 MRI, that claimant has a recurrent disc herniation, is limited to sedentary work, and requires additional treatment. EX 29 at 20-21. Dr. Barrash's 2017 opinion does not address the cause of claimant's conditions, and therefore does not contradict his later opinion. *See* Tr. at 129 (Dr. Barrash testified he was not asked in July 2017 to address causation).

work-related. Employer need not also prove that some non-work-related incident caused the injury.[6] *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39, 41 (2000).

Dr. Barrash testified at the hearing that a recurrent herniation is almost always caused by activity and it is "obvious" that strenuous activity, such as documented on the surveillance videos, caused claimant's recurrent herniation at L5-S1. Tr. at 128, 133. He also testified that the disc bulge at L4-L5 was due to post-injury activity. *Id*. at 134-135. He stated claimant's condition was not due to the natural progression of his prior work injury. *Id.* at 130-131, 148. The administrative law judge properly found Dr. Barrash's opinion sufficient to rebut the Section 20(a) presumption. *Bourgeois v. Director, OWCP*, 946 F.3d 263 (5th Cir. 2020); *Plaisance*, 683 F.3d 225, 46 BRBS 25(CRT); *see also Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003). Therefore, we affirm this finding as it is supported by substantial evidence.

After employer rebuts the Section 20(a) presumption, the issue of causation must be resolved on the evidence of record as a whole, with claimant bearing the burden of persuasion. *Plaisance*, 683 F.3d at 232, 46 BRBS at 29(CRT); *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). Employer remains liable for the "natural or unavoidable" consequences of claimant's work-related injury. 33 U.S.C. §902(2); *see, e.g., Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000); *Plappert v. Marine Corps Exch.*, 31 BRBS 109, 110, *aff'g on recon. en banc* 31 BRBS 13 (1997). However, it is claimant's burden to establish that his current harm is related to a work injury. *See generally Ins. Co. of the State of Pennsylvania v. Director, OWCP [Vickers]*, 713 F.3d 779, 47 BRBS 19(CRT) (5th Cir. 2013). The administrative law judge found Dr. Barrash's opinion relating claimant's back condition to a recent, non-work activity the most convincing, "given that it is relatively recent and concedes that Claimant requires treatment." Decision and Order at 37. The administrative law judge thus concluded claimant did not establish that his "L4-L5 and L5-S1 injuries are . . . a natural progression of the injury suffered while working in May 2012." *Id.*

Claimant challenges the administrative law judge's negative assessment of his credibility in light of the undisputed May 2012 work injury and April 2016 MRI findings.[7]

[6] Thus, claimant's rebuttal contentions concerning application of the law addressing intervening cause are not persuasive. *See* Cl. Br. at 40, 45-46.

[7] The administrative law judge determined claimant's testimony is "highly suspect" based on his demeanor at the hearing. Decision and Order at 34. He stated his impression of claimant is consistent with those formed by Drs. Barrash and Perez. Dr. Barrash noted

We reject this contention. The administrative law judge addressed the credibility of claimant's subjective complaints after his back surgery in January 2013, but prior to the April 2016 MRI. He found claimant's subjective complaints in this period are not supported in view of the functional capacity assessments of Drs. Kaldis and Barrash formed by their physical examinations of claimant and their review of the surveillance videos taken at various times from March 2013 to February 2015. Cl. Pet. for Rev. at 41-42; *see* EXs 28 at 12, 29 at 6, 8, 10. The administrative law judge thus rationally relied on Dr. Barrash's opinion that a specific non-work-related activity, such as those shown on the surveillance videos, explains the April 2016 MRI results in light of the September 2013 and December 2015 reports of Dr. Kaldis that claimant's back was at maximum medical improvement and he could return to his usual employment on September 16, 2013, and the November 2015 report of Dr. Barrash that claimant could have returned to work as of his first evaluation in December 2014. EXs 28 at 14; 29 at 10-11.

The administrative law judge is entitled to weigh the evidence and draw reasonable inferences from it. *Bourgeois*, 946 F.3d at 265. His assessment of a witness's credibility is to be afforded deference. *Bis Salamis, Inc. v. Director, OWCP [Meeks]*, 819 F.3d 116, 50 BRBS 29(CRT) (5th Cir. 2016); *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995). The administrative law judge's finding that claimant did not establish that his current symptoms at L4-L5 and L5-S1 are due in any way to the May 2012 work injury is supported by substantial evidence of record. Therefore, we affirm the denial of benefits after April 2016.[8] *Bourgeois*, 946 F.3d at 266; *Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001).

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claimant's subjective symptoms were out of proportion to his examination findings, and Dr. Perez stated claimant's <psychological?> testing profile indicated gross exaggeration and was not credible. EXs 29 at 3, 7; 31 at 3. The administrative law judge determined these conclusions are consistent with the surveillance video demonstrating no limp although claimant presented to Dr. Barrash with a pronounced limp. Dr. Kaldis opined the video disclosed claimant engaging in activities inconsistent with the limitations he insisted prevented him from working. Decision and Order at 35; EXs 14, 28 at 12-13; 29 at 6.

[8] Claimant's remaining arguments are moot. Once the administrative law judge determined claimant did not establish his current injury is work-related, employer's liability ended and the remaining issues concerning disability and medical benefits became moot.

Accordingly, we affirm the administrative law judge's Decision and Order.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge