U.S. Department of Labor

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

BRB No. 20-0469

RICKY GUIDRY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TAMPA PIPE & WELDING, INCORPORATED	)	DATE ISSUED: 03/25/2021
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY 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.

Isaac H. Soileau, Jr. (Soileau & Associates, LLC), Metairie, Louisiana, for Claimant.

Richard P. Salloum (Franke & Salloum, PLLC), Gulfport, Mississippi, for Employer/Carrier.

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

PER CURIAM:

Claimant appeals Administrative Law Judge Patrick M. Rosenow's Decision and Order (2018-LHC-01321) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 et seq. (Act). The Benefits

Review Board 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, while at work on March 13, 2015,[1] was assisting with scaffolding when the structure tilted toward him, causing him to fall and hit his head, neck, and back. He told the safety man what happened, that he thought he pulled a muscle in his back, and that he planned to rest over the weekend to see if he could return to work. He returned to work the following Monday and requested medical attention because his condition worsened over the weekend. He testified Employer did not offer to send him to a doctor, so he went to the Tampa Veterans' Administration Hospital (Tampa VA) reporting left hip and thigh pain. He was assessed as having left lumbar radiculopathy and intractable left lumbar and left thigh pain, given pain medication, and admitted for a 48-hour observation. An MRI revealed spondylitic changes in Claimant's lumbar spine with disc protrusions contacting exiting nerve roots at L4-5 and L5-S1, along with mild foraminal stenosis. He was discharged on March 17, 2015, with pain and steroid medications and instructions to follow-up to address a possible disc herniation.

Claimant went back to work with Employer for a few days, but after a reoccurrence of left leg pain he returned to the Tampa VA on March 19, 2015, where he was readmitted for overnight observation. He was discharged with a diagnosis of malingering,[2] L5-S1 chronic disc prolapse, and tobacco dependence, EX 12 at 30, 39, and was issued a return to work slip with restrictions of no lifting over 20 pounds and no operating of heavy machinery, *id.* at 38. He again returned to work, but continued complaints of pain prompted Employer to send him to Dr. Bruce Bohnker, an occupational medicine specialist, who examined Claimant on March 24 and 26, 2015. Dr. Bohnker diagnosed a herniated disc at L5/S1, listed "medical causation" as "work-related," concurred with the work restrictions imposed by the Tampa VA, but also added "NO work capacity due to shipyard requirement," and referred Claimant to an orthopedic/spine surgeon. EX 16.

[1]The parties stipulated that at the time of the March 13, 2015 accident, Claimant was a borrowed employee of Tampa Pipe & Welding, Incorporated, with Shellback Marine Services (Shellback), a labor staffing company, serving as his nominal or payroll employer. EX 60 at 3-6; Decision and Order at 2-3. The parties also stipulated Signal Mutual Indemnity Association, Limited, is the insurance carrier for Shellback and Tampa Pipe as of the date of the accident. *Id.* These entities shall be collectively referred to as Employer.

[2]Dr. Daniel Poetter, the attending physician, also stated Claimant exhibited "pain medication seeking behavior." EX 12 at 31.

Claimant thereafter ceased working altogether and returned home where he continued to seek treatment for his leg and back pain at the Veterans' Administration Hospital in Alexandria, Louisiana (Alexandria VA).[3]

Claimant was also evaluated for cervical and lumbar spine pain by orthopedic surgeons Dr. Neil Romero and Dr. David Muldowny on July 1 and August 16, 2016, respectively. Dr. Romero diagnosed degenerative changes in Claimant's cervical and lumbar spines and stated his present symptoms were "more likely not an exacerbation" but instead "more likely a continuation of ongoing symptoms," unrelated to the work injury. EX 27; EX 66, Dep. at 14-20. Dr. Muldowny diagnosed Claimant with cervical disc degeneration, spinal stenosis in the cervical region, and degeneration in the lumbar region. EX 29. Furthermore, Dr. Robert Kagan, a radiologist, issued reports dated December 14 and 15, 2016, wherein he opined, based on his review of Claimant's MRIs, that there was "never any objective evidence of injury" to either the cervical or lumbar spine "that could be casually related to a work-related injury occurring on 03-13-15." EX 34 at 2, 7.

Claimant, in his claim dated July 21, 2015, sought benefits for work-related injuries to his lumbar and cervical spine, which Employer controverted. CX 1 at 2, 4. In his decision, the administrative law judge found Claimant invoked the Section 20(a) presumption, 33 U.S.C. §920(a), that he sustained lumbar and cervical spine injuries as a result of the March 13, 2015 work accident, and that Employer established rebuttal thereof. In weighing the evidence as a whole, the administrative law judge found Claimant did not carry his burden to establish that the work accident caused or aggravated any problems he had with his lower extremities, lumbar spine, or cervical spine. Accordingly, he denied benefits.

On appeal, Claimant challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's finding that Claimant's injuries are not work-related and the resulting denial of benefits. Claimant has filed a reply brief.

Claimant contends the administrative law judge erred in finding the Section 20(a) presumption rebutted through Dr. Kagan's opinion because it is based solely on his interpretation of select MRI scans and x-rays provided to him by Employer; it did not

[3]Claimant visited the Alexandria VA on 18 occasions between April 7, 2015 and November 16, 2018. EX 2 at 82-116. He presented with complaints of neck and low back pain and underwent various testing including: an electromyography (EMG) on May 3, 2016; cervical MRIs on May 21, 2015 and July 30, 2018; and lumbar MRIs on September 1, 2015, November 2, 2016, and July 3, 2017. *Id.*

address whether Claimant's work accident aggravated or exacerbated his pre-existing cervical condition; and it is contradicted by the opinion of Dr. Bohnker, who, Claimant states, should be accorded greater weight.

Upon invocation of the Section 20(a) presumption,[4] the burden shifts to the employer to rebut it. Under the aggravation rule, if a work-related injury contributes to, combines with, or aggravates a pre-existing condition, the entire resultant condition is compensable. *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966). To rebut the Section 20(a) presumption, the employer must produce substantial evidence that the injury was not caused or aggravated by Claimant's work accident. 33 U.S.C. §920(a); *Brown v. Jacksonville Shipyards Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990); *Jones v. Aluminum Co. of America*, 35 BRBS 37, 40 (2001); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39, 41-42 (2000). The opinion of a physician that, to a reasonable degree of medical certainty, no relationship exists between an injury and the employment accident or exposures alleged to be the cause of the injury is sufficient to rebut the Section 20(a) presumption. *See Jones*, 35 BRBS at 40; *O'Kelley*, 34 BRBS at 41-42. Moreover, the employer's burden on rebuttal is one of production only, not one of persuasion. *See Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008). The employer satisfies its burden when it presents '"such relevant evidence as a reasonable mind might accept as adequate' to support a finding that workplace conditions did not cause the accident or injury." *American Grain Trimmers, Inc. v. OWCP*, 181 F.3d 810, 817, 33 BRBS 71, 76(CRT) (7th Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000).

The administrative law judge found Dr. Kagan's opinion, that Claimant's cervical and lumbar problems pre-existed the March 13, 2015 incident and are solely responsible for any current symptoms, "is substantial evidence to rebut" the Section 20(a) presumption. Decision and Order at 29. Dr. Kagan, in his December 14, 2016 report, opined there is no objective evidence "of injury to the lumbar spine causally related to a work-related accident of 03-13-15" nor "any aggravation of [Claimant's] pre-existing condition that could be causally related to the work-related accident of 03-13-15 within reasonable medical probability." EX 34 at 7. He concluded in his December 15, 2016, report that any issues with Claimant's cervical spine and corresponding spondylosis "represent a pre-existing condition in their entirety relative to a work-related accident occurring on 03-13-15," with "no objective evidence of any injury" that "could be causally related" to that work

[4]We affirm the administrative law judge's finding Claimant established a prima facie case entitling him to the Section 20(a) presumption that his cervical and lumbar conditions are work-related as it is unchallenged on appeal. *See Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

accident.[5] *Id.* at 2. Dr. Kagan's opinion, stated "within reasonable medical probability," constitutes substantial evidence in support of the administrative law judge's conclusion that Employer rebutted the Section 20(a) presumption.[6] *Jones*, 35 BRBS at 40; *O'Kelley*, 34 BRBS at 41-42. As Dr. Kagan's opinion satisfies Employer's burden to produce substantial rebuttal evidence that Claimant's cervical and lumbar conditions are not work-related, we affirm the administrative law judge's finding that Employer rebutted the Section 20(a) presumption. *Suarez v. Serv. Employees Int'l, Inc.*, 50 BRBS 33 (2016); *Jones*, 35 BRBS at 40; *O'Kelley*, 34 BRBS at 41-42.

Claimant next contends the administrative law judge's conclusion that he did not establish a causal connection between his cervical and lumbar conditions and the March 13, 2015 work accident, based on the record as a whole, is erroneous because he did not

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[5]Dr. Kagan stated:

> As I explained above, these degenerative changes would have to antedate an accident occurring on 03-13-15 by a number of years and ***represent a pre-existing condition in their entirety***. There is no objective evidence of any recent injury to the cervical spine. Specifically, there is no recent disc injury and there is certainly no evidence of a disc herniation. Consequently, there is ***no objective evidence of any injury to the cervical spine that could be casually related to the work related injury of 03-13-15*** *within reasonable medical probability.*

EX 34 at 2 (emphasis added). The administrative law judge could rationally infer that Dr. Kagan's use of the phrases "no objective evidence of ***any*** injury to the cervical spine" related to the work accident and that Claimant's cervical conditions "represent a pre-existing condition ***in their entirety***" relative to that accident, sufficiently precludes aggravation as a possible cause of his alleged post-accident cervical condition/symptoms.

[6]Contrary to Claimant's contention, the relative weight of the evidence is not assessed at rebuttal; rather, the administrative law judge's task is to decide, as a legal matter, whether Employer submitted evidence that could satisfy a reasonable fact-finder that Claimant's injury is not work-related. *Truczinskas v. Director, OWCP*, 699 F.3d 672, 46 BRBS 85(CRT) (1st Cir. 2012); *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010). Thus, in addressing rebuttal, the administrative law judge was not required to address whether Dr. Kagan's opinion was contradicted by Dr. Bohnker's opinion or determine the relative weight to be given to those opinions.

fully consider the aggravation rule and his conclusion is otherwise not supported by substantial evidence.[7]

Once Employer rebuts the Section 20(a) presumption, the administrative law judge must weigh all of the relevant evidence and resolve the causation issue based on the record as a whole, with Claimant bearing the burden of persuasion. *See Ceres Gulf, Inc. v. Director, OWCP* [*Plaisance*], 683 F.3d 225, 228, 46 BRBS 25, 27(CRT) (5th Cir. 2012); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 257, 28 BRBS 43(CRT) (1984). It is Claimant's burden, therefore, to prove his work accident in fact caused his injury or aggravated, accelerated, or combined with his pre-existing conditions to result in that injury. *Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT); *Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

The administrative law judge applied the appropriate standard in resolving the causation issue. He recognized the aggravation rule, Decision and Order at 4, 28, accurately identified Claimant's position that the work accident aggravated his underlying cervical and lumbar conditions to render him totally disabled, *id.* at 29, and sufficiently discussed the entirety of the relevant evidence in terms of Claimant's contention and the proper causation standard, *id.* at 5-23, 29-32. We therefore reject Claimant's arguments to the contrary. Claimant's remaining contentions involve the administrative law judge's weighing of that relevant evidence.[8]

[7]Claimant specifically asserts the administrative law judge erred by relying solely on the opinions of Drs. Romero and Kagan because they are based on the erroneous assumption that he was symptomatic prior to his March 2015 work accident. He further contends the administrative law judge erred in rejecting the opinions of Drs. Bohnker and Muldowny based, in part, on his discrediting Claimant's testimony. He also alleges the administrative law judge's credibility determination was based on erroneous evidence that he was arrested and convicted for serious drug-related and weapons charges – events Employer ultimately conceded were attributable to another similarly named individual, not Claimant.

[8]The administrative law judge's decision entirely accords with the Administrative Procedure Act (APA) as it contains "findings and conclusions, and the reasons or bases therefor, on all material issues of fact, law or discretion presented on the record." 5 U.S.C. §557(c)(3)(A). His decision contains a sufficient explanation of his rationale and adequately identifies the medical records upon which he relied in discrediting Claimant's testimony. *See* Decision and Order at 13-16, 20. Claimant's APA contention is without merit.

It is well established that the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences and conclusions from the evidence. *See John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *see also Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The Board may not reweigh the evidence or substitute its own views for those of the administrative law judge. *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982). Here, the administrative law judge reasonably concluded from Claimant's medical records that he made "repeated visits" to doctors between 2010 and 2015 "with complaints of back and neck pain and requests for prescription pain medication."[9] Decision and Order at 30; *see also* EXs 1, 2 (at 17, 58), 3, and 12 (at 2). *Calbeck*, 306 F.2d 693; *Donovan*, 300 F.2d 741. His rejection of Claimant's testimony that he was asymptomatic as of the March 2015 scaffolding accident and of Claimant's testimony in general, as not credible, is therefore rational and supported by substantial evidence.[10] *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Additionally, he permissibly found "the inaccurate information provided by Claimant [about his pre-accident symptoms and treatment] significantly taints the probative value of

[9]We therefore reject Claimant's contention that Dr. Kagan's opinion was based on an erroneous assumption that his pre-existing condition was symptomatic at the time of his accident.

[10]We are troubled by the administrative law judge's inclusion in the record documents pertaining to the arrest and conviction of a third party for drug-related charges and his erroneous attribution of these convictions to Claimant, despite the parties' agreement at the hearing that these charges have nothing to do with Claimant. HT at 7-11. We disagree with Claimant that remand is required on this basis, however, as the administrative law judge did not rely on this erroneous evidence for any purpose; he discredited Claimant's testimony based on medical records undermining Claimant's assertion that he was asymptomatic prior to the work accident. We also reject Claimant's contention that the administrative law judge did not watch the surveillance videos of Claimant engaged in physical activity. The administrative law judge summarized in his decision what the videos "show," including "Claimant demonstrating no difficulty or discomfort while mowing the lawn." Decision and Order at 27, 30. Finally, we see no error in the administrative law judge's finding testimony from Sherry Kerry (incorrectly identified as Sherry Guidry in the Decision and Order) not "particularly credible." Decision and Order at 31. Although Ms. Kerry testified she lives with Claimant and stated he did not complain about back pain prior to the work accident, the administrative law judge permissibly found the probative value of her testimony undermined by the medical records documenting such complaints and treatment with pain medication. *Id*.

and diminishes the weight to be given the opinions of Dr. Bohnker and Dr. Muldowny." Decision and Order at 32. We thus affirm his decision to credit the opinions of Drs. Kagan and Romero over those of Drs. Bohnker and Muldowny, as the former physicians had a more accurate picture of Claimant's pre-existing conditions. *Id.*

As Drs. Kagan and Romero attributed Claimant's lumbar and cervical complaints to his pre-accident, underlying degenerative disease, substantial evidence supports the administrative law judge's conclusion that the March 2015 scaffolding accident did not cause or aggravate Claimant's lumbar and cervical conditions. EX 27; EX 34; EX 66 at 14-20; *see generally Del Monte Fresh Produce v. Director, OWCP* [*Gates*], 563 F.3d 1216, 1219, 43 BRBS 21, 22(CRT) (11th Cir. 2009). We therefore affirm the administrative law judge's finding, based on the evidence as a whole, that Claimant did not establish his present cervical and lumbar conditions/symptoms are work-related. *Id.*; *Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000); *Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001).

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge