U.S. Department of Labor

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

BRB No. 22-0070

MOSES KATENTURE Claimant-Petitioner v. CONSTELLIS GROUP/TRIPLE CANOPY, INCORPORATED and CONTINENTAL INSURANCE COMPANY Employer/Carrier-Respondents	)	DATE ISSUED: 03/03/2023 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Jonathan C. Calianos, Administrative Law Judge, United States Department of Labor.

Andrew Nyombi (KNA Pearl), Silver Spring, Maryland, for Claimant.

Lauren E. Wilson and Juana E. Eburi (Brown Sims), Houston, Texas, for Employer/Carrier.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Jonathan C. Calianos' Decision and Order Denying Benefits (2020-LDA-00589) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*

(Act), as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq*. (DBA). We must affirm the ALJ'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, a citizen of Uganda, allegedly sustained a psychological injury and hearing loss as a result of his work as an armed security guard in Iraq from 2007 to 2011.[1] He stopped working for Employer in April of 2011 and returned home to Uganda because he "wasn't feeling well" and was "experiencing memory loss." EX 17 at 8; Claimant's Deposition (Dep.) at 23-29. After leaving Iraq, despite thinking he might need to see a doctor, he did not, deciding he'd "be fine[.]" EX 17 at 8. His symptoms worsened, and prompted his visit to a psychiatrist, Dr. Musto Bwonya Alex, on June 20, 2019.[2] EX 17 at 8; Dep. at 29. Claimant visited the China-Uganda Friendship Hospital out-patient department for treatment eleven times from 2019 to 2021.[3] Claimant has not returned to any work or applied for any other jobs since that time. *Id.* 8-9; Dep. at 29-30.

On September 18, 2019, Claimant filed his claim seeking benefits for a work-related psychological injury. EX 1. On January 11, 2021, Claimant filed an amended claim seeking benefits for both a work-related psychological injury and hearing loss. EX 3. Employer controverted the first claim on October 3, 2019, and then filed a subsequent controversion on June 9, 2021, to dispute the amended claim. EX 5, 6. The case was referred to the Office of Administrative Judges (OALJ), and the parties opted for a decision on the paper record without a formal hearing. Decision and Order (D&O) at 2.

[1] Because the district director in New York filed the ALJ's decision, this case arises under the jurisdiction of the United States Court of Appeals for the Second Circuit. *McDonald v. Aecom Technology Corp.*, 45 BRBS 45 (2011); *see also Global Linguist Solutions, L.L.C. v. Abdelmeged*, 913 F.3d 921, 52 BRBS 53(CRT) (9th Cir. 2019).

[2] Claimant stated he began experiencing adverse psychological symptoms in 2012 such as "bad dreams, sleepless nights, loss of appetite, lack of sexual desire. My ear problems and the legs and also quarrelling every time." EX 17 at 21; Dep. at 78. Claimant was seen at the China-Uganda Friendship Hospital and diagnosed with post-traumatic stress disorder (PTSD) and depression. He was prescribed medications to alleviate his symptoms, and it was recommended he not return to work in warzones. CX 1 at 1-2.

[3] Some dates and the signature of the treating physician are largely illegible. CX 1 at 3-18.

In his decision, the ALJ found Claimant was entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), relating his psychological condition and hearing loss to his work in Iraq with Employer. D&O at 12, 14. He also found Employer rebutted the presumption for both claims and determined Claimant did not prove he suffered from either a work-related psychological injury or work-related hearing loss by a preponderance of the evidence. Accordingly, the ALJ denied Claimant's claim for both his psychological condition and hearing loss. D&O at 17-18.

On appeal, Claimant challenges the ALJ's denial of benefits, arguing he erred in finding Employer rebutted the Section 20(a) presumption and erred in weighing the evidence. Employer responds, urging affirmance of the ALJ's decision.

Where, as here, the Section 20(a) presumption was invoked to link the claimant's harms with his employment, the burden shifts to the employer to rebut the presumption by producing substantial evidence that the injury was not caused or aggravated by the claimant's working conditions. *Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008); *see also Ceres Gulf, Inc. v. Director, OWCP [Plaisance]*, 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). An employer's burden on rebuttal is one of production, not persuasion; thus, an employer satisfies its burden to rebut the Section 20(a) presumption by offering substantial evidence which "throws factual doubt" on the claimant's prima facie case. *Rainey*, 517 F.3d 632, 42 BRBS 11(CRT); *Plaisance*, 683 F.3d at 231, 46 BRBS at 29(CRT). Therefore, 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); *Duhagon v. Metro. Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999).

Hearing Loss

Claimant first contends the ALJ erred in finding Employer rebutted the Section 20(a) presumption relating his hearing loss to his employment because Employer's audiologist, Dr. Laurie Herbert, did not conduct sufficient testing or dispute his hearing loss treatment. Consequently, he requests the Board reverse the ALJ's denial of hearing loss benefits and remand the case for further consideration of that claim. Employer maintains the ALJ adequately addressed the evidence and found Claimant's evidence lacking.

We hold the ALJ permissibly found Dr. Herbert's opinion rebuts the Section 20(a) presumption because it is substantial evidence that a reasonable mind could accept as adequate to support a finding that Claimant does not have any work-related hearing loss. Dr. Herbert stated the audiogram Claimant submitted is incomplete because it had no

threshold hearing levels recorded for the right ear, no bone conduction scores, no objective tests to validate the subjective responses, no speech reception threshold, no tympanometry, no acoustic reflex response, and no otoacoustic emission test. EX 9 at 2-3. Dr. Herbert opined Claimant's "hearing loss is less likely than not related" to his work because there were no patterns reflecting the expected high frequency loss associated with noise exposure. *Id.* She also noted there was no key to assist in interpreting the audiogram or calibration information to certify proper maintenance of the machine. *Id.* Because Dr. Herbert specifically opined Claimant's hearing loss is likely not related to his work, and otherwise throws factual doubt on the completeness and reliability of the audiograms, the ALJ permissibly found her opinion sufficient to rebut the presumption. D&O at 13; *see Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000).

Once the Section 20(a) presumption is rebutted, it falls from the case, and the ALJ must weigh all the evidence with the burden of persuasion on the claimant and resolve the case based on the record as a whole. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *John W. McGrath Corp. v. Hughes*, 264 F.2d 314 (2d Cir.), *cert. denied*, 360 U.S. 931 (1959). The ALJ provided an adequate rationale for finding Claimant's audiogram inherently unreliable and insufficient to establish work-related hearing loss, as well as finding it lacked "the indicia of reliability" set forth in the statute and regulations. *See* 33 U.S.C. §908(c)(13); 20 C.F.R. §702.441. The ALJ's discretionary weighing of the evidence and his decision to accord greater weight to the opinion proffered by Dr. Herbert is rational and supported by the record.[4] Consequently, we affirm his finding that Claimant does not have a work-related hearing loss.[5] *Coffey*, 34 BRBS 85.

Psychological Condition

---

[4] The ALJ found Claimant's audiograms were inherently unreliable and insufficient, did not comply with the regulatory requirements to constitute presumptive evidence of a hearing loss, lacked calibration information pursuant to 20 C.F.R. §702.441(d), and lacked the name of the treating provider. D&O at 13-14.

[5] We are not persuaded by Claimant's assertion that his hearing loss evidence is credible because Employer did not challenge the testing facility's licensure or dispute that the audiograms administered at the China-Uganda Friendship Hospital are widely accepted in Uganda. The ALJ acknowledged there may be a difference in standards but found that fact effectively irrelevant, as the ultimate burden of persuasion is on Claimant to establish a work-related hearing loss, and the documents submitted had a number of deficiencies, including those identified by Dr. Herbert, which rationally caused the ALJ to question their reliability. D&O at 17 n.8.

Claimant also contends the ALJ erroneously relied on Dr. Bahar Safaei-Far's opinion as substantial evidence to rebut the Section 20(a) presumption. Claimant maintains Employer did not rebut the presumption because Dr. Safaei-Far did not administer any diagnostic tests to determine whether he suffered from a psychological disorder.

The ALJ found Claimant invoked the Section 20(a) presumption, and the burden thus shifted to Employer to rebut it by producing substantial evidence that Claimant's psychological condition was not caused or aggravated by Claimant's working conditions. *Rainey*, 517 F.3d 632, 42 BRBS 11(CRT). As previously noted, the presumption may be rebutted with evidence disproving the existence of the alleged injury. *See, e.g., Bourgeois*, 946 F.3d 263, 53 BRBS 91(CRT).

The ALJ found Dr. Safaei-Far's opinion constitutes substantial evidence that a reasonable mind could accept to support a finding that Claimant does not have any psychological injury. *Bourgeois,* 946 F.3d 263, 53 BRBS 91(CRT). Dr. Safaei-Far opined Claimant did not meet any diagnostic criteria for a mental illness and his results on the three objective malingering tests indicated overreporting and exaggerating symptoms.[6] EX 8 at 7. As Dr. Safaei-Far's opinion casts doubt on Claimant's claim, it is sufficient to rebut the Section 20(a) presumption.[7] *Powell v. Serv. Employees Int'l, Inc.*, 53 BRBS 13 (2019); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000); *see Bourgeois*, 946 F.3d 263, 53 BRBS 91(CRT).

---

[6] Dr. Safaei-Far administered the Test of Memory Malingering (TOMM) visual recognition test and Claimant scored 14 out of 50 and 18 out of 50 on two trials of the test, indicating "intentional suboptimal effort or overreporting or exaggerating symptoms." EX 8 at 7. Dr. Safaei-Far administered the Morel Emotional Numbing Test for PTSD (MENT) and Claimant scored 15 errors placing him into the invalid range for males and indicating "the results are not consistent with any known clinical diagnosis but were consistent with various population samples that simulated impairment." *Id.* Dr. Safaei-Far administered the Miller Forensic Assessment of Symptoms Test (M-FAST), and Claimant scored a 19 which shows "evidence of malingering or feigned psychiatric symptoms." *Id.*

[7] With respect to Claimant's assertions that Employer's expert did not conduct testing to assess whether he suffered a psychological harm, and the absence of such testing precludes rebuttal, Claimant is mistaken. Dr. Safaei-Far stated that the results of the testing he conducted are not consistent with "any known clinical diagnosis" but rather indicate malingering and exaggeration, EX 8, thus casting doubt on Claimant's allegations of a psychological injury. Employer's experts are not limited to any particular method for rebutting the presumption.

After the presumption dropped from the case, the ALJ weighed the evidence as a whole and found Claimant did not establish a work-related psychological injury by a preponderance of the evidence. *Powell,* 53 BRBS 13. He found there "are discrepancies in [Claimant's] accounts that call into question his credibility," noted Claimant was "inconsistent as to the onset of his symptoms," and relied on Dr. Safaei-Far's opinion which noted the same inconsistencies. D&O at 14-17. He also relied on the three separate psychological tests Dr. Safaei-Far administered, which indicated "symptom over-reporting and exaggeration." D&O at 15; EX 8 at 7. The ALJ next stated that even if he were to find Claimant's testimony credible, the medical records submitted are still insufficient to support a claim for psychological injury because his:

> description of his psychological symptoms were (sic) vague, and there is little to no testimony as to the severity of his psychological symptoms, the progression of the symptoms, or the frequency of the symptoms. Further, the treatment records diagnosing PTSD, general anxiety disorder and depression have not been authenticated and lack any indicia of reliability.

D&O at 15.[8] Finally, the ALJ stated even if he were to accept the medical records as authentic, they still fail to establish Claimant suffered from a work-related psychological condition because the records lack a mental illness history, include little to no mention of Claimant's work for Employer, and contain no objective diagnostic testing or opinion on causation. D&O 16-17. The ALJ's weighing of the evidence is rational and supported by the record. *Powell,* 53 BRBS 13; *Victorian v. International-Matex Tank Terminals*, 52 BRBS 35 (2018), *aff'd sub nom. International-Matex Tank Terminals v. Director, OWCP*,

[8] The ALJ noted the medical records of every physician Claimant allegedly visited are incomplete regarding credentials, signatures, and qualifications. D&O at 16.

943 F.3d 278, 53 BRBS 79(CRT) (5th Cir. 2019). We, therefore, affirm the ALJ's conclusion that Claimant has not established he sustained a work-related psychological injury by a preponderance of the evidence. *Powell,* 53 BRBS 13.

Accordingly, we affirm the ALJ's Decision and Order Denying Benefits.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge