U.S. Department of Labor

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

BRB No. 22-0089

KATAKURI E. MUHEREZA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSTELLIS GROUP/TRIPLE CANOPY INCORPORATED	)	
	)	
and	)	
	)	
STARR INDEMNITY & LIABILITY COMPANY	)	DATE ISSUED: 03/22/2023
	)	
Employer/Carrier	)	DECISION and ORDER

Appeal of Decision and Order Denying Benefits of Jerry R. DeMaio, Administrative Law Judge, United States Department of Labor.

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

Before: GRESH, Chief Administrative Appeals Judge, BUZZARD and JONES, Administrative Appeals Judges.

GRESH, Chief Administrative Appeals Judge, and JONES, Administrative Appeals Judge:

Claimant appeals Administrative Law Judge (ALJ) Jerry R. DeMaio's Decision and Order Denying Benefits (2020-LDA-00405) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*

(Act), and as extended under 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 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 Ugandan citizen and currently resides in Western Uganda. He initially worked for Employer as a security guard at Camp Cobra in Iraq from May to July 2009 and then returned to work for Employer as an armed security guard at Camp Dahlke in Afghanistan on March 3, 2018. HT at 24; Cl. Deposition (CX 13) at 36. Although he suffered a back injury during his first stint with Employer, he was permitted to return to full duty. CX 2; HT at 22. Seventeen weeks later, after working 12-hour days and 7-day weeks, Claimant claimed that while he was preparing for work, he "developed a heart problem whereby his heart was pounding much, and shaking too much, and his feet were itching." HT at 25. He alleged he subsequently fainted, and his coworkers informed his supervisor, who took him to the on-site military hospital to receive medical attention.[1]

Following an examination at the military hospital, Employer's staff doctors told Claimant he had uncontrolled diabetes and would be sent back to Uganda for further treatment.[2] HT at 25. Claimant returned to Uganda from Camp Dahlke after his discharge from the hospital and sought medical treatment from several physicians. HT at 29. After his return, Drs. Henry Tamale, Fabian Ochaya and Agaba Vincent diagnosed Claimant with work-related diabetes mellitus, *H. pylori*, ulcers, and post-traumatic stress disorder (PTSD). CX 3, 5, 6. At Employer's request, he was also seen by Drs. Vianney Kweyamba and Emmanuel K. Mwesiga. EX 8, 9. Dr. Kweyamba reported Claimant's diabetes and ulcers were not work-related, while Dr. Mwesiga indicated further testing needed to be done to determine if his psychological injuries were work-related. EX 8 at 7; EX 9 at 5.

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[1] This case arises within the jurisdiction of the United States Court of Appeals for the Second Circuit because the district director who filed the ALJ's decision is located in the Region II District Office of the Office of Workers' Compensation Programs (OWCP), which is in New York. 33 U.S.C. §921(c); *McDonald v. Aecom Tech. Corp.*, 45 BRBS 45 (2011).

[2] Employer's records indicate Claimant was also counseled against purchasing diabetes medicine from Afghanistan locals on July 9, 2018. EX 6. During the hearing, Claimant denied buying medicine from locals but admitted to purchasing medicine from a friend and coworker prior to July 9, 2018, for symptoms related to his diabetes. HT at 43-45; CX 13 at 83-84.

Claimant filed a claim for benefits, claiming his diabetes mellitus, *H. pylori*, ulcers, and psychological injuries are work-related. First, the ALJ determined Claimant was not credible as a witness based on his contradictory evidence and inconsistent testimony during the hearing. D&O at 12. The ALJ determined Claimant misrepresented when he was diagnosed with diabetes, as his medical records indicated his hemoglobin A1C (HbA1C) was at 7.6% on February 28, 2018, indicating Claimant was diabetic before his diagnosis on July 9, 2018. *Id.* at 12. He noted Claimant initially claimed he sought treatment the morning after arriving back in Uganda; however, Claimant changed his testimony once confronted with evidence that he waited several weeks to seek treatment with the Entebbe Diabetic Association. HT at 47-48. The ALJ further concluded Claimant misrepresented his statements about purchasing diabetes medicine from his friend and coworker, his doctor's recommendations about his diet, and the number of rocket attacks at his camp. D&O at 12-13.

The ALJ then reviewed Drs. Tamale, Mivule, Ochaya, Vincent, Kweyamba and Mwesiga's medical reports in detail. He determined Employer's evidence indicating Drs. Tamale, Mivule, Ochaya, and Vincent were not licensed to practice medicine as doctors in Uganda weighed heavily against their credibility. D&O at 13-15. In addition, the ALJ found Claimant's doctors relied heavily on his uncredible statements, without supporting medical examinations, to reach their diagnoses. *Id.* at 12-13. Consequently, the ALJ accorded more weight to Employer's evidence and determined Claimant did not invoke the Section 20(a) presumption relating his injuries to his employment, 33 U.S.C. §920(a), and denied benefits. D&O at 19.

Claimant appeals, asserting he met his prima facie burden to invoke the Section 20(a) presumption. He also claims Employer did not present sufficient evidence to rebut the presumption, and therefore his injuries should be considered compensable as a matter of law. Employer did not file a response to Claimant's appeal.

To be entitled to the Section 20(a) presumption linking his injuries to his employment, a claimant must sufficiently allege: 1) he has sustained a harm; and 2) an accident occurred or working conditions existed which could have caused or aggravated the harm. *Rose v. Vectrus Systems Corporation*, 57 BRBS 27 (2022) (Decision on Recon. en banc); *see, e.g., Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010)*; Brown v. I.T.T/Cont'l Baking Co.*, 921 F.2d 289, 24 BRBS 75(CRT) (D.C. Cir. 1990); *O'Kelley v. Dep't of the Army/NAF,* 34 BRBS 39 (2000). The claimant bears

an initial burden of production to invoke the Section 20(a) presumption.[3] *Rose*, 56 BRBS at 36. Credibility can play no role in addressing whether the claimant has established a prima facie case. *Id.* at 37. In this regard, the Section 20(a) invocation analysis "does not require examination of the entire record, an independent assessment of witness[] credibility, or weighing of the evidence." *Id.* Instead, a claimant need only "present some evidence or allegation that if true would state a claim under the Act."[4] *Id.* Consequently, if he establishes his prima facie case, he is entitled to the presumption that his injury is work-related and compensable. *Id.*

Once the Section 20(a) presumption is invoked, the burden shifts to the employer to rebut it with substantial evidence that the claimant's condition was not caused or aggravated by his employment. *Newport News Shipbuilding & Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009). Substantial evidence is evidence which a reasonable mind could accept as adequate to support a conclusion or cast doubt on Claimant's alleged causal link between his injury and his employment. *Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008); *see Universal Mar. Corp. v. Moore* ("Moore"), 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). If the employer successfully rebuts the presumption, the claimant is no longer entitled to it, and the issue of causation must be resolved on the record as a whole, with the claimant bearing the burden of persuasion by a preponderance of the evidence. *Moore*, 126 F.3d at 262, 31 BRBS at 124; *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996).

Here, the ALJ first engaged in a credibility analysis of Claimant's testimony and his documentary evidence to determine if he invoked the Section 20(a) presumption. The ALJ surmised that in light of Claimant's misrepresentations of his injuries, coupled with Drs. Tamale, Mivule, Ochaya and Vincent's lack of medical credentials, his evidence was outweighed by the more credible evidence proffered by Drs. Kweyamba and Mwesiga. D&O 18-19. He determined Drs. Vincent and Ochaya's reliance on Claimant's misrepresentations undermined their diagnoses of depression and PTSD, especially when weighed against Employer's more credible evidence from Dr. Mwesiga that he believed Claimant may have been coached in his responses. *Id.* at 18. The ALJ found that, while Claimant presented evidence supporting his diabetes claim, Dr. Kweyamba's credible

[3] "The burden of production or 'some evidence' standard which we have set forth here is a light burden – being no greater than an employer's burden on rebuttal – meant to give the claimant the benefit of the statutory framework." *Rose*, 56 BRBS at 38.

[4] "Whether the claimant's evidence fails or carries the day is a matter to be resolved at step three when weighing the evidence, not at step one invocation." *Rose*, 56 BRBS at 38.

determination that there was no causal relationship between Claimant's employment and his diabetes outweighed Claimant's non-credible statements and the non-credible statements of his treatment providers. *Id.* Finally, the ALJ concluded Claimant's non-credible testimony along with Dr. Kweyamba's conclusions undermined his ulcers claim. *Id.* at 19.

The ALJ's credibility analysis at the invocation stage was improper under *Rose.* Based on the record, Claimant has met this burden and established a prima facie case with respect to his claims. First, he demonstrated with sufficient evidence that he suffered these injuries. He described the onset of his diabetes and ulcers on July 9, 2018. HT at 25. Further, he presented medical evidence to corroborate his diabetes, *H. pylori*, and ulcer injuries from Dr. Tamale, Surs Healthcare, and Entebbe Regional Hospital. CXs 3-4. With respect to his psychological injuries, Claimant produced evidence from Drs. Vincent and Ochaya substantiating his depression and PTSD. CXs 5-6. The evidence Claimant submitted is enough to establish he suffered these harms. *See, e.g., Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011) (determining that a claimant's testimony regarding his back pain levels and job duties was sufficient to invoke the Section 20(a) presumption).

Second, Claimant identified working conditions that could have caused his injuries. With respect to his diabetes claims, Claimant testified the foods served in Camp Dahlke were sweet and could have caused his diabetes. HT at 27. To substantiate his ulcers and *H. pylori* injury, Claimant produced documentary evidence related to the prevalence of *H. pylori* and ulcers in Afghanistan. CX 9. Finally, regarding Claimant's psychological injuries, he described the working conditions and environment he was working in as a war zone, where it "really stressed [him] out, because [he] would stand many hours, wearing heavy equipment. And that one occasion, incoming bombs would attack [his] camp." *Id.* These statements constitute sufficient evidence, at the invocation stage, to establish working conditions that could have caused Claimant's alleged harms. *Rose*, 56 BRBS at 38; *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (CRT) (a claimant is not required to introduce evidence that working conditions in fact caused the harm but only that conditions existed which could have caused the harm).

Consequently, the ALJ erred in finding Claimant did not meet his burden to invoke the Section 20(a) presumption for his injuries. However, the Board has held an ALJ's failure to correctly apply Section 20(a) is harmless if he nevertheless has analyzed an employer's evidence rebutting the presumption and then appropriately weighed all the evidence. *See Reed v. The Macke Co.*, 14 BRBS 568 (1981); *Seaman v. Jacksonville Shipyards, Inc.*, 14 BRBS 148.9 (1981); *Roberts v. Bath Iron Works Corp.*, 13 BRBS 503 (1981). In this instance, although the ALJ erred in not invoking the Section 20(a) presumption with respect to Claimant's diabetes and ulcers claims, the error is harmless as Employer submitted evidence sufficient to rebut the presumption, the ALJ weighed all

relevant evidence, and substantial evidence supports his determinations that Claimant ultimately did not carry his burden to establish the work-relatedness of these conditions. The ALJ found Dr. Kweyamba's examination and determination that Claimant's diabetes and ulcers were not worked related was specific, concrete, and sufficient to rebut Claimant's Section 20(a) presumption. D&O at 18; EX 8; *see Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1994). Next, the ALJ weighed the evidence as a whole and permissibly determined Claimant's inconsistent testimony, his treating practitioners' lack of credentials, and his non-credible evidence were outweighed by Employer's more credible evidence. *Id.* at 19; *see Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996); *see also Perini Corp. v. Heyde,* 306 F. Supp. 1321 (D.R.I. 1969) (it is within the ALJ's discretion to determine and weigh evidence and testimony for credibility). Thus, any error finding Claimant did not invoke the Section 20(a) presumption was harmless. *See Kubin v. Pro-Football, Inc.,* 29 BRBS 117 (1995); *Novak v. I.T.O. Corp. of Baltimore*, 12 BRBS 127 (1979) (error in failing to invoke the 20(a) presumption was harmless as the outcome would have ultimately been the same). Therefore, we affirm the ALJ's findings that Claimant's diabetes, *H. pylori*, and ulcers are not work-related. *See Reed*, 14 BRBS 568.

However, with respect to Claimant's psychological claims, the ALJ's error is not harmless. Claimant submitted two medical reports stating he had work-related psychological conditions. CXs 5-6. In response, Employer submitted Dr. Mwesiga's report, and the ALJ did not adequately consider whether or not the opinions contained in that report suffice to rebut the Section 20(a) presumption. EX 9. Therefore, we must vacate the denial of benefits for a psychological condition and remand the case to the ALJ. The ALJ must reexamine the record to determine whether Dr. Mwesiga's medical evidence or any other evidence of record is sufficient to rebut the Section 20(a) presumption linking Claimant's psychological condition to his employment. *See, e.g., Rainey*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008); *Am. Stevedoring Ltd. v. Marinelli,* 248 F.3d 54, 65 (2d Cir.2001); *Parsons Corp. of California v. Director, OWCP,* 619 F.2d 38, 12 BRBS 234 (9th Cir. 1980) (rebuttal requires substantial evidence specific and comprehensive enough to sever potential connection between the disability and the work environment; the standard is not met where an expert could not say exposure did not trigger or accelerate the disease).[5]

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[5] Although our dissenting colleague indicates he believes Dr. Mwesiga's opinion does not constitute substantial evidence to rebut the Section 20(a) presumption, the ALJ is authorized to evaluate credibility, weigh the evidence, and draw his own inferences and conclusions. *Sea-Land Services, Inc., v. Director, OWCP* [*Ceasar*], 949 F.3d 921, 54 BRBS 9(CRT) (5th Cir. 2020); *Miffleton v. Briggs Ice Cream Co.*, 12 BRBS 445 (1980), *aff'd*, 659 F.2d 252 (D.C. Cir. 1981) (table). The Board does not have the authority to engage in *de novo* review of the evidence, nor may the Board substitute its credibility determinations for the ALJ's. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir.

If the ALJ finds the evidence rebuts the presumption, he must then weigh the evidence on the record as a whole to determine whether Claimant's psychological injuries are work-related, with Claimant bearing the burden of persuasion. If he finds Employer has not rebutted the presumption, then Claimant has established a work-related psychological condition as a matter of law, and the ALJ must address whether Claimant has established any disability related to this condition. *Santoro*, 30 BRBS 171 (CRT).

Accordingly, we reverse the ALJ's finding that Claimant did not invoke the Section 20(a) presumption with regard to his psychological injury claim, and we remand the case for further consideration consistent with this opinion. In all other respects, we affirm the ALJ's Decision and Order Denying Benefits.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, concurring in part and dissenting in part:

I concur with my colleagues that the ALJ erred in failing to invoke the Section 20(a) presumption, but such error was harmless with respect to Claimant's diabetes and ulcers claims. However, I respectfully dissent from their decision to remand the case for the ALJ to determine whether Dr. Mwesiga's opinion rebuts the Section 20(a) presumption with respect to Claimant's psychological condition. An employer rebuts the Section 20(a) presumption by producing substantial evidence of the absence of a causal relationship between the claimant's injury and his work. *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990); *see Conoco, Inc. v. Director, OWCP,* 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). An equivocal opinion as to etiology is insufficient to support rebuttal. *Phillips v. Newport News Shipbuilding & Dry Dock Co.*,

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1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962).

22 BRBS 94 (1988). Further, rebuttal is not established when a doctor concedes a claimant's condition could have been aggravated by his work. *Quinones v. H.B. Zachery, Inc.*, 32 BRBS 6 (1998), *rev'd on other grounds,* 206 F.3d 474, 34 BRBS 23 (CRT) (5th Cir. 2000).

I agree with Claimant that Dr. Mwesiga's opinion does not constitute substantial evidence to rebut the Section 20(a) presumption. *Rainey v. Director, OWCP*, 517 F.3d 632, 637 (2d Cir. 2008) ("[A]n employer cannot satisfy its burden of production simply by submitting any 'evidence' whatsoever."). Dr. Mwesiga diagnosed "Probable Post Traumatic Stress Disorder" and stated it was "work-related." EX 9. He then added, without elaboration, that he "need[s] to assess [Claimant] on inpatient [basis] to make [a] clear diagnosis," he "need[s] to rule out the possibility [Claimant] was coached on the symptomology," and he "would be able to know if the symptoms are genuine" only after a three-day admission.[6] *Id.*

Given that Dr. Mwesiga stated Claimant probably has work-related PTSD – and his only basis for questioning that diagnosis is vague, lacks specificity, and requires further inpatient assessment to make a "clear diagnosis" – his opinion is not substantial evidence rebutting the presumption. EX 9; *Rainey*, 517 F.3d at 637 (2d Cir. 2008) ("[E]mployer must introduce '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.") (citations omitted). As such, there is no need to remand the claim for the ALJ to consider whether Employer rebutted the Section 20(a) presumption linking Claimant's PTSD to his working conditions. *See Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157 (1990) (remand unnecessary when "there is no evidence in the record sufficient to meet employer's rebuttal burden").

Consequently, I would hold Claimant's psychological injuries are work-related as a matter of law. On remand, the ALJ would need to address Claimant's entitlement to disability benefits.

GREG J. BUZZARD
Administrative Appeals Judge

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[6] The only explanation Dr. Mwesiga offered to question the legitimacy of Claimant's PTSD is that he was not aware of a psychiatrist with Claimant's doctor's name (Dr. Vincent Agaba) – but even then, he failed to explain why this factor caused him to conclude he was unsure whether Claimant had been "coached." EX 9.