U.S. Department of Labor

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

BRB No. 20-0064

DANIEL HILL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NORTHROP GRUMMAN	)	
	)	
and	)	DATE ISSUED: 05/27/2020
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA c/o AIG CLAIMS, INCORPORATED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of J. Alick Henderson, Administrative Law Judge, United States Department of Labor.

Howard S. Grossman and Callie J. Fixelle (Grossman Attorneys at Law), Boca Raton, Florida, for claimant.

Billy J. Frey and Ashley N. Vega (Thomas Quinn LLP), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2019-LDA-00113) of Administrative Law Judge J. Alick Henderson rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* as extended by

the Defense Base Act, 42 U.S.C. §1651 *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 started working for employer in 2012 in Kandahar, Afghanistan, as an aircraft maintenance liaison.[1] He testified he was exposed to dusty conditions, both indoors and outdoors, and to fumes from burn pits, which employer eliminated in 2015. Tr. at 32-33, 39-40, 44-45. Employer required claimant to undergo a pre-employment physical examination and annual examinations thereafter. *Id*. at 30-31. At claimant's annual physical in June 2014, a chest x-ray showed a spot on his lung. After further testing, he was diagnosed with benign fibrosis, mild emphysema, and edema within the lung bases. CX 7 at 19-20. Claimant's treating physician, Dr. Randall Rigdon, opined claimant did not have an active inflammatory lung disorder, and claimant denied experiencing respiratory symptoms; therefore, Dr. Rigdon provided a medical release for claimant to return to work in Afghanistan. *Id*. at 21-23. In July 2018, claimant experienced severe shortness of breath; he was diagnosed with interstitial lung disease (ILD) and was required to return to the United States. Tr. at 45-47; CX 4 at 8-9, 42, 45-46. He filed a claim for benefits under the Act on August 27, 2018. CX 1. Employer controverted the claim averring there is no medical evidence claimant's respiratory condition is related to his employment in Afghanistan. EX 1.

In his decision, the administrative law judge found claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), that his working conditions in Afghanistan could have caused or contributed to his ILD based on claimant's testimony about his dust and burn pit fumes exposure, the opinion of Dr. Richard Sneeringer that claimant's burn pit fumes exposure could be a contributing factor to his pulmonary fibrosis, and the opinion of Dr. Lisa Lancaster that occupational dust exposure could be a risk factor for idiopathic pulmonary fibrosis (IPF).[2] Decision and Order at 28, 32. The administrative law judge found the opinion of Dr. Patricia Rosen rebutted the Section 20(a) presumption that claimant's ILD is due to his work-related exposures to burn pit fumes, dust, and other pulmonary irritants. *Id*. at 35. In weighing the evidence as a whole, he determined claimant established exposure to burn pit emissions until sometime in 2014, and to large amounts of

[1] Claimant testified he also worked about 20 percent of the time in Abu Dhabi, United Arab Emirates. Tr. at 44.

[2] IPF and UIP are acronyms for idiopathic pulmonary fibrosis and usual interstitial pneumonia. Claimant was diagnosed with IPF at the Cleveland Clinic in Abu Dhabi in July 2018. Decision and Order at 32; CX 4 at 35.

dust.[3] *Id*. at 36-37. However, he credited Dr. Rosen's diagnosis of IPF with no evidence of a work-related component as "most well-reasoned and persuasive" over the opinions of Drs. Sneeringer and Lancaster that claimant's working conditions in Afghanistan could be a contributing factor to claimant's lung disease. *Id*. at 38. Accordingly, the administrative law judge denied the claim. *Id*. at 39.

On appeal, claimant challenges the administrative law judge's finding Dr. Rosen's opinion sufficient to rebut the Section 20(a) presumption that claimant's dust exposure in Afghanistan caused, contributed to or hastened his ILD. Specifically, claimant argues Dr. Rosen's report did not address his occupational dust exposure, the administrative law judge disregarded the Section 20(a) rebuttal standard as enunciated by the United States Court of Appeals for the Eleventh Circuit, in whose jurisdiction this case arises, that employer must "rule out" a "possible" causal connection between the employment and the injury, and the administrative law judge erred by not considering whether claimant's dusty working conditions aggravated his ILD.

In his decision, the administrative law judge relied on *Higgins v. Academi*, BRB No. 18-0310 (Mar. 14, 2019) (unpub.) to address claimant's contention that employer must "rule out the possibility" of work-related causation. In *Higgins*, the Board addressed the rebuttal discussion in *Brown v. Jacksonville Shipyards, Inc.*, 893 F 2d 294, 23 BRBS 22(CRT) (11th Cir. 1990), in which the Eleventh Circuit stated "[n]one of the physicians expressed an opinion *ruling out the possibility* that there was a causal connection between the accident and Brown's disability. Therefore, there was no direct concrete evidence sufficient to rebut the statutory presumption." *Brown*, 893 F.2d at 297, 23 BRBS at 24(CRT) (emphasis added). Section 20(a) of the Act presumes an injury is work-related "in the absence of substantial evidence to the contrary." 33 U.S.C. §920(a). The Board stated the Eleventh Circuit has not addressed the Section 20(a) rebuttal standard in a published case post-*Brown*:

> but every other circuit to address the issue has stated that an employer does not have to "rule out possibilities" in order to rebut the Section 20(a) presumption, but must produce "substantial evidence" of the absence of causation (and aggravation if such a theory is raised).

[3] The administrative law judge noted claimant's testimony about dust exposure inside his eight-man tent and later in modular housing and about severe dust storms. Decision and Order at 4, 6; Tr. at 33, 44-45.

and

> The Board held in a case arising in the Eleventh Circuit that 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 O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39, 41-42 (2000).

Higgins, slip op. at 5.[4] The administrative law judge also noted that a more recent unpublished Eleventh Circuit decision did not cite the "rule out" standard.[5] Decision and Order at 33. In view of the statutory language and for the reasons stated in *Higgins*, we reject claimant's contention the administrative law judge erred by not applying a "ruling out possibilities" standard for rebuttal of the Section 20(a) presumption.

Claimant avers that, even under the substantial evidence rebuttal standard, employer did not rebut the Section 20(a) presumption because it presented no evidence that his occupational dust exposure did not aggravate, contribute to or hasten the onset of his ILD.[6]

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[4] *See, e.g., Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *Bath Iron Works Corp. v. Fields*, 599 F.3d 47, 44 BRBS 13(CRT) (1st Cir. 2010); *C & C Marine Maint. Co. v. Bellows*, 538 F.3d 293, 42 BRBS 37(CRT) (3d Cir. 2008); *Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008); *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003); *American Grain Trimmers v. Director, OWCP [Janich]*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997).

[5] The Eleventh Circuit stated Section 20(a) "creates a rebuttable presumption which the employer (has) the duty of rebutting with evidence that the accident neither caused nor aggravated the claimant's new or existing injuries." *Universal Mar. Serv. Corp. v. Dir.*, 137 F. App'x 210, 211 n.l (11th Cir. 2005) (citing *Brown*, 893 F.2d at 297, 23 BRBS at 24(CRT)).

[6] Claimant relies on the opinion of Dr. Lancaster linking his ILD to his occupational dust exposure. She examined claimant on February 12, 2019, and on May 16, 2019. CX 9. Dr. Lancaster diagnosed IPF and opined claimant "has multiple risk factors for dust and occupational dust exposure that could be risk factors for IPF." CX 9 at 17, 21. She reiterated her assessment after claimant's May 16 office visit. *Id*. at 146.

Employer relied on the reports of Dr. Rosen to rebut the presumption. She issued her initial report on April 11, 2019, based on claimant's medical records and deposition. EX 3 at 9. In her recitation of the medical evidence she reviewed, she noted claimant's reports of his exposure to burn pit fumes and of dust to other physicians. Dr. Rosen based her opinion that claimant has non-work-related IPF on his initially showing symptoms in 2014 "when exposure was unlikely to be significant" and that "a period of two or three years" exposure is not consistent with its onset. *Id*. at 2. Dr. Rosen elaborated on the absence of a correlation between burn pit exposure and IPF/ILD. She stated that UIP is a form of ILD used interchangeably with IPF.[7] *Id*. at 9. She also stated this illness has greater prevalence in males and increases with age, usually in their sixth and seventh decades; "the cause is unknown which is why it is termed idiopathic."[8] *Id*. She stated claimant has ILD, which is an ordinary disease of life, and "this patient's illness is not work related." *Id.* at 2.

Employer was granted 30 days after the May 23, 2019 hearing to submit additional evidence in response to evidence claimant submitted at the hearing. Tr. at 11. Dr. Rosen's June 13, 2019 report states she reviewed Dr. Lancaster's May 16, 2019 work capacity evaluation and letter, and the intake survey from the National Jewish Health Center (CX 33) addressing dust exposure. EX 6 at 2. Dr. Rosen reiterated her diagnosis of IPF "without evidence of a work-related component." *Id*. at 1-2.

The administrative law judge found Dr. Rosen is well-qualified to offer a medical opinion, based on her training, education and experience, and given the amount of medical documentation she reviewed, she has a sufficient understanding of claimant's medical history upon which to base her opinion.[9] Decision and Order at 34. He determined Dr. Rosen's opinion constitutes substantial evidence "to rebut Claimant's prima facie case that his IPF was due to work-related exposures such as burn pits, dust, or other pulmonary irritants." *Id*. at 35. The administrative law judge relied on Dr. Rosen's opinion, the lack of medical studies linking burn pit emissions to respiratory disorders, her explanation that a period of two to three years from claimant's first exposure to burn pit emissions and the

[7] *See* n.2, *supra*.

[8] In her listing of known causative agents, she noted, inter alia, smoking and reflux; claimant has a gastroesophageal reflux disease and a more than 50 pack-year smoking history. EX 3 at 3, 6, 9.

[9] Dr. Rosen did not physically examine claimant. She is board-certified in internal and emergency medicine and in medical toxicology. EX 2 at 3/334.

onset of his pulmonary fibrosis is not consistent with the pathophysiology of IPF, and claimant's admission he did not work in close proximity to a burn pit. *Id.*

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). Where, as here, the Section 20(a) presumption applies, the burden shifts to employer to rebut it by producing substantial evidence that the injury was not caused or aggravated by claimant's working conditions. *Ceres Gulf, Inc. v. Director, OWCP [Plaisance]*, 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012). Where aggravation is raised, the evidence employer offers on rebuttal must address aggravation. *See Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009).

We agree with claimant's argument that the administrative law judge did not adequately address whether employer rebutted the Section 20(a) presumption that his occupational dust exposure in Afghanistan from 2012 to July 2018 contributed to, aggravated, or hastened his ILD.[10] The administrative law judge acknowledged claimant's aggravation/contribution theory, *see* Decision and Order at 3, 33, but his rebuttal findings addressed only Dr. Rosen's rationale for opining that claimant's ILD was not caused by burn pit exposure.[11] Decision and Order at 34-35. Accordingly, we vacate the

[10] We reject employer's contention, raised in its response brief, that claimant did not raise an aggravation theory due to his occupational dust exposure. In his opening statement, claimant's attorney linked claimant's ILD to dust, sand, wind, and sandstorms, as well as to burn pit fumes. Tr. at 15-16, 20. The administrative law judge afforded employer an opportunity to submit additional evidence after the hearing. *Id*. at 11. Employer submitted Dr. Rosen's supplemental report. EX 2. Claimant's post-hearing brief also addressed the aggravation issue. Cl. Post-Hearing Br. at 4-6, 16-18, 25/46-48, 58-60, 67.

[11] We note that, while Dr. Rosen opined the cause of IPF is unknown, she was able to state it was not caused by burn pit exposure. *See generally Stevens v. Todd Pacific Shipyards*, 14 BRBS 626 (1982) (Kalaris, J., concurring and dissenting), *aff'd mem*., 722 F.2d 747 (9th Cir. 1983), *cert. denied*, 467 U.S. 1243 (1984) (employer does not have to offer evidence what a disease is due to, only that it is not due to work). Claimant does not appeal the administrative law judge's finding employer rebutted the Section 20(a) presumption with regard to the claim based on his burn pit exposure and that claimant did not establish a causal connection between his ILD and burn pit exposure based on the record as a whole. Accordingly, we affirm these findings. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

administrative law judge's finding employer rebutted the Section 20(a) presumption with respect to claimant's dust exposure and remand the case for him to address whether employer produced substantial evidence to rebut the Section 20(a) presumption that claimant's dust exposure in Afghanistan aggravated, contributed to or hastened his ILD. *Myshka v. Electric Boat Corp*., 48 BRBS 79 (2015); *L.W. [Washington] v. Northrop Grumman Ship Systems, Inc.*, 43 BRBS 27 (2009). If the presumption is not rebutted, claimant's condition is work-related as a matter of law. *See, e.g., Ramsay Scarlett & Co. v. Director, OWCP*, 806 F.3d 327, 49 BRBS 87(CRT) (5th Cir. 2015). If the presumption is rebutted, the administrative law judge must address whether claimant established by a preponderance of the evidence that his dust exposure in Afghanistan aggravated, contributed to or hastened his ILD. *See, e.g., Suarez v. Service Employees Int'l, Inc.*, 50 BRBS 33 (2016).

Accordingly, we vacate the administrative law judge's Decision and Order and remand the case for further proceedings in accordance with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge