U.S. Department of Labor

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

BRB No. 22-0392

RODNEY RIDDICK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CP & O, LLC	)	
	)	DATE ISSUED: 10/30/2023
and	)	
	)	
PORTS INSURANCE COMPANY, INCORPORATED	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Monica Markley, Administrative Law Judge, United States Department of Labor.

Charlene A. Morring (The Law Firm of Charlene Morring, P.C.), Norfolk, Virginia, for Claimant.

Christopher Hedrick (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for Employer/Carrier.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Monica Markley's Decision and Order Denying Benefits (2019-LHC-00609) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*

(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 alleges he suffered a back injury during the course of his employment as a lasher for Employer on November 18, 2018, when he claims a lashing rod fell on his back as he was descending a ladder and/or additionally while he was lifting heavy lashing rods when he continued to work that day.[1] CX 1. Claimant alleges he was in greater pain the next day and went to the hospital. He was diagnosed with an L4 compression fracture. CX 5. Employer initially paid Claimant temporary total disability benefits but, upon investigation, ceased payments and controverted the matter. CXs 6, 8. Ultimately, the ALJ denied Claimant's claim, finding the Section 20(a) presumption, 33 U.S.C. §920(a), invoked and rebutted, and on weighing the record evidence as a whole finding Claimant did not establish a work-related injury by a preponderance of the evidence. Decision and Order (D&O) at 15-22.

In this case, the medical experts agree, and the parties stipulated, Claimant's objective findings establish he suffered an acute compression fracture at L4 and an indeterminate endplate deformity at L5. CXs 5, 12, 13; EXs 4, 8, 12. The ALJ found Claimant alleged he was struck on the back by a lashing rod while he was working for Employer, and he later felt a pop in his back as he continued to work that same day, which, while "a thin case," the ALJ found established the second prong of the prima facie case. D&O at 16. Having invoked the Section 20(a) presumption linking this injury to his heavy work, D&O at 15, the ALJ then found the reports of Drs. Andrew N. Pollak and Bryan A. Fox, EXs 8, 12, rebutted the presumption because they concluded the mechanism of injury reported is inconsistent with the objective findings. Instead, they asserted Claimant would have had to have suffered an "axial loading injury" or a "forward bending injury" to result in a compression fracture at L4. EX 8 at 3; *see also* EX 12 at 1. They concluded it is "highly unlikely and almost impossible for a lashing rod striking him in the lumbar spine to cause a compression fracture." EX 8 at 3; EX 12 at 1-2 ("it would not be likely that

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the injury occurred in Norfolk, Virginia. 33 U.S.C. §921(c); *see Roberts v. Custom Ship Interiors*, 35 BRBS 65, 67 n.2 (2001), *aff'd*, 300 F.3d 510, 36 BRBS 51(CRT) (4th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003); 20 C.F.R. §702.201(a).

ANY direct blow to the back would generate a compression fracture at L4." (emphasis in original)).

The ALJ determined these opinions constituted substantial evidence to rebut the presumption. D&O at 16-17. And, on weighing the evidence as a whole, the ALJ found Claimant to be an inconsistent and unreliable witness.[2] She also rejected his excuses of poor memory and less formal education as reasons for his inconsistencies, stating they are "innumerable" and "cannot be explained away by mere confusion [or] lack of education." *Id.* at 19. Rather, the ALJ gave great weight to Dr. Pollak's and Dr. Fox's opinions, rejecting Claimant's arguments to the contrary, as they reviewed Claimant's complete medical records and concluded the blow to the back was unlikely to have caused the compression fracture. *Id.* at 10-11, 19-20. She also noted Dr. Grant A. Skidmore, one of Claimant's treating doctors, believed being hit on the back by a lashing rod was an "odd mechanism" to result in a compression fracture. *Id.* at 9, 20. Based on the record, the ALJ found Claimant did not establish his injury is work-related, and she denied benefits. *Id.* at 20-21.

Claimant appeals the ALJ's decision, contending she erred in finding the presumption rebutted and in weighing the evidence as a whole, including making erroneous credibility determinations. Employer responds, urging affirmance.

Claimant first contends the ALJ erred in finding Employer rebutted the Section 20(a) presumption with the reports of Drs. Pollak and Fox. EXs 8, 12. He asserts the doctors neglected to consider certain information, such as the actual weight of the lashing rod and Dr. Arthur W. Wardell's records, and these omissions render their opinions not credible. In determining whether an injury is work-related, a claimant is aided by the Section 20(a) presumption, which is invoked after he establishes he sustained a harm or pain and conditions existed, or an accident occurred, at his place of employment, which could have caused the harm or pain. *American Stevedoring, Ltd. v. Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001); *Rose v. Vectrus Systems Corp.*, 56 BRBS 27 (2022) (Decision on Recon. en banc), *appeal dismissed* (M.D. Fla. Aug. 24, 2023); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996). Once, as here, the Section 20(a)

[2] The ALJ specifically called out Claimant's "many differing accounts and explanations of both the timing and mechanism of his injury." D&O at 17. She identified at least six different statements about the date and time the accident occurred. *Id.* at 17-18 (citing CXs 1, 3, 5; EXs, 4, 5; TR at 32). She also noted multiple descriptions of the event itself which included how it happened (lifting heavy objects or getting hit by lashing rod while on ladder or both), where he was on the ladder (not on, just started climbing, half-way down), and what happened after the rod hit him (hung on him or fell to ground). *Id.* at 17-18 (citing CXs 3, 5, 9; EXs 4, 5; TR at 58-59).

presumption is invoked, the burden shifts to the employer to produce 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); *Universal Mar. Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). The employer's burden on rebuttal is one of production, not persuasion. *Id.*; *Rose*, 56 BRBS at 35; *Victorian v. International-Matex Tank Terminals*, 52 BRBS 35 (2018), *aff'd sub nom. International-Matex Tank Terminals v. Director*, OWCP, 943 F.3d 278, 53 BRBS 79(CRT) (5th Cir. 2019); *Suarez v. Serv. Employees Int'l, Inc.*, 50 BRBS 33 (2016). All an employer must do is submit "such relevant evidence as a reasonable mind might accept as adequate" to support a finding that the claimant's injury is not work-related. *Rainey*, 517 F.3d at 637, 42 BRBS at 14(CRT). 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). In addition, it is well settled that a medical opinion of non-causation rendered to a reasonable degree of medical certainty is sufficient to rebut the presumption. *See O'Kelley*, 34 BRBS 39.

In this case, the ALJ rationally found Employer rebutted the Section 20(a) presumption with Dr. Pollak's and Dr. Fox's opinions. After reviewing Claimant's medical records, Dr. Pollak noted Claimant had reported two different mechanisms of injury: lifting heavy objects and having a lashing rod fall on his back. EX 8 at 2-3. However, Dr. Pollak stated "neither mechanism is even remotely consistent with the injury sustained." EX 8 at 3. He stated acute compression injuries are caused by axial loads or forward bending, would have resulted in "significant immediate pain," and if it had occurred from the lashing rod, Claimant would not, as he testified to, have been able to climb back up the ladder to store the rod.[3] As Claimant described the pain worsening with time, Dr. Pollak stated the only way Claimant would not have noticed pain from a compression fracture immediately is if he had multiple injuries distracting him from this one or if he was impaired by drugs or alcohol, and there was no evidence of either here. *Id.* Dr. Pollak concluded it is "highly unlikely and almost impossible" for a lashing rod to have caused the compression fracture, but if the rod had struck him with "sufficient force to cause forward flexion of the spine resulting in an L4 compression fracture," there should have been significant bruising shown on the MRI, but none was reported. *Id.* at 3-4.

Similarly, Dr. Fox concluded Claimant sustained an L4 "acute compression/burst type injury" which is a "high-energy injury" and "is NOT an injury that is sustained with a direct blow to the back." EX 12 at 1 (emphasis in original). He noted none of the doctors

[3] Claimant stated after he was hit, he climbed up the ladder to put the lashing rod back in its place and then climbed down. TR at 59; EX 5 at 24.

reported soft tissue injuries such as edema, swelling, or bruising, but even if Claimant was hit as described, it would not have caused a compression fracture at L4. The injury diagnosed would have been caused by "an axial load, often times with a forward flexed posture." *Id.* at 1-2. He also opined the pain from the fracture would have been "immediate and disabling." *Id.*

Both doctors presented unequivocal opinions stating it is highly unlikely that Claimant's compression fracture was caused by a lashing rod falling on his back, and Dr. Pollak also stated it would not have been caused by lifting heavy objects. *See generally Powell v. Serv. Employees Int'l, Inc.*, 53 BRBS 13 (2019). Consequently, the ALJ rationally found these opinions rebut the Section 20(a) presumption, and we affirm her finding. *See Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *Manente v. Sea-Land Serv., Inc.*, 39 BRBS 1 (2004); *O'Kelley*, 34 BRBS 39.

Claimant next contends the ALJ erred in weighing the evidence as a whole and in giving great weight to Employer's experts and little weight to Claimant's testimony. If the employer rebuts the Section 20(a) presumption, it no longer applies, and the issue of causation must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *Santoro v. Maher Terminal, Inc.*, 30 BRBS 171 (1996); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). It is well established the ALJ is entitled to weigh the evidence and draw her own inferences and conclusions from it. *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). Whether the evidence is susceptible to opposing inferences is not material. *See, e.g., Sprague v. Director, OWCP*, 688 F.2d 862, 15 BRBS 11(CRT) (1st Cir. 1982). It is impermissible for the Board to reweigh the evidence or to substitute its own views for those of the ALJ. *Sealand Terminals v. Gasparic*, 7 F.3d 321, 28 BRBS 7(CRT) (2d Cir. 1993); *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982). Further, the Board will not interfere with credibility determinations unless they are "inherently incredible or patently unreasonable." *Cordero v. Triple A Mach. Shop*, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *see also Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010).

In weighing the evidence as a whole, the ALJ first determined Claimant allegations, testimony, and reports to medical personnel were inconsistent and unreliable. D&O at 17-18. A review of the record, *see* n.2, *supra*, supports the ALJ's assessment. On more than one occasion, Claimant offered conflicting statements regarding the accident from the date

and time it occurred to his alleged witness to how the event played out.[4] D&O at 17-18. In addition to giving great weight to the reports of Drs. Pollak and Fox addressed above, the ALJ noted the Emergency Department doctors, and later Dr. Skidmore, also doubted Claimant's stated mechanism of injury.[5] *Id.* at 19. The evidence the ALJ credits supports her conclusion that Claimant has not established a work-related injury.[6] The ALJ's credibility determinations are not "inherently incredible" or "patently unreasonable," and her decision to give greater weight to Employer's evidence is rational and supported by substantial evidence.[7] *Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT); *Cordero*, 580 F.2d at

[4] Claimant's alleged witness to the event, his co-worker Mr. Clifton Davis, twice signed written statements indicating he did not see any loose lashing rods or any accident. EXs 6, 10. Claimant testified in his deposition that he told Mr. Davis he was "all right" after this incident. EX 5 at 12. And, another co-worker, Mr. Gilbert Harris, stated Claimant had mentioned an accident to him, but Claimant said he did not want to report it and was okay. CX 4.

[5] At the hospital, Claimant reported he had been lifting heavy objects at work. Upon diagnosing an L4 compression fracture, the emergency room doctor recommended an MRI to investigate because the "mechanism of injury doesn't support vertebral fracture." CX 5 at 3. Dr. Skidmore, who saw Claimant on November 26, 2018, stated Claimant reported he repetitively lifted heavy loads at work and was hit by a rod on his back, though he kept working that day and heard a pop, he went home and went to the hospital the next day. Dr. Skidmore considered the reported mechanism for a compression injury to be "odd." EX 4 at 3.

[6] Contrary to Claimant's assertion, the mere fact that he sustained an acute injury does not, alone, make it work-related.

[7] We reject Claimant's assertion that any failure to address Dr. Wardell's opinion is detrimental to the credibility of Drs. Pollak and Fox. As the ALJ noted, D&O at 20 n.7, Claimant's treatment with Dr. Wardell is irrelevant to the causation analysis. Indeed, Dr. Wardell did not render an opinion on causation other than to mention how Claimant said he was injured. His focus was on treating Claimant's back pain. CX 9; EX 3.

Additionally, we decline to address any arguments pertaining to aggravation, as Claimant has never alleged his work aggravated a pre-existing condition. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989); *Levesque v. Bath Iron Works Corp.*, 13 BRBS 483 (1981), *aff'd*, 673 F.2d 1297 (1st Cir. 1981) (table). Indeed, Claimant has stated he never had any problems with his back prior to the lashing rod incident, *see, e.g.*, EX 5 at 16, and the statement in his brief that "[b]y failing to credit the fact that [Claimant] worked, *without pain*, prior to his injury, the ALJ erred in not addressing whether the aggravation

1335, 8 BRBS at 747; *Duhagon v. Metro. Stevedore Co*., 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988).

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

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rule applies" is nonsensical. Cl. Brief at 36. By definition, there must be a pre-existing condition to aggravate. *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (en banc) (under the "aggravation rule," where an employment-related injury contributes to, combines with, or aggravates a pre-existing disease or underlying condition, the entire resultant condition is compensable); *Newport News Shipbuilding & Dry Dock Co. v. Fishel*, 694 F.2d 327, 15 BRBS 52(CRT) (4th Cir. 1982); *Care v. Washington Metro. Area Transit Auth.*, 21 BRBS 248 (1988).