U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0382

KENNETH R. WORTHEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: Apr. 28, 2016
	)	
BOLLINGER SHIPYARDS, INCORPORATED	)	
	)	
and	)	
	)	
AMERICAN LONGSHORE MUTUAL ASSOCIATION	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
THOMA-SEA SHIPBUILDERS, L.L.C.	)	
	)	
and	)	
	)	
LOUISIANA WORKERS' COMPENSATION CORPORATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

V. William Farrington, Jr. (Farrington & Thomas, LLC), New Orleans, Louisiana, for claimant.

Alan G. Brackett, Robert N. Popich and Pierce C. Azuma (Mouledoux, Bland, Legrand & Brackett, L.L.C), New Orleans, Louisiana, for Bollinger Shipyards and American Longshore Mutual Association.

Richard S. Vale, Brett W. Tweedel and Pamela Noya Molnar (Blue

Williams, L.L.P.), Metairie, Louisiana, for Thoma-Sea Shipbuilders and Louisiana Workers' Compensation Corporation.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and BUZZARD, Administrative Appeals Judges.

PER CURIAM:

Bollinger Shipyards, Incorporated (Bollinger), appeals the Decision and Order on Remand (2010-LHC-2149, 2011-LHC-628) of Administrative Law Judge Lee J. Romero, Jr., rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *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). This case is before the Board for a second time.

Claimant sustained orthopedic injuries and developed a respiratory condition in the course of his work as a welding supervisor with Bollinger, for whom he periodically worked between 2000 and March 2010, and with Thoma-Sea Shipbuilders, LLC (Thoma-Sea), for whom he last worked in covered employment between March 29 and May 18, 2010. Claimant testified that his work at Bollinger exposed him to welding fumes, sandblasting dust, industrial cleaning solvents, and other fumes and chemicals. HT at 43-47. In August 2006, claimant underwent a pulmonary function test (PFT) that showed severe airway obstruction, and he was diagnosed with asthma. CX 9; HT at 114. In 2008, claimant had another PFT after which Dr. Bourgeois reported that claimant could no longer wear a respirator due to his lung condition. CX 19 at 19. Claimant continued to work in his regular capacity, but he did not use a respirator. HT at 45.

Following a February 2010 medical release based on improvement of his orthopedic conditions,[1] claimant attempted to return to work for Bollinger in March 2010. At Bollinger's behest, claimant was examined by Dr. Bourgeois on March 22, 2010, who diagnosed chronic obstructive pulmonary disease (COPD), a left rotator cuff injury,

[1]Claimant missed periods of work with Bollinger in 2009 while receiving treatment for his orthopedic conditions. He underwent arthroscopic surgery on both knees on October 1, 2009, returned to work three days a week while receiving a series of injections for his neck, and then underwent arthroscopic surgery on his left shoulder on November 18, 2009.

bilateral knee pain, and cervical disc disease. BX 19 at 28-29. Claimant testified that Dr. Bourgeois informed him that he could not return to work, advised him to see a pulmonologist and an orthopedist for treatment of his conditions, and recommended that he apply for Social Security disability benefits. HT at 54; EX 5 at 42-43. Decision and Order on Remand at 15. Nonetheless, claimant applied for work with Thoma-Sea that same day. HT at 111. Claimant passed Thoma-Sea's pre-employment physical examination and worked as a welding supervisor from March 29 through May 18, 2010, when he was terminated for reasons unrelated to his physical condition. CX 36. Claimant subsequently filed claims under the Act against both Bollinger and Thoma-Sea, seeking compensation for his orthopedic and respiratory conditions. CX 2. In July 2010, Dr. Gomes examined claimant and administered another PFT. The results were essentially the same as those from the March 2010 PFT, and Dr. Gomes stated claimant cannot return to any job that exposes him to fumes and dust. BXs 17, 18 at 9; CX 27.

The administrative law judge found that claimant sustained work-related injuries to his back, neck, shoulder and knees, and that claimant is entitled to, and Bollinger is liable for, disability and medical benefits relating to those injuries.[2] With regard to claimant's lung condition, the administrative law judge found that claimant established a prima facie case against both employers, as he suffers from COPD and was exposed to welding fumes and other injurious stimuli at both jobs, and that Bollinger did not rebut the Section 20(a) presumption. The administrative law judge, therefore, found claimant entitled to, and Bollinger liable for, medical and temporary total disability benefits for claimant's lung condition commencing May 18, 2010. Bollinger appealed the administrative law judge's responsible employer finding.

The Board affirmed the administrative law judge's finding that Bollinger is liable for benefits for claimant's orthopedic conditions, vacated the administrative law judge's finding that Bollinger is liable for benefits for claimant's respiratory condition, and remanded the case for further consideration of that issue. *Worthey v. Bollinger Shipyards, Inc.*, BRB No. 12-0358 (Apr. 3, 2013) (McGranery, J. concurring in part, dissenting in part). Specifically, the Board stated that the administrative law judge did not consider the onset of claimant's disability in ascertaining the date of awareness for determining the employer responsible for claimant's COPD. The Board also stated that the administrative law judge erred by not requiring Thoma-Sea, as the last employer, to

[2]Specifically, the administrative law judge awarded claimant temporary total disability benefits from January 1 through March 29, 2010, and medical benefits, due to his orthopedic conditions. The administrative law judge also awarded claimant permanent partial disability benefits for a 20 percent impairment to each knee under the schedule to be paid if, and when, claimant's lung condition becomes permanent and partial.

bear any burden in showing it is not liable for benefits for claimant's COPD. The Board thus remanded the case for reconsideration of these issues. *Id.*, slip op. at 8-9.

On remand, the administrative law judge found that claimant became aware of the relationship between his respiratory disease, his employment and his disability on March 22, 2010, the date that Dr. Bourgeois would not clear claimant to return to work and advised that he seek disability benefits. The administrative law judge found that Thoma-Sea rebutted the Section 20(a) presumption by showing that claimant's exposure to injurious stimuli while working for it did not contribute causally to claimant's COPD. He then determined that Bollinger did not offer substantial evidence to rebut the Section 20(a) presumption that claimant's COPD is related to his work exposures to injurious stimuli at Bollinger. Accordingly, the administrative law judge found that Bollinger, as the last employer to expose claimant to injurious stimuli prior to claimant's date of awareness, is liable for medical and temporary total disability benefits for claimant's respiratory condition commencing May 18, 2010.

On appeal, Bollinger challenges the administrative law judge's finding that it is the employer responsible for benefits for claimant's respiratory condition. Claimant responds, urging the Board to hold Thoma-Sea liable as the responsible employer. Thoma-Sea also responds, urging affirmance of the administrative law judge's decision.

Bollinger contends that the five PFTs administered after the July 13, 2010 PFT demonstrate a decline in claimant's respiratory condition and that Dr. Gomes opined in October 2014 that this decline was related to *all* of claimant's workplace exposures through May 2010, a period that includes his employment at Thoma-Sea. Bollinger thus contends that this evidence rebuts the Section 20(a) presumption with respect to its liability, and that, based on the record as a whole, this evidence establishes that Thoma-Sea is the responsible employer.

As the Board stated in its prior decision in this case, pursuant to *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955), the responsible employer in an occupational disease case is the last employer during whose employment the claimant was exposed to injurious stimuli prior to the date the claimant became aware that he was suffering from an occupational disease arising from his employment. The claimant is not "aware" under this standard until he is aware of the relationship between his employment and his disease, and that he is disabled thereby.[3] *See Argonaut Insurance Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51(CRT) (11th Cir.

[3]"Disability" is defined as the "incapacity because of injury to earn wages. . . ." 33 U.S.C. §902(10); *see Liberty Mutual Ins. Co. v. Commercial Union Ins. Co.*, 978 F.2d 750, 26 BRBS 85(CRT) (1st Cir. 1992).

1988);[4] *Liberty Mutual Ins. Co. v. Commercial Union Ins. Co.*, 978 F.2d 750, 26 BRBS 85(CRT) (1st Cir. 1992);[5] *see also Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).[6] Although the Fifth Circuit, within whose jurisdiction this case arises, has not specifically applied the awareness component of *Cardillo*, neither has it disavowed it. *See, e.g.*, *New Orleans Stevedores v. Ibos*, 317 F.3d 480, 36 BRBS 93(CRT) (5th Cir. 2003), *cert. denied*, 540 U.S. 1141 (2004); *Cooper/T. Smith Stevedoring Co., Inc. v. Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT) (5th Cir. 2002); *Avondale Industries, Inc. v. Director, OWCP, [Cuevas]*, 977 F.2d 186, 26 BRBS 111(CRT) (5th Cir. 1992). Factually, these Fifth Circuit cases presented situations in which it is clear that the employee's awareness of a work-related disability occurred after all injurious exposure had ceased.[7] *See also Carver v. Ingalls Shipbuilding, Inc.*, 24 BRBS 243 (1991).

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[4]In *Patterson*, the Eleventh Circuit held liable the carrier on the risk at the time claimant first missed work because of his work exposures, as that is when the claimant was aware or should have been aware of the connection between his disability, disease and employment. *Patterson*, 846 F.2d at 721-722, 21 BRBS at 57(CRT).

[5]In *Liberty Mutual*, the First Circuit observed that, in *Cardillo*, the worker's awareness of his disease and his disability coincided. If the two do not coincide, the court held that the responsible entity is the one that last exposed the claimant to injurious stimuli prior to the date claimant became disabled by an occupational disease arising naturally out of his employment. *Liberty Mutual*, 978 F.2d 756, 26 BRBS at 99(CRT).

[6]In interpreting *Cardillo*, the *Cordero* court stated that the onset of disability is a key factor in assessing liability under the last injurious exposure rule. It follows, therefore, that it does not matter that the disease was diagnosed or treated while the claimant worked for a previous employer so long as it had not resulted in disability. *Cordero*, 580 F.2d at 1337, 8 BRBS at 749.

[7]In *Ibos*, the employee retired due to his work-related disease; thus, awareness would have occurred after the last employment. *Ibos v. New Orleans Stevedores*, 35 BRBS 50 (2001), *aff'd in pert. part and rev'd on other grounds,* 317 F.3d 480, 36 BRBS 93(CRT) (5th Cir. 2003), *cert. denied*, 540 U.S. 1141 (2004). In *Louisiana Ins. Guar. Ass'n v. Director, OWCP [Harvey]*, 614 F.3d 179, 44 BRBS 53(CRT) (5th Cir. 2010), the claimant's last injurious exposure was in 1977; his disease, first diagnosed in 1998, caused claimant to retire in 2005. In *Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT), the employee voluntarily retired in 1984 and was diagnosed with an occupational disease in 1993. In *Cuevas*, 977 F.2d 186, 26 BRBS 111(CRT), the claimant's first audiogram was administered in 1986, "substantially after" claimant's last covered exposure to noise. In *Fulks v. Avondale Shipyards, Inc.*, 637 F.2d 1008, 12 BRBS 975 (5th Cir.), *cert. denied*, 454 U.S. 1080 (1981), the claimant was not aware of the work-related nature of his

On remand, the administrative law judge concluded that claimant became aware or should have been aware of the relationship between his COPD, his work-related exposures, and his disability on March 22, 2010, when Dr. Bourgeois stated that claimant could not return to work and should apply for Social Security disability benefits. Decision and Order on Remand at 16; BX 19 at 28-29; CX 25; EX 5 at 42-43.[8] Bollinger has not challenged this conclusion on appeal and thus we affirm this finding.[9] *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007); *see also Patterson*, 846 F.2d 715, 21 BRBS 51(CRT).

Moreover, substantial evidence supports the administrative law judge's finding that claimant's occupational exposures at Thoma-Sea did not aggravate claimant's COPD.[10] The administrative law judge found that while Drs. Bourgeois and Gomes

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disability until several years after he was hospitalized, and then terminated, because of his disease.

[8]As the administrative law judge correctly noted, claimant also testified that he had a "pretty good idea" that his COPD was caused, in part, by his occupational exposures. Decision and Order on Remand at 15.

[9]Although the administrative law judge's finding that claimant became aware on March 22, 2010, appears to be inconsistent with the award of benefits commencing May 10, 2010, we are not empowered to address issues which the parties have not appealed. *Bis Salamis, Inc. v. Director, OWCP, [Meeks]*, ___ F.3d ___, 2016 WL 1077125 at *5 n.3, No. 15-60148 (5th Cir. Mar. 17, 2016) (issues are waived if not appealed).

[10]The *Ibos* court stated that there need not be an actual causal relationship between the claimant's exposure at the last employer and his disease in order for the last employer to be held liable on the basis of injurious exposure. *Ibos*, 317 F.3d at 485, 36 BRBS at 96(CRT). Literal application of this standard would read out the "awareness" component of the *Cardillo* standard on the facts presented here. As the administrative law judge found that claimant was aware of a relationship between his employment and his disabling disease prior to commencing work with Thoma-Sea, Bollinger has to establish a causal relationship between claimant's employment exposure at Thoma-Sea and claimant's subsequent disability in order for Thoma-Sea to be held liable under the aggravation rule. *See generally Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (en banc).

opined that additional exposure to welding fumes *could have* contributed to claimant's COPD,[11] the two similar 2010 PFTs and Dr. Gomes's interpretation of them constitute the most probative evidence and demonstrate that claimant's exposure to injurious stimuli at Thoma-Sea did not actually contribute causally to claimant's COPD. The administrative law judge found that the values of the PFTs taken prior to and following claimant's work for Thoma-Sea, e.g., the March 22 and July 13, 2010 PFTs, were very similar,[12] such that Dr. Gomes stated the two tests were almost "identical." EX 21 at 25-26. Dr. Gomes stated, assuming claimant worked seven weeks ending on May 18, 2010, with Thoma-Sea, that the "work during that period of time did not aggravate [claimant's] lung condition." *Id.* at 21.

In making this finding, the administrative law judge acknowledged Dr. Gomes's October 2014 deposition testimony, on which Bollinger relies, that claimant's exposure during his employment through May 18, 2010, when claimant's employment with Thoma-Sea ended, was related to the progression of claimant's COPD in 2012. ALMX 24 at 52. The administrative law judge also noted claimant's testimony that his work with Thoma-Sea was "one of the worst" and that at the end of each day he would cough up "black stuff." HT at 90-98. However, the administrative law judge concluded that "the objective results of the PFTs [are] more probative in demonstrating that Thoma-Sea did not contribute causally to claimant's COPD." Decision and Order on Remand at 20.

It is well established that an administrative law judge has considerable discretion in evaluating and weighing the evidence of record and may draw inferences therefrom. *See Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *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

[11]Specifically, the administrative law judge found that Dr. Bourgeois opined that exposure to welding fumes from 2008 to 2010 could have affected claimant's condition if it was a "tremendous exposure." EX 5 at 34-35. However, Dr. Bourgeois stated that exposures to welding fumes over a six-week period would not affect or "make that big a difference" in an individual's pulmonary function. *Id.* at 34-38. The administrative law judge found that Dr. Gomes similarly opined, in terms of claimant's work exposure with Thoma-Sea, that "in certain individuals a very limited exposure could injure the lungs in a permanent fashion, but in [claimant's] case, the lung function studies don't support that assertion." EX 21 at 23-24.

[12]Claimant's FEV_1 value in the PFTs administered on March 22, 2010 and July 13, 2010, was 1.55 liters. TSXs 5, 21.

Cir. 1962). The Board is not entitled to reweigh the evidence and may not disregard the administrative law judge's findings on the ground that other inferences might have been drawn. *See James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000); *Presley v. Tinsley Maint. Serv.*, 529 F.2d 433, 3 BRBS 398 (5th Cir. 1976).

Bollinger has failed to establish that the administrative law judge erred in finding that the March 22 and July 13, 2010 PFTs, and Dr. Gomes's interpretation of them, constitute the most probative evidence as to the relationship between the Thoma-Sea exposure and claimant's respiratory condition. *See generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). The administrative law judge rationally credited the March 22 and July 13, 2010 PFTs, and Dr. Gomes's July 13, 2010 analysis thereof, over the subsequent PFT testing and Dr. Gomes's October 2014 testimony. *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). Thus, substantial evidence supports the administrative law judge's conclusion that the exposures at Thoma-Sea did not contribute causally to claimant's COPD. We therefore affirm the administrative law judge's finding that Thoma-Sea is not liable for benefits for claimant's respiratory condition. Consequently, we also affirm the administrative law judge's conclusion that Bollinger, as the last employer to expose claimant to injurious stimuli prior to the onset of his disability and his awareness of the relationship between that disability and his work exposures, is the employer liable for benefits for claimant's COPD. *Patterson*, 846 F.2d 715, 21 BRBS 51(CRT).

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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GREG J. BUZZARD
Administrative Appeals Judge