U.S. Department of Labor

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

BRB No. 16-0378

JOSE BONILLA	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KINDER MORGAN BULK TERMINALS	)	DATE ISSUED: Apr. 13, 2017
	)	
and	)	
	)	
ACE AMERICAN INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Granting Benefits of Pamela J. Lakes, Administrative Law Judge, United States Department of Labor.

John J. Sharpless (Law Office of Michael J. Winer, P.A.), Tampa, Florida, for claimant.

Phillip S. Howell and David T. Burr (Galloway, Johnson, Tompkins, Burr & Smith, PLC), Tampa, Florida, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits (2014-LHC-01102) of Administrative Law Judge Pamela J. Lakes 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).

Claimant commenced working for employer on October 18, 2006, first as a loader operator and later as a longshoreman unloading fertilizer, ash and ammonia products at employer's facility. Claimant alleged he was exposed to ash and other pulmonary irritants during his employment. Claimant testified that his employment duties involved moving ash from railcars to hoppers, cleaning ash from conveyer belts, and moving ash from silos located at employer's facility. Claimant also testified that he was exposed to ammonia while unloading ships. Claimant last worked for employer on May 9, 2013. Claimant subsequently sought medical care from Dr. Griffith and was diagnosed with occupational lung disease, asthma, acute bronchitis, chronic rhinosinusitis, and dyspnea. CX 3 at 9; EX 1. He filed a claim for disability and medical benefits under the Act, asserting that he sustained a compensable injury to his lungs as a result of his exposure to dust, ash and chemicals while working for employer.

In her Decision and Order, the administrative law judge applied Section 20(a), 33 U.S.C. §920(a), to presume that claimant's respiratory symptomatology is related to his employment exposures with employer. She next found that while employer rebutted the existence of Reactive Airways Dysfunction Syndrome, it did not rebut the Section 20(a) presumption with respect to claimant's remaining conditions and symptoms; thus, she found claimant's respiratory conditions to be related to his employment exposures. Decision and Order at 39-40. After addressing the remaining issues disputed by the parties, the administrative law judge awarded claimant continuing temporary total disability compensation commencing May 10, 2013, as well as medical benefits. 33 U.S.C. §§907, 908(b).

On appeal, employer challenges the administrative law judge's finding that claimant is entitled to the benefit of the Section 20(a) presumption. Alternatively, employer asserts the administrative law judge erred in finding that it failed to present evidence sufficient to rebut the Section 20(a) presumption. Claimant responds, urging affirmance of the administrative law judge's decision in its entirety.

Employer initially contends the administrative law judge erred in invoking the Section 20(a), 33 U.S.C. §920(a), presumption. In order to be entitled to the Section 20(a) presumption, claimant must establish the two elements of his prima facie case: an injury or harm and a work-related accident or working conditions that could have caused or aggravated the harm. *See Ramsey Scarlett & Co. v. Director, OWCP*, 806 F.3d 327, 49 BRBS 87(CRT) (5th Cir. 2015); *see generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Claimant is not required to introduce affirmative medical evidence that the working conditions in fact caused his harm in order to establish his prima facie case. *See generally Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989). Once claimant establishes his prima facie case, Section 20(a) links his harm to the employment accident or working conditions.

See Port Cooper/T. Smith Stevedoring Co. v. Hunter, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000).

In this case, employer does not specifically dispute the existence of claimant's respiratory symptoms,[1] *see* Emp. Br. at 10, or that claimant presented evidence of his exposure to pulmonary irritants, including ash, during his employment with employer. *Id.* at 3-4. Employer, however, challenges the administrative law judge's invocation of the Section 20(a) presumption on the ground that no credible evidence exists that claimant's exposures were sufficient to have caused his chronic medical conditions. *Id.* at 10-11. In invoking the presumption, the administrative law judge discussed claimant's testimony regarding his work exposures to ash and other irritants, two OSHA Material Data Safety Sheets,[2] and the opinions of Drs. DeMott, Dydek, Kreitzer, and Griffith, each of whom opined that claimant's respiratory symptoms could be or are related to his exposure to ash.[3] *See* Decision and Order at 31-38. The credited evidence establishes

[1] The administrative law judge did not make a specific finding of fact as to the exact nature of claimant's medical conditions, referring only to "chronic respiratory conditions and asthma." Decision and Order at 33. She credited claimant's testimony that he suffered acute symptoms of burning and reddening of his skin, dry and burning eyes, difficulty breathing, and coughing. *Id.*

[2] The two OSHA documents describe the possible health effects resulting from exposure to bed and fly ash. These include eye and skin irritation, fibrosis, chronic bronchitis, silicosis, and aggravation of pre-existing diseases of the lungs. CXs 17, 18.

[3] We reject employer's argument that, in light of the decision of the United States Court of Appeals for the Eleventh Circuit in *McClain v. Metabolife Int'l, Inc.*, 401 F.3d 1233 (11th Cir. 2005), the testimony of these experts is not "sufficiently reliable." In *McClain,* the court addressed at length the effort to exclude from admission into evidence experts' testimony under the standards set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Section 23(a) of the Act provides:

> In making an investigation or inquiry or conducting a hearing the deputy commissioner or Board shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation or inquiry or conduct such hearing in such manner as to best ascertain the rights of the parties.…

33 U.S.C. §923(a); *see also* 20 C.F.R. §702.339. Moreover, Section 702.338 of the Act's implementing regulations states, in relevant part, that:

claimant sustained respiratory symptoms and the existence of exposures at work that could have caused those symptoms. *See Hunter*, 227 F.3d 285, 34 BRBS 96(CRT); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000); *Sinclair*, 23 BRBS 148. Thus, we reject employer's contention that claimant did not establish his prima facie case, and, as it is supported by substantial evidence, we affirm the administrative law judge's finding that the Section 20(a) presumption is invoked. *Ramsey Scarlett*, 806 F.3d 327, 49 BRBS 87(CRT).

Upon invocation of the Section 20(a) presumption, the burden shifts to employer to rebut the presumed causal connection with substantial evidence that claimant's injury is not related to the work exposures. *See Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990); *see also 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); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). Employer's burden on rebuttal is one of production only, not one of persuasion. *See Rainey*, 517 F.3d 632, 42 BRBS 11(CRT); *American Stevedoring Ltd. v. Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT) (2d

---

> The administrative law judge shall inquire fully into the matters at issue and shall receive in evidence the testimony of witnesses and any documents that are relevant and material to such matters….

20 C.F.R. §702.338. Additionally, under the Rules of Practice and Procedure Before the Office of Administrative Law Judges,

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, pursuant to executive order, by these rules, or by other rules or regulations prescribed by the administrative agency pursuant to statutory authority.

29 C.F.R. §18.402; *see also* 29 C.F.R. §18.401 (defining "relevant" evidence). Thus, the Act and regulations afford the administrative law judge wide discretion to admit evidence relevant to the issues before her. *Tampa Ship Repair & Dry Dock Co. v. Director, OWCP*, 535 F.2d 936, 4 BRBS 243 (5th Cir. 1976); *Olsen v. Triple A Machine Shops, Inc.*, 25 BRBS 40 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP*, Nos. 91-70642, 92-70444 (9th Cir. 1993); *McCurley v. Kiewest Co.*, 22 BRBS 115 (1989). In this case, the admissibility of the medical opinions was not at issue, *Casey v. Georgetown Univ. Medical Center*, 31 BRBS 147 (1997), and the administrative law judge is afforded wide discretion to determine the weight to be accorded to the medical opinions of record. *See, e.g., Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995).

Cir. 2001). In this regard, employer satisfies its burden of production when it presents ‘“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.” *American Grain Trimmers, Inc. v. Office of Workers’ Compensation Programs*, 181 F.3d 810, 817, 33 BRBS 71, 76(CRT) (7th Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000). 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 has been held to be sufficient to rebut the Section 20(a) presumption. *See O’Kelley,* 34 BRBS 39.

The administrative law judge found that employer failed to produce evidence sufficient to rebut the Section 20(a) presumption. The administrative law judge determined that: Dr. Poole’s testimony did not account for the actual amount of ash to which claimant was exposed while working for employer; Dr. DeMott acknowledged that exposure to ash could have caused the symptoms and conditions reported by claimant; and Dr. McCluskey’s testimony, which addressed the lack of a direct association between claimant’s employment and his conditions, is too equivocal to constitute substantial evidence sufficient to rebut the presumption. *See* Decision and Order at 38-39. On appeal, employer contends that the opinions of Drs. Poole and McCluskey constitute substantial evidence sufficient to rebut the Section 20(a) presumption.

We reject employer’s contention that the administrative law judge erred in rejecting the opinion of Dr. Poole as rebuttal evidence. The administrative law judge found that Dr. Poole, a certified industrial hygienist, focused his testimony on the “levels of dust that were likely to have been present” at employer’s facility during the periods of claimant’s employment with employer, and not the actual level of exposure experienced by claimant. *See* Decision and Order at 38. Dr. Poole collected bed ash samples on October 18, 2012 and January 31, 2013, a time during which claimant was employed by employer. He also reviewed two sampling reports from 2007. Tr. at 275, 332. After the samples were tested, Dr. Poole stated that the results indicated the majority of the particles tested were outside the respirable range, and that the trace metals contained in the bed ash were too low to be of concern. *Id.* at 297-299. Dr. Poole concluded from his testing that claimant was not exposed to bed ash above permissible exposure levels. *Id.* at 301-302.

In finding Dr. Poole’s opinion insufficient to rebut the Section 20(a) presumption, the administrative law judge stated that it is not clear that claimant was exposed only to bed ash, as employer’s contract also included fly ash. Moreover, the administrative law judge found that it is not clear that the samples were representative of claimant’s exposure, that there is not “person-specific dose evidence” to indicate that claimant’s exposure was not harmful, and that at least some particles were respirable. Decision and Order at 38-39. As the fact-finder, the administrative law judge was entitled to conclude

that Dr. Poole's opinion does not constitute substantial evidence of the absence of a relationship between claimant's respiratory conditions and his work exposures. *See Ramsey Scarlett*, 806 F.3d 327, 49 BRBS 87(CRT). Therefore, we affirm finding that Dr. Poole's opinion does not rebut the Section 20(a) presumption. *Id.*

We cannot affirm, however, the administrative law judge's determination that Dr. McCluskey's opinion is insufficient to rebut the Section 20(a) presumption, as the administrative law judge's conclusion rests at least in part on an implicit finding that claimant raised a claim for benefits based on an aggravation theory of recovery. Dr. McCluskey is Board-certified in occupational medicine and has a Ph.D. in toxicology. EX 18, dep. at 5-6. Employer sent Dr. McCluskey some medical documents for his review. Dr. McCluskey noted that claimant's January 13, 2012 and July 12, 2012 examinations showed no shortness of breath, lung disease or respiratory distress. EX 18 at exh. 1. Dr. McCluskey noted the first respiratory diagnosis was in July 2013, which was after claimant had stopped working.

Dr. McCluskey examined claimant on August 15, 2014, and in his subsequent report dated March 30, 2015, noted that claimant's "lungs [were] clear to auscultation bilaterally. No wheezing, rales or rhonchi appreciated. No stridor noted. [Claimant] coughed several times during the visit." EX 18 at exh. 1, p.4. Dr. McCluskey stated that Dr. Griffith's diagnosis of "occupational lung disease" appears to be unsubstantiated. *Id.* at p.7. Within the body of this report, Dr. McCluskey stated that "there is no objective evidence to indicate that any of [claimant's] concerns are work-related" and that, as claimant last worked for employer in 2013, "it would be very difficult, if not impossible, to link any diagnosis found at this point in time, or in the future, to his former workplace." *Id.* In the "Conclusions" section of this same report, Dr. McCluskey, in bold type, wrote:

> **There is absolutely no objective, or scientifically-reliable evidence to suggest that [claimant] suffered any persistent or chronic health consequences as a direct result of any exposure he may have encountered while working at the Tampaplex terminal from 2007 – 2013.**

Id. at p.8.

At his deposition on May 5, 2015, Dr. McCluskey reviewed the pulmonary function test (PFT) administered by Dr. Dominguez on January 12, 2015, which showed severe restriction; Dr. Dominguez diagnosed severe, persistent asthma. Dr. McCluskey

stated that the PFT does not meet "ATS criteria."[4] EX 18, dep. at 85. Dr. McCluskey testified that, to a reasonable degree of medical certainty, no objective evidence indicates claimant's respiratory complaints are "related to his previous employment" with employer. EX 18, dep. at 22. Dr. McCluskey acknowledged that ash exposure has the potential to be a health hazard, but that claimant is not exhibiting the symptoms that could be caused by such exposure. *Id.*, dep. at 77-83.

In her decision, the administrative law judge acknowledged Dr. McCluskey's statement that his opinion was given to a reasonable degree of medical certainty, *see* Decision and Order at 39; EX 18 at 8, but questioned whether his opinion in fact constituted a "medical judgment" in light of his reliance on "scientific analysis and methodology."[5] Decision and Order at 39. The administrative law judge also italicized the term "direct result" in Dr. McCuskey's "Conclusions" in determining that Dr. McCluskey's opinion is insufficient to rebut the Section 20(a) presumption. *See id.* Specifically, the administrative law judge concluded that Dr. McCluskey's opinion did not establish that it is more likely than not that claimant's work exposures did not "cause, contribute to, or aggravate" his respiratory conditions, and she consequently determined that Dr. McCluskey's opinion does not constitute substantial evidence sufficient to rebut the presumption. *Id.*

Based upon the record before us, however, we are unable to ascertain the basis for the administrative law judge's implicit finding that claimant's claim is based on an aggravation theory of recovery. The "aggravation rule" states that an employer is liable for the claimant's full disability if the work-related injury aggravates, accelerates, or combines with a pre-existing condition to result in that disability. *See Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (en banc). Consequently, the administrative law judge's rejection of Dr. McCluskey's "no direct result" opinion on the ground that it does not address "aggravation" must be vacated and the case remanded for further findings. On remand, the administrative law judge must determine whether

[4] The January 12, 2015 PFT results state "1987 ATS back-extrapolation criteria has (sic) not been met. FEV's may not be accurate." CX 4 at 10.

[5] The administrative law judge's statement erroneously suggests that "scientific evidence" cannot rebut the Section 20(a) presumption in an appropriate case. *See generally Ceres Gulf, Inc. v. Director, OWCP* [*Plaisance*], 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012). Dr. McCluskey testified that he is both a physician and a toxicologist, and that, although his causation opinion was given "primarily as a physician," EX 18, dep. at 75, his opinion is not diminished by the fact that he used a scientific analysis to determine whether claimant's allegedly toxic work exposures are the cause of his respiratory complaints. *Id.* at exh. 6-7.

claimant raised an aggravation claim. Based on this determination, the administrative law judge must reconsider whether Dr. McCluskey's opinion is sufficient to rebut the Section 20(a) presumption under the standard of whether "a reasonable mind *could* accept" his opinion as adequate to support a finding that workplace conditions did not cause claimant's injury or aggravate a pre-existing condition. *See* n.5, *supra*; *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 651-652, 44 BRBS 47, 50(CRT) (9th Cir. 2010) (The "weighing of credibility, however, has no proper place in determining whether [employer] met its burden of production at [rebuttal]"). If, on remand, the administrative law judge finds that the Section 20(a) presumption is rebutted, it no longer controls, and the issue of causation must be resolved on the evidence of record as a whole, with claimant bearing the burden of persuasion.[6] *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

Accordingly, we affirm the administrative law judge's findings that the Section 20(a) presumption is invoked and that Dr. Poole's opinion does not rebut the Section 20(a) presumption. We vacate the administrative law judge's finding that employer did not rebut the Section 20(a) presumption and we remand the case for further consideration in accordance with this opinion.

SO ORDERED.

_____

BETTY JEAN HALL, Chief
Administrative Appeals Judge

_____

RYAN GILLIGAN
Administrative Appeals Judge

_____

JONATHAN ROLFE

[6] We decline to address employer's contention that claimant failed to offer creditable evidence that his injury is, in fact, related to his work exposures, as the administrative law judge did not address this issue and the Board is not empowered to engage in de novo review of the evidence. *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982); 20 C.F.R. §802.301(a).

Administrative Appeals Judge