U.S. Department of Labor

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

BRB No. 17-0365

KYIER T. THOMAS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MID-ATLANTIC TERMINAL	)	
	)	DATE ISSUED: Apr. 12, 2018
and	)	
	)	
AMERICAN LONGSHORE MUTUAL ASSOCIATION LIMITED c/o AERS	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Paul R. Almanza, Administrative Law Judge, United States Department of Labor.

Bruce B. Eisenstein (Eisenstein Law Firm), Baltimore, Maryland, for claimant.

Heather H. Kraus (Semmes, Bowen & Semmes), Baltimore, Maryland, for employer/carrier.

Before: BOGGS, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2014-LHC-00648, 2014-LHC-00649) of Administrative Law Judge Paul R. Almanza 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 worked as a longshoreman in the Port of Baltimore Dundalk Marine Terminal. Tr. at 75. On May 11, 2011, claimant did fence repair work along the perimeter of the yard. *Id.* at 78-79. This work entailed using a 25 pound sledgehammer. At the time, claimant did not feel any adverse effects from this work. *Id.* at 79. The next morning, however, claimant was unable to walk due to back pain and missed work on May 12 and May 13. Tr. at 79-80. On May 14, 2011, claimant went to the hospital where the emergency room physician told him not to return to work until May 18, 2011. *Id.* at 81-82.

However, on May 17, 2011, employer asked claimant to come into work because a customer had specifically requested that he oversee the unloading of the customer's cargo from rail cars. Tr. at 92-83. Claimant went to work, but was only able to work "very gingerly" because of his back pain. *Id.* at 83. At some time on that day, claimant asked a coworker, Mr. Cook, to take him to another part of the yard so they could work on another project until necessary additional equipment arrived. *Id.* at 87. Claimant climbed into the uncovered rear bed of a pickup truck. *Id.* at 87-89. After claimant climbed onto the truck bed but before he sat down, Mr. Cook started the truck and began driving. *Id.* at 89-90. The sudden movement caused claimant to flip and fall off the rear of the truck. *Id.* Claimant's vest was caught on the truck's bumper and claimant was dragged by the truck. *Id.* at 91. Afterwards, claimant informed his supervisor and foreman of the incident and was told that if he felt all right, he should finish working. *Id.* at 92. Claimant decided to keep working for the day, although his back was in great pain. *Id.*

After this incident, claimant worked in a light-duty capacity for three months. Tr. at 93. During this time, claimant's legs started cramping and he had consistent back pain. *Id.* at 93-94. Claimant underwent an MRI in August 2011 which showed a disc herniation in his lumbar spine. CX 19. Claimant was put on temporary total disability on September 14, 2011. He has not returned to work since that time. Tr. at 20.

Starting in October 2011, claimant underwent a series of epidural shots in his spine but continued to experience back pain. CXs 19, 20; Tr. at 108-109. On April 2, 2012, claimant underwent lumbar surgery. CX 11.

In late 2012, claimant underwent MRIs of his cervical spine and thoracic spine, revealing disc herniations, stenosis, a "congenitally narrow canal," and disc protrusion in his thoracic spine. CXs 15, 16. Claimant underwent surgery on his cervical spine on February 20, 2013. CX 13. He testified that it provided temporary relief that eventually subsided. Tr. at 118. Claimant chose not to undergo thoracic spine surgery. *Id.* at 118-119.

Claimant filed a claim for benefits under the Act for his lumbar, thoracic and cervical spine conditions. The administrative law judge concluded that he established a prima facie case that his thoracic and cervical spine conditions are due to the employment incidents in May 2011. Decision and Order at 6.[1] The administrative law judge found that employer produced substantial evidence to rebut the Section 20(a) presumption of causation with respect to claimant's thoracic and cervical spine injuries, relying primarily on the opinion of Dr. Edward Cohen, who stated that claimant's lumbar spine injury was the only injury arising out of the workplace accidents and that claimant's thoracic and cervical spine conditions are due to degenerative changes. *Id.* at 7 (citing EX 12); 33 U.S.C. §920(a). Weighing the evidence as a whole, the administrative law judge found that claimant did not establish that his thoracic and cervical spine conditions are due to his employment accidents. *Id.* at 8-11.

The administrative law judge concluded that claimant reached maximum medical improvement for his lumbar spine injury on October 4, 2012, the date claimant underwent a work capacity evaluation by Dr. Sellman, a neurologist. Decision and Order at 13 (citing CX 3). The administrative law judge further determined that claimant did not thereafter show that he is unable to return to his usual work due to his lumbar spine injuries. *Id.* at 14. The administrative law judge denied disability benefits after November 30, 2012.[2]

Claimant appeals the administrative law judge's denial of benefits. Employer filed a response brief in support of the administrative law judge's decision.

Where, as here, the Section 20(a) presumption has been invoked, the burden shifts to the employer to offer substantial evidence to rebut the presumption. *See Norfolk Shipbuilding & Drydock Corp. v. Faulk*, 228 F.3d 378, 34 BRBS 71(CRT) (4th Cir. 2000), *cert. denied*, 429 U.S. 1078 (1977). The employer must rebut the presumption through facts, not mere speculation, that the harm is not work-related. *Ceres Marine Terminals, Inc. v. Director, OWCP [Jackson]*, 848 F.3d 115, 50 BRBS 91(CRT) (4th Cir. 2016). Where the presumption is rebutted, it falls out of the case and the administrative

[1] The administrative law judge noted that the parties stipulated that claimant's lumbar spine injuries arose out of claimant's employment accidents on May 12 and May 17, 2011. Decision and Order at 6.

[2] Employer voluntarily paid claimant temporary total disability benefits from September 15, 2011 until January 1, 2013, and temporary partial disability benefits (based on a labor market survey showing claimant's earning capacity) from January 2, 2013. CX 6. Employer stopped paying benefits on May 27, 2015 upon receiving Dr. Cohen's report. EX 11.

law judge must weigh all of the relevant evidence to determine whether claimant sustained his burden of establishing that his injuries are due to his employment accidents. *Id.*, 848 F.3d at 121, 50 BRBS at 94(CRT).

The administrative law judge found that Dr. Cohen's opinion that claimant's thoracic and cervical spine injuries are not work-related constitutes substantial evidence to rebut the Section 20(a) presumption of causation. Decision and Order at 7. Having found rebuttal, the administrative law judge weighed the evidence as a whole. The administrative law judge found that only Dr. Cohen's opinion addressed the causal relationship in a well-reasoned manner, and, accordingly, he relied on Dr. Cohen's opinion to conclude that claimant did not meet his burden to show that his thoracic and cervical spine conditions arose from the May 2011 work incidents. Decision and Order at 11.

Claimant contends the administrative law judge erred in finding Dr. Cohen's opinion sufficient to rebut the Section 20(a) presumption with respect to claimant's thoracic and cervical conditions. On the record as a whole, claimant assigns error to the administrative law judge's reliance on the opinion of Dr. Cohen, to the exclusion of the opinions of claimant's treating physicians who stated that all of claimant's current spine injuries are due to his work accidents.

We reject claimant's contention that the administrative law judge erred in finding that employer rebutted the Section 20(a) presumption. The administrative law judge properly found that Dr. Cohen's opinion, stating to a reasonable degree of medical certainty that claimant's cervical and thoracic spine injuries are due to degenerative changes, and not his workplace accidents, constitutes substantial evidence to rebut the presumption. *See Universal Maritime 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). Accordingly, we affirm the administrative law judge's finding that employer rebutted the Section 20(a) presumption.

We further reject claimant's contention that the administrative law judge erred in weighing the evidence as a whole to conclude that claimant did not establish that his thoracic or cervical spine injuries are due to his employment accidents. The administrative law judge found that the treating doctors' contemporaneous reports of claimant's symptoms suggest that his "thoracic and cervical pain first occur[ed] years after the injury" and that such objective evidence is more credible than claimant's testimony that he complained of pain in his entire back from the outset. Decision and Order at 8-11. Based on these findings, the administrative law judge rejected the opinions of claimant's physicians that his thoracic and cervical spine injuries are work-related because "they do not explain, or even acknowledge, the gulf in time between the onset of symptoms and the injury itself." *Id.* at 11. Conversely, the administrative law

judge credited Dr. Cohen's opinion – that had claimant's injuries been work-related his pain would have become symptomatic in closer proximity to the accident – as being well-reasoned and consistent with the objective evidence. *Id*.

Claimant is essentially asking the Board to reweigh the evidence which it is not empowered to do. *See Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994). It is well established that an administrative law judge is entitled to evaluate the credibility of all witnesses and to weigh the evidence and draw his own conclusions from it. *See Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994). Moreover, claimant does not contest the finding that he did not complain of thoracic or cervical pain until long after his work accidents,[3] or that his physicians did not address this fact in setting forth their opinions on causation. Those findings are therefore affirmed. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007). In light of these unchallenged findings, the administrative law judge rationally determined that claimant's physicians' opinions are "not well-reasoned" because they do not address or acknowledge the gap in time between the May 2011 accidents and the onset of his thoracic and cervical pain late-2012 or early-2013, whereas Dr. Cohen "was the only physician to address this causal relationship in a well-reasoned manner." *Burns*, 41 F.3d 1555, 29 BRBS 28(CRT); Decision and Order at 11. We therefore affirm the administrative law judge's finding that claimant did not establish that his thoracic and cervical spine injuries are related to his employment accidents and the consequent denial of benefits for those injuries. *See generally Hice v. Director, OWCP*, 48 F.Supp.2d 501 (D. Md. 1999).

Claimant next contends that the administrative law judge's conclusion that claimant did not establish he is permanently totally disabled after November 30, 2012, because of his lumbar spine injury cannot be affirmed. A claimant makes out his prima facie case of total disability by showing he is unable to return to his usual work due to his

[3] In addition to being unchallenged, the administrative law judge's finding that claimant did not report thoracic and cervical pain for "more than a year and a half" after his work accidents is supported by substantial evidence. *See Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Hess]*, 681 F.2d 938, 14 BRBS 1004 (4th Cir. 1982). The administrative law judge noted that claimant was initially diagnosed only with lower back pain in May 2011; neck pain is not specifically mentioned in claimant's medical records until December 2012. Decision and Order at 9 (citing CXs 9, 22). Although "mid-back" pain was noted in August 2012, the thoracic spine is not specifically mentioned until after claimant's February 2013 cervical surgery. *Id*. (citing CXs 12, 14). Claimant appears to concede that he did not report such pain until well after his work accidents, stating that it was "logical" for him not to have complained of neck and upper back pain "as he had lumbar surgery in 2012." Claimant's Brief at 36.

work-related injury. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Brickhouse]*, 315 F.3d 286, 36 BRBS 85(CRT) (4th Cir. 2002). In addressing this issue, an administrative law judge should compare the claimant's medical restrictions resulting from the work injury with the specific physical requirements of his usual employment. *Curit v. Bath Iron Works*, 22 BRBS 100 (1988); *Carroll v. Hanover Bridge Marina*, 17 BRBS 176 (1985).

In this case, the administrative law judge concluded that claimant did not establish that he is unable to return to his usual work due to his lumbar spine injuries after Dr. Sellman opined that claimant's lumbar condition reached maximum medical improvement on October 4, 2012. Decision and Order at 13. The administrative law judge discounted Dr. Sellman's opinion as to the extent of claimant's disability because his conclusion "was made without crucial evidence regarding Claimant's cervical and thoracic spine conditions." *Id.* at 14. The administrative law judge also relied on objective EMG results showing no abnormal nerve signals or neuropathy in claimant's lower back after his surgery. *Id.* at 13. The administrative law judge declined to credit claimant's subjective complaints to his doctors, and their disability opinions based on those complaints, finding they were not substantiated by objective test results. In addition, the administrative law judge found the opinions of Drs. Franchetti and Dwyer insufficient to establish claimant's inability to work due to his lumbar condition.

We affirm the administrative law judge's findings with respect to the opinions of Drs. Buchner, Franchetti and Dwyer. The administrative law judge was well within his discretion to credit Dr. Buchner's EMG report that noted "pain-free lumbar range of motion in all plates." EX 7; *see Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). Similarly, the administrative law judge provided rational bases for finding the opinions of Drs. Franchetti and Dwyer insufficient to sustain claimant's burden of showing he cannot return to his usual work because of his work-related lumbar injury.[4] *Burns*, 41 F.3d 1555, 29 BRBS 28(CRT).

Nonetheless, we cannot affirm the finding that claimant failed to make out his prima facie case of total disability. The date of maximum medical improvement is not

[4] Specifically, the administrative law judge rejected Dr. Franchetti's August 15, 2013, opinion because he did not address how claimant's complaints of pain are related to the work-related lumbar injury and because his clinical findings were not substantiated by prior and subsequent medical evaluations of other providers. Decision and Order at 13. The administrative law judge rejected Dr. Dwyer's April 8, 2014, opinion that claimant is unable to work at all because he has "abnormalities on MRI on cervical, thoracic and lumbar regions that are all symptomatic"; the administrative law judge found there is no MRI taken after claimant's surgery to support that statement. *Id.* at n.4.

necessarily determinative of the date claimant is capable of returning to his usual work nor does it indicate a cessation of symptoms.[5] *See generally Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991). Thus, the administrative law judge erred to the extent that he inferred claimant was not disabled because his lumbar condition had reached maximum medical improvement. *See* Decision and Order at 13. Rather, the issue concerns what residual restrictions, if any, claimant has after he has been released to work and/or reached maximum medical improvement. *See generally Newport News Shipbuilding & Dry Dock Co. v. Riley*, 262 F.3d 227, 35 BRBS 87(CRT) (4th Cir. 2001); *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 49 (2005). Dr. Sellman stated that claimant was not able to return to work at the time he reached maximum medical improvement, noting "persistent low back pain" and "pronounced lumbar muscular spasm." He noted that claimant suffered from a "very short-stepped tentative labored gait with poor balance" and that claimant has difficulty sitting and standing. He concluded that claimant was able to bend or stoop for two hours and squat or kneel for one hour. He also restricted claimant from lifting more than 10 pounds. CX 3.

The administrative law judge's rejection of Dr. Sellman's opinion also is inconsistent with his findings regarding the onset of the cervical and thoracic injuries; the administrative law judge concluded that claimant's cervical and thoracic spine injuries did not become symptomatic until later in 2012 and Dr. Sellman's opinion is dated October 4, 2012. Dr. Sellman stated he was evaluating only claimant's lumbar condition and thus, claimant's physical restrictions at the time of Dr. Sellman's examination were due only to claimant's lumbar spine injury. CX 3. In addition, claimant correctly contends that the administrative law judge did not discuss Dr. Park's July 9, 2013, opinion wherein he stated that claimant is unable to work because of "cervical and lumbar pain."[6] CX 29.

Claimant bears the burden of proving that he has physical restrictions due to his lumbar injury that preclude him from returning to his usual work for employer. *Riley*, 262 F.3d 227, 35 BRBS 87(CRT). Deference is given to the administrative law judge's credibility determinations and weighing of the medical evidence. *Newport News*

[5] The date of maximum medical improvement separates temporary from permanent disability, i.e., the point at which claimant's injury has plateaued after improving. The extent of a claimant's disability is determined by the existence of a job the claimant can perform in his injured capacity. *See Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991).

[6] The administrative law judge discussed Dr. Park's August 2012 report wherein he referred claimant for EMG testing. Decision and Order at 12-13.

Shipbuilding & Dry Dock Co. v. Tann, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988). However, as the administrative law judge erred in giving unwarranted significance to the date of maximum medical improvement; in discounting, without sufficient explanation, Dr. Sellman's opinion because he was unaware of the yet-to-be diagnosed cervical and thoracic problems; and in not discussing Dr. Park's 2013 opinion, we must remand this case for further consideration of the evidence of record. *Howell v. Einbinder*, 350 F.2d 442 (D.C. Cir. 1965). The administrative law judge should address whether claimant established that, after the date of maximum medical improvement, he has any restrictions due to his lumbar injury that preclude his performance of his usual work. *See Riley*, 262 F.3d 227, 35 BRBS 87(CRT); *Curit*, 22 BRBS 100. If the administrative law judge concludes on remand that claimant established a prima facie case of total disability, he should address whether employer has shown the availability of suitable alternate employment. *Moore*, 126 F.3d 256, 31 BRBS 119(CRT).

Accordingly, we vacate the administrative law judge's denial of disability compensation after November 30, 2012, for claimant's lumbar spine condition and we remand the case for further proceedings consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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JUDITH S. BOGGS
Administrative Appeals Judge

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GREG J. BUZZARD
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge