U.S. Department of Labor

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

BRB No. 18-0542

CARMICHAEL GIBSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TAPPAN ZEE CONSTRUCTORS, LLC	)	
	)	DATE ISSUED: 04/09/2019
and	)	
	)	
ACE AMERICAN INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Timothy F. Schweitzer (Hofmann & Schweitzer), New York, New York, for claimant.

Robert N. Dengler (Flicker, Garelick & Associates, LLP), New York, New York, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2017-LHC-00412) of Administrative Law Judge Theresa C. Timlin 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 alleged injuries to his back, neck, and left shoulder as a result of a September 2, 2015 work incident for employer on the Tappan Zee Bridge replacement project.[1] Claimant testified that a machine malfunction during a concrete pour caused the attached hose to become clogged with concrete. The ensuing efforts to clean out the clogged hose, which was roughly twenty feet long and weighed 300 to 400 pounds empty, entailed breaking up the hardened concrete by using sledgehammers to beat on the hose and by lifting the hose up, folding it over, and slamming it down.

Claimant stated he had a headache and felt a little stiffness/tightness in his neck after work that day, but did not think anything of it at the time. HT at 42-46; EX 12, Dep. at 60-81. He continued to perform his usual work for employer despite some discomfort during the next two days leading up to the Labor Day weekend. The stiffness and discomfort worsened over the three-day holiday weekend, prompting him to tell the barge supervisor, Dan Kittka, during his next work shift on September 8, 2015, that he was not feeling well. Claimant, at Mr. Kittka's direction, saw a physician's assistant (PA) on site, who diagnosed cervical myalgia and a tension headache. The PA instructed claimant to avoid strenuous activity to the injured area, and recommended Motrin and treatment consisting of hot/cold compresses, stretching, and massage therapy. The PA also told claimant he could return to full-duty work "as tolerated." CX 18. Later that day, claimant went to the emergency room at South Nassau Hospital where he was diagnosed with a muscle strain and sinusitis and released.

Claimant continued in his usual job with employer until September 30, 2015, when he stated the pain became so unbearable that he could no longer work. HT at 76-77. On that date, claimant's primary care physician, Dr. Spera, diagnosed cervicalgia, weakness, cervical radiculopathy, and opined that claimant was disabled from employment. JX 1 at 160. Dr. Spera referred claimant to Dr. Faust who, on April 4, 2016, diagnosed cervical and lumbar radiculopathy consistent with the work incident described by claimant, and opined that claimant has a temporary total disability and cannot return to work even with restrictions. *Id.* at 248-251. Dr. Faust stated claimant's cervical MRI showing herniated discs at C5-6 and C6-7 correlates with his pain. CX 19 at 11. After conservative treatment

[1]Employer hired claimant to work as a remix operator at a concrete remix plant, which was located on a barge on the Hudson River at the Tappan Zee Bridge replacement work site. Claimant's job required him to stand at the controls all day and to perform routine maintenance and cleanup of the equipment. HT at 26-30.

failed, Dr. Faust recommended a three-level anterior cervical disc fusion (ACDF). JX 1 at 373.

Drs. Toriello and Magliato conducted evaluations of claimant in September and November 2016, respectively. Dr. Toriello opined that claimant's work-related neck and back injuries had resolved with no objective evidence of continued disability such that claimant could return to work without restrictions. EX 4. Dr. Magliato opined that claimant sustained a cervical and lumbar injury as a result of the work accident. CX 6. He also opined that while claimant presently had legitimate subjective complaints of cervical and lumbar spine pain, there was little objective evidence to support Dr. Faust's surgical recommendation. *Id.* He thus recommended that claimant see a pain management specialist for six to eight more weeks, rather than undergo the three-level ACDF proposed by Dr. Faust. *Id.*

Employer voluntarily paid claimant temporary total disability benefits from October 1, 2015 to October 5, 2016, when it terminated compensation based on Dr. Toriello's release of claimant to return to work with no restrictions. The case was forwarded to the Office of Administrative Law Judges for a formal hearing, which was held on July 17, 2017.

The administrative law judge found claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), that he sustained cervical abnormalities as a result of the September 2, 2015 work incident, that employer established rebuttal thereof, and that claimant satisfied his burden of establishing that his cervical spine condition is work-related. The administrative law judge found claimant entitled to ongoing temporary total disability benefits from the day after employer's compensation payments ended, and medical benefits, including surgery, for his cervical spine injury.

On appeal, employer challenges the administrative law judge's finding that claimant's cervical spine condition is work-related. Claimant responds, urging affirmance of the administrative law judge's decision. Employer has filed a reply brief.

Employer contends the administrative law judge erroneously found that claimant established the working conditions element for purposes of invoking the Section 20(a) presumption because there is no evidence that claimant's handling of the concrete hose on September 2, 2015, caused the cervical spine symptoms he experienced days later.

In order to invoke the Section 20(a) presumption, a claimant must establish that he suffered harm and that conditions existed or an accident occurred at work that could have caused, aggravated, or accelerated the condition. *See Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008); *American Stevedoring, Ltd. v. Marinelli*, 248 F.3d

54, 64-65, 35 BRBS 41, 49(CRT) (2d Cir. 2001). Although it is the claimant's burden to establish each element of his prima facie case, he is not required to affirmatively prove that his working conditions in fact caused the harm alleged in order to establish his entitlement to the Section 20(a) presumption. *See Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990). The "working conditions" prong of a claimant's prima facie case requires that the administrative law judge determine whether the employment events which are alleged to have caused the harm sustained by the claimant in fact occurred. *See Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996). Claimant's theory as to how the injury arose must go beyond "mere fancy." *Champion v. S & M Traylor Bros.*, 690 F.2d 285, 295 (D.C. Cir. 1982); *Stevens*, 23 BRBS 191.

The administrative law judge found claimant credibly described the physically demanding work he performed on September 2, 2015. HT at 35-41; EX 12, Dep. at 61-80.[2] He permissibly found the testimony consistent with an accident that could have caused claimant's cervical spine abnormalities. Decision and Order at 47. It thus is sufficient to establish the "working conditions" element of claimant's prima facie case.[3] *See, e.g.*, *Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988). Accordingly, we affirm the administrative law judge's finding that claimant invoked the Section 20(a) presumption as it is supported by substantial evidence. *Rainey*, 517 F.3d 632, 42 BRBS 11(CRT); *Marinelli*, 248 F.3d at 64-65, 35 BRBS at 49(CRT).

Once, as here, the Section 20(a) presumption has been rebutted,[4] it drops from the case, and the issue of the existence of a causal relationship must be decided on the record

[2]Claimant's description of the work events of September 2, 2015, is consistent with the Supervisor's Investigation Report compiled and signed by his supervisor, Mr. Kittka. CX 4.

[3]The medical evidence also supports the finding that the work accident could have caused claimant's cervical condition. Dr. Faust's reports and testimony state that the work events of September 2, 2015, either led to or caused claimant's present cervical condition. CXs 10, 19. Dr. Magliato stated it appeared claimant sustained a cervical injury as a result of the work accident. CX 6. Dr. Toriello stated claimant had evidence of a "resolved cervical strain" causally related to the work accident. EX 4.

[4]The administrative law judge found employer rebutted the Section 20(a) presumption with Dr. Toriello's opinion, "which is that there is no disabling injury at

as a whole with the claimant bearing the burden of establishing the work-relatedness of his injury by a preponderance of the evidence. *Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

Employer challenges the administrative law judge's finding, based on the record as a whole, that claimant's present cervical condition is related to the September 2, 2015 work accident. Employer contends the administrative law judge's reliance on Dr. Faust's opinion is improper because it is premised on two significant factual inaccuracies: Dr. Faust incorrectly relied on the notion that claimant experienced some "abrupt" symptoms while engaged in unclogging the concrete hose and on the mistaken premise that claimant did not have any symptomology of his cervical spine prior to the alleged work incident.

Employer's contentions are without merit. Dr. Faust stated claimant's cervical condition was caused or aggravated by the September 2, 2015 work incident. CX 19, Dep. at 14, 28-29, 34-39, 47. Employer's counsel directly asked Dr. Faust whether claimant's statement that he had abrupt symptoms served as the basis for his causation opinion and whether claimant's failure to provide full information of his pre-accident cervical condition altered his conclusions, to which Dr. Faust answered "no." *Id.*, Dep. at 34, 47, 49-50. Moreover, the administrative law judge noted the inconsistencies between claimant's testimony and the information he provided to Dr. Faust,[5] but nevertheless credited Dr. Faust's testimony that any such inconsistencies did not alter his opinion on causation, as is within her discretion. *See, e.g., Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994).

In analyzing the record evidence as a whole, the administrative law judge credited Dr. Faust's opinion over Dr. Toriello's because he has superior credentials,[6] he is

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present." Decision and Order at 47. This finding is affirmed as it is unchallenged on appeal. *See Scalio v. Ceres Marine Terminals*, 41 BRBS 57 (2007).

[5]The administrative law judge found claimant "has not been completely forthcoming about his history of cervical spine problems." Decision and Order at 48. Additionally, the administrative law judge found claimant's statement that he "did not immediately feel pain after the work accident with the hose, and he did not report any issues with pain until the following week," did not coincide with claimant's reporting to Dr. Faust that he sustained "abrupt" pain at the time of the accident. *Id*.

[6]The administrative law judge found that while Drs. Faust and Toriello are Board-certified in orthopedic surgery, Dr. Faust also participated in a one-year spine and joint

claimant's treating physician, and he is the physician who saw claimant most recently.[7] Decision and Order at 47-48. The administrative law judge found Dr. Faust's opinion further supported by Dr. Magliato's opinion that claimant sustained a cervical injury as a result of his accident. *Id.* at 48. The administrative law judge therefore relied on Dr. Faust's opinion that the September 2, 2015 work injury "was the proximate cause for [claimant's] symptom onset" to find claimant established that his cervical condition is work-related. *Id.*

It is well established that the administrative law judge 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). It is impermissible for the Board to reweigh the evidence or to substitute its own views for those of the administrative law judge. *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982).

The administrative law judge permissibly accorded greatest weight to the opinion of Dr. Faust tying claimant's cervical condition to the work accident of September 2, 2015, and her conclusion that claimant established that his cervical condition is work-related is supported by substantial evidence and is affirmed. *See Pietrunti v. Director, OWCP*, 119 F.3d 1035, 1042, 31 BRBS 84, 89(CRT) (2d Cir. 1997) (opinion of treating physician is entitled to considerable weight); *see also Marinelli*, 248 F.3d at 65, 35 BRBS at 49(CRT). As employer raises no other contentions, the administrative law judge's award of benefits is affirmed.

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replacement fellowship at Johns Hopkins Hospital in Baltimore, Maryland. Decision and Order at 47.

[7]The administrative law judge found that Drs. Toriello and Magliato each only saw claimant once in September and November of 2016, respectively, whereas Dr. Faust, as claimant's treating physician, routinely saw claimant.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge