U.S. Department of Labor

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

BRB No. 14-0425

JOHN D. STEPHENSON	)	
	)	
Claimant-Respondent	)	
	)	DATE ISSUED: Aug. 17, 2015
v.	)	
	)	
METRO MACHINE CORPORATION	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order – Granting Benefits and the Order Granting Claimant's Motion for Reconsideration of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna Klein Camden, LLP), Norfolk, Virginia, for claimant.

F. Nash Bilisoly and Kimberly Herson Timms (Vandeventer Black LLP), Norfolk, Virginia, 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 and the Order Granting Claimant's Motion for Reconsideration (2013-LHC-00934) of Administrative Law Judge Kenneth A. Krantz 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 for employer as a pipefitter from August 1983 until August of 2011. Claimant testified that, on February 18, 2008, he was working in the superstructure of a ship where he inhaled welding, burning, and epoxy-paint fumes, and that he began experiencing severe breathing difficulties later that night. Tr. at 13-14. The next morning, claimant was admitted to the hospital emergency room, and he was diagnosed with "exacerbation of chronic obstructive pulmonary disease" by Dr. Blais.[1] CX 11-1. Claimant was hospitalized for eight days, during which time he was prescribed steroids, inhalers, empiric antibiotics, and albuterol to treat his chronic obstructive pulmonary disease (COPD). Upon discharge, claimant was prescribed a nebulizer and oxygen concentrator, which he had not used prior to the hospitalization. CX 11; Tr. at 17. Claimant has continued the same treatment since his hospitalization, but his medication dosages have increased. Claimant returned to work after his hospitalization, but his restrictions precluded him from going on board ships and lifting over certain weights. Tr. at 43. Claimant voluntarily retired in 2011.

In October 2011, claimant was treated for a fracture at the T7 vertebra by Dr. Jamali. CX 9-27. Dr. Jamali opined that the fracture was due to long-term steroid intake from the management of claimant's respiratory condition. CX 14-8. Subsequently, claimant sought medical benefits under Section 7 of the Act, 33 U.S.C. §907, for his pulmonary and T7 vertebra conditions. CXs 4, 5; Tr. at 8. Employer contested the claim. CX 5. The parties stipulated that: claimant injured his pulmonary organs on February 18, 2008; the injury arose out of and in the course of claimant's employment with employer; and that the Act applies to the claim. ALJX 1. The administrative law judge found that claimant established a prima facie case by showing a harm, COPD, and a work incident that could have caused that harm or aggravated a pre-existing condition; therefore, he found claimant entitled to the Section 20(a), 33 U.S.C. §920(a), presumption. Finding that employer did not rebut the presumption, the administrative law judge awarded claimant past and future medical benefits for his work-related COPD. 33 U.S.C. §907; Decision and Order at 14.

Pursuant to claimant's Motion for Reconsideration, the administrative law judge found that claimant established a prima facie case linking his T7 vertebra fracture to excessive coughing from, and the steroids he was prescribed for, his work-related COPD. In so finding, the administrative law judge rejected employer's contention that the

[1] Claimant has a long history of breathing problems. He has been treating his wheezing and coughing with an inhaler since 1986 and was diagnosed with chronic obstructive pulmonary disease in 1996 and emphysema in 2001. Tr. at 27-29, 32; CX 13.

decision of the United States Court of Appeals for the Fifth Circuit in *Amerada Hess Corp. v. Director, OWCP*, 543 F.3d 755, 42 BRBS 41(CRT) (5th Cir. 2008), is applicable to this case, which arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit.[2] Finding that employer failed to rebut the Section 20(a) presumption, the administrative law judge awarded claimant medical benefits for his T7 vertebra fracture. Employer challenges the award of medical benefits for both claimant's COPD and T7 fracture on appeal. Claimant responds, urging affirmance. Employer filed a reply brief.

Employer first contends the administrative law judge erred in finding that claimant established a prima facie case relating his chronic COPD to his work exposures on February 18, 2008. Specifically, employer contends the administrative law judge erred in finding it stipulated that claimant sustained an aggravation injury, because it stipulated only that claimant injured his pulmonary organs on February 18, 2008. Employer argues that, because the only medical opinion in this case, that of Dr. Ripoll, who is claimant's treating physician and a pulmonary specialist, is equivocal as to whether the exposure to welding and paint fumes contributed to claimant's COPD, claimant cannot establish his prima facie case. We reject employer's contention.

In order to be entitled to the Section 20(a), 33 U.S.C. §920(a), presumption linking his harm to his employment, claimant must establish a prima facie case by showing that he suffered a harm and that either a work-related accident occurred or that working conditions existed which could have caused the harm or aggravated a pre-existing condition. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *see U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). To make out a prima facie case, claimant is not required to establish an actual causal connection between the harm and his work accident or working conditions. The Section 20(a) presumption attaches when claimant "allege(s) (1) an injury or death (2) that arose out of and in the course of (3) his maritime employment." *Moore*, 126 F.3d at 262, 31 BRBS at 123(CRT) (citing *U.S. Industries*, 455 U.S. at 616, 14 BRBS at 633); *see Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 24 BRBS 75(CRT) (D.C. Cir. 1990). Moreover, under the aggravation rule, employer is liable for the consequences if the work-related incident aggravates a pre-existing condition. *Newport News Shipbuilding & Dry Dock Co. v. Fishel*, 694 F.2d 327, 15 BRBS 52(CRT) (4th Cir. 1982).

The administrative law judge found that claimant has COPD, a harm, and that employer stipulated, and claimant demonstrated, that he was exposed to welding and

[2] Claimant was injured in the course of his employment in Virginia.

epoxy fumes at work on February 18, 2008.[3] Decision and Order at 14. We reject employer's assertion that claimant cannot establish a prima facie case without a medical opinion affirmatively linking claimant's chronic COPD to the work accident. Claimant's claim that his work exposure to fumes permanently aggravated his COPD goes beyond "mere fancy." *See Champion v. S & M Traylor Bros.*, 690 F.2d 285, 15 BRBS 33(CRT) (D.C. Cir. 1982); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990). Indeed, although Dr. Ripoll was of two minds on this subject, *see* n. 4, *infra*, his January 10 and November 28, 2012 letters support claimant's allegation that the exposure to fumes at work "could have aggravated" claimant's underlying COPD and contributed to his chronic condition. CXs 6, 7; *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968). Thus, as claimant established both elements of his prima facie case, we affirm the administrative law judge's application of the Section 20(a) presumption to claimant's claim. *Moore*, 126 F.3d 256, 31 BRBS 119(CRT).

Upon invocation of the Section 20(a) presumption, the burden shifts to employer to rebut it with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009). While the employer's burden on rebuttal is one of production and not persuasion, it cannot meet this burden by simply producing "any evidence." Rather, the employer must produce "substantial evidence," which is "such relevant evidence as a reasonable mind might accept as adequate" to support a conclusion. *Moore*, 126 F.3d at 262, 31 BRBS at 123(CRT) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)); *see also Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008). In this case, the only medical evidence addressing causation and/or aggravation is Dr. Ripoll's opinion. The administrative law judge found Dr. Ripoll's opinion to be equivocal and therefore insufficient to rebut the presumption.[4] Moreover, employer concedes that the administrative law judge

[3] Claimant's treatment records and Dr. Ripoll's opinion unequivocally state that claimant suffers from COPD, which is a chronic lung condition. CXs 1, 11, 13. Moreover, employer conceded before the administrative law judge that claimant has an ongoing lung condition. Tr. at 9, 11. Although employer did not specifically stipulate to a permanent COPD aggravation, in stipulating to a work-related pulmonary injury on February 18, 2008, ALJX 1, it conceded to an accident or working conditions that could have caused or aggravated claimant's pre-existing COPD.

[4] The administrative law judge found Dr. Ripoll's opinion regarding the etiology of claimant's COPD to be contradictory and equivocal as Dr. Ripoll offered differing opinions on various occasions, in which he states: 1) that claimant's exposure in 2008 was an acute pulmonary event that did not affect the rate of progression of the underlying disease; and 2) that as the rate of deterioration increased following the 2008 inhalation

"appropriately" discounted Dr. Ripoll's opinion as equivocal. Emp. Br. at 10. Accordingly, there is not substantial evidence of record to rebut the Section 20(a) presumption, and we affirm the administrative law judge's finding that employer did not rebut the Section 20(a) presumption. *See Moore*, 126 F.3d at 262, 31 BRBS at 123(CRT); *Rainey*, 517 F.3d at 636-637, 42 BRBS at 14(CRT). Therefore, claimant's chronic COPD is work-related as a matter of law. *Holiday*, 591 F.3d 219, 43 BRBS 67(CRT). As employer does not raise any other challenge to the award of medical benefits for claimant's COPD, that award is affirmed. *Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989).

Employer also contends the administrative law judge erred in awarding claimant medical benefits for his T7 vertebra fracture because he erroneously applied the Section 20(a) presumption to this secondary injury. Specifically, employer argues that the administrative law judge should have applied the "natural or unavoidable" standard enunciated by the Fifth Circuit in *Amerada Hess*, 543 F.3d 755, 42 BRBS 41(CRT), and required claimant to establish the work-relatedness of his T7 vertebra injury without the benefit of the Section 20(a) presumption, because claimant did not include this secondary injury on his original claim form. In *Amerada Hess*, the Fifth Circuit relied on the Supreme Court's decision in *U.S. Industries*, 455 U.S. 608, 14 BRBS 631, and held that, as the claimant's claim for benefits did not assert a work-related heart condition, the administrative law judge erred in applying the Section 20(a) presumption to determine that the claimant was entitled to medical expenses for his heart condition, which he alleged arose because of the steroid treatment for his work-related back injury. Because the heart condition developed subsequent to the work injury and was not "claimed" as a work-related condition, the court held that a causal relationship existed only if the claimant established, without benefit of the Section 20(a) presumption, that his heart condition "naturally or unavoidably" resulted from the work-related injury or the treatment, as established by medical or scientific evidence. *See* 33 U.S.C. §902(2). The administrative law judge made no finding on the work-relatedness of the heart condition under this standard; therefore, the Fifth Circuit remanded the case for him to do so. *Amerada Hess*, 543 F.3d at 763, 42 BRBS at 44-45(CRT); *see also Ins. Co. of the State of Pennsylvania v. Director, OWCP [Vickers]*, 713 F.3d 779, 47 BRBS 19(CRT) (5th Cir. 2013) (the court held that a "catch-all" claim for a left arm injury and for injuries to "other parts of [claimant's] body, [and] other related problems associated with [his] injury and working conditions in Iraq" was too vague for the Section 20(a) presumption to apply to claimant's claim for chronic inflammatory demyelinating polyneuropathy).

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injury, it was highly likely that the deterioration was caused by the inhalation injury. Decision and Order at 16; CXs 1, 6, 7; EX 9.

We reject employer's contention that the administrative law judge should have applied this case precedent in this case, which does not arise within the jurisdiction of the Fifth Circuit.[5] *See, e.g., Cronin v. U.S.*, 765 F.3d 1331 (Fed. Cir. 2014); *Bradley v. U.S.*, 161 F.3d 777 (4th Cir. 1998). Neither party submitted claimant's initial claim form into evidence. However, by the time of the informal conference before the district director on May 12, 2012, claimant had raised a claim for medical benefits for his T7 vertebra fracture as a consequence of the February 2008 injury, based on Dr. Jamali's opinion that steroid use for the pulmonary condition contributed to the vertebra facture. CXs 4-1, 5-3, 14-8. Claimant also raised this issue at the hearing, *see* Tr. at 8, and employer does not contend on appeal that it was surprised by this issue or had insufficient notice such that its defense was hindered. *See U.S. Industries*, 455 U.S. at 613 n.7, 14 BRBS at 633 n.7 ("considerable liberality" is allowed in amending claims); *see also Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001); *Meehan Seaway Service, Inc. v. Director, OWCP*, 125 F.3d 1163, 31 BRBS 114(CRT) (8th Cir. 1997); *Dangerfield v. Todd Pacific Shipyards Corp.*, 22 BRBS 104 (1989). Thus, claimant sufficiently made a claim for his secondary injury before both the district director and the administrative law judge, and the administrative law judge properly applied the Section 20(a) presumption to this condition. *U.S. Industries*, 455 U.S. 608, 14 BRBS 631. As employer does not challenge the administrative law judge's finding that employer did not rebut the Section 20(a) presumption that claimant's T7 vertebra fracture is related to the work injury, or any other aspect of the award of medical benefit for this condition, we affirm the award of medical benefits. *Atlantic Marine, Inc. v. Bruce*, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981).

[5] We note that in both *Amerada Hess* and *Vickers*, one member of the panel disagreed with the majority's opinion that the Section 20(a) presumption does not apply to "sequela" injuries, so long as the claimant makes out a prima facie case.

Accordingly, the administrative law judge's Decision and Order – Granting Benefits and the Order Granting Claimant's Motion for Reconsideration are affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge