

U.S. Department of Labor

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



BRB No. 19-0117

HENRY JONES)	
)	
Claimant-Respondent)	
)	
v.)	
)	
ISLAND OPERATING COMPANY,)	
INCORPORATED)	
)	DATE ISSUED: 08/02/2019
and)	
)	
LOUISIANA WORKERS')	
COMPENSATION CORPORATION)	
)	
Employer/Carrier-)	
Petitioners)	DECISION and ORDER

Appeal of the Decision and Order of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Jere Jay Bice and Julia Love Taylor (Veron, Bice, Palermo & Wilson, LLC), Lake Charles, Louisiana, for claimant.

David K. Johnson (Johnson, Rahman & Thomas), Baton Rouge, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2018-LHC-00269) of Administrative Law Judge Patrick M. Rosenow rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by

the Outer Continental Shelf Lands Act, 43 U.S.C. §1331 *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 asserted he injured his back during the course of his employment as a B operator/roustabout on an offshore oil rig on September 9, 2016. His job duties that day included offloading incoming groceries for approximately three hours and operating an industrial drill for 15 to 20 minutes. He alleged he felt radiating back pain while walking up stairs after he stopped drilling to take a bathroom break. Claimant noticed blood in his stool, and his supervisor summoned a helicopter to take him ashore. He did not report a back injury to his supervisor that day, to his family doctor with whom he spoke by telephone while waiting for the helicopter, or when he was examined by a nurse practitioner for anal fissures on September 14, 2016.¹ CX 1.

Claimant requested 12 weeks of leave on September 15, 2016, under the Family Medical Leave Act, which was approved. CX 12. He testified this request was due to his back and leg pain. Tr. at 61-62. Claimant also received a letter from employer outlining the job duties of B operator/roustabout and testified he felt unable to perform them. CX 13. He tried to file for short-term disability benefits, but was informed it was unavailable and he should file for workers' compensation instead. Tr. at 64-65. Claimant reported his injury on October 5, 2016, and employer filed a notice of controversion on October 7, 2016. CXs 9; 11.

Claimant's back was first examined on October 20, 2016, by Dr. Gunderson, an orthopedic surgeon. CX 2 at 1. He reported his September 9, 2016 working conditions and told Dr. Gunderson the onset of his back and leg pain was within a week of this date. *Id.* An MRI on November 16, 2016, revealed a disc herniation at L5-S1, neural canal narrowing at L4-5 and L5-S1, and retrolisthesis, which involves vertebrae slipping backwards. CXs 2; 10 at 32-33.

The administrative law judge found claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), because he has a harm to his back and testified to loading and drilling activities on September 9, 2016, that could have caused the harm. Decision and Order at 11-12. He found employer rebutted the presumption with the opinion of Dr. Romero that some other event could have caused or aggravated claimant's back condition. *Id.* at 12.

¹ Claimant testified that he was seen by a gastroenterology practice that did not treat orthopedic pain. Tr. at 50-51.

With respect to whether claimant established on the record as a whole a causal relationship between his back pain and his work on September 9, 2016, the administrative law judge addressed the medical evidence and claimant's testimony. He found the medical opinions linking claimant's work activities to his back condition rested on an assumption that the onset of symptoms was temporally connected to the alleged date of injury. Decision and Order at 12. He found claimant's testimony is the only direct evidence linking his back pain to the events of September 9, 2016, and the history he gave Drs. Gunderson and Romero was "relatively consistent" with his hearing testimony, as are his current symptoms and the MRI studies. *Id.*; compare Tr. at 28-33 with CX 2 at 1 and EX 4 at 1.

The administrative law judge addressed employer's contention that claimant's testimony is not credible because the record contains no evidence "of an immediate or even prompt complaint to anyone about the onset of back pain."² Decision and Order at 12. He found some of claimant's explanations for not promptly reporting his work injury to employer or his medical professionals "less than compelling" or "troubling."³ *Id.* at 14. The administrative law judge credited, however, claimant's "primary explanation" that he was concerned he could lose his job if he reported it, as he testified he had experienced employer's laying off and demoting workers, and his hope that the back pain would resolve during two weeks of leave. *Id.* The administrative law judge determined claimant's back pain became manifest sometime before September 22, 2016, when claimant requested

² The administrative law judge noted claimant's testimony that the first time he mentioned back symptomatology to a medical professional was sometime between September 22 and October 4, 2016, when he was contacted by Stafford Medical about his symptoms. Claimant assumed that Stafford Medical thereafter informed employer of his back injury because employer subsequently mailed him the physical requirements he must meet for his job. Decision and Order at 14; Tr. at 56-60, 85-86.

³ The administrative law judge found "inconsistencies and counterintuitive factors" that undermine claimant's credibility. Decision and Order at 14. He discounted claimant's explanation that he did not tell his supervisor of his back pain because he did not ask. The administrative law judge found "slightly less troubling" claimant's explanation that he did not tell his primary care provider because he hoped the back pain would resolve and he was very concerned about the rectal bleeding. He found "inconsistent on its face" claimant's explanation that he did not tell the gastroenterology nurse practitioner because he was confused and worried about the combination of rectal bleeding and back pain. *Id.*

medical leave, as there was no reason for him to request leave for anal fissures.⁴ *Id.* He also stated there is no suggestion that claimant is feigning a back injury. “[G]iven that Claimant was asymptomatic before 9 Sep 16 and became symptomatic by at least 22 Sep 16, along with the very low standard required for an aggravation injury,” the administrative law judge found, “[c]laimant has established that it is more likely than not that his work on 9 Sep 16 aggravated his pre-existing condition.” *Id.* at 15. He thus awarded claimant ongoing temporary total disability benefits from the date of injury. 33 U.S.C. §908(b).

Employer appeals the administrative law judge’s finding that claimant established the occurrence of a work accident on September 9, 2019, that caused or aggravated his back condition. Claimant responds that the administrative law judge’s finding of entitlement on the record as a whole is supported by substantial evidence. He also contends the award is proper because the administrative law judge erred in finding that employer rebutted the Section 20(a) presumption. Employer filed a reply brief.

We first consider claimant’s argument that employer failed to rebut the Section 20(a) presumption.⁵ Once, as here, the claimant establishes a prima facie case, Section 20(a) applies to relate the injury to the work incident alleged to be the cause of the injury, and the employer can rebut this presumption by producing substantial evidence that the injury is not related to the work incident. *Ceres Gulf, Inc. v. Director, OWCP [Plaisance]*, 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). Employer’s burden on rebuttal is one of production, not persuasion; thus, the United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, held that in order to rebut the Section 20(a) presumption, employer need only offer substantial evidence that “throws factual doubt” on claimant’s prima facie case. *Plaisance*, 683 F.3d at 231, 46 BRBS at 29(CRT).

The administrative law judge relied on the opinion of Dr. Romero to find the Section 20(a) presumption rebutted. Decision and Order at 12. Dr. Romero examined claimant on Feb. 10, 2017. CX 3; EX 4. He stated:

I do agree that the medical records document his first complaint of lumbar symptoms in October of 2016, but [claimant] reports today that he started

⁴ The uncontradicted evidence shows that claimant requested medical leave on September 15, 2016, not September 22, 2016. CX 12.

⁵ The Board may address an issue raised in a response brief that provides an alternate avenue of affirming the administrative law judge’s decision. *See, e.g., Misho v. Global Linguist Solutions*, 48 BRBS 13 (2014).

with immediate back pain after having a bowel movement on September 9, 2016. I cannot clearly say whether or not his back condition is related to him straining to have a bowel movement or some other work related injury or some other injury that may have occurred after September 9, 2016.

It is difficult to tell if this injury occurred as a result of a work related incident or if it occurred as a result of him straining to have a bowel movement or some other injury after September of 2016.

EX 4 at 3. The administrative law judge found “Dr. Romero’s recognition of the possibility that a strained bowel movement or other event unrelated to work could have caused Claimant’s symptoms is sufficient to rebut the presumption of causation.” Decision and Order at 12.

We agree with claimant that Dr. Romero’s opinion is legally insufficient to rebut the Section 20(a) presumption. His opinion fails to state that claimant’s work on September 9, 2016, is not the cause of his injury. He merely states that the back injury could be due to the working conditions, or to the bowel movement, or to something else. Because Dr. Romero stated that claimant’s work is one of the potential causes of the injury, it is insufficient to rebut the Section 20(a) presumption as a matter of law. *Louisiana Ins. Guar. Ass’n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000); *see also Ramsey Scarlett & Co. v. Director, OWCP [Fabre]*, 806 F.3d 327, 49 BRBS 87(CRT) (5th Cir. 2015); *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009); *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000). There is no other evidence in the record sufficient to rebut the Section 20(a) presumption.

As employer did not produce substantial evidence of the absence of a connection between claimant’s work and his back injury, we reverse the administrative law judge’s finding that employer rebutted the Section 20(a) presumption. Claimant’s back injury therefore is work-related as a matter of law. *See, e.g., Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011).

In addition, we reject employer’s argument that the administrative law judge erred in finding on the record as a whole that claimant’s injury is work-related. Claimant bears the burden of persuasion on this issue. *Plaisance*, 683 F.3d 225, 46 BRBS 25(CRT); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). In arriving at his decision, the administrative law judge is entitled to evaluate the credibility

of all witnesses and to draw his own inferences and conclusions from the evidence, *see Bis Salamis, Inc. v. Director, OWCP [Meeks]*, 819 F.3d 116, 50 BRBS 29(CRT) (5th Cir. 2016), and the Board may not reweigh the evidence, but may assess only whether there is substantial evidence to support the administrative law judge's decision. *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991).

The Board has reviewed the administrative law judge's decision and employer's contentions in view of the evidence of record. We affirm, as employer has not demonstrated reversible error in the administrative law judge's conclusions. 20 C.F.R. §802.404(b). Substantial evidence supports his finding that "it is more likely than not" that claimant's work on September 9, 2016, aggravated his pre-existing back condition.⁶ This conclusion is supported by the request for medical leave on September 15, 2016, *see* n.3 *supra*, claimant's testimony, the opinions of Drs. Gunderson and Romero,⁷ the absence of prior back symptomatology, and the evidence demonstrating that, prior to claimant's being evacuated from the rig, he engaged in work for employer offloading groceries and operating an industrial drill. As the administrative law judge's finding that claimant established a work-related back injury is rational, supported by substantial evidence, and in accordance with law, it is affirmed. *Cooper/T. Smith Stevedoring Co., Inc. v. Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT) (5th Cir. 2002); *Suarez v. Service Employees Int'l, Inc.*, 50 BRBS 33 (2016).

⁶ The aggravation rule provides that employer is liable for the totality of the claimant's disability if the work injury aggravates a pre-existing condition. *See Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (en banc). Contrary to employer's contention that claimant did not have a pre-existing back condition, Drs. Gunderson and Romero and the MRI report note advanced degenerative changes to the lower back and both doctors and the MRI report specifically state that the retrolisthesis is related to degenerative changes. CXs 5 at 1; 10 at 32; EX 4 at 2-3.

⁷ The administrative law judge found claimant's trial testimony consistent with the history he gave Drs. Gunderson and Romero. Decision and Order at 12. He found that both doctors stated claimant's symptoms are consistent with the history he gave them. *Id.* Dr. Gunderson opined at his deposition that claimant's symptoms are a result of the September 9, 2016 work injury. CX 10 at 18, 26, 32-34. Dr. Romero opined that claimant's current symptoms, as well as the herniation at L5-S1, are likely related to an incident occurring in either September or October 2016. CX 3 at 3. Although not as specific as Dr. Gunderson's opinion, the administrative law judge permissibly found Dr. Romero's opinion supports claimant's theory of the case. Decision and Order at 12.

Accordingly, we affirm the administrative law judge's Decision and Order.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge