U.S. Department of Labor

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

BRB No. 19-0148

DEVANAND MACK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 08/28/2019
McALLISTER TOWING & TRANSPORTATION COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Lauren C. Boucher, Administrative Law Judge, United States Department of Labor.

Clifford R. Mermell (Gillis, Mermell & Pacheco, P.A.), Miami, Florida, for claimant.

Christopher J. Field (Field & Kawczynski, LLC), South Amboy, New Jersey, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2018-LHC-00060) of Administrative Law Judge Lauren C. Boucher rendered on a claim filed pursuant to 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 carpenter. On April 17, 2017, he had to lift and carry heavy buckets of debris from a tugboat's engine room up the stairs to the back deck of the boat. Claimant testified each bucket weighed 20-30 pounds and estimated that he carried 30 or more buckets on that day, describing it as "very hard" work. Tr. at 37; EX 10 at 130-131. He testified he felt back pain and right shoulder pain during the course of his work and told both his direct supervisor, Mr. Harry, and his acting supervisor, Mr. Brathwaite, about the pain during the workday. Both men denied claimant had reported any pain or injury to them on April 17. EXs 13 at 223-34; 14 at 13.

Claimant testified he was sore after work that day, but the next day, April 18, 2017, "the pain hit [him] really bad" such that he could not get out of bed. EX 10 at 135-137. He called Mr. Cintula, employer's Marine Superintendent, and told him he was in pain. Mr. Cintula told claimant to go to a doctor. *Id.* at 137.

Claimant visited his workers' compensation doctor,[1] Dr. Baldeo, on April 18, 2017 and Dr. Baldeo issued a "Medical Certificate of Illness" indicating claimant was being taken off work for "medical reasons." EX 3. On April 24, 2017, Dr. Baldeo issued a second certificate indicating claimant remained off work for medical reasons. EX 4. On April 27, 2017, Dr. Baldeo issued a third certificate indicating claimant was being treated for a "work-related injury." CX 1 at 2; EX 12 at 199-200. Dr. Baldeo diagnosed claimant with bursitis of the right shoulder; various traumatic injuries to his spine, including disc displacement; traumatic internal derangement of the right shoulder, thoracic and lumbar spine; and contusion of the right shoulder. CX 1 at 7.

Claimant filed an injury report at employer's office on May 3, 2017. EX 1. He has not returned to work. Subsequently, claimant filed a claim for benefits under the Act, which employer controverted. The parties stipulated, inter alia, that "Claimant sustained the alleged lower back and right shoulder injuries on April 17, 2017" and "[t]he alleged injuries occurred at Employer's yard in Staten Island." Decision and Order at 3. The parties disputed if the alleged accident occurred. Tr. at 9.

[1] Claimant had suffered prior work injuries, unrelated to this claim. He testified that he has a different personal physician for non-work-related illnesses.

The administrative law judge found claimant established a prima facie case that his injuries are work-related and invoked the Section 20(a) presumption, 33 U.S.C. §920(a), through Dr. Baldeo's reports concerning claimant's physical injuries and claimant's testimony about his working conditions on April 17, 2017.[2] The administrative law judge also found employer rebutted the presumption through Dr. Baldeo's medical certificates indicating claimant was being treated for "medical reasons," and the testimony of claimant's co-workers that he did not report a work injury on April 17 or 18. Decision and Order at 8. She noted claimant had suffered three prior work-related injuries and, on each occasion, had reported the injuries immediately, which he did not do in this case. The administrative law judge concluded that, although the evidence "is circumstantial and does not directly disprove causation," it was nonetheless sufficient to rebut the Section 20(a) presumption. *Id.* at 8-9.

In weighing the evidence as a whole, the administrative law judge found claimant was not a credible witness because of inconsistencies between his testimony and other evidence of record regarding his reporting of the injury. Decision and Order at 10-11. She also found that claimant's and Dr. Baldeo's initial failure to promptly report claimant's injuries as work-related cast doubt on claimant's allegation that he was injured in the course of his employment on April 17. *See id.* at 12. She thus concluded claimant did not establish that his injuries arose out of his employment and denied benefits. *See id.*

On appeal, claimant challenges the administrative law judge's findings that employer rebutted the Section 20(a) presumption and that he did not establish a causal relationship between his injury and his work on April 17 based on the record as a whole. Employer filed a response brief, urging affirmance of the administrative law judge's decision. Claimant filed a reply.

Claimant first contends the administrative law judge erroneously rejected the parties' stipulations that "Claimant sustained the alleged lower back and right shoulder injuries on April 17, 2017" and "[t]he alleged injuries occurred at Employer's yard in Staten Island." Claimant argues the stipulations establish that his injuries are work-related. We reject claimant's contention. While the stipulations are poorly worded, employer made it clear at the hearing that it was disputing the occurrence of an accident on April 17, Tr. at 9, and employer's notice of controversion states that it was challenging whether claimant's injury was work-related. EX 2. Claimant did not challenge employer's statements at the

[2] The hearing was held before Administrative Law Judge Odegard, who was due to retire before the decision in this case could be issued. Judge Boucher (the administrative law judge), attended the hearing and, with the agreement of the parties, the case was transferred to her to render the decision. Tr. at 5; Decision and Order at 2.

hearing and his attempt to assert that he misunderstood the stipulations and issues is unavailing at this stage. *See Suarez v. Service Employees Int'l, Inc.*, 50 BRBS 33 (2016) (declining to address on appeal issue to which parties stipulated and which was not raised before the administrative law judge).

Claimant next contends the administrative law judge erred in finding that employer rebutted the Section 20(a) presumption. Where, as here, claimant has invoked the Section 20(a) presumption, the burden shifts to employer to rebut the presumption by producing substantial evidence that claimant's injury is not related to his employment. *See Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008); *Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011). Substantial evidence is defined as "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." *See Rainey*, 517 F.3d at 637, 42 BRBS at 14(CRT). Once the presumption is rebutted, it falls from the case and the issue of causation must be resolved on the evidence of record as a whole, with claimant bearing the burden of persuasion. *Id.*, 517 F.3d at 634, 42 BRBS at 12(CRT).

In concluding that employer rebutted the Section 20(a) presumption, the administrative law judge relied on Dr. Baldeo's medical certificates stating claimant was being treated for "medical reasons," noting the certificates did not describe claimant's injury as "work-related" until nine days after the initial examination. She also credited the testimony of claimant's co-workers that claimant did not report a work-place injury on April 17 or 18. Decision and Order at 8. She noted claimant suffered three prior work-related injuries and, on each occasion, reported the injuries immediately, which he did not do in this case. The administrative law judge stated that although the evidence "is circumstantial and does not directly disprove causation, the evidence is not hypothetical." *Id*. She thus concluded this evidence is sufficient to rebut the presumption. *See id.* at 8-9.

We agree with claimant that the administrative law judge's rebuttal finding cannot be affirmed. Dr. Baldeo's medical certificates do not constitute substantial evidence of the absence of a work-related injury. The certificates stating claimant was out of work for "medical reasons" do not preclude the conclusion that the medical reason was a work-related injury. More importantly, the administrative law judge's finding that Dr. Baldeo did not describe claimant's injury as work-related until nine days after the initial examination is not supported by Dr. Baldeo's narrative reports. Dr. Baldeo's report on claimant's initial visit on April 18, contemporaneous with the first medical certificate, states that claimant was disabled as a result of his work-related injuries to his shoulder and back. CX 1 at 5-8. Dr. Baldeo's subsequent reports on claimant's injury consistently indicate that claimant's injuries were the result of his work on April 17. *Id.* The contemporaneous medical certificates stating claimant was out of work for medical reasons therefore are not substantial evidence that claimant's injuries were not caused by his work

and the administrative law judge erroneously relied on them as rebuttal evidence.[3] *See Rainey*, 517 F.3d at 637, 42 BRBS at 14(CRT); *C&C Marine Maint. Co. v. Bellows*, 538 F.3d 293, 42 BRBS 37(CRT) (3d Cir. 2008); *Bath Iron Works Corp. v. Preston*, 389 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *Donnell v. Bath Iron Works Corp.*, 22 BRBS 136 (1989).

The remaining evidence on which the administrative law judge relied also is insufficient as a matter of law to rebut the Section 20(a) presumption. The Section 20(a) presumption may be rebutted by circumstantial or negative evidence if it is "specific and comprehensive enough" to sever the potential connection between a particular injury and a job-related accident. *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976); *Holmes v. Universal Mar. Serv. Corp.*, 29 BRBS 18 (1995). The administrative law judge relied on the testimony of claimant's co-workers that he did not report any work pain or injury to them on April 17 or 18, and on claimant's failure to immediately file an injury report with his employer. The administrative law judge concluded this negative evidence was "specific factual information … that raises questions regarding the relationship between Claimant's injury and his employment" and is sufficient to rebut the presumption. Decision and Order at 8-9.

We disagree. Negative evidence consisting of a claimant's failure to report an injury is insufficient standing alone to rebut the Section 20(a) presumption.[4] *See Swinton*, 554 F.2d at 1083-85, 4 BRBS at 476-81 (noting a failure to complain contemporaneously with the accident is an insubstantial basis for concluding there is no causal link between an accident and the injury); *Alexander v. Ryan-Walsh Stevedoring Co.*, 23 BRBS 185 (1990) (rejecting employer's contention claimant's failure to inform his physicians of his injury is by itself sufficient to establish either that the injury did not occur or to establish rebuttal); *Gencarelle v. General Dynamics Corp.*, 22 BRBS 170, *aff'd*, 892 F.2d 173, 23 BRBS 13(CRT) (2d Cir. 1989) (affirming a three-year gap between claimant's last day of employment and his first complaint of knee pain is insufficient to establish rebuttal). In this case, claimant informed Dr. Baldeo on his initial visit that his injuries were the result of his work the day before, and Dr. Baldeo concluded there is a causal relationship between the work accident and his injuries. CX 1 at 7. The negative evidence of claimant's co-

[3] The administrative law judge accurately concluded that Dr. Bercic did not render an opinion on whether claimant was injured on April 17, 2017, and thus she did not consider it at the rebuttal stage. Decision and Order at 9 n.7.

[4] Moreover, the administrative law judge recognized that claimant complied with the Act's notice of injury requirement. 33 U.S.C. §912 (requiring that a notice of injury be filed within 30 days of the date of injury).

workers' testimony that he did not inform them of his work injury is not substantial evidence, standing alone, of the absence of a connection between claimant's injury and his work on April 17.[5] *See Holmes*, 29 BRBS at 21 (negative evidence supporting medical opinion of absence of causal relationship sufficient to rebut); *Craig v. Maher Terminal, Inc.*, 11 BRBS 400 (1979) (same). In the absence of any other evidence in the record legally sufficient to support a finding that claimant's injuries are not work-related, we reverse the administrative law judge's finding that employer rebutted the Section 20(a) presumption and hold that causation is established as a matter of law.[6] *See Rainey*, 517 F.3d at 637, 42 BRBS at 14(CRT); *Swinton*, 554 F.2d 1075, 4 BRBS 466; *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988). The denial of benefits is therefore vacated and the case is remanded for the administrative law judge to address the remaining issues.

[5] We note that on weighing the evidence as a whole the administrative law judge did not credit claimant's testimony concerning the relationship between his physical ailments and the work accident or Dr. Baldeo's opinion, finding them outweighed by other evidence of record. However, the issue on rebuttal does not concern the credibility of the parties' evidence, but only whether employer offered substantial evidence of non-causation. *See Truczinskas v. Director, OWCP*, 699 F.3d 672, 46 BRBS 85(CRT) (1st Cir. 2012); *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010). As discussed, employer's evidence does not meet this standard as a matter of law.

[6] Thus, we need not address claimant's contention that the administrative law judge erred in weighing the evidence as a whole.

Accordingly, we reverse the administrative law judge's finding that employer rebutted the Section 20(a) presumption. We vacate the Decision and Order Denying Benefits and remand the case for further proceedings consistent with this opinion.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge