U.S. Department of Labor

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

BRB No. 17-0376

CHRISTOPHER J. MARTIN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: Dec. 14, 2017
	)	
ATLAS MANUFACTURING AND REPAIR	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

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

J. Jacob Goehring (Schwartz Law Firm, LLC), Metairie, Louisiana, for claimant.

Thomas H. Huval (Jones Fussell, L.L.P.), Covington, Louisiana, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order and the Order on Reconsideration (2015-LHC-01895) of Administrative Law Judge Patrick M. Rosenow 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 alleges he injured his cervical spine on January 20, 2015, while performing cement work for employer. He alleges he lifted an 80-pound bag of cement and felt his neck crack causing shooting pain down his back and arm. Tr. at 66-67. Claimant stated he immediately put down the bag and told his coworkers, Joby Verrett,

Charlie Bergeron, and David Gaston what happened. *Id*. at 67. Claimant alleges he also told Walton Boudreaux, employer's co-owner and his supervisor, that his neck was sore from lifting concrete when he next saw him, later that day or the next day. Claimant stated that although he continued to work full-time through February 11, 2015, when the project ended,[1] his pain worsened, he complained daily, and he needed assistance with work. He also testified he needed a lighter face shield to ease the pain in his neck. *Id*. at 34, 68-73.

On February 17, 2015, six days after the project ended, claimant went to the emergency room complaining of neck pain that radiated down his left arm. EX 12. He was discharged with a diagnosis of musculoskeletal pain. *Id*. at 4. On three other occasions in February 2015, claimant sought treatment for his condition with other medical providers. CXs 4, 5, 7.[2] Claimant filed a claim for benefits under the Act on March 11, 2015, alleging that the work incident on January 20, 2015, rendered him totally disabled as of February 11, 2015.[3] EX 13. Employer controverted the claim, asserting there was insufficient evidence of a work accident on that, or any, date. EX 15.

The administrative law judge denied the claim, finding that claimant failed to establish a prima facie case. He found that the only evidence of a work incident is claimant's testimony and medical records. The administrative law judge stated that the medical records were premised on the history claimant reported to his providers, and were therefore "no more reliable than the accuracy of that history." Decision and Order at 16. The administrative law judge found claimant's testimony was uncorroborated, undermined by his own actions, and directly contradicted by the testimony of his coworkers and Mr. Boudreaux, all of whom the administrative law judge found to be more credible than claimant. Accordingly, the administrative law judge found claimant failed to establish that a work incident occurred as alleged. *Id*. at 17. The administrative law judge summarily denied claimant's motion for reconsideration.[4] Claimant appeals, and employer responds, urging affirmance.

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[1] Claimant has not returned to work. Tr. at 34.

[2] An April 27, 2015 EMG revealed "acute chronic left C6 radiculopathy as well as moderate ulnar entrapment neuropathy across the left elbow," and a May 7, 2015 MRI revealed bulging discs of the cervical spine at C4-6, C5-6, and C6-7. CX 7 at 120, 132.

[3] Claimant also filed a Louisiana workers' compensation claim.

[4] Although the parties additionally disputed whether the Act applies to claimant's claim, the administrative law judge did not reach this issue.

Claimant contends the administrative law judge erred in failing to invoke the Section 20(a), 33 U.S.C. §920(a), presumption that his cervical condition is work related. Specifically, he challenges the administrative law judge's finding that he did not establish that an accident occurred at work on January 20, 2015.[5]

In determining whether an injury is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after the claimant establishes a prima facie case that: (1) he suffered a harm; and (2) an accident occurred or conditions existed at work which could have caused that harm. *See Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000). The Section 20(a) presumption does not apply to aid a claimant in establishing his prima facie case. *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Rather, the claimant has the burden of proving the existence of an injury or harm and the occurrence of an accident or working conditions that could have caused the harm. *See Bis Salamis, Inc. v. Director, OWCP*, 819 F.3d 116, 50 BRBS 29(CRT) (5th Cir. 2016); *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989). If the claimant establishes the two elements of his prima facie case, Section 20(a) applies to presume that the harm was caused by the work incident. *Hunter*, 227 F.3d 285, 34 BRBS 96(CRT); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *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).

Claimant contends the administrative law judge erred in crediting the testimony of his coworkers to find that a work accident did not occur. Specifically, he asserts their testimony is unreliable because it is inconsistent as to whether they discussed claimant's case among themselves prior to the hearing and because text messages establish that Mr. Verrett was aware claimant had neck pain at work. Contrary to claimant's assertion, the

[5] Claimant's contention that regularly lifting 80-pound bags of cement is a working condition that could have caused his injury represents a different theory of recovery than that raised before the administrative law judge. As claimant's claim for compensation, pre-trial statement, opening statement at the hearing, and post-hearing brief allege only that he was injured while lifting bags of concrete on January 20, 2015, we reject claimant's contention that the administrative law judge erred by failing to address a cumulative trauma theory of recovery. EX 13; Tr. at 26, 28-29; Cl. Post Hr. Br. at 5; *see U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001); *Brown v. Pacific Dry Dock*, 22 BRBS 284, 286 n.2 (1989). Moreover, as claimant may not advance a new theory of the case on appeal, we decline to address claimant's contention in the first instance. *Turk v. E. Shore R.R., Inc.*, 34 BRBS 27 (2000).

administrative law judge's findings, inferences, and credibility determinations are rational and supported by substantial evidence.

Mr. Verrett, Mr. Bergeron, and Mr. Gaston each testified that claimant did not complain about a work injury on January 20, 2015, or anytime thereafter. They also stated they never saw claimant have trouble, or need help, performing his job. Tr. at 134-138, 158-161, 171-174. Mr. Boudreaux similarly testified that claimant worked the entire job with no reduction in hours or duties and that claimant did not inform him of a work injury or neck pain while the job was ongoing.[6] *Id.* at 207-211. Further, claimant's text messages show that, while Mr. Verrett was aware claimant complained of neck pain due to his welding shield, Mr. Verrett stated that claimant did not mention his neck cracking while lifting a bag of cement. CX 8.

The administrative law judge found claimant's description of the alleged work incident uncorroborated and unanimously contradicted by each of his coworkers and his supervisor, all of whom the administrative law judge found to be more credible than claimant. Although the administrative law judge found that there may have been some "minor inconsistencies" in the testimony of claimant's coworkers and supervisor regarding whether they had discussed claimant's case among themselves, he rejected claimant's assertion that this was "nefarious" and found their appearance on the witness stand and demeanor to be more credible than that of claimant. Decision and Order at 16. Additionally, the administrative law judge found claimant's account of events undermined by his purchasing a heavier welding shield,[7] requesting days off between projects to repaint his kitchen, sending text messages that first mention an injury only after he retained counsel, and volunteering, on February 17, 2015, to work on a new project in Alabama. *Id.*; EX 21 at 20.

It is well established that an administrative law judge has considerable discretion in evaluating and weighing the evidence of record and may draw inferences therefrom. *See Hunter*, 227 F.3d 285, 34 BRBS 96(CRT); *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). The administrative law judge's credibility determinations must be affirmed unless they are inherently incredible or patently

[6] Mr. Boudreaux testified that claimant first informed him of a neck injury on Wednesday, February 18, 2015. Tr. at 217. He related that he had received text messages from claimant on various subjects between January 27 and February 17, 2015, but that claimant did not mention an injury. *Id.* at 217-218; EX 4 at 13-14.

[7] Mr. Boudreaux testified that he was with claimant when he purchased a new welding shield and it weighed two ounces more than the old one. Tr. at 232.

unreasonable. *Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22(CRT) (5th Cir. 1994); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). The Board is not empowered to reweigh the evidence and may not disregard the administrative law judge's findings on the ground that other inferences also could have been drawn from the evidence. *See James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000); *Presley v. Tinsley Maint. Serv.*, 529 F.2d 433, 3 BRBS 398 (5th Cir. 1976).

Claimant has not established error in the administrative law judge's credibility determinations. The credited evidence establishes that claimant's allegations were not only uncorroborated but were directly contradicted. Consequently, the administrative law judge rationally found claimant failed to establish that an incident occurred as alleged on January 20, 2015. *Bis Salamis, Inc.*, 819 F.3d at 129-130 50 BRBS at 37-38(CRT); *Lennon*, 20 F.3d 658, 28 BRBS 22(CRT). As claimant failed to establish an essential element of his prima facie case, the Section 20(a) presumption does not apply. *Bis Salamis, Inc.*, 819 F.3d at 129-130 50 BRBS at 37-38(CRT); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 27(CRT) (9th Cir. 1988); *Bolden*, 30 BRBS 71. Consequently, we affirm the denial of benefits.

Accordingly, the administrative law judge's Decision and Order is affirmed.[8]

SO ORDERED.

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[8] We reject claimant's assertion that the administrative law judge erred in failing to address the coverage issue in this case. Resolution of this issue was not necessary, as the administrative law judge permissibly denied benefits on the merits. Moreover, claimant has not established that the administrative law judge abused his discretion in denying claimant's motion for reconsideration. *Duran v. Interport Maint. Corp.*, 27 BRBS 8 (1993).

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