U.S. Department of Labor

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

BRB No. 19-0306

MICHAEL J. OSTEN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 12/17/2019
ELECTRIC BOAT CORPORATION	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Medical Benefits of Jerry R. DeMaio, Administrative Law Judge, United States Department of Labor.

Carolyn P. Kelly (Suisman, Shapiro, Wool, Brennan, Gray & Greenberg, P.C.), New London, Connecticut, for claimant.

Robert J. Quigley, Jr. (McKenney, Quigley & Clarkin, LLP), Providence, Rhode Island, for self-insured employer.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and GRESH, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Medical Benefits (2018-LHC-00112 and 2018-LHC-00354) of Administrative Law Judge Jerry R. DeMaio 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).

This case arises out of a claim for medical benefits for the back surgery claimant's physician recommended. Claimant has worked for employer since 1989 and sustained numerous back injuries.[1] Tr. at 17. The parties dispute whether the recommended back surgery is related to his work injuries.

Claimant suffered his first work injury in 1992 when he was moving a support beam and a rope slipped, causing the beam to fall onto his back. Tr. at 19. He was out of work for a week and then returned to work with no physical restrictions. Tr. at 19-21; CX 2. No diagnostic tests were performed.

In October 1995, claimant suffered another injury while installing gear boxes when one weighing approximately 75 to 125 pounds slipped and landed on his back. Tr. at 22-23. He was diagnosed with chronic stable lumbar back pain but again returned to work without restrictions. CX 6. An x-ray of his back was normal. CX 4. Dr. Thompson stated on January 5, 1996, that claimant was not a surgical candidate. CX 7.

Claimant suffered another work injury in 2002 when he was trying to move a cargo module and felt his back "crunch." Tr. at 22-23. An MRI showed moderate degenerative disease, including a bulging disc at the L4-L5 level and more advanced degenerative changes at the L5-S1 level. CX 9. There was no radiculopathy. CX 10 at 1-3. Claimant was not given work restrictions, but was prescribed medication and an exercise regimen. In April 2003, Dr. Pasha stated claimant was not a surgical candidate. *Id.* at 9. In May 2003, employer's physician, Dr. Willetts, examined claimant and reviewed his medical records. Dr. Willetts stated claimant had a nine percent spine impairment apportioned to seven percent pre-existing the 1995 injury, one percent due to the 1995 injury, and one percent due to the 2002 injury.

Claimant experienced back pain in 2005 when he bent over to reach a pump at work. CX 12. X-rays showed moderate chronic degenerative changes to the L5-S1 level and bone spur formation. *Id.* Claimant's condition improved with medication and exercise. A 2008 MRI showed degenerative disease at the L4-L5 and L5-S1 levels, as well as disc desiccation, a large right herniation at the L5-S1 level, and a small central herniation at the L4-L5 level. CX 13. An EMG showed acute L5 radiculopathy. CX 14 at 1.

Claimant suffered another work injury in 2009 when he slipped and fell on ice, resulting in pain in his lower back and legs. CXs 17, 18. After a few days off, he returned to work with no restrictions on February 6, 2009, CX 19, but returned for a follow-up

[1] Claimant's employment was continuous except for a period from June 1997 through January 1999 when he was laid off. Tr. at 17.

medical visit because of recurring lower back pain. CX 20. An MRI performed on July 15, 2009, showed a small disc extrusion at the L3-L4 level, a small left extrusion at the L4-L5 level, and severe disc space narrowing at the L5-S1 level. CX 21. A 2014 MRI, x-ray, and EMG were consistent with prior tests showing advanced degenerative disease and radiculopathy. CX 22. Claimant was treated with steroid injections. A March 2015 MRI showed collapsed disc space with protrusion at the L5-S1 level. Claimant declined surgery at that time. CX 24.

Claimant started working as a mechanical inspector on October 15, 2015; he testified he applied for this job in part because it required less heavy physical labor and less time working aboard vessels. Tr. at 28-29, 39. He suffered his most recent work injury on August 23, 2016, when he fell from a ladder while climbing out of a tank on a vessel, hitting his head, slipping and falling backwards. *Id.* at 25. Afterwards, he had head lacerations and felt dizzy. On leaving the vessel, he climbed another ladder but got dizzy and fell again. He was hospitalized and diagnosed with a concussion, a left knee sprain, a right knee sprain, and a lumbar sprain. CX 32 at 3. A CT scan of his spine showed severe disc space narrowing with vacuum change at the L5-S1 level but no acute injury. CX 27 at 7. He received temporary total disability benefits from August 24 to October 23, 2016. CX 34 at 4. Claimant underwent an MRI in September 2016, which showed mild progression of the degenerative changes since 2011. CX 35. After suffering more headaches and reduced concentration, claimant was taken off work again from December 19, 2016 through April 26, 2017, receiving temporary total disability for that period. CX 34. Claimant thereafter returned to work without restrictions.

On May 15, 2017, claimant was referred to Dr. Halperin, an orthopedic surgeon. Dr. Halperin ordered an MRI that he read as showing advanced spondylitic changes at the L4-L5 and L5-S1 levels with disc desiccation at both levels and a mild bulge at the L3-L4 level. CX 40. Dr. Halperin opined that claimant's injury on August 23, 2016 aggravated his pre-existing lumbar spondylosis to the point of requiring decompression fusion surgery at the L4-L5 and L5-S1 levels. *Id.* at 3.

The parties disputed whether claimant's current back condition and the recommended surgery are related to his work injuries.[2] The administrative law judge found claimant established a prima facie case and invoked the Section 20(a) presumption based on his back pain and Dr. Halperin's opinion that the August 2016 work injury aggravated his pre-existing condition and necessitated surgery. Decision and Order at 9. The administrative law judge noted claimant's concession that employer rebutted the Section

[2] The administrative law judge noted that the parties do not dispute that the surgery is appropriate for claimant's back condition. Decision and Order at 8.

20(a) presumption through the opinions of its experts, Drs. Morgan and Palumbo, who opined that claimant's 2016 injury and his other work injuries did not cause or aggravate the conditions that require the surgery. *See id.* at 10. On weighing the evidence as a whole, the administrative law judge gave the opinions of Drs. Morgan and Palumbo significant weight because he found them to be well-reasoned, well-documented, and supported by the diagnostic testing. He found the records show a progression of claimant's degenerative disease that preexisted his 2016 work injury. *See id.* at 11. He gave less weight to Dr. Halperin's opinion because it "changed," *see infra*, and Dr. Halperin was not given an opportunity to explain his opinion. *See id.* at 12. The administrative law judge concluded that the preponderance of the evidence does not establish claimant's condition is work-related and therefore denied the claim for medical benefits.

Claimant appeals the administrative law judge's decision. Employer filed a response brief, urging affirmance.

Under Section 7(a) of the Act, 33 U.S.C. §907(a), employer is liable for reasonable and necessary medical care for the claimant's work-related injury. The work-relatedness of an injury is assessed pursuant to Section 20(a) of the Act, 33 U.S.C. §920(a). Where, as here, claimant has established a prima facie case that he suffered a harm and that an accident occurred or working conditions existed which could have caused the harm, the Section 20(a) presumption applies to link the harm with claimant's work. *American Stevedoring Ltd. v. Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001). The burden then shifts to employer to rebut the presumption by producing substantial evidence that the injury was not caused or aggravated by claimant's employment. *Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008). Once the presumption is rebutted, it falls from the case and the issue of causation must be resolved on the evidence of the record as a whole. *See id.*, 517 F.3d at 634, 42 BRBS at 12(CRT).

We reject claimant's contention that the administrative law judge erred in finding that employer rebutted the Section 20(a) presumption. Claimant conceded before the administrative law judge that the presumption was rebutted and he may not contest the issue now.[3] *See* Decision and Order at 9-10 (citing Cl. Br. at 21). Because the issue of rebuttal is forfeited due to claimant's concession before the administrative law judge, we will not address it on appeal. *See Turk v. Eastern Shore Railroad Inc.*, 34 BRBS 27 (2000).

[3] Claimant's brief before the administrative law judge stated "[t]hese opinions [of Drs. Morgan and Palumbo] probably represent substantial evidence rebutting the presumption of causation." Cl. Post-Hearing Br. at 21. In his brief to the Board, claimant acknowledges his concession but states that "after analyzing the [administrative law judge's] Decision and Order" he now considers the concession "erroneous." Cl. Br. at 10.

We therefore affirm the administrative law judge's finding that employer rebutted the Section 20(a) presumption.

In challenging the administrative law judge's findings on the weight of the evidence as a whole, claimant contends the administrative law judge erred in analyzing the claim primarily as one of traumatic injury in 2016 and not addressing the claims of repetitive trauma and aggravation. Claimant also avers it is sufficient if a work injury causes a condition to become symptomatic even if there is no change in the underlying physiology. Finally, claimant contends the degenerative disc disease "derives in part from past work injuries." Cl. Br. at 14.

The administrative law judge credited the opinions of Drs. Morgan and Palumbo that degenerative disease necessitated claimant's surgery, finding the MRI and EMG results over the years supported their conclusions. Decision and Order at 11. He noted Dr. Halperin's first recommendation for surgery did not mention the 2016 injury as the catalyst for the surgery. When Dr. Halperin did tie the surgery to the last work incident, the administrative law judge found he gave no reason for this opinion, nor was he deposed to provide one. *Id.* at 12. The administrative law judge emphasized that Dr. Halperin's note linking claimant's surgery to his work injury mentioned a recent X-ray but did not include any discussion of the X-ray results that might be attributable to the work injury. *See id.* The administrative law judge also relied on the absence of physical changes in the objective tests after the last incident. *Id.* at 13. Finally, he stated the evidence is not apportioned between pain from degeneration and pain from injury. *Id.* He therefore denied the claim for medical benefits.

We agree with claimant that the administrative law judge's decision cannot be affirmed. The administrative law judge focused only on the effect of claimant's 2016 work injury on his back condition. He did not, however, fully consider all the theories claimant asserted in his claim, including repetitive trauma and whether claimant's degenerative disc disease was aggravated by or due to the progression of his earlier work injuries. There is conflicting evidence in the record on the issue of whether claimant's back condition which now requires surgery is due at least in part to repetitive trauma or the cumulative effects of his work injuries. Therefore, we remand the case for further findings of fact. *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982).

The evidence indicates claimant did not suffer any back pain prior to his first work accident in 1992. *See* CX 7 at 1 (Dr. Thompson's January 1996 report stating that claimant's recurrent back pain started in 1992 with his first work accident); CX 10 at 1 (Dr. Pasha stating that claimant's chronic lower back pain started after his work injury); CX 11 at 2 (Dr. Willets noting that claimant stated he had no back problems prior to his 1992 work injury). In 2002, Dr. Pasha stated he offered to refer claimant to a spine surgeon for a

surgical option but claimant was reluctant to consider surgery at the time. CX 10 at 3. In 2003, Dr. Pasha stated claimant's lumbar spine impairment stemmed from his 1994 and 1995 injuries at work and that he believed claimant could be a surgical candidate in the future. CX 10 at 9. In 2009, after claimant fell on ice at work, CX 17, he testified Dr. Pasha first recommended surgery, which claimant decided not to undergo because "[he] was scared." EX 1 at 15. In 2015, Dr. Pasha stated he would "hold off on any surgical recommendations" but indicated it might become necessary as claimant had already undergone five steroid injections without lasting effect. CX 24. Dr. Halperin first indicated claimant could be a surgical candidate in 2015 but Dr. Halperin did not actually recommend surgery at that time and Dr. Abella noted claimant was reluctant to undergo surgery. CX 24 at 1-2. The administrative law judge found claimant's medical records show a long history of progressing degenerative disease prior to his 2016 injury. Decision and Order at 11-12.

On the other hand, Dr. Morgan ascribed claimant's degenerative condition to "genetic predisposition," EX 5 at 11, and not "wear and tear." *Id.* at 14. When asked whether claimant's prior work injuries caused, contributed to, aggravated, or accelerated claimant's back condition, he denied it, stating the surgery is necessitated solely by the progression of claimant's degenerative disc disease. EX 5 at 10-11. Dr. Palumbo agreed that claimant's prior work injuries did not aggravate claimant's preexisting back condition to make surgery necessary. EX 8 at 7. He stated claimant's degenerative condition is due to his age. EX 8 at 5 (p.17). He opined the repetitive soft tissue injuries claimant experienced do not cause degeneration. *Id.* at 10 (p.36). He also suggested claimant had a genetic predisposition to degeneration. *Id.* at 8 (p.26).

Because the administrative law judge did not consider all theories claimant raised, the case must be remanded for the administrative law judge to weigh the evidence as a whole and determine whether claimant's back surgery is related to his work injuries. On remand, the administrative law judge is directed to consider the aggravation rule, which provides that an employer is liable for the entire resultant disability if a work injury aggravates or combines with a pre-existing condition (work-related or not). *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966). Moreover, it is sufficient if claimant's employment activities made his existing condition symptomatic. The underlying condition does not have to be physically worsened. *See Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981); *Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011). In this respect, the administrative law judge erred in denying the claim because he could not apportion between pain from the degeneration and pain from the injury. The work injury need be only "a cause" of the need for surgery, not the only cause. *Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 33 BRBS 65(CRT) (5th Cir. 1999). If the work injuries caused pain, and pain is a reason for the surgery, then the surgery is related to the work injuries. *Id.*

In addition, employer remains liable for the natural progression of a work-related injury, unless the condition is worsened by an intervening cause. *Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000) (employer liable for later "onset of complications" from the work injury); *Alexander v. Ryan-Walsh Stevedoring Co.*, 23 BRBS 185 (1990), *vacated and remanded on other grounds mem.*, 927 F.2d 599 (5th Cir. 1991) (employer liable for benefits for claimant's carpal tunnel syndrome regardless of whether it was result of natural progression of earlier injury or work-related aggravation as it was claimant's employer at all relevant times). If the cumulative effect of all of claimant's work injuries exacerbated or otherwise contributed to the degenerative condition that now requires surgery, then employer is liable for the surgery. Because the administrative law judge did not consider all theories claimant raised, we vacate the administrative law judge's finding that claimant did not establish that his back condition requiring surgery is work-related and remand for the administrative law judge to weigh the evidence as a whole in light of the applicable law. *See Myshka v. Electric Boat Corp.*, 48 BRBS 79 (2015).

Accordingly, the administrative law judge's finding that employer rebutted the Section 20(a) presumption is affirmed. The administrative law judge's denial of medical benefits is vacated and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge