U.S. Department of Labor

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

BRB Nos. 13-0374
and 14-0183

EVERETT WATSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
FLUOR DANIEL CORPORATION	)	DATE ISSUED: Feb. 25, 2015
	)	
and	)	
	)	
THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeals of the Decision and Order and the Order Granting Employer's Show Cause Order and Dismissing Claimant's Request for Modification of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Everett Watson, Dallas, Texas, *pro se.*

John Schouest, Limor Ben-Maier and Nour Shatleh (Kelley, Kronenberg), Houston, Texas, for employer/carrier.

Before: HALL, Acting Chief Administrative Appeals Judge, McGRANERY and BUZZARD, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order and the Order Granting Employer's Show Cause Order and Dismissing Claimant's Request for Modification (2013-LDA-00614) of Administrative Law Judge Clement J. Kennington rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). In an appeal by a claimant without representation by counsel, the Board will review the administrative law judge's findings

of fact and conclusions of law to determine if they are rational, supported by substantial evidence, and in accordance with law. If they are, they must be affirmed. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant had been diagnosed with multiple heart-related conditions[1] prior to commencing employment with KBR as an electrician in August 2009. Claimant was first assigned to Baghdad, Iraq, where he worked as an electrician at about 10 bases. *See* Decision and Order at 2. From Baghdad, claimant was assigned to Bagram Airfield, and then was transferred to Camp Goshta, Afghanistan. On January 23, 2010, Fluor Daniel Corporation (hereinafter employer) assumed the contract previously held by KBR. In April 2010, employer required that claimant undergo a physical examination prior to his leaving on scheduled rest and relaxation leave. That examination revealed that claimant had elevated blood pressure, an abnormal EKG, and an abnormal chest x-ray. Employer therefore returned claimant to the United States for further medical evaluation and to obtain clearance to return to work. On June 13, 2010, claimant underwent a cardiac ablation and, on July 9, 2011, he had a pacemaker implanted. He has not returned to work for employer. Claimant filed a claim under the Act, alleging that his cardiac conditions were worsened by his employment in Afghanistan.

In his Decision and Order, the administrative law judge determined that, as claimant's medical conditions were the same before and after his employment with employer, claimant failed to establish his prima facie case. Alternatively, assuming claimant had established a prima facie case, the administrative law judge found that employer rebutted the Section 20(a), 33 U.S.C. §920(a), presumption and that, based on the record as a whole, the administrative law judge determined that claimant's cardiac conditions are not causally related to his employment with employer. Accordingly, the administrative law judge denied the claim for benefits.

Claimant, without the assistance of counsel, appealed the administrative law judge's denial of his claim.[2] BRB No. 13-0374. Claimant subsequently advised the Board that he wished to seek modification of the denial of his claim. By Order dated November 14, 2013, the Board dismissed claimant's appeal, and remanded the case for modification proceedings. Following employer's filing of a motion for summary

[1] In the 1970's, claimant was diagnosed with an asymptomatic atrial flutter. In 2004, claimant was diagnosed with, inter alia, high systolic hypertension, mild atrial flutter, dilated left atrium, and a thickening of the mitral value. *See* EX 4. In 2008, claimant was diagnosed with an atrial flutter and acute myocardial infarction. *See* EX 26.

[2] Claimant had been represented by counsel in the proceedings before the administrative law judge.

decision, the administrative law judge issued a show cause order requesting that Claimant provide evidence of a change in condition or mistake of fact since the issuance of the May 21, 2013 Decision and Order. Claimant responded to the administrative law judge's order with a letter, supported by documentation, which alleged eight specific mistakes in fact in the administrative law judge's initial decision. Employer responded to claimant's letter, and claimant replied to employer's rebuttal brief. In his order denying claimant's motion for modification, the administrative law judge addressed each of claimant's eight contentions and found that claimant's assertions of error and new evidence did not establish that there had been a mistake in fact in his initial evaluation of the evidence of record.

Claimant, without the benefit of counsel, appeals the administrative law judge's Order Granting Employer's Show Cause Order and Dismissing Claimant's Request for Modification. BRB No. 14-0183. Claimant additionally sought reinstatement of his prior appeal, BRB No. 13-0374. In an Order dated May 9, 2014, the Board reinstated claimant's appeal of the administrative law judge's Decision and Order, BRB No. 13-0374, and consolidated it with BRB No. 14-0183 for purposes of decision. Employer responds to claimant's appeals, urging affirmance, and claimant has filed a letter in reply to employer's response brief.

We first address claimant's challenge to the sole issue addressed by the administrative law judge in his initial Decision and Order, i.e., the finding that claimant did not establish a causal relationship between his cardiac conditions and his employment with employer. Claimant bears the burden of proving the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused the harm in order to establish a prima facie case; if claimant establishes these two elements of his prima facie case, the Section 20(a) presumption links his condition to his employment. *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000);[3] *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* 33 U.S.C. §920(a); *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). The burden then shifts to employer to rebut the presumed causal connection with substantial evidence that claimant's conditions were not caused or aggravated by his work injury. *See Ortco Contractors Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003); *Hunter*, 227 F.3d 285, 34 BRBS 96(CRT); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS

[3] As the district director in the Houston office filed and served the administrative law judge's decisions, Fifth Circuit law applies in this case. 42 U.S.C. §1651(b); *Service Employees Int'l, Inc. v. Director, OWCP*, 595 F.3d 447, 44 BRBS 1(CRT) (2d Cir. 2010); *McDonald v. Aecom Technology Corp.*, 45 BRBS 45 (2011).

187(CRT) (5th Cir. 1999). In order to rebut the presumption, employer need not "prove the deficiency" in claimant's prima facie case; rather, "all it must do is advance evidence to throw factual doubt on the prima facie case." *Ceres Gulf, Inc. v. Director, OWCP* [*Plaisance*], 683 F.3d 225, 231, 46 BRBS 25, 29(CRT) (5th Cir. 2012). If employer rebuts the Section 20(a) presumption, the administrative law judge must weigh all of the relevant evidence and resolve the causation issue based on the record as a whole, with claimant bearing the burden of persuasion. *See Plaisance*, 683 F.3d at 229, 46 BRBS at 29(CRT); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

In his decision, the administrative law judge initially found that claimant did not establish his prima facie case; the administrative law judge, however, proceeded to address the evidence of record with the assumption that claimant had in fact established invocation of the Section 20(a) presumption.[4] The administrative law judge found that employer rebutted the Section 20(a) presumption based upon the credible reports of Drs. Meissner and Fyfe, both of whom opined that claimant's cardiac conditions are unrelated to his employment with employer. As these opinions constitute substantial evidence of the absence of a causal link between claimant's cardiac conditions and his employment with employer, we affirm the administrative law judge's finding that the Section 20(a) presumption is rebutted. *See Plaisance*, 683 F.3d at 231, 46 BRBS at 29(CRT); *Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000).

On the record as a whole, the administrative law judge implicitly credited the opinions of Drs. Meissner and Fyfe over that of Dr. Chen, and concluded that claimant did not meet his burden of establishing that his cardiac conditions are related to his employment with employer. Decision and Order at 6-8. Specifically, in discussing the evidence, the administrative law judge found claimant's testimony to be evasive and unsupported by the record, and he consequently rejected claimant's description of the working conditions he experienced in Afghanistan. The administrative law judge also found that Dr. Chen, who opined that claimant's cardiomyopathy was exacerbated by the stress of his work for employer, relied solely on claimant's statements and did not review claimant's prior medical history, while, in contrast, Drs. Meissner and Fyfe, who have extensive backgrounds in cardiology, were more familiar with claimant's medical history. The administrative law judge found that Dr. Meissner opined that claimant had developed a bradycardia-dependent cardiomyopathy due to "untreated sick sinus syndrome (Persistent Atrial Flutter with high grade AV block)" which was not related to any

[4] The administrative law judge stated that claimant failed to establish a prima facie case because claimant did not show that his work for employer aggravated his pre-existing heart condition. Decision and Order at 9.

physical or mental stressors of employment.[5] Decision and Order at 4. Dr. Fyfe similarly opined that claimant had an asymptomatic irregular heartbeat and an atrial flutter, but that no evidence was present relating claimant's cardiomyopathy to his employment with employer. *Id*. at 5. Based upon a review of claimant's medical records, the doctor opined that "nothing significant has changed since 2004." *Id*.; *see* EX 35 at 5. It is well established that an administrative law judge is entitled to weigh the medical evidence and draw his own inferences therefrom. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). In this case, the administrative law judge provided a rational reason for crediting the opinions of Drs. Meissner and Fyfe, and this credited evidence is substantial and sufficient to establish that claimant's cardiac conditions are unrelated to his employment with employer. Therefore, we affirm the administrative law judge's conclusion, in his initial decision, that claimant did not establish that his cardiac conditions are related to his employment with employer. *Sistrunk*, 35 BRBS 171; *Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000); *Rochester v. Geo. Washington Univ.*, 30 BRBS 233 (1997).

We next address claimant's challenge to the administrative law judge's denial of his motion for modification. BRB No. 14-0183. In seeking modification of the denial of his claim, claimant, in response to the administrative law judge's January 7, 2014, show cause order, submitted a five-page single-spaced letter, supported by a thirty-seven page appendix, wherein he set forth eight specific mistakes in fact which, he asserted, were contained in the administrative law judge's initial decision. Employer responded to claimant's letter and claimant, in reply, filed a second letter with supporting documentation. In his February 12, 2014, Order addressing his show cause order and claimant's request for modification, the administrative law judge considered at length each of claimant's asserted mistakes in fact, and found that claimant did not demonstrate that his initial decision was based on a mistake in fact. Consequently, the administrative law judge denied claimant's request for modification.

Section 22 of the Act provides the only means for changing otherwise final decisions. Modification pursuant to Section 22 is permitted if the petitioning party demonstrates a mistake in a determination of fact, *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459 (1968), or a change in the claimant's physical or economic condition, *Metropolitan Stevedore Co. v. Rambo* [*Rambo I*], 515 U.S. 291, 30 BRBS 1(CRT) (1995). The party requesting modification bears the burden of showing that the claim comes within the scope of Section 22. *See*, *e.g.*, *Metropolitan Stevedore Co. v. Rambo* [*Rambo II*], 521 U.S. 121, 31 BRBS 54(CRT) (1997); *Vasquez v. Continental*

[5] Sick sinus syndrome is a medical term encompassing a group of heart rhythm disorders including sinus bradycardia, sinus pauses, or sinus arrest. A.D.A.M. Medical Encyclopedia.

Maritime of San Francisco, Inc., 23 BRBS 428 (1990). Under Section 22, the administrative law judge has broad discretion to correct mistakes of fact "whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *see also Banks*, 390 U.S. 459.

Claimant, in support of his appeal, avers that he was given an insufficient amount of time to prepare for his modification hearing and that the administrative law judge erred in not considering his request for modification and the evidence in support thereof. On December 11, 2013, the administrative law judge issued a Notice of Hearing and Pre-Hearing Order wherein a formal hearing was scheduled for February 7, 2014, and the parties were directed to, inter alia, conclude all discovery and exchange exhibits and witness lists no later than thirty days prior to the hearing. On January 7, 2014, the date on which discovery was to have concluded, the administrative law judge issued a show cause order granting claimant an additional ten days to provide evidence in support of his request for modification.[6] Claimant responded to the administrative law judge's order with a five-page single spaced letter alleging eight specific contentions of error in the administrative law judge's initial decision, accompanied by thirty-seven pages of supporting documents; after employer replied thereto, claimant sent to the administrative law judge a second letter consisting of seventeen pages with documentation. Thus, contrary to claimant's contentions on appeal, claimant was allowed an additional ten days beyond the discovery period in which to present evidence in support of his modification request and, within this period, claimant did submit evidence to the administrative law judge. Claimant has failed to show that the administrative law judge abused his discretion in denying a further extension for submission of evidence. *See, e.g., Olsen v. Triple A Machine Shops, Inc.*, 25 BRBS 40 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP*, 996 F.2d 1226 (9th Cir. 1993).

In the administrative law judge's order addressing claimant's request for modification, he considered each of the mistakes in fact alleged by claimant. The administrative law judge addressed at length the eight contentions raised in claimant's petition for modification, as well as the additional contentions raised in claimant's reply letter. *See* Order at 4-9. Consequently, we reject claimant's assertion that the administrative law judge did not adequately address his request for modification.

[6] The administrative law judge's show cause order was in response to a Motion for Summary Decision filed by employer on December 11, 2013. While employer's motion was premature, in that the time for exchanging exhibits had yet to lapse, the administrative law judge did not abuse his discretion in issuing his show cause order thirty days before the scheduled hearing.

We additionally affirm the administrative law judge's finding that claimant did not establish a mistake in fact concerning the lack of a causal relationship between his cardiac conditions and his employment with employer. *See* Order at 2-9. The administrative law judge concluded that claimant was selectively interpreting his own medical history and ignoring the existence of his pre-existing cardiac conditions. As a result, the administrative law judge concluded that claimant presented no evidence or argument sufficient to overturn the administrative law judge's reliance on the opinion of Dr. Fyfe, or to warrant a change in his decision to not rely upon the opinion of Dr. Chen. These findings are rational and supported by substantial evidence; consequently, we affirm the administrative law judge's finding that claimant did not establish a basis for modification of the administrative law judge's denial of benefits in this case.

Accordingly, the administrative law judge's Decision and Order and Order Granting Employer's Show Cause Order and Dismissing Claimant's Request for Modification are affirmed.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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GREG J. BUZZARD
Administrative Appeals Judge