U.S. Department of Labor

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

BRB No. 18-0194

MARK MOSES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JOHN MEEK CONSTRUCTION COMPANY	)	DATE ISSUED: 02/12/2020
	)	
and	)	
	)	
SEABRIGHT INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of William J. King, Administrative Law Judge, United States Department of Labor.

Eric A. Dupree, Paul R. Myers and Paul A. Lazarr (Dupree Law), Coronado, California, for claimant.

Barry W. Ponticello and Renee C. St. Clair (England, Ponticello & St. Clair), San Diego, California, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2013-LHC-00879) of Administrative Law Judge William J. King 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 Connolly-Pacific Company (Connolly) as a pile driver from 1980 until he sustained work injuries to his right hand, right knee, and back in 1988. Tr. at 35-36. He returned to work for Connolly in 1993 as a warehouse foreman, as his work restrictions prevented his return to work as a pile driver. *Id*. at 40-41. When Connolly laid off claimant in November 2001, he obtained a job with employer as a yard foreman. *Id*. at 41-42. He last worked for employer on September 8, 2010. *Id*. at 34.

On September 10, 2010, claimant was involved in a non-work-related motor vehicle accident (MVA). Tr. at 102-103. As a result of the accident, he was diagnosed with bilateral wrist sprains, left knee contusion, aggravation of cervical stenosis, and a possible right patella fracture. *Id*. at 104; JX 19 at 668. He underwent a right knee arthroscopy in September 2011 and complained of back pain related to overcompensating for the right knee injury. JXs 21 at 1158, 1223-1266, 1277; 42 at 6085. In January 2012, claimant filed a claim alleging he sustained a work-related cumulative trauma injury to his back and knees while working for employer through September 8, 2010. JX 44. Employer controverted the claim.[1]

The administrative law judge found claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), that his bilateral knee and back conditions were aggravated over the course of his employment with employer, Decision and Order at 11-12, but determined the opinion of Dr. Dodge rebuts the presumption. *Id*. at 12-13. The administrative law judge concluded claimant did not establish a causal relationship between his work for employer and his knee and back conditions. *Id.* at 13. He found claimant's testimony is not credible and the expert opinions of Drs. Stark and Delman unpersuasive. *Id*. at 14-24. Thus, he denied the claim.

[1] Employer was insured by American Home Assurance Company and Commerce & Industry Insurance Company (AIG) from January 1, 2002 to January 1, 2009, and by Seabright Insurance Company (Seabright) from January 1, 2009 through January 1, 2012. JX 38. Both insurers were parties to the claim. After claimant filed his appeal, the Board granted AIG's request to remand the case to the district director to implement its settlement agreement with claimant. *Moses v. John Meek Constr. Co.*, BRB No. 18-0194 (Jul. 30, 2018) (Order). Subsequently, the Board granted claimant's request to reinstate his appeal against Seabright. *Moses v. John Meek Constr. Co.*, BRB No. 18-0194 (Apr. 25, 2019) (Order).

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 work-related injury to or aggravation of his knee and back conditions based on the record as a whole. Employer responds, urging affirmance.

Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence that the employee's injury was not caused, aggravated, or accelerated by the conditions of his employment. *See Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998). The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has held that an employer's burden on rebuttal is to produce "evidence specific and comprehensive enough to sever the potential connection between the disability and the work environment." *Ramey*, 134 F.3d at 959, 31 BRBS at 210(CRT) (internal citation omitted). The inquiry at rebuttal concerns "whether the employer submitted evidence that could satisfy a reasonable fact finder that the claimant's injury was not work-related." *Ogawa*, 608 F.3d at 651, 44 BRBS at 50(CRT). Thus, the employer's burden on rebuttal is one of production only. The weighing of conflicting evidence or of the credibility of evidence "has no proper place in determining whether [employer] met its burden of production." *Id.*

The administrative law judge relied on Dr. Dodge's opinion that claimant's back and knee disability are due to the 1988 work accident at Connolly as well as the 2010 MVA, and that any change in claimant's back and knee conditions in the interval between these incidents is due to natural aging and degenerative processes. Decision and Order at 13; JX 6 at 131, 200, 216. Dr. Dodge also stated that claimant did not sustain a cumulative trauma or specific injury while working for employer. JX 6 at 200. Dr. Dodge's opinion that no relationship exists between claimant's knee and back conditions and his employment is sufficient to rebut the Section 20(a) presumption. *Duhagon*, 169 F.3d at 618, 33 BRBS at 3(CRT); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). Such evidence "could satisfy a reasonable factfinder that the claimant's injury was not work-related." *Ogawa*, 608 F.3d at 651, 44 BRBS at 50(CRT). Contrary to claimant's contentions on appeal, the credibility of Dr. Dodge's opinion is not pertinent to the rebuttal inquiry. *Id.* Accordingly, we affirm the administrative law judge's finding that employer rebutted the Section 20(a) presumption as it is supported by substantial evidence.

Once the Section 20(a) presumption is rebutted, the administrative law judge must weigh all of the evidence relevant to the causation issue; claimant bears the burden of proving on the record as a whole that his injuries are work-related. *Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT); *Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT); *see also Director, OWCP*

v. Greenwich Collieries, 512 U.S. 267, 28 BRBS 43(CRT) (1994). Under the aggravation rule, when the employment injury aggravates, exacerbates or combines with a prior condition, the entire resulting disability is compensable. The relative contribution of the pre-existing condition and the aggravating injury are not weighed for purposes of this inquiry. *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966); *see also Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991). If a claimant sustains a subsequent injury outside of work, or while working for a non-covered employer, that is not the natural or unavoidable result of the original work injury, any disability attributable to that intervening cause is not compensable. *See J.T.* [*Tracy*] *v. Global Int'l Offshore, Ltd.,* 43 BRBS 92 (2009), *aff'd sub nom. Keller Found./Case Found. v. Tracy*, 696 F.3d 835, 46 BRBS 69(CRT) (9th Cir. 2012), *cert. denied*, 570 U.S. 904 (2013); *Wright v. Connolly-Pacific Co.*, 25 BRBS 161 (1991), *aff'd mem. sub nom. Wright v. Director, OWCP*, 8 F.3d 34 (9th Cir. 1993); *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991).

The administrative law judge summarized the medical evidence from the period claimant worked for employer from 2001 to 2010 and his job duties there. He found it establishes claimant sustained a work-related left knee injury in June 2002 for which he underwent arthroscopic surgery and was released to return to work without restrictions.[2] Decision and Order at 9; JXs 50 at 6706.01-6706.19. The administrative law judge determined there is no evidence of additional left knee complaints or of any right knee complaints or treatment during this period. Decision and Order at 17.

With respect to claimant's back, the administrative law judge found a chiropractor treated claimant in 2004 and 2010, and that medical records refer to a 2009 office visit to Dr. Vu for back pain; an x-ray taken at that time found mild degenerative lumbar spine changes. Decision and Order at 10; JXs 6 at 119; 8 at 137; 10 at 270; 26 at 2163. The administrative law judge found, however, that there is no evidence claimant was seen for a work-related back injury or that he missed work or modified his work activity during this period. Decision and Order at 10-11. He determined claimant's work duties involved only occasional heavy work as a pile driver and crew member, and occasional medium and heavy work as a yard foreman. *Id*. at 11. Based on this evidence, he determined claimant fully performed his work duties before the MVA without evidence of complaint, medical treatment, or medically-recommended functional limitations. *Id*. at 10-11. The administrative law judge stated the post-MVA medical records address a right knee injury, and later include back complaints, and contain evidence of degenerative knee and low back

[2] In February 2003, claimant also sustained a work-related right thumb laceration with only temporary restrictions and was instructed to limit use of the hand and keep it clean and dry. Decision and Order at 10; JX 50 at 6706.21-6706.28.

conditions. *Id*. at 11.

In addressing the record evidence as a whole, the administrative law judge found claimant's testimony that he sustained work-related back and knee aggravations with employer not credible because it is internally inconsistent and unsupported by medical or employment records.[3] Decision and Order at 14. The administrative law judge noted claimant's deposition testimony in a civil case arising out of the September 2010 MVA that his right knee was "fine" until the MVA. *Id.* at 14; JX 17 at 565-566.

The administrative law judge also reviewed the medical opinions of Drs. Stark and Delman.[4] He stated each party retained a medical expert, there are no opinions from treating physicians, and each expert "interpreted their impression of the evidence in the light most favorable to their party, and each based his opinions on material misrepresentations of the evidence." Decision and Order at 17. Dr. Stark opined that claimant sustained a work-related cumulative trauma injury to his back and knees. JXs 8 at 238-239; 10 at 278-279. The administrative law judge found his opinion distinguishing degenerative conditions due to aging from those caused by cumulative trauma conclusory and his opinions "unreliable because they remained constant in the face of his ever-changing understanding of the facts." Decision and Order at 17. Specifically, claimant reported to Dr. Stark that his knee and back conditions progressed over the course of his employment with employer. *Id*. at 18; JX 8 at 135. The administrative law judge found this history inconsistent with the facts that claimant had just three episodes of back treatment while working for employer and that the contemporaneous records do not reflect any work-related condition, do not diagnose a deteriorating back condition, and do not impose work restrictions or otherwise recommend claimant modify his activity. Decision and Order at 19.

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[3] Specifically, claimant testified he reported work injuries to a supervisor or wrote that he did on his time card, but the records show only reports of the 2002 left knee injury and the 2003 thumb laceration. Decision and Order at 14; JX 33 at 2572, 2575; *see* n.2, *supra*.

[4] The administrative law judge stated that he need not discuss Dr. Dodge's deposition testimony in weighing the evidence as a whole because he offered no opinions in support of claimant's case. Accordingly, we need not address claimant's contention that Dr. Dodge's opinion is not substantial evidence, based on the record as a whole, that claimant did not establish a cumulative trauma work injury.

The administrative law judge found the basis for Dr. Stark's opinion also unsupported by the record. Decision and Order at 19. He determined Dr. Stark based his opinion on erroneous facts concerning the extent of claimant's work for employer as a pile driver and an erroneous belief that claimant's job was changed to yard foreman due to his low back deterioration. The administrative law judge found that claimant's usual work for employer was as a yard foreman and that he was able to perform this work until his MVA. *Id.*; *see* JXs 8 at 238-239; 43 at 6139 (p. 88), 6144 (p. 106), 6153 (p. 142). Moreover, he determined Dr. Stark's opinion is deficient because claimant stopped working and applied for disability benefits and retirement only after his MVA. The administrative law judge thus concluded Dr. Stark's opinion is more consistent with advocacy rather than medical expertise. Decision and Order at 21.

The administrative law judge found Dr. Delman's diagnoses entitled to "great weight." Decision and Order at 22. Dr. Delman diagnosed right knee osteoarthritis and a medial meniscus tear, left knee osteoarthritis, lumbosacral stenosis, degenerative disc disease and disc displacement. JX 57 at 9358 (p. 6). The administrative law judge determined Dr. Delman gave a "clear explanation" of general causation in cumulative trauma cases. Decision and Order at 22-23.

The administrative law judge found, however, Dr. Delman's opinion that cumulative trauma at work contributed to claimant's knee and back conditions relies on claimant's inaccurate testimony about his work duties.[5] Decision and Order at 23; JX 1 at 30-32. The administrative law judge determined there is no evidence claimant actually sustained a cumulative trauma injury based on Dr. Delman's admissions that: claimant could have experienced temporary symptoms that did not aggravate the underlying condition; he cannot say when claimant developed left knee osteoarthritis and there is no evidence of left knee arthritis before his MVA; he knows of no evidence of right knee disability prior to claimant's MVA and no evidence claimant's spinal condition changed while working for employer; there is no objective evidence claimant's work duties caused cumulative trauma; a reasonable conclusion is claimant's back condition is related to the normal progression of his 1988 injury at Connolly; and claimant became disabled because of his MVA. Decision and Order at 23; JX 57 at 9360 (p. 18), 9368-70 (p. 50-52, 57), 9372-74 (p. 62, 69-70). The administrative law judge found Dr. Delman's candor made him a credible witness, but his testimony did not meet claimant's burden of proof to

[5] The administrative law judge found claimant's testimony about the scope of his duties credible, but he found his testimony "unreliable" regarding the frequency and duration he performed his duties, which Dr. Delman stated were key factors linking work-related cumulative trauma to claimant's diagnoses. Decision and Order at 23; JX 57 at 9368 (p. 50-51).

establish he sustained work-related cumulative trauma. Decision and Order at 24. The administrative law judge instead gave "controlling weight" to Dr. Delman's testimony that there was a lack of objective evidence of work-related cumulative trauma. *Id*. Thus the administrative law judge concluded claimant did not prove he sustained a cumulative trauma injury due to his work for employer. *Id*.

In challenging the administrative law judge's finding that he did not establish work-related cumulative trauma to his knees and back based on the record as a whole, claimant avers the administrative law judge erred in requiring him to show "specific causation" and therefore declining to give weight to Dr. Delman's opinion. Claimant also contends the administrative law judge's treatment of Drs. Delman's and Stark's opinions on causation was arbitrary and irrational.

We reject claimant's contention that the administrative law judge erred by requiring that he prove "specific causation" of work-related cumulative trauma. It is claimant's burden to show on the record as a whole that his work duties with employer in fact caused a cumulative trauma injury that caused or contributed to his post-employment bilateral knee and back conditions because he is the proponent of this factual proposition.[6] *Greenwich Collieries,* 512 U.S. 267, 28 BRBS 43(CRT); *Del Vecchio v. Bowers,* 296 U.S. 280 (1935); *see also Ogawa*, 608 F.3d at 651, 44 BRBS at 50(CRT).

It is undisputed that claimant sustained injuries to his right knee and back at Connolly in 1988, and he subsequently sustained non-work-related injuries to his knees and back in 2010, after which he stopped working. The Ninth Circuit has stated it adheres to an administrative law judge's credibility determinations unless they "'conflict with the clear preponderance of the evidence, or where the determinations are inherently incredible or patently unreasonable.'" *Ogawa*, 608 F.3d at 648, 44 BRBS at 48(CRT) (quoting *Todd Pac. Shipyards Corp. v. Dir., OWCP*, 914 F.2d 1317, 1321 (9th Cir. 1990)). Moreover, the Board is not empowered to reweigh the evidence and must accept the rational inferences and findings of fact of the administrative law judge that are supported by the record. *See, e.g., Duhagon*, 169 F.3d at 618, 33 BRBS 2-3(CRT); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988). It is

[6] Claimant's reliance on the Board's statement in *Zaradnik v. The Dutra Group*, BRB Nos. 16-0128/A (Dec. 9, 2016) (unpub.), *aff'd on recon.* (Sept. 22, 2017) (en banc) (unpub.), that whether a condition was disabling during the period claimant worked for the employer is immaterial to the causation inquiry, is taken out of context. *Id.*, slip op. at 8 (Dec. 9, 2016). It is claimant's burden to establish a causal relationship between the injury and the work irrespective of when the disability is made manifest, whether while he is working or thereafter. *Zaradnik*, of course, is without binding effect in any event.

not "inherently incredible or patently unreasonable" for the administrative law judge to find claimant lacks credibility concerning the extent of his heavy labor duties for employer and to reject Dr. Stark's opinion for lacking a proper factual foundation. He reasonably relied on negative evidence showing claimant received minimal medical treatment during the period he worked for employer and that treatment was not ascribed to claimant's work, and on Dr. Delman's admission that there is no objective evidence of work-related cumulative trauma. Therefore, he permissibly concluded Drs. Delman's and Stark's opinions do not establish claimant sustained any work-related cumulative trauma injuries during his employment with employer. *Ogawa*, 608 F.3d at 648, 44 BRB at 48-49. We affirm the administrative law judge's conclusion that claimant did not establish a work-related cumulative trauma injury based on the record evidence as a whole, as it is supported by substantial evidence. *Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT)

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge