U.S. Department of Labor

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

BRB No. 15-0304

ROBERT DUNBAR	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ATLANTIC SOUNDING COMPANY, INCORPORATED	)	DATE ISSUED: Jan. 13, 2016
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Dana Rosen, Administrative Law Judge, United States Department of Labor.

John H. Klein (Montagna Klein Camden, LLP), Norfolk, Virginia, for claimant.

Christopher J. Field (Field Womack & Kawczynski, LLC), South Amboy, New Jersey, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2014-LHC-01631) of Administrative Law Judge Dana Rosen rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq*. (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On December 30, 2010, claimant, while working for employer as a welder, rolled

over onto a spud well when a spark from his welding torch went into his right ear.[1] Tr. at 24 – 25. The area of claimant's body struck by the spud well was subsequently identified as claimant's rib cage or abdomen.[2] Claimant received treatment, was apparently placed on light-duty work for a period of time, and then returned to his usual employment duties with employer until he was laid off December 31, 2011.[3] *Id.* at 21 – 22, 26 – 27.

Claimant, who had previously been diagnosed with a hiatal hernia in 2002, sought treatment for anemia with his gastroenterologist, Dr. Ganderson, in 2012. In June 2013, claimant returned to Dr. Ganderson for follow-up care and complaints of abdominal pain. On June 7, 2013, Dr. Ganderson opined that claimant's hiatal hernia was related to the December 2010 work incident and, on February 19, 2014, Dr. Ganderson recommended that claimant undergo surgical repair of his hernia. CX 2w.

In her Decision and Order, the administrative law judge applied Section 20(a), 33 U.S.C. §920(a), to presume that claimant's hiatal hernia is related to his December 30, 2010, work incident. She found that employer did not rebut the Section 20(a) presumption. The administrative law judge further found, based on the record as a whole, that claimant's hiatal hernia is related to the work incident. After addressing the remaining issues disputed by the parties, the administrative law judge held employer liable for medical benefits related to claimant's hiatal hernia, as well as any temporary total disability benefits due if and when claimant undergoes the recommended surgery. 33 U.S.C. §§907; 908(b); *see* Decision and Order at 13 – 14.

On appeal, employer contends the administrative law judge erred in concluding that claimant suffered an abdominal trauma as a result of the December 30, 2010 work incident. Alternatively, employer contends the administrative law judge erred in determining it failed to present evidence sufficient to rebut the Section 20(a) presumption. Employer also contends the evidence as a whole establishes that claimant's

[1] Claimant described a spud well as a pipe that passes through the side of a barge. A long pipe, called a spud, passes through the spud well to hold the barge in place. Tr. at 23 – 24.

[2] The accident report filled out by claimant on December 30, 2010, described an injury to his left rib cage. EX 1. Claimant's initial LS-203 Claim for Compensation, dated June 27, 2013, indicated claimant injured his stomach. JX 2. Claimant's second LS-203, dated November 12, 2013, stated that the December 30, 2010, work incident resulted in abdominal trauma. JX 3.

[3] Claimant, as a result of this work incident, lost no time from work and employer paid for claimant's medical care. EX 2; Tr. at 26 – 27.

hiatal hernia is not related to the December 30, 2010, work incident.[4] Claimant responds, urging affirmance of the administrative law judge's decision.

In order to be entitled to the benefit of the Section 20(a) presumption, claimant must establish a prima facie case by showing that he sustained a harm and that an accident occurred or working conditions existed which could have caused or aggravated the harm. *See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996). Once claimant has established his prima facie case, Section 20(a) links his harm to his employment. *See Holiday*, 591 F.3d 219, 43 BRBS 67(CRT); *see also Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000). In her Decision and Order, the administrative law judge invoked the Section 20(a) presumption based on her findings that claimant suffers from a harm, a hiatal hernia, and that the specific work incident on December 30, 2010 could have caused or aggravated that condition. Decision and Order at 9 – 10.

Employer first contends the administrative law judge erred in finding claimant sustained an abdominal trauma on December 30, 2010 which could have caused or aggravated his hiatal hernia; specifically, employer asserts that claimant initially reported an injury to his rib cage and only later changed the site of his trauma to comport with the 2013 medical opinion of Dr. Ganderson. In this case, it is undisputed that claimant, on December 30, 2010, fell and struck a spud well during the course of his employment with employer; the dispute between the parties involves the part of claimant's body injured in this fall. The administrative law judge addressed claimant's testimony regarding the area of his body which was struck by the spud well, *see* Tr. at 24 – 26, and the statements in his two LS-203 Claim for Compensation forms, *see* n. 1, supra, and concluded that claimant's testimony establishes that the spud well struck his rib cage and his abdomen. Decision and Order at 9, 11. Finding claimant's testimony credible and relying on Dr.

[4] In its appellate brief, employer summarily avers that the administrative law judge erred in concluding that claimant's claim was timely filed. *See* Emp. Br. at 12 n.7. We decline to address this issue as it has not been adequately briefed. *Montoya v. Navy Exch. Serv. Command*, 49 BRBS 51 (2015). Therefore, we affirm the administrative law judge's finding that the claim was timely filed. *See Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 24 BRBS 98(CRT) (4th Cir. 1991). Moreover, we note that the right to seek medical benefits is never time-barred. *See Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 43 BRBS 179 (2010), *aff'd*, 637 F.3d 280, 45 BRBS 9(CRT) (4th Cir.), *cert. denied*, 132 S.Ct. 757 (2011); *Alexander v. Avondale Industries, Inc.*, 36 BRBS 142 (2002).

Ganderson's opinion, the administrative law judge found that claimant established that the accident could have caused or facilitated his hiatal hernia. *Id.* It is well-established that the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw her own inferences and conclusions from the evidence. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 371 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). The administrative law judge's decision to credit claimant's testimony in this regard is neither inherently incredible nor patently unreasonable. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Thus, as it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant established the elements of his prima facie case, and the consequent application of Section 20(a) to presume that claimant's December 30, 2010 work incident caused or aggravated claimant's hiatal hernia. *See Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994); *Hunter*, 227 F.3d 285, 34 BRBS 96(CRT).

Upon invocation of the Section 20(a) presumption, the burden shifts to employer to rebut this presumed causal connection with substantial evidence that claimant's injury was not caused or aggravated by this incident at work. *See Holiday*, 591 F.3d 219, 43 BRBS 67(CRT). If the administrative law judge finds that the Section 20(a) presumption is rebutted, it no longer controls, and the issue of causation must be resolved on the evidence of record as a whole, with claimant bearing the burden of persuasion. *See Moore*, 126 F.3d 256, 31 BRBS 119(CRT).

Employer contends the opinion of Dr. Newman constitutes substantial evidence sufficient to rebut the Section 20(a) presumption. Additionally, employer asserts that the administrative law judge erred in relying on claimant's belated assertion of an abdominal injury and Dr. Ganderson's opinion in finding a casual relationship between the December 30, 2010 work incident and claimant's hiatal hernia.

We need not address employer's challenge to the administrative law judge's finding that employer did not rebut the Section 20(a) presumption because, assuming, arguendo, that Dr. Newman's opinion is sufficient to rebut the Section 20(a) presumption, the administrative law judge's conclusion that claimant's hiatal hernia is related to the December 30, 2010 work incident is supported by substantial evidence. Although the administrative law judge erroneously weighed the conflicting evidence in addressing whether employer rebutted the Section 20(a) presumption, this error is harmless in this case, as she subsequently found, based on the medical evidence as a whole, that claimant's hiatal hernia was facilitated or aggravated by the December 30,

2011, work incident.[5] *See, e.g.*, *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999).

In this regard, Dr. Newman reviewed claimant's records and opined that the December 30, 2010, work incident neither caused nor aggravated claimant's hernia. Dr. Newman determined that claimant's 2011 medical records reflected a resolution of his prior symptoms without an associated rib cage fracture, abdominal trauma, or penetrating abdominal wound. *See* EX 7. The administrative law judge gave Dr. Newman's opinion little weight because Dr. Newman is a pulmonologist who does not treat hernia patients and his opinion relied upon a treatise referencing hernias related to gunshot wounds, fractured ribs or a ruptured spleen, situations not present in this case. The administrative law judge further stated that Dr. Newman did not examine claimant, and that his testimony failed to address additional causes of hernias or events that could aggravate or facilitate a hernia. *See* Decision and Order at 7 – 8, 10 – 11. In contrast, the administrative law judge gave greater weight to the opinion of Dr. Ganderson, who opined that claimant's hiatal hernia was facilitated, and possibly caused, by the trauma he

[5] Upon finding that the claimant established a prima face case and invoked the Section 20(a) presumption, the administrative law judge should proceed to determine whether employer has rebutted the Section 20(a) presumption with "substantial evidence to the contrary." *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1998) (*en banc*), *cert. denied*, 528 U.S. 1187 (2000); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). In this regard, employer's burden is merely to *produce* substantial evidence of the absence of a causal relationship between claimant's condition and his employment. The weighing of conflicting evidence or of the credibility of evidence "has no proper place in determining whether [employer] met its burden of production." *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 651, 44 BRBS 47, 50(CRT) (9th Cir. 2010). "Instead, at the second step the ALJ's task is to decide, as a legal matter, whether the employer submitted evidence that could satisfy a reasonable factfinder that the claimant's injury was not work-related." *Id.*; *see also Bath Iron Works Corp. v. Fields*, 599 F.3d 47, 44 BRBS 13(CRT) (1st Cir. 2010) (the determination of whether employer produced substantial evidence is a legal judgment not dependent on credibility). If employer produces substantial evidence rebutting the Section 20(a) presumption, the presumption drops from the case and it is at this point of analysis that the administrative law judge must weigh the relevant evidence and make credibility assessments in order to address the causation issue based on the record as a whole, an issue on which claimant bears the ultimate burden of persuasion. *Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 257, 28 BRBS 43(CRT) (1994).

experienced in the December 30, 2010, work incident. *See* CX 4a. The administrative law judge determined that Dr. Ganderson's opinion is entitled to significant weight because, as claimant's treating gastroenterologist, Dr. Ganderson had the benefit of examining claimant and noting the progression of his enlarging hiatal hernia. Decision and Order at 11.

Employer's contention that the opinion of Dr. Newman is entitled to dispositive weight when compared to the contrary opinion of Dr. Ganderson would require the Board to reweigh the evidence, which it is not empowered to do.[6] *See, e.g., Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). Moreover, as discussed, the administrative law judge was entitled to rely on claimant's testimony that his abdomen was injured in the fall at work. *Pittman Mechanical Contractors*, 35 F.3d 122, 28 BRBS 89(CRT). It is well-established that an administrative law judge has considerable discretion in evaluating and weighing the evidence of record and is not bound to accept the opinion or theory of any particular medical examiner. *See Newport News Shipbuilding & Dry Dock Co. v. Cherry*, 326 F.3d 449, 37 BRBS 7(CRT) (4th Cir. 2003); *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). The administrative law judge rationally credited the opinion of Dr. Ganderson, claimant's treating gastroenterologist, that claimant's hiatal hernia was caused or aggravated by the December 30, 2010 incident at work. Decision and Order at 10 – 12. Thus, we affirm the administrative law judge's conclusion that claimant's hiatal hernia is related to his December 30, 2010, work incident as it is supported by substantial evidence of record. *See Pittman Mechanical Contractors*, 35 F.3d 122, 28 BRBS 89(CRT); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP* [*Hess*], 681 F.2d 938, 14 BRBS 1004 (4th Cir. 1982). As claimant established a causal relationship between his work accident and his hiatal hernia, we affirm the administrative law judge's finding that employer is liable for necessary medical benefits for that condition. 33 U.S.C. §907(a); *see generally Pozos v. Army & Air Force Exch. Serv.*, 31 BRBS 173 (1999).

Lastly, employer argues that the administrative law judge's "award" of undefined, future temporary total disability benefits to claimant is unenforceable. The administrative

[6] The administrative law judge also gave less weight to Dr. Newman's opinion because his medical report was "very litigation oriented versus purely medical evaluation." Decision and Order at 10. Employer avers this characterization of the report is "absurd" because, in order to defend a claim made over three years after the accident, it was required to obtain a medical report for litigation purposes. There is some merit to employer's contention; however, any error the administrative law judge made in this respect is harmless, as the administrative law judge gave other rational reasons for giving Dr. Newman's opinion less weight than Dr. Ganderson's. *Id*. at 11-12.

law judge stated that claimant "is entitled to receive temporary total disability if and when he has the hiatal hernia surgery recommended by Dr. Ganderson." Decision and Order at 13. This statement is generally accurate, as disability ensuing from surgery for a work-related condition is compensable. 33 U.S.C. §§902(10), 908; *see generally Pacific Ship Repair & Fabrication Inc. v. Director, OWCP* [*Benge*], 687 F.3d 1182, 46 BRBS 35(CRT) (9th Cir. 2012). Employer correctly asserts, however, that this statement does not constitute an enforceable award of temporary total disability benefits. *See generally Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1999). The record before the administrative law judge indicates that the hernia surgery recommended by Dr. Ganderson had not yet occurred, nor had it been scheduled. Moreover, the administrative law judge did not determine claimant's average weekly wage and the parties did not submit a stipulation on this issue. Thus, the record contains no evidence from which a disability award could be based. *Id*.; *see generally Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000). Therefore, to the extent the administrative law judge "awarded" disability benefits, that "award" is vacated.

Accordingly, the administrative law judge's "award" of future temporary total disability benefits is vacated. In all other respects, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge