U.S. Department of Labor

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

BRB No. 16-0252

PAMELA CHATMON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: Jan. 30, 2017
NAVY EXCHANGE SERVICES COMMAND	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Granting Benefits of William Dorsey, Administrative Law Judge, United States Department of Labor.

Kris R. Marotti (Tarro & Marotti Law Firm, LLC), Warwick, Rhode Island, and Douglas Thomas Moore (Law Offices of Douglas Thomas Moore), Honolulu, Hawaii, for claimant.

James P. Aleccia and Marcy K. Mitani (Aleccia & Mitani), Long Beach, California, for self-insured employer.

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

HALL, Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order Granting Benefits (2012-LHC-01643) of Administrative Law Judge William Dorsey 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.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *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 was employed by employer as a department manager at the Pearl Harbor Navy Exchange when, on November 24, 2011, she slipped and fell on a wet tile floor.

Following this incident, claimant sought medical care at the Tripler Army Medical Center emergency room for complaints of pain throughout her body. She attempted to return to work on November 27, 2011, but left early due to recurring pain. Claimant subsequently sought and received medical treatment for numerous complaints of pain and discomfort. Employer voluntarily paid claimant temporary total disability benefits from November 28, 2011 through April 1, 2012.

On April 2, 2012, claimant attempted to return to her usual work with employer but was unable to complete her scheduled shift that day due to her complaints of pain. On December 18, 2012, claimant commenced modified work for employer. Claimant sought disability and medical benefits under the Act. Employer, in controverting claimant's claim, challenged the work-relatedness of some of the medical conditions allegedly resulting from the fall, as well as claimant's contention that she sustained a loss of wage-earning capacity as a result of the November 24, 2011 work incident.[1]

In his Decision and Order, the administrative law judge concluded that claimant established a causal relationship between her head, right shoulder, low back, buttocks, right knee, ribs and right elbow conditions and her November 24, 2011, slip and fall, but he declined to address claimant's references to chest and hip conditions. Decision and Order at 38-48. The administrative law judge also found that claimant is incapable of returning to her usual employment duties with employer, but that the modified position offered to claimant by employer on November 20, 2012, constitutes suitable alternate employment that claimant is capable of performing eight hours a day, with no loss of wage-earning capacity. *Id*. at 48-53. The administrative law judge awarded claimant temporary total disability benefits from November 28, 2011 through November 19, 2012, permanent partial disability benefits for a four percent impairment to claimant's right thumb, permanent partial disability benefits for a six percent impairment to claimant's right hand, permanent partial disability benefits for a two percent impairment to claimant's right upper extremity, and medical benefits for her eleven work-related conditions. *Id*. at 58.

On appeal, claimant challenges the administrative law judge's decision not to address her contention that her right hip condition constitutes a compensable injury, as well as the administrative law judge's denial of ongoing compensation benefits subsequent to November 19, 2012. Employer responds, urging affirmance of the administrative law judge's decision in its entirety.

[1] Employer accepted claimant's claim that her slip and fall resulted in injuries to her chin, left shoulder, neck, and right wrist.

Claimant contends the administrative law judge erred in failing to address her claim that her right hip condition is related to her November 24, 2011, slip and fall. Employer, in response, asserts that the administrative law judge rationally determined that claimant did not establish the compensability of her right hip condition.

An injury is compensable under the Act if it arises out of and in the course of employment. 33 U.S.C. §902(2). In establishing that an injury is causally related to her employment, claimant is aided by the Section 20(a), 33 U.S.C. §920(a), presumption, which provides a presumed causal nexus between the injury and employment. In order to be entitled to the Section 20(a) presumption, claimant bears the initial burden of establishing her prima facie case by showing that she suffered a harm and either that a work-related accident occurred, or that working conditions existed, which could have caused the harm. *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); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996). If these two elements are established, the Section 20(a) presumption applies to link the employee's injury or harm to the employment incident. *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000).

Before the administrative law judge, claimant asserted that the November 24, 2011 slip and fall at work resulted in injuries to several parts of her body. Claimant's LS-201 Notice of Employee's Injury form and LS-203 Employee's Claim for Compensation form, employer's LS-207 Notice of Controversion of Right to Compensation form, and the parties' post-hearing briefs reference 12 to 14 body parts. The administrative law judge found that employer agreed that the work incident caused or aggravated claimant's chin, left shoulder, neck, and right wrist conditions. Decision and Order at 39; *see* n.1, *supra*. Next, the administrative law judge addressed five specific injuries controverted by employer, those to claimant's head, right shoulder, low back, buttocks, and right knee. The administrative law judge found that each of these injuries was caused by the work incident. *Id*. at 39-46. With regard to the injury allegedly sustained to claimant's ribs, the administrative law judge concluded that, although neither party spent much time addressing that condition, a causal relationship is presumed to exist as employer provided no evidence sufficient to rebut the Section 20(a) presumption with regard to that condition. *Id.* at 46. Similarly, after finding that claimant "put little effort into proving that she has a compensable arm injury," the administrative law judge identified sufficient evidence to establish that, on the record as a whole, claimant's right elbow injury was caused by her November 24, 2011, slip and fall. *Id.* at 47-48. Lastly, after stating that claimant bears the burden of proof with regard to her alleged injuries, the administrative law judge declined to address claimant's "passing references" to injuries allegedly

sustained to her chest and hip as a result of her work-related slip and fall. *Id.* at 48. Claimant appeals only the denial of the hip claim.

We agree with claimant that the administrative law judge's decision not to address her right hip condition cannot be affirmed, as his treatment of this injury is not consistent with his consideration of claimant's similarly vague claims of injuries to her ribs and right elbow. Claimant's September 20, 2013, and March 6, 2014, Pre-Hearing Statements state her contention that she sustained a hip injury in the fall at work. These documents arguably raise a claim for a work-related injury. In *U.S. Industries/Federal Sheet Metal*, 455 U.S. at 615-616, 14 BRBS at 633, the Supreme Court held that "A prima facie 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." Moreover, claimant alleged at the formal hearing that she injured her hip in the fall at work, *see* Tr. at 72, and both claimant's and employer's post-hearing briefs reference the hip condition. In addition, in support of her claim, claimant offered into evidence the testimony of Drs. Hager and Fernandes, both of whom documented claimant's complaints of hip pain. *See* CXs 47 at 27, 30, 48-49; 34 at 740-750. As the administrative law judge addressed two of claimant's other "vague" claims, and claimant provided written allegations of a work-related injury to her hip, we must remand this case for the administrative law judge to address whether claimant sufficiently raised a claim for a work-related hip injury such that he must address it. *U.S. Industries/Federal Sheet Metal*, 455 U.S. 608, 14 BRBS 631. We, therefore, vacate the denial of the claim for a hip injury, and we remand the case for the administrative law judge to address the issue of the sufficiency of the "claim" for a work-related hip injury.[2]

Claimant next contends that the administrative law judge erred in failing to award her ongoing temporary partial disability benefits after November 19, 2012. Where, as in this case, it is undisputed that claimant is incapable of resuming her usual employment duties with employer, claimant has established a prima facie case of total disability, and the burden shifts to employer to demonstrate the availability of suitable alternate employment. *See Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). An employer can establish suitable alternate employment by offering an injured employee a light-duty job at its facility which is tailored to the employee's physical limitations, so long as the job is necessary and the claimant is capable of performing it. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996). In this case, claimant does not challenge the administrative law judge's finding

[2] Employer alleges that claimant is not entitled to invocation of the Section 20(a) presumption because she could not have injured her hip in the fall at work. *See* Emp. Resp. Br. at 7-8. Employer may raise this contention before the administrative law judge on remand.

that the modified position she accepted establishes the availability of suitable alternate employment. Rather, claimant challenges the administrative law judge's finding that she is capable of working eight hours, as opposed to only four hours, per day. In his decision, the administrative law judge addressed the restrictions placed on claimant by her physicians, claimant's Functional Capacity Evaluation (FCE), claimant's testimony, and video evidence of claimant performing the modified position at employer's facility, in concluding that claimant is capable of working an eight hour day, and that, consequently, claimant is not entitled to ongoing temporary partial disability benefits subsequent to November 19, 2012. *See* Decision and Order at 50-53.

We affirm the administrative law judge's decision on this issue. The administrative law judge found that the results of claimant's October 26 and 29, 2012 FCE, which indicated that claimant could perform light to medium work for an eight hour day, constitutes the best evidence of claimant's orthopedic abilities. Decision and Order at 51. The administrative law judge further found that Dr. Diamond, who took into consideration claimant's results, similarly opined that claimant could work eight hours a day. *Id.* at 52. Moreover, the administrative law judge determined that the video evidence regarding claimant's performance of the modified job indicated that claimant worked with no apparent distress and underutilized the chair provided as an accommodation. In contrast, the administrative law judge rejected claimant's testimony regarding her subjective complaints of pain and the opinion of Dr. Fernandes, that claimant is limited to four hours of work per day, because that opinion lacks sufficient detail.[3] *Id.* at 52-53.

The administrative law judge is entitled to weigh the evidence and draw his own inferences and conclusions therefrom. The Board is not empowered to reweigh the evidence, but must affirm the administrative law judge's weighing of the evidence if it is rational. *See generally Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). In this case, the administrative law judge extensively reviewed the evidence of

[3] We reject claimant's assertion that, in light of the decision of the United States Court of Appeals for the Ninth Circuit in *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir.), *cert. denied*, 528 U.S. 809 (1999), the administrative law judge erred in declining to rely on the opinion of claimant's treating physician, Dr. Fernandes. Given that Dr. Diamond examined claimant and reviewed claimant's medical records, the administrative law judge was not required to disregard his opinion on the basis that he was not a "treating physician" or to summarily give the opinion of Dr. Fernandes greater weight because he is a "treating physician." *See id.*, 153 F.3d 1051; *Brown v. Nat'l Steel & Shipbuilding Co.*, 34 BRBS 195 (2001).

record, and his finding that claimant is capable of working an eight hour day in the modified position offered to her by employer is rational and supported by substantial evidence. Therefore, we affirm the administrative law judge's determination that claimant is capable of working an eight hour day as of November 20, 2012, and his consequent denial of ongoing temporary partial disability benefits after that date.

Accordingly, we vacate the denial of the hip injury claim, and we remand the case for further consideration consistent with this decision. In all other respects, the administrative law judge's Decision and Order Granting Benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur:

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RYAN GILLIGAN
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, concurring and dissenting:

I concur in my colleagues' decision to affirm the administrative law judge's finding that claimant is capable of working an eight hour day and his consequent denial of claimant's request for ongoing temporary partial disability benefits subsequent to November 19, 2012. However, I respectfully dissent from their decision to vacate the administrative law judge's denial of the "claim" for a work-related right hip injury. The administrative law judge acted within his discretion in determining that a claim for this injury was not sufficiently raised. I would, therefore, affirm the administrative law judge's Decision and Order in its entirety.

Employer accepted claimant's contention that she sustained work-related injuries to her chin, left shoulder, neck, and right wrist. *See* Decision and Order at 39. Employer controverted claimant's specific contentions that her head, right shoulder, low back, buttocks, and right knee were injured in the accident. The administrative law judge concluded that claimant established a causal relationship between these five conditions and her slip and fall at work. *Id.* at 39-46. Although he found that neither party "spent

much time" addressing claimant's alleged rib condition, and that claimant merely "referenced" an arm injury, the administrative law judge nonetheless proceeded to address those conditions, concluding that claimant's rib and right arm injuries were causally related to her slip and fall. *Id.* at 46-48. He declined, however, to address claimant's "passing references" to chest and hip conditions. *Id.* at 48. The administrative law judge stated, "I decline to scour the record in search of evidence to make out such claims for her . . . ." Claimant appeals the administrative law judge's refusal to address her "claim" for a hip injury.

In *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982), the Supreme Court held that the Section 20(a), 33 U.S.C. §920(a), presumption, by its terms, does not apply to a claim that has not been made. Noting that Section 12(b), 33 U.S.C. §912(b), requires a claimant to give the adjudicator and adverse parties timely notice of his injury, the Court stated that "[t]he claim, like the notice required by [Section] 12 and like the pleadings required in any type of litigation, serves the purposes of notifying the adverse party of the allegations and of confining the issues to be tried and adjudicated." *Id*., 455 U.S. at 613, 14 BRBS at 632-633. Moreover, the Court stated that:

> [Such notice] must be more than a mere declaration that the employee has received an injury or is suffering from an illness that is related to his employment; it must contain enough details about the nature and extent of the injury or disease to allow the employer to conduct a prompt and complete investigation of the claim so that no prejudice will ensue.

Id., 455 U.S. at 613 n.6, 14 BRBS at 632 n.6, (quoting 1A Benedict on Admiralty, 71, at 4-5 (7th ed. 1981)). The Court concluded that, where a claimant is represented by counsel, an administrative law judge is not required to address, and an employer is not required to rebut, a claim that was not made, "as there is no reason to depart from the specific statutory direction that a claim be made and that the presumption, however construed, attach to the claim." *Id*., 455 U.S. at 614-615, 14 BRBS at 633.

On appeal, claimant, who has been represented by counsel throughout these proceedings, argues that she sustained a compensable injury to her right hip as a result of her slip and fall at work, and further asserts that the injury "is of grave consequence as her right hip pain has increased substantially since she returned to work in December 2012." Claimant's Brief at 24-25. Claimant's primary argument is that "more than sufficient evidence was introduced at trial to raise the [Section] 20(a) presumption" that she suffered a right hip injury. *Id.* at 21. That argument is unavailing because, as the Court stated in *U.S. Industries/Federal Sheet Metal*, "the [Section 20(a)] presumption by its terms cannot apply to a claim that has never been made." *See* 455 U.S. at 613, 14 BRBS at 632. Claimant's secondary argument, that "the record is replete with evidence

that [claimant] experienced pain everywhere in her body after she fell," is also not persuasive. Claimant's testimony that she had "all-over pain," Hearing Transcript at 39, 44, does little, if anything, to put the trier-of-fact and employer on notice that she is seeking benefits for a right hip injury that has become more painful as a result of her return to work.[4]

Under the circumstances of this case, where claimant alleged injuries to a vast number of body parts but failed to provide the administrative law judge and employer with "enough details about the nature and extent" of her alleged right hip injury, claimant has failed to establish error in the administrative law judge's conclusion that he need not "scour the record" to develop claimant's case for her. I would hold that claimant's "passing references" to a possible right hip condition did not rise to the level of a claim for benefits within the meaning of *U.S. Industries/Federal Sheet Metal*, and that the administrative law judge, therefore, did not have an obligation to adjudicate a claim insufficiently made. Consequently, I dissent from the majority's decision to remand this case on this issue.

[4] Moreover, claimant points to no evidence to refute the administrative law judge's finding that claimant made only "passing references" to a right hip injury. Decision and Order at 48. A review of claimant's pleadings and testimony confirms the administrative law judge's conclusion. Claimant's claim form did not mention an injury to either hip. Claimant's LS-203 Claim Form dated April 6, 2012. Her subsequent pre-hearing submissions summarily reference an injury to "hip," along with 13 other body parts, but fail to specify that claimant's alleged injury is to her right hip. Claimant's Pretrial Statements dated September 20, 2013, and March 6, 2014. At deposition and at trial, claimant testified in detail that she suffered pain and injury to each of the body parts that were ultimately found to be compensable by the administrative law judge, including her head, right shoulder, low back, buttocks, right knee, ribs, and right arm. Claimant's Deposition Testimony at 32-33, 45-47, 49-51, 55-56, 59-60; Hearing Transcript at 31-44. Claimant, however, did not mention a right hip injury at her deposition, and at trial made only one statement that could be construed to encompass a right hip condition: an assertion, without further explanation, that Dr. Hager recommended "a hip scan" for an injury to "hips bilateral." *Id*. at 74. Finally, her post-hearing brief contains summary references to a "hip" injury, or "left hip" pain, none of which supports her contention that she made a claim for a *right hip* injury. Claimant's Post-Trial Brief at 2, 8, 10, 11, 12, 15, 19, 20. Similar to her hearing testimony, the post-hearing brief contains one reference, without analysis or explanation, to a recommendation by Dr. Hager that claimant get an "MR arthrogram" on her "right hip." *Id*. at 21.

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GREG J. BUZZARD
Administrative Appeals Judge