U.S. Department of Labor

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

BRB No. 16-0283

LONI LEON	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
L-3 COMMUNICATIONS	)	
	)	
Employer	)	
	)	
and	)	
	)	
ACE AMERICAN INSURANCE COMPANY	)	DATE ISSUED: Jan. 31, 2017
	)	
Carrier-Respondent	)	
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
Carrier-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order on Remand and the Order Denying Reconsideration of William Dorsey, Administrative Law Judge, United States Department of Labor.

Michael W. Thomas and Edwin B. Barnes (Thomas, Quinn & Krieger, L.L.P.), San Francisco, California, for L-3 Communications and Insurance Company of the State of Pennsylvania.

Keith L. Flicker and Daniel J. Louis (Flicker, Garelick & Associates, L.L.P.), New York, New York, for L-3 Communications and ACE American Insurance Company.

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

PER CURIAM:

L-3 Communications and Insurance Company of the State of Pennsylvania (ICSP) appeal the Decision and Order on Remand and the Order Denying Reconsideration (2011-LDA-00147) 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.* (the Act), as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq*. (the DBA). 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 is before the Board for the second time. Claimant worked for employer beginning in February 2005 as a logistics manager. Her duties involved ensuring equipment delivery and taking inventory of the equipment on the vessel known as HSV-X1, in support of a Department of Defense contract. Relevant to this case, claimant's work on HSV-X1 required her to travel to Guam and Tasmania. She last worked in Guam from August 30 until September 23, 2006, when the HSV-X1 was being demilitarized. At that time, claimant took a final inventory, and the equipment was dismantled and crated. Thereafter, claimant flew to Tasmania to meet the HSV-X1, uncrate the equipment, and perform an inventory audit. She worked in Tasmania from September 30 through October 12, 2006. During her stay in Tasmania, claimant began experiencing joint, chest and back pain accompanied by a fever, chills, and a hoarse, raspy, phlegm-producing cough. She believed she had the flu and was sent to the hotel to rest. Feeling slightly better the next day, claimant returned to the vessel and finished the contract work.

Upon returning to San Diego, some of claimant's symptoms improved; however, she continued to experience night sweats, chest pain, and a cough. In early 2007, claimant came under the care of Dr. Kavy, a pulmonologist, who diagnosed Mycobacterium Avium Complex (MAC), caused by the Mycobacterium avium and M. intracellulare bacteria (MAI), and bronchiectasis, which is a sequela of MAC.[1] Dr. Kavy

[1] Dr. Kavy explained that MAI is an infectious organism that can proliferate in environments that are hot, humid, poorly ventilated, and wet. It can live on metal shavings and dust and, if the shavings and dust are made airborne, the bacteria can be inhaled. He stated that MAI is ubiquitous and can be found anywhere, and most people are exposed to very small amounts on a daily basis. He explained that those small amounts are combatted by the human immune system. However, when the exposure is too much for the immune system, MAI attacks and permanently damages the lungs (MAC) and the cartilaginous walls of the bronchial tubes (bronchiectasis). AX 12 at 14;

opined that claimant inhaled enough bacteria to compromise her immune system while working on the HSV-X1. Specifically, he believed it more likely than not that claimant contracted the disease while working in Guam, as the environment there was hot, humid, dusty, and moldy, and those are conditions in which MAI can proliferate. Because of the permanent damage to her respiratory system, her other symptoms, and her adverse reactions to the medications, Dr. Kavy stated that claimant is totally disabled.

On October 29, 2008, claimant filed a claim for benefits, seeking compensation under either the Act or under the DBA extension of the Act.[2] Employer controverted the claim. Nevertheless, ICSP paid claimant temporary total disability benefits from December 1, 2008, until November 7, 2010. 33 U.S.C. §908(b). In a decision dated March 1, 2012, Administrative Law Judge Webster found that claimant's MAC is related to her occupational exposure to bacteria in Guam and that ACE is liable for claimant's temporary total disability benefits. On reconsideration, Administrative Law Judge Dorsey, to whom the case was assigned after Judge Webster's death, corrected some typographical errors and omissions and ordered ACE to reimburse ICSP for the benefits it had paid.

ACE appealed the finding that it is liable for claimant's benefits.[3] The Board agreed with ACE that Judge Webster provided no explanation for summarily finding that claimant did not "raise" the Section 20(a), 33 U.S.C. §920(a), presumption against ICSP for her work in Tasmania. The Board also noted an inconsistency in his finding ACE liable for the injury that arose out of claimant's work between August 30 and October 12, 2006, as that period encompassed work in both Guam and Tasmania. Accordingly, the Board vacated the finding that ACE is the responsible carrier and remanded the case for further consideration. *Leon v. L-3 Communications*, BRB No. 12-0414 (April 26, 2013).

On remand, Judge Dorsey (the administrative law judge) thoroughly summarized the evidence. He applied *Albina Engine & Machine v. Director, OWCP*, 627 F.3d 1293, 44 BRBS 89(CRT) (9th Cir. 2010), to find that claimant invoked the Section 20(a), 33 U.S.C. §920(a), presumption against ICSP, that ICSP rebutted the presumption, and that,

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Tr. at 85-90, 98, 117-120. MAC can be treated by a regimen of medicines over the course of one or two years, but claimant has not been able to tolerate the medications, and her infection persists. AX 12 at 16, 32; Tr. at 94.

[2] Employer's Longshore carrier, ACE American Insurance Company (ACE), is the carrier on the risk for claimant's work in Guam, and its DBA carrier, ICSP, is the carrier on the risk for claimant's work in Tasmania.

[3] No party challenged claimant's entitlement to disability or medical benefits.

on the record as a whole, the preponderance of the evidence establishes that claimant was last exposed to MAI in Tasmania, making ICSP the responsible carrier. Decision and Order on Rem. at 15-20. After giving the parties the opportunity to correct the exhibits in the record, the administrative law judge denied ICSP's motion for reconsideration, stating that nothing in the corrected evidence changed his decision that ICSP is the responsible carrier. Order Denying Recon. at 1-2.

ICSP appeals the administrative law judge's decisions, raising three issues before the Board. First, it contends the administrative law judge erred in considering claimant's MAC to be an "occupational disease." Second, it asserts the administrative law judge erred in invoking the Section 20(a) presumption against ICSP, and third, it asserts claimant was not exposed to "injurious" stimuli while working in Tasmania. In response, ACE argues that ICSP waived the occupational disease/aggravation issue by not only failing to raise it before the administrative law judge on remand but by agreeing in its brief on remand that the occupational disease standard of *Albina Engine* applies. With respect to the remaining two arguments, ACE asserts that the administrative law judge properly applied the law, and the decision should be affirmed. ICSP filed a reply brief. Claimant has not participated in this appeal, as the compensability of her injury is not at issue.

Initially, we agree with ACE that ICSP waived the issue of whether claimant's injury is an "occupational disease." Although ICSP raised this issue in its original brief before Judge Webster, it did not pursue this issue until the current appeal. Specifically, Judge Webster determined in the original decision that the occupational disease test is applicable, this issue was not raised before the Board in the first appeal, the Board remanded the case with a citation to *Albina Engine*, *see Leon*, slip op. at 6, and, on remand, both carriers urged Judge Dorsey to use the *Albina Engine* occupational disease test.[4] At this juncture, ICSP is improperly asserting an argument it did not raise on remand before Judge Dorsey; therefore, he did not address the argument, and it may not be raised on appeal now. *Z.S. v. Science Applications Int'l Corp.*, 42 BRBS 87 (2008); *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989). Accordingly, we decline to address ICSP's argument that claimant's MAC is not an "occupational disease," and the issue of responsible carrier will be addressed under the occupational disease standard. For the reasons set forth below, we affirm the administrative law judge's finding that ICSP is the responsible carrier upon application of this test.

In an occupational disease case, the responsible employer is the last employer to

[4] ICSP stated in its brief on remand that "[t]he appropriate analysis is under the industrial disease test set forth in *Albina Engine* . . . ." ICSP Rem. Br. at 18; *see also* ICSP Resp. Br. to Board (first appeal) at 17 (same statement).

expose the claimant to injurious stimuli prior to her awareness of her work-related disease; the responsible carrier is the carrier on the risk at that time. *Albina Engine*, 627 F.3d 1293, 44 BRBS 89(CRT); *Lustig v. U.S. Dept. of Labor*, 881 F.2d 593, 22 BRBS 159(CRT) (9th Cir. 1989); *see also Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 16 BRBS 13(CRT) (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984); *Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51(CRT) (11th Cir. 1988); *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955). It is irrelevant under *Cardillo* to show that a claimant's disease existed while working for a previous employer, so long as it had not resulted in disability. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has held that an employer cannot be held liable under the Act unless the claimant has "been exposed to injurious stimuli in quantities which have the potential to cause h[er] disease." *Todd Shipyards Corp. v. Director, OWCP* [*Picinich*], 914 F.2d 1317, 24 BRBS 36(CRT) (9th Cir. 1990). However, the court also has explained that there need not be a demonstrated medical causal relationship between the claimant's exposure at a particular employer and her occupational disease in order for that employer to be held liable. *Jones Stevedoring Co. v. Director, OWCP* [*Taylor*], 133 F.3d 683, 31 BRBS 178(CRT) (9th Cir. 1997).

In *Albina Engine*, the Ninth Circuit set forth the procedure for addressing the responsible employer issue in a multi-employer occupational disease case. It held:

> [T]he ALJ in multiple-employer occupational disease cases should conduct a sequential analysis, as follows: the ALJ should consider *sequentially*, starting with the last employer, (1) whether the § 20(a) presumption has been invoked successfully against that employer, (2) whether that employer has presented substantial, specific and comprehensive evidence so as to rebut the § 20(a) presumption, *see* [*Ramey v. Stevedoring Services of America*, 134 F.3d 954, 959, 31 BRBS 206, 210(CRT) (9th Cir. 1998)], and (3) if the answer to the second question is yes, whether a preponderance of the evidence supports a finding that that employer is responsible for the claimant's injury, *see* [*Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 700, 14 BRBS 538, 544 (2d Cir. 1982)]. The first employer in the analytical sequence (that is, the last employer in time) who is found to be responsible under this analysis shall be liable for payment of benefits, and the ALJ need not continue with this analysis for the remaining employers. In conducting this analysis, the ALJ should consider *all* evidence regarding exposure or lack thereof at a particular employer, and evidence supporting a finding of exposure at a given employer may be submitted either by the claimant or by earlier employers.

Albina Engine, 627 F.3d at 1302, 44 BRBS at 93-94(CRT) (emphasis in original) (internal footnote omitted). Thus, the Ninth Circuit determined that the test for ascertaining the responsible employer in an occupational disease case correlates to that of the shifting burdens under Section 20(a) of the Act. *Id.* Moreover, the employer/carrier bears the burden of proving it is not the responsible entity. *General Ship Service v. Director, OWCP*, 938 F.2d 960, 25 BRBS 22(CRT) (9th Cir. 1991); *Lustig*, 881 F.2d 593, 22 BRBS 159(CRT); *Susoeff v. The San Francisco Stevedoring Co.*, 19 BRBS 149 (1986).

It is undisputed that claimant has MAC caused by exposure to the MAI bacterium. With regard to claimant's working conditions, it is undisputed that she worked on the same vessel in Guam and Tasmania for the same employer. ICSP contends the administrative law judge erred in finding that claimant was exposed to MAI in Tasmania in sufficient quantities to potentially cause her disease. We reject this contention.

Claimant testified to dirty, filthy, humid, and wet conditions on the vessel while in Guam, and to filthy, dirty, dusty, and wet conditions on the vessel in Tasmania. AX 10 at 33-39; Tr. at 57-58, 68-70. Dr. Kavy opined that claimant was exposed to MAI while she worked on HSV-X1. He believed that, more probably than not, the exposure occurred during her work on the ship in Guam because her employment there was of longer duration, the weather was particularly conducive to the proliferation of the bacteria, and the work of other employees and the humidity could make the bacteria airborne. AX 12 at 65-67; Tr. at 117-118. Nevertheless, Dr. Kavy also acknowledged that claimant could have been exposed to MAI when the ship was in Tasmania. Tr. at 101-102, 114-116. Although the temperatures in Tasmania were cooler than those in Guam, and although the area of the ship where claimant worked had more ventilation than in Guam, Dr. Kavy stated that exposure in Tasmania was possible and could have aggravated what she already had in her body, making her symptomatic.[5] *Id.* at 129-130. Based on this evidence, the administrative law judge properly invoked the Section 20(a) presumption against ICSP, as claimant offered sufficient evidence to establish she had been exposed to MAI on the ship in Tasmania, and that exposure could have caused her MAC. *Albina Engine*, 627 F.3d 1293, 44 BRBS 89(CRT); *see Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010). The administrative law judge's finding is rational and supported by substantial evidence, and, therefore, is affirmed.

[5] Claimant suffered fatigue and had a coughing fit while in Guam. She does not know whether these were symptoms of MAC, although they were similar to what she experienced in Tasmania. Tr. at 60, 74-75, 80-81. Dr. Kavy stated they may have been the initial manifestations of the disease. *Id.* at 122. However, it is undisputed that claimant did not lose time from work until she became symptomatic in Tasmania. AX 10 at 44-45; Tr. at 60, 132; *see* Decision and Order on Rem. at 19.

The administrative law judge next found that ICSP rebutted the presumption with Dr. Kavy's opinion that it was more probable than not that claimant was exposed in Guam and not in Tasmania. This finding has not been challenged on appeal. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007). As the presumption has been rebutted, the administrative law judge must determine, based on a preponderance of the evidence, whether ICSP is liable for benefits. The burden of persuasion in a responsible employer/carrier case is first on the last employer/carrier to establish that it is not the liable entity. *Albina Engine*, 627 F.3d 1293, 44 BRBS 89(CRT). In this case, to avoid liability, ICSP must show that claimant was not exposed in Tasmania to injurious stimuli that had the potential to cause her disease. *Picinich*, 914 F.2d 1317, 24 BRBS 36(CRT).

The administrative law judge acknowledged claimant's working conditions in Guam as well as Dr. Kavy's opinion that it was more likely than not that claimant was exposed to injurious stimuli in Guam. However, the administrative law judge found that the evidence establishes that the dustiness and dampness on the ship persisted in Tasmania, and that the temperatures and humidity, while not as high as in Guam, were "not so different."[6] Decision and Order on Rem. at 18. Moreover, the administrative law judge inferred that MAI, which is a ubiquitous bacterium that grew on the ship in Guam, and which can thrive in conditions other bacteria cannot, was still present on the same ship in Tasmania. That is, he found there is no evidence in the record establishing that MAI was absent by the time the HSV-X1 reached Tasmania. *Id.*

The administrative law judge next considered whether claimant was exposed in Tasmania to sufficient quantities of MAI to cause MAC. Given that Dr. Kavy could not identify a specific quantity of MAI needed to overwhelm claimant's immune system and cause MAC,[7] AX 12 at 27, the administrative law judge gave limited weight to the doctor's opinion that exposure in Tasmania was insufficient to cause her disease. Decision and Order on Rem. at 18. Rather, the administrative law judge relied on Dr.

[6] Contrary to ICSP's assertion, the administrative law judge addressed all the factors ICSP states are necessary for the proliferation of the MAI bacteria, such as the degree of ventilation, and acknowledged the differences and similarities between the two sets of working conditions. Decision and Order on Rem. at 17-20. However, the evidence of record does not establish that every environmental element must be met for MAI to thrive. Therefore, we reject ICSP's argument that the absence of certain elements at claimant's work in Tasmania requires the conclusion that there was no exposure to MAI in Tasmania.

[7] Indeed, Dr. Kavy clearly stated that everyone's immune system is different. AX 12 at 30-31.

Kavy's agreement with the statement that claimant's exposure in Tasmania could have combined with her Guam exposure and could have been enough to overcome her immune system and cause the disabling symptoms that first manifested themselves in Tasmania. *Id*. at 19; Tr. at 130.[8] Indeed, this additional exposure, the administrative law judge found, was critical, even if small in comparison to the Guam exposure.[9] Decision and Order on Rem. at 19; n.5, *supra*. Further, the administrative law judge noted that no one tested the ship in Tasmania to determine the presence or absence of MAI on the vessel, and he noted that MAI is a ubiquitous bacterium that can be found anywhere, including in Tasmania. Decision and Order on Rem. at 20.

The administrative law judge has the discretion to weigh the evidence and draw reasonable inferences therefrom. *See Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT); *see generally Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). It is solely within his discretion to accept or reject all or any part of any testimony according to his judgment, *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969), and the Board is not empowered to reweigh the evidence or to disregard his findings merely because other reasonable inferences could have been drawn from the evidence. Rather, the Board must affirm the administrative law judge's inferences and weighing of the evidence if they are rational. *Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT); *Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994); *Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994); *see also See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96(CRT) (4th Cir. 1994).

In this case, ICSP bears the burden of establishing that claimant was not exposed to injurious stimuli while it was on the risk. Based on the preponderance of the evidence, the administrative law judge found that ICSP did not carry this burden. *See, e.g.*, *Taylor*, 133 F.3d 683, 31 BRBS 178(CRT); *Picinich*, 914 F.2d 1317, 24 BRBS 36(CRT). His

[8] "Q: Is the – is the exposure to the MAI bacteria in Tasmania, can that be seen as the topping off, let's say, of the amount that she had in her body, but wasn't yet sick, could that last exposure seem to – be seen to aggravate or exacerbate her existing condition, such that she now became sick and symptomatic? * * * A: * * * Yes." Tr. at 130 (question and non-responsive statement from witness omitted); *see also* AX 12 at 27 (Dr. Kavy stated that the condition can get worse with repetitive exposures).

[9] Dr. Kavy also stated in his deposition that the incubation period could be days, weeks, or months, and that it is possible claimant's exposure during the six days in Tasmania before the onset of symptoms was a sufficient incubation period. AX 12 at 38-39, 60-61.

finding is reasonable and is supported by substantial evidence. Therefore, we affirm the administrative law judge's conclusion that ICSP was the carrier on the risk at the time of claimant's last exposure to MAI before she became aware of her occupational disease.

Accordingly, the administrative law judge's Decision and Order on Remand and the Order Denying Reconsideration are affirmed.[10]

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge

_____
GREG J. BUZZARD
Administrative Appeals Judge

[10] On October 9, 2015, claimant's counsel filed a fee petition for work performed before the Board in BRB No. 12-0414, requesting a total fee of $5,638.75, representing 12.75 hours of attorney services at an hourly rate of $425, plus 2 hours of paralegal services at an hourly rate of $110. Employer and ICSP filed a consent motion to hold the fee petition in abeyance pending a final decision in this appeal, BRB No. 16-0283. As the Board has now issued a final decision affirming ICSP's liability for claimant's benefits, we grant ICSP 10 days from the receipt of this decision to file objections to claimant's counsel's fee petition. 20 C.F.R. §802.203(g).