U.S. Department of Labor

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

BRB No. 16-0377

JEFFREY M. ENGLISH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KINDER MORGAN BULK TERMINALS	)	DATE ISSUED: Jan. 30, 2017
	)	
and	)	
	)	
ACE AMERICAN INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Granting Benefits of Pamela J. Lakes, Administrative Law Judge, United States Department of Labor.

John J. Sharpless (Law Office of Michael J. Winer, P.A.), Tampa, Florida, for claimant.

Phillip S. Howell and David T. Burr (Galloway, Johnson, Tompkins, Burr & Smith, PLC), Tampa, Florida, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits (2014-LHC-01096) of Administrative Law Judge Pamela J. Lakes 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). 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 as a loader/unloader and equipment operator at employer's Tampaplex facility. Tr. at 196-199. Claimant alleged he was exposed to dust and ash, as well as ammonia, during his employment. *Id.* at 200, 235-236. Additionally, claimant testified regarding a specific incident which occurred during the morning hours of December 8, 2012. On that day, while claimant and his co-workers were performing general cleanup duties, a silo located on employer's facility ruptured, exposing claimant to ash. Claimant testified that, as a result of this event, he began to experience breathing problems, he had difficulty catching his breath, and his nose began to burn. *Id.* at 212-213. Claimant and a co-worker returned to employer's office, during which time claimant believed he almost passed out. Claimant used a hand-held oxygen tank. Later, claimant required the use of a second oxygen tank in order to facilitate his breathing. *Id.* at 215-216, 250-251.

Claimant testified that, although he experienced increasing breathing difficulties, he continued to work for employer following this incident. Tr. at 218, 257. He sought medical care for his breathing symptoms in February 2013, *id.* at 221, and has continued to receive treatment. *Id*. at 222-230. Claimant has been diagnosed with restrictive and obstructive lung disease based on the results of pulmonary function testing. CXs 2 at 53; 3. Claimant filed a claim for disability and medical benefits under the Act.

In her Decision and Order, the administrative law judge applied Section 20(a), 33 U.S.C. §920(a), to presume that claimant's acute and chronic medical conditions are related to his employment exposures with employer. She next found that while employer rebutted the existence of Reactive Airways Dysfunction Syndrome, it did not rebut the Section 20(a) presumption with respect to claimant's remaining acute and chronic pulmonary or respiratory conditions and symptoms. Assuming, arguendo, that employer rebutted the Section 20(a) presumption, the administrative law judge further found, based on the record as a whole, that claimant's acute and chronic respiratory conditions are due at least in part or were aggravated by his exposure to ash during the ruptured silo incident and from his exposure to ash and other chemicals, including ammonia, during his employment with employer. After addressing the remaining issues disputed by the parties, the administrative law judge held employer liable for medical benefits related to claimant's conditions, as well as for ongoing temporary total disability compensation, commencing April 24, 2013. 33 U.S.C. §§907; 908(b).

On appeal, employer challenges the administrative law judge's finding that claimant is entitled to the benefit of the Section 20(a) presumption. Alternatively, employer asserts the administrative law judge erred in determining that it failed to present evidence sufficient to rebut the Section 20(a) presumption and that the administrative law judge erred in finding a causal relationship between claimant's respiratory conditions and his work exposures based on the record as a whole. Claimant responds, urging affirmance of the administrative law judge's decision in its entirety.

Employer contends the administrative law judge erred in invoking the Section 20(a), 33 U.S.C. §920(a), presumption. In order to be entitled to the Section 20(a) presumption, claimant must establish the two elements of his prima facie case: an injury or harm and a work-related accident or working conditions that could have caused or aggravated the harm. *See Ramsey Scarlett & Co. v. Director, OWCP* [*Fabre*], 806 F.3d 327, 49 BRBS 87(CRT) (5th Cir. 2015); *see generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Claimant is not required to introduce medical evidence that the working conditions in fact caused his harm in order to establish his prima facie case. *See generally Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989). Once claimant establishes his prima facie case, Section 20(a) links his harm to the employment accident or working conditions. *See Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000).

In its appeal, employer does not specifically dispute the existence of the symptoms from which claimant suffers, essentially continued breathing difficulty, *see* Emp. Br. at 11, or that claimant presented evidence of his exposure to ash during his employment with employer. *Id*. at 4, 13. Employer, however, challenges the administrative law judge's invocation of the Section 20(a) presumption on the ground that no credible evidence exists that claimant's exposure to ash could have caused his chronic medical conditions. *Id*. at 11-12. In invoking the presumption, the administrative law judge discussed claimant's testimony regarding his exposures to ash and other irritants while working for employer,[1] an OSHA Material Data Safety Sheet addressing bed ash and an accompanying report addressing fly ash,[2] and the opinions of Drs. DeMott, Dydek, Kreitzer, Griffith, and Haimes, each of whom opined that claimant's respiratory symptoms are or could be related to his work-related exposure to ash.[3] *See* Decision and

[1] Specifically, the administrative law judge discussed claimant's testimony regarding the immediate effects of his acute exposure to ash during the December 8, 2012, silo rupture, the chronic effects resulting from that incident and his prior exposures, the worsening of his symptoms following this specific work incident, and the improvement of his conditions once he removed himself from workplace exposures. *See* Decision and Order at 32-33.

[2] These documents describe the possible health effects resulting from exposure to bed and fly ash. These include eye and skin irritation, fibrosis, chronic bronchitis, silicosis, and aggravation of pre-existing diseases of the lungs. CXs 24, 25.

[3] We reject employer's argument that, in light of the decision of the United States Court of Appeals for the Eleventh Circuit in *McClain v. Metabolife Int'l, Inc.*, 401 F.3d 1233 (11th Cir. 2005), the testimony of these physicians is not "sufficiently reliable." In

Order at 32-37; *see also* Tr. at 201-207, 201-211, 389-392; CXs 1, 2, 3. Thus, we reject employer's argument that claimant did not establish his prima facie case, and, as it is supported by substantial evidence, we affirm the administrative law judge's invocation of

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McClain, the court addressed at length the effort to exclude from admission into evidence experts' testimony under the standards set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Section 23(a) of the Act provides:

> In making an investigation or inquiry or conducting a hearing the deputy commissioner or Board shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation or inquiry or conduct such hearing in such manner as to best ascertain the rights of the parties.…

33 U.S.C. §923(a); *see also* 20 C.F.R. §702.339. Moreover, Section 702.338 of the Act's implementing regulations states, in relevant part, that:

> The administrative law judge shall inquire fully into the matters at issue and shall receive in evidence the testimony of witnesses and any documents that are relevant and material to such matters….

20 C.F.R. §702.338. Additionally, under the Rules of Practice and Procedure Before the Office of Administrative Law Judges,

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, pursuant to executive order, by these rules, or by other rules or regulations prescribed by the administrative agency pursuant to statutory authority.

29 C.F.R. §18.402; *see also* 29 C.F.R. §18.401 (defining "relevant" evidence). Thus, the Act and regulations afford the administrative law judge wide discretion to admit evidence relevant to the issues before him. *Tampa Ship Repair & Dry Dock Co. v. Director, OWCP*, 535 F.2d 936, 4 BRBS 243 (5th Cir. 1976); *Olsen v. Triple A Machine Shops, Inc.*, 25 BRBS 40 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP*, Nos. 91-70642, 92-70444 (9th Cir. 1993); *McCurley v. Kiewest Co.*, 22 BRBS 115 (1989). In this case, the admissibility of the medical opinions was not at issue, *Casey v. Georgetown Univ. Medical Center*, 31 BRBS 147 (1997), and the administrative law judge is afforded wide discretion to determine the weight to be accorded to the medical opinions of record. *See, e.g., Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995).

the Section 20(a) presumption. The evidence credited by the administrative law judge establishes that claimant has respiratory symptoms and the existence of exposures at work that could have caused or aggravated those conditions. *See Hunter*, 227 F.3d 285, 34 BRBS 96(CRT); *O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39 (2000); *Sinclair*, 23 BRBS 148.

Upon invocation of the Section 20(a) presumption, the burden shifts to employer to rebut the presumed causal connection with substantial evidence that claimant's injury was not caused or aggravated by the exposures at work. *See Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990); *see also Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). 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 O'Kelley*, 34 BRBS 39; *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

The administrative law judge found that employer failed to produce evidence sufficient to rebut the Section 20(a) presumption. Specifically, the administrative law judge found that: Dr. DeMott acknowledged that claimant's exposure to ash could have irritated claimant's respiratory tract, such exposure could cause the symptoms and conditions reported by claimant; Dr. Poole's testimony did not account for the actual amount of ash that claimant was exposed to during the silo rupture; and that Dr. McCluskey acknowledged that ash exposure could aggravate respiratory diseases. *See* Decision and Order at 37-40.

Employer contends that the opinions of Drs. DeMott, Poole and McCluskey, constitute substantial evidence sufficient to rebut the Section 20(a) presumption. We need not address employer's challenge. Assuming, arguendo, that the presumption is rebutted, the administrative law judge's conclusion that claimant's conditions are related to his employment exposures to ash is supported by substantial evidence on the record as a whole. *See generally Peterson v. Columbia Marine Lines*, 21 BRBS 299 (1988).

The administrative law judge found that the medical evidence as a whole establishes that claimant's acute and chronic conditions resulted, at least in part, from his work exposures to ash and other chemicals. *See*, *e.g.*, *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *Conoco, Inc. v. Director, OWCP* [*Prewitt*], 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). The administrative law judge noted that, while the exact amount of claimant's exposures are in dispute, it is undisputed that claimant was in fact exposed to ash when a silo ruptured on December 8, 2012, that claimant was exposed to other chemicals while working for employer, and that claimant suffered acute and ongoing chronic symptoms of the respiratory tract following

the specific silo incident. The administrative law judge relied on the opinions of Drs. Kreitzer,[4] Griffith,[5] and Haimes,[6] who related claimant's conditions to his work exposures, as well as the OSHA Material Data Safety Sheet and accompanying documents, which recognize the possible health effects resulting from ash exposure. The administrative law judge rejected the contrary opinion of Dr. McCluskey,[7] which she found to be equivocal. *See* Decision and Order at 40-41.

We reject employer's contention that the opinion of Dr. Kreitzer does not constitute evidence which is sufficiently reliable to establish a causal relationship between claimant's medical conditions and his work exposures on the record as a whole. *See Ramsey Scarlett & Co.*, 806 F.3d 327, 49 BRBS 87(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 John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *see also 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). In this case, the administrative law judge discussed at length the medical opinions. *See* Decision and Order at 14-30. She rationally credited the opinions of Drs. Kreitzer, Griffith and Haimes, as supported by the OSHA Material Safety Data Sheet and accompanying report, *see* n.2 *supra*, that claimant's acute and chronic respiratory conditions are due at least in part to the ash exposure at employer's facility. Decision and Order at 40-41. Thus, we affirm the administrative law judge's conclusion that

[4] Dr. Kreitzer, who is Board-certified in internal medicine, pulmonary diseases and sleep medicine, examined claimant on October 27, 2014, and, after reviewing claimant's medical records, opined that claimant's restrictive and obstructive lung diseases are related to his ash exposure with employer. CX 2 at 76-77. He noted that claimant is a non-smoker with no prior history of asthma. *Id*.

[5] Dr. Griffith's medical records indicate that claimant was being treated for an occupational lung disease which developed after his work-related exposure to chemicals and an "ecological disaster." CX 3 at 66.

[6] Dr. Haimes, in a report dated March 5, 2013, documented claimant's history of exposure to ash on December 8, 2012, and opined that claimant's abnormal pulmonary function test was work-related. CX 3 at 16-18.

[7] Dr. McCluskey, who examined claimant on September 12, 2014, found no objective evidence to support a finding that claimant sustained any persistent or chronic health consequences as a direct result of his employment exposures while working for employer. *See* EX 44 at 18-19.

claimant's respiratory conditions are related to his employment exposures, as it is supported by substantial evidence of record. *See Tampa Ship Repair & Dry Dock Co. v. Director, OWCP*, 535 F.2d 936, 4 BRBS 243 (5th Cir. 1976); *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); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP* [*Hess*], 681 F.2d 938, 14 BRBS 1004 (4th Cir. 1982). As employer does not challenge the remaining findings of fact and conclusion of law of the administrative law judge, the award of disability and medical benefits to claimant is affirmed.

Accordingly, 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

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RYAN GILLIGAN
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge