U.S. Department of Labor

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

BRB No. 17-0369

ROY L. HASSELL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: Jan. 24, 2018
HUNTINGTON INGALLS INDUSTRIES, INCORPORATED	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

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

Charlene A. Morring (Montagna Klein Camden, LLP), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2016-LHC-00540) of Administrative Law Judge Dana Rosen 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 for employer as a sheet metal worker. Tr. at 22-23. Claimant previously suffered a back injury at work in 2005 for which he underwent two back surgeries by Dr. Skidmore. Tr. at 47; EX 2. Afterwards, claimant started experiencing pain in his right hip and returned to see Dr. Skidmore. Tr. at 48. Dr. Skidmore placed

claimant on permanent light-duty status. *Id.* at 49-50; EX 2. Claimant also treated with Dr. Haynes and Dr. Wardell for his right hip problems. Dr. Haynes diagnosed severe coxarthrosis of the hip and told claimant on May 7, 2012 that he would eventually need a total hip replacement, which claimant opted not to undergo at that time. Tr. at 38; EX 2. Dr. Haynes opined at that time that claimant's hip arthritis was "part of the normal aging process" and "not caused or related to any specific work activity." EX 3. Claimant was treated by Dr. Wardell from October 2012 until March 2015 for his right hip problems, with Dr. Wardell prescribing two injections that claimant testified "worked fairly well." Tr. at 40.

On May 4, 2015, claimant injured his back at work while working on a ladder in a twisted position. Tr. at 24-25. He testified that he felt pain in his lower back but that he was not experiencing any pain in his hip at the time. *Id.* at 25-26. He reported the injury that day but continued to work. *Id.* at 25, 28. Claimant started physical therapy on May 20, 2015. *Id.* at 29. In spite of the therapy, claimant testified that his pain continued to worsen, stating that the irritation was "radiating more on the right side because [he] was feeling it in [his] groin and in [his] joints." *Id.* at 32.

Claimant eventually went to see Dr. Wardell on June 24, 2015. Claimant testified that he told Dr. Wardell about the injury in May 2015 and that, at the time, his "pain was mostly still in [his] lower back and waist area." Tr. at 33. Dr. Wardell recorded that claimant reported pain in his back that radiated into the right buttock and thigh. On examination, Dr. Wardell noted "mild restriction of further flexion with pain radiating down both posterior thighs and legs, right worse than left." CX 6 at 1. Dr. Wardell sent claimant to physical therapy. Tr. at 33. Claimant returned to see Dr. Wardell on July 9, 2015, whereupon Dr. Wardell put claimant in a no-work status. *Id.* at 50; CX 6 at 1. Claimant has not returned to work since that time. Tr. at 50.

In December 2015, claimant returned to Dr. Haynes for treatment of his right hip condition. EX 9 at 7. Dr. Haynes testified that claimant's right hip condition was similar to the one he had treated claimant for in 2012. *Id.* at 8-9. Dr. Haynes stated that he did not remember claimant telling him about any other injury he had received. *Id.* at 10, 12.

Claimant filed a claim for medical benefits under the Act for his continuing right hip pain. 33 U.S.C. §907. The parties stipulated that claimant's back injury on May 4, 2015, arose out of his employment. Decision and Order at 2. Claimant has been receiving temporary total disability benefits from May 4, 2015, for the lower back injury.

The administrative law judge found that claimant invoked the Section 20(a), 33 U.S.C. §920(a), presumption that his right hip injury is causally related to his 2015 work-related back injury based on Dr. Wardell's opinion that claimant's right hip arthritis was aggravated by his work-related back injury. Decision and Order at 23. She further found

that employer rebutted the presumption through the medical opinions of Dr. Skidmore and Dr. Haynes. *Id.* at 24. In weighing the evidence as a whole, the administrative law judge concluded that claimant did not establish that his right hip arthritis arose out of or was aggravated by his May 2015 injury. *Id.* at 33. The administrative law judge found that the opinions of Dr. Skidmore and Dr. Haynes are "well-reasoned, well-explained, consistent, supported by the objective medical tests, and highly persuasive." *Id.* at 25. The administrative law judge determined that Dr. Wardell's opinion that claimant's right hip condition is related to his 2015 employment injury is not persuasive because it was "equivocal" and "not consistent with the evidence in the record." *Id.* at 30-31. She relied on the fact that claimant had been treated for his advancing right hip condition for years prior to his May 2015 back injury and Dr. Haynes's statement that arthritis takes years to develop. *Id.* at 32. Accordingly, the administrative law judge denied claimant's claim for medical benefits under the Act.

On appeal, claimant challenges the administrative law judge's denial of medical benefits for his right hip pain. Claimant asserts that the administrative law judge erred in relying upon the opinion of Dr. Haynes to rebut the Section 20(a) presumption. Claimant also contends that the administrative law judge erred in weighing the evidence as a whole to find that claimant did not establish a causal relationship between his work-related back injury and his right hip arthritis. Employer urges affirmance of the administrative law judge's decision.

Where, as here, the claimant successfully invokes the Section 20(a) presumption, the burden shifts to the employer to rebut the presumption by producing substantial evidence that the injury is not work-related. *Ceres Marine Terminals v. Director, OWCP [Jackson]*, 848 F.3d 115, 50 BRBS 91(CRT) (4th Cir. 2016). Where the claimant makes a prima facie case alleging aggravation of a previous injury, "the employer may rebut with substantial evidence demonstrating that the claimant's symptoms are a natural outgrowth of, or complication of, an existing predicate condition," or with substantial evidence that the claimant's condition was not aggravated by the subsequent incident. *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 225, 43 BRBS 67, 69(CRT) (4th Cir. 2009). Substantial evidence requires that the employer "put forward as much relevant factual matter as a reasonable mind would need to accept, as one rational conclusion, that the employee's injury did not arise out of his employment." *Id.*, 591 F.3d at 225, 43 BRBS at 69(CRT).

In this case, the administrative law judge relied on the opinions of Dr. Haynes and Dr. Skidmore to conclude that employer rebutted the Section 20(a) presumption. Decision and Order at 24. In December 2015, Dr. Haynes stated that claimant's bilateral hip coxarthrosis was "more of an issue with natural progression of the disease" and not "related to Worker's Compensation." EX 7. In May 2012, after Dr. Haynes had first concluded that claimant's right hip arthritis was not work-related, *see* EX 3, Dr.

Skidmore stated that he deferred to Dr. Haynes's expert opinion and agreed that claimant's arthritis was age-related and not work-related. EX 4.

Claimant contends Dr. Haynes's opinion does not constitute substantial evidence to rebut the presumption because Dr. Haynes was not aware of claimant's back injury in May 2015, nor he did not review Dr. Wardell's medical records in rendering his opinion. We agree that the administrative law judge's finding that employer rebutted the Section 20(a) presumption cannot be affirmed at this time.

In *Holiday*, the claimant experienced back pain at work, on a non-covered situs, on January 31, 2004, which he reported to his employer. The claimant experienced another episode of back pain on February 10, 2004, while working at the shipyard. The administrative law judge applied Section 20(a) to presume that claimant's back pain was due to the February covered injury, but found it rebutted. He denied the claim on the record as whole. On appeal, the Board reversed the rebuttal finding because the evidence on which the administrative law judge relied did not state that claimant's back condition was not aggravated by the February incident.

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, affirmed the Board's decision, stating that the administrative law judge relied on evidence which did not address the work incident which allegedly made claimant's back condition materially worse. *Holiday*, 591 F.3d at 226, 43 BRBS at 70(CRT). The Fourth Circuit stated that evidence which did not address the second injury may not be able to rebut an aggravation claim because "it cannot respond to the prima facie case in the first place." *Id.* "To accept as substantial evidence that which addresses the former occurrence but not the latter would be to eviscerate the aggravation component as a freestanding claim for relief under the LHWCA." *Id.* However, an employer need not provide affirmative evidence directly ruling out an aggravation, as substantial evidence "casting doubt on the causative link" may be sufficient to rebut the Section 20(a) presumption. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 263, 31 BRBS 119, 123(CRT) (4th Cir. 1997).

In this case, Dr. Haynes had treated claimant for his right hip arthritis in 2012, prior to the 2015 back injury, and examined him again in December 2015, after the back injury. He testified at his deposition that claimant's right hip arthritis had "not changed dramatically" in 2015 and that claimant's condition upon examination and complaints of pain were "similar" to the previous examination. *See* EX 9 at 8, 11. Dr. Haynes stated that claimant's arthritis in December 2015 was "more of an issue with natural progression of the disease" and not "related to Worker's Compensation." EX 7b. However, Dr. Haynes's December 2015 report references only the 2005 work injury. EX 7c. Neither party's attorney informed Dr. Haynes at his deposition of the 2015 work accident, and Dr. Haynes testified that claimant did not mention any new work injuries that occurred

after 2012. EX 9 at 10. While the administrative law judge was aware that Dr. Haynes did not know of claimant's May 2015 back injury, *see* Decision and Order at 12, she did not specifically address whether and to what extent Dr. Haynes's lack of information about the 2015 injury affects the sufficiency of his opinion for rebuttal purposes.[1] Therefore, we must vacate the administrative law judge's finding that employer rebutted the Section 20(a) presumption and remand for the administrative law judge to reconsider Dr. Haynes's opinion in light of *Holiday* and the aggravation rule.

If, on remand, the administrative law judge concludes that under *Holiday*, Dr. Haynes's opinion does not constitute substantial evidence to rebut the Section 20(a) presumption, then claimant's current hip pain is work-related as a matter of law. *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). If the administrative law judge concludes that Dr. Haynes's opinion rebuts the presumption, then she should re-address the weight to be accorded to the medical evidence on the record as a whole to determine if claimant met his burden of establishing that his hip condition is related to the 2015 work incident. *Moore*, 126 F.3d at 262, 31 BRBS at 123(CRT).

[1] Moreover, Dr. Skidmore's only opinion concerning claimant's hip condition was given in 2012 before the subject work accident and therefore, as a matter of law, Dr. Skidmore's opinion cannot rebut the Section 20(a) presumption that the 2015 work accident aggravated claimant's hip condition. *Holiday*, 591 F.3d at 226, 43 BRBS at 70(CRT); EX 4b.

Accordingly, the administrative law judge's Decision and Order is vacated, and the case remanded for further proceedings consistent with this opinion.

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