U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 19-0386

ALLEN B. FLORES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PACIFIC CRANE MAINTENANCE COMPANY, L.P.	)	
	)	
and	)	
	)	DATE ISSUED: 01/14/2020
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Respondents	)	
	)	
ILWU-PMA WELFARE PLAN	)	
	)	
Intervenor	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Tonia M. Flores, Seal Beach, California, for claimant.

Lisa M. Conner and Melody C. Chang (Flynn, Delich & Wise LLP), Long Beach, California, for employer/carrier.

Before: BOGGS, Chief Administrative Appeals Judge, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Claimant, represented by his wife as a non-attorney lay representative, appeals the Decision and Order Denying Benefits (2017-LHC-00773) of Administrative Law Judge Richard M. Clark rendered on a claim filed pursuant to 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 started working for employer in 2006. JX 12 at 1060-1061. He underwent a pre-employment physical examination that showed no abnormalities. Claimant testified that when he worked in employer's crane shop, he felt "the usual aches and pains" in his back and neck, but was able to do the work. *Id*. at 1062. Beginning in 2009, he also worked in employer's tire shop, mounting and dismounting new tires. Part of this work involved using sledgehammers, which weighed up to 20 pounds, to pound "snap rings." On May 4, 2010, claimant sought treatment at Bay Chiropractic for pain in his back, arms, knee, and chest, as well as shortness of breath. He denied any specific accident but reported that his work aggravated his pain.

On April 12, 2011, claimant first reported to employer that he had pain in his shoulders, neck, and back, stating he believed it was from mounting and dismounting tires. JX 5 at 85. Employer filed a complaint against claimant with the Pacific Maritime Association for not making a timely injury report. CX 24 at 209. Claimant testified he thought he was disciplined for reporting an injury, explaining he did not report the pain when it started in February because he did not know it was work-related.[1] Tr. at 126-128; 172-173.

Claimant took December 23 through December 26, 2011, off work for the Christmas holiday. JX 12A at 1166-1167. When he returned to work on December 27, 2011, he was told he was being transferred to the Maersk crane shop, which claimant complained was a hostile work environment. Claimant did not report an injury at that time, but told the general manager he was going to see a doctor; he saw Dr. Bland, complaining of dizziness and chronic neck pain. JX 9A at 238. Dr. Bland excused claimant from work for the next day. JX 6 at 91.

Employer filed additional complaints against claimant on December 28 and 29, 2011, and January 3, 2012, for failing to report to work. CX 24 at 224. Claimant reported each time that he was sick and would not be coming to work. On January 31, 2012, claimant filled out an accident report stating he had had increasing pain in his neck, head, right arm, lower back, and knees starting in January 2011 and attributed it to his work. JX

[1]In his post-hearing brief, Claimant asserted a Section 49 discrimination claim, 33 U.S.C. §948a, against employer based on this incident. *See infra*.

9A at 240. Dr. Bland filled out a form stating he had been treating claimant since February 16, 2011, for stress, hypertension, and right arm pain and that claimant was disabled as of January 31, 2012, but that the disability is not work-related. EX 4 at 40, 70. Claimant stopped working for employer on January 31, 2012. JX 12 at 1066. On March 30, 2012, he filed a claim under the Act for cumulative trauma through January 30, 2012. JX 1 at 1.

On May 29, 2012, claimant underwent disc replacement surgery for "early myelopathy and a large herniated disc" and cervical degenerative disc disease. JX 9A at 291-300; 320-324. On September 11, 2012, claimant saw Dr. Mandelbaum and Dr. Benke for his right shoulder pain and was diagnosed with right shoulder impingement syndrome, rotator cuff and bicep tendinitis, and AC joint arthritis. He was given a corticosteroid injection and referred for physical therapy. JX 9A at 337-338.

On December 5, 2012, claimant saw Dr. Ishaaya at the "Longshoreman Clinic" for an internal medicine evaluation for shortness of breath, among other problems. Dr. Ishaaya diagnosed claimant with obstructive sleep apnea, wheezing, asthma, and reactive airway disease. JX 9B at 374-377.

Claimant returned to longshore work for other employers on February 15, 2013, working at various times in different positions, including as a dock supervisor and a basic ship clerk, interspersed with periods when he was off work for medical treatment.[2] In January 2015, claimant saw Dr. Ng, a pulmonologist, stating he had experienced respiratory symptoms for several years and they were caused by exposures at work. Dr. Ng stated that it was "unclear whether respiratory symptoms are secondary to his occupational exposures." JX 9C at 474-476.

Claimant saw Dr. Knapp on January 28, 2015, for his right shoulder pain, stating it started in April 2011 and was the result of repetitive work activities. An MRI was performed and Dr. Knapp found "right shoulder small anterior rim rent SS tear." JX 9C at 497. Dr. Knapp performed a right shoulder diagnostic arthroscopy and rotator cuff repair on April 10, 2015. On February 24, 2015, claimant underwent ulnar transposition surgery to treat neuropathy in his left elbow.[3] As of August 2017, claimant had not been regularly working. He testified he sought work three days a week depending on how he felt when he woke up. JX 12A at 1201-1202, 1207.

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[2] No other employers were joined as potentially responsible employers. Decision and Order at 87, n.39.

[3] On July 27, 2016, Dr. Knapp filled out a Work Capacity Evaluation indicating that claimant's "left shoulder needs surgery," JX 7 at 140, but as of the time of the hearing, claimant had not undergone left shoulder surgery.

In his initial claim for compensation, claimant alleged cumulative trauma injuries through January 30, 2012, to his neck, back, right shoulder, right elbow, and "stress with hypertension & cardiopulmonary." JX 1 at 1. On November 17, 2016, he amended his claim to add claims for a left shoulder injury, left elbow injury, and reduced lung function, also giving the date of his injury as January 30, 2012.[4] *Id.* at 2.

The administrative law judge thoroughly reviewed claimant's work and medical history in his decision.[5] He found claimant is not a credible witness because his account of his work history is not plausible. Decision and Order at 62-66. He also concluded claimant's account of the development of his symptoms is not consistent with the credible medical evidence. *Id.* at 67.

The administrative law judge noted the parties agreed claimant is entitled to the Section 20(a) presumption for all his claimed injuries, 33 U.S.C. §920(a). Decision and Order at 85. But he found employer rebutted the Section 20(a) presumption based on Dr. London's opinion that none of claimant's orthopedic injuries are work-related and the opinions of Drs. Zagelbaum and Bressler disputing the existence and the work-relatedness of claimant's lung problems. *Id.* at 86. In weighing the evidence as a whole, he concluded claimant did not establish that any of his injuries are work-related. He accordingly denied claimant's claim for medical benefits and compensation. He also denied claimant's Section 49 discrimination claim because it was not properly raised. Decision and Order at 99-100.[6]

Claimant, represented by his wife as a lay representative, appeals the administrative law judge's Decision and Order Denying Benefits. Employer filed a response brief, urging affirmance.

We first address claimant's challenge to the administrative law judge's finding that he was not a credible witness. It is the administrative law judge's prerogative to evaluate the credibility of witnesses and the Board may not interfere with credibility determinations

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[4] Claimant alleged his injuries are solely the result of his work with employer that ended on January 30, 2012.

[5] The administrative law judge found claimant's notices of injury were timely filed under Section 12, 33 U.S.C. §912. Decision and Order at 82-83.

[6] The administrative law judge further denied employer's request for costs under Section 26 of the Act, 33 U.S.C. §926, on the bases that it does not apply to administrative proceedings and claimant had reasonable grounds to pursue the matter through a hearing. He denied intervenor's claim for reimbursement under Section 17, 33 U.S.C. §917, because claimant did not establish entitlement to any benefits. He also denied as moot employer's application for Section 8(f) relief, 33 U.S.C. §908(f).

unless they are inherently incredible or patently unreasonable. *See Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). The administrative law judge supported his conclusion that claimant's testimony is not credible by noting many instances when it is inconsistent with less subjective evidence. Decision and Order at 61-70. He found claimant's testimony to be self-aggrandizing and intended to retroactively create a false narrative concerning the work-relatedness of his physical complaints.[7] *Id.* As the administrative law judge's credibility determination is neither inherently incredible nor patently unreasonable, it is affirmed.[8] *Ogawa*, 608 F.3d at 650, 44 BRBS at 49(CRT); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 27(CRT) (9th Cir. 1988).

Claimant next contends the administrative law judge erroneously denied his Section 49 discrimination claim. Section 49 of the Act prohibits employers from discharging or discriminating against an employee based on his claiming or attempting to claim compensation under the Act. 33 U.S.C. §948a.[9] The administrative law judge found that claimant's Section 49 claim was not properly raised because it was mentioned for the first time in claimant's post-hearing brief. Decision and Order at 99. He also noted that even if it had been properly raised, it would fail because Section 49 protects only against discrimination from filing or pursuing a claim under the Longshore Act, whereas employer's allegedly discriminatory actions preceded the filing of claimant's Longshore Act claim. *Id.* at 100.

We affirm the administrative law judge's denial of claimant's Section 49 claim. Employer was not given an opportunity to respond to the Section 49 claim because it was

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[7] The administrative law judge found, inter alia, that claimant was not truthful in reporting his job duties or the onset of his symptoms to his physicians.

[8] We further reject claimant's challenge to the administrative law judge's consideration of the surveillance videos of claimant. Claimant has not established that the administrative law judge mischaracterized the surveillance videos and, in any event, any error is harmless as he gave the videos only "limited weight."

[9] Section 49 of the Act states, in relevant part:

> It shall be unlawful for any employer or his duly authorized agent to discharge or in any other manner discriminate against an employee as to his employment because such employee has claimed or attempted to claim compensation from such employer, or because he has testified or is about to testify in a proceeding under this chapter.

33 U.S.C. §948a.

not raised until claimant's post-hearing brief. *Del Monte Fresh Produce v. Director, OWCP [Gates]*, 563 F.3d 1216, 43 BRBS 21(CRT) (11th Cir. 2009).

Claimant also challenges the administrative law judge's conclusion that he did not establish that any of his injuries are work-related, arguing the administrative law judge should have given greater weight to Dr. Georgis's opinion.[10] In establishing that his injuries are work-related, a claimant is aided by the Section 20(a) presumption, which presumes that an injury is work-related. 33 U.S.C. §920(a); *see Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998). Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut it with substantial evidence to "sever the potential connection between the disability and the work environment." *Id.*, 134 F.3d at 959, 31 BRBS at 210(CRT) (internal quotation omitted). If employer rebuts the Section 20(a) presumption, it falls out of the case and the administrative law judge must weigh the evidence as a whole to determine if claimant's injuries are work-related, with claimant bearing the burden of persuasion. *See Ogawa*, 608 F.3d at 651, 44 BRBS at 50(CRT); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

The administrative law judge found claimant established a prima facie case and invoked the Section 20(a) presumption for all of his claimed injuries because "there is no dispute that he was engaged in some tasks that *could* cause the harms in question." Decision and Order at 85 (emphasis in original). But the administrative law judge found employer rebutted the Section 20(a) presumption based on Dr. London's opinion that claimant's orthopedic injuries are not work-related. *Id.* at 86. With regard to claimant's pulmonary condition, the administrative law judge found the presumption rebutted based on Dr. Zagelbaum's statement that claimant does not have work-related asthma or reactive airway disorder and Dr. Bressler's 2014 opinion that there is no connection between claimant's work and his internal medical conditions. We affirm the administrative law judge's finding that employer presented substantial evidence that severs the connection between claimant's harms and his work for employer. *Ogawa*, 608 F.3d at 651, 44 BRBS at 50(CRT). As the Section 20(a) presumption was rebutted, the burden was on claimant to establish his conditions are related to his work for employer. *Id.*

On weighing the evidence as a whole, the administrative law judge addressed each claimed injury separately and at length, and concluded claimant failed to establish that any of his injuries are work-related. He found Dr. Georgis's opinion that claimant's orthopedic injuries are work-related is not entitled to dispositive weight because his review of claimant's medical records was limited to those claimant chose and based only on

[10] To the extent claimant alleges Dr. London's opinion violates a requirement of the California workers' compensation statute, the Board is not the proper forum for such a claim as it is not empowered to enforce California statutes.

claimant's non-credible description of his work activities. Decision and Order at 78, 88-91, 93-94. In his discussion of each injury, the administrative law judge stated whether he credited employer's evidence of non-causation or found a failure of proof on claimant's part, or both. *Id.* at 86-99.

On appeal, claimant essentially asks the Board to reweigh the evidence, which we are not empowered to do. *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 25 BRBS 85(CRT) (9th Cir. 1991). It is the administrative law judge's prerogative to determine the weight to be given the evidence and he is not required to accept the opinion of any particular medical examiner. *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999). The administrative law judge provided rational reasons for rejecting Dr. Georgis's opinion. Similarly, the administrative law judge permissibly discounted the opinions of claimant's other physicians who relied on claimant for their understanding of the onset of his complaints, his work duties, and exposures.[11] Claimant has not identified any errors in the administrative law judge's consideration of the evidence. As the administrative law judge's conclusion that claimant did not establish that any of his injuries are work-related is supported by substantial evidence, it is affirmed. *Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT); *Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001). We therefore affirm the denial of benefits.

[11] For example, the administrative law judge accurately noted that, although Dr. Rasouli stated he understood claimant's neck injury to be "industrial," he did not know anything about claimant's work except that it involved swinging sledgehammers, which the administrative law judge found was not an accurate description of claimant's job. Decision and Order at 92-93. In addition, Dr. Bressler initially stated claimant's pulmonary conditions are not work-related. RX 9 at 190-191. However, he changed his opinion based on claimant's reports and not any evidence of actual exposures to irritants at claimant's work. *Id.* at 218. Thus, the administrative law judge rationally declined to credit his later opinion. Decision and Order at 98

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge