U.S. Department of Labor

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

BRB Nos. 13-0570
and 14-0416

CHARLES WOODS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HELMERICH & PAYNE	)	DATE ISSUED: July 30, 2015
	)	
and	)	
	)	
NATIONAL UNION FIRE INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER
	)	

Appeals of the Decision and Order and the Decision and Order on Modification of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Charles E. Woods, Batesville, Mississippi, pro se.

Laurie Briggs Young (Adams and Reese, LLP), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant, appearing without representation, appeals the Decision and Order and the Decision and Order on Modification (2012-LHC-01386) of Administrative Law Judge Clement J. Kennington 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 Outer Continental Shelf Lands Act, 43 U.S.C. §1331 *et seq.* (the Act). In an appeal by a claimant without legal representation, we will review the administrative law judge's findings of fact and conclusions of law to determine if they are rational, supported by substantial evidence, and in accordance with law. If they are, they

must be affirmed. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant was employed as a tool pusher on a deep-water oil drilling rig. On February 2, 2010, he fell six feet from a bunk bed to the floor. Claimant reported the incident, but he then worked 12-hour shifts for 14 days. Claimant continued working for employer, in his usual 14-day on and 14-day off cycle, until he was removed from the rig for non injury-related reasons on February 9, 2011. Claimant filed a claim under the Act on April 15, 2011, asserting that he injured his back and right hip in the fall. Employer controverted the claim. Claimant underwent laser procedures on his back on April 16, 2012, and January 8, 2013. Claimant also received steroid blocks at L4.

In his initial decision, the administrative law judge found that claimant did not establish his prima facie case, as he did not show he had a physical harm that could have been caused by the fall at work. Decision and Order at 14-15. Thus, claimant was not entitled to the benefit of the Section 20(a) presumption, 33 U.S.C. §920(a), and the administrative law judge denied the claim. Claimant, without legal representation, appealed the administrative law judge's decision to the Board. BRB No. 13-0570. Claimant also filed a claim for Section 22 modification with the administrative law judge. 33 U.S.C. §922. Accordingly, by order dated March 26, 2014, the Board dismissed claimant's appeal and remanded the case for the administrative law judge to address his modification petition.

On modification, the administrative law judge found that claimant submitted evidence sufficient to invoke the Section 20(a) presumption linking his back and hip conditions to the work accident. However, the administrative law judge denied claimant's petition for modification as he found that employer rebutted the Section 20(a) presumption and that claimant failed to establish the work-relatedness of his conditions based on the record as a whole. The administrative law judge declined to address claimant's allegation of a left knee injury related to his February 2, 2010 fall, as the issue is not within the scope of Section 22. The administrative law judge further noted that his original decision encompassed a finding that the work injury did not result in harm to claimant's knee, and that this decision remained unchanged. Thus, the administrative law judge again denied the claim.

Claimant, without legal representation, appeals the administrative law judge's decision on modification. BRB No. 14-0416. Employer filed a response brief in support of the administrative law judge's decision. By order issued on October 31, 2014, the Board reinstated claimant's appeal of the administrative law judge's original decision, BRB No. 13-0570, and consolidated that appeal with claimant's appeal of the administrative law judge's decision on modification.

We need not address the administrative law judge's initial decision with respect to claimant's back and hip claims because the administrative law judge, on modification, afforded claimant the benefit of the Section 20(a) presumption that these conditions are related to the fall from the bunk bed.[1] Decision and Order on Modif. at 2. Once, as in this case, the claimant establishes a prima facie case, Section 20(a) applies to relate the harms to the work accident, and the burden is on the employer to rebut this presumption by producing substantial evidence that the harms are not related to the work accident. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). Specifically, employer's burden is one of production, i.e., it must produce substantial evidence that "throws factual doubt" on claimant's prima facie case. *Ceres Gulf, Inc. v. Director, OWCP* [*Plaisance*], 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012); *Conoco, Inc.*, 194 F.3d 684, 33 BRBS 187(CRT). If the employer rebuts the presumption, it falls from the case and claimant bears the burden of proving that there is a causal relationship between the harm and the work accident based on the evidence of record as a whole. *Id.*; *see also Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997).

In this case, the administrative law judge concluded that employer produced substantial evidence to rebut the Section 20(a) presumption. The administrative law judge found that the following facts in the aggregate rebut the presumed connection between the fall and claimant's back and hip pain: (1) claimant worked a 14-day period after the accident and continued to work his regular schedule on the oil drilling rig until February 9, 2011, when employer removed him from the rig due to his refusal to stop "investigating" his nephew's accident; (2) the medical records of claimant's family physician, Dr. Corkern, do not support claimant's testimony that he reported lower back, right hip and knee pain on February 18, 2010, in that Dr. Corkern's records first note these complaints on March 1, 2011; (3) claimant's refusal of employer's February 2011 offer of land-based work because he was upset about his nephew's accident and his mother's illness, rather than because of injury; (4) claimant's failure to report to employer any alleged injuries related to the February 2, 2010 work accident until March 24, 2011; (5) the normal MRIs of claimant's spine on March 7, 2011; (6) the statement by Dr. Lovell, a neurosurgeon, that claimant has mild spinal degeneration unrelated to an accident; (7) the similar diagnosis by Dr. Prada that claimant received before undergoing

[1] Claimant's failure to establish a prima facie case was the sole basis for the administrative law judge's initial denial of benefits. On modification, the administrative law judge relied on the reports of Drs. Crosby and Lovell to find claimant entitled to the Section 20(a) presumption. Dr. Crosby stated that, based on his discussions with claimant, claimant's reports of right hip and leg pain are related to the fall from the bed. CX 4 at 1. Dr. Lovell stated that an incident like the one claimant reported could cause a pre-existing lumbar condition to become symptomatic. CX 2 at 4. *But see* n.2, *infra*.

laser surgery; (8) claimant's requesting that his stepson, an MRI technologist, help him find a doctor who would support his claim; (9) claimant's refusal to cooperate with employer's investigation of the claim; and (10) claimant's post-accident ability to engage in strenuous activity at home. Decision and Order on Modif. at 4-5; *see* Tr. at 74-94, 115-117, 182-190, 202-203, 209-210, 223-224; CX 8 at 2; EXs 1 at 10, 36-39, 43-44, ex 19; 5 at 4, 14; 6 at 4-5; 9 at 4; 13 at 7-8, 12, 18-19.

An administrative law judge may find this type of "negative" evidence sufficient to rebut the Section 20(a) presumption, so long as he finds it to be "substantial evidence" of the lack of a connection between claimant's harm and his work accident. *See Plaisance*, 683 F.3d 225, 46 BRBS 25(CRT); *see also Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). In this case, the administrative law judge rationally found this evidence sufficient to "throw factual doubt" on claimant's claim that his back and hip pain was caused by the fall from the bed. *Plaisance*, 683 F.3d at 231, 46 BRBS at 29(CRT). Accordingly, as it is supported by substantial evidence, we affirm the administrative law judge's finding that employer rebutted the Section 20(a) presumption. *See Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003).

Similarly, the administrative law judge rationally relied on this same evidence to find that claimant was not a credible witness as to the effects of the fall, and that any "credible evidence" thus was outweighed. Decision and Order on Modif. at 5. The Board is not empowered to reweigh the evidence, *see Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991), and the administrative law judge's credibility determinations must be affirmed unless they are "inherently incredible or patently unreasonable." *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Based on the absence of an unequivocal medical opinion that claimant's orthopedic injuries were, in fact, caused by his fall from the bunk bed,[2] and the circumstantial evidence credited by the administrative

[2] The reports of Drs. Crosby and Lovell do not unequivocally link claimant's back and hip conditions to the work injury. In this regard, Dr. Crosby's September 19, 2011 report states that he deferred to Dr. Lovell for a causation determination but, based on claimant's recitation of his history, "all of the symptoms are related to the original injury." CX 4 at 1. Claimant's recitation of his history to Dr. Crosby is not consistent with Dr. Corkern's medical records. CX 1 at 15. Dr. Lovell noted on May 26, 2011, that, "[I] cannot say with a reasonable degree of medical certainty that the claimant's claimed incident is responsible for his current symptoms," but that the incident "could cause a pre-existing condition in the lumbar spine to become symptomatic." CX 2 at 4. Dr. Lovell subsequently stated, in an August 1, 2011 letter to claimant's counsel, that claimant's back and hip symptoms are "degenerative in nature and I do not believe are

law judge, his conclusion that claimant failed to carry his burden of establishing the work-relatedness of his back and right hip conditions is supported by substantial evidence. *See Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001); *see also Hice v. Director, OWCP*, 48 F.Supp. 2d 501 (D. Md. 1999). Therefore, we affirm the denial of benefits on modification for the claimed injuries to claimant's back and right hip.

In his request for modification, claimant also submitted medical records for treatment of his left knee. These records show that claimant was diagnosed with degenerative joint disease by Dr. Luber on January 28, 2013. A February 11, 2013 MRI was interpreted as showing a medial meniscus tear, for which claimant underwent arthroscopic surgery on February 28, 2013. Claimant continued to complain of left knee pain, and he underwent a total knee replacement by Dr. Boyd sometime between January and April 2014. Claimant also submitted a statement alleging that he sustained a work-related left knee injury from a fall that was exacerbated by the February 2, 2010 fall from the bunk bed. *See* Emp. Resp. Br. at ex 1 p.2. Employer objected to claimant's raising on modification a claim for a left knee injury.

In his decision on modification, the administrative law judge agreed with employer that it was improper for claimant to use Section 22 modification to assert a claim for an additional injury, as such a claim does not fall under either the "change in condition" or "mistake of fact" prong of Section 22.[3] Decision and Order on Modif. at 2.

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necessarily caused by any particular accident." EX 16. Dr. Lovell added that "the lack of witness [to the alleged bunk bed accident] and the failure to require medical attention for a year and a half after the claimed incident makes it very difficult for me to equate the two to the point that the patient should be considered a Workers' Compensation injury." *Id.*

[3] Section 22 of the Act states:

> Upon his own initiative, or upon the application of any party in interest . . . on the ground of a change in conditions or because of a mistake in a determination of fact . . . the [administrative law judge] may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case . . . and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. . . .

33 U.S.C. §922.

The administrative law judge also stated that, in his initial decision, he had found that claimant did not establish a prima facie case "supporting any left knee injury connected to the bunk bed incident" and that finding remains unchanged. *Id*.

We need not address whether claimant's claim of a left knee injury resulting from the bunk bed fall is properly the subject of a Section 22 proceeding because substantial evidence of record supports the administrative law judge's alternative finding that claimant did not establish his prima facie case with respect to a left knee condition. In order to be entitled to the Section 20(a) presumption, claimant must establish a prima facie case by showing that he suffered a harm and that either a work-related accident occurred or that working conditions existed which could have caused or aggravated the harm. *See Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *see generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Claimant first complained of left knee pain to Dr. Corkern on March 1, 2011, more than a year after the fall. CX 1 at 11. The March 7, 2011 MRI taken of claimant's left knee revealed "no acute finding."[4] EX 1 at ex. 19.3. Dr. Lovell interpreted this MRI as "normal." EX 1 at ex. 9. On April 11, 2011, Dr. Terry similarly stated that the MRI was normal. Dr. Terry stated claimant's knee pain was likely due to a "post-traumatic neuroma of the infrapatellar branch of the saphenous nerve" for which he gave claimant an injection." EX 1 at ex. 9.[5]

In his initial decision, the administrative law judge noted claimant's delay in reporting any knee pain to a physician until March 1, 2011, as well as the 2011 "normal" MRI. *See* Decision and Order at 5 n.4, 9, 10 n.11, 15. Along with the evidence discussed above in regard to rebuttal of the Section 20(a) presumption, the administrative law judge rationally concluded from this evidence that claimant did not establish a prima facie case for "any injury" arising out of the bunk bed incident, that is, that claimant did not establish that his left knee pain could have been caused by the fall from the bed. *See Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *Mijangos*, 948 F.2d 941, 25 BRBS 78(CRT); Decision and Order at 14-16; Tr. at 49-52, 57, 66-67, 74-94, 130-145, 169-174, 184-188; EXs 2; 5 at 4; 6 at 4-5; 9 at 4; 13 at 1-3; 14. On modification, claimant submitted more recent medical records concerning his left knee condition. These records, however, contain no reference to the cause of any knee condition and, moreover, reveal a new diagnosis. The February 11, 2013 MRI revealed a

[4] The left knee radiology report states that the MRI revealed: (1) slight chondromalacia in the medial patella facet; (2) ACL and PCL are normal; (3) tendons and ligaments are intact; and (4) menisci are normal. EX 1 at ex. 19.3.

[5] Dr. Terry stated that a "last resort" would be to excise the neuroma. EX 1 at ex. 9.

"small radial tear of the posterior horn of the medial meniscus." Dr. Norris Radiology Rept., Feb. 12, 2013. Therefore, assuming, *arguendo*, that claimant's knee claim comes within the scope of Section 22, claimant has not established a mistake of fact in the administrative law judge's initial decision. There is no credible evidence that the left knee condition for which claimant underwent surgery in 2013 could have resulted from the fall from the bed in February 2010 given the normal MRI in 2011. Thus, we affirm the administrative law judge's rejection of claimant's left knee injury claim. *Manente v. Sea-Land Serv., Inc.*, 39 BRBS 1 (2004).

Accordingly, the administrative law judge's Decision and Order and Decision and Order on Modification are affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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GREG J. BUZZARD
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge