U.S. Department of Labor

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

BRB No. 14-0359

JASON MOSIER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: June 23, 2015
BAE SYSTEMS	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order and the Order Denying Motion for Reconsideration of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

W. John Gadd, Clearwater, Florida, for claimant.

Mark K. Eckels (Boyd & Jenerette), Jacksonville, Florida, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order and the Order Denying Motion for Reconsideration (2012-LHC-02037) of Administrative Law Judge Paul C. Johnson, Jr., 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 sustained injuries to his left hand and wrist on October 3, 2010, when he fell from a ladder while working at employer's shipyard. Claimant underwent surgery on April 8, 2011, by Dr. Goll to repair a wrist tendon and ligament strap. EX 10. Claimant's injury was deemed at maximum medical improvement on July 14, 2011. EX 10 at 47. Employer voluntarily paid compensation for temporary total and partial disability, as well as for permanent partial disability for a five percent left arm

impairment.[1] 33 U.S.C. §908(b), (c)(2), (e); *see* EXs 5-6. Claimant was hospitalized in September 2012 after suffering a seizure, and he returned to the hospital emergency room in February 2013 for recurrent seizures. He was diagnosed with chronic migraines, panic and anxiety disorder and spells; the seizures were attributed to a history of an electrical injury. EXs 8 at 60-61; 11. Claimant testified that he has constant wrist pain, which is exacerbated with activity. Tr. at 23-24; EX 8 at 58-60. Claimant claimed he suffers from a psychological condition due to his wrist pain. Claimant stated he is depressed; claimant also testified that he received a diagnosis of work-related post-traumatic stress disorder (PTSD) from Lu Griz, a psychologist.[2] Tr. at 25-28. In addition, claimant wrote a letter to his treating physician, Dr. Goll, on August 29, 2012, stating he was depressed about his pain and inability to work. EX 10 at 36. Claimant sought medical benefits for his alleged psychological condition.

In his decision, the administrative law judge found that claimant's testimony of emotional and psychological "injuries" stemming from the work-related wrist injury is sufficient to invoke the Section 20(a) presumption. 33 U.S.C. §920(a). The administrative law judge found that employer rebutted the presumption, and that, based on the record as a whole, claimant did not establish he has a work-related psychological injury. Thus, the administrative law judge denied the claim. The administrative law judge denied claimant's motion for reconsideration.

On appeal, claimant challenges the denial of the medical benefits claim for a work-related psychological condition. Employer responds, urging affirmance of the administrative law judge's decision.

In its response brief, employer contends the administrative law judge erred in finding claimant entitled to the Section 20(a) presumption. We will address this contention as it provides an alternate avenue of affirming the administrative law judge's finding that claimant did not establish he has a work-related psychological injury. *See Misho v. Global Linguist Solutions*, 48 BRBS 13 (2014). 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

[1]Claimant testified that he did not return to work for employer due to wrist pain, but he has worked at other jobs. Tr. at 21, 27, 30.

[2]There is no report from Dr. Griz in the record. The administrative law judge granted employer's pre-hearing motion to exclude Dr. Griz's report because it had not been disclosed in a timely manner. In his decision, the administrative law judge noted that claimant's counsel was offered the opportunity post-hearing to re-address the admissibility of the report, but he did not do so. Decision and Order at 10.

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). Although claimant is not required to affirmatively prove that his work injury in fact caused the harm, it is claimant's burden to prove both the "harm" and "accident/working conditions" prongs of his prima facie case. *Id.; see Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Claimant's theory as to how the injury arose must go beyond "mere fancy." *Champion v. S & M Traylor Bros.*, 690 F.2d 285, 295 (D.C. Cir. 1982); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990).

In this case, it is uncontested that claimant sustained a work-related left hand and wrist injury. In finding the Section 20(a) presumption invoked as to the claim that claimant has a psychological condition related to the wrist injury, the administrative law judge relied on claimant's testimony that he suffers from emotional or psychological conditions due to pain from the wrist injury.[3] Decision and Order at 9; EX 8 at 63; *see also* Tr. at 24-25 (claimant attributes depression to inability to return to work after the injury). However, in discussing the record evidence as a whole, the administrative law judge rejected claimant's testimony that he has a psychological harm or that any psychological condition he has is related to his workplace accident. The administrative law judge found, "[T]he only source of such evidence [on these issues] is Mr. Mosier, and I do not credit his testimony."[4] Decision and Order at 10.

An administrative law judge can find that a claimant satisfies the "harm" element of his prima facie case based solely on a claimant's testimony. *See, e.g., Welch v. Pennzoil Co.*, 23 BRBS 395 (1990); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988). Similarly, the administrative law judge may find based on a claimant's testimony that the work accident "could have caused" his harm. *See Universal Maritime*

[3]The record also contains the March 2, 2013 report of Dr. Hentschel, who diagnosed claimant with an uncontrolled anxiety and panic disorder NOS (not otherwise specified) and referred him for a psychiatric evaluation. EX 11 at 4. Dr. Hentschel saw claimant as a follow-up to his emergency room visits for seizures. Dr. Goll treated claimant's wrist injury. Dr. Goll's medical records consistently state that claimant's examinations were "negative for anxiety and depression," although Dr. Goll did acknowledge claimant's continuing wrist pain. *See, e.g.*, EX 9 at 100-102; EX 10 at 7.

[4]The administrative law judge found claimant credible only as to his asking Dr. Goll for a referral for a mental health assessment in August 2012. The administrative law judge found not credible claimant's testimony that, "Dr. Griz attributed PTSD to his workplace accident, based on my evaluation of [claimant's] demeanor while testifying on this issue at the hearing." Decision and Order at 10.

Corp. v. Moore, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997) ("even though it may appear incredible in light of [] other [evidence] . . . the ALJ was entitled to credit Moore's testimony that the back pain resulted from the accident itself;" Section 20(a) presumption applies). However, the administrative law judge must find such testimony credible as to these issues, as claimant bears the burden of establishing the elements of his prima facie case. *See Mackey v. Marine Terminals Corp.*, 21 BRBS 129 (1988) (administrative law judge rationally rejected claimant's contention that he had a harm; Section 20(a) presumption is not invoked). In view of the administrative law judge's inconsistency in the treatment of claimant's testimony concerning the existence of a psychological harm that could have been caused by the work injury, as well as his lack of discussion at invocation of the records of Drs. Goll and Hentschel, *see* n. 3, *supra*, we must vacate the administrative law judge's finding that the Section 20(a) presumption is applicable in this case. We remand the case for the administrative law judge to address whether claimant produced credible evidence sufficient to invoke the Section 20(a) presumption.[5] *Id.; see generally Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008).

We next address claimant's contention that the administrative law judge erred in finding the Section 20(a) presumption rebutted. This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit, which stated in *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990), that the Act places on employer the duty of rebutting the Section 20(a) presumption with evidence that the employee's employment neither caused nor aggravated his harm. In *Brown*, as none of the physicians in that case expressed an opinion "ruling out" a causal connection between the harm and the employment, the court determined that there was "no direct concrete evidence sufficient to rebut the statutory presumption."[6] *Id.*, 893 F.2d

[5]On remand, the administrative law judge should also address the effect, if any, of employer's counsel's statement at the hearing that claimant's "testimony [] will give rise to the [Section 20(a)] presumption." Tr. at 14-15. We note that, in its post-hearing brief, employer alleged that claimant's testimony is insufficient to establish the "harm" element of claimant's prima facie case. *See, e.g.*, Emp. Post-Hearing Br. at 3-4 (Oct. 14, 2013) ("the Employer submits that such evidence does not rise to a level . . . sufficient to invoke the Section 20(a) presumption").

[6]Subsequent decisions in other circuits have disapproved a "ruling out standard," holding explicitly that employer need not "rule out" the possibility that there was a causal connection in order to rebut the Section 20(a) presumption. *See, e.g., Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008); *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003); *American Grain Trimmers v. Director, OWCP [Janich]*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000); *Bath Iron Works Corp. v. Director, OWCP [Shorette]*, 109 F.3d 53, 31 BRBS 19(CRT) (1st Cir. 1997); *see also*

at 297, 23 BRBS at 24(CRT); *see also O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39, 41-42 (2000).

In this case, the administrative law judge summarily found that employer rebutted the Section 20(a) presumption

> by presenting evidence (1) that Claimant did not inform any treating physician of his depression or stress until, at the earliest, August 29, 2012, and (2) that none of the treating physicians noticed any psychological issues, referred Mr. Mosier to a psychiatrist or psychologist, or attributed his seizures to the effects of his workplace accident.

Decision and Order at 9; *see* Tr. at 21-24; EXs 9-11. The administrative law judge did not discuss the *Brown* decision in making this determination. Therefore, we must vacate the administrative law judge's finding that employer rebutted the Section 20(a) presumption. If, on remand, the administrative law judge again finds the Section 20(a) presumption invoked, he must determine, in light of *Brown*, whether employer produced evidence that rebuts the Section 20(a) presumption.

If the Section 20(a) presumption is rebutted, claimant bears the burden of persuading the administrative law judge that his injury is work-related, based on the record as a whole. *See, e.g.*, *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *Moore*, 126 F.3d 256, 31 BRBS 119(CRT). Claimant contends the administrative law judge erred in finding that he failed to meet this burden. The administrative law judge found there is no medical evidence of record attributing any psychological harm to claimant's work injury. The administrative law judge noted that claimant did not raise the possibility of a work-related psychological injury until almost two years after the work accident and Dr. Goll's medical notes do not record any psychological symptoms during this period. The administrative law judge found that, in the meantime, claimant suffered from an unrelated electrical injury, seizures and migraine headaches. Moreover, as discussed above, the administrative law judge found, in weighing the evidence as a whole, that claimant's testimony is not credible. Accordingly, the administrative law judge concluded, on the record as a whole, that claimant failed to establish he sustained a work-related psychological injury. Decision and Order at 9-10; Order Denying Mot. for Recon. at 1.

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).

The administrative law judge should revisit this issue in view of his assessment of claimant's credibility on remand, if he again finds the Section 20(a) presumption invoked and rebutted. *See generally Eller & Co. v. Golden*, 620 F.2d 71, 12 BRBS 348 (5th Cir. 1980). However, substantial evidence supports the administrative law judge's finding that there is "no medical evidence" in the record stating claimant has a psychological condition related to the work-related wrist injury. Moreover, the administrative law judge is entitled to weigh the evidence of record and deference must be accorded his findings if they are rational and supported by substantial evidence.[7] *See Del Monte Fresh Produce v. Director, OWCP [Gates]*, 563 F.3d 1216, 43 BRBS 21(CRT) (11th Cir. 2009). The administrative law judge's decision to accord determinative weight to the objective medical evidence is within his discretion. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Therefore, we reject claimant's contention that the administrative law judge erred in relying on the medical reports to deny his claim.

Accordingly, the administrative law judge's Decision and Order and Order Denying Motion for Reconsideration are vacated, and the case is remanded for further consideration consistent with this decision.

[7]In this respect, claimant contends the administrative law judge erred by crediting Dr. Goll's deposition testimony that he did not observe a psychological condition over claimant's testimony that he has a work-related psychological condition, because the administrative law judge had declined to accept Dr. Goll's testimony with respect to whether claimant had requested that Dr. Goll refer him for psychological treatment. It is well-established that the administrative law judge may accept or reject all, or any part, of any testimony. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Young v. Newport News Shipbuilding & Dry Dock Co.*, 45 BRBS 35 (2011). Accordingly, the administrative law judge acted within his discretion to credit part of Dr. Goll's testimony and to not credit another part.

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