U.S. Department of Labor

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

BRB No. 14-0396

WALTER TILLERY, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
UNION CARBIDE CORPORATION	)	DATE ISSUED: June 18, 2015
	)	
and	)	
	)	
ACE AMERICAN INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

John F. Dillon (John F. Dillon, PLC), Folsom, Louisiana, for claimant.

Phillip E. Foco and Scott P. Ledet (Bienvenu, Bonnecaze, Foco, Viator & Holinga, A.P.L.L.C.), Baton Rouge, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2013-LHC-00363) of Administrative Law Judge Lee J. Romero, 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 supported by substantial evidence, are rational, and are 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 began working for employer in 1969. In 1972, he became a marine dock technician who loaded and unloaded ships and barges at employer's dock facility.

Claimant was exposed to many chemicals during this employment, and he alleges he was also exposed to asbestos from gaskets used on the docks and in insulation on the ships and barges. In 1974, claimant and his co-workers began wearing respirators. Claimant developed occupational asthma in the 1970s. It worsened in the 1980s, and, in 1985, claimant was removed from the docks and put to work in a lab where he was free from exposure to fumes. In 1995, claimant retired from employment due to his work-related chemically-induced respiratory condition. He filed a claim for his respiratory injuries in 2003. Claimant and employer stipulated, and the administrative law judge issued an order approving the stipulations, that claimant was exposed to toxic gases and suffered respiratory injuries while working for employer. The parties agreed that the claim for compensation had not been timely filed; however, they agreed claimant is entitled to medical benefits to treat his work-related respiratory condition.

In November 2010, 15 years after his retirement, claimant was diagnosed with an asbestos-related pleural disease. CX 6. The administrative law judge found that claimant's claim for this condition was timely filed, 33 U.S.C. §913, and he rejected employer's *res judicata* defense. In addressing the compensability of the asbestos injury, the administrative law judge found that claimant established a prima facie case relating his asbestos-related lung condition to his employment at employer's dock facility. He also found that employer, through the opinion of its environmental engineering expert, Dr. Schonberg, rebutted the Section 20(a), 33 U.S.C. §920(a), presumption linking claimant's asbestos injury to his employment. Decision and Order at 24. In weighing the evidence as a whole, the administrative law judge found that Dr. Schonberg's opinion outweighed that of claimant's expert, Mr. Parker, and also outweighed claimant's lay testimony, which the administrative law judge found was "uncertain" as to claimant's asbestos exposure. As claimant failed to prove his claim by a preponderance of the evidence, the administrative law judge denied the claim for disability and medical benefits for asbestos-related pleural disease. *Id.* at 27. Claimant appeals the denial of benefits, and employer responds, urging affirmance.

Claimant contends the administrative law judge erred in denying his claim based on Dr. Schonberg's opinion. Claimant avers the administrative law judge erred by failing to address all the evidence of record regarding the injurious effects of low levels of asbestos exposure, and by, effectively, concluding there is a "safe" level of exposure to asbestos. Employer asserts the administrative law judge properly weighed the evidence and found that claimant did not establish the compensability of his condition by a preponderance of the evidence because he did not establish exposure to asbestos at employer's dock. We reject claimant's contentions of error and affirm the denial of benefits, as the administrative law judge's decision is supported by substantial evidence.

In determining whether an injury is work-related, a claimant is aided by the Section 20(a), 33 U.S.C. §920(a), presumption. Once the claimant establishes a prima

facie case, as here, Section 20(a) applies to relate the injury to the employment, and the burden is on the employer to rebut this presumption by producing substantial evidence that the injury is not related to the employment. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). The employer's burden on rebuttal is one of production, not persuasion; once the employer produces substantial evidence of the absence of a causal relationship, as here, where employer has produced evidence that claimant was not exposed to asbestos while he was working at its dock facility, the Section 20(a) presumption is rebutted and falls from the case.[1] *Ceres Gulf, Inc. v. Director, OWCP* [*Plaisance*], 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012); *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003); *Conoco, Inc.*, 194 F.3d 684, 33 BRBS 187(CRT). Because the presumption no longer controls, the issue of whether there is a causal relationship must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *Plaisance*, 683 F.3d 225, 46 BRBS 25(CRT); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). Claimant contends the administrative law judge erred in weighing the evidence as a whole by failing to take all the evidence into account and by giving greater weight to the testimony of employer's witness, Dr. Schonberg.[2]

Dr. Schonberg has a Ph.D. in environmental engineering; he began working for employer in 1970 as a process engineer. As such, he had to recognize safety hazards, evaluate conditions, and recommend controls. Dr. Schonberg reviewed claimant's deposition and was familiar with where claimant worked as a marine dock technician.

[1] Employer does not dispute that claimant has asbestos-related pleural disease. Claimant testified he was exposed to asbestos during his time in the Navy and while working for NASA, both of which pre-dated his employment with employer. EX 3 at 20-21; Tr. at 28-30. Claimant also asserts that he was exposed to asbestos at other areas of employer's facility, CX 4 at 8; EX 3 at 24-25; Tr. at 24-26; if so, employer asserts this exposure would not have been on a covered situs, 33 U.S.C. §903(a). Emp. Br. at 11.

[2] To the extent claimant also challenges the administrative law judge's finding that employer rebutted the Section 20(a) presumption, we reject his argument. The administrative law judge found that employer presented substantial evidence that claimant was not exposed to asbestos during his employment on the docks at employer's facility based on the deposition testimony of Dr. Schonberg, who not only was familiar with the area and the jobs, but who also conducted testing and monitored the areas of employer's facility. The finding that employer rebutted the Section 20(a) presumption is affirmed as it is supported by substantial evidence. *Ceres Gulf, Inc. v. Director, OWCP* [*Plaisance*], 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012).

Dr. Schonberg stated that, on the docks, claimant would have worked in the open air or in a climate-controlled technician shelter where he would not have been exposed to asbestos. EX 6 at 33-35. Air currents and distance would have diluted any asbestos fibers emanating from other parts of the facility. Further, he stated that the barges would not have contained asbestos because they did not carry "hot" items and, if there was asbestos on any of the ships or barges, claimant would not have been exposed to it because his job duties would not have resulted in his exposure to respirable dust. *Id.* at 43-44, 46, 62-63, 66, 122. Additionally, Dr. Schonberg testified that he monitored gaskets, which clamant said he used, while they were being changed, and he was unable to detect any levels of asbestos. Indeed, he stated that not all gaskets contain asbestos. *Id.* at 40, 46. Dr. Schonberg stated that his contemporaneous testing revealed asbestos levels at or below threshold limits and that, most of the time, asbestos was undetectable. *Id.* at 66. Because of employer's protocol, including surveys, monitoring, safe work permits, and other procedures, including use of respirators, Dr. Schonberg testified that claimant would not have been exposed to asbestos while working on employer's docks. *Id.* at 122-123, 140.

In addition to Dr. Schonberg's testimony, the administrative law judge noted that, while claimant testified he believed he was exposed to asbestos on employer's docks, he, as a lay person, remained uncertain as to his true exposures. He saw insulation on the ships but did not know whether it contained asbestos, and he did not know if the gaskets contained asbestos. Decision and Order at 4, 27; Tr. at 30, 37-38. The administrative law judge found claimant's testimony sufficient to invoke the Section 20(a) presumption, but not sufficient to carry the burden of establishing by a preponderance of the evidence that he suffered injurious exposure. Decision and Order at 27. Moreover, the administrative law judge gave less weight to claimant's certified industrial hygienist, Mr. Parker, because he relied solely on claimant's testimony regarding his exposure to asbestos and because he was under the mistaken impression that claimant did not wear respiratory protection.[3] *Id.* at 13-14, 27; CX 7-8. Moreover, the administrative law judge found that the data relied on by Mr. Parker were generalized and unrelated to employer's facility. Decision and Order at 14, 21; CX 8 at 38-39.

The administrative law judge is entitled to determine the weight to be accorded to the evidence of record and to address the credibility and sufficiency of any testimony. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W.*

[3] Claimant testified that employer required the use of respirators beginning in 1974 and that he wore them until 1985 when his respiratory condition due to exposure to chemicals precluded their usage, and he was moved into the lab. Tr. at 27, 39-40.

McGrath Corp. v. Hughes, 289 F.2d 403 (2d Cir. 1961). In this case, Dr. Schonberg testified that claimant was not exposed to asbestos while he worked on the docks at employer's facility. As Dr. Schonberg had specific knowledge of the conditions at employer's facility at the time claimant worked there, the administrative law judge rationally credited and gave greater weight to his opinion than to that of Mr. Parker.[4] Accordingly, based on the weight of the evidence, the administrative law judge found that claimant did not establish the work-relatedness of his asbestos condition by a preponderance of the evidence. The administrative law judge's decision is supported by substantial evidence of record. Therefore, we affirm the denial of benefits for claimant's asbestos-related condition.[5] *See Plaisance*, 683 F.3d 225, 46 BRBS 25(CRT);[6] *Hice v. Director, OWCP*, 48 F.Supp.2d 501 (D. Md. 1999); *Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001); *Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000).

[4] In this respect, we reject claimant's contention that the administrative law judge erred by not discussing the exhibits offered to show the risks associated with exposure to low levels of asbestos and the likelihood of claimant's exposure to asbestos given the type of work he performed. As discussed, the administrative law judge rationally found, based on Dr. Schonberg's opinion, that claimant was not exposed to asbestos. Thus, the administrative law judge was not required to also discuss the evidence claimant introduced concerning the levels at which asbestos is allegedly harmful. *See H.B. Zachry Co. v. Quinones*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000).

[5] This decision does not affect claimant's prior award for medical benefits for his work-related lung condition caused by exposures to fumes and chemicals.

[6] Contrary to claimant's assertion, the administrative law judge's decision is not contrary to *New Orleans Stevedores v. Ibos*, 317 F.3d 480, 36 BRBS 93(CRT) (5th Cir. 2003), *cert. denied*, 540 U.S. 1141 (2004). The issue in *Ibos* was which of several covered employers was liable for the claimant's work-related disease. The court did not address the situation presented here, where the issue is whether the claimant was exposed to asbestos at the only named employer. Moreover, in *Plaisance*, a hearing loss case, the court criticized the Board's use of *Ibos* as it relates to employer's burden to produce substantial evidence to rebut the Section 20(a) presumption. *Plaisance*, 683 F.3d at 231, 46 BRBS at 29(CRT).

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

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 C. GILLIGAN
Administrative Appeals Judge