U.S. Department of Labor

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

BRB No. 15-0179

MAGDALENA (SOTO) LUNA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: Mar. 16, 2016
NATIONAL STEEL AND SHIPBUILDING COMPANY	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and the Order Denying Petition for Reconsideration of William Dorsey, Administrative Law Judge, United States Department of Labor.

Jeffrey M. Winter (Law Office of Jeffrey Winter), San Diego, California, for claimant.

Barry W. Ponticello and Renee C. St. Clair (England, Ponticello & St. Clair), San Diego, California, for self-insured employer.

Before: BOGGS, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits and the Order Denying Petition for Reconsideration (2010-LHC-02100, 2010-LHC-02101, 2010-LHC-02103) of Administrative Law Judge William Dorsey 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 findings of fact and conclusions of law of the administrative law judge which 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 traumatic injuries to her knees and back on October 24, 2001, and to her right elbow on August 13, 2003, while working for employer as a welder, for which employer voluntarily paid claimant disability benefits. Claimant also alleged that

she sustained bilateral hearing loss, as well as cumulative traumatic injuries to her back, right elbow and both knees as a result of her work for employer through March 4, 2005.[1] Claimant further alleged that the stress caused by the various surgeries she endured to treat her work-related injuries,[2] and the loss of her job, led to her having a significant psychological condition, as diagnosed by Drs. Dodge, Brizendine, Moyer and Ray.[3] Claimant also received psychological evaluations from Drs. Ornish and Sbordone, on behalf of employer.

The administrative law judge found claimant sustained work-related injuries to her back and knees, and he thus awarded claimant disability benefits for those conditions. Pertinent to this appeal, the administrative law judge found claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), that her psychological diagnoses of depression and a pain disorder are related to her work injuries, that employer established rebuttal thereof, and that claimant did not show by a preponderance of the evidence that she sustained any work-related injury to her psyche. The administrative law judge, therefore, denied claimant's claim for benefits relating to her alleged psychological injuries. The administrative law judge denied claimant's motion for reconsideration.

On appeal, claimant challenges only the administrative law judge's finding that employer rebutted the Section 20(a) presumption linking her depression to her work injuries. Employer responds, urging affirmance of the administrative law judge's decision. Claimant filed a reply brief.

Claimant contends that the administrative law judge erred in finding that employer rebutted the Section 20(a) presumption with regard to her depression. Claimant avers that, contrary to the administrative law judge's findings, Drs. Ornish and Sbordone each

[1]Employer paid claimant periods of temporary total disability benefits for her left knee injury from April 11-17, April 20 to May 15, 2005, and from May 23, 2005 to February 2, 2006, as well as a scheduled award based on a ten percent loss of her left lower extremity.

[2]Claimant underwent surgical procedures to her right knee in 2002, right elbow in April 2004, left knee in 2005, and to her back in September 2007.

[3]Dr. Dodge, on June 10, 2008, stated that claimant was experiencing profound depression and emotional distress, prompting him to prescribe medication and refer claimant to Dr. Brizendine. CX 14 at 195-196. Drs. Brizendine, Moyer and Ray each diagnosed claimant with a major depressive disorder and a pain disorder. CX 38 at 468-471; 475-475; HT at 150; CX 79 at 1566-68.

diagnosed claimant as suffering from depression, and that neither doctor could state that this condition is not work-related.

Once, as in this case, claimant establishes entitlement to invocation of the Section 20(a) presumption, the burden shifts to employer to rebut the presumption with substantial evidence that the employee's injury was not caused, aggravated, or accelerated by the conditions of his employment. *See Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998). In establishing rebuttal of the Section 20(a) presumption, proof of another agency of causation is not necessary. *See Stevens v. Todd Pacific Shipyards*, 14 BRBS 626 (1982) (Kalaris, J., concurring and dissenting), *aff'd mem.*, 722 F.2d 747 (9th Cir. 1983), *cert. denied*, 467 U.S. 1243 (1984). Rather, the testimony of a physician given to a reasonable degree of medical certainty that no relationship exists between an injury and an employee's employment is sufficient to rebut the presumption. *See O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). In particular, the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has held that an employer's burden on rebuttal is to produce "evidence specific and comprehensive enough to sever the potential connection between the disability and the work environment." *Ramey*, 134 F.3d at 959, 31 BRBS at 210(CRT) (internal citation omitted). The inquiry at rebuttal concerns "whether the employer submitted evidence that could satisfy a reasonable fact finder that the claimant's injury was not work-related." *Ogawa*, 608 F.3d at 651, 44 BRBS at 50(CRT). Thus, an employer's burden on rebuttal is one of production only, not one of persuasion. *Id*. If the administrative law judge finds that the Section 20(a) presumption is rebutted, then he must weigh all of the relevant evidence and resolve the causation issue based on the record as a whole, with the claimant bearing the burden of persuasion. *Id.*; *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 257, 28 BRBS 43(CRT) (1994); *Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

In his decision, the administrative law judge found claimant entitled to the Section 20(a) presumption that her psychological diagnoses of depression and a pain disorder are work-related based on the opinion of Dr. Ray.[4] Although, in addressing Section 20(a) rebuttal, the administrative law judge recited the appropriate standard, Decision and Order at 36, his initial discussion of this issue consists only of a cursory finding that employer's "proof has done that." *Id.* Without specifically identifying the evidence upon which his rebuttal finding was based, the administrative law judge

[4]Dr. Ray, on December 18, 2012, stated that it is within the realm of reasonable medical probability that claimant sustained a psychiatric/psychological injury, i.e., a recurrent, severe major depressive disorder, a pain disorder, and cluster B personality traits, caused predominantly by the events of her employment. CX 79 at 1601.

considered "all of the evidence in the record on whether the claimant has an industrially-related psychological condition," Decision and Order at 37-47, and concluded that claimant "has failed to prove an injury to her psyche that is related to her work or work injuries." Decision and Order at 47.

In his Order Denying Petition for Reconsideration, the administrative law judge explained that employer rebutted the Section 20(a) presumption "by offering the opinions of Drs. Sbordone and Ornish." Order at 2. Specifically, the administrative law judge stated:

> Drs. Sbordone and Ornish evaluated the Claimant. Neither diagnosed depression, and each rejected that the Claimant suffers from psychosis.
>
> Because the [Section] 20(a) was rebutted by Drs. Sbordone and Ornish, the Decision proceeded to consider the record as a whole. Credibility matters there. The evidence as a whole convinced me that the Claimant failed to carry her burden that she suffers from any compensable psychological injuries. The opinions of Drs. Sbordone and Ornish can be broken into two parts: (1) what they concluded, and (2) why they concluded it. The "what" is that the Claimant suffers from no relevant psychological condition. The "why" is because of their evaluations [of] her credibility. It is their articulation of the "what" that rebuts the statutory presumption.

Order at 2-3. In further discussing the "what" aspect of their opinions, the administrative law judge stated that "Drs. Sbordone and Ornish expressed, in no uncertain terms, their opinions that the Claimant was faking psychological conditions, including memory loss." Order at 3. The administrative law judge added that "[t]here is no need to parse through the hodgepodge of psychological symptoms and declare separately that each is false." *Id.* He thus relied on the opinions of Drs. Sbordone and Ornish, who concluded that claimant "is malingering or has a factitious disorder," to find that employer rebutted the Section 20(a) presumption. *Id.*

In his recitation of the evidence, the administrative law judge extensively reviewed the opinions of Drs. Ornish and Sbordone. Decision and Order 14-16, 18, 20-26, 28-29. However, the administrative law judge's finding that "neither [doctor] diagnosed depression" is not supported by substantial evidence of record. Both Dr. Ornish and Dr. Sbordone listed "major depression," albeit based on claimant's history, as a diagnosis in their respective reports. In each of his reports dated October 26, 2009, October 13, 2011, and May 17, 2013, Dr. Ornish included a diagnosis of major depressive disorder. EX 27 at 315, 357, 376, 429. Specifically, in his October 26, 2009 report, Dr. Ornish identified claimant as having a "possible major depressive disorder in 2008," which he indicated, if true, was "industrial" and had "resolved" by that date. EX 27 at 315. Dr. Ornish

explained that his diagnosis of a major depressive disorder was based on symptoms described by Dr. Dodge on June 10, 2008, of claimant being profoundly depressed, sleeping all day, and not eating, which Dr. Ornish noted are "consistent with a major depressive disorder as diagnosed" by Drs. Dodge and Brizendine. EX 27 at 315. Dr. Ornish added:

> However, I cannot state with reasonable medical certainty that [claimant] suffered from a major depression in 2008, since [she] denied to me feeling depressed and told me that she only felt transiently depressed following the death of her mother from cancer, and transiently depressed as an adverse reaction to the three different anti-depressant trials prescribed by Dr. Dodge. Moreover, [claimant] testified in her deposition on September 3, 2008 that she did not feel anxious or depressed when she was evaluated by Dr. Brizendine one month earlier.

EX 27 at 315. Dr. Ornish further stated that "although I cannot state with reasonable medical certainty that [claimant] suffered from major depression in 2008, I can state with reasonable medical certainty that at the time that I evaluated [claimant] on May 12, 2009, she was *permanent and stationary* with no evidence of any *permanent, partial, psychiatric disability*." EX 27 at 317 [emphasis in original].

In his follow-up reports dated October 13, 2011 and May 17, 2013, Dr. Ornish included in his diagnoses of claimant's conditions that she has a "history of major depressive disorder with anxiety, recurrent." EX 27 at 357,[5] 429. In his hearing testimony, Dr. Ornish explained, with regard to his initial diagnosis of "a possible, maybe depressive disorder in 2008," that "if [claimant] had one, I thought it was industrial and resolved, but I say 'possible' because I could not obtain a history to corroborate a major depression." EX 27 at 398. Dr. Ornish also acknowledged that he included, in subsequent reports dated October 13, 2011 and May 17, 2013, a diagnosis of history of major depressive disorder, recurrent, HT at 458. Dr. Ornish, however, stated that, at that time, he "did not diagnose [depression] with a reasonable degree of medical certainty. So, it was possible, but I cannot opine that she had one with reasonable medical certainty. If she had one at that time, it would have been industrial, but I'm not offering an opinion

[5]Dr. Ornish reiterated in his October 13, 2011 report, that claimant's hospitalizations as the result of her psychological conditions, including her recurrent major depression, were due to "the cut in her [workers' compensation] benefits [i.e., employer reduced its payment of compensation under the Act from $1,800 to $600 per month], her ensuing severe financial problems, and her fear that she was going to lose her home due to foreclosure, with superimposed economic secondary gains." EX 27 at 375.

that she had one." HT at 471. Dr. Ornish's response to claimant's counsel's question as to whether his May 2013 diagnosis of major depressive disorder, recurrent, is industrial or not is as follows:

> The – it would be – my opinion was that it was caused by the financial stressors. It was ultimately [for] a trier of fact to determine if those stressors were considered industrial or non-industrial.

HT at 471. He later, however, stated that in terms of his May 2009 diagnosis of possible depression his "testimony was I could not diagnose depression with reasonable medical certainty because there is such a contradiction between what the history from [claimant], what she testified to, and what the records indicated." HT at 474. Dr. Ornish added that he provided a number of reasons as to why "I did not make a diagnosis with reasonable medical certainty of a major depression back in 2008," but "[l]et me be clear. If she had one at the time that I saw her, on May 12, 2009, it was resolved." HT at 475. Moreover, although Dr. Ornish stated that he saw no signs of depression in May 2013, he nonetheless recommended that claimant continue to see Dr. Moyer for medication monitoring and that she "should continue taking her anti-depressants for another year, at which point consideration should be given to tapering them off."[6] EX 27 at 440; *see generally Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997). Dr. Ornish further stated that even though claimant is malingering, "you can have malingering and still have a genuine depression. That's part of what has made this case complex," HT at 504-505, because "you can have partial malingering, where they have some genuine symptoms – in this case, I've diagnosed a major depressive [disorder] recurrent." HT at 516.[7]

In his July 10, 2011 report, Dr. Sbordone included a diagnosis of "major depression, severe without psychotic features." EX 29 at 484. Dr. Sbordone testified, however, that he "did not see" any evidence of a major depression at that time, HT at 562-563, and elaborated that the major depression diagnosis was purely based on claimant's medical history, including her hospitalizations. HT at 563. He added that claimant's "two basic issues were the factitious disorder and the issue of malingering" as

[6]Dr. Ornish stated that if claimant "experiences an increase in symptoms of anxiety and depression once her anti-depressants are tapered off, her anti-depressants should be resumed and continued for another year or two." EX 27 at 440. If claimant's "depression recurs each time her antidepressants are discontinued, then it is possible she will need to be maintained on them indefinitely." *Id.*

[7]Dr. Ornish diagnosed malingering, factitious disorder, history of major depression and history of conversion disorder. HT at 515.

he "was seeing evidence of both of those at the time of [his] examination" of claimant. HT at 563.

Both Dr. Ornish and Dr. Sbordone listed "major depression" as a diagnosis by history and, in 2009, Dr. Ornish stated that if claimant did have a depressive disorder in 2008 "it was industrial."[8] Thus, the administrative law judge's conclusion that employer established rebuttal, based on his finding that neither doctor diagnosed depression, cannot stand. As this served as the basis for the administrative law judge's finding that employer established rebuttal of the Section 20(a) presumption, we vacate that finding and remand for reconsideration of that issue.

On remand, the administrative law judge must determine whether employer produced "evidence specific and comprehensive enough to sever the potential connection" between claimant's depression and her work injuries. *Ramey*, 134 F.3d at 959, 31 BRBS at 210(CRT); *see also Ogawa*, 608 F.3d at 651, 44 BRBS at 50(CRT). If, on remand, the administrative law judge finds that employer did not rebut the Section 20(a) presumption with regard to claimant's depression, or alternatively, finds that employer rebutted the Section 20(a) presumption only at a point in time subsequent to the date of injury, claimant's depression is work-related as a matter of law, at least for a period of time. *See generally Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011). The administrative law judge would then have to address claimant's entitlement to medical benefits relating to the treatment of that work-related depression. 33 U.S.C. §907. Moreover, the administrative law judge also would have to address any issues relating to the nature and extent of claimant's work-related depression. If, on remand, the administrative law judge again finds that employer has rebutted the Section 20(a) presumption with regard to claimant's depression from the date of injury, the administrative law judge may reinstate the denial of medical and disability benefits for a psychological injury, as claimant has not challenged the administrative law judge's finding that she has not established, based on the record as a whole, that she suffers from any work-related psychological disorder. *Scalio v. Ceres Marine Terminals, Inc.*, 41BRBS 57 (2007).

[8]In 2013, Dr. Ornish stated, "from a forensic psychiatric perspective Ms. Luna's permanent, partial, psychiatric disability was *non-industrial* . . . ." EX 27 at 438.

Accordingly, the administrative law judge's finding that employer rebutted the Section 20(a) presumption with regard to her depressive disorder is vacated, and the case is remanded for further consideration consistent with this opinion. In all other regards, the administrative law judge's Decision and Order Awarding Benefits and the Order Denying Petition for Reconsideration are affirmed.

SO ORDERED.

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JUDITH S. BOGGS
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge