U.S. Department of Labor

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

BRB No. 15-0297

ALFRED HANSEN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PORTS AMERICA TEXAS	)	DATE ISSUED: Mar. 3, 2016
	)	
and	)	
	)	
PORTS INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Alfred Hansen, Houston, Texas, pro se.

Christopher M. Landry (Pugh, Accardo, Haas, Radecker & Carey, LLC), Covington, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant, appearing without counsel, appeals the Decision and Order Denying Benefits (2013-LHC-00643) of Administrative Law Judge Larry W. Price 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). 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 alleged that, as a result of exposure to spilled butyl mercaptan at employer's facility on April 14, 2012, he has experienced migraine headaches, head spasms, clavicle pain, shortness of breath, depression, irritation, confusion, nausea, and sensitivity to heat and to the outdoors. Tr. at 41; EXs 2 at 1, 4 at 3. Employer controverted the claim. The case was referred to the Office of Administrative Law Judges (OALJ) on January 7, 2013, but the hearing was not held until January 29, 2015, due primarily to claimant's non-compliance with employer's discovery requests. As a result of claimant's continued violations of several orders to participate in discovery, in an order issued on January 22, 2015, the administrative law judge ruled that he would restrict claimant from calling witnesses other than himself, and prohibit claimant from introducing non-medical exhibits that he had not identified during discovery and medical exhibits that employer did not possess.[1]

In his Decision and Order, the administrative law judge found that claimant is entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), linking his symptoms to butyl mercaptan exposure, but that employer established rebuttal of the presumption. Decision and Order at 7-8. The administrative law judge concluded that the record as a whole does not support a finding that any of claimant's symptoms are causally related to exposure to butyl mercaptan. *Id*. at 9. Accordingly, the claim was denied.

Claimant appeals the denial of benefits, as well as the administrative law judge's discovery orders. Employer filed a response brief in support of the administrative law judge's orders and the denial of benefits.

In his Decision and Order, the administrative law judge reviewed the prior discovery orders he issued in this case. The administrative law judge stated that he had conducted conference calls with the parties to resolve the discovery disputes and that his staff had spent considerable time attempting to contact claimant, but that claimant did not answer or return telephone calls. Decision and Order at 2. The administrative law judge summarized the sanctions he imposed on claimant, but noted that, at the hearing, he nonetheless allowed claimant to submit exhibits that had not already been submitted into the record by employer, and he allowed claimant's testimony to include hearsay

[1] The administrative law judge also denied claimant's motion for a continuance, which would have been the fourth continuance in this case since it was referred to the OALJ for a hearing on January 7, 2013. At the January 29, 2015 hearing, claimant offered several reasons for his motion for another continuance, which were to: find an attorney, make copies of documents he intended to submit as exhibits, put his evidence in order, and obtain from employer the report of Dr. Holland. Tr. at 4-5, 8-11; *see* discussion, *infra*.

statements by persons that claimant had not previously identified to employer.[2] *Id*. at 2-3.

Discovery rulings are reviewed under an abuse of discretion standard, *Olsen v. Triple A Machine Shops, Inc*., 25 BRBS 40 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP*, 996 F.2d 1226 (9th Cir. 1993). The administrative law judge has the authority to issue orders to compel discovery, which includes the production of documents, attendance at depositions, and the answering of requests for admissions. 33 U.S.C. §927(a); *Sledge v. Sealand Terminal, Inc.*, 14 BRBS 334 (1981); 29 C.F.R. §18.21 (2014).[3] The administrative law judge also has great discretion concerning the admission of evidence, and such decisions are reversible only if they are arbitrary, capricious, or based on an abuse of discretion. *See, e.g.*, *Patterson v. Omniplex World Services*, 36 BRBS 149 (2002); *Burley v. Tidewater Temps, Inc.*, 35 BRBS 185 (2002). Section 18.6(d)(2), 29 C.F.R. §18.6(d)(2) (2014), states in relevant part:

> If a party . . . fails to comply with a subpoena or with an order, including, but not limited to, an order for the taking of a deposition . . . the production of documents, . . . or requests for admissions, . . . the administrative law judge, for the purpose of permitting resolution of the relevant issues and disposition of the proceeding without unnecessary delay despite such failure, may take such action in regard thereto as is just, including but not limited to the following:
>
> ***
>
> (iii) Rule that the non-complying party may not introduce into evidence or otherwise rely upon the testimony by such party, . . . or the documents or other evidence, in support of or in opposition to any claim or defense; . . .

[2] The administrative law judge denied employer's motion to dismiss claimant's claim for failure to comply with discovery orders, properly stating that he lacks authority to do so. Decision and Order at 2; *see Goicochea v. Wards Cove Packing Co.*, 37 BRBS 4 (2003).

[3] The OALJ Rules of Practice and Procedure are applicable to proceedings under the Longshore Act unless they are "inconsistent with a rule of special application as provided by statute, executive order, or regulation." 29 C.F.R. §18.1 (2014). These rules were recently amended, with the final regulations becoming effective on June 18, 2015. The amended rules are inapplicable to this claim because the administrative law judge's Decision and Order was issued on April 7, 2015. Citations to the rules in this decision, therefore, are to those in effect at that time.

Section 18.28(a) provides in pertinent part that, "[C]ontinuances will only be granted in cases of . . . undue hardship, or a showing of other good cause." 29 C.F.R. §18.28(a) (2014).

We reject claimant's contention that the administrative law judge committed error by imposing sanctions and refusing to grant a continuance at the hearing.[4] The administrative law judge repeatedly sought to have claimant schedule and attend his deposition and ordered him to comply with employer's other discovery requests. There is no indication in the record that claimant disclosed to employer before the hearing the names of witnesses he intended to call at the hearing. Due to claimant's non-compliance with employer's discovery requests and the administrative law judge's orders, the administrative law judge did not abuse his discretion by imposing sanctions in the form of limiting the evidence claimant could submit.[5] *Patterson*, 36 BRBS 149; *Olsen*, 25 BRBS 40; 29 C.F.R. §18.6(d)(2) (2014). Nonetheless, the administrative law judge permitted claimant to make copies of employer's exhibits after the hearing and to file a post-hearing brief. Tr. at 13. Moreover, the administrative law judge did not abuse his discretion under Section 18.28(a) by declining to grant claimant's motion for another continuance. *See* Tr. at 4-5, 8-11. Scheduled hearings in this case had already been continued or cancelled due to claimant's non-cooperation with several discovery orders.[6] Over two years had passed since the case was referred to the OALJ. Therefore, we affirm the administrative law judge's pre-hearing orders and denial of an additional continuance as the administrative law judge did not abuse his discretion in directing discovery and scheduling the hearing.

[4] We also reject claimant's assertion that the administrative law judge did not sign the Decision and Order. The last page of the decision states that it was "Digitally signed." Decision and Order 10.

[5] Contrary to claimant's contention the administrative law judge admitted into evidence the butyl mercaptan Material Safety Data Sheet as Claimant's Exhibit 1. Tr. at 107; Decision and Order at 1.

[6] By order dated September 12, 2013, the administrative law judge cancelled the hearing to provide the parties with more time for discovery. By orders dated March 6, 2014 and July 15, 2014, the administrative law judge again canceled the scheduled hearings, citing claimant's failure to participate in discovery. Efforts to compel claimant's participation in discovery were made by orders dated November 20, 2013, January 31, 2014, March 26, 2014, July 15, 2014, October 16, 2014, and January 14, 2015.

We next address the administrative law judge's finding that claimant did not establish a work-related injury from butyl mercaptan exposure. Once the claimant establishes a prima facie case, as here, Section 20(a) applies to relate his injury to his 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); *Cline v. Huntington Ingalls, Inc.*, 48 BRBS 5 (2013). If the employer rebuts the presumption, it no longer controls, and the issue of whether there is a causal relationship between claimant's injuries and the incident at work must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *Ceres Gulf, Inc. v. Director, OWCP* [*Plaisance*], 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012); *Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001).

In this case, the administrative law judge credited the testimony of Captain Mike Stallings, of the Port Authority Fire Department, the deposition testimony of Drs. Holland and Steiner, and the toxicology report of Dr. Lindsay to find that employer rebutted the Section 20(a) presumption and that, based on the record as a whole, claimant did not establish that his injuries are related to butyl mercaptan exposure. Decision and Order at 8. Specifically, the administrative law judge found, based on the testimony of Captain Stallings, that the amount of butyl mercaptan spilled was less than half a cup. Tr. at 51-52. The administrative law judge also credited Captain Stallings's testimony that the area had been monitored and deemed safe when he arrived at the scene at 7 p.m., which is when claimant reported that he was exposed. Tr. at 30, 58, 96. Captain Stallings testified that he was able to walk within 10 feet of the area of the spill before his meter indicated that there was chemical exposure, and that, even then, the meter did not record the exposure level as toxic; for this reason, the HazMat unit did not wear protective gear. *Id*. at 64, 71. The administrative law judge credited Dr. Holland's opinion that, "all of Mr. Hansen's symptoms exceed the amount of exposure that has been documented . . . his symptoms exceed the . . . health effects that have been documented on the MSDS [Material Safety Data Sheet]." EX 2 at 3-4; *see also* EX 3 at 7-8 pgs. 25-26. The administrative law judge further credited Dr. Holland's opinion that none of claimant's subjective complaints is work-related or exposure-related. EX 3 at 8 p. 27. The administrative law judge credited the concurring opinion of Dr. Steiner in this regard and his statement that claimant could have returned to work the day following the spill. EX 4 at 4, 5 at 4-5 pgs. 12-15. The administrative law judge also credited the opinion of Dr. Lindsay that, among other things, there is no biochemical or physiologic explanation for claimant's reported symptoms from exposure to butyl mercaptan. EX 7 at 12.

The administrative law judge, as the fact-finder, was entitled to rely on the testimony of Captain Stallings and the medical opinions of Drs. Holland, Steiner, and Lindsay. *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th

Cir. 1995); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). As the credited evidence, that the symptoms claimant alleged were not caused or aggravated by the April 14, 2012 spill of butyl mercaptan at employer's facility, is sufficient to rebut the Section 20(a) presumption, and is substantial evidence supporting the administrative law judge's finding that claimant did not establish a work-related injury from butyl mercaptan exposure, we affirm these findings. *Plaisance*, 683 F.3d 225, 46 BRBS 25(CRT); *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Cline*, 48 BRBS 5; *Sistrunk*, 35 BRBS 171. Accordingly, we affirm the administrative law judge's denial of the claim.[7]

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

SO ORDERED.

_____
BETTY JEAN HALL, Chief
Administrative Appeals Judge

_____
GREG J. BUZZARD
Administrative Appeals Judge

_____
JONATHAN ROLFE
Administrative Appeals Judge

[7] In view of the administrative law judge's denial of the claim, we reject claimant's contention that the administrative law judge erred by not ordering employer to pay his medical bills. Employer is not liable for medical treatment if the injury is not work-related. 33 U.S.C. §907(a).