U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 18-0310

JAMES D. HIGGINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 03/14/2019
ACADEMI	)	
	)	
and	)	
	)	
STARR INDEMNITY and LIABILITY COMPANY c/o GALLAGHER BASSETT SERVICES	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Morris D. Davis, Administrative Law Judge, United States Department of Labor.

Lara D. Merrigan (Merrigan Legal), San Rafael, California, and Jon B. Robinson (Strongpoint Law Firm, LLC), Mandeville, Louisiana, for claimant.

Jonathan A. Tweedy and Christy L. Johnson (Brown Sims), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2017-LDA-00182) of Administrative Law Judge Morris D. Davis 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 Defense Base Act, 42 U.S.C. §1651 *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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant experienced bilateral elbow and chest pain on June 8, 2016, while working for employer in Afghanistan. Tr. at 42. Claimant returned to the United States on June 11, 2016, for a previously-scheduled vacation. *Id*. at 43. He experienced a recurrence of elbow and chest pain that evening and was hospitalized. *Id*. at 45-49. Claimant was released on June 15, 2016, with a diagnosis of myocarditis. JX 40 at 4 (pp.14-15).

Claimant again went to the emergency room on June 28, 2016, with bilateral elbow and chest pain; he was discharged after a few hours when the pain dissipated. Tr. at 57-58; JX 9 at 1. These symptoms recurred on July 8, 2016, and he returned to the emergency room, where he was diagnosed with a heart attack and underwent surgery to clear blocked arteries. Tr. at 61-67; JXs 11-14. Claimant's treating physician, Dr. Haitas, informed him that the heart attack was caused by viral myocarditis (VM). Tr. at 69. Claimant underwent a viral serology test on July 20, 2016. He tested positive for the Coxsackie B4 virus (CB4), which is caused by the spread of contaminated fecal matter.[1] *Id*. at 69-73; JX 38 at 6 (pp. 23). Due to the impairment caused by the heart attack, claimant can no longer work as a contractor, and he has not returned to work. Tr. at 81-83. Claimant filed a claim for benefits under the Act, asserting that he was exposed to unsanitary conditions in Afghanistan that caused CB4, which in turn caused VM and resulted in his heart attack and cardiac disability. JXs 1 at 3; 2 at 2; Cl. Post-Hearing Br. at 55-62, 66-68.

In his decision, the administrative law judge found claimant entitled to the Section 20(a) presumption that his cardiac condition was caused by his employment in Afghanistan. 33 U.S.C. §920(a). Specifically, employer conceded that claimant sustained a cardiac injury, and the administrative law judge determined that claimant established that working in Afghanistan could have caused CB4 and VM and that the mild chest pain claimant experienced in Afghanistan on June 8, 2016, establishes a temporal connection between the start of claimant's cardiac problems and his employment. Decision and Order at 18-19. The administrative law judge found that employer rebutted the Section 20(a) presumption based on the opinion of Dr. Roseman that "there was no causal nexus between

[1] The record indicates that 70 percent of persons under 30 living in the United States have contracted CB4, which usually causes only mild flu-like symptoms. JXs 38 at 7-8, 12 (pp. 26-29, 46-48); 41 at 12 (pp. 45-46).

claimant's employment and his injury." *Id*. at 21. The administrative law judge then determined that claimant failed to establish a compensable injury on the record as a whole because he did not show, by a preponderance of the evidence, that he contracted CB4 in Afghanistan or that "the CB4 caused VM and the July 2016 heart attack that led to his current cardiac condition." *Id*. at 21, 26-27.

Claimant appeals the denial of the claim. Employer responds, urging affirmance. Claimant filed a reply brief.[2]

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[2] In his reply brief, claimant avers that the administrative law judge erred by not applying the "zone of special danger" analysis to find that his CB4 and VM arose out of his employment for employer in Afghanistan. Specifically, claimant argues that the zone of special danger applies to establish that an injury "arose out of" as well as in the "course of his employment." Cl. Reply Br. at 3-13. Claimant asserts that the Board should reject the statements in a footnote in *Compton v. Dyncorp, Int'l*, BRB No. 13-0388, slip op. at 2 n.1 (2014), *aff'd,* 650 F. App'x 550, 552 (9th Cir. 2016). In *Compton*, the Board noted:

> we reject claimant's contention that the administrative law judge erred in failing to apply "the zone of special danger" principle to this case. Under the Act, an injury generally occurs in the course of employment if it occurs within the time and space boundaries of the employment and in the course of an activity whose purpose is related to the employment. *Palumbo v. Port Houston Terminal, Inc.*, 18 BRBS 33 (1986); *Mulvaney v. Bethlehem Steel Corp*., 14 BRBS 593 (1981). However, in cases arising under the Defense Base Act, the United States Supreme Court has held the injury may be within the course of employment even if the injury did not occur within the space and time boundaries of work, so long as the employment creates a "zone of special danger" out of which the injury arises. *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 507 (1951). In this case, the issue does not concern whether claimant's injuries occurred in the course of his employment but whether they arose out of his employment, *i.e.*, were they caused by the employment. *See* 33 U.S.C. §902(2). The "zone of special danger" doctrine does not aid claimant in this inquiry, although the Section 20(a) presumption, which the administrative law judge did apply, does aid claimant.

Compton, slip op. at 2 n.1. In affirming the Board, the United States Court of Appeals for the Ninth Circuit stated, "[T]he issue is whether Compton suffered injuries 'arising out of' that course of employment, which the 'zone of special danger' doctrine does not answer." *Compton*, 650 F. App'x at 552. For the reasons stated in *Compton*, and explicitly affirmed

Claimant first contends the administrative law judge erred in finding his heart condition is not related to work because his initial chest pains occurred on June 8, 2016, while he was in Afghanistan, and the administrative law judge found, in discussing invocation of the Section 20(a) presumption, that the medical evidence establishes these pains were the beginning of a continuous injury that culminated in his July 2016 heart attack. Generally, chest pain has been recognized as a compensable injury. *See, e.g.*, *Cairns v. Matson Terminals*, 21 BRBS 252 (1988). However, claimant did not assert before the administrative law judge that his heart attack and cardiac condition arose, in part, out of the chest pain he experienced in Afghanistan due to its unique circumstances or working conditions.[3] Rather, claimant averred that his chest pains were part of the symptomology and cardiac injury due solely to his contracting CB4 in Afghanistan. Cl. Post-Hearing Br. at 55-57. As such, claimant cannot argue for the first time on appeal that the chest pain he experienced in Afghanistan is a separate, compensable injury that renders work-related his entire subsequent cardiac condition and disability. *See generally Johnston v. Hayward Baker*, 48 BRBS 59 (2014).

Claimant next challenges the administrative law judge's finding that employer rebutted the Section 20(a) presumption. Claimant correctly contends that the administrative law judge did not cite the law of the United States Court of Appeals for the Eleventh Circuit, within whose jurisdiction this case arises. *See McDonald v. Aecom Tech. Corp.*, 45 BRBS 45 (2011). Claimant argues that, because Dr. Roseman did not "rule out the possibility" that claimant contracted CB4 in Afghanistan when working for employer, the administrative law judge erred in finding Dr. Roseman's opinion sufficient to rebut the Section 20(a) presumption.

In his decision, the administrative law judge found that employer rebutted the Section 20(a) presumption based on "Dr. Roseman's detailed and unequivocal opinion that there was no causal nexus between Claimant's employment and his injury." Decision and Order at 21. He agreed with claimant that Dr. Roseman did not "rule out" that claimant contracted CB4 in Afghanistan; however, he found that "the rebuttal standard does not require Employer to rule out any possible causal connection between Claimant's employment and his cardiac condition." *Id*. The administrative law judge stated that

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by the Ninth Circuit, we reject claimant's contention that the zone of special danger serves to establish that his CB4 and VM arose out of his employment in Afghanistan.

[3] Claimant attributed his chest pains solely to CB4 and not to any other aspect of his working in Afghanistan. The administrative law judge also relied on claimant's testimony that he experienced only one episode of chest pain in Afghanistan and that he felt "fine" shortly thereafter. Decision and Order at 24 (citing Tr. at 42-43; JXs 27 at 48; 39 at 5).

employer's burden on rebuttal is to "throw factual doubt on the prima facie case," which he found employer did based on Dr. Roseman's opinion. *Id*. (citing *Ceres Gulf, Inc. v. Director, OWCP [Plaisance]*, 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012)).

Upon invocation of the Section 20(a) presumption, the burden shifts to employer to rebut it. In *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990), the Eleventh Circuit stated that "None of the physicians expressed an opinion ruling out the possibility that there was a causal connection between the accident and Brown's disability. Therefore, there was no direct concrete evidence sufficient to rebut the statutory presumption." This circuit has not since addressed the Section 20(a) rebuttal standard, but every other circuit to address the issue has stated that an employer does not have to "rule out possibilities" in order to rebut the Section 20(a) presumption, but must produce "substantial evidence" of the absence of causation (and aggravation if such a theory is raised).[4] *See Bath Iron Works Corp. v. Fields*, 599 F.3d 47, 44 BRBS 13(CRT) (1st Cir. 2010); *Plaisance*, 683 F.3d 225, 46 BRBS 25(CRT); *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *C & C Marine Maint. Co. v. Bellows*, 538 F.3d 293, 42 BRBS 37(CRT) (3d Cir. 2008); *Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008); *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); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). The Board held in a case arising in the Eleventh Circuit that the opinion of a physician that, to a reasonable degree of medical certainty, no relationship exists between an injury and the employment accident or exposures alleged to be the cause of the injury is sufficient to rebut the Section 20(a) presumption. *See O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39, 41-42 (2000).

The administrative law judge found that Dr. Roseman opined "within a degree of medical probability or certainty" that the "data . . . cannot substantiate" claimant's contention that CB4 led to VM, which led to his cardiac condition. JX 24 at 14. He opined "based upon a reasonable degree of medical certainty" that claimant does not have

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[4] The Act states:

> In any proceedings for the enforcement of a claim for compensation under this chapter it shall be presumed, *in the absence of substantial evidence to the contrary* –
>
> (a) That the claim comes within the provision of this chapter.

33 U.S.C. §920(a) (emphasis added).

myocarditis. JXs 10; 24 at 24-25; *see also* JX 41. Dr. Roseman's unequivocal opinion thus severs the connection between claimant's employment in Afghanistan and his heart attack and resulting disability. Therefore, we hold that the administrative law judge properly found Dr. Roseman's opinion constitutes substantial evidence to rebut the Section 20(a) presumption that claimant's cardiac condition is due to employment conditions in Afghanistan and we affirm the administrative law judge's finding in this regard.[5] *See O'Kelley*, 34 BRBS 39; *see also Plaisance*, 683 F.3d 225, 46 BRBS 25(CRT); *Suarez v. Service Int'l, Inc.*, 50 BRBS 33 (2016).

Claimant also challenges the administrative law judge's weighing of the medical evidence and testimony to find that he did not establish his cardiac condition is work-related, based on the evidence as a whole. Cl. Pet. for Rev. at 92. To prevail on the claim as presented to the administrative law judge, claimant must establish, based on the evidence as a whole, that he has work-related VM, which caused his heart attack and cardiac disability. *See generally Moore*, 126 F.3d 256, 31 BRBS 119(CRT). The administrative law judge found that Dr. Haitas's initial myocarditis diagnosis after claimant was hospitalized in June 2016 was significantly weakened by the equivocation he expressed at his subsequent deposition. Decision and Order at 23. Specifically, Dr. Haitas stated several times that he had "serious doubts or questions" about the cause of claimant's cardiac condition and he acknowledged multiple times that claimant experienced symptoms consistent with ischemia (rather than VM). JX 40 at 4, 8, 13-14 (pp. 13, 29, 49-51). Thus, the administrative law judge found that Dr. Haitas's initial myocarditis diagnosis does not satisfy claimant's burden of proof. Decision and Order at 23.

The administrative law judge also placed "limited weight" on Dr. Hilton's myocarditis diagnosis. Decision and Order at 24; JX 30 at 4-5. The administrative law judge permissibly found that "Dr. Hilton's self-proclaimed lack of expertise with MRI interpretation undercuts his myocarditis diagnosis based on the same." Decision and Order at 24. He found that Dr. Hilton also mischaracterized some of claimant's symptoms, such

[5] Claimant argues that Dr. Roseman did not rebut the Section 20(a) presumption with regard to his June 8, 2016 episode of chest pain in Afghanistan. The administrative law judge did not address this assertion, which was not raised below, and the Board need not address it now. *See Johnston*, 48 BRBS 59. We note that claimant reported chest pain and bilateral elbow pain in Afghanistan on June 8, 2016, and when he returned home in June 2016. Tr. at 42, 45-46, 57-58; JX 9 at 1. Dr. Roseman stated that the bilateral elbow pain was evidence that claimant did not have myocarditis, which is characterized by stabbing chest pains, whereas the unusual symptom of bilateral elbow pain is characteristic of ischemic heart disease, and he opined that claimant's recurrent chest pain was due to pre-existing coronary artery disease. JXs 24 at 21-22; 24; 41 at 19 (pp. 74).

as intermittent chest pain in Afghanistan, rather than a single episode, and mistakenly believed claimant left Afghanistan for this reason, rather than for scheduled vacation. *Id*.; JXs 27 at 48 (p. 187); 39 at 5, 8 (pp. 15-16, 27-28); Tr. at 42-43. Lastly, the administrative law judge determined that Dr. Hilton made unsupported and inconsistent statements regarding whether claimant had coronary artery disease, notwithstanding his stating that the myocarditis diagnosis was premised on claimant's not having coronary artery disease. JX 39 at 10-11 (pp. 36-39). In conclusion, the administrative law judge found that claimant "failed to prove by a preponderance of the evidence that . . . CB4 caused myocarditis and the heart attack that led to his debilitating cardiac condition."[6] Decision and Order at 26-27; *see also id*. at 23-24.

It is well-established that, in arriving at his decision, the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co*., 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963). The Board may not reweigh the evidence, but may assess only whether there is substantial evidence to support the administrative law judge's decision. *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003); *Miffleton v. Briggs Ice Cream Co.*, 12 BRBS 445 (1980), *aff'd*, No. 80-1870 (D.C. Cir. 1981). Claimant's contention that the administrative law judge should have concluded from a holistic assessment of the evidence that he sustained a work-related cardiac injury misperceives the Board's role. Claimant has not demonstrated that the administrative law judge's finding that he did not establish he has VM is not rational or unsupported by the evidence, and the Board may not reweigh the evidence or draw its own inferences from the record.[7] *Del Monte Fresh Produce v.*

[6] The administrative law judge also discussed employer's evidence. The administrative law judge was within his discretion to find "well-reasoned" Dr. Roseman's opinion that claimant "may have been misdiagnosed with myocarditis," notwithstanding his misgivings about other aspects of Dr. Roseman's opinion. Decision and Order at 26; *see Perini Corp. v. Heyde*, 306 F. Supp. 1321 (D.R.I. 1969). The administrative law judge specifically noted Dr. Roseman's discussion of the weakness of claimant's MRI testing for diagnosing myocarditis because "the evaluation did not assess all three 'Lake Louise Criteria'" (myocardial edema, hyperemia and capillary leak, and late gadolinium enhancement) to evaluate myocarditis. JX 41 at 13 (pp. 49-51). The administrative law judge found it significant that Dr. Roseman's misdiagnosis opinion mirrors statements by Dr. Haitas, who expressed similar doubts, and that Dr. Haitas supported Dr. Roseman's opinion that claimant's June 2016 heart problems represented unstable angina. JX 40 at 8, 12-13, 41.

[7] Claimant takes issue with the administrative law judge not addressing his disability status as of June 12, 2016, when he was hospitalized for chest pains. The administrative

Director, OWCP [Gates], 563 F.3d 1216, 43 BRBS 21(CRT) (11th Cir. 2009); *see also Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). The administrative law judge must assess the sufficiency of the evidence offered for establishing that claimant has a work-related cardiac condition. His finding that claimant did not meet his burden by a preponderance of the evidence is rational and supported by substantial evidence. *Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001); *Coffey v. Marine Terminals Corp.*, 34 BRBS 112 (2000); *Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999).

Accordingly, we affirm the administrative law judge's Decision and Order Denying Benefits.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

law judge was not required to address the onset of claimant's disability due to his cardiac disability once he determined that claimant did not establish a work-related injury.