U.S. Department of Labor

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

BRB No. 18-0463

JOHN G. PEARN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 03/12/2019
INSPECTORATE AMERICA, CORPORATION	)	
	)	
and	)	
	)	
NEW HAMPSHIRE INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

John G. Pearn, Seabrook, Texas.

John H. Hughes (Allen & Gooch), Lafayette, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant, appearing without counsel, appeals the Decision and Order (2015-LHC-00012) of Administrative Law Judge Patrick M. Rosenow 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, who had extensive pre-existing back problems,[1] alleged that on July 5, 2013, he experienced an onset of mid-back pain just below his right shoulder blade when the harness and oxygen tank he was wearing for work slipped down his back and shifted to the right. JX 1, Dep. at 47-49. Claimant testified he finished his shift and reported the accident to employer's dispatcher, Chris Malone, and to Tommy Mender, the safety watch. Claimant testified he also reported the incident to employer's district manager, Bob Pitcairn, on July 6, 2013. HT at 112-113.

On July 9, 2013, claimant went to First Choice Emergency Room, where he was diagnosed with a lumbar strain and chronic lower back pain. He resumed his normal work schedule on July 18, 2013,[2] and continued to work until November 12, 2013, when, upon completion of a smaller offshore job, he became unable to feel his right leg and/or walk on it. CX 33. Claimant went to St. John Hospital on November 14, 2013, with complaints of chronic back pain. X-rays indicated no acute injury and an MRI revealed post-operative changes, but no other significant findings. Claimant was prescribed medication, cleared to return to work without restrictions on November 18, 2013, and told to follow up with his neurosurgeon or pain management doctor. Claimant, however, did not return to work for employer and thereafter filed a claim for benefits under the Act on January 31, 2014.[3]

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[1]Claimant was diagnosed with disc protrusions at L5-S1 and L2-L3 and chronic radiculopathy at S1, L2, and possibly L3 following an automobile accident on October 24, 2007. EX 1. Dr. Wang performed surgery on May 12, 2009, consisting of a spinal fusion at L5-S1, laminectomy at L4-L5, reduction of spondylolisthesis, and the implantation of an internal bone growth stimulator. *Id.* Claimant returned to work approximately three months after the surgery but continuing back pain prompted further periodic treatment by Dr. Pinchot between July 2009 and November 2011. HT at 94-97.

[2]Claimant indicated that following the completion of his July 6, 2013 work day, he had three regularly scheduled off-days. Claimant then was "out sick" for his next six workday cycle, and following three more regularly scheduled off-days, he returned to work. CX 33.

[3]In December 2013, claimant completed a form for short-term disability benefits, indicating he had pulled a muscle while bending over and suffered bulging discs and a pinched nerve, which had rendered him unable to work since November 13, 2013. In January 2014, claimant submitted a note to employer from his pain management physician, Dr. Pinchot, stating that claimant's inability to work since November 13, 2013, resulted

Employer controverted the claim on the grounds that it was not provided timely notice of the injury and that claimant's condition is not work-related.[4]

In his Decision and Order,[5] the administrative law judge found claimant invoked the Section 20(a) presumption, 33 U.S.C. §920(a), that his current lumbar condition is related to the work incident. Decision and Order at 16. He next found employer rebutted the presumption and, based on the evidence as a whole, found that claimant failed to establish a causal relationship between his present lumbar condition and the July 5, 2013 work incident. *Id.* at 16 – 18. Accordingly, the administrative law judge denied claimant's claim for compensation and medical benefits.

Because claimant is appealing without the assistance of counsel, the Board will address all findings adverse to claimant, namely the administrative law judge's findings that claimant is not entitled the Section 20(a) presumption for any alleged thoracic spine injury, that employer rebutted the Section 20(a) presumption, and that claimant did not establish, on the record as a whole, that his present back condition is work-related.[6]

In order to be entitled to the Section 20(a) presumption, a claimant must establish a prima facie case by showing that he suffered a harm and that either a work-related accident

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from a herniated disc and lumbar radiculopathy due to a regression in his pre-existing back condition because of the July 5, 2013 incident. However, employer notified claimant on January 29, 2014, that it would not pay state workers' compensation benefits. Claimant received medical leave and/or short-term disability benefits until February 10, 2014. He was informed by employer on May 1, 2014, that he had been terminated.

[4]The record establishes that claimant had a second surgical procedure on his back on August 25, 2016. CX 20. Dr. Oishi performed laminectomies and bilateral neural foraminotomies from L2 through L6. *Id.*

[5]Claimant was initially represented by counsel, who withdrew "over the course of extensive prehearing proceedings." Decision and Order at 1. Claimant thus proceeded without counsel at the hearing and thereafter.

[6]The administrative law judge, in his decision, "reviewed and considered all testimony and exhibits admitted into the record." Decision and Order at 2 n.4. In light of this, and given that the administrative law judge appears to have considered all evidence relevant to the causation issue, there is no merit to claimant's assertion that the administrative law judge did not address certain pages from his exhibits. *See generally H.B. Zachery Co. v. Quinones*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000).

occurred or that working conditions existed which could have caused or aggravated the harm. *See Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 287, 34 BRBS 96, 97(CRT) (5th Cir. 2000). The administrative law judge found the record establishes claimant suffers from a bodily injury and a work-related incident occurred on July 5, 2013, that could have aggravated his pre-existing condition to result in the present bodily injury. Decision and Order at 16. It appears the administrative law judge found that claimant's "current condition" involves only the lumbar spine region because he stated in a footnote that claimant is not entitled to the Section 20(a) presumption with regard to his thoracic spine. In reaching this conclusion, the administrative law judge found claimant did not produce sufficient evidence to establish that the July 5, 2013 work incident could have caused his thoracic spine strain. Decision and Order at 16 n.50.

The administrative law judge's finding regarding claimant's thoracic spine strain cannot be affirmed.[7] As the administrative law judge noted, Dr. Kaldis opined on March 10, 2015, that "[t]he thoracic strain was related to [claimant's] report of having twisted and bent over to inspect a cargo tank" while working on July 5, 2013.[8] Decision and Order at 12. Consequently, we reverse the administrative law judge's finding that claimant is not entitled to the Section 20(a) presumption with regard to his thoracic strain. As there is no evidence in the record to rebut the Section 20(a) presumption in terms of this injury, we hold that claimant established he sustained a thoracic strain as a result of his July 5, 2013 work accident as a matter of law. *See* discussion, *infra*.

We next address the administrative law judge's finding that employer rebutted the Section 20(a) presumption with respect to claimant's lumbar injury. Once claimant establishes a prima facie case, as here, Section 20(a) applies to relate his current lumbar condition to his employment, and the burden shifts to employer to rebut this presumption by producing substantial evidence that claimant's condition was not caused or aggravated by his work accident. *See Ceres Gulf, Inc. v. Director, OWCP* [*Plaisance*], 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012); *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).

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[7]The administrative law judge's finding that claimant did not present evidence sufficient to invoke the Section 20(a) presumption to relate his urinary tract difficulties to his work accident is affirmed as it is supported by substantial evidence.

[8]Dr. Kaldis stated, in his March 10, 2015 report, that "the back injury that [claimant] sustained when twisting sounds like he had a thoracic strain attributable to this injury," i.e., the July 5, 2013 work accident. Dr. Kaldis reiterated this opinion in his follow-up report dated November 3, 2015, and during his January 5, 2016 deposition. *See* EX 10 at 87, 89; CX 29, Dep. at 21.

Substantial evidence is "that relevant evidence -- more than a scintilla but less than a preponderance -- that would cause a reasonable person to accept the fact-finding." *Plaisance*, 683 F.3d at 228, 46 BRBS at 27(CRT). Consequently, in order to rebut the presumption, an employer need not "prove the deficiency" in the claimant's prima facie case; rather, "all it must do is advance evidence to throw factual doubt on the prima facie case." *Plaisance*, 683 F.3d at 231, 46 BRBS at 29(CRT). The employer's burden is one of production, not persuasion; once the employer produces substantial evidence of the absence of a causal relationship, the Section 20(a) presumption is rebutted. *Id.*, 683 F.3d at 231, 46 BRBS at 28-29(CRT); *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003); *Conoco*, 194 F.3d 684, 33 BRBS 187(CRT). If the employer rebuts the presumption, it no longer controls, and 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); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994); *Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001).

We cannot affirm the administrative law judge's finding that employer rebutted the Section 20(a) presumption, and we remand the case for further findings. The administrative law judge's rebuttal discussion consists of his statement that employer "must offer substantial evidence in rebuttal," and that "[e]mployer met that burden with the opinions of Drs. Kaldis and Barrash." Decision and Order at 16. In setting out the relevant evidence of record, the administrative law judge, however, stated Dr. Kaldis "does not think he can make a determination of whether or not the events of 5 July 13 aggravated the pre-existing condition." Decision and Order at 12. The administrative law judge also found that "[a]lthough Dr. Kaldis initially denied that the work accident on 5 Jul 13 could have played any role in Claimant's current condition, once he was aware that claimant was wearing a tank on his back, he conceded that, although he did not think it did, the work incident could have aggravated the pre-existing condition." Decision and Order at 15-16. He also stated that Dr. Kaldis "ultimately said he didn't think he could make a determination of whether or not Claimant aggravated his pre-existing condition on 5 Jul 13." *Id.* at 17. Dr. Barrash stated that the changes noted on the imaging study of the lumbar spine area are chronic in nature, the thoracic MRI really shows very little in the way of significant change, and at the present time claimant's "complaints are out of proportion to what I find neurologically and clinically." EX 6. Because the administrative law judge summarily found the opinions of Drs. Kaldis and Barrash rebut the Section 20(a) presumption, we remand the case for him to address whether either constitutes substantial evidence that the work accident did not cause the lumbar condition or aggravate claimant's pre-existing lumbar condition. *See generally Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009).

For purposes of administrative efficiency, we address the administrative law judge's weighing of the evidence based upon the record as a whole. If the Section 20(a) presumption is rebutted, the claimant bears the burden of establishing that his condition is work-related based upon a weighing of the evidence in the record as a whole. *See Suarez v. Service Employees Int'l Inc.,* 50 BRBS 33, 36 (2016); *see also Bis Salamis, Inc. v. Director, OWCP* [*Meeks*], 819 F.3d 116, 127, 50 BRBS 29, 35(CRT) (5th Cir. 2016).

"Having considered the totality of the evidence," the administrative law judge concluded that it is insufficient to satisfy claimant's burden of proof. Decision and Order at 18. He permissibly accorded diminished weight to claimant's hearing and deposition testimony because they were in conflict with each other and with other evidence.[9] *Meeks*, 819 F.3d 116, 50 BRBS 29(CRT). He instead relied on testimony from claimant's co-worker, Mr. Hanna,[10] and from employer's division and risk managers, Mr. Pitcairn and Ms. Ducker,[11] to find that claimant did not report injuring his back at the time of the July 5, 2013 work incident.

The administrative law judge found that claimant's post-incident treatment records and actions similarly called into question whether his pre-existing back condition was aggravated as a result of the July 5, 2013 work incident. The administrative law judge found it significant that claimant returned to his usual job for employer after the initial

[9]The administrative law judge found claimant was inconsistent in stating the reason he discontinued his pain management visits in November 2011, and there were "also a number of inconsistencies between his testimony and the testimony of other witnesses as to the timing of events after he got off work" on July 5, 2013. Decision and Order at 16. The administrative law judge further found it significant that claimant "denied having told any doctor that he has chronic back pain and could not recall denying any injury and reporting that his back pain started" on November 9, 2013. *Id.*

[10]The administrative law judge found Mr. Hanna testified that claimant regularly complained about his back pain and the hardware from the previous surgery, and that while he remembered claimant mentioning something about his back hurting on July 5, 2013, he did not believe there was a specific problem. EX 12, Dep. at 21. The administrative law judge inferred from this testimony that Mr. Hanna did not think there was any problem at that time and that any complaints of back pain were a part of claimant's chronic back issues.

[11]The administrative law judge found the statements of Mr. Pitcairn and Ms. Ducker, that claimant never reported being injured on the job until well after July 5, 2013, HT at 139, EX 11, Dep. at 8, refuted claimant's statements that he reported the accident to a supervisor and to Mr. Pitcairn around the time of the incident, HT at 59.

emergency room visit on July 9, 2013, and regularly worked in that capacity without any further treatment until November 12, 2013.[12] Additionally, the administrative law judge found that once claimant stopped working and sought treatment for his back on November 14 and 22, 2013, he reported the symptoms as chronic back pain and related it to a non-work-related incident.[13] Decision and Order at 16. In this regard, the administrative law judge found that claimant, at his November 2013 emergency room visits, reported chronic back pain as a result of an incident on Saturday, November 9, 2013, which worsened the next day.[14] The administrative law judge further found that the medical evidence was not "particularly helpful" because Dr. Kaldis's opinions are inconsistent and inconclusive on whether claimant aggravated his pre-existing condition, and because Dr. Barrash opined that claimant's objective testing was inconsistent with his symptoms. Decision and Order at 17.

It is well established that an administrative law judge's credibility determinations must be affirmed unless they are inherently incredible or patently unreasonable. *Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22(CRT) (5th Cir. 1994). The administrative law judge is not bound to accept the opinion or theory of any particular witness, *Avondale Industries, Inc. v. Director, OWCP*, 977 F.2d 186, 26 BRBS 111(CRT) (5th Cir. 1992), and the Board is not empowered to reweigh the evidence. *See Hunter*, 227 F.3d at 287, 34 BRBS at 97(CRT). Here, the administrative law judge rationally found the evidence as a whole does not show that claimant's lumbar condition is work-related. Thus, his conclusion that claimant failed to carry his burden of proof is affirmed as it is supported by substantial evidence. *Meeks*, 819 F.3d at 127, 50 BRBS at 35(CRT). Therefore, if the

[12]The administrative law judge relied, in part, on claimant's representation to his mental health care provider, Dr. Albritton, on September 19, 2013, that he was working over 100 hours per week. EX 8. Employer's records indicate that claimant regularly performed his usual inspector work and earned regular and overtime pay from August through November 12, 2013. EX 15; *see also* CX 33 (claimant's work calendars indicate he averaged 74.35 hours of work per week in the thirteen weeks preceding his last day of work with employer).

[13]Moreover, the administrative law judge inferred from the fact that claimant, after his November 12, 2013 last day of work, first sought short-term disability benefits rather than workers' compensation benefits, just as he had following his non-work-related motor vehicle accident, that claimant, himself, believed his present back pain was not work-related.

[14]Claimant's work calendar reflects that he did not work on Saturday and Sunday, November 9 and 10, 2013. CX 33.

administrative law judge determines on remand that employer rebutted the Section 20(a) presumption with regard to claimant's lumbar condition, he may reinstate the denial of benefits for that condition.

The Board's decision to reverse the administrative law judge's finding that claimant's thoracic strain is not work-related and vacate his rebuttal finding with regard to claimant's lumbar condition may require that the administrative law judge also address the Section 12 issue.[15] *See* 33 U.S.C. §912. Employer raised timely notice of injury as an issue before the administrative law judge, Decision and Order at 3, and resolution of this issue is pertinent to the compensability of the claim. For these reasons, we also remand the case for consideration of this issue. *See* 33 U.S.C. §912(a), (d); *see generally Todd Shipyards Corp. v. Allan*, 666 F.2d 399, 14 BRBS 427 (9th Cir.), *cert. denied*, 459 U.S. 1034 (1982); *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004). Consequently, on remand, the administrative law judge must consider whether claimant provided employer with timely written notice of his injury pursuant to Section 12(a) of the Act. If the administrative law judge finds that claimant did not provide timely written notice, he must then determine whether claimant's failure to do so is excused pursuant to Section 12(d). If claimant's claim is not time-barred by Section 12, the administrative law judge must address claimant's entitlement to disability compensation for any work-related condition(s).[16]

[15]This issue remains moot if claimant was not disabled by his work-related thoracic strain and the lumbar condition is not work-related or not disabling.

[16]However, a claim for medical benefits for a work-related condition is not subject to the time limitations of Section 12. *See Siler v. Dillingham Ship Repair*, 28 BRBS 38 (1994); *see* 33 U.S.C. §907(a).

Accordingly, the administrative law judge's finding that claimant did not sustain a work-related thoracic injury is reversed. His finding that employer rebutted the Section 20(a) presumption with regard to claimant's lumbar condition is vacated. The administrative law judge's denial of benefits is therefore vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge