U.S. Department of Labor

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

BRB No. 16-0623

JOEL D. COLEMAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KINDER MORGAN BULK TERMINALS	)	DATE ISSUED: Nov. 14, 2017
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Pamela J. Lakes, Administrative Law Judge, United States Department of Labor.

Anthony Cortese, Tampa, Florida, and Lara D. Merrigan (Merrigan Legal), San Rafael, California, for claimant.

Phillip S. Howell and David T. Burr (Galloway, Johnson, Tompkins, Burr & Smith, PLC), Tampa, Florida, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2013-LHC-00349) of Administrative Law Judge Pamela J. Lakes 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 worked for employer, first as a warehouse worker and later as a supervisor. Claimant alleged he was exposed to ash and other irritants, which resulted in respiratory problems. Specifically, claimant has had two bouts of pneumonia, and has been diagnosed with, inter alia, occupational asthma, bronchitis, and chronic sinusitis for which surgery was recommended in 2015. In 2008, claimant was diagnosed with hypogammaglobulinemia (HGG), which is an immune disorder that reduces the antibodies necessary to fight infections.

On August 24, 2012, claimant filed a claim for disability and medical benefits under the Act, asserting that his respiratory conditions, including but not limited to occupational asthma, were the result of his exposure to various toxic substances while working for employer. Claimant further alleged that employer terminated his employment on August 24, 2012, in violation of Section 49 of the Act, 33 U.S.C. §948a.

In her Decision and Order, the administrative law judge applied Section 20(a), 33 U.S.C. §920(a), to presume that claimant's respiratory symptomatology is related to his employment exposures with employer. Decision and Order at 37-43. She found that employer rebutted the presumption, *id.* at 43-46, and that, on the record as a whole, claimant did not establish a causal connection between his respiratory symptoms and his employment with employer. *Id.* at 46-48. Consequently, the administrative law judge denied claimant's claim for compensation and medical benefits under the Act. *Id.* at 48. The administrative law judge found that employer had not committed a discriminatory act in terminating claimant; thus, the administrative law judge denied claimant's Section 49 claim. *Id.* at 48-51.

On appeal, claimant challenges the administrative law judge's findings that his respiratory conditions are not work-related, and the consequent denial of his claim for compensation and medical benefits under the Act. Employer responds, urging affirmance of the administrative law judge's decision in its entirety. Claimant filed a reply brief.[1]

Section 20(a) - Invocation

In order to be entitled to the Section 20(a), 33 U.S.C. §920(a), presumption, claimant must establish the two elements of his prima facie case: an injury or harm and a work-related accident or working conditions that could have caused or aggravated the harm. *See Ramsey Scarlett & Co. v. Director, OWCP*, 806 F.3d 327, 49 BRBS 87(CRT)

[1] We affirm, as unchallenged on appeal, the administrative law judge's finding that employer did not violate Section 49 of the Act, 33 U.S.C. §948a, when it terminated claimant on August 27, 2012. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

(5th Cir. 2015); *see generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Once claimant establishes his prima facie case, Section 20(a) links his harm to the employment accident or working conditions. *See Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000).

In invoking the Section 20(a) presumption, the administrative law judge discussed claimant's testimony regarding his work exposures to ash and other irritants, two OSHA Material Data Safety Sheets,[2] and the opinions of Drs. Lipsey, Kreitzer, and Griffith, each of whom opined that claimant's respiratory symptoms are or could be related to his exposures with employer. *See* Decision and Order at 37-43. Finding that claimant "has established a possible association between his symptomatology and his employment [with employer],"[3] *see id.* at 38, the administrative law judge concluded that claimant was entitled to the benefit of the Section 20(a) presumption that his respiratory conditions are work-related. *Id.* at 38, 43. As these findings are unchallenged on appeal, they are affirmed. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

Section 20(a) - Rebuttal

Upon invocation of the Section 20(a) presumption, the burden shifts to employer to rebut the presumed causal connection with substantial evidence that claimant's injury is not related to the work exposures. *See Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990); *see also 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); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). Employer's burden on rebuttal is one of production only, not one of persuasion. *See Rainey*, 517 F.3d 632, 42 BRBS 11(CRT). In this regard, employer satisfies its burden of production when it presents

[2] The two OSHA documents describe the possible health effects resulting from exposure to bed and fly ash. These include eye and skin irritation, fibrosis, chronic bronchitis, silicosis, and aggravation of pre-existing diseases of the lungs. CX 55. In weighing the evidence as a whole, the administrative law judge found that the record information concerning claimant's exposure to bauxite and ammonia is vague. Decision and Order at 46-47.

[3] The administrative law judge did not make a specific finding of fact as to the exact nature of claimant's medical conditions. Rather, the administrative law judge found that claimant was diagnosed with sinusitis and occupational asthma, Decision and Order at 38, and that claimant experienced respiratory symptoms contemporaneous with his 2007 workplace exposures. *Id.* at 43, 45; *see* discussion, *infra*.

‘“such relevant evidence as a reasonable mind might accept as adequate’ to support a finding that workplace conditions did not cause the accident or injury.” *American Grain Trimmers, Inc. v. Office of Workers’ Compensation Programs*, 181 F.3d 810, 817, 33 BRBS 71, 76(CRT) (7th Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000). 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 has been held to be sufficient to rebut the Section 20(a) presumption. *See O’Kelley v. Dept. of the Army/NAF*, 34 BRBS 39 (2000).

Claimant contends the administrative law judge erred in finding that employer produced substantial evidence to rebut the Section 20(a) presumption. The administrative law judge found that the opinion of Dr. Cosmo rebuts the Section 20(a) presumption. Dr. Cosmo opined that claimant’s respiratory conditions were not caused or aggravated by his work exposure to ash and other substances, and that claimant’s workplace exposures did not result in the development of occupational asthma. *See* Decision and Order at 46.

We reject claimant’s contention that the administrative law judge erred in accepting the opinion of Dr. Cosmo as sufficient to rebut the Section 20(a) presumption with regard to the claim for occupational asthma. Dr. Cosmo reviewed claimant’s medical records and, based on the lack of objective evidence, opined that claimant does not have occupational asthma. *See* EX 16 at 22-23, 43. Specifically, Dr. Cosmo found that claimant’s pulmonary function tests did not show evidence of an obstruction in airflow that would confirm a diagnosis of occupational asthma. *Id.* As the administrative law judge properly considered this opinion in light of employer’s burden of production, and as this opinion constitutes substantial evidence that claimant does not suffer from the condition of occupational asthma, we affirm the administrative law judge’s finding that the Section 20(a) presumption, as it relates to claimant’s claim for occupational asthma, is rebutted. *See generally 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); *O’Kelley*, 34 BRBS 39.

We cannot affirm, however, the administrative law judge’s finding that Dr. Cosmo’s opinion is sufficient to rebut the Section 20(a) presumption as it relates to claimant’s remaining respiratory conditions. The administrative law judge found that claimant satisfied the harm element of his prima facie case by establishing he experienced respiratory symptoms contemporaneously with his 2007 exposures and that his current symptomatology could be due to those exposures. *See* Decision and Order at 43; *see also* Employee’s Claim for Compensation dated August 24, 2012. The administrative law judge did not, however, specify which “respiratory symptoms” or “current symptomatology” constitutes the harm to which the Section 20(a) presumption

applies.[4] Although Dr. Cosmo opined that claimant's "respiratory conditions" were not caused by his employment exposures, he did not identify any specific conditions other than occupational asthma, and his examination of claimant revealed a severe restrictive breathing impairment that could not be fully explained.[5] *See* EX 16 at 43-44; EX 16, ex. 1 at 4.

The administrative law judge acknowledged Dr. Cosmo's testimony that he could not explain the severe breathing restriction he found on examination of claimant, *see* Decision and Order at 45, but she nevertheless concluded that Dr. Cosmo's opinion rebuts the Section 20(a) presumption as it relates to claimant's respiratory conditions other than his occupational asthma. We are unable to review this finding because the administrative law judge's determination that claimant suffered or suffers from "respiratory conditions" is broad and inexact. We are unable to determine whether Dr. Cosmo's finding of a restrictive breathing impairment is included in the "harms" to which the Section 20(a) presumption applies and, thus, whether the presumption is rebutted with respect to this condition. Consequently, the administrative law judge's determination that Dr. Cosmo's opinion rebuts the Section 20(a) presumption with regard to claimant's non-occupational asthma respiratory conditions must be vacated, and the case remanded for further findings. On remand, the administrative law judge must state the specific respiratory harms which resulted in invocation of Section 20(a) presumption; once these findings are made, the administrative law judge must reconsider whether Dr. Cosmo's opinion is sufficient to rebut the presumed causal connection between the conditions identified and claimant's work exposure to ash.[6] *See Gooden v. Director,*

[4] The administrative law judge did find that claimant's respiratory conditions include sinusitis. *See* Decision and Order at 45, 48.

[5] Dr. Cosmo found that claimant has a restrictive impairment, based upon a forced vital capacity breathing volume result of 42 percent, which he described as a severe flow limitation. *See* EX 16 at 35.

[6] Claimant references the possibility that his work-related exposures may have aggravated both his respiratory conditions as well as his pre-existing HGG. It is well-established that pursuant to the "aggravation rule" an employer is liable for the claimant's full disability if the work-related injury aggravates, accelerates, or combines with a pre-existing condition to result in that disability. *See Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (en banc); *see also Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010). On remand, the administrative law judge should address if necessary whether claimant raised an aggravation claim. Moreover, an employer takes his employee as it finds him, such that it is liable if claimant's pre-existing HGG made him more susceptible to disease from the work exposures. *J.V. Vozzolo, Inc. v. Britton*, 377 F.2d 144, 147-148 (D.C. Cir. 1967)

OWCP, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998). If, on remand, the administrative law judge finds the Section 20(a) presumption rebutted with respect to claimant's identified non-occupational asthma conditions, the issue of causation must be resolved on the evidence of record as a whole, with claimant bearing the burden of persuasion. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

Causation On The Record As A Whole

Claimant contends he established that his occupational asthma is related to his work for employer based on the record as a whole, and that the administrative law judge erred in requiring claimant to establish that his exposure with employer actually caused his injury.

We reject claimant's contention that his burden on the record as a whole is to prove only that his work exposures could have caused his occupational asthma. It is claimant's burden to prove on the record as a whole that his exposures with employer in fact caused his injury because claimant is the proponent of this factual proposition.[7] *Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT); *Del Vecchio v. Bowers*, 296 U.S. 280 (1935). Thus, in this case, the administrative law judge correctly stated that "the burden of proof to establish causation by a preponderance of the evidence . . . on the Claimant." Decision and Order at 46.

We also reject claimant's contention that the administrative law judge erred in evaluating the evidence as a whole and in concluding that claimant did not establish he has occupational asthma due to his employment exposure to ash. The administrative law judge fully and thoroughly considered all of the relevant evidence in addressing claimant's contention that he sustained occupational asthma due to his exposures with employer. *See* Decision and Order at 46-48. It is well-established that 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 John W. McGrath Corp. v. Hughes*,

("[E]mployers accept with their employees the frailties that predispose them to bodily hurt.").

[7] Claimant's brief inappropriately conflates case precedent addressing the responsible employer in a multi-employer case with that addressing causation. This case involves claimant's employment with only one employer and does not involve determining which of more than one employer was the last to expose the claimant to injurious stimuli.

289 F.2d 403 (2d Cir. 1961); *see also 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). Moreover, it is impermissible for the Board to reweigh the evidence or to substitute its own views for those of the administrative law judge. *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982). The administrative law judge's conclusion that claimant failed to meet his burden of persuasion on causation is supported by substantial evidence in the record, specifically the opinion of Dr. Cosmo that the objective medical evidence does not support a diagnosis of occupational asthma. *See Del Monte Fresh Produce v. Director, OWCP* [*Gates*], 563 F.3d 1216, 1219, 43 BRBS 21, 22(CRT) (11th Cir. 2009). We therefore affirm the administrative law judge's finding, based on the evidence as a whole, that claimant did not establish he has work-related occupational asthma. *See Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000); *Sistrunk*, 35 BRBS 171.

Accordingly, we vacate the administrative law judge's finding that employer rebutted the Section 20(a) presumption with regard to claimant's non-occupational asthma respiratory conditions, and we remand the case for further consideration in accordance with this opinion. In all other respects, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge