U.S. Department of Labor

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

BRB No. 17-0164

WILLIAM PATTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: Oct. 23, 2017
	)	
DEPARTMENT OF THE ARMY/NAF	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of Decision and Order Awarding Medical Benefits and Denying Section 48a Discrimination Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

William Patton, Cologna Veneta, Verona, Italy.

James M. Mesnard (Seyfarth Shaw LLP), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Claimant, appearing without representation, appeals the Decision and Order Awarding Medical Benefits and Denying Section 48a Discrimination Claim of Administrative Law Judge Larry S. Merck 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 Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *et seq.* (the Act). In an appeal by a claimant without legal representation, the Board 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 was employed by the Army's Morale, Welfare and Recreation Division at the Elderle Hotel (hereinafter employer or the Hotel) in Vicenza, Italy, as a

maintenance helper. On March 1, 2002, he allegedly sustained a work-related hernia while moving a potted tree. Claimant testified that he missed four or five days of work following this alleged incident and sought medical care. He returned to work for approximately 20 months. On November 3, 2003, claimant underwent hernia surgery after which he testified that he took 45 days of annual leave to recover. Claimant then returned to work at the Hotel.

On September 5, 2006, claimant experienced dizziness after climbing a flight of stairs at work. Claimant sought medical care, was referred to a specialist, and was diagnosed with chronic obstructive pulmonary disease (COPD). Claimant was first placed in Family Medical Leave Act status and, on January 12, 2007, leave without pay (LWOP) status. On May 16, 2007, claimant presented medical documentation to employer regarding his alleged March 1, 2002, work-related hernia; employer filed its First Report of Injury on June 13, 2007. Claimant was placed back on the Hotel's work schedule on October 15, 2007. When claimant did not report to work, he was discharged on November 16, 2007.

On April 15, 2008, claimant filed claims under the Act for the hernia and COPD. Claimant additionally sought benefits for a work-related psychological injury. Claimant further alleged his employment was terminated in violation of Section 49 of the Act, 33 U.S.C. §948a.

In his Decision and Order, the administrative law judge denied claimant's claim for disability benefits for the hernia, finding that this claim was untimely filed pursuant to Section 13(a) of the Act, 33 U.S.C. §913(a). Decision and Order at 48-49. The administrative law judge found that claimant is entitled the Section 20(a) presumption, 33 U.S.C. §920(a), with regard to his hernia, COPD, and psychological condition, that employer rebutted the presumption with regard to these conditions, and that, on the record as a whole, claimant did not establish a causal connection between his COPD and psychological conditions and his employment with employer. With regard to claimant's hernia, the administrative law judge found that claimant established a causal connection between that condition and his employment. Consequently, the administrative law judge awarded claimant medical benefits for his work-related hernia, but denied claimant's claim for disability and medical benefits for his COPD and psychological condition. 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.

Claimant, without the assistance of counsel, challenges the administrative law judge's denial of his claims for benefits under the Act. Employer responds, urging affirmance. Claimant has filed a reply brief.

SECTION 13(a)

Section 13(a) of the Act[1] provides a claimant with one year after he becomes aware, or with the exercise of reasonable diligence should be aware, of the relationship between his traumatic injury and his employment, within which he must file a claim for compensation for the injury. Following the decision of the United States Court of Appeals for the District of Columbia Circuit in *Stancil v. Massey*, 436 F.2d 274 (D.C. Cir. 1970), the courts of appeals have held that the statute of limitations begins to run only after the employee becomes aware or reasonably should have been aware of the full character, extent, and impact of the injury. Generally, the courts have held that the employee is aware of the full character, extent, and impact of the injury when he knows or should know that the injury is work-related and that the injury will impair his earning power. *Dyncorp Int'l v. Director, OWCP* [*Mechler*], 658 F.3d 133, 45 BRBS 61(CRT) (2d Cir. 2011); *Paducah Marine Ways v. Thompson*, 82 F.3d 130, 30 BRBS 33(CRT) (6th Cir. 1996); *Duluth, Missabe & Iron Range Ry. Co. v. Director, OWCP* [*Heskin*], 43 F.3d 1206 (8th Cir. 1994); *Abel v. Director, OWCP*, 932 F.2d 819, 24 BRBS 130(CRT) (9th Cir. 1991); *Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 24 BRBS 98(CRT) (4th Cir. 1991); *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990); *Marathon Oil Co. v. Lunsford*, 733 F.2d 1139, 6 BRBS 100(CRT) (5th Cir. 1984); *see Suarez v. Service Employees Int'l, Inc.*, 50 BRBS 33 (2016). In the absence of substantial evidence to the contrary, Section 20(b) of the Act, 33 U.S.C. §920(b), presumes that the claim for benefits was timely filed. *Steed v. Container Stevedoring Co.*, 25 BRBS 210 (1991). In order to rebut the Section 20(b) presumption, employer must establish that the Section 13 statute of limitations is not tolled by application of Section 30(f), 33 U.S.C. §930(f). *Blanding v. Director, OWCP*, 186 F.3d 232, 33 BRBS 114(CRT) (2d Cir. 1999).

In addressing whether claimant's claim for benefits for his hernia was timely filed, the administrative law judge relied on claimant's testimony in determining that his date

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[1] Section 13(a) states, in relevant part, that:

> Except as otherwise provided in this section, the right to compensation for disability or death benefits under this chapter shall be barred unless a claim therefore is filed within one year after the injury or death . . . . The time for filing a claim shall not begin to run until the employee or beneficiary is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment.

33 U.S.C. §913(a).

of awareness was November 2, 2003. The administrative law judge found that claimant testified that he sustained a work-related hernia injury on March 1, 2002 while moving a potted tree, that he underwent hernia surgery on November 2, 2003, and that he took 45 days off work following that surgery in order to recover. *See* Decision and Order at 49; Tr. at 112; EXs 1, 37. The administrative law judge thus found that claimant had to file his claim for benefits for his hernia within one year of the date of his surgery. *Id.* at 49. As claimant did not file a claim until April 15, 2008, the administrative law judge found the claim was untimely filed. *Id*.

We affirm the administrative law judge's finding. Claimant's testimony that he was aware of the work-related nature of his hernia condition, his subsequent surgery, and his loss of work due to that condition is sufficient to commence the running of the statute of limitations. *See Suarez*, 50 BRBS at 40. Accordingly, the administrative law judge's finding that claimant's date of awareness was November 2, 2003, is supported by substantial evidence of record. Moreover, substantial evidence supports the administrative law judge's finding that employer did not gain knowledge of claimant's work-related hernia until May 23, 2007, at which time employer filed its Section 30(a) report. Decision and Order at 47; EXs 1 at 1; 67 at 13 (Dep. of Mr. Hyde); 68 at 16, 34 (Dep. of Mr. Sherrick). Thus, the statute of limitations was not tolled pursuant to Section 30(f). *See generally Blanding*, 186 F.3d 232, 33 BRBS 114(CRT). Because claimant's claim for disability benefits for his hernia was not filed until April 15, 2008, we affirm the administrative law judge's finding that this claim was untimely filed. Thus, we affirm the denial of disability benefits for this condition.[2] *Suarez*, 50 BRBS 33.

CAUSATION

The administrative law judge invoked the Section 20(a) presumption based on findings that claimant suffers from COPD and anxiety and depression, and the existence of working conditions which could have caused or exacerbated those conditions.[3] *See*

[2] The award of medical benefits for claimant's hernia is affirmed, as it is unchallenged on appeal. *See Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007); *Siler v. Dillingham Ship Repair*, 28 BRBS 38 (1994) (decision on recon. en banc).

[3] In 2009, Dr. Gerr stated that claimant's 2002 CT scan showed evidence of COPD. EX 47 at 3. Claimant testified he was exposed to dust, caulking materials, mildew and bleach. Tr. at 116; EX 59 at 118-121. Dr. Obici and Dr. Pompoli diagnosed claimant with a psychological disorder. EXs 42 at 1-2; 52 at 3. Claimant alleged that this condition was due to a "labor conflict" between him and his supervisors at work. Tr. at 120-140; EX 59 at 53-60.

U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP, 455 U.S. 608, 14 BRBS 631 (1982); *American Stevedoring, Ltd. v. Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); Decision and Order at 52-54. The burden thus shifted to employer to rebut the presumed causal connections with substantial evidence that claimant's injuries were not caused or aggravated by his employment. *See Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008). If the Section 20(a) presumption is rebutted, it no longer controls, and the issue of causation must be resolved on the evidence of record as a whole, with claimant bearing the burden of persuasion. *See Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT); *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).

COPD

With regard to claimant's COPD, the administrative law judge found that the opinions of Dr. Dal Negro and Dr. Gerr rebut the Section 20(a) presumption. Decision and Order at 61. Dr. Gerr opined to a reasonable degree of medical certainty that claimant's employment at the Hotel did not cause or aggravate his COPD. EX 47 at 5. Dr. Dal Nagro opined that it is "unlikely" and "not probable" that claimant's COPD was due to his employment exposures. EXs 52, 60. As these opinions constitute substantial evidence that claimant's work exposures did not cause or aggravate his COPD, we affirm the administrative law judge's finding that the Section 20(a) presumption is rebutted with regard to claimant's COPD. *See Cline v. Huntington Ingalls, Inc.*, 48 BRBS 5 (2013); *Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000).

The administrative law judge weighed the evidence as a whole and concluded that claimant failed to establish that his COPD is related to his employment exposures. Decision and Order at 61-62. The administrative law judge gave substantial weight to the opinions of Drs. Gerr and Dal Negro. *See* EXs 60 at 17-18; 47 at 5. In contrast, the administrative law judge found that the only evidence of a causal relationship between claimant's COPD and his employment consists of claimant's own testimony and an LS-1 Form completed by Dr. Villa which check-marked the "Yes" box indicating that claimant's COPD was caused or aggravated by his work. EX 7. The administrative law judge found, however, Dr. Villa's report to be equivocal in light of the fact that, on this same document, he also stated that it was unclear whether claimant's COPD preceded his employment. *See* Decision and Order at 62. Further finding that no physician who examined claimant or his medical records opined affirmatively as to a causal relationship between claimant's COPD and his employment, the administrative law judge concluded that claimant did not meet his burden of establishing that his COPD was caused, contributed to, or aggravated by his work at the Hotel. *Id*.

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*, 289 F.2d 403 (2d Cir. 1961); *see also Calbeck v. Strachan Shipping Corp.*, 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. 1961). 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 establishing the work-relatedness of his COPD is rational in view of the credited opinions of Drs. Gerr and Dal Negro that claimant's COPD is unrelated to his employment and the equivocal opinion of Dr. Villa. *See Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22(CRT) (5th Cir. 1994). We therefore affirm the administrative law judge's determination based on the evidence as a whole that claimant did not establish a causal relationship between his COPD and his employment. *See Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000).

Psychological Symptoms

In addressing the presumed causal relationship between claimant's psychological symptoms and his employment with employer, the administrative law judge found the opinion of Dr. Pompoli, in conjunction with the testimony of Mssrs. DiFalco, Hyde, and Sherrick, sufficient to rebut the Section 20(a) presumption. *See* Decision and Order at 57-59. Mr. DiFalco, a human resources officer for employer, testified that he was not aware of any complaints by claimant regarding alleged poor treatment at work. *See* EX 63 at 25-26. Mr. Hyde, a maintenance worker/training specialist/hotel manager for employer, and Mr. Sherrick, employer's hotel manager, similarly testified that they were unaware of any "labor conflicts" between employer and claimant. *See* EXs 67 at 29-30; 68 at 26. Dr. Pompoli, a psychiatry and psychotherapy specialist who examined claimant on four occasions, diagnosed claimant with an "Unspecified anxiety Disorder associated to obsessive symptomatology in a subject with paranoid and obsessive-compulsive personality signs" which pre-existed his employment with employer. *See* EX 52 at 3. While Dr. Pompoli initially opined that claimant's "hypothetical labor conflict may reasonably have represented stressful life events" which triggered or exacerbated his present psychological condition, *see id*., he subsequently clarified his diagnosis by stating that claimant's pre-existing psychological condition may have led claimant to incorrectly interpret facts and behaviors, i.e., that actions were aimed at harming claimant when in fact this was not the case. Dr. Pompoli thus concluded that, if no workplace conflict or discrimination involving claimant and employer existed, then claimant's psychological symptoms "were entirely due to [claimant's] pre-existing dysfunctional personality traits." *See* EX 53.

We affirm the administrative law judge's determination that employer presented substantial evidence sufficient to rebut the presumed causal relationship between claimant's psychological symptoms and his employment with employer. Employer's burden on rebuttal is one of production only, not of persuasion. *Rainey*, 517 F.3d at 637, 42 BRBS at 14(CRT). An employer satisfies this burden of production when it presents "'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." *Id.* (quoting *American Grain Trimmers, Inc. v. Director, OWCP*, 181 F.3d 810, 817, 33 BRBS 71, 76(CRT) (7th Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000)). In this case, the administrative law judge properly considered Dr. Pompoli's testimony in combination with the testimony of claimant's co-workers concerning the work events alleged to have occurred. As employer presented substantial evidence that claimant's psychological symptoms are not work-related, we affirm the administrative law judge's finding that the Section 20(a) presumption is rebutted. *See Cline*, 48 BRBS 5; *O'Kelley*, 34 BRBS 39.

The administrative law judge weighed the evidence as a whole and found that claimant failed to meet his burden of establishing that he suffers from a work-related psychological condition. Decision and Order at 62-64. The administrative law judge specifically found that claimant's testimony regarding his relationships with his supervisors was not credible. *Id.* at 44-45, 62-63. In this regard, the administrative law judge found that Mssrs. DiFalco, Hyde, and Sheffield each testified at their depositions that they knew of no ongoing labor conflicts involving claimant and employer. To the contrary, the administrative law judge found that claimant consistently received outstanding performance ratings in each year between 2002 and 2007 and nine cash awards between 2002 and 2006. *Id.* at 63-64. The administrative law judge gave greater weight to Dr. Pompoli's testimony than to that of Dr. Obici that claimant has a psychological condition secondary to work-related conflicts, CX 1, finding that it is unclear whether Dr. Obici, claimant's primary care physician and a general practitioner, has any expertise in psychology, whereas Dr. Pompoli has expertise in the area of psychology. Decision and Order at 63. Moreover, the administrative law judge found that Dr. Obici did explain the tests or information on which he based his opinion. *Id.* at 53, 62-63. The administrative law judge concluded that the evidence of record supports a conclusion that no labor conflict existed between employer and claimant and that claimant does not suffer from a work-related psychological condition. *Id.* at 64.

The administrative law judge is entitled to determine the weight to be accorded to conflicting evidence. *Hice v. Director, OWCP*, 48 F.Supp.2d 501 (D. Md. 1999). The administrative law judge gave a rational basis for giving dispositive weight to the testimony of Mssrs. DiFalco, Hyde, and Sheffield and to Dr. Pompoli's opinion. Therefore, we affirm the administrative law judge's conclusion that claimant failed to meet his burden of establishing a causal relationship between his psychological symptoms and his employment. *See Coffey*, 34 BRBS 85.

SECTION 49

Section 49 of the Act prohibits an employer from discharging or discriminating against an employee because the employee has claimed compensation under the Act. If the employee can show that he is the victim of such discrimination and if he is qualified to return to work, he is entitled to reinstatement and back wages. 33 U.S.C. §948a;[4] *see Babick v. Todd Pacific Shipyards Corp.*, 49 BRBS 11 (2015). The essence of discrimination is in treating like individuals differently. *See Mueller Brass Co. v. N.L.R.B.*, 544 F.2d 815 (5th Cir. 1977); *Jaros v. Nat'l Steel & Shipbuilding Co.*, 21 BRBS 26 (1988). In order to establish a prima facie case of discrimination, a claimant must demonstrate that his employer committed a discriminatory act motivated by discriminatory animus or intent. *Babick*, 49 BRBS at 12-13; *Dunn v. Lockheed Martin*, 33 BRBS 204 (1999).

The administrative law judge found that claimant failed to establish a prima facie case of discrimination pursuant to Section 49. *See* Decision and Order at 65-68. The administrative law judge found that neither employer's placing of claimant in LWOP status nor its decision to terminate claimant following his failure to report to work in October 2015 constituted a discriminatory act. Assuming, *arguendo*, that claimant had established his prima facie case, the administrative law judge found that employer provided a legitimate, non-discriminatory reason for its actions. The administrative law judge concluded that claimant did not establish employer discriminated against him because he filed a claim under the Act. *Id.* at 68.

Claimant first took annual leave from September 28 to October 5, 2006, and was on LWOP status from October 6 through October 11, 2006.[5] *See* EX 17 at 33. Upon the

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[4] Section 49 of the Act provides:

> It shall be unlawful for any employer or his duly authorized agent to discharge or in any manner discriminate against an employee as to his employment because such employee has claimed or attempted to claim compensation from such employer, or because he has testified or is about to testify in a proceeding under this chapter.

33 U.S.C. §948a.

[5] While claimant deposed that employer placed him in LWOP status on October 6, 2006, *see* EX 59 at 109, the record contains a Request for Leave or Approved Absence form signed by claimant wherein claimant requested such leave between October 6 and October 11, 2006. *See* EX 17 at 33.

conclusion of this period of time, employer placed claimant in Family Medical Leave Act (FMLA) status for 12 weeks, effective October 12, 2006. *See id.* at 31, 32. When claimant's FMLA status expired, employer placed claimant in LWOP status commencing January 12, 2007. *Id.* at 34. Claimant was released to return to light duty work on October 15, 2007. *See* EX 7. He was returned to the Hotel's work schedule on October 15, 2007; however, when he did not report for duty, he was terminated by employer on November 16, 2007. *See* EX 17 at 40-41. Approximately five months later, on April 15, 2008, claimant filed his claims for benefits under the Act. *See* EXs 5, 13.

We affirm the administrative law judge's determination that claimant has not established the applicability of Section 49 to this case. The administrative law judge relied on the testimony of Mssrs. Hyde and Sherrick in determining that claimant was placed in LWOP status because he had exhausted all of his annual and sick leave, *see* Decision and Order at 67, and the record indicates that claimant himself initially requested that he be placed in LWOP status. *See* EX 17 at 33. Moreover, with regard to claimant's termination, Mssrs. Hyde and Sherrick testified that claimant had been out of work for over a year. When his medical excuses expired, employer placed claimant back on the Hotel's work schedule and, according to the evidence attempted, without success to contact him. *See* EXs 67 at 22-26; 68 at 27, 31-32. When claimant did not return to work after several weeks, employer terminated his employment. EXs 16 at 40-41; 63 at 14.

We affirm the administrative law judge's finding that claimant did not make a out a prima facie of discrimination under Section 49. The administrative law judge rationally found that claimant did not present evidence that he was treated differently from other employees regarding either his work status or his subsequent dismissal. The administrative law judge observed that employer's representatives testified that its actions were consistent with protocol and that claimant did not counter this evidence. *See* Decision and Order at 67. We note, moreover, that the actions on which claimant based his Section 49 claim occurred prior to claimant's filing of his claims for benefits under the Act, whereas the Act contemplates remedies for employees who are discriminated against "because" they filed a claim. *See Babick*, 49 BRBS at 14. As the administrative law judge's finding that employer did not violate Section 49 is rational, supported by substantial evidence, and in accordance with law, it is affirmed. *See*, *e.g.*, *Hunt v. Newport News Shipbuilding & Dry Dock Co.*, 28 BRBS 364 (1994), *aff'd mem.*, 61 F.3d 900 (4th Cir. 1995); *Manship v. Norfolk & W. Ry. Co.*, 30 BRBS 175 (1988).

Accordingly, the administrative law judge's Decision and Order Awarding Medical Benefits and Denying Section 48a Discrimination Claim is 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