U.S. Department of Labor

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

BRB Nos. 18-0275
and 18-0275A

GREGORY K. CLINE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 10/03/2018
	)	
SOC, LLC	)	
	)	
and	)	
	)	
STARR INDEMNITY & LIABILITY COMPANY c/o GALLAGHER BASSETT SERVICES	)	
	)	
Employer/Carrier-Respondents Cross-Petitioners	)	DECISION and ORDER

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

Jonathan Beiser (Beiser Law Firm), Rockville, Maryland, for claimant.

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

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

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order (2017-LDA-00038) 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*., 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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant alleged he injured his right knee and low back on February 2, 2016, when a treadmill malfunctioned during the course of his employment for employer in Iraq.[1] Claimant reported the injury to employer and sought treatment in Iraq,[2] but he continued working until his contract term ended shortly thereafter. Claimant returned to the United States, where he received treatment for right knee and lower back pain beginning on March 10, 2016. Claimant sought compensation and medical benefits for his injuries.

The administrative law judge found claimant presented sufficient evidence to invoke the Section 20(a) presumption, 33 U.S.C. §920(a), that his right knee and lower back injuries are related to the work incident. Decision and Order at 19. The administrative law judge determined that employer did not rebut the presumption that claimant's right knee condition is work-related. *Id*. at 20. The administrative law judge found, however, that employer rebutted the presumption with respect to the lower back injury and that claimant failed to show based on the record as a whole that his lumbar spine condition was caused by the treadmill incident. *Id*. Based on claimant's work-related right knee injury, the administrative law judge awarded claimant compensation for temporary total disability, 33 U.S.C. §908(b), from March 10, 2016, to June 12, 2017, and for temporary partial disability, 33 U.S.C. §908(e), from June 13, 2017, due to a weekly loss of wage-earning capacity of $1,371.73. *Id*. at 22-23.

On appeal, claimant challenges the administrative law judge's finding that his lower back condition is not related to the treadmill incident. BRB No 18-0275. Employer responds, urging affirmance. Employer cross-appeals the finding that claimant has a work-related right knee condition. BRB No. 18-0275A. Claimant did not submit a response brief.

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[1] Claimant's job duties required that he maintain a high level of fitness. Tr. at 39-40.

[2] The medical officer, Beverly Ford, diagnosed a low back strain and knee strain with possible meniscus or ligament tear. She prescribed a knee wrap and anti-inflammatories. CX 4.

Claimant contends the preponderance of the evidence establishes that his back condition is work-related due to the absence of any back pain prior to the treadmill incident. If, as here, the Section 20(a) presumption is invoked and rebutted, it no longer controls, and the issue of whether there is a causal relationship between the work accident and the injury 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).

Dr. Fitzpatrick, claimant's treating physician, wrote in her report dated March 10, 2016, that claimant injured his back "during the treadmill incident." CX 5 at 2. At her deposition, however, she testified that in the absence of a pre-injury MRI for purposes of comparison with the post-injury MRI, it would be difficult to determine if the disc problems are acute or chronic.[3] EX 16 at 8 (p. 29). Dr. Vanderweide, employer's examining physician, opined that the MRI results do not show "significant findings" and are "consistent with age-related degeneration." EXs 17 at 5 (pp. 17-18); 23.

The administrative law judge found Dr. Fitzpatrick's opinion "somewhat ambiguous" and Dr. Vanderweide's opinion "even less helpful" for purposes of establishing a causal relationship between claimant's back pain and the treadmill incident. Decision and Order at 20. The administrative law judge thus concluded that the evidence does not establish "that it is more likely than not that Claimant's lumbar spine condition was caused or aggravated by the faulty treadmill." *Id.*

The Board is not empowered to reweigh the evidence, but must accept the rational inferences and findings of fact of the administrative law judge that are supported by the record. *See James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *see also Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994). Moreover, an administrative law judge is entitled to weigh the medical evidence and draw his own inferences therefrom. *See Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995). In this case, the administrative law judge permissibly concluded that the weight of the evidence is insufficient to establish a causal relationship between claimant's back condition and the work incident based on his finding that neither physician credibly diagnosed claimant with

[3] The September 18, 2017 MRI report states that claimant has: disc bulge at L4-5 with degenerative change that encroaches on the neural foramina without definite impingement; disc bulge and mild degenerative change at L5-S1 and L3-4; and mild degenerative change at L2-3 and L1-2. The conducting radiologist concluded that the MRI showed mild spondylosis of the lumbar spine. EX 23.

a work-related back injury.[4] Accordingly, we affirm the administrative law judge's conclusion that claimant failed to establish, by a preponderance of the evidence, that his lumbar back condition is related to his work-related treadmill accident, as it is supported by substantial evidence. *Cooper/T. Smith Stevedoring Co., Inc. v. Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT) (5th Cir. 2002); *Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001).

On cross-appeal, employer challenges the administrative law judge's finding that it did not rebut the Section 20(a) presumption with respect to claimant's right knee injury. Employer argues there is credible evidence that claimant's knee condition is not related to the treadmill incident. Specifically, employer avers that claimant missed no time from work, Dr. Fitzpatrick never placed claimant in off-work status[5] and opined that the type of knee injury claimant has would require a strike or blow, and claimant testified that he did not strike his knee when the treadmill malfunctioned but rather sustained a twisting injury. Emp. Pet. for Rev. at 11-12; Tr. at 40-41; CX 5 at 1; EX 16 at 6 (p. 21). Employer also puts forth that claimant did not consistently seek medical care, he stopped physical therapy in November 2016, and he did not complain of knee pain when he began treating with Dr. Andrews in July 2017 for lumbar pain. *Id*. at 12.

Once the claimant establishes a prima facie case, Section 20(a) applies to relate the injury to the work incident, and the employer can rebut this presumption by producing substantial evidence that the injury is not related to the work accident. *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). Employer's burden on rebuttal is one of production, not persuasion; thus, the United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, has held that, in order to rebut the Section 20(a) presumption, employer need only offer substantial evidence that "throws factual doubt" on claimant's prima facie case. *Plaisance*, 683 F.3d at 231, 46 BRBS at 29(CRT).

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[4] Contrary to claimant's contention, the absence of a prior reported back injury or treatment does not establish error in the administrative law judge's conclusion that he failed to establish the existence of a causal relationship between his back condition and the work accident. Moreover, the fact that the MRI validates the area where claimant has pain does not establish a causal relationship because there is no evidence that the radiologist linked the central annular fissure to the work accident.

[5] Contrary to employer's contention, Dr. Fitzpatrick opined on August 2, 2016, that claimant was unable to return to work due to his knee condition. CX 5 at 5.

We reject employer's contention that the administrative law judge erred in finding that employer did not rebut the Section 20(a) presumption. The administrative law judge addressed the opinions of Drs. Vanderweide and Fitzpatrick, and noted that "Dr. Vanderweide agreed with Dr. Fitzpatrick that the knee condition was at least initially related in some part to the treadmill incident . . . ." Decision and Order at 20. Specifically, Dr. Vanderweide opined that claimant's knee complaints "are likely the result of an aggravation or acceleration of a pre-existing condition" and "[I]n the absence of clinical information to the contrary, [claimant's] current complaints of knee pain are causally related to his work-related accident . . . ." EX 4 at 4; *see also* EXs 4 at 1; 17 at 2-3 (pp. 8-9), 3-4 (pp. 12-16). Dr. Fitzpatrick opined that claimant sustained cartilage damage secondary to an injury and, even assuming that the damage was not the result of a direct blow to the knee, the MRI indicated that the defect was not degenerative. EX 16 at 5-6 (pp. 20-22). She also directly related claimant's right knee defect to the treadmill malfunction. CX 5 at 5.

Employer does not contest the finding that the medical opinions are in agreement as to the relationship between claimant's knee injury and the work incident.[6] Moreover, the administrative law judge's conclusion that "employer was unable to rebut the presumption" is supported by substantial evidence as both physicians of record stated that there is a causal relationship between claimant's knee injury and the work incident. *Ramsey Scarlett & Co. v. Director, OWCP [Fabre]*, 806 F.3d 327, 49 BRBS 87(CRT) (5th Cir. 2015). Therefore, we affirm the administrative law judge's finding that employer did not rebut the Section 20(a) presumption. As employer does not otherwise challenge the award of benefits for the knee injury, it is affirmed.

[6] We note, moreover, that in its post-hearing brief, employer did not argue that it rebutted the Section 20(a) presumption based on the evidence that it now identifies on appeal to show error. Thus, this issue arguably has not been preserved for appeal. *Johnston v. Hayward Baker*, 48 BRBS 59 (2014). Employer argued that, "[W]hile Dr. Vanderweide related Claimant's knee complaints to the injury event, he did so only because he had nothing but claimant's self-serving history to guide his opinion." Emp. Post-Hearing Br. at 22.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge