U.S. Department of Labor

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

BRB No. 19-0195

WILLIE J. BENSON	)	**NOT PUBLISHED**
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED: OCT 17 2019
BD LONG PRODUCTS, LLC	)	
	)	
and	)	
	)	
TRAVELERS PROPERTY AND CASUALTY COMPANY OF AMERICA	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order and the Order Denying Reconsideration of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Ted Williams, Baton Rouge, Louisiana, for claimant.

Joseph B. Guilbeau (Juge, Napolitano, Guilbeau, Ruli & Frieman), Metairie, Louisiana, for employer/carrier.

Before: BUZZARD, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order and the Order Denying Reconsideration (2017-LHC-01209) of Administrative Law Judge Lee J. Romero, Jr., rendered on a claim filed pursuant to 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 material handler and then as a crane operator. Tr. at 23, 26. He testified he suffered from back pain that became worse a year or two after he became a crane operator, and although he generally felt sore, he continued to work with no medical treatment or accommodations.[1] *Id.* 39-40. On May 13, 2016, he began his usual 12-hour shift and, by the end of the day, had increased back pain. On May 14, 2016, when claimant got out of bed, his back "locked up." *Id.* at 40. He reported his injury to his supervisor. *Id.* at 41-42. Claimant was sent to the company doctor, Dr. Bailey.

Dr. Bailey recommended an MRI of claimant's back and, on reading the MRI, diagnosed claimant with a herniated disc. CX 3 at 47. Dr. Gremillion, claimant's family doctor, first saw claimant on May 18, 2016, and prescribed medication. Tr. at 44-45. Dr. Gremillion interpreted claimant's MRI as revealing a herniated nucleus pulposus causing left foraminal stenosis at the L3-4 level on the left and L4-5 on the right, along with a disc bulge at L3-4. CX 11 at 12-13. He also diagnosed claimant as having a pinched nerve. *Id.* at 14. Neither prescription medications nor physical therapy relieved claimant's back pain. Tr. at 45-46.

Dr. Gremillion referred claimant to Dr. Waguespack, a neurosurgeon. On reviewing the MRI, Dr. Waguespack stated it appeared "fairly normal and typical," but there was some spondylosis "consistent with normal degenerative aging issues." CX 10 at 11, 15. He diagnosed it as a "bulge" and not a herniation because he used the term "herniation" to describe something "surgically relevant." *Id.* at 29. Claimant last saw Dr. Waguespack in November 2016, when he offered to refer claimant to a pain management doctor, which employer refused to authorize. Dr. Waguespack released claimant to full-duty work.

Claimant also saw Dr. Awasthi, an orthopedic surgeon, for a second opinion. Dr. Awasthi reviewed claimant's medical records, including a CT myelogram and the MRI. CX 5 at 3. He did not find a herniated nucleus pulposus at L4-L5, noting only "slight diminished signal intensity at L3-L4 and at L4-L5 with preservation of disc height." *Id.* He diagnosed claimant with pre-existing lumbar degenerative disc disease and lumbar spondylosis, which may have been aggravated by claimant's work. *Id.* He stated that claimant would potentially reach maximum medical improvement in six months, i.e., in November of 2016, at which time claimant should be able to return to work with some

---

[1] As a crane operator, claimant moved finished product and scrap metal onto barges from trucks. To reach the cab of the crane, he had to climb a flight of stairs to a deck and then a six-foot ladder. Tr. at 26-27, 29. He described the movement of the crane as "bumpy," with no seat padding for protection, and stated that performing his job required him to bend forward and twist from side to side. *Id.* at 36-37.

modifications, including avoiding prolonged sitting, standing and walking for more than two hours at a time. *Id.* at 5-6.

Claimant returned to work on December 28, 2016, and employer gave him a padded seat to use in the crane cab, but it did not improve his condition.[2] Tr. at 50-51. He continued to work until February 9, 2017, when his back "locked up" for the second time. Claimant attempted to work but was unable to perform his job and was sent home. He has not returned to work since February 9, 2017. When claimant remained absent, employer terminated his employment as of August 3, 2017. CX 13 at 8.

In June 2017, claimant returned to see Dr. Gremillion, who placed restrictions prohibiting him from kneeling, squatting, stooping, or lifting or carrying more than 10 pounds and limiting him to occasional sitting. CXs 7 at 3; 11 at 20. Dr. Gremillion affirmed that claimant was unable to work at that time. CX 7 at 4. In his deposition, Dr. Gremillion stated that sitting in a steel chair would potentially inflame a herniated disc, and he opined that claimant's work circumstances could have aggravated his herniated disc, but he was not certain of the true cause of claimant's back condition. CX 11 at 42-44. Claimant testified he cannot work 12-hour shifts or climb the six foot ladder to the crane cab. Tr. at 63.

Claimant filed a claim for additional benefits under the Act, asserting he is unable to return to his former job and thus is temporarily totally disabled. The administrative law judge found claimant established a prima facie case that he has pre-existing degenerative disc disease which was aggravated by his work conditions and resulted in two flare-ups on May 14, 2016, and February 9, 2017. Decision and Order at 23. He found employer failed to rebut the Section 20(a), 33 U.S.C. §920(a), presumption. *Id.* at 25. However, he proceeded to weigh the evidence as a whole assuming, arguendo, that the presumption was rebutted. On weighing the evidence, the administrative law judge concluded claimant established a causal nexus between his lower back pain and his work. *Id.* at 29.

The administrative law judge found that claimant has not reached maximum medical improvement because Drs. Gremillion, Waguespack, and Awasthi recommended he seek pain management treatment. Decision and Order at 32. He also found that Drs. Gremillion and Awasthi gave claimant restrictions that preclude him from performing his usual job duties. As claimant established a prima facie case of total disability, the administrative law

[2] Employer paid claimant temporary total disability benefits from May 20 through December 10, 2016.

judge awarded temporary total disability benefits.[3] *See id.* The administrative law judge denied employer's motion for reconsideration.

Employer appeals the administrative law judge's award of benefits. Claimant filed a response, urging affirmance.

Employer first contends Dr. Waguespack's testimony is sufficient to rebut the Section 20(a) presumption. We disagree. Where, as here, claimant has established a prima facie case that he suffered an injury at work that aggravated a pre-existing condition, the Section 20(a) presumption applies and the burden shifts to employer to rebut it by producing substantial evidence that the injury was not caused or aggravated by claimant's working conditions. *Ceres Gulf, Inc. v. Director, OWCP [Plaisance]*, 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012). Where aggravation is raised, the evidence employer offers on rebuttal must address aggravation. *See Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009). In addition, a claimant sustains a work-related injury if the work accident causes an underlying condition to become symptomatic. *Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981);[4] *Welch v. Pennzoil Co.*, 23 BRBS 395 (1990); *see also Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998) (focus is not on origin of the underlying heart disease but on the heart attack).

Dr. Waguespack testified he could not draw a firm conclusion about the cause of claimant's back pain because claimant's medical history was not well-documented, but he understood claimant visited him because of a work-related injury. CX 10 at 18-20. The administrative law judge found that Dr. Waguespack determined claimant's pain "was the result of an aggravation of his pre-existing degenerative disc disease." Decision and Order at 28-29. Moreover, he found Dr. Waguespack "declined to give his opinion on the causation of Claimant's pain because he felt investigating the cause was irrelevant to Claimant's treatment." *Id.* at 28-29; *see* CX 10 at 24. Contrary to employer's argument, the administrative law judge properly found this opinion insufficient to rebut the Section 20(a) presumption because it does not address the alleged aggravation of claimant's pre-existing back condition by his employment. Decision and Order at 25; *Holiday*, 591 F.3d

---

[3] The parties stipulated to claimant's average weekly wage. Employer did not submit evidence of suitable alternate employment. The administrative law judge also ordered employer to pay medical benefits. Decision and Order at 35.

[4] "Whether circumstances of his employment combined with his disease so to induce an attack of symptoms severe enough to incapacitate him or whether they actually altered the underlying disease process is not significant. In either event his disability would result from the aggravation of his preexisting condition." *Gardner*, 640 F.2d at 1389, 13 BRBS at 106.

at 226, 43 BRBS at 70(CRT) ("[I]t is not substantial [evidence] if it cannot respond to the prima facie case in the first place."). In addition, any error in failing to find the Section 20(a) presumption rebutted is harmless because the administrative law judge weighed the evidence as a whole assuming, arguendo, employer rebutted the presumption. *See Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999).

If employer rebuts the Section 20(a) presumption, it falls out of the case and claimant bears the burden of proving based on the record as a whole that his injury was caused by his working conditions. *Bis Salamis, Inc. v. Director, OWCP [Meeks]*, 819 F.3d 116, 50 BRBS 29(CRT) (5th Cir. 2016). The administrative law judge found that Drs. Gremillion and Awasthi agreed claimant's pain was the result of an aggravation of pre-existing degenerative disc disease and his work conditions were a potential cause of the aggravation. Decision and Order at 28-29. The administrative law judge further acknowledged that Dr. Bailey also linked claimant's condition with his work, stating claimant had ergonomic problems with his crane seat. *Id.* The administrative law judge found there was no specific objective medical evidence to refute the causal connection between claimant's lower back pain and his working conditions, noting Dr. Waguespack "declined to give his opinion on the causation of Claimant's pain because he felt investigating the cause was irrelevant to Claimant's treatment." *Id.*; *see* CX 10 at 24.

The administrative law judge permissibly found, on the record as a whole, that claimant established a causal nexus between his lower back pain and his employment based on the opinions of Drs. Gremillion, Awasthi, and Bailey. It is his prerogative to weigh the evidence and determine the weight to be afforded to the medical opinions. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). The Board does not have the authority to reweigh the evidence. *See James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000). Substantial evidence supports the administrative law judge's finding that claimant's back condition is work-related. Therefore, we affirm it. *Conoco, Inc.*, 194 F.3d 684, 33 BRBS 187(CRT).

Employer next challenges the administrative law judge's finding that claimant has not reached maximum medical improvement. Employer contends no doctor stated pain management is necessary for claimant's condition and the administrative law judge erred in declining to find claimant's condition permanent. We reject employer's contention.

A disability is considered permanent as of the date a claimant's condition reaches maximum medical improvement or if a condition has continued for a lengthy period and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *See Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). If a physician believes that further treatment is necessary, then a possibility of improvement exists and maximum medical improvement does not occur until the treatment is complete. *See Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004).

Substantial evidence supports the administrative law judge's finding that claimant's condition is not permanent. First, he found that Dr. Awasthi's opinion regarding maximum medical improvement in the autumn of 2016 was only a prediction, and claimant suffered a subsequent exacerbation at work. Order Denying Reconsideration at 16. Next, he addressed the doctors' recommended treatments, and noted that Dr. Awasthi thought pain management would potentially be necessary. *Id.* at 17 (citing CX 5 at 5-6). He further noted that while no physician required claimant to undergo pain management, Drs. Waguespack, Gremillion, and Awasthi all supported it as a reasonable next step for claimant's treatment. *Id.* at 19; CXs 4 at 65; 8; 10 at 99; 11 at 23-24. These medical opinions support the administrative law judge's finding that claimant requires further treatment through pain management to improve his condition, and this reasoning precludes a finding that claimant has reached maximum medical improvement. *See Abbott v. Louisiana Ins. Guaranty Assn. v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994). The administrative law judge's conclusion that claimant's condition is temporary is supported by substantial evidence and in accordance with the law and, therefore, is affirmed.

Finally, employer contends the administrative law judge erred in finding claimant established he is totally disabled. To make out a prima facie case of total disability, a claimant must establish that he is unable to perform his usual employment due to his work-related injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011). Dr. Waguespack released claimant to full-duty work in November 2016. Claimant returned to work in December 2016 but suffered a second flare-up of his back injury on February 9, 2017, at which time he stopped working. Dr. Gremillion was the only doctor who treated claimant after the second flare-up, and he opined that claimant was unable to work due to his back injury. CX 11. In addition, claimant testified his job duties are incompatible with his work restrictions. Tr. at 61-62. The administrative law judge's finding that claimant is unable to perform his usual work is supported by Dr. Gremillion's opinion offered after the February 2017 injury.[5] *J.R. [Rodriguez] v. Bollinger Shipyard, Inc.*, 42 BRBS 95 (2008), *aff'd sub nom. Bollinger Shipyards, Inc. v. Director, OWCP*, 604 F.3d 864, 44 BRBS 19(CRT) (5th Cir. 2010). Thus, we reject employer's contention of error and affirm the administrative law judge's conclusion that claimant is totally disabled as supported by substantial evidence. *See Mijangos*, 948 F.2d at 945, 25 BRBS at 81(CRT); *Devor v. Dep't of the Army*, 41 BRBS 77 (2007).

---

[5] We reject employer's argument that the administrative law judge erred in crediting Dr. Gremillion's opinion to find claimant totally disabled. Although Dr. Gremillion was not specifically aware claimant had suffered a second flare-up of his injury on February 9, 2017, Dr. Gremillion nevertheless examined claimant after that flare-up and imposed restrictions which the administrative law judge rationally found "preclude Claimant from performing his usual job duties." Decision and Order at 32.

Accordingly, the administrative law judge's Decision and Order and his Order Denying Reconsideration are affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge