U.S. Department of Labor

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

BRB No. 17-0119

ROBERT F. HIRSCH, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: Sept. 21, 2017
ELECTRIC BOAT CORPORATION	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Colleen A. Geraghty, Administrative Law Judge, United States Department of Labor.

Mary Ann Violette and Robert P. Audette (Audette, Cordeiro & Violette, P.C.), East Providence, Rhode Island, for claimant.

Robert J. Quigley, Jr. (McKenney, Quigley & Clarkin, LLP), Providence, Rhode Island, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2016-LHC-00694) of Administrative Law Judge Colleen A. Geraghty 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 began working at employer's Quonset Point facility in 1976. He worked as a structural welder for three years, then as a pipefitter for 36 years. Tr. at 17, 20, 26.

Claimant retired in December 2014. Claimant testified that, as a structural welder, he performed all stick-style welding as well as grinding of regular steel and alloys, which exposed him to grinding dust, asbestos, welding smoke, and dirt. *Id*. at 18-19, 37-38. As

a pipefitter, claimant polished and ground pipes and performed tack welding, which exposed him to asbestos, grinding dust, smoke, welding fumes, and diesel fumes. *Id*. at 23-28, 37-38. Claimant further testified that, until the last 10-15 years of his employment, employer allowed its employees to smoke cigarettes while performing their duties at work.[1] *Id*. at 20-21, 26, 58-59. Claimant stated that he and other employees smoked at work. *Id*. at 21, 26, 45. In July 2014, Dr. Matarese diagnosed claimant with moderately severe chronic obstructive pulmonary disease (COPD), due primarily to smoking but with some contribution from claimant's work exposure to grinding dust, welding fumes, and diesel fumes. CX 1; CX 3 at 16. Dr. Matarese stated claimant has an 11 percent impairment under the American Medical Association *Guides to the Evaluation of Permanent Impairment* (6th ed.). CX 1. Claimant subsequently filed a claim for benefits under the Act, alleging that his COPD is due in part to his occupational exposures, including cigarette smoke.

The administrative law judge found that claimant established he has a harm, COPD. She also found that claimant's work exposures to asbestos, grinding dust, welding fumes, and diesel fumes constitute working conditions that could have caused, aggravated, or accelerated claimant's lung condition. As claimant established both elements of his prima facie case, the administrative law judge invoked the Section 20(a), 33 U.S.C. §920(a), presumption that his COPD is work-related. Decision and Order at 8-9. With respect to claimant's theory that his smoking at work constituted a "working condition," which could have caused his COPD, the administrative law judge found that claimant's smoking at work was voluntary and was not a requirement of his job. *Id.* at 9. The administrative law judge next found that employer rebutted the Section 20(a) presumption with the opinion of Dr. Conway and, on the record as a whole, claimant did not establish by a preponderance of the evidence that he has a work-related pulmonary condition. The administrative law judge denied the claim for compensation and medical benefits. *Id*. at 11-12.

On appeal, claimant challenges the administrative law judge's findings that his smoking at work was not a "working condition" for purposes of establishing his prima facie case, that Dr. Conway's opinion rebuts the Section 20(a) presumption, that claimant's COPD is not work-related, and that claimant is not entitled to have employer pay for annual lung cancer screenings due to his exposure to asbestos at work. Employer responds, urging affirmance.

[1] At the time of the August 23, 2016 hearing, claimant was 68 years old. Tr. at 16. He testified that he began smoking cigarettes at the age of 20 and continued to smoke less than a half a pack a day. *Id.* at 44.

In order to establish a prima facie case, claimant bears the burden of proving the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused the harm. *See Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 605, 38 BRBS 60, 62(CRT) (1st Cir. 2004). If these elements are established, the Section 20(a) presumption applies to link claimant's injury or harm with his working conditions. *Id.* Upon invocation of the presumption, the burden shifts to employer to rebut it with "substantial evidence" that claimant's condition was not caused or aggravated by his employment. *See Bath Iron Works Corp. v. Fields*, 599 F.3d 47, 53, 44 BRBS 13, 15(CRT) (1st Cir. 2010). Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Bath Iron Works Corp. v. Brown*, 194 F.3d 1, 5, 33 BRBS 162, 165(CRT) (1st Cir. 1999). If the employer succeeds in rebutting the Section 20(a) presumption, the presumption falls out of the case and the administrative law judge "must weigh all of the record evidence to determine whether the claimant has established the necessary causal link between the injury and employment." *Fields*, 599 F.3d at 53, 44 BRBS at 15(CRT). The claimant bears the ultimate burden of proof to establish the necessary causal link between the injury and employment. *Id.; see Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

Initially, claimant asserts that the administrative law judge erred in finding his cigarette smoking at work did not constitute a "working condition" for purposes of establishing a prima facie case. Claimant asserts that his smoking at work constitutes a "regular incident" of his employment and, therefore, is a "working condition" that could have caused his COPD.[2] We reject this contention. With respect to occupational diseases, coverage under the Act is limited to diseases that arise from hazards specific to the claimant's employment, as distinguished from employment generally. *See* 33 U.S.C. §902(2) (defining "injury" under the Act as including "such occupational disease or infection as arises naturally out of such employment"); *Gencarelle v. General Dynamics Corp.*, 892 F.2d 173, 177, 23 BRBS 13, 20(CRT) (2d Cir. 1989) (occupational disease is a disease caused by harmful conditions present in a "peculiar" or increased degree by comparison with employment generally). Thus, claimant's linking his disease to an exposure that is not "peculiar" to his employment, but was a personal activity permitted

[2] Claimant cites *Sheerer v. Bath Iron Works Corp.*, 35 BRBS 45 (2001) for the proposition that accidental injuries arising in the course of "incidental" employment activities "arise in the course of employment" and are compensable under the Act. In *Sheerer*, the Board affirmed the administrative law judge's finding that the claimant's injury, incurred during his lunch hour in employer's break room while playing ping pong, arose out of and in the course of employment. *Sheerer*, however, was a traumatic injury case to which the definition of accidental injury applies, i.e., "accidental injury or death arising out of and in the course of employment."

by employer, is insufficient to bring his claim within the Act's coverage. Moreover, substantial evidence supports the administrative law judge's findings that claimant was not required to smoke at work and that claimant presented no evidence that his smoking at work was more hazardous than smoking elsewhere. Consequently, we affirm the administrative law judge's finding that claimant failed to establish that his smoking is a "working condition" that could have caused his COPD.[3]

Claimant additionally challenges the administrative law judge's finding that Dr. Conway's opinion rebuts the Section 20(a) presumption. Specifically, claimant contends Dr. Conway did not rule out claimant's workplace exposures to dust, particulates, fumes, and asbestos as contributing to his COPD. Cl. Br. at 10. Contrary to claimant's assertion, Dr. Conway was not required to "rule out" any possible causal relationship between claimant's employment and his condition. *Bath Iron Works Corp. v. Director, OWCP [Harford]*, 137 F.3d 673, 32 BRBS 45(CRT) (1st Cir. 1998); *Bath Iron Works Corp. v. Director, OWCP [Shorette]*, 109 F.3d 53, 31 BRBS 19(CRT) (1st Cir. 1997). Rather, his opinion need only support the conclusion that claimant's condition was not caused or aggravated by his employment. *See Fields*, 599 F.3d at 53, 44 BRBS at 15(CRT); *Brown*, 194 F.3d at 5, 33 BRBS at 165(CRT). Moreover, the administrative law judge accurately characterized Dr. Conway's opinion as stating that: claimant's COPD is due entirely to smoking; claimant's work exposures did not cause or contribute to his COPD; and there is no evidence of a lung injury due to workplace exposures.[4] Decision and Order at 7; EX 2, 3. Consequently, we affirm the administrative law judge's finding that employer rebutted the Section 20(a) presumption as Dr. Conway's opinion satisfies its burden of producing substantial evidence that claimant's respiratory

[3] While the case was before the administrative law judge, claimant did not argue that his COPD is due to second-hand smoke inhalation. To the extent claimant raises this argument on appeal, we decline to address it in the first instance. *See Levesque v. Bath Iron Works Corp.*, 13 BRBS 483, *aff'd mem. sub nom. Levesque v. Director, OWCP*, 673 F.2d 1297 (1st Cir. 1981) (table).

[4] Dr. Conway found no indicia of any disease caused by exposure to asbestos as claimant's x-rays and CT scans showed no fibrotic changes, pleural plaques, or any asbestos-induced lung disease. EXs 2 at 4; 3 at 26-28. Dr. Conway explained that smoking causes emphysema/COPD and that claimant's smoking history was significant enough to have been the sole cause of his emphysema/COPD. EX 3 at 17. Dr. Conway further explained that the number of non-smokers exposed to particulates, gas, and fumes who develop COPD is "de minimis" and their conditions fall on the chronic bronchitis side of the COPD spectrum. *Id.* at 39. Because claimant's COPD is purely emphysematous with no chronic bronchitic pattern of symptoms, Dr. Conway attributed claimant's COPD entirely to smoking. *Id.* at 38-41.

condition was not caused or aggravated by claimant's employment. *See Harford*, 137 F.3d 673, 32 BRBS 45(CRT); *Shorette*, 109 F.3d 53, 31 BRBS 19(CRT); *O'Kelley v. Dep't of the Army/NAF,* 34 BRBS 39 (2000).

Additionally, we affirm the administrative law judge's weighing of the evidence on the record as a whole. It is well established that the administrative law judge is entitled to evaluate the evidence and draw his own inferences and conclusions. *See Bath Iron Works Corp. v. Director, OWCP [Hutchins]*, 244 F.3d 222, 35 BRBS 35(CRT) (1st Cir. 2001); *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). The Board may not reweigh the evidence or substitute its own views for those of the administrative law judge. *Hutchins*, 244 F.3d 222, 35 BRBS 35(CRT); *Sprague v. Director, OWCP*, 688 F.2d 862, 15 BRBS 11(CRT) (1st Cir. 1982). The administrative law judge's finding that claimant did not establish a causal connection between his lung impairment and his asbestos exposure is supported by substantial evidence, as both doctors of record stated that claimant's objective medical evidence is inconsistent with an asbestos-related lung disease. Decision and Order at 11; CX 3 at 46; EXs 2 at 4; 3 at 26-28. With respect to claimant's other exposures, the administrative law judge found that claimant did not sustain his burden of establishing the work-relatedness of his lung impairment. Dr. Conway opined that claimant's COPD is emphysematous, with no bronchitic or asthmatic symptoms such as daily cough, congestion, mucous, or wheezing, and therefore is not related to his work exposures. EXs 2 at 2; 4 at 1; 5 at 1; CX 4 at 1. Dr. Matarese opined that claimant's exposures to grinding dust, welding fumes, and diesel fumes "more probably than not [] contributed to some degree" to claimant's COPD. CX 3 at 49. The administrative law judge rationally found Dr. Matarese's opinion insufficient to meet claimant's burden because he "talked in generalities" and did not explain how the exposures contributed, given the emphysematous nature of claimant's impairment. Decision and Order at 11. The administrative law judge's conclusion is rational and supported by substantial evidence. Therefore, we affirm her finding that claimant failed to establish by a preponderance of the evidence that his COPD is work-related. *See Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000). We, therefore, affirm the denial of disability benefits.

Lastly, we reject claimant's assertion that his exposure to asbestos, alone, entitles him to medical monitoring under the Act. The administrative law judge properly found that claimant is not entitled to benefits absent a work-related harm.[5] *See* 33 U.S.C. §907;

[5] The administrative law judge accurately noted that Drs. Matarese and Conway "agree Claimant's radiographic evidence does not show any indicia of asbestos-related lung disease and that Claimant did not have wheezing, crackles or rales associated with fibrotic changes in the lungs." Decision and Order at 11.

Wheatley v. Adler, 407 F.2d 307 (D.C. Cir. 1968) (*en banc*); *cf. Crawford v. Director, OWCP*, 932 F.2d 152, 24 BRBS 123(CRT) (2d Cir. 1991); *Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989) (claimant entitled to medical monitoring for non-disabling work-related pleural plaques). As claimant did not establish a work-related injury, we also affirm the denial of medical benefits. *Rochester v. George Washington University*, 30 BRBS 233 (1997).

Accordingly, 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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JUDITH S. BOGGS
Administrative Appeals Judge

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GREG J. BUZZARD
Administrative Appeals Judge