U.S. Department of Labor

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

BRB No. 17-0138

RHONDA HARRISON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: Sept. 13, 2017
	)	
HUNTINGTON INGALLS INDUSTRIES, INCORPORATED	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Claim for Benefits of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Charlene A. Morring (Montagna Klein Camden, LLP), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Claim for Benefits (2015-LHC-00898) of Administrative Law Judge Alan L. Bergstrom 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 has worked for employer for more than 30 years, most recently as a tool clerk. Tr. at 15-16. For the five years prior to the hearing, claimant worked the third shift, from 11 p.m. to 7 a.m. *Id.* at 17. Claimant testified that she was required stand a lot and to wear steel-toed shoes. *Id.* at 18.

Claimant testified that she started to experience problems with her left foot in 2012, when her steel-toed shoes rubbed the side of her foot.[1] Tr. at 18-19. Claimant testified that Dr. Mawusi noticed the swelling on her feet from the rubbing of the steel toe and told her she needed to change her shoes; claimant tried a number of things to keep her foot from sliding or rubbing, including wrapping the foot, but these solutions were ineffective. *Id.* at 18-19, 33. Claimant changed to a hard-top shoe but was told by employer she needed to wear steel-toed shoes. *Id.* at 19, 25.

Claimant underwent surgery on August 13, 2013 to amputate the fifth toe of her left foot. As a result of her surgery, she was unable to work from August 9 through November 20, 2013. Tr. at 21; EX 8. Claimant did not seek benefits for this period of disability.

Claimant returned to full-duty work and was again required to work the third shift and wear steel-toed shoes. Tr. at 21-22. After her return to work, claimant began having problems with the fourth toe of her left foot and she returned to Dr. Mawusi. *Id.* at 22. Dr. Mawusi took her off work from October 2014 until March 2015. Claimant had surgery on her fourth toe on December 5, 2014. EX 1 at dd.[2] She returned to full-duty work in March 2015. Tr. at 23.

Claimant sought compensation under the Act from October 13, 2014 to March 29, 2015, and medical benefits for the injury to the fourth toe of her left foot, alleging that her foot condition was aggravated by having to wear steel-toed shoes at work. CX 1 at 5. The administrative law judge determined that claimant was not entitled to the benefit of the Section 20(a), 33 U.S.C. §920(a), presumption that her fourth toe injury was due to her employment.[3] Decision and Order at 37. The administrative law judge acknowledged Dr. Mawusi's December 5, 2014 opinion that claimant should "change her job position due to adverse affect [sic] to her feet." Decision and Order at 38 (citing CX 4 at 9). But he found this insufficient to invoke the Section 20(a) presumption because Dr. Mawusi did not state how long claimant's neuropathy was aggravated, hastened, or

[1] Claimant also suffers from chronic left foot ulcers, chronic left foot edema, and acute diabetes mellitus.

[2] Claimant underwent a left foot bone biopsy/arthroplasty with debridement on her fourth toe "PIP" joint. EX 1 at dd. The administrative law judge stated this was a procedure to correct a hammertoe deformity. Decision and Order at 38.

[3] The administrative law judge found that the claim for the left fourth toe injury was timely filed. Decision and Order at 35. The timeliness of the claim is not at issue in this appeal.

worsened by claimant's work or how the hammertoe could have been caused by claimant's work. *Id.* The administrative law judge also discounted the written statement from Dr. Mawusi that standing all day and wearing steel-toed shoes had contributed to the fifth toe amputation because it was made without expressed rationale and contradicted by a note in his medical records attributing the amputation to claimant's falling in a gas station. *Id.* at 38. The administrative law judge concluded that "when all the credible evidence of record is considered as a whole, claimant has failed to demonstrate that [] conditions [] existed at work which could have caused, aggravated, or accelerated her pre-existing left-foot diabetic condition, peripheral neuropathy or hammertoe digits." *Id.* at 39. Accordingly, the administrative law judge denied the claim for benefits.

Claimant appeals the administrative law judge's decision, contending he erred in finding that she is not entitled to the Section 20(a) presumption that her fourth toe injury was due at least in part to the shoes she was required to wear at work. Employer filed a response brief, urging affirmance.

Section 20(a) of the Act provides a presumption that a claimant's injury is work-related. In order to invoke this presumption, an employee is required to establish a prima facie case by showing: (1) that she suffered physical harm; and (2) that a workplace accident or workplace conditions could have caused, aggravated, or accelerated the harm. *Metro Machine Corp. v. Director, OWCP [Stephenson]*, 846 F.3d 680, 50 BRBS 81(CRT) (4th Cir. 2017). Once the prima facie case is established, the burden shifts to the employer to provide substantial evidence to rebut the presumed causal connection between the injury and the employment. *See Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009).

The administrative law judge's decision largely restates Dr. Mawusi's reports. The administrative law judge found that "[t]he only medical statement related to the Claimant's October 2014 medical condition and her work requirements is Dr. Mawusi's [] December 5, 2014 statement . . . that he 'recommended Patient change her job position due to adverse affect [sic] to her feet with history of diabetes and neuropathy.'" Decision and Order at 38 (citing CX 4 at 9). However, the administrative law judge found that there are no medical entries stating how long claimant's peripheral neuropathy may have been aggravated by her working conditions. *Id.* The administrative law judge briefly dismissed claimant's testimony by saying that "the evidence of record does not establish [a causal] link by a preponderance of the evidence. Mere allegations are not sufficient to carry her burden of proof." *Id.* at 39.

We agree with claimant that the administrative law judge failed to properly apply Section 20(a). The administrative law judge discounted Dr. Mawusi's written statement and his advice that claimant change her job because the medical records show that Dr. Mawusi had also attributed claimant's foot condition to claimant's falling in a gas station.

This finding does not acknowledge, however, that claimant's working conditions are not required to be the sole cause of claimant's injury but that it is sufficient if working conditions aggravate or accelerate a pre-existing disability. *See Newport News Shipbuilding & Dry Dock Co. v. Fishel*, 694 F.2d 327, 15 BRBS 52(CRT) (4th Cir. 1982). In any event, the January 16, 2014 letter is of limited use as it referred specifically to claimant's fifth toe amputation, which is not the injury at issue in the claim before the administrative law judge.

The administrative law judge also appears to have relied on the fact that there is no medical opinion affirmatively stating that claimant's working conditions caused or aggravated her foot problems. However, it is well settled that a claimant is not required to produce affirmative medical evidence in order to establish a prima facie case. *See Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990). Claimant need only establish the existence of an accident or working conditions that *could have* caused or aggravated the harm. *See Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990) (emphasis added). Once a prima facie case has been established, the Section 20(a) presumption applies to link the injury to claimant's work and the burden then shifts to the employer. *See Holiday*, 519 F.3d at 225, 43 BRBS at 69(CRT). Thus, in determining whether claimant made out her prima facie case, the administrative law judge erred in requiring claimant to prove by a preponderance of the evidence that her standing and wearing steel-toed shoes at work actually caused her disabling foot condition. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997) (claimant must *allege* that her injury occurred in the course and scope of her employment in order to be entitled to the Section 20(a) presumption); Decision and Order at 39. The fact that Dr. Mawusi did not affirmatively link the fourth toe injury to claimant's steel-toed shoes or that he did not describe how claimant's work affected her condition medically is not dispositive for purposes of claimant's prima facie case.[4]

Moreover, the administrative law judge did not properly determine the weight to afford claimant's testimony. Claimant's testimony as to her working conditions and the

[4] The administrative law judge placed some emphasis on Dr. Mawusi's repeated notations that claimant was "noncompliant" with her footwear. *See* Decision and Order at 34. Claimant's testimony appears to indicate that claimant's non-compliance was due to the fact that she was required to wear the steel-toed shoes while she was working and was not permitted to wear the diabetic shoe. Tr. at 18-19, 37-38. Once she was taken off work on October 30, 2014, Dr. Mawusi's notes indicate that claimant wore her surgical shoes and that "patient has been following postoperative instructions regarding weightbearing." *See, e.g.*, EX 1 at Z-aa; EX 1 at dd. During the period between October 30, 2014 and March 2015, when claimant was not working, Dr. Mawusi did not indicate that claimant was non-compliant.

requirement of wearing steel-toed shoes is uncontradicted. Claimant testified that she first noticed problems with her left foot in 2012 from the steel rubbing the side of her foot and that Dr. Mawusi told her that she needed to change her shoes. Tr. at 19, 32. Claimant also testified that after returning to work following her toe amputation, the problems that she had experienced with her fifth toe started happening to her fourth toe, which is the injury at issue here. *Id.* at 37. A claimant's credible testimony alone can be sufficient to establish a prima facie case. *See Moore*, 126 F.3d 256, 31 BRBS 119(CRT). The administrative law judge appeared to find claimant's testimony insufficient to invoke the Section 20(a) presumption on the ground that "allegations" alone are insufficient. A claimant's theory as to how an injury occurred must go beyond "mere fancy," but it is not a high burden to meet. *Id.; see Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989); *see also Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 24 BRBS 75(CRT) (D.C. Cir. 1990) (noting the "minimal requirements of establishing a prima facie case".). However, determining the credibility of testimony and the weight to accord it are matters within the purview of the administrative law judge. *See Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994).[5]

Accordingly, we must vacate the administrative law judge's finding that the Section 20(a) presumption has not been invoked. We remand the case for the administrative law judge to assess the sufficiency of claimant's testimony and Dr. Mawusi's opinion to determine if claimant put forth sufficient evidence that her working conditions "could have" caused the harm to claimant's disabling fourth left toe injury. *Stephenson*, 846 F.3d at 688, 50 BRBS at 85(CRT). If so, the burden shifts to employer to rebut the presumption with substantial evidence to the contrary. *Holiday*, 519 F.3d at 225, 43 BRBS at 69(CRT).

[5] Under the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), findings as to credibility and weight must be accompanied by appropriate explanation. *See Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988).

Accordingly, the administrative law judge's Decision and Order Denying Claim for Benefits is vacated and the case is remanded for further proceedings consistent with this opinion.

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