U.S. Department of Labor

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

BRB No. 18-0006

ANTHONY T. TAFT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LOCKHEED MARTIN CORPORATION	)	
	)	DATE ISSUED: Sept. 18, 2018
and	)	
	)	
ACE AMERICAN INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order and Order Denying Employer's Motion for Reconsideration of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Lara D. Merrigan (Merrigan Legal), San Rafael, California, and Jon B. Robinson (Strongpoint Law Firm, LLC), Mandeville, Louisiana, for claimant.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and GILLIGAN, Administrative Appeals Judges

PER CURIAM:

Claimant appeals the Decision and Order and Order Denying Employer's Motion for Reconsideration (2016-LDA-00379, 2017-LDA-00307) of Administrative Law Judge Larry W. Price 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 worked for employer for over four years in Afghanistan as a field engineer, where he experienced gun and rocket attacks and witnessed the shooting of his supervisor. He voluntarily left his overseas employment on September 22, 2014, and returned to the United States. Claimant alleged he injured both shoulders during the course of his employment on May 7, 2014, while he was decommissioning equipment. He filed a claim for injuries to both shoulders, hearing loss and delayed-onset post-traumatic stress disorder (PTSD).

In his decision, the administrative law judge found claimant sustained a work-related right shoulder injury, but failed to establish that he suffered a work-related left shoulder injury. He determined that claimant also established he has work-related hearing loss and PTSD. The administrative law judge determined that claimant's right shoulder disability is temporary, and that his PTSD reached maximum medical improvement on August 23, 2016. Decision and Order at 23, 28. He concluded that claimant cannot return to his usual employment for employer and that employer established the availability of suitable alternate employment with a post-injury wage-earning capacity of $725.50 per week as of August 17, 2016. The administrative law judge calculated that claimant's average weekly wage for his right shoulder injury is $3,962.23 and that his average weekly wage for his PTSD is $2,744.84. Decision and Order at 26-28.

The administrative law judge awarded claimant temporary total disability compensation under 33 U.S.C. §908(b) for his right shoulder injury from September 16, 2015 through August 16, 2016, and temporary partial disability benefits under 33 U.S.C. §908(e), commencing August 17, 2016. The administrative law judge awarded claimant medical benefits for his hearing loss and PTSD. The administrative law judge denied employer's motion for reconsideration.

On appeal, claimant challenges the administrative law judge's finding that his left shoulder injury is not work-related and the average weekly wage calculation for his PTSD injury. Employer has not responded to this appeal.

In order to be entitled to the Section 20(a) presumption, claimant must establish a prima facie case by showing that he suffered a harm and that either a work-related accident occurred or that working conditions existed which could have caused or aggravated the harm. *See Noble Drilling Co. v. Drake*, 795 F.2d 478, 19 BRBS 6(CRT) (5th Cir. 1986); *see generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Once, as here, the claimant establishes a prima facie case, Section 20(a) applies to relate the injury to the work incident alleged to be the cause of the injury, and the employer can rebut this presumption by producing substantial evidence that the

injury is not related to the work incident.[1] *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).

Claimant contends the administrative law judge erred in finding that employer rebutted the Section 20(a) presumption, 33 U.S.C. §920(a), and in determining he did not establish a work-related left shoulder injury, based on the evidence as a whole. We disagree. In his decision, the administrative law judge relied on Dr. Orth's statement that, had claimant injured his left shoulder in the May 2014 work incident, he would have contemporaneously experienced significant pain and sought immediate medical treatment. The administrative law judge found that Dr. Orth's opinion, coupled with the fact that claimant did not seek treatment for his left shoulder until August 2016, is sufficient to rebut the Section 20(a) presumption that claimant's left shoulder injury is work-related. The administrative law judge permissibly determined that Dr. Orth's opinion and the approximately 24-month delay in claimant's reporting of the injury constitute substantial evidence throwing doubt on claimant's prima facie case. EX 1 at 3-4; DX 7. *Plaisance*, 683 F.3d at 231, 46 BRBS at 29(CRT). Accordingly, we affirm the administrative law judge's finding that employer rebutted the Section 20(a) presumption with regard to that alleged injury.[2] *Id.*

After an employer rebuts the presumption, it no longer controls and the issue of causation must be resolved on the evidence of record as a whole, with the claimant bearing

[1] The administrative law judge invoked the Section 20(a) presumption based on Dr. Smith's September 2016 opinion that claimant's left partial rotator cuff tear was "most likely" exacerbated by the May 2014 work injury. JX 10 at 4-6. Claimant reported to Dr. Smith that his pain began in May 2014.

[2] We reject claimant's contentions regarding the weight the administrative law judge should have afforded Dr. Orth's opinion, as the administrative law judge is not to weigh the evidence at the rebuttal stage. *See Cline v. Huntington Ingalls, Inc.*, 48 BRBS 5 (2013); *see also Truczinskas v. Director, OWCP*, 699 F.3d 672, 46 BRBS 85(CRT) (1st Cir. 2012). Moreover, Dr. Orth's opinion that claimant did not sustain any injury to his left shoulder in May 2014 is sufficient to refute claimant's contention that Dr. Orth did not address whether the work injury aggravated a left shoulder condition. *See Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000); *Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999).

the burden of persuasion. *Plaisance*, 683 F.3d 225, 46 BRBS 25(CRT); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). In arriving at his decision, 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 Calbeck v. Strachan Shipping Co*., 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963). The Board may not reweigh the evidence, but may assess only whether there is substantial evidence to support the administrative law judge's decision. *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991).

Claimant contends the administrative law judge erred by not giving weight to his testimony of left shoulder pain and consistent complaints to Dr. Perez of bilateral shoulder pain.[3] Addressing the record as a whole, the administrative law judge permissibly gave no weight to claimant's testimony that he informed Dr. Perez of left shoulder complaints prior to August 2, 2016, and that the May 2014 incident caused or contributed to his current left shoulder pain, because the medical records contains no evidence of left shoulder pain complaints until August 2016.[4] Decision and Order at 21; *see Compton v. Avondale Industries, Inc.*, 33 BRBS 174 (1999). Accordingly, as it is rational and supported by substantial evidence, we affirm the administrative law judge's conclusion that claimant failed to show by a preponderance of the evidence that his left shoulder condition is related to the work accident. *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).

Claimant next challenges the administrative law judge's calculation of his average weekly wage for his PTSD injury. Claimant contends the administrative law judge erred

[3] Claimant also generally cites to Dr. Smith's reports, JX 10, without raising any specific contentions relating to those reports. Accordingly, we need not further address them. *See Montoya v. Navy Exch. Serv. Command*, 49 BRBS 51 (2015); *Plappert v. Marine Corps Exch.*, 31 BRBS 109, *aff'g on recon. en banc* 31 BRBS 13 (1997).

To the extent claimant raises a general contention that the evidence he submitted, including Dr. Smith's statements, outweighs the opinion of Dr. Orth, he raises an objection to the weighing of the evidence that is not within the province of this Board. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). The administrative law judge observed that claimant had numerous medical appointments after the alleged 2014 injury and his first documented complaints of left shoulder pain appear in 2016. Decision and Order at 21.

by applying Section 10(i) to fix the time of injury as January 1, 2015, and to calculate an average weekly wage of $2,744.84 as of that date. 33 U.S.C. §910(i). Instead, claimant avers that his average weekly wage should be calculated under 33 U.S.C. §910(c) from the wages he earned in the year immediately preceding his last day of work for employer on September 22, 2014, which, claimant avers, yields an average weekly wage of $3,959.56. Alternatively, claimant contends the administrative law judge erred by including in the divisor the weeks he did not work from the time he resigned on September 22, 2014, until his PTSD became manifest on January 1, 2015.

The administrative law judge stated that, for purposes of calculating claimant's average weekly wage, the "time of injury" is the date of onset of claimant's disability, which he found was the date claimant's PTSD prevented him from returning to his usual employment overseas. Decision and Order at 28. Relying on claimant's credible testimony that he could not pinpoint exactly when he became unable to work due to his PTSD, but that he began having psychological symptoms two to three months after returning from Afghanistan and that his symptoms have gotten progressively worse, the administrative law judge concluded that the applicable time of injury for calculating claimant's average weekly wage is January 1, 2015.[5] Based on the 52-week period prior to January 1, 2015, the administrative law judge found that claimant earned $135,293.23 over the course of 49.29 weeks.[6] Dividing claimant's earnings by 49.29, he thus determined that claimant's average weekly wage is $2,744.84. *Id*.

Section 10(i) of the Act states that for purposes of calculating average weekly wage:

> with respect to a claim for disability or death due to an occupational disease which does not immediately result in death or disability, the time of injury shall be deemed to be the date on which the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability.

[5] The administrative law judge found that the date of onset of disability, January 1, 2015, pre-dated claimant's awareness, which employer contended was January 13, 2016, when Dr. Lanier diagnosed PTSD.

[6] The administrative law judge subtracted the 19 days that claimant missed work due to an unrelated work injury.

33 U.S.C. §910(i).[7] Section 10(i) does not, by itself contain a method of calculating average weekly wage -- one uses subsection 10(a), (b), or (c) for a non-retiree. *See* 33 U.S.C. §910(a)-(c). However, the administrative law judge properly recognized that use of the date of awareness could undercompensate a claimant whose occupational disease reduced his wage-earning capacity before he was "aware" under the terms of Section 10(i). Decision and Order at 27-28; *see, e.g., LaFaille v. Benefits Review Board*, 884 F.2d 54, 22 BRBS 108(CRT) (2d Cir. 1989)[8]; *Wayland v. Moore Dry Dock Co.*, 21 BRBS 177 (1988); *see also Roberts v. Sea-Land Services, Inc.*, 566 U.S. 93, 46 BRBS 15(CRT) (2012).[9] The

[7] The parties agreed, and the administrative law judge found, that claimant's PTSD is an occupational disease. Decision and Order at 27; Cl. Post-Hearing Br. at 57. Contrary to claimant's contention, Section 10(i) is not limited only to those workers who have "retired." Rather, as written, it applies to all claims involving "an occupational disease which does not immediately result in death or disability," regardless of whether the claimant is retired or not. *See generally LeBlanc v. Cooper/T. Smith Stevedoring, Inc.*, 130 F.3d. 157, 31 BRBS 195(CRT) (5th Cir. 1997); *LaFaille v. Benefits Review Board*, 884 F.2d 54, 22 BRBS 108(CRT) (2d Cir. 1989); *Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986). Claimant's reference to *Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 26 BRBS 151(CRT) (1993), thus is inapposite, as the Supreme Court held that hearing loss is an occupational disease which immediately results in disability and thus Section 10(i) is not applicable to hearing loss claims.

[8] In *LaFaille*, the court stated:

> Among the anomalies that would result [from application of Section]10(i) is the scenario described . . . in which an employee becomes [medically] disabled before suffering a wage loss attributable to his disease, but recognizes the occupational origin of the disease only after retirement or after accepting a lower paying job. Section 10(i) would give him nothing.

The court observed that, in amending the Act in 1984, Congress stated that in such circumstances, Section 10(c) should be used to calculate average weekly wage so that compensation shall be "based upon the claimant's wages prior to any reduction attributable to the disability." *LaFaille*, 884 F.2d at 59-60, 22 BRBS at 16(CRT) (citing H.R. Rep. 98-1027, 98th Cong., 2d Sess. 30, 1984 U.S.C.C.A.N. 2771, 2780 (1984)).

[9] In *Roberts*, the Supreme Court addressed the date on which the maximum compensation rate under Section 6 of the Act, 33 U.S.C. §906, is to be calculated. The Court stated in a footnote: "lower courts have rightly concluded that when dates of injury and onset of disability diverge, the latter is the relevant date for determining the applicable national average weekly wage." *Roberts*, 566 U.S. at 106 n.7, 46 BRBS at 19 n.7(CRT)

administrative law judge proceeded to calculate claimant's average weekly wage based on claimant's annual earning capacity in the year prior to January 1, 2015, the date the administrative law judge found claimant became disabled by his PTSD.

Section 10(c) of the Act affords the administrative law judge wide discretion to determine the average weekly wage on which a claimant's compensation benefits are to be based.[10] *See, e.g., Staftex Staffing v. Director, OWCP [Loredo]*, 237 F.3d 404, 34 BRBS 44(CRT), *modified on other grounds on reh'g*, 237 F.3d 409, 35 BRBS 26(CRT) (5th Cir. 2000); *Hall v. Consol. Emp't Sys., Inc.*, 139 F.3d 1025, 32 BRBS 91(CRT) (5th Cir. 1998); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991); *Jasmine v. Can-Am Prot. Grp., Inc.*, 46 BRBS 17 (2012). We reject claimant's contention that the administrative law judge was required to calculate his average weekly wage as of his last day of employment on September 22, 2014. The administrative law judge permissibly gave weight to claimant's testimony that he did not have any psychological symptoms until two or three months after returning from Afghanistan. Decision and Order at 28; Tr. at 112; JX 15 at 32 (pp. 123-125). Claimant also testified that he did not stop

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(citing *Service Employees Int'l, Inc. v. Director, OWCP [Barrios]*, 595 F.3d 447, 44 BRBS 1(CRT) (2d Cir. 2010)).

[10] Although the administrative law judge did not state so, it is evident he used Section 10(c) to calculate claimant's average weekly wage. Section 10(c) of the Act states that a claimant's average weekly wage shall be determined as follows:

> If either of the foregoing methods [subsection 10(a) or (b)] of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C. §910(c). Claimant's wage records indicate that he worked seven days a week, which renders inapplicable Sections 10(a) and (b). CX 1; EX 2; *see* 33 U.S.C. §910(a), (b) (subsections expressly limited to five and six-day per week workers). Indeed, claimant and employer asserted below that neither Section 10(a) nor (b) applies and that claimant's average weekly wage should be calculated under Section 10(c). *See* Cl. Post-Hearing Br. at 79; Emp. Post-Hearing Br. at 53.

working due to his work injuries and that he could have performed his usual work when he first returned to the United States. Tr. at 111-112. Substantial evidence of record thus supports the conclusion that claimant's PTSD became symptomatic and disabling on January 1, 2015. Thus, we affirm the finding that claimant's average weekly wage should be calculated pursuant to Section 10(c) as of the onset of claimant's disability due to his occupational disease. *See generally Alexander v. Triple A Machine Shop*, 32 BRBS 40 (1998), *rev'd on other grounds sub nom Alexander v. Director, OWCP*, 297 F.3d 805, 36 BRBS 25(CRT) (9th Cir. 2002).

We also reject claimant's contention that it was inequitable for the administrative law judge to include in the divisor the weeks he did not work from September 22, 2014 to January 1, 2015. Claimant does not dispute the administrative law judge's finding that he voluntarily chose not to work during this period and was not unable to work due to his injury. Decision and Order at 28; Tr. at 111-112; JX 15 at 31 (pp. 120-121); *cf. Christie v. Georgia-Pacific Co.*, 898 F.3d 952 (9th Cir. 2018); *Moody v. Huntington Ingalls, Inc.*, 879 F.3d 96, 51 BRBS 45(CRT) (4th Cir. 2018). Thus, in determining claimant's "annual earning capacity" in the entire year prior to January 1, 2015, the administrative law judge permissibly included in the divisor the number of weeks from September 22, 2014 to January 1, 2015, when claimant voluntarily chose not to work. *See generally James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000). Claimant does not otherwise challenge the resulting calculation of $2,744.84. As the administrative law judge's finding that claimant's average weekly wage pursuant to Section 10(c) as of January 1, 2015 was $2,744.84 is rational, supported by substantial evidence, and in accordance with law, we affirm it. *See generally Wayland*, 21 BRBS 177.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge