U.S. Department of Labor

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

BRB No. 14-0161

JOHN MYSHKA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ELECTRIC BOAT CORPORATION	)	DATE ISSUED: Jan. 13, 2015
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Compensation of Timothy J. McGrath, Administrative Law Judge, United States Department of Labor.

Scott N. Roberts (Law Office of Scott Roberts, LLC), Groton, Connecticut, for claimant.

Jeffrey E. Estey, Jr. (McKenney, Quigley, Izzo & Clarkin), Providence, Rhode Island, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Compensation (2013-LHC-01483) of Administrative Law Judge Timothy J. McGrath 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 supported by substantial evidence, rational, 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).

Prior to commencing his current period of employment with employer,[1] claimant filed claims under the Act and the Connecticut Workers' Compensation Act for bilateral

[1] Claimant has had two periods of employment with employer. He worked for employer as a welder from 1979 until he was laid off in 1996. Tr. at 16. He then

injuries to his hands and arms allegedly sustained as a result of cumulative trauma while he worked as a welder for Pequot River Shipworks. JXs 4, 5. On September 14, 1999, Dr. Browning assigned a 14 percent impairment rating to each of claimant's hands. JX 7. Following an independent medical examination conducted on November 23, 1999, Dr. Wainwright assigned a three percent impairment rating to each of claimant's hands. JX 8. Thereafter, claimant entered into approved settlement agreements with Pequot River Shipworks pursuant to Section 8(i) of the Act, 33 U.S.C. §908(i), and the Connecticut Workers' Compensation Act. JXs 4, 5. The parties' application for approval of the Section 8(i) settlement, dated October 25, 2001, set forth the respective impairment ratings found by Drs. Browning and Wainwright, and indicated that the nature and extent of claimant's disability were disputed issues and reason for the settlement agreement. JX 5 at 6-10. The settlement application further indicated that no medical treatment for claimant's injury was anticipated. *Id*. at 8. The Section 8(i) settlement application provided for a lump sum payment to claimant of $9,400 to settle all claims under the Act, and noted that this sum "represents a reasonable compromise . . . and [is] appropriate for the extent of the loss claimed and the nature of the injury sustained given the disputed nature of the claimant's case…." *Id*. at 9. In a Decision and Order Approving Settlement issued on November 13, 2001, Administrative Law Judge Sutton ordered employer to pay claimant the lump sum of $9,400. *Id.* at 4-5. The stipulation submitted with respect to the Connecticut workers' compensation claim, which was approved by the Connecticut Workers' Compensation Commission on December 18, 2001, clarified that one payment of $9,400 was to be made to claimant by employer to settle both the Longshore Act and the Connecticut Workers' Compensation Act claims. JX 4 at 2.

In 2002, claimant returned to his position as a welder for employer, and he resumed the use of welding and grinding tools. Tr. at 17, 20-21, 28-29. By 2011, claimant's hand problems had worsened and he sought medical attention from employer's yard hospital for his hand complaints, which included difficulty picking up and holding objects. *Id*. at 21-22. Claimant was subsequently referred to Dr. Cambridge, an orthopedic surgeon, who evaluated claimant on October 5, 2011. *Id.* at 21; JX 3 at 4. Dr. Cambridge reported that claimant had a five-year history of paresthesias in both hands which awakened him at night and that claimant experienced numbness in his hands when holding objects. JX 3 at 4. Claimant then underwent three surgical procedures performed by Dr. Cambridge: a trigger release of his right fourth finger on November 10, 2011; neurolysis of the ulnar nerve to address cubital tunnel syndrome at the right elbow on December 8, 2011; and a right carpal tunnel release on January 5, 2012. JXs 3; 6 at 5, 7, 10. After Dr. Cambridge released him to return to unrestricted work on

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engaged in other employment, including employment as a welder for Pequot River Shipworks from November 1998 to June 1999. Tr. at 17-18; JXs 4, 5. In 2002, claimant was rehired by employer as a welder, and continued in that employment as of the date of the hearing. Tr. at 20-21, 23-24.

February 19, 2012, claimant returned to his regular welding work for employer. Tr. at 23-24; JX 3 at 3.

On August 7, 2012, Dr. Cambridge assigned claimant a permanent partial disability rating of eight percent to his right upper extremity based on the combination of his right fourth trigger finger, right cubital tunnel syndrome and right carpal tunnel syndrome.[2] JX 3 at 5-6. In his subsequent deposition testimony, Dr. Cambridge stated that the eight percent rating represented the percentage of permanent impairment to claimant's entire right upper extremity for the combination of his three conditions in accordance with the criteria of the Sixth Edition of the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*).[3] JX 6 at 10-15. Dr. Cambridge further testified that if he were to isolate each of claimant's three conditions, he would assign a rating of five to seven percent for the cubital tunnel syndrome, three to five percent for the carpal tunnel syndrome, and two percent for the trigger finger. *Id*. at 11. In summarizing his opinion, Dr. Cambridge rated claimant's elbow at five percent, his carpal tunnel condition at five percent, and his fourth finger at two percent, based in part on the Sixth Edition of the AMA *Guides*. *Id*. at 16.

Employer voluntarily paid claimant temporary total disability benefits from November 10, 2011 to February 18, 2012, at a weekly compensation rate of $804.30, and medical benefits. JX 1A; 33 U.S.C. §§907, 908(b). Prior to the hearing in this case, the parties resolved the compensation issues regarding claimant's right elbow and right fourth finger conditions, and employer subsequently paid claimant compensation under the schedule for a five percent permanent partial disability to the right arm and for a two percent disability to the right fourth finger. Tr. at 10; Cl. Petition for Review at 2; Emp. Resp. Br. at 4; 33 U.S.C. §908(c)(1), (12), (19). The sole remaining issue presented at the hearing involved claimant's entitlement to a scheduled award of permanent partial disability benefits for the impairment to his right hand due to his carpal tunnel condition. Tr. at 10; Decision and Order at 2; 33 U.S.C. §908(c)(3), (19).

In his Decision and Order, the administrative law judge noted the parties' stipulations, inter alia, that claimant sustained an injury on August 26, 2011, and that

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[2] In his August 7, 2012 report, Dr. Cambridge additionally noted that claimant had returned to work, that he was "virtually asymptomatic" and had excellent range of motion of the elbow and hand, and that his neurovascular examination was unremarkable. JX 3 at 6.

[3] In his deposition testimony, Dr. Cambridge revised his assessment of claimant's permanent disability for the combination of his three conditions to a rating of ten or twelve percent of the right upper extremity based on the Sixth Edition of the AMA *Guides*. JX 6 at 13-15.

employer had paid claimant temporary total disability and medical benefits for that injury. The administrative law judge nevertheless found that claimant failed to establish a prima facie case that he had suffered a work-related injury to his right hand. Based on his determination that the present impairment rating to claimant's right hand is lower than the 14 percent impairment rating assessed to each of claimant's hands by Dr. Browning in 1999, the administrative law judge concluded that claimant did not show that he sustained a new injury or an aggravation of his pre-existing right hand condition. Therefore, the administrative law judge denied the permanent partial disability benefits sought by claimant.

On appeal, claimant contends the administrative law judge erred in finding that claimant did not establish that he sustained a new injury or aggravation of his right hand condition attributable to his work for employer. Employer responds, urging affirmance of the administrative law judge's denial of benefits.

Section 20(a) of the Act, 33 U.S.C. §920(a), provides claimant with a presumption that his disabling condition is related to his employment if claimant establishes his prima facie case by proving that he sustained a harm and that conditions existed or an accident occurred at his place of employment which could have caused the harm. *Rainey v. Director, OWCP*, 517 F.3d 632, 634, 42 BRBS 11, 12(CRT) (2d Cir. 2008); *American Stevedoring, Ltd. v. Marinelli*, 248 F.3d 54, 64-65, 35 BRBS 41, 49(CRT) (2d Cir. 2001); *see also Bath Iron Works Corp. v. Fields*, 599 F.3d 47, 44 BRBS 13(CRT) (1st Cir. 2010); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117, 118-19 (1995). Although it is claimant's burden to establish each element of his prima facie case by affirmative proof, claimant is not required to affirmatively prove that his working conditions in fact caused the harm alleged in order to establish his entitlement to the Section 20(a) presumption. *See Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990). Once the claimant establishes a prima facie case, Section 20(a) applies to relate the disabling injury to the employment, and the employer can rebut this presumption by producing substantial evidence that claimant's condition was not caused or aggravated by his employment. *Rainey*, 517 F.3d at 634, 42 BRBS at 12(CRT); *Marinelli*, 248 F.3d at 65, 35 BRBS at 49(CRT). If a work-related injury aggravates, exacerbates, accelerates, contributes to, or combines with a pre-existing condition, the entire resultant disabling condition is compensable. *Rainey*, 517 F.3d at 636, 42 BRBS at 13 (CRT). If the employer rebuts the Section 20(a) 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 the burden of persuasion. *Rainey*, 517 F.3d at 634, 42 BRBS at 12(CRT); *Marinelli*, 248 F.3d at 65, 35 BRBS at 49(CRT); *Santoro v. Maher Terminal, Inc.*, 30 BRBS 171 (1996); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

We agree with claimant that the administrative law judge erred in finding that claimant did not establish that he injured his right hand at work because he did not make a prima facie case. The administrative law judge's decision reflects a misperception of

the operation of the Section 20(a) presumption and the aggravation rule. *See Rainey*, 517 F.3d 632, 42 BRBS 11(CRT). Contrary to the administrative law judge's finding that claimant failed to establish his prima facie case, *see* Decision and Order at 2, uncontroverted evidence establishes that claimant satisfied both elements of his prima facie case. Specifically, it is undisputed that claimant sustained a harm, right carpal tunnel syndrome, for which he underwent surgery, and that working conditions existed, including claimant's use of welding and grinding tools, which could have worsened his hand condition. *See, e.g.*, *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968) (en banc); *Fields*, 599 F.3d 47, 44 BRBS 13(CRT). Claimant testified that his hand condition had worsened after his employment at Pequot River Shipworks, Tr. at 21-24, and Dr. Cambridge wrote that claimant had a five-year history of paresthesias preceding his October 5, 2011, examination of claimant. CX 3 at 4. Additionally, the parties stipulated that claimant sustained injuries at work on August 26, 2011, *see* JX 1A, and there appears to have been no dispute between the parties that claimant was entitled to temporary total disability and medical benefits for his work-related carpal tunnel syndrome.[4] Thus, the issue presented for adjudication appears to be whether the permanent impairment to claimant's right hand after he reached maximum medical improvement following his carpal tunnel release surgery is causally related to his employment with employer.[5] Therefore, we must remand the case for the administrative law judge to address, consistent with the Section 20(a) presumption and the aggravation rule, whether claimant presently has a disabling right hand condition that is causally related to his employment with employer. It must be underscored that if the conditions of claimant's employment with employer aggravated, contributed to or combined with claimant's pre-existing right hand condition, the entire resulting permanent disability is compensable, *see Rainey*, 517 F.3d at 636, 42 BRBS at 13(CRT), subject to the credit doctrine which provides a credit to an employer in a scheduled permanent partial disability case where scheduled benefits have been paid under the Act for prior disability to the same member. *See Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (en banc).

[4] Employer voluntarily paid claimant temporary total disability and medical benefits, including the cost of claimant's carpal tunnel release surgery, *see* Employer's Trial Memorandum at 5, and, in its response brief filed with the Board, employer does not contest claimant's entitlement to those benefits. It appears that "causation" originally was a contested issue, but that this issue was crossed out when the parties submitted their stipulations to the administrative law judge. JX 1A.

[5] While the parties did not stipulate that claimant's hand condition has reached maximum medical improvement and the administrative law judge did not specifically address this issue, the parties apparently rely on the August 7, 2012 disability rating by Dr. Cambridge to establish the date of permanency. *See, e.g.*, *Jones v. Genco, Inc.*, 21 BRBS 12 (1988).

Contrary to the administrative law judge's reasoning, *see* Decision and Order at 4-5, the fact that claimant may have a lower impairment rating after his recovery from carpal tunnel release surgery than the rating assigned by Dr. Browning in 1999 does not establish the absence of a work injury occurring in 2011.[6] Therefore, if the administrative law judge determines, on remand, that claimant has a permanent right hand impairment that was caused or aggravated by his employment with employer, he may not deny the claim simply because the percentage of claimant's residual impairment following surgery is lower than that previously found by Dr. Browning.[7] If the administrative law judge finds a causal relationship between claimant's present right hand condition and his employment, he must determine the extent of claimant's disability. As previously noted, the credit doctrine provides an employer with a credit for the amount of a prior scheduled award against its liability for permanent partial disability benefits resulting from an injury to the same scheduled member. *Nash*, 782 F.2d at 520-21, 18 BRBS at 53-54(CRT); *Bomback v. Marine Terminals Corp.*, 44 BRBS 95, 99 (2010). The employer receives a credit for the actual dollar amount of compensation paid for the prior injury rather than for the prior percentage of impairment. *Director, OWCP v. Bethlehem Steel Corp*. [*Brown*], 868 F.2d 759, 763-64, 22 BRBS 47, 51-52(CRT) (5th Cir. 1989); *Bomback*, 44 BRBS at 99. Thus, if the administrative law judge awards scheduled permanent disability benefits to claimant on remand, he must determine whether employer is entitled to a credit for the compensation paid pursuant to the prior

[6] The administrative law judge stated that the percentage of impairment to claimant's right hand decreased from the 1999 impairment rating to the 2012 rating, and he therefore inferred that claimant's "employment at Electric Boat appears to have improved his pre-existing right hand injury as opposed to aggravating or contributing to it." Decision and Order at 4. We are unable to view the administrative law judge's inference as reasonable as it disregards the critical fact that claimant underwent carpal tunnel release surgery prior to Dr. Cambridge's assessment of the percentage of residual impairment to claimant's right hand. While we are mindful of the Board's limited scope of review, the Board is not bound to accept an inference that was reached in an invalid manner. *See, e.g., Hernandez v. National Steel & Shipbuilding Co.*, 32 BRBS 109, 113 (1998).

[7] We note, moreover, that the administrative law judge failed to consider that the percentage of impairment to claimant's hands was disputed at the time that claimant and Pequot River Shipworks entered into a Section 8(i) settlement in 2001, and that while Dr. Browning assigned a 14 percent rating, Dr. Wainwright found only a three percent impairment to claimant's hands as of November 1999. As noted by claimant, the Section 8(i) settlement approved by Judge Sutton did not include a finding regarding the percentage of impairment to claimant's hands. *See* EXs 5, 7, 8.

Section 8(i) settlement, and, if employer is so entitled, he must calculate such credit on a dollar-for-dollar basis.[8] *Id.*

Accordingly, the administrative law judge's Decision and Order Denying Compensation is vacated, and the case is remanded for further consideration with this opinion.

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

[8] As noted by claimant, the $9,400 paid to claimant pursuant to the approved Section 8(i) settlement was in settlement of claims for scheduled benefits for both of claimant's hands, and did not specifically apportion the settlement amount between the two hands. JX 5; *see generally Barscz v. Director, OWCP*, 486 F.3d 744, 752, 41 BRBS 17, 22-23(CRT) (2d Cir. 2007) (the party seeking a credit under Section 3(e) of the Act, 33 U.S.C. §903(e), has the burden of proof on the issue of allocation of a state workers' compensation settlement). In this case, claimant avers that because the percentage of impairment to each of his hands was the same, either three percent as assessed by Dr. Wainwright or 14 percent as assessed by Dr. Browning, it would be reasonable to apportion half of the $9,400 paid to claimant, or $4,700, to claimant's right hand impairment. We need not decide this issue as it is a matter for the administrative law judge's consideration on remand.