U.S. Department of Labor

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

BRB No. 15-0003

NATHANIEL E. RAIFORD (DECEASED)	)	
Claimant-Petitioner	)	
v.	)	
	)	DATE ISSUED: Aug. 24, 2015
HUNTINGTON INGALLS INDUSTRIES, INCORPORATED	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Dana Rosen, Administrative Law Judge, United States Department of Labor.

John H. Klein (Montagna Klein Camden, L.L.P.), Norfolk, Virginia, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (2014-LHC-00349) of Administrative Law Judge Dana Rosen 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, are rational, and are 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 in its paint department for nearly 30 years, working the first shift in the sign shop. When the sign shop closed in 2008, claimant was reassigned to painting on ships in various locations around the shipyard. Shortly after this reassignment, he was moved to the second shift. In his 2012 deposition, claimant

stated he was not happy with the shift change. He worried about getting home because he did not drive and the bus did not run that late, so he had to hire someone to drive him home. Additionally, his sleep pattern was affected, and he could not concentrate on his work, although he was partnered with another worker. CX 9 at 5-9, 20-22. On January 30, 2009, claimant stopped working and went to the hospital for what he thought was an anxiety attack. Doctors admitted him and ran tests; upon his release, claimant's family was told he had had a stroke.[1] CX 9 at 12; Tr. at 23-25. Claimant was treated for stroke-related issues, depression, and anxiety, and he lived with his nephew for approximately four months after he left the hospital. Tr. at 25. Although he returned to independent living for a time, claimant did not return to any work after January 30, 2009.

Claimant first saw Dr. Sutton, his general physician, on February 2, 2009. Dr. Sutton had concerns with claimant's "altered mental status" reported by claimant to be due to distress from his work reassignment, and he noted claimant's self-reported history of depression and sleep dysfunction.[2] Dr. Sutton noted that repercussions from the stroke had yet to be determined. Dr. Sutton also reported that claimant was so distraught at the end of the appointment that he would not leave the doctor's office and had to be taken to the emergency room. CX 3A-B. At claimant's next appointment, on February 13, 2009, Dr. Sutton stated that the family informed him claimant had been admitted to the hospital due to an abnormal CT scan and an abnormal MRI – both of which indicated evidence of old infarcts "in the pons" as well evidence of a "left thalamus with possible subacute cerebrovascular accident involving the left frontal area." CX 3D. The family also informed Dr. Sutton that the hospital doctors attributed claimant's altered mental status to a stroke. On follow-up appointments, progress reports identified Dr. Sutton's assessments of claimant's having a history of cerebrovascular accidents (CVAs) and other problems but did not identify a specific cause for these problems. CX 3. Dr. Sutton excused claimant from work through September 2009; his notes also indicated that claimant's return to work must be on the day shift due to his medication schedule. CX 3X-AE.

On February 26, 2009, claimant saw a psychiatrist, Dr. Schlobohm, for his sleeping and memory problems and post-stroke issues. Dr. Schlobohm reported that claimant presented with mental problems and that he was worried about "getting himself together" so he could return to work. They discussed that depression can follow a stroke and vascular disease, and Dr. Schlobohm diagnosed "affective disorder, organic." CX 4A-D. Dr. Schlobohm continued to see claimant until July 21, 2009, when he advised

[1] There are no hospital reports in the record.

[2] There are no medical reports in the record pre-dating February 2009.

claimant to take a medical retirement. CX 4J. According to Dr. Schlobohm, claimant was then transferred to Dr. Burns.[3] CX 6A-B.

On May 4, 2010, claimant, via his nephew, filed a claim for compensation form, alleging he suffered from work-related anxiety, depression, and a stroke. EXs 2-3. Thereafter, claimant was readmitted to the hospital and began "ischemic stroke protocol." CX 3P-Q. On May 21, 2010, employer filed a notice of controversion, asserting the claim and notice of injury had been untimely filed and that claimant's conditions were not work-related. EX 5. Claimant died on May 23, 2013.[4]

The hearing was held on April 8, 2014. Before the administrative law judge, claimant's estate (claimant) contended: the notice of injury was timely filed, and, if it was not, the untimeliness should be excused because there was no prejudice to employer, 33 U.S.C. §912(a), (d); the claim was timely filed because claimant had no definite statement that his condition would affect his earning capacity until July 21, 2009, when his doctor advised him to take a medical retirement, 33 U.S.C. §913(a); his anxiety, depression and stroke were caused by his shift change; and he is entitled to temporary total disability benefits which accrued from January 30, 2009, until his death, as well as reimbursement of his medical expenses. Employer argued that the notice of injury and claim were untimely filed, and that it was prejudiced by the delayed notice. Alternatively, employer asserted that claimant's condition was not compensable because it was not related to his work.

The administrative law judge found that claimant failed to give employer timely notice of his injury and that this delay was unexcused, and that claimant's claim for compensation was untimely filed. Decision and Order at 11-13. Because a claim for medical benefits is never time-barred, the administrative law judge addressed the cause of claimant's medical conditions. She found that claimant established the harm claimed, the strokes and altered mental status, but not an accident or working conditions that could have caused this harm, and she did not invoke the Section 20(a), 33 U.S.C. §920(a), presumption. Decision and Order at 14-15. Rather, the administrative law judge found claimant's condition was caused by his strokes, citing the reports of Drs. Sutton, Schlobohm and Shean. CXs 3-5.[5] Even if the shift change at work caused anxiety and

[3] There are no reports from Dr. Burns in the record.

[4] Claimant's estate pursued his claim for disability and medical benefits. CXs 7-8; EX 2. There is no claim for death benefits.

[5] On May 14, 2010, a medical examiner for Social Security benefits, Dr. Shean, determined that claimant's cognitive abilities had deteriorated since being diagnosed with multiple CVAs in February 2009, and he deemed claimant not competent to manage his

led to the strokes and depression, the administrative law judge found that the shift change was a legitimate personnel action, and that psychological problems caused by a legitimate personnel action are not compensable. Accordingly, the administrative law judge denied the claim for reimbursement of medical benefits. Decision and Order at 16.

Claimant appeals the denial of benefits, and employer responds, urging affirmance. Claimant filed a reply brief. Claimant challenges the administrative law judge's findings on the timeliness of the notice of injury and the claim for compensation, as well as on whether his condition was work-related.

We first address claimant's contention that the administrative law judge erred in finding that his medical conditions were not work-related. In determining whether a disability is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after he establishes a prima facie case. To establish a prima facie case, the claimant must show that he sustained a harm or pain and that conditions existed or an accident occurred at his place of employment which could have caused the harm or pain. *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Maryland Shipbuilding & Drydock Co. v. Jenkins*, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). The claimant bears the burden of establishing the elements of his prima facie case by the preponderance of the evidence and without the benefit of the Section 20(a) presumption.

The administrative law judge found, and no party disputes, that claimant had a harm: "altered mental status" and CVAs. Decision and Order at 14. This finding is supported by the medical evidence and is affirmed. *S.K.* [*Kamal*] *v. ITT Industries, Inc.*, 43 BRBS 78 (2009), *aff'd in part and rev'd in part mem.*, No. 4:09-MC-348 (S.D. Tex. Mar. 1, 2011). However, claimant asserts only that his shift change was the cause of his mental condition and strokes. Contrary to claimant's assertion, his shift change does not constitute a "working condition" to which the Section 20(a) presumption applies. Rather, as the administrative law judge properly found, the shift change was a "legitimate personnel action" that cannot result in a compensable injury.

Well-established law provides that a work-related psychological injury may be compensable. *See, e.g., American Nat'l Red Cross v. Hagen*, 327 F.2d 559 (7th Cir.

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funds or to perform simple or complex tasks, to have normal association with co-workers or the public, or to complete a normal work-day. He diagnosed "mood disorder due to medical condition (multiple CVAs)" and "[d]ementia, moderate, due to medical condition (multiple CVAs)." CX 5.

1964); *R.F.* [*Fear*] *v. CSA, Ltd.*, 43 BRBS 139 (2009). A claimant is not required to show that his working conditions were "unusually stressful" in order to satisfy the "working conditions" element for invocation of Section 20(a) in a psychological injury case. Even work-related stress that seems relatively mild may establish "working conditions," as the issue is the effect on the claimant and not on the general population. *See Konno v. Young Bros., Ltd.*, 28 BRBS 57 (1994) (depression); *see also Cairns v. Matson Terminals, Inc*., 21 BRBS 252 (1988) (heart condition). If the psychological injury was caused by an accident at work or by specified working conditions, it is compensable. *Jackson v. Ceres Marine Terminals, Inc.*, 48 BRBS 71 (2014). However, a psychological injury resulting from a "legitimate personnel action" is not compensable under the Act, inasmuch as such an event is not a "working condition" which can form the basis for a compensable injury. *Pedroza v. Benefits Review Board*, 624 F.3d 926, 44 BRBS 67(CRT) (9th Cir. 2010); *Marino v. Navy Exchange*, 20 BRBS 166 (1988).

In *Marino*, the claimant worked for the employer from May 1974 until July 1982 as a food service supervisor. In late 1980 or early 1981, he was transferred to work in the main office at the Naval Training Center. On July 13, 1982, he was notified there would be a reduction-in-force and his job would be eliminated. Later that day, he blacked out while driving a work car. The claimant did not return to any employment thereafter, and he filed a claim for a work-related psychological injury. The administrative law judge found that the act of informing the claimant of the layoff/termination caused the claimant's disabling psychological injury, and he awarded benefits. The Board reversed the award, stating:

> A legitimate personnel action or termination is not the type of activity intended to give rise to a worker's compensation claim. To hold otherwise would unfairly hinder employer in making legitimate personnel decisions and in conducting its business. Employer must be able to make decisions regarding layoffs without the concern that it will involve workmen's compensation remedies. If the reduction-in-force was improper, claimant has other remedies. We therefore vacate the award of benefits and hold that, if claimant's psychological condition arose wholly from his termination, the condition is not compensable.

Marino, 20 BRBS at 168. The Board remanded the case for the administrative law judge to consider whether general working conditions also played a role in the claimant's disability.

The Board addressed the issue of a "legitimate personnel action" again in *Sewell v. Noncommissioned Officers' Open Mess, McChord Air Force Base*, 32 BRBS 127 (1997) (McGranery, J., dissenting), *aff'd on recon. en banc*, 32 BRBS 134 (1998) (Brown and McGranery, JJ., dissenting). In *Sewell*, the claimant worked as a civilian bartender from

1976 until May 15, 1986. In 1986, she got a new supervisor who, according to the claimant, had a more aggressive management style than her former supervisor. The new supervisor found problems with the claimant's performance, disciplined her and, ultimately, terminated her. In 1987, the claimant was diagnosed with major depression caused by work stressors, including the termination, poor working conditions, and stress associated with her supervisor. Because the claimant's psychological condition did not relate solely to her termination, but also to her general working conditions, the Board held it was proper to distinguish *Marino* and to apply the Section 20(a) presumption to the claim. *Sewell*, 32 BRBS at 135-136; *Sewell*, 32 BRBS at 131.

In *Pedroza*, 624 F.3d 926, 44 BRBS 67(CRT), the claimant, while unloading a ship, struck a 440-volt cable with his forklift and caused an explosion. He did not seek medical attention. One year after the incident, the claimant received a letter from the department manager stating that the incident had been caused by the claimant's negligence. After reading the letter, the claimant sought medical attention and refuted the letter, complaining he was not being treated fairly after 25 years of service, and his supervisor was hindering his ability to perform his job. After multiple letters and meetings discussing his job performance and work ethic, the claimant went on leave for three months. During this time, he sought treatment for psychological problems. While on a second term of leave, advised by his doctor, the claimant filed a claim for benefits for his psychological injuries. The administrative law judge denied benefits, finding that the claimant's psychological problems stemmed from the disciplinary action in July 2000 and not the 1999 workplace incident. As the psychological problems the claimant developed were due to the disciplinary actions, and not due to the work incident itself, and as the disciplinary actions were "legitimate personnel decisions," the United States Court of Appeals for the Ninth Circuit held that "psychological injuries arising from legitimate personnel decisions are not compensable under the Act" and affirmed the reasoning in the Board's decisions in *Sewell* and *Marino*. *Pedroza*, 624 F.3d at 931-932, 44 BRBS at 70(CRT). The court stated that "[a]n interpretation contrary to this would create a trap for the 'unwary' employer and [would] undermine the interest of employers and employees alike." *Id.*, 624 F.3d at 931, 44 BRBS at 70(CRT). As both the Act and the *Marino-Sewell* doctrine establish a balance between the needs of employers and the needs of employees, the court concluded that the claimant's psychological problems were not compensable because they were solely the result of legitimate personnel actions. *Id.*

Claimant asserts *Marino* is not applicable here. He avers his work-shift change is not the type of personnel action encompassed by *Marino*, stating that "there was an actual change in [his] working conditions, site, hours, job duties, [and] resulting transportation arrangements." Cl. Br. at 24.[6] It appears claimant is asserting that he endured an

[6] Claimant cites *Vane v. East Coast Cranes & Electrical*, 47 BRBS 129(ALJ) (2012), *aff'd*, BRB No. 13-0119 (Sept. 20, 2013), for the proposition that shift changes

ongoing change of his employment conditions whereas Marino was terminated and had no continuing "working conditions." To the extent claimant is proposing that only those personnel actions culminating in job loss are among those contemplated by *Marino*, we reject claimant's assertion. While *Marino* involved a general reduction-in-force, which happened to result in the termination of the claimant's employment, there are other personnel decisions an employer must make to run its business, and not all involve terminations. *See Sewell*, 32 BRBS at 136 n.3; *see also Pedroza*, 624 F.3d 926, 44 BRBS 67(CRT) (reprimand and demotion); *Konno*, 28 BRBS at 61 (fraud investigation). Here, employer's personnel decision permitted it to continue claimant's employment after the sign shop closed by switching his job location and duties and, finally, shift. Thus, it was reasonable for the administrative law judge to include the change of shifts among the types of personnel decisions designated as "legitimate personnel actions." *Pedroza*, 624 F.3d at 931-932, 44 BRBS at 70(CRT); *Marino*, 20 BRBS at 168.

With regard to *Sewell*, claimant asserts that cumulative stress from a claimant's general working conditions is compensable. Although this is a generally true statement of the law, *see Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004) (ridicule by co-workers caused stress which exacerbated claimant's neurological disease); *Hagen*, 327 F.2d 559 (stress from conflicts at work, long periods of "on-call" duty, and performance of supervisor's job as well as his own, caused psychological injury), the claimant in *Sewell* alleged stress from her termination as well as from general working conditions. Claimant here did not make such an assertion. As the only cause of disability alleged by claimant was the shift change itself, which was a legitimate personnel action, claimant has not established the "working conditions" element of a prima facie case. *Pedroza*, 624 F.3d at 931-932, 44 BRBS at 70(CRT); *Marino*, 20 BRBS at 168; *see generally Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996). Thus, claimant's medical and psychological conditions are not compensable. Consequently, we affirm the denial of disability and medical benefits on this ground. In light of this decision, we need not address any other issues raised by claimant on appeal.

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can result in compensable injuries because they are "working conditions." One administrative law judge is not bound by another's decision, and unpublished Board decisions lack precedential value. *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990). Moreover, the facts of *Vane* are distinguishable in that Vane's regular job involved the weekly rotation of shifts whereas, in this case, the administrative law judge found that claimant's one-time change of shift was the result of the closing of the sign shop.

Accordingly, the administrative law judge's Decision and Order 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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JONATHAN ROLFE
Administrative Appeals Judge