U.S. Department of Labor

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

BRB No. 20-0518

STEPHEN J. DeFALCO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 03/25/2021
ELECTRIC BOAT CORPORATION	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Jerry R. DeMaio, Administrative Law Judge, United States Department of Labor.

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

Mark P. McKenney (McKenney, Clarkin & Estey, LLP), Providence, Rhode Island, for Self-Insured Employer.

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

PER CURIAM:

Claimant appeals Administrative Law Judge Jerry R. DeMaio's Decision and Order Awarding Benefits and Order Denying Claimant's Motion for Reconsideration (2019-LHC-00018) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (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 applicable 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 approximately 40 years from October 26, 1976 to July 29, 2016, in various occupations at its Quonset facility in North Kingston, Rhode Island. Decision and Order at 2-4. Claimant testified that over the course of his career he was exposed to various pulmonary irritants and he never wore a respirator. Tr. at 17- 26, 29-38, 40-51. Claimant was examined by Dr. Stephen Matarese, a pulmonologist, on August 31, 2016, who diagnosed chronic obstructive pulmonary disease due to Claimant's occupational exposures and cigarette smoking history. CX 1 at 3; *see also* CX 3 at 16-17, 31, 61. He subsequently diagnosed Claimant as also having asthma and obstructive sleep apnea, and opined Claimant has a 17 percent pulmonary impairment, pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed.). CXs 1 at 5, 8, 49, 3 at 17, 19, 23, 25. Claimant filed a claim under the Act for permanent partial disability and medical benefits for his pulmonary condition. JX 1; 33 U.S.C. §908(c)(23).

The administrative law judge determined Claimant invoked the Section 20(a) presumption, 33 U.S.C. §920(a), that his pulmonary condition was caused or aggravated by his working conditions for Employer. Decision and Order at 7-8. He found Employer rebutted the presumption based on the opinion of Dr. Michael Conway. *Id*. at 8; *see* EX 8 at 29-30. On the record as whole, the administrative law judge concluded Claimant failed to establish his pulmonary injury was caused or aggravated by his working conditions. Decision and Order at 10. Accordingly, the administrative law judge denied the claim for benefits under the Act.

On appeal, Claimant challenges the administrative law judge's findings that Employer rebutted the Section 20(a) presumption and that he did not establish his occupational exposures to dust and fumes contributed to his pulmonary condition. Employer responds in support of the administrative law judge's conclusions.

Claimant contends the administrative law judge erred in finding Dr. Conway's opinion rebutted the Section 20(a) presumption. Once the Section 20(a) presumption is invoked, as here, the relevant inquiry is whether the employer produced substantial evidence of the lack of a causal nexus. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004). 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). An employer's burden on rebuttal is one of production, not persuasion; it is an "objective test," and the determination of whether the employer has produced "substantial evidence" that a reasonable mind would accept as evidence of the non-work-relatedness of the injury is a legal judgment, independent of the relative credibility of competing evidence. *Bath Iron Works Corp. v. Fields*, 599 F.3d 47, 44 BRBS 13(CRT) (1st Cir. 2010). As it applies to rebuttal of the Section 20(a) presumption, where aggravation of or contribution to an

underlying condition is claimed, an employer must present substantial evidence of the absence of aggravation/contribution. *Id.*; *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009).

We agree with Claimant that the administrative law judge's decision cannot be affirmed. Dr. Conway originally attributed Claimant's asthma to his work exposure to fumes. EX 1 at 3. At his May 10, 2019 deposition, Dr. Conway was made aware that Claimant had a greater smoking history than he had assumed. The following exchange took place:

> Q. Based on the records you've reviewed, the pulmonary function testing, all of that, do you have an opinion to a reasonable degree of probability as to whether [Claimant's] work exposures to dust or fumes or other substances, all the various substances that he thought he encountered, caused or aggravated or even contributed to his present obstructive disease?
>
> A. I don't know the answer to that. I honestly don't know the answer because of the grave inconsistency between what he describes as a pattern of worsening at work not manifested in any of the records. I cannot tell you that his workplace was the cause. I can't exclude it because of the fact that he gives this history and I can't just simply call him a liar, but I'm disturbed by the inconsistency and that means that I cannot say with a reasonable degree of probability that his work caused it.

EX 8 at 30. Dr. Conway also testified Claimant's breathing problems "could" be caused by cigarette smoking, but "could have occurred without cigarette smoke or fume exposure." *Id*. at 29-30. Dr. Conway's equivocal opinion is legally insufficient to rebut the presumption because it does not refute Claimant's claim that his working conditions for Employer caused, aggravated or contributed to his pulmonary condition; he explicitly stated he does not "know the answer to that" and "cannot exclude" work as a cause. *See Fields*, 599 F.3d at 56, 44 BRBS at 18(CRT) (affirming the Board's decision holding employer's evidence was legally insufficient to rebut the presumption because the doctors did not address whether claimant's working conditions caused his underlying osteoarthritis to become symptomatic); *Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (affirming the Board's reversal of the administrative law judge's finding that employer rebutted the Section 20(a) presumption because the evidence did not address aggravation); *Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (court affirmed Board's reversal of rebuttal finding as legal sufficiency of evidence was at issue). Therefore, we reverse the administrative law judge's finding that Claimant's pulmonary condition is unrelated to his employment. *See Bath Iron Works Corp. v. Director, OWCP [Shorette]*, 109 F.3d 53, 31 BRBS 19(CRT) (1st Cir.

1997).[1] We remand the case for the administrative law judge to address the parties' contentions concerning the extent of Claimant's pulmonary impairment, Claimant's average weekly wage, and any remaining issues. *See generally Preston*, 380 F.3d 597, 38 BRBS 60(CRT).

Accordingly, we vacate the denial of benefits and remand the case for further proceedings consistent with this decision.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[1] Therefore, we need not address Claimant's contentions that the administrative law judge erred in weighing the record evidence as a whole.