U.S. Department of Labor

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

BRB No. 22-0179

LEONARD GALLOWAY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NORTH FLORIDA SHIPYARDS, INCORPORATED	)	DATE ISSUED: 5/19/2023
	)	
and	)	
	)	
ABERCROMBIE, SIMMONS & GILLETTE	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Paul C. Johnson, Jr., District Chief Administrative Law Judge, United States Department of Labor.

Leonard Galloway, Jacksonville, Florida.

Mark K. Eckels (Boyd & Jenerette, P.A.), Jacksonville, Florida, for Employer/Carrier.

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

PER CURIAM:

Claimant, without representation, appeals District Chief Administrative Law Judge (ALJ) Paul C. Johnson, Jr.'s, Decision and Order Denying Benefits (2018-LHC-00437)

rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (Act). On appeal, Claimant generally challenges the ALJ's decision; therefore, the Benefits Review Board will review the findings adverse to him and address whether substantial evidence supports the ALJ's decision. *See Pierce v. Elec. Boat Corp.*, 54 BRBS 27 (2020). We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.

Claimant sustained a left knee injury, as well as alleged injuries to his right knee, right shoulder, and back, as a result of his falling into a hole on a pier while working for Employer on October 12, 2009.[1] He was helped up out of the hole and, upon trying to stand, fell back down to the ground due to excruciating left knee pain. After being taken to Shands Hospital complaining of left knee pain, a left knee x-ray revealed "intact" bones, but "a moderate-sized joint effusion." EX 12 at 19. The doctor drained fluid from Claimant's left knee and discharged him on crutches and with prescriptions. *Id.*, at 17. Claimant began treating his ongoing left knee pain with Dr. Stanton Longenecker, a board-certified orthopedic surgeon, on October 27, 2009, who diagnosed Claimant with a lateral tibial plateau fracture of the left knee. EX 6, Dep. at 7. Dr. Longenecker performed surgeries on Claimant's left knee on November 2, 2009, and again on March 24, 2010,[2] EX 6, Dep. at 9-10, and subsequently concluded Claimant's left knee injury reached maximum medical improvement (MMI) as of December 9, 2010, with a 50% impairment of the left knee, *id.*, Dep. at 14-15,17.[3] Meanwhile, on November 20, 2009, Claimant filed a claim seeking benefits for a "left knee" injury. EX 2. Employer accepted the claim and voluntarily paid Claimant disability and medical benefits for his work-related left knee injury.[4] EXs 3, 4; HT at 8.

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[1] This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit because the injury occurred in Jacksonville, Florida. 33 U.S.C. 921(c); *see Roberts v. Custom Ship Interiors*, 35 BRBS 65, 67 n.2 (2001), *aff'd*, 300 F.3d 510, 36 BRBS 51(CRT) (4th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003); 20 C.F.R. 702.201(a).

[2] Dr. Longenecker performed a third procedure on Claimant's left knee - a manipulation under anesthesia to break up scar tissue in the front of his left knee - in September 2010. EX 6, Dep. at 11-13.

[3] Based on a functional capacity evaluation performed on November 29, 2010, Dr. Longenecker further opined Claimant could return to work with restrictions.

[4] Employer paid Claimant temporary total disability benefits for his left knee injury from October 14, 2009, through July 18, 2012, as well as permanent partial disability

Continued left knee pain, however, prompted Claimant's treatment with Dr. Howard Weiss beginning on April 22, 2011.[5] EX 7; EX 8, Dep. at 33. In May 2011, when Dr. Weiss examined Claimant's left knee, Claimant first reported having back pain; an MRI at that time revealed degenerative disc disease at L4-5 and L5-S. CXs 4, 5. In subsequent visits with Dr. Weiss in 2012, Claimant continued to report having back pain, but also began complaining of right knee and right shoulder pain. CX 6. Between 2014 and 2018, Claimant treated for chronic back, right shoulder, and bilateral knee pain with various physicians, including Drs. Burnette, Rolfe, Wolfe, Chaves, Duffy, Sturney, Fialho, Flinchbaugh, Fawn, Gabra, Pham, and Salahi.[6] EXs 9, 11, 13, 14.

On March 7, 2018, when he was represented by counsel, Claimant filed an amended claim for compensation alleging he sustained injuries to his right shoulder, lower back, and right and left knees as a result of the October 12, 2009 work accident. Employer controverted the claim, and the case was forwarded to the Office of Administrative Law Judges. At Employer's request, Dr. Chaim Rogozinski, conducted an examination of Claimant on March 6, 2019. EX 20. Based on that evaluation and a review of Claimant's medical records, Dr. Rogozinski concluded Claimant sustained only a left knee injury as a result of the 2009 accident. *Id.* He opined Claimant's right knee and back complaints are

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benefits under the schedule based on an 80% loss of his left lower extremity. EX 4. Claimant has not worked since his October 12, 2009, work injury.

[5] Dr. Weiss had previously seen Claimant on March 24, 2010, while Claimant was at Brooks Rehabilitation Hospital recuperating from his left total knee arthroplasty. EX 7, Dep. at 6-7.

[6] Much of Claimant's treatment, particularly relating to his right knee, right shoulder, and back symptoms, is documented in the record through Claimant's testimony and Dr. Chaim Rogozinski's chronology of Claimant's Medical Treatment Records, HT at 51-53; EX 9, as opposed to the individual physicians' reports. In regard to his right knee, right shoulder, and back symptoms, Claimant was diagnosed with chronic pain syndrome, degenerative joint disease, and a displacement of a lumbar intervertebral disc. EX 9. During 2014 and 2015, he received multiple injections to both his right shoulder and right knee, as well as prescription pain medication. EXs 9, 13; HT at 27. On December 8, 2015, Dr. Gavin Duffy performed a right total knee arthroplasty on Claimant. EX 14 at 12. Claimant thereafter continued a pain management regimen of prescription pain medication and injections to his right shoulder and lumbar spine. He also continued to report bilateral knee pain. EX 9.

not related to the work accident because they are neither consistent with the mechanism of the work injury nor contemporaneous with the accident. *Id.*

On March 9, 2020, Employer filed a motion for summary decision on the grounds that there is no evidence relating Claimant's alleged right knee and back injuries to the October 2009 work accident.[7] Claimant filed a timely response. In an order dated June 5, 2020, the ALJ denied Employer's motion for summary decision and rescheduled the hearing because he found Claimant's assertion that his work accident "caused direct injury to his right knee and his back" raised a material fact, disputed by the parties, as to whether he really complained of such injuries "back at the time of the injury."[8] Order dated June 5, 2020, at 2. The ALJ held a telephonic hearing on October 22, 2020, which focused exclusively on Claimant's "injuries to the right knee, right shoulder and lower back that occurred in an accident on October 12, 2009."[9] HT at 7, 9-10.

In the ALJ's decision, citing *Bis Salamis, Inc. v. Director, OWCP [Meeks]*, 819 F.3d 116, 50 BRBS 29(CRT) (5th Cir. 2016), and *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996) to support his credibility determinations, he found "Claimant lacks credibility" and that "the weight of the credible evidence preponderates against" finding Claimant incurred any injuries "in the workplace accident" beyond the originally claimed left knee injury. D&O at 30. He therefore concluded Claimant did not establish he sustained a harm to his right knee, right shoulder, or back as a result of the October 2009 work accident. Accordingly, he denied Claimant's claim for benefits relating to those injuries. Claimant, without legal representation, appeals the denial of benefits. Employer responds, urging affirmance of the ALJ's decision.

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[7] At the hearing, Employer claimed: "the first time there has been any mention of [Claimant allegedly] injuring his right shoulder in this accident was when we came on the record today." HT at 29. The 2018 amended claim explicitly listed the right shoulder injury, so Employer's statement is not correct. However, Employer's counsel also noted he was "prepared to go forward because I think the evidence will show [Claimant] did not hurt any of those body parts as he is alleging today." *Id.* at 30.

[8] The ALJ inferred from Claimant's "direct injury" contention that "Claimant does not contend that his right knee and back injuries are consequential to his left knee injury but are direct results of his workplace accident." Order dated June 5, 2020, at 2.

[9] The parties additionally agreed Employer paid Claimant all medical and disability benefits related to the work-related left knee injury. HT at 8-10.

To be entitled to the Section 20(a) presumption linking his injuries to his employment, a claimant must sufficiently allege: 1) he has sustained a harm; and 2) an accident occurred or working conditions existed which could have caused or aggravated the harm. *Rose v. Vectrus Systems Corporation*, 57 BRBS 27 (2022) (Decision on Recon. en banc), *appeal pending*; *see, e.g., Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *Brown v. I.T.T/Cont'l Baking Co.*, 921 F.2d 289, 24 BRBS 75(CRT) (D.C. Cir. 1990); *O'Kelley v. Dep't of the Army/NAF,* 34 BRBS 39 (2000). The claimant bears an initial burden of production to invoke the Section 20(a) presumption.[10] *Rose*, 56 BRBS at 36.

Credibility plays no role in addressing whether the claimant has established a prima facie case. *Id.* at 37. In this regard, the Section 20(a) invocation analysis "does not require examination of the entire record, an independent assessment of witness[] credibility, or weighing of the evidence." *Id.* Instead, a claimant need only "present some evidence or allegation that if true would state a claim under the Act."[11] *Id.* Moreover, when a claimant claims a work-related primary injury as well as a secondary injury resulting from the primary injury, the Section 20(a) presumption applies to both. *Metro Mach. Corp. v. Director, OWCP*, 846 F.3d 680, 50 BRBS 81(CRT) (4th Cir. 2017); *see also U.S. Ind./Fed. Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631(1982); *but see Ins. Co. of the State of Pennsylvania v. Director, OWCP [Vickers]*, 713 F.3d 779, 47 BRBS 19(CRT) (5th Cir. 2013); *see generally Port of Portland v. Director, OWCP [Ronne II]*, 192 F.3d 933, 33 BRBS 143(CRT) (9th Cir. 1999), *cert. denied*, 529 U.S. 1086 (2000). If the claimant establishes his prima facie case, he is entitled to the presumption that his injury is work-related and compensable. *Id.*

We need not address whether the ALJ erred by not invoking the Section 20(a) presumption in this case. Any such error would be harmless as his ultimate determination that the evidence establishes Claimant did not sustain a harm to his right knee, right shoulder, or back as a result of the October 12, 2009 work accident comports with law and is supported by substantial evidence. *See Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 651-652, 44 BRBS 47, 51(CRT) (9th Cir. 2010) (ALJ's error in finding no rebuttal of the Section 20(a) presumption did not require remand because she "took into account all of the

[10] "The burden of production or 'some evidence' standard which we have set forth here is a light burden – being no greater than an employer's burden on rebuttal – meant to give the claimant the benefit of the statutory framework." *Rose*, 56 BRBS at 38.

[11] "Whether the claimant's evidence fails or carries the day is a matter to be resolved at step three when weighing the evidence, not at step one invocation." *Rose*, 56 BRBS at 38.

evidence" and her "ultimate conclusion" that the claim was compensable was supported by substantial evidence); *Reed v. The Macke Co*., 14 BRBS 568 (1981).

First, even if we were to assume Claimant invoked the presumption, the record and the ALJ's analysis of it reflects Employer put forth substantial evidence that Claimant's right knee, right shoulder, and back injuries were neither directly caused by the October 2009 work accident, nor a consequence of his resulting work-related left knee injury. *See Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990); *O'Kelley*, 34 BRBS at 41-42. In this regard, the incident report and contemporaneous medical records, which reflect Claimant reported only to have injured his left knee as a result of the October 2009 work incident, refute Claimant's allegations of having sustained any other injuries on the accident date. *Compare* EXs 1, 2, 9, 10, 15, 16 and EX 6, Dep. at 7, 18-20, 21, 30, 32; EX 7, Dep. at 8-9, 11, 22 *with* HT at 21, 23, 26-27, 39, 43, 46, 47 and EX 8, Dep. at 29-30, 35, 44. Additionally, the record establishes Claimant did not complain to any medical professional of back pain until May 11, 2011, CXs 4, 5, right knee pain until February 20, 2012, CX 6, or right shoulder pain until October 24, 2012, EX 9 at 23; each well after the 2009 work accident. *Id.* Based on the sizable gap between the date of the work-related left knee injury and Claimant's complaints of secondary pain, Drs. Longnecker, Weiss, and Rogozinski each opined,[12] within a reasonable degree of medical probability, that Claimant's right knee and back issues are not causally related to the work accident or to the work-related left knee injury. EX 6, Dep. at 21-23, 41-42; EX 7, Dep. at 22, 43-45; EX 20. This constitutes substantial evidence rebutting Claimant's claim that he sustained work-related injuries to his right knee, right shoulder,[13] and back. *Powell v. Serv. Employees Int'l, Inc.*, 53 BRBS 13 (2019); *Seguro v. Universal Maritime Service Corp.*, 36 BRBS 28, 34 (2002); *Bass v. Broadway Maintenance*, 28 BRBS 11, 15 (1994); *see also*

[12] These are the only physicians who offered opinions on causation regarding Claimant's right knee and back conditions.

[13] In terms of Claimant's alleged right shoulder injury, the ALJ found it significant that Claimant did not report any pain for "more than three years after the workplace accident," and the record does "not show any requests for treatment or any other complaints until April 1, 2014." D&O at 31. The ALJ found that even when Claimant complained in May 2014 to Dr. Burnette of pain, clicking, and popping in the right shoulder, "he significantly reported no history of trauma to his right shoulder." *Id.* Moreover, the ALJ found no diagnostic studies of the right shoulder prior to October 3, 2017, and that although those revealed rotator cuff tendinosis and arthrosis of the glenohumeral and AC joints, "[t]here is nothing in the record explaining the cause of those shoulder conditions – i.e., whether they were or could have been caused by trauma, or by aging, or by other degenerative means." *Id.*, at 31-32.

Brown, 893 F.2d 294, 23 BRBS 22(CRT). With rebuttal evidence, the presumption falls from the case, and the matter must be addressed on the record as a whole.

Second, the ALJ provided valid reasons for finding Claimant's testimony that he sustained work-related injuries to his right knee, right shoulder, and back less credible than the other evidence of record which overwhelmingly indicates no such causal connection.[14] Questions of witness credibility are for the ALJ as the trier-of-fact, and the Board must respect his evaluation of all testimony. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). It is within the ALJ's discretion to accept or reject all or any part of any testimony according to his judgment. *Perini Corp. v. Heyde*, 306 F. Supp. 1321 (D.R.I. 1969). The Board will not interfere with credibility determinations unless they are "inherently incredible or patently unreasonable." *Cordero v. Triple A Mach. Shop*, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Roberson v. Bethlehem Steel Corp*., 8 BRBS 775 (1978), *aff'd sub nom. Director, OWCP v. Bethlehem Steel Corp.*, 620 F.2d 60, 12 BRBS 344 (5th Cir. 1980).

Consequently, the ALJ permissibly discredited Claimant's testimony that he sustained injuries to his right knee, right shoulder, and back as a result of his work accident and gave greater weight to evidence indicating he did not sustain those alleged injuries as a result of his work for Employer. Claimant, therefore, did not satisfy his ultimate burden to establish, by a preponderance of the evidence, that his right knee, right shoulder, and back injuries are related to the 2009 accident or to the resulting work-related left knee injury. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT)

[14] The ALJ rationally rejected Claimant's explanation for not reporting these injuries at the time of accident – Claimant alleged Employer, through its supervisor Robert Garcia, instructed him to not mention anything other than his left knee injury to medical providers – because "it makes no sense" and conflicts with the other evidence of record. D&O at 32. In this respect, the ALJ found: Employer's immediate actions in arranging Claimant's trip to the emergency room contradicts Claimant's allegation that it was trying to preclude treatment of any injuries; Mr. Garcia explicitly denied having told Claimant to conceal any injuries; the medical records "overwhelmingly demonstrate" Claimant reported no pain to any body part other than his left knee until nearly two years after the workplace accident; and Dr. Weiss, who initially examined Claimant "completely" in 2011, EX 7, Dep. at 11, determined his right knee was unremarkable, his back was normal, and that Claimant made no mention of right shoulder pain. *Id.*, Dep. at 11-12.

(1994); *Victorian v. International-Matex Tank Terminals*, 52 BRBS 35 (2018), *aff'd sub nom. Int'l-Matex Tank Terminals v. Director, OWCP*, 943 F.3d 278, 53 BRBS 79(CRT) (5th Cir. 2019); *Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001).

Accordingly, we affirm the ALJ's Decision and Order Denying Benefits.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge