U.S. Department of Labor

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

BRB No. 15-0250

SIMON HOUSER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED: Dec. 21, 2015
HUNTINGTON INGALLS, INCORPORATED	)	
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Granting Benefits of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

Robert E. Walsh (Rutter Mills, L.L.P.), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits (2013-LHC-00861, 2013-LHC-00862) of Administrative Law Judge Kenneth A. Krantz 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 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 began working for employer as an outdoor machinist in 2002. Tr. at 14-15. Claimant testified that, in April or May 2011 while at work, he felt weakness and tingling in his hands, began dropping things, and started to drag his leg when he walked. He also testified to a time when he felt a hot sensation in his back while sitting at work during a break and to shortness of breath when climbing stairs. Because of the

weakness, which he perceived as being out of shape, claimant started exercising. While using a curl bar, claimant felt something pinch in his neck. *Id.* at 21-22, 42-44; EX 15 at 10-14. Dr. Graham, claimant's general practitioner, ordered physical therapy, which was unsuccessful in relieving the pain. Dr. Graham referred claimant to Dr. Goldberg, a neurologist. The MRI of claimant's cervical spine revealed multiple levels of degenerative changes and osteophyte complex, congenital narrowing of the canal, mild to moderate disc dessication, a herniation with cord flattening and abnormal signal at C3-4, and small bulges and protrusions at other levels. In addition, Dr. Goldberg diagnosed claimant with bilateral carpal tunnel syndrome. EX 4. Dr. Goldberg referred claimant to a surgeon, and Dr. Kerner performed decompression and fusion surgery at C3-4 on September 22, 2011, noting diffuse degeneration elsewhere, as well as the loss of cervical lordosis. EX 6. In March 2012, claimant reported a progress of his neck pain. Dr. Kerner stated that further surgical intervention is not possible, and he prescribed pain medication. EX 8 at 13. Claimant has not returned to work, and he filed a claim for benefits for his cervical condition and carpal tunnel syndrome, contending they were caused by his working conditions.[1]

The administrative law judge found that claimant invoked, and employer rebutted, the Section 20(a), 33 U.S.C. §920(a), presumption relating claimant's cervical injury to his working conditions. Decision and Order at 12. In addressing the evidence as a whole, the administrative law judge credited claimant's testimony and Dr. Kerner's opinion and found a preponderance of the evidence supports finding that claimant's cervical injury is work-related.[2] The administrative law judge also found that claimant cannot return to work as a result of his cervical injury, that the condition has not reached maximum medical improvement, and that employer established the availability of suitable alternate employment. Accordingly, the administrative law judge awarded claimant temporary partial disability benefits, commencing September 22, 2011, and medical benefits for the cervical spine condition. *Id*. at 14-18; 33 U.S.C. §§907, 908(e). Employer appeals the award of benefits, and claimant responds, urging affirmance.

Employer contends the administrative law judge erred in requiring it to disprove

[1] Claimant testified he performed heavy tasks such as removing and replacing valves which required using grinding and torqueing tools, and lifting heavy items. He testified he often had to perform this work in awkward positions, such as in tight spaces, overhead, or upside down. CX 1; Tr. at 19, 26-29.

[2] The administrative law judge found that claimant did not present any evidence related to the claim for carpal tunnel syndrome. Therefore, the administrative law judge found the condition is not work-related and he denied the claim. Decision and Order at 15. This finding is not appealed.

the work-relatedness of claimant's cervical condition after it rebutted the Section 20(a) presumption rather than placing the burden on claimant to prove his condition is work-related. Employer also contends the administrative law judge erred in crediting Dr. Kerner's opinion on the basis that he treated claimant whereas Dr. Erickson did not. Claimant responds, asserting the administrative law judge rationally weighed the evidence of record and it is improper for employer to ask the Board to reweigh the evidence.

In determining whether an injury is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after claimant establishes 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. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). In this case, the administrative law judge found the Section 20(a) presumption applicable because claimant has a cervical injury, claimant testified to working conditions that could have caused his injury, and Dr. Kerner testified that claimant's work could have contributed to the disc herniations. Decision and Order at 12; Tr. at 15-17; EX 13. Upon invocation of the Section 20(a) presumption, the burden shifts to the employer to produce substantial evidence to rebut the presumption; the employer bears only a burden of production, not persuasion. *Moore*, 126 F.3d 256, 31 BRBS 119(CRT). The administrative law judge found employer rebutted the Section 20(a) presumption with the opinions of Drs. Graham, Kerner and Erickson.[3] Decision and Order at 12.

When, as here, the Section 20(a) presumption is rebutted, it falls from the case, and the issue of whether there is a causal relationship must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996). In addressing the evidence as a whole, it is well established that an administrative law judge is entitled to evaluate the credibility of all witnesses and has considerable discretion in evaluating and determining the weight to be accorded to the evidence. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W.*

[3] Dr. Graham reported that claimant had been "working out" and complaining of neck and shoulder pain and stiffness. EX 1. Dr. Kerner opined that there is no basis for concluding that claimant's disc herniation was directly caused by claimant's work as an outside machinist. EX 6 at 8; EX 7. Dr. Erickson opined that there is no physical evidence that claimant's degenerative changes are due to, or hastened or worsened by, his work activity. EX 11 at 2.

McGrath Corp. v. Hughes, 289 F.2d 403 (2d Cir. 1961); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969).

On the record as a whole, the administrative law judge credited claimant's testimony and gave greater weight to the opinion of Dr. Kerner than to that of Dr. Erickson in finding claimant's cervical injuries related to claimant's work. The administrative law judge relied on claimant's testimony that his cervical symptoms began before he started his exercise regimen, and that he began exercising in response to the symptoms. Tr. at 21. The administrative law judge found claimant's initial attribution of the pain to weightlifting does not detract from his testimony that his work caused pain, as it was not until he saw a neurologist that a more serious condition was actually diagnosed. The administrative law judge thus rejected employer's contention that claimant tailored his medical history to establish a workers' compensation claim. Decision and Order at 14. With respect to the medical evidence, employer avers that Dr. Kerner's opinion is not creditable because it is speculative and lacks consistency. However, the administrative law judge determined that "Dr. Kerner's testimony demonstrates the struggle science and medicine have in isolating or excluding factors in the cause of spinal injuries." Decision and Order at 14. Dr. Kerner opined that he could not cite a medical or scientific basis for the conclusion that claimant's outside machinist work "caused directly his cervical herniation." EX 7 at 1-2. However, Dr. Kerner stated that claimant's work "was a contributing factor to the advancement of his condition . . . [h]e certainly had wear and tear because of his work-related injury." EX 13 at 37-38. The administrative law judge concluded that Dr. Kerner's opinion suggests that claimant's condition arose from several factors working together, one of which was claimant's heavy work. Thus, the administrative law judge concluded that claimant met his burden of establishing his cervical condition is work-related.

Employer submitted the opinion of Dr. Erickson, its expert orthopedist. After examining claimant in August 2013 and reviewing his medical reports, Dr. Erickson concluded that the degenerative changes in claimant's cervical spine are not the result of cumulative work trauma but are the "result of disease of life" because "[t]here is no physical evidence that his degenerative changes were due to, made worse by, or hastened by his work activity." She based her conclusion on the fact that there was no specific incident at work when claimant would have hurt his neck and on "recent research" which "indicates that heredity has a dominant role in disc degeneration." EX 11. In assigning this opinion less weight than Dr. Kerner's, the administrative law judge noted that Dr. Erickson evaluated claimant only one time and stated only that there was no "physical" evidence to relate claimant's cervical injury to his work. Decision and Order at 14. In contrast, Dr. Kerner evaluated claimant before and after the surgery he performed, and the administrative law judge found, based on Dr. Kerner's opinion, that claimant presented "a preponderance of circumstantial evidence" to support his claim. *Id.* Because the administrative law judge's conclusion is rational and supported by

substantial evidence, we reject employer's argument that the administrative law judge erred.

Although Dr. Kerner could not say that claimant's work *directly caused* the herniation at C3-4, he clearly stated that claimant's heavy work as an outside machinist played a role in claimant's degenerative cervical condition. EXs 6, 13 at 37-38; *see also* EX 2 (Dr. Goldberg stated cervical injury due to claimant's type of work). Dr. Kerner also stated the degenerative condition likely affected the disc herniation. EX 13 at 37. While employer contends that Dr. Erickson's opinion is more credible because it is "based in science," a review of her report demonstrates that the study on which she relied does not preclude strenuous work from having an effect on spinal deterioration. Although Dr. Erickson stated that the study concluded heredity "has a dominant role," she acknowledged "[t]here is evidence to suggest that occupational exposures have an effect on disc degeneration" but that the etiology is more complex than previously believed.[4] EX 11 at 2-3. This part of Dr. Erickson's opinion is consistent with Dr. Kerner's opinion that it is difficult to isolate factors that cause spinal degeneration. *See* EX 7.

The working conditions that form the basis of claimant's claim need not be the primary cause of his injury; they need only play some role in causing or aggravating the condition. *See Director, OWCP v. Vessel Repair, Inc.* [*Vina*], 168 F.3d 190, 33 BRBS 65(CRT) (5th Cir. 1999); *Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001); *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993); *see generally Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968) (*en banc*). Contrary to employer's contention on appeal, the administrative law judge required claimant to prove that his working conditions "contributed to, aggravated or accelerated his neck injuries." Decision and Order at 14. Moreover, Dr. Kerner stated that claimant's work played a role in claimant's deteriorating neck condition. Dr. Erickson acknowledged that, pursuant to the study she cited, employment may play a role in spinal deterioration, albeit not a primary one.

In reviewing findings of fact, the Board may not reweigh the evidence, but may inquire only into the existence of evidence to support the findings. *South Chicago Coal & Dock Co. v. Bassett*, 104 F.2d 522 (7th Cir. 1939), *aff'd*, 309 U.S. 251 (1940); *Miffleton v. Briggs Ice Cream Co.*, 12 BRBS 445 (1980), *aff'd*, 659 F.2d 252 (D.C. Cir. 1981) (table). Further, the administrative law judge's findings may not be disregarded

[4] Dr. Erickson initially explained that "[p]reviously, heavy physical loading – often associated with occupation – was the main suspected risk factor for disc degeneration. . . ." EX 11 at 2.

merely because other inferences and conclusions also could have been drawn from the evidence. *Newport News Shipbuilding & Dry Dock Co. v. Ward*, 326 F.3d 434, 37 BRBS 17(CRT) (4th Cir. 2003); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988). Employer has not established that the administrative law judge erred in crediting the opinion of Dr. Kerner over that of Dr. Erickson on the grounds that his opinion is more nuanced and that he evaluated claimant's condition over a longer period of time. *See generally Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994); *Richardson v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 74 (2005), *aff'd mem. sub nom. Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 245 F.App'x. 249 (4th Cir 2007). As substantial evidence supports the administrative law judge's finding that claimant's working conditions played a role in his deteriorating cervical condition, we affirm the award of benefits. *Id.*; *see generally Casey v. Georgetown University Medical Center*, 31 BRBS 147 (1997); *Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991).

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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RYAN GILLIGAN
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge