U.S. Department of Labor

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

BRB No. 19-0461

MARK JARRETT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NATIONAL STEEL & SHIPBUILDING COMPANY	)	
	)	
	)	DATE ISSUED: 02/18/2020
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Compensation and Benefits and the Order Denying Motion for Reconsideration of Richard M. Clark, Administrative Law Judge, United States Department of Labor

Preston Easley and Peter Yovanovich (Law Offices of Preston Easley APC), San Pedro, California, for claimant.

Alex M. Oberjuerge (England, Ponticello & St. Clair), San Diego, California, for self-insured employer.

Before: BUZZARD, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Compensation and Benefits and the Order Denying Motion for Reconsideration (2017-LHC-01334) of Administrative

Law Judge Richard M. Clark rendered on a claim filed pursuant to 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 worked for employer as a burner from 1975 to 1978 and as a structural layout man from 1978 to 1986. Tr. at 29, 48-49. After an absence in 1986 and 1987, he returned to work for employer in 1988 as an accuracy control technician, a position he held until he left his employment with employer in 2002. Tr. at 58, 170-71.

Both the burner and the layout position descriptions state the jobs entailed "exposure to fumes, odors, dust, and gases that could cause problems with the respiratory system." EX 7 at 540; EX 8 at 542. In claimant's testimony, he described his environmental exposures during his employment as a burner and layout man. Tr. at 31, 40, 44, 53. His accuracy control technician job position description indicates there was occasional exposure to "dust, welding/burning, fumes, and smoke." EX 5 at 536. The administrative law judge found that claimant's work as an accuracy control technician placed him within arms' distance of burning, welding, and other hot work, although less often than when he was a burner or layout man. Decision and Order at 7.

After claimant stopped working for employer in 2002, he worked in non-longshore jobs before returning to work for employer in late 2008, again working as an accuracy control technician. He then worked with employer as a quality insurance inspector from July 2010 to October 2011 before returning to the accuracy control technician position. Tr. at 62-63.

Claimant testified he smoked cigarettes on and off from age 18 until he eventually stopped after a hospital stay in September 2009. His medical records estimated that when he quit smoking, he had a 40 pack-year smoking history. CX 9 at 126.

On September 9, 2009, claimant reported to the emergency room with chest pains and trouble breathing. He was admitted to the hospital. EX 12 at 886-888. He testified he was told he had chronic obstructive pulmonary disease (COPD), but the hospital records show no admission diagnosis and progress notes on his day of discharge state his chest pain was most likely related to stress and an asthma exacerbation. *Id.* at 892-900. The administrative law judge found claimant was not actually diagnosed with COPD during this hospital visit. Decision and Order at 11.

Thereafter, claimant repeatedly sought medical attention for shortness of breath or other respiratory difficulties. In January 2011, he reported his breathing problems were

worsening, and he was "exposed to lots of occupational dusts" and wore a hazard mask but not every day. EX 12 at 1033-34. He was referred to Dr. Weiss, a pulmonary specialist, who diagnosed COPD at this time. *Id.* at 1051-52.

After his 2009 hospitalization, claimant testified he had trouble with the physical demands of his job, especially climbing ladders and stairs. Tr. at 66-68. He also testified he had difficulty crawling through tanks or going underneath blocks to do laser checks. *Id.* at 68-69. Dr. Weiss took claimant off work at various times, including in January and June 2012, for exacerbation of his COPD, and in November 2014 Dr. Weiss told claimant he should change jobs because of his physical difficulties. *Id.* at 75, 83. Claimant stopped working on November 21, 2014. *Id.* at 234-35. Claimant attempted to return to work in February 2015 but was unable to perform his normal work duties. CX 8 at 113. After he stopped working, he collected disability benefits from California's Employment Development Division (EDD) for less than one year.

Claimant filed a claim under the Act on October 30, 2015, for permanent disability benefits for COPD allegedly due to his workplace exposures. Claimant gave employer formal notice of his injury on November 13, 2015. The administrative law judge found claimant's notice of injury and claim were timely filed under Sections 12(a) and 13(b)(2), 33 U.S.C. §§912(a), 913(b)(2), because claimant was not aware that his disability was permanent rather than temporary until he unsuccessfully tried to return to work in February 2015.[1] Decision and Order at 39, 41-42.

The administrative law judge found claimant established a prima facie case that his COPD was caused, contributed to, or made symptomatic by his workplace conditions. Decision and Order at 43. He concluded employer rebutted the Section 20(a) presumption because Dr. Munday opined that claimant's COPD is fully explained by his smoking history and that he does not suffer from an industrial pulmonary injury. *Id.* at 45. Weighing the evidence as a whole, the administrative law judge credited Dr. Lineback's opinion that claimant's COPD was aggravated and partially caused by his workplace exposures because, as a pulmonary expert, Dr. Lineback had a better understanding of claimant's work exposures. Decision and Order at 47-50. The administrative law judge concluded claimant established his working conditions contributed to or aggravated his COPD. *Id.* at 51.

[1] In the alternative, regarding claimant's claim that his work duties aggravated his symptoms, the administrative law judge found that while claimant's notice was not timely under Section 12, employer did not establish that it was prejudiced by the untimely notice under Section 12(d)(2) and therefore claimant's claim is not barred. Decision and Order at 40-41.

The administrative law judge found it undisputed that claimant cannot return to his usual work. Decision and Order at 52-53. He excluded a number of jobs identified in employer's two labor market surveys as unsuitable for claimant's abilities, but concluded employer established the availability of suitable alternate employment based on the remaining jobs. *Id.* at 57-58. He awarded claimant ongoing permanent partial disability benefits from November 22, 2014, based on claimant's post-injury wage-earning capacity.[2] The administrative law judge found employer not entitled to a credit under Section 3(e), 33 U.S.C. §903(e), for the EDD payments made to claimant because employer did not establish that the EDD is a workers' compensation system. *Id.* The administrative law judge denied employer's motion for reconsideration.

Employer appeals the administrative law judge's findings that claimant's notice of injury and claim were timely filed, his COPD is work-related, some of the identified alternate positions are not suitable for claimant, and it is not entitled to a credit for the EDD payments. Claimant filed a response brief, urging affirmance of the administrative law judge's decision. Employer filed a reply brief.

Timeliness

Employer first asserts the administrative law judge erred in finding claimant's notice of injury and claim were timely filed. Section 20(b) of the Act provides a presumption that claimant's notice of injury and claim were timely filed "in the absence of substantial evidence to the contrary." 33 U.S.C. §920(b); *see Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989). Sections 12 and 13 state, respectively, that in the case of an occupational disease that does not immediately result in disability, a claimant has one year to give notice of his injury and two years to file his claim after the date he becomes aware or should have been aware of the relationship between his employment, disease, and disability.[3] 33 U.S.C. §§912(a), 913(b)(2). The regulations state that in such cases the period for filing does not begin to run until the employee is disabled, i.e., when he becomes aware he has a loss of wage-earning capacity. 20 C.F.R. §§702.212(b); 702.222(c); *see Todd Shipyards Corp. v. Allan*, 666 F.2d 399, 14 BRBS 427 (9th Cir.), *cert. denied*, 459 U.S. 1034 (1982).

Employer contends the administrative law judge erred in finding the time to file did not begin to run until February 2015, asserting claimant should have been aware of the

[2] He also awarded employer Section 8(f) relief, 33 U.S.C. §908(f), based on claimant's pre-existing pulmonary condition. Decision and Order at 60-61.

[3] Employer does not dispute that claimant's COPD is an occupational disease.

relationship between his COPD and his work in September 2009 when he was hospitalized. In the alternative, employer contends claimant's date of awareness was in December 2012 when his doctors started excusing him from work for exacerbations of his COPD. We reject employer's arguments.

The administrative law judge concluded the record does not support a finding that claimant was diagnosed with COPD, or that physicians told claimant his respiratory problems were related to his work, in September 2009. Decision and Order at 11. The administrative law judge acknowledged claimant's testimony that, in 2009, he thought his work was playing a role in his symptoms, but noted the hospital records and progress notes do not reflect that diagnosis. *Id.* at n.14. The administrative law judge concluded claimant's medical records are more likely to accurately reflect what physicians told him than claimant's own recollections. *Id.* He determined claimant did not become aware of his permanent disability due to his COPD until he was unable to work in February 2015. *Id.* at 41-42. Thus, the notice of injury and claim filed on November 13, 2015 and October 30, 2015, respectively, were timely filed as to the February 2015 date of awareness.

The administrative law judge's finding that claimant was not diagnosed with COPD in September 2009 is supported by claimant's medical records. While the administrative law judge could have reached a different conclusion based on claimant's testimony, the Board may not disregard his findings merely because another inference could have been drawn from the evidence. *See Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999).

Employer's contention that the date of awareness should run from December 2012 when claimant first lost time from work due to his COPD is not in accordance with the law.[4] An awareness of a temporary disability does not commence the filing periods; the administrative law judge accurately noted the time for filing under Sections 12 and 13 does not begin to run until the employee is aware or should have been aware of the "full character, extent and impact" of the injury.[5] *J.M. Martinac Shipbuilding v. Director,*

[4] To the extent employer appears to argue that claimant's claim is untimely because he waited to file it until he was financially motivated to do so, the argument is irrelevant. Emp. Br. at 17. A claimant's motivation is not a factor in considering timeliness under either Sections 12 or 13.

[5] Employer asserts that as of claimant's September 2009 hospital visit, he was told he had a serious permanent impairment that would prematurely end his life unless he quit smoking and this warning is sufficient to start the statute of limitations for giving notice or filing a claim. Emp. Reply Br. at 18-19. We reject this contention, as the mere fact that claimant was told he has a permanent impairment is not sufficient to trigger the notice or

OWCP, 900 F.2d 180, 183-84, 23 BRBS 127, 130(CRT) (9th Cir. 1990); 20 C.F.R. §§702.212(b), 702.222(c); *see also SSA Terminals v. Carrion*, 821 F.3d 1168, 50 BRBS 61(CRT) (9th Cir. 2016); *Lewis v. Todd Pacific Shipyards Corp.*, 30 BRBS 154 (1996). The administrative law judge concluded claimant did not become aware of a permanent loss of wage-earning capacity until February 2015 when he attempted to return to work but was unable to perform his duties. This finding is rational, supported by substantial evidence, and in accordance with law. *J.M. Martinac Shipbuilding*, 900 F.2d 180, 23 BRBS 127(CRT); *see also Paducah Marine Ways v. Thompson*, 82 F.3d 130, 30 BRBS 33(CRT) (6th Cir. 1996); *Duluth, Missabe & Iron Range Ry. Co. v. Director, OWCP [Heskin]*, 43 F.3d 1206 (8th Cir. 1994). Therefore, it is affirmed.[6] Because we affirm the administrative law judge's conclusion that the statutes of limitations under Sections 12 and 13 did not begin to run until February 2015, we also affirm the findings that claimant's notice of injury and his claim were timely filed.[7]

Causation

Employer next challenges the administrative law judge's finding that claimant's work caused his COPD. Where, as here, a claimant has established a prima facie case, he is aided by the Section 20(a) presumption, which presumes his injury is work-related. 33 U.S.C. §920(a); *see Ramey v. Stevedoring Servs. of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998). Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut it with substantial evidence sufficient to "sever the potential connection between the disability and the work environment." *Ramey*, 134 F.3d at 959, 31 BRBS at 210(CRT) (quoting *Parsons Corp. v. Director, OWCP*, 619 F.2d 38, 41, 12 BRBS 234, 235 (9th Cir. 1980)). The administrative law judge found employer rebutted the

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filing requirements because he also must be aware that his condition is work-related and causes a loss in earning capacity. *See E.M. [Mechler] v. Dyncorp Int'l*, 42 BRBS 73 (2008), *aff'd sub nom. Dyncorp Int'l v. Director, OWCP*, 658 F.3d 133, 45 BRBS 61(CRT) (2d Cir. 2011).

[6] The administrative law judge noted it would be possible to date the notice period from November 21, 2014, when claimant actually stopped working due to his COPD but even with that earlier date of awareness, claimant filed the notice of injury and claim within the one- and two-year statutes of limitations for occupational disease cases. Decision and Order at 39.

[7] Thus, we need not address employer's contentions regarding the administrative law judge's alternative findings regarding the timeliness of claimant's notice of injury of his aggravation "claim."

Section 20(a) presumption with Dr. Munday's opinion that claimant's COPD is fully explained by his smoking history and that he does not suffer from an industrial pulmonary injury. When the Section 20(a) presumption is rebutted, it falls out of the case and the administrative law judge must weigh the evidence as a whole to determine whether claimant established his injury is work-related. *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

Employer contends the administrative law judge erred in giving greater weight to Dr. Lineback's opinion than to Dr. Munday's. The administrative law judge found Dr. Munday's opinion that claimant's COPD is solely due to his smoking history is undermined because his reasoning discounted the evidence of claimant's harmful exposures. Decision and Order at 49. The administrative law judge found Dr. Lineback's opinion that claimant's work exposures contributed to his COPD was based on an overestimation of claimant's exposure to irritants. He noted Dr. Lineback was not aware of the extent claimant's work took place outdoors nor did he distinguish between claimant's exposures at his different jobs. The administrative law judge concluded, however, that Dr. Lineback's understanding of claimant's exposures was closer to the extent of his actual exposures than Dr. Munday's assessment. *Id.* at 49-50. He also found Dr. Munday has less relevant expertise than Dr. Lineback because Dr. Munday is a toxicologist and not a pulmonary specialist. *Id.* at 37.

We reject employer's contention of error. Employer is essentially asking the Board to reweigh the evidence, which we are not permitted to do. *See Duhagon*, 169 F.3d at 618, 33 BRBS at 3(CRT). The administrative law judge has the sole discretion to determine the weight to be accorded the evidence and to draw his own conclusions therefrom. *See Ogawa*, 608 F.3d at 650, 44 BRBS at 49(CRT). He is not required to accept the opinion or theory of any particular medical examiner but may accept or reject any part of an expert's testimony. *See Duhagon*, 169 F.3d at 618, 33 BRBS at 3(CRT); *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995). The administrative law judge's reasons for giving Dr. Munday's opinion less weight than Dr. Lineback's are rational and well within his discretion. He thoroughly reviewed all the evidence and explained his reasoning in arriving at his conclusions. His finding that claimant established his working conditions contributed to his COPD is supported by substantial evidence in the record and therefore it is affirmed.[8] *Ogawa*, 608 F.3d at 652, 44 BRBS at 51(CRT).

[8] Employer's challenge to the administrative law judge's finding that it did not rebut the Section 20(a) presumption as to claimant's aggravation claim is moot, because when

Suitable Alternate Employment

We next address employer's challenge to the administrative law judge's findings on suitable alternate employment. Employer contends he erroneously excluded higher-paying jobs due to claimant's alleged inexperience or lack of skills, as he did not accurately determine claimant's abilities. Once a claimant has established a prima facie case of total disability because he is unable to return to his usual employment due to his work injury, the burden shifts to the employer to establish suitable alternate employment which the claimant can perform considering his restrictions, age, education, and vocational background. *See Hairston v. Todd Shipyards, Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988).

The administrative law judge found claimant is physically restricted from work exposing him to smoke or requiring significant physical exertion. Decision and Order at 53. He excluded a number of identified jobs in employer's labor market surveys because they require skills and experience which claimant does not possess but determined employer established the availability of suitable alternate employment through those surveys, which included one suitable position available as of November 22, 2014, and three suitable jobs available as of December 8, 2017.[9] *Id.* at 57-58.

Employer contends the administrative law judge erred by not accepting its vocational expert's conclusion that claimant has some transferable computer skills, arguing that claimant also has some knowledge of computers due to his work as an accuracy control technician. The administrative law judge determined, however, that claimant's computer skills are limited, relying on his testimony that he has only basic computer skills, is unfamiliar with Microsoft Office programs, and used computers at work only to fill out his timecard and to use a program designed specifically for employer. Decision and Order at 55 (citing Tr. at 75, 87-88). He rationally relied on claimant's testimony as to his own abilities and discounted the vocational expert's report because the expert did not state the source of her information. Decision and Order at 55. The administrative law judge's conclusions as to claimant's abilities and skills are supported by substantial evidence and are therefore affirmed. *See generally Johnson v. Director, OWCP*, 911 F.2d 247, 24 BRBS

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weighing the evidence, the administrative law judge concluded claimant's primary claim of work-related COPD is compensable.

[9] The administrative law judge found claimant did not diligently seek employment and thus is partially disabled. Decision and Order at 57, n.56. This finding is affirmed as it is not challenged on appeal. *See Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

3(CRT) (9th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978).

We also affirm the administrative law judge's rejection of certain jobs identified in the labor market surveys because they require experience and skills claimant does not possess.[10] In identifying suitable alternate employment, an administrative law judge is required to consider not only the claimant's technical or vocational skills but also "inquire whether there exists a reasonable likelihood, given the claimant's age, education, and background, that he would be hired if he diligently sought the job." *See Hairston*, 849 F.2d at 1196, 21 BRBS at 123(CRT). The administrative law judge found the vocational expert's labor market report overstated claimant's qualifications with respect to customer service skills and experience, clerical and writing skills, and computer skills. Decision and Order at 54. He noted claimant primarily orally communicated with his co-workers and there is no evidence that claimant's jobs required much, if any, written communication. In addition, his jobs with employer did not involve interacting with customers or the public, and his only customer service experience was well over 30 years ago. *Id.* He therefore concluded it was unrealistic to believe that an employer would hire someone with claimant's skills and background for positions involving customer service or written communication skills. Because the administrative law judge's findings are rational and supported by substantial evidence, they are affirmed. *See Fortier v. Electric Boat Corp.*, 38 BRBS 75 (2004). We therefore affirm the administrative law judge's conclusions as to suitable alternate employment and claimant's residual wage-earning capacity.

Credit for EDD Payments

Lastly, employer challenges the administrative law judge's denial of a credit to employer under Section 3(e) for the EDD payments to claimant. Employer argues the administrative law judge's reliance on *Cutietta v. National Steel & Shipbuilding Co.*, 49 BRBS 37 (2015), is misplaced because there is evidence to show the EDD benefits were paid for claimant's COPD and should be recoverable as a credit under the Act.

Section 3(e) provides a credit for amounts paid to a claimant under a state workers' compensation law or the Jones Act "for the same injury, disability, or death for which benefits are claimed" under the Act. 33 U.S.C. §903(e). The party claiming the credit bears the burden of proving entitlement to the credit. *See Barcz v. Director, OWCP*, 486 F.3d 744, 41 BRBS 17(CRT) (2d Cir. 2007). In *Cutietta*, 49 BRBS at 42, the Board reversed an administrative law judge's award to an employer of a Section 3(e) credit

[10] These jobs are in the nature of a customer service representative, clerk, or receptionist. Decision and Order at 55-58.

because the employer did not show that the EDD payments were made pursuant to a workers' compensation law. *See Cutietta*, 49 BRBS at 43.[11] In the present claim, the administrative law judge initially denied employer a credit because it did not submit evidence that claimant filed a state workers' compensation claim. Decision and Order at 59. In its motion for reconsideration, employer provided a case number and venue for claimant's state workers' compensation claim, but the administrative law judge denied a credit because he is bound by the Board's holding in *Cutietta* that the EDD payments are not workers' compensation payments. Order Denying Reconsideration at 2.

Employer contends it is entitled to a credit under Section 3(e) for the EDD payments made to claimant because the EDD payments were unquestionably for the same disease for which claimant is seeking benefits under the Act. We reject employer's contention and affirm the administrative law judge's denial of a Section 3(e) credit. In order to be entitled to a credit under Section 3(e), employer must show that the EDD payments were paid "pursuant to any other workers' compensation law." 33 U.S.C. §903(e). The EDD disability payments are not compensation for a work-related injury.[12] *See* Cal. Un. Ins. Code § 2601. Moreover, under the state statute, an individual is not eligible for disability benefits at the same time as he receives or is entitled to receive disability benefits "for the same injury or illness under the workers' compensation law of this state." Cal. Un. Ins. Code § 2629(a), (b)(2). California's workers' compensation is governed by a separate provision of the state's legislative code than that governing EDD benefits. *See* Cal. Labor Code §3700 *et seq.* Therefore, the EDD payments made to claimant were not made under the California's state workers' compensation law that would entitle employer to a credit

[11] In *Cutietta*, the employer reimbursed the EDD for the payments the EDD made to the claimant. The employer then sought a Section 3(e) credit for the amount the claimant received from the EDD. The Board reversed the administrative law judge's grant of a credit for two reasons. First, the administrative law judge erred in finding that the employer's repayment was an indirect workers' compensation payment because there was no evidence the claimant had filed a state workers' compensation claim. Second, the employer did not show the EDD payments themselves were made pursuant to a workers' compensation law. *Cutietta*, 49 BRBS at 43.

[12] In fact, the EDD website states that disability insurance benefits are for workers who have a loss of wages due to an inability to work because of a non-work-related illness. https://www.edd.ca.gov/Disability/Am_I_Eligible_for_DI_Benefits.htm (accessed Feb. 12, 2020).

under Section 3(e).[13] *Cutietta*, 49 BRBS at 43. We affirm the administrative law judge's denial of a Section 3(e) credit for the EDD payments claimant received.

Accordingly, the administrative law judge's Decision and Order Awarding Compensation and Benefits and the Order Denying Motion for Reconsideration are affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

[13] Employer argues that denying it a credit for the EDD payments risks claimant receiving a double-recovery and double-liability for employer. *See* Emp. Reply Br. at 23. Employer's argument is unavailing because while double recovery should generally be avoided, it is not absolutely prohibited by the Act. *See Cutietta*, 49 BRBS at 43 n.10 (citing *Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates]*, 519 U.S. 248, 31 BRBS 5(CRT) (1997)).