U.S. Department of Labor

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

BRB Nos. 16-0403
and 16-0403A

CHARLES RENEKE	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
MARINE TERMINALS CORPORATION	)	DATE ISSUED: Mar. 6, 2017
	)	
and	)	
	)	
AMTRUST NORTH AMERICA	)	
	)	
Employer/Carrier-	)	
Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order Denying Benefits of William J. King, Administrative Law Judge, United States Department of Labor.

Theodore P. Heus (Preston Bunnell, LLP), Portland, Oregon, for claimant.

James R. Babcock (Holmes Weddle & Barcott, P.C.), Lake Oswego, Oregon, for employer/carrier.

Before: BUZZARD, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order Denying Benefits (2014-LHC-01680) of Administrative Law Judge William J. King 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 worked as a longshoreman from 1965 until November 13, 2002, when he suffered neck and lower back injuries while lashing for employer and did not return to work. After participating in a two-mile walking event in 2009, claimant sought treatment for bilateral knee pain. CX 5. In July 2009, claimant's x-rays showed mild osteoarthritis in both knees, CX 6, which he treated conservatively until undergoing total right knee replacement surgery on September 11, 2012. CX 19. On January 10, 2013, claimant filed a claim for progressive bilateral knee injuries due to his longshore work. CX 22. Employer controverted the claim. CX 24.

The administrative law judge found that claimant established a prima facie case relating his bilateral knee osteoarthritis to his working conditions, and he invoked the Section 20(a), 33 U.S.C. §920(a), presumption. The administrative law judge also found that employer rebutted the presumption with Dr. Swanson's opinion that claimant's working conditions did not cause his bilateral knee osteoarthritis. Decision and Order at 9. On the record as a whole, the administrative law judge found that claimant is not a credible witness and that the absence of contemporaneous medical records documenting any knee pain or treatment prior to 2009 weighed against claimant's contention that he experienced knee pain at work prior to retiring in 2002. *Id*. at 5-6. Further, finding Dr. Swanson's opinion to be logical and supported by objective evidence, the administrative law judge found Dr. Swanson's opinion entitled to greater weight than those of Dr. Blackstone, which he found to be conclusory and equivocal, and Dr. Bowman, which he found to be speculative. *Id.* at 7, 9-10; CX 25 at 108-109; CX 33 at 144-146; CX 35 at 155; CX 38 at 438. Thus, the administrative law judge found claimant did not establish that his knee conditions are work-related on the record as a whole. Accordingly, the administrative law judge denied benefits and did not address the remaining issues raised by the parties.

On appeal, claimant contends the administrative law judge erred in finding that employer rebutted the Section 20(a) presumption and in finding that claimant failed to meet his burden on the record as a whole. Claimant asks the Board to award him permanent partial disability benefits for his impairment to each knee. Employer responds, urging affirmance of the administrative law judge's denial of benefits. Claimant filed a reply brief. BRB No. 16-0403. Employer cross-appeals, asserting that, if the administrative law judge's decision is vacated, the case must be remanded for the administrative law judge to address the remaining issues raised before him. Claimant responded with a motion to dismiss employer's cross-appeal, and employer filed a reply brief. BRB No. 16-0403A.

In order to be entitled to the benefit of the Section 20(a) presumption, 33 U.S.C. §920(a), a claimant must establish a prima facie case by showing that he sustained a harm and that an accident occurred or working conditions existed which could have caused or aggravated the harm. *See, e.g., Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998). Where, as here, the claimant has established his prima facie case, the burden shifts to the employer to present substantial evidence that the claimant's injury was not caused or aggravated by the work injury. *Id.* The employer's burden on rebuttal is one of production, not persuasion, but the employer cannot satisfy its burden of production simply by submitting any "evidence" whatsoever; it must be that which a reasonable mind would accept as evidence of the non-work-relatedness of the injury. *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *see Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008). If the administrative law judge finds that the Section 20(a) presumption is rebutted, it no longer controls, and the issue of causation must be resolved on the evidence of record as a whole, with claimant bearing the burden of persuasion. *Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

Initially, we reject claimant's contention that the administrative law judge erred in finding the Section 20(a) presumption rebutted. Dr. Swanson issued a report on January 19, 2015, based on an examination of claimant and review of his treatment records and x-rays. Dr. Swanson opined that claimant did not have osteoarthritis at the time he left work in 2002 because his 2009 x-rays demonstrated only mild osteoarthritis. He explained that obesity accelerates the progression of osteoarthritis and that as claimant was obese in 2002, if claimant had osteoarthritis at that time, it would have been more severe seven years later. Moreover, absent records and/or imaging studies from before 2002, he stated it would be purely speculative to state that claimant had osteoarthritis in his knees before his retirement. CX 33 at 146. As Dr. Swanson also unequivocally attributed claimant's bilateral knee osteoarthritis to his genetic inheritance, aging, and exogenous obesity, his report constitutes substantial evidence rebutting the Section 20(a) presumption. *Id*. at 147; *see Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). We, therefore, affirm the administrative law judge's finding that employer rebutted the Section 20(a) presumption.

In weighing the evidence on the record as a whole, it is well-established that the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences and conclusions from the evidence. *See generally Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 371 U.S. 954 (1963). The Board will not interfere with an administrative law judge's credibility determinations unless they are inherently incredible or patently unreasonable. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911

(1979). Further, the administrative law judge is tasked with weighing the evidence and drawing inferences from, and conclusions based on, that evidence. *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988). The Board may not reweigh the evidence or disregard an administrative law judge's findings merely because other inferences could have been drawn from the evidence. *Rhine v. Stevedoring Servs. of Am.*, 596 F.3d 1161, 44 BRBS 9(CRT) (9th Cir. 2010).

In this case, the administrative law judge addressed the relevant evidence in its entirety, assessed claimant's credibility, and weighed the conflicting medical opinions as to the cause of claimant's knee pain and need for surgery. In light of the inconsistencies in claimant's testimony, the administrative law judge rationally determined that claimant's statements regarding knee pain prior to retiring in 2002 are not credible. As the administrative law judge stated, claimant's treatment records do not document any knee complaints prior to 2009, and claimant inconsistently testified that his knees did, and did not, play a role in his decision to retire from the waterfront.[1] Decision and Order at 9; CX 37 at 364-366; CX 41 at 456, 490-491. The administrative law judge's credibility determination is not inherently incredible or patently unreasonable. *Cordero*, 580 F.2d 1331, 8 BRBS 744. We therefore affirm the administrative law judge's finding that claimant is not a credible witness.

We also reject claimant's contention that the administrative law judge erred in giving little weight to the opinions of Drs. Blackstone and Bowman. Claimant essentially asks the Board to reweigh the evidence. This we cannot do. *Rhine*, 596 F.3d 1161, 44 BRBS 9(CRT). The administrative law judge rationally found Dr. Blackstone did not explain his opinion that if an x-ray had been taken in 2002 it would have shown arthritic changes, and that Dr. Blackstone undermined his own opinion that the arthritic changes seen on claimant's 2009 x-rays did not develop only between 2002 and 2009 by also stating that "changes can advance quickly."[2] Decision and Order at 7, 9-10; CX 25 at

[1] As substantial evidence supports this finding, any error the administrative law judge may have made in finding other aspects of claimant's testimony unreliable is harmless. *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). We therefore need not address claimant's challenges to the administrative law judge's alternative reasons for finding his testimony unreliable.

[2] Dr. Blackstone performed claimant's right knee total arthroplasty in September 2012. CXs 11, 19. Dr. Blackstone opined that claimant's "work activities over the years, up through his retirement did contribute to playing a role in [claimant's bilateral knee condition] and [t]he need for surgery with regards to the right knee." CX 25 at 2. Dr. Blackstone stated he does "not believe that the findings on the x-rays developed only

108-109. Similarly, the administrative law judge accurately observed that Dr. Bowman premised his opinion on claimant's having asymptomatic osteoarthritis prior to a triggering traumatic injury in 2009, yet Dr. Bowman was unaware of any such triggering event.[3] Decision and Order at 10; CX 38 at 438. As claimant's testimony and the opinions of Drs. Blackstone and Bowman are the only evidence of record linking claimant's knee conditions to his prior working conditions,[4] and as the administrative law judge reasonably found this evidence to be unpersuasive,[5] we affirm his finding that claimant failed to carry his burden of establishing, based on the record as a whole, that his bilateral knee osteoarthritis is work-related. *Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT); *Hice v. Director, OWCP*, 48 F. Supp. 2d 501 (D. Md. 1999).

Moreover, the administrative law judge rationally credited Dr. Swanson's opinion that claimant did not have osteoarthritis at the time he retired in 2002 and that his current

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between 2002 and the time of the x-rays, although changes can advance quickly;" and that "if x-rays were taken in 2002, they would have likely have [sic] shown some changes." *Id*. at 2-3. Claimant's counsel memorialized a conference with Dr. Blackstone wherein these opinions were stated. Dr. Blackstone later concurred with the conference summary in a February 2013 letter. *Id*.

[3] Dr. Bowman opined that claimant's 2009 x-rays revealed arthritic conditions that developed over several years or perhaps a decade, and that claimant "may very well have had evidence [of arthritis in either knee when he retired in 2002] had radiographs been obtained at that time." CX 35 at 155. Dr. Bowman explained that "[o]steoarthritis is often asymptomatic for quite some time before an event or activity creates symptoms." *Id*. When deposed, however, Dr. Bowman conceded that "[c]laimant did not report any traumatic incident or activity as to trigger the arthritis." Decision and Order at 10; CX 38 at 438. Although claimant reported knee pain shortly after participating in a two-mile walking event in 2009, the administrative law judge accurately found that Dr. Bowman opined that weight-bearing activities, such as walking, alone do not cause osteoarthritis, and that claimant did not identify a triggering traumatic event. Decision and Order at 10; CX 38 at 438.

[4] Claimant's treating physician, Dr. Park, did not render an opinion on the cause of claimant's knee osteoarthritis. CXs 5, 7, 9, 10, 12, 15, 16, 26.

[5] As substantial evidence supports the administrative law judge's decision to discount Dr. Bowman's opinion as speculative, any error the administrative law judge may have made in additionally finding that Dr. Bowman was unaware of claimant's job duties is harmless. *See generally Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010).

condition is due to genetics and obesity. The administrative law judge found this opinion supported by medical records documenting claimant's obesity and the 2009 x-rays showing only mild osteoarthritis. *Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT). Therefore, as it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant's bilateral knee condition is not work-related and the consequent denial of benefits. As a result, employer's cross-appeal and claimant's motion to dismiss the cross-appeal are moot.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

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GREG J. BUZZARD
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge