U.S. Department of Labor

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

BRB No. 18-0430

VAN GUARAGGI	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 03/07/2019
	)	
PUCKETT MACHINERY	)	
	)	
and	)	
	)	
ZURICH AMERICAN INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Tracy A. Daly, Administrative Law Judge, United States Department of Labor.

Jay Foster, Ocean Springs, Mississippi, for claimant.

Nicholas W. Earles (Schouest, Bamdas, Soshea & Ben-Maier), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2016-LHC-00104) of Administrative Law Judge Tracy A. Daly 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 alleged that he slipped and fell and injured his back on September 16, 2014, during the course of his employment as a diesel mechanic. The accident was not witnessed and claimant did not report the incident that day. On September 17, he emailed his supervisor that he had "pulled his back out" at work the previous day. Claimant refused to submit an incident report on September 18, and he was terminated by employer on September 22 for failure to comply with company policy. *See* Tr. at 124-125; EX 6.

Claimant first received treatment for his back after the alleged injury at a previously-scheduled appointment on October 6, 2014, with Dr. Crittenden, an internist, who had treated claimant since June 2012 for, inter alia, weight gain, chest pain, anxiety and sleeping problems. CX 4 at 1; EX 2 at 3, 32-50. Claimant filed a claim seeking compensation for temporary total disability and medical benefits. 33 U.S.C. §§907, 908(b). Employer controverted the claim, asserting, inter alia, that claimant did not sustain a back injury at work. Decision and Order at 4.

The administrative law judge found that because claimant did not establish an injury at work, he was not entitled to the Section 20(a) presumption that his back injury was work-related, 33 U.S.C. §920(a), and he denied the claim. Decision and Order at 24-25.

On appeal, claimant challenges the administrative law judge's finding that he did not invoke the Section 20(a) presumption. Employer responds that the administrative law judge's decision is supported by the record and that claimant's contentions are without merit.

In order to establish a prima facie case, claimant bears the burden of establishing the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused the harm. *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *see* 33 U.S.C. §920(a); *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). The Section 20(a) presumption applies only after these two elements are established.[1] *Hunter*, 227 F.3d 285, 34 BRBS 96(CRT).

[1] Claimant asserted an injury from a work accident on September 16, 2014. EX 1. Thus, claimant's burden on invocation was to establish a prima facie case of an accident, not working conditions from which the harm could have arisen. *Compare Marino v. Navy*

The administrative law judge rejected claimant's contention that he sustained a work accident on September 16, 2014. The administrative law judge found that emails and voicemails on September 17 and 18 between claimant or his wife, and employees of employer "only establishes that Claimant made a delayed and informal report of an alleged work-related accident and injury to his supervisor." Decision and Order at 22. The administrative law judge found the pictures claimant took of his work space on September 16 not sufficiently probative because they were of poor quality and incomplete in terms of establishing the working conditions at the job site on the date of injury. *Id.* at 22-23; CX 3. He found that, due to claimant's lack of credibility and the delayed reporting of an alleged work injury to a medical provider, claimant's subsequent reports of injury do not establish that claimant was involved in a work accident on September 16, 2014.[2] Decision and Order at 23. Moreover, the administrative law judge accorded no weight to claimant's testimony, because he found it inconsistent with his conduct[3] and his medical treatment following the alleged incident.[4]

Exch., 20 BRBS 166, 167 (1988) *with Perry v. Carolina Shipping Co.*, 20 BRBS 90, 91 (1987).

[2] Claimant was referred to Dr. Lee by Dr. Crittenden. At his initial examination on May 8, 2017, Dr. Lee recorded claimant's history of a work injury in 2014. CX 5 at 5.

[3] The administrative law judge found it significant that despite having been involved in an accident which, claimant alleged, immediately injured and put him "in shock," he still reattached part of the engine he was repairing, made two trips to his truck to carry out tools, and did not report the accident to anyone. Decision and Order at 17. The administrative law judge further found claimant's failure to report the accident "directly contradicts his concern about a loss of income" due to that event. *Id.* Moreover, the administrative law judge found claimant's decision to work in allegedly unsafe conditions "highly irrational" since he had refused to work in "nearly identical" conditions during the preceding month. *Id.* at 18.

[4] As previously noted, claimant did not seek treatment of any alleged injury until attending a previously scheduled appointment with Dr. Crittenden on October 6, 2014. CX 4 at 1. The administrative law judge found that imaging tests taken after the alleged work accident did not include a diagnosis of an acute injury and that review of pre- and post-accident treatment records establish that Dr. Crittenden did not "significantly modify his treatment protocol." Decision and Order at 18-19; CX 4 at 2-3; EX 2 at 3-4. The administrative law judge found that the lack of change in treatment protocol "is entirely inconsistent with Claimant's report of an injury that significantly impacted his physical functioning." Decision and Order at 19.

We reject claimant's assertions of error in the administrative law judge's weighing of the evidence.[5] The administrative law judge has the authority to address witness credibility and to draw his own inferences and conclusions from the evidence. *See*, *e.g.*, *Bis Salamis, Inc. v. Director, OWCP [Meeks]*, 819 F.3d 116, 50 BRBS 29(CRT) (5th Cir. 2016); *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995). Those determinations may be disturbed only if they are inherently incredible or patently unreasonable. *Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22(CRT) (5th Cir. 1994); *Cordero v. Triple A Machine* Shop, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *see Bolden*, 30 BRBS 71.

They are not. The administrative law judge addressed at length the inconsistencies in claimant's testimony, his conduct, his refusal to be examined or take a drug test, and the fact that claimant first sought medical treatment approximately three weeks after the alleged accident, and permissibly found claimant's testimony insufficient to establish the alleged work event occurred.[6] On this record, his decision is rational and well within his discretion. *Meeks*, 819 F.3d 116, 50 BRBS 29(CRT). Therefore, we affirm the administrative law judge's finding that a work accident did not occur. Claimant thus failed to establish an essential element of his prima facie case.[7] *See U.S. Industries*, 455 U.S.

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[5] Claimant avers that employer's stipulation that it received timely notice of injury from him, in conjunction with Section 20(b), 33 U.S.C. §920(b), is sufficient to establish a prima facie case of an accident. However, Section 20(b) has no bearing on the issue of entitlement to the Section 20(a) presumption. *See generally Avondale Shipyards, Inc. v. Vinson*, 623 F.2d 1117, 12 BRBS 478 (5th Cir. 1980). Moreover, claimant overlooks that it is his burden to establish a prima facie case of a work accident. *See generally U.S. Industries*, 455 U.S. 608, 14 BRBS 631. In addition, we reject claimant's contention that employer is bound, under Federal Rule of Civil Procedure 30(b)(6), by the deposition testimony of Teresa Odom, because Ms. Odom's testimony has no bearing on the seminal issue in this case of whether claimant established he was involved in a work accident.

[6] There were no witnesses to claimant's alleged accident. Thus the credibility of claimant's testimony of the events on September 16, 2014, was key to establishing the accident element. Accordingly, the administrative law judge permissibly gave no weight to the medical reports linking claimant's back condition to a work accident because the statements by Drs. Crittenden and Lee were based upon claimant's not credible reporting of a work accident.

[7] The administrative law judge also found that claimant did not show that he suffered a harm. Decision and Order at 23. We need not address this finding or claimant's contentions that employer cannot rebut the Section 20(a) presumption in this regard because we have affirmed the claimant's finding that claimant did not present a prima facie

608, 14 BRBS 631; *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 27(CRT) (9th Cir. 1988); *Bolden*, 30 BRBS 71.

Accordingly, we affirm the administrative law judge's Decision and Order.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

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case that there was a work accident. *See generally Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).