U.S. Department of Labor

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

BRB No. 18-0488

ANA BERTHA PEREZ	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 03/13/2019
NAVY EXCHANGE SERVICE COMMAND	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Steven B. Berlin, Administrative Law Judge, United States Department of Labor.

Jeffrey M. Winter and Scott MacInnes (Law Office of Jeffrey M. Winter), San Diego, California, for claimant.

William N. Brooks II (Law Offices of William N. Brooks), Long Beach, California, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2014-LHC-00073, 2014-LHC-00074) of Administrative Law Judge Steven B. Berlin 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.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *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 started working for employer, the Navy Exchange, in San Diego, in 2007, where her duties primarily consisted of receiving incoming goods, unpacking and sorting them, and moving them to the sales floor. Tr. at 32, 37. On occasion, she used a scanning "gun" to scan tags, which required her to squeeze a "trigger" on the scanner. *Id.* at 44. She also used another gun-like tool to put security tags on higher-priced items. *Id.* at 44-45.

On June 21, 2010, claimant suffered an injury at work when a box containing twelve pairs of shoes fell on her head and right side. Tr. at 43, 46-47. Claimant reported the incident to employer and signed a form entitled "Associate's Notice of Injury/Illness." JX 34. On the form, claimant asserted unspecified injuries to her "shoulders, right wrist, right fingers, both arms, elbows, and back." *Id.*

The next day, claimant went to an emergency room complaining of pain in her right wrist, both shoulders, neck, and right upper back. JX 5 at 7. Claimant was diagnosed with cervical sprain/strain and muscle spasm, lumbar strain, musculoskeletal pain, right rotator cuff injury, and wrist contusion. *Id.* at 9, 10. She was taken off work. Claimant returned to the hospital the next day and saw another doctor, reporting worsening pain in her neck and left shoulder. The doctor diagnosed a shoulder strain. On June 28, 2010, claimant returned to the hospital for a follow-up and asked for a release to return to work with modified duty. *Id.* at 10H. The doctor released her to work with restrictions prohibiting lifting over 10 pounds and avoiding overhead work. *Id.*

Claimant returned to work on June 28, 2010. The next day, she went to see Dr. Pohl, who noted that claimant's shoulder motion was restricted and shoulder rotation was painful. JX 23 at 213. He restricted her from lifting over five pounds, making repetitive motions, bending, and doing overhead work. *See id.*

Employer provided claimant with light-duty work as a door greeter for some time.[1] Thereafter, claimant returned to her pre-injury warehouse job with some accommodations.

On June 16, 2011, claimant alleged a second work injury occurred when she tried to lift a box onto a table and "felt something electrical to [her] head, to [her] spine, up the side." Tr. at 53. She testified that she reported the incident to her supervisor that day but was told to finish work. *Id.* Her supervisor, however, disputed this account, stating she did not report the incident, which was also not documented. *Id.* at 177-178.

[1] It is unclear how long claimant was on light-duty work. Claimant testified at the hearing that it was for a month but, at her earlier deposition, she testified that it was two months. Tr. at 50, 52; JX 37 at 584.

Claimant went to the emergency room the next day but the hospital records contain no mention of a workplace injury occurring the day before. Claimant reported only the prior work injury on June 21, 2010, and stated that since that time she has had pain in her shoulders radiating down her arms bilaterally. JX 29 at 290. Claimant denied suffering any back pain.

On June 23, 2011, claimant saw Dr. Flores and again described only the June 21, 2010, incident and reported bilateral shoulder pain and occasional lower back pain. JX 29 at 298. Dr. Flores reviewed a CT scan and noted that claimant's healed cervical spine fractures could have been from the 2010 workplace injury. *Id.* at 299. Claimant was hospitalized from June 17 until June 21, 2011. Tr. at 76; JX 29 at 284. Thereafter, she returned to work and continued working until August 2, 2011. Tr. at 52. She stopped working on August 3, 2011, when her new treating provider, Dr. Reese, a chiropractor, took her off work.

Claimant filed a claim for injuries to her neck, back, both shoulders, right wrist, right fingers, and elbows resulting from the June 21, 2010 work accident. She also filed a claim for injuries to her neck, back, both shoulders, and right wrist from the alleged work accident on June 16, 2011, as well as for cumulative trauma to her neck, back, bilateral shoulders, and wrists (carpal tunnel syndrome) due to repetitive work through August 2, 2011, her last day of work.[2] JX 2. Employer stipulated to traumatic injuries to claimant's neck, back, and both shoulders as a result of the June 21, 2010 accident.

The administrative law judge found that claimant did not establish a prima facie case that she suffered a work injury on June 16, 2011, noting that claimant offered no evidence of an accident at work on that day apart from her own statements. Decision and Order at 31. He found that claimant was not a credible witness because of several inconsistencies in her statements, both to medical providers and in her testimony, and noted that claimant did not mention any work accident when she reported to the emergency room the day after the alleged incident on June 16, 2011. *Id.* at 24, 31. He also rejected the opinion of Dr. Reese, as well as physicians to whom Dr. Reese referred claimant, because Dr. Reese pleaded guilty to felony conspiracy to commit workers' compensation fraud in order to fraudulently obtain money from California workers' compensation insurers.[3] Decision and Order at 14, 16.

[2] The administrative law judge found that the claim for the alleged incident on June 16, 2011 was not barred under Section 12 of the Act, 33 U.S.C. §912. Decision and Order at 29. This finding is not challenged on appeal.

[3] Dr. Reese admitted to receiving kickbacks in exchange for referrals for shockwave therapy, MRIs, nerve conduction testing, and psychological evaluations. Decision and

The administrative law judge found that claimant invoked the Section 20(a) presumption as to the cumulative trauma injuries to her back, neck, and shoulders, noting that claimant's description of her job duties of bending to pick up boxes from the floor and pushing pallets was corroborated by her supervisor. Decision and Order at 31-32. He found, however, that employer rebutted the Section 20(a) presumption through the opinion of Dr. London that her work duties did not cause cumulative trauma to her neck, back, or shoulders, or carpal tunnel syndrome. *Id.* at 33. He concluded that the evidence as a whole does not support a finding that claimant's work caused cumulative trauma to her neck, back and shoulders. Lastly, he found that claimant did not establish that her carpal tunnel syndrome was caused or aggravated by either the work accident on June 21, 2010 or her cumulative work in general. *See id.* at 36-37. The administrative law judge concluded that claimant established only that she was temporarily totally disabled from June 22 to June 27, 2010 due to the work accident on June 21, 2010.

Claimant appeals the Decision and Order, contending the administrative law judge erred in finding that she did not invoke the Section 20(a) presumption with respect to the alleged work accident on June 16, 2011, and in rejecting the opinions of claimant's physicians on the basis of Dr. Reese's fraud. Claimant also contends the administrative law judge erred in not awarding additional periods of total disability or past and future medical care for her injuries. Employer filed a response brief, urging affirmance of the administrative law judge's decision. Claimant filed a reply brief.

Order at 13; JX 79 at 4-5. Although claimant's claim has not been directly implicated in Dr. Reese's fraudulent scheme, the administrative law judge noted that Dr. Reese's treatment of claimant included referrals for psychological treatment, shockwave therapy, and multiple nerve conduction tests despite indications that "conservative treatment" was appropriate, as well as "duplicative" and "unnecessary" MRIs which Dr. Reese was paid to review. Decision and Order at 14 n.19. The administrative law judge found that the history of treatment in this case "is consistent with the fraud and conspiracy to commit fraud to which Reese pled guilty" and "[i]nvolves not just Reese, but each of the doctors and testing and treatment facilities." *Id.* He therefore gave "no weight" to Dr. Reese's opinion and rejected, as "not credible," the opinions of Drs. Do, Kim, Kupfer, Dove, and several diagnostic and imaging facilities. *Id.* at 16. He stated, however, that he would "accord weight only to these providers' notes of statements [c]laimant made to them and objective laboratory results interpreted by others." *Id.*

The June 16, 2011 Injury

Claimant bears the burden of making out a prima facie case by showing that (1) she suffered a harm and (2) conditions existed or an accident occurred which could have caused or aggravated the harm. *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010). Once a prima facie case is established, the Section 20(a) presumption applies to aid a claimant in establishing that her injury is work-related. *See id.*; 33 U.S.C. §920(a). The administrative law judge concluded that claimant did not establish a prima facie case with regard to the alleged work accident on June 16, 2011, because she failed to establish that the accident occurred.

We affirm the administrative law judge's finding that claimant did not establish a prima facie case for a traumatic injury on June 16, 2011. The occurrence of a work accident on June 16, 2011 is supported only by claimant's testimony, which the administrative law judge rationally determined was not credible. *See Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 27(CRT) (9th Cir. 1988). The hospital record from the day after the alleged incident mentioned only the June 21, 2010 incident. The administrative law judge reasonably found that claimant's failure to mention the alleged incident at the emergency room detracted from her credibility as to its occurrence, especially in light of the severity of the harm she alleged. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Moreover, claimant's credibility was also undermined by her supervisor's testimony that contrary to claimant's assertion, claimant did not report any injury on that date. Tr. at 177-78. As it is rational and supported by substantial evidence, we affirm the administrative law judge's finding that claimant did not establish that she suffered a work accident on June 16, 2011. Thus, claimant is not entitled to disability or medical benefits for any of the harms alleged to have occurred in this accident.

Cumulative Trauma Claim

With regard to claimant's cumulative aggravation claim for injuries to her back, neck, shoulders, and wrists, the administrative law judge found that she invoked the Section 20(a) presumption because there is evidence that her job duties of bending, standing, removing plastic from clothes, and hanging clothes on rolling racks could have caused the pain alleged. Decision and Order at 32. He concluded, however, that employer rebutted the presumption with Dr. London's opinion. In weighing the evidence as a whole, he found that claimant did not establish that her continued work aggravated her injuries. *Id.* at 35, 37.

Once, as here, the Section 20(a) presumption is invoked, the burden shifts to employer to rebut it with substantial evidence that the injuries were not caused or

aggravated by the work accident or working conditions. *Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT). If employer rebuts the presumption, the administrative law judge must weigh the relevant evidence to determine if claimant met her burden of proving a causal relationship between the injuries and the work accident or working conditions. *Id.*

We reject claimant's contention that the administrative law judge erred in finding that employer rebutted the presumption. Dr. London stated that claimant did not sustain cumulative trauma injuries to her neck, back, and shoulders. JX 76 at 33. He also stated that claimant's carpal tunnel syndrome was not caused or aggravated by her work. JXs 11 at 20; 76 at 36-37. The administrative law judge thus rationally concluded that Dr. London's opinion that claimant's work did not cause cumulative trauma to her neck, back, shoulders, or wrists rebuts the Section 20(a) presumption. *See Ogawa*, 608 F.3d at 648, 44 BRBS at 49(CRT); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000).

We also affirm the administrative law judge's conclusion that claimant did not establish that her work either caused or aggravated her conditions based on the record as a whole. The administrative law judge permissibly gave less weight to Dr. Levine's opinion that claimant's injuries are due to cumulative trauma at work because Dr. Levine relied on claimant's exaggerated and inaccurate description of her job duties.[4] *See* Decision and Order at 26; *see generally Presley v. Tinsley Maint. Serv.*, 529 F.2d 433, 3 BRBS 398 (5th Cir. 1976). He also acted within his discretion in relying on Dr. London's opinion that claimant's x-ray and MRI results showed degenerative conditions that were normal for a person of her age, she was exaggerating her symptoms, her continued work did not cause or aggravate her symptoms, and her work activities were not repetitive enough to cause carpal tunnel syndrome. *See Ogawa*, 608 F.3d at 651, 44 BRBS at 49(CRT); Decision and Order at 35-36; JX 11 at 138K; JX 75 at 35; JX 76 at 20. Dr. London's opinion constitutes substantial evidence that claimant's back, neck, and shoulder injuries and carpal tunnel syndrome are not work-related. We therefore affirm the administrative law judge's conclusion that claimant did not establish that she sustained work-related cumulative injuries to her back, neck, shoulders, and right wrist.

[4] The administrative law judge noted that although claimant told Dr. Levine a box fell on her head during the June 21, 2010 accident, she also reported for the first time that she grabbed the box with both hands and felt a pop in her right shoulder. Decision and Order at 19; JX 24 at 224; Tr. at 43, 46-47. In addition, claimant's description of her job duties to Dr. Levine made no mention of the light duty accommodation employer made for her but stated that she was often required to lift heavy boxes overhead as well as pushing, pulling, twisting, and bending. Decision and Order at 23 (citing JX 76 at 269F).

The Opinions of Claimant's Other Treating Physicians

Claimant also assigns error to the administrative law judge for discrediting the opinions of her other treating physicians to whom she was referred by Dr. Reese. Claimant argues that there is no evidence in the record that any of these doctors were involved in Dr. Reese's schemes. The administrative law judge noted that Dr. Reese denied deriving any financial benefit from the referrals he made to Drs. Do, Kim, Kupfer, Dove, Johnson, and Vital Imaging Medical Group and Health Solutions Diagnostics. Decision and Order at 14-15. He found, however, that this testimony was not credible because of the high amount Dr. Reese charged for his treatment sessions and to review the test results.[5] He also found that it was difficult to credit any of Dr. Reese's testimony because the events giving rise to Dr. Reese's workers' compensation fraud occurred at the same time as he was treating claimant. *See id.* at 15-16. The administrative law judge also found that the history of treatment in this case, which included unnecessary and duplicative MRIs, multiple referrals for nerve conduction study, and shockwave therapy at one provider that was directly implicated in Dr. Reese's illegal scheme, "is consistent with the fraud and conspiracy to commit fraud to which Reese pled guilty" and "[i]nvolves not just Reese, but each of the doctors and testing and treatment facilities." Decision and Order at 14 n.19. The administrative law judge thus rejected the opinions of Drs. Do, Kim, Kupfer, and Dove and the reports of the various imaging and diagnostic companies. *Id.* at 16.

We reject claimant's allegation of error. The administrative law judge is empowered to weigh the evidence and draw reasonable inferences from it, and it is within his discretion to accept or reject all or part of any testimony according to his judgment. *See Duhagon*, 169 F.3d at 618, 33 BRBS at 3(CRT); *Perini Corp. v. Heyde*, 306 F. Supp. 1321 (D.R.I. 1969). In addition, an administrative law judge's credibility determinations will not be disturbed unless they are inherently incredible or patently unreasonable. *See Ogawa*, 608 F.3d at 648, 44 BRBS at 48(CRT). Dr. Reese's conviction for workers' compensation fraud provides support for the administrative law judge's finding that his testimony is not credible and his calling into question the reliability of the physicians to whom claimant was referred by Dr. Reese based on the similarities between the history of claimant's treatment and the fraudulent scheme to which Dr. Reese pled guilty. The administrative law judge rationally rejected the opinions of the doctors associated with Dr. Reese and his findings will not be disturbed on appeal. *Burns v. Director, OWCP*, 41 F.3d 1555, 29

[5] For example, the administrative law judge noted that Dr. Johnson rented office space from Dr. Reese and Dr. Reese admitted that sham rents were part of his conspiracy to commit workers' compensation fraud. The administrative law judge found therefore that it was more likely than not that Dr. Johnson was involved in the scheme. Decision and Order at 15.

BRBS 28(CRT) (D.C. Cir. 1994). Furthermore, even if the administrative law judge erred in questioning the credibility of Drs. Do, Kim, Kupfer, and Dove, any such error is harmless because the doctors' opinions do not assist claimant in establishing that her injuries are related to the 2010 accident or to cumulative trauma.[6] *See Ogawa*, 608 F.3d at 648, 44 BRBS at 49(CRT).

Claimant's Entitlement to Disability and Medical Benefits

Claimant contends she is entitled to additional periods of temporary total disability for her period of hospitalization after June 16, 2011, *see* JX 21, and for the period after she stopped working for employer on August 1, 2011 until she obtained suitable alternate employment on April 1, 2014, and to temporary partial disability benefits thereafter. The administrative law judge concluded, and employer stipulated, that claimant was temporarily totally disabled for the period of six days following the June 21, 2010 work incident. Decision and Order at 37. The administrative law judge found that claimant did not establish any period of disability after June 27, 2010.

We reject claimant's contention that she is entitled to additional periods of disability as the issue is not adequately briefed. 20 C.F.R. §802.211(b); *Plappert v. Marine Corps Exch.*, 31 BRBS 109 (1997), *aff'g on recon. en banc* 31 BRBS 13 (1997). Claimant introduced the contention but did not refer to any additional law or evidence other than a bare citation to one exhibit in the record. The Board has stated previously that adequate briefing must include "a discussion of the relevant law and evidence." *Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 214, 218 (1988).

In any event, the administrative law judge's conclusion that claimant is not entitled to any additional periods of disability after June 27, 2010 is supported by substantial evidence. Claimant returned to work after June 27, 2010 and there is no evidence found credible by the administrative law judge that claimant's subsequent cessation of employment was caused by the June 21, 2010 work accident. The administrative law judge's denial of benefits for any additional periods is therefore affirmed.

We also reject claimant's contention that the administrative law judge erred by not ordering employer to pay her past medical bills and future medical care, including carpal tunnel surgery. The administrative law judge stated that claimant "offered no evidence of

[6] Specifically, Dr. Kupfer was the only doctor to express an opinion as to causation, stating that claimant's shoulder, neck, upper extremity injuries, and carpal tunnel syndrome were all caused by the June 2011 accident, but he was not informed of the June 2010 work accident and the administrative law judge found that the June 2011 accident did not occur.

unreimbursed medical expenses that she paid," and stated that employer is liable for any future reasonable and necessary medical expenses related to her June 21, 2010 work accident. On appeal, claimant has not shown that any reasonable and necessary medical expenses related to her June 2010 work accident have not been paid. Moreover, the administrative law judge properly found that any medical expenses related to her carpal tunnel surgery are not compensable under the Act because she did not establish that her work caused or aggravated this condition. *See generally Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993). The administrative law judge's finding that employer is liable only for any reasonable and necessary medical care for the work-related injuries that occurred on June 21, 2010, is therefore affirmed. 33 U.S.C. §907(a).

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge