U.S. Department of Labor

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

BRB No. 15-0104

WILLIAM R. GRIFFIN, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HUNTINGTON INGALLS, INCORPORATED	)	DATE ISSUED: Sept. 17, 2015
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Medical Treatment of Dana Rosen, Administrative Law Judge, United States Department of Labor.

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

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2013-LHC-02028) of Administrative Law Judge Dana Rosen rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq*. (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On March 16, 2002, claimant sustained an injury to his right shoulder while working for employer as a supervisor.[1] Tr. at 15. After receiving treatment at employer's clinic, claimant commenced medical treatment with Dr. Cavazos, who initially recommended conservative care. Thereafter, on October 12, 2002, Dr. Cavazos performed an arthroscopic subacromial decompression on claimant's right shoulder. EX

[1] Specifically, claimant alleged that he experienced right shoulder pain after pulling a five-gallon water bottle out from under a desk.

7-2. On April 2, 2003, claimant underwent right shoulder manipulation and, on March 16, 2004, a release of his right rotator cuff interval. EX 7-3, 6. Claimant continued to experience symptoms in his right shoulder and, on July 2, 2004, he commenced treating with Dr. Zaslav. CX 1-1. Dr. Zaslav diagnosed an impingement and possible rotator cuff tear, and he performed a third shoulder surgery on September 20, 2005. CX 1-3. In March 2006, Dr. Zaslav recommended that claimant treat with Dr. Decker for pain management. EX 3-9. Dr. Decker subsequently prescribed the use of a spinal cord stimulator. CX 1-4.

In 2007, claimant experienced additional shoulder symptoms after performing work at his lake house. On July 6, 2009, claimant underwent an arthogram which Dr. Decker interpreted as revealing a rotator cuff tear in claimant's right shoulder. CX 1-11. On June 1, 2010, claimant was involved in an automobile accident which ultimately required that he undergo a surgical procedure on his cervical spine. Dr. Zaslav, who claimant had returned to for treatment, opined that claimant's automobile accident had resulted in a mild exacerbation of his already worsening shoulder condition. CX 1-27. Surgery, although considered, was not recommended because claimant had experienced complications following his prior surgery. CX 1-13, 20. As claimant continued to experience shoulder complaints, Dr. Zaslav subsequently recommended that claimant undergo right shoulder surgery to repair his torn rotator cuff. CX 1-21. After employer declined to pay for the surgery recommended by Dr. Zaslav, claimant filed a timely claim for medical benefits under the Act, seeking to hold employer liable for the right shoulder surgery recommended by Dr. Zaslav.[2]

In her Decision and Order, the administrative law judge applied Section 20(a), 33 U.S.C. §920(a), to presume that claimant's right rotator cuff tear is related to his March 16, 2002, work incident.[3] She found that employer did not rebut the Section 20(a) presumption. Consequently, as claimant's injury is work-related and medical treatment is indicated, the administrative law judge held employer liable for medical benefits. 33 U.S.C. §907.

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[2] Employer paid claimant benefits for various periods of disability due to his March 16, 2002 work-injury. While employer concedes that claimant was diagnosed with a rotator cuff tear in July 2009, *see* Employer's brief at 21, employer controverted claimant's claim for medical treatment for this condition on the basis that it was the result of claimant's non-work-related activities. Claimant, who had previously returned to work for employer, retired in February 2013.

[3] Pursuant to Section 20(a), "it shall be presumed, in the absence of substantial evidence to the contrary . . . [t]hat the claim comes within the provisions of this chapter." 33 U.S.C. §920(a).

On appeal, employer contends that the administrative law judge erred in concluding that it failed to present evidence sufficient to rebut the Section 20(a) presumption. Employer also contends the evidence as a whole establishes that claimant's current shoulder condition is not related to the March 2002 work incident. Claimant has not filed a response brief.

In her Decision and Order, the administrative law judge invoked the Section 20(a) presumption based on her findings that claimant suffers from a harm to his right shoulder and that the specific work incident on March 16, 2002 could have caused that condition. *See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); Decision and Order at 20-22. The burden thus shifted to employer to rebut this presumed causal connection with substantial evidence that claimant's injury was not caused by this incident at work.[4] *See Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009). 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. *See Moore*, 126 F.3d 256, 31 BRBS 119(CRT).

Employer contends that the opinions of Drs. Decker, Badder and Cavazos constitute substantial evidence sufficient to rebut the Section 20(a) presumption. We need not address this specific contention because, assuming, *arguendo*, that these physicians' opinions are sufficient to rebut the Section 20(a) presumption, the administrative law judge's conclusion that claimant's injuries are related to his March 16, 2002 work incident is supported by substantial evidence. Although the administrative law judge erroneously weighed the conflicting evidence in addressing whether employer

[4] We note, in this regard, that it is well established that an employer remains liable for the natural progression of a work-related injury. *See, e.g., Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000). However, if claimant sustains a subsequent injury outside of work that is not the natural or unavoidable result of the original work injury, or if he subsequently develops an unrelated medical condition that has no causal connection to the work injury, any disability attributable to that intervening cause is not compensable. *See J.T.* [*Tracy*] *v. Global Int'l Offshore, Ltd.*, 43 BRBS 92 (2009), *aff'd Keller Found./Case Found. v. Tracy*, 696 F.3d 835, 46 BRBS 69(CRT) (9th Cir. 2012), *cert. denied*, 133 S.Ct. 2825 (2013). Employer remains liable for any disability attributable to the work injury, or to the natural progression of the work injury, notwithstanding the supervening injury. *See Macklin v. Huntington Ingalls Inc.*, 46 BRBS 31 (2012).

rebutted the Section 20(a) presumption, this error is harmless in this case.[5] *See, e.g., Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *Conoco, Inc. v. Director, OWCP* [*Prewitt*], 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999).

In this regard, the administrative law judge gave little weight to the opinion of Dr. Decker based upon her determination that Dr. Decker's statement that claimant's "surgery was necessitated by [his] automobile accident and was not due to any intervening problem at work," necessarily referred to claimant's 2010 cervical procedure since claimant had yet to undergo surgery for his torn rotator cuff. *See* Decision and Order at 24 - 25. Dr. Baddar, who reviewed claimant's medical records but did not examine claimant, opined that claimant's rotator cuff tear occurred after September 2005, and that this condition was therefore due to an intervening event such as physical labor or claimant's automobile accident. EX 9-2. As claimant's rotator cuff tear was diagnosed in July 2009, prior to his automobile accident, and claimant credibly testified that the work he performed at his lake house was less strenuous than that which he performed while working for employer, the administrative law judge declined to rely on Dr.

[5] Upon finding that the claimant established a prima face case and invoked the Section 20(a) presumption, the administrative law judge should proceed to determine whether employer has rebutted the Section 20(a) presumption with "substantial evidence to the contrary." *See* n.3, *supra*; *Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *see also American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1998) (*en banc*), *cert. denied*, 528 U.S. 1187 (2000); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). In this regard, employer's burden is merely to *produce* substantial evidence of the absence of a causal relationship between claimant's condition and his employment. The weighing of conflicting evidence or of the credibility of evidence "has no proper place in determining whether [employer] met its burden of production." *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 651, 44 BRBS 47, 50(CRT) (9th Cir. 2010). "Instead, at the second step the ALJ's task is to decide, as a legal matter, whether the employer submitted evidence that could satisfy a reasonable factfinder that the claimant's injury was not work-related." *Id.*; *see also Bath Iron Works Corp. v. Fields*, 599 F.3d 47, 44 BRBS 13(CRT) (1st Cir. 2010) (the determination of whether employer produced substantial evidence is a legal judgment not dependent on credibility). If employer produces substantial evidence rebutting the Section 20(a) presumption, the presumption drops from the case and it is at this point of analysis that the administrative law judge must weigh the relevant evidence and make credibility assessments in order to address the causation issue based on the record as a whole, an issue on which claimant bears the ultimate burden of persuasion. *Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 257, 28 BRBS 43(CRT) (1994).

Baddar's opinion.[6] Decision and Order at 25. In giving little weight to the opinion of Dr. Cavazos, who treated claimant between October 2002 and July 2004, the administrative law judge found that his view that claimant's 2002 work injury had resolved prior to the diagnosis of the rotator cuff tear in 2009 and that the rotator cuff tear was thus a distinct injury unrelated to his March 16, 2002, work injury, was belied by his awareness of claimant's continued pain and right shoulder problems after the date the original injury had allegedly healed.[7] *Id.* at 24-25. In contrast, the administrative law judge gave greater weight to the opinion of Dr. Zaslav who, based on his continued treatment of claimant and medical test results, opined that claimant's need for right rotator cuff surgery is related to his March 16, 2002, work injury. Specifically, Dr. Zaslav opined that while claimant's June 2010 automobile accident caused some minor exacerbation to his shoulder, that incident did not cause either a major structural change to the shoulder or to the prior findings of a rotator cuff tear.[8] *See* CX 1-27. The administrative law judge determined that Dr. Zaslav's medical opinion and diagnoses are entitled to greater weight than those of the other physicians' since, as claimant's primary treating orthopedic surgeon, Dr. Zaslav examined, treated and observed claimant on at least sixteen occasions, and he ordered treatment, x-rays and physical therapy, performed surgery, and reviewed claimant's medical tests. Decision and Order at 25.

Employer's contention that the opinions of Drs. Cavazos, Decker and Baddar are better reasoned than the contrary opinion of Dr. Zaslav would require the Board to reweigh the evidence, which it is not empowered to do. *See Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963). Claimant's decision to forego a fourth surgical procedure until 2011 does not detract from the fact that claimant was diagnosed with a rotator cuff tear on July 6, 2009, before the automobile accident, and that he continued to experience shoulder pain. S*ee* CX 1-11, 20 (claimant, although continuing to experience shoulder pain on a daily basis, declined to pursue surgery on November 29, 2010). In this regard, Dr. Zaslav's records indicate that another

[6] Claimant testified that the work he performed at his lake home consisted of using a screwdriver to replace electrical receptacles. Tr. at 26 – 29.

[7] While Dr. Cavazos last treated claimant in July 2004, he examined claimant on January 19, 2012, and reviewed claimant's medical records at employer's request prior to rendering his current opinion.

[8] Dr. Zaslav thereafter indicated, in a letter submitted by claimant's counsel, that to a degree of medical certainty claimant's post-injury leisure activities did not cause a significant structural change to his right shoulder and claimant's current need for medical treatment is a result of his March 16, 2002, work injury. *See* CX 1-28.

arthroscopic procedure to repair claimant's shoulder condition was considered on July 20, 2009, but Dr. Zaslav expressed concern over claimant's high risk for complications following surgery. See CX 1-13, 14. The administrative law judge fully addressed the medical opinions and acted within her discretion in relying on the opinion of Dr. Zaslav, claimant's primary treating orthopedic physician, in concluding that claimant's need for arthroscopic surgery to repair a right rotator cuff tear, which was diagnosed in July 2009, is related to the March 16, 2002 incident at work. Decision and Order at 23 – 26; *see* CX 1-27, 28. It is well-established that an administrative law judge has considerable discretion in evaluating and weighing the evidence of record and is not bound to accept the opinion or theory of any particular medical examiner. *See Newport News Shipbuilding & Dry Dock Co. v. Cherry*, 326 F.3d 449, 37 BRBS 7(CRT) (4th Cir. 2003); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Thus, as the administrative law judge rationally accorded greater weight to the opinion of Dr. Zaslav, we affirm the administrative law judge's conclusion that claimant's right rotator cuff condition is related to his March 16, 2002 work incident as it is supported by substantial evidence of record. *See generally Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP* [*Hess*], 681 F.2d 938, 14 BRBS 1004 (4th Cir. 1982). As no other issues are raised on appeal, we affirm the administrative law judge's finding that employer is liable for medical benefits for claimant's right shoulder condition. 33 U.S.C. §907.

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

SO ORDERED.

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JUDITH S. BOGGS
Administrative Appeals Judge

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GREG J. BUZZARD
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge