U.S. Department of Labor

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

BRB No. 18-0155

MICHAEL CALABRESE	)	
	)	
	)	
v.	)	
	)	DATE ISSUED: Sept. 13, 2018
BAE SYSTEMS HAWAII SHIPYARDS	)	
	)	
and	)	
	)	
SIGNAL MUTUAL IDEMNITY ASSOCIATION, LIMITED	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Christopher Larsen, Administrative Law Judge, United States Department of Labor.

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

Frank B. Hugg, Oakland, California, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2017-LHC-0186; 2017-LHC-0187; 2015-LHC-0292) of Administrative Law Judge Christopher Larsen rendered on claims 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 for employer, first as an electrician and then as its Production Support/Maintenance Foreman, at its Pearl Harbor, Hawaii, facility from July 2008 through September 29, 2015. Claimant, while off work from February 21, 2014 to June 24, 2015,[1] was diagnosed with optic neuritis, which was treated with steroids. After his return to work, claimant stated he experienced hip pain on July 16, 2015, while walking up a stairway at employer's facility. Claimant reported the incident to employer the next day. He was sent for medical treatment; Dr. Diaz-Ordaz diagnosed a strained left hip and ordered an x-ray and physical therapy. Dr. Diaz-Ordaz found claimant capable of returning to work without any restrictions. On July 22, 2015, Dr. Blum diagnosed left hip pain "secondary to muscle strain and imbalance," left hip flexor strain, and piriformis syndrome for which he prescribed medication and physical therapy. MRIs of claimant's hips were interpreted by Dr. Chun on September 19, 2015, as revealing bilateral avascular necrosis. Dr. Chun imposed work restrictions, which employer determined it could not accommodate. Claimant last worked for employer on September 29, 2015.[2]

In October 2015, claimant filed a claim alleging that his work duties for employer from June 25 through September 29, 2015, requiring him to frequently stand, walk, and climb stairs, aggravated his avascular necrosis.[3] Claimant and employer thereafter obtained medical evaluations of claimant, respectively from Drs. Soma and Lau. Dr. Soma, in reports dated April 11, 2016, and April 27, 2017, diagnosed bilateral avascular necrosis and opined that "there is no question that [claimant's] bilateral [avascular necrosis] condition was aggravated and accelerated by his frequent climbing of stairs and ladders while working [for employer] from July 10, 2015 until September 29, 2015." CX 18. Dr. Lau, in his report dated December 6, 2016, also diagnosed bilateral avascular necrosis, but he disagreed with Dr. Soma's aggravation opinion. EX 1. Dr. Lau opined that claimant's

[1]Claimant alleged that his inability to work during this period was due to work-related stress. As a result, claimant filed, but later withdrew, a claim alleging a work-related injury to his psyche. EX 7 at 18, 34-35.

[2]Claimant underwent a left hip replacement by Dr. Rosen on April 14, 2016, and was found to be permanent and stationary by Dr. Soma on April 27, 2017.

[3]The parties agreed the steroid treatment that claimant received to treat his optic neuritis caused the bilateral avascular necrosis of the hips. HT at 16, 62; Cl. Post-Hearing Brief at 2; Emp. Post-Hearing Brief at 7-8.

avascular necrosis was not caused, aggravated, and/or accelerated by his work for employer. *Id.*

In his Decision and Order, the administrative law judge found claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), linking his avascular necrosis to his working conditions. The administrative law judge found, however, that employer produced substantial evidence sufficient to rebut the presumption. The administrative law judge concluded that claimant did not establish, based on the evidence of record as a whole, that he suffered a work-related aggravation or acceleration of his avascular necrosis, and thus, denied claimant's claim.

On appeal, claimant challenges the administrative law judge's denial of the claim for benefits under the Act, contending he erred in finding that employer rebutted the Section 20(a) presumption. Employer responds, urging affirmance of the administrative law judge's decision.

Claimant contends the administrative law judge erred in finding employer rebutted the Section 20(a) presumption because Dr. Lau opined that claimant's repetitive climbing of stairs and ladders with employer from July 10 through September 29, 2015, resulted in symptomatic flare-ups or a temporary aggravation of his hip condition.

Once, as in this case, the Section 20(a) presumption is invoked, the burden shifts to the employer to rebut the presumption with substantial evidence that the claimant's injury was not caused, aggravated, or accelerated by the conditions of his employment. *See Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998). The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has held that an employer's burden on rebuttal is to produce "evidence specific and comprehensive enough to sever the potential connection between the disability and the work environment." *Ramey*, 134 F.3d at 959, 31 BRBS at 210(CRT) (internal citation omitted). The inquiry at rebuttal concerns "whether the employer submitted evidence that could satisfy a reasonable fact finder that the claimant's injury was not work-related." *Ogawa*, 608 F.3d at 651, 44 BRBS at 50(CRT). Thus, an employer's burden on rebuttal is one of production only, not one of persuasion. *Id*.

Dr. Lau, in his September 6, 2016 report, stated "I do not believe that work activity caused, aggravated, or accelerated [claimant's] bilateral hip conditions, either the avascular necrosis or the degenerative conditions of his hips." EX 1. Dr. Lau stated that claimant's need for total bilateral hip replacements is "due to his underlying osteonecrosis or avascular

necrosis possibly caused by his high-dosed steroid taken in September 2014 or October 2014." *Id.*

The administrative law judge, however, did not cite either of these statements in support of his rebuttal finding. Rather, the administrative law judge relied on Dr. Lau's testimony that "I believe at most [claimant sustained] a temporary aggravation to his hip condition" as a result of climbing stairs and ladders at work. Dr. Lau stated that while claimant "may have become symptomatic or have a flare up when he does activity, because his hip is already collapsed and that could make him become symptomatic with activity," those painful symptoms at work were "due to the underlying collapse of his hip that occurred from the avascular necrosis." Decision and Order at 6-7 (citing HT at 139-140). The administrative law judge further deemed significant Dr. Lau's statement that "[a]ny type of activity, walking, stairs, climbing, even lying down and getting up from a chair, normal activities of daily living, would cause flares or make [claimant's hip condition] symptomatic." *Id.*

The administrative law judge's finding of rebuttal based on the cited portions of Dr. Lau's opinion reflects an incorrect view of the aggravation rule. Under the aggravation rule, it is sufficient if the circumstances of employment cause the underlying condition to become painful or otherwise symptomatic, even if that underlying condition is not made worse by the employment. *See Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966); *see also Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981); *Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986). As it applies to rebuttal where aggravation of an underlying condition is claimed, an employer must present substantial evidence of the absence of aggravation. *Bath Iron Works Corp. v. Fields*, 599 F.3d 47, 44 BRBS 13(CRT) (1st Cir. 2010); *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009). The portions of Dr. Lau's opinion discussed by the administrative law judge are, standing alone, insufficient to rebut the Section 20(a) presumption, because Dr. Lau states that claimant "at most" became symptomatic and had a temporary aggravation due to his work. EX 1.6; HT at 139-140, 148.

Nevertheless, the credited opinion of Dr. Lau when considered in its entirety establishes that claimant's hip surgery and resulting disability were not due to work-related aggravations but to the natural degeneration of the underlying avascular necrosis, a condition the parties concede is unrelated to claimant's work for employer. EX 1; *see* n.3, *supra*. Moreover, Dr. Lau's overall opinion supports only the conclusion that claimant's hip surgery and resulting disability were not accelerated by his working conditions, even

if he had symptomatic flare-ups at work while climbing and walking.[4] EX 1. Thus, contrary to claimant's contention, Dr. Lau's opinion rebuts the Section 20(a) presumption that a work-related aggravation of claimant's avascular necrosis contributed to his need for hip surgery and disability. *See generally Lamon v. A-Z Corp.*, 46 BRBS 27 (2012), *vacating on recon.* 45 BRBS 73 (2011). Consequently, the administrative law judge's finding that employer rebutted the Section 20(a) presumption is affirmed. *Ogawa*, 608 F.3d at 651, 44 BRBS at 50(CRT). Moreover, the administrative law judge's finding that claimant did not show by a preponderance of the evidence that he suffered a work-related aggravation or acceleration of his avascular necrosis is affirmed as it is unchallenged on appeal.[5] *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

[4]The record establishes that claimant continued to perform his usual work for employer, albeit with flare-ups, through September 29, 2015. HT at 163.

[5]While claimant makes a general assertion that "[t]he ALJ must look at the evidence as a whole and make 'common sense of the situation,' which the ALJ failed to do in [this case]," Cl. Brief at 22, he has not raised any error regarding the administrative law judge's actual consideration of the evidence as a whole on causation, Decision and Order at 8-15, his crediting of the opinion of Dr. Lau over that of Dr. Soma, or his conclusion that claimant did not establish a work-related injury based on a preponderance of the evidence as a whole. *Id.* at 15; *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994); *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge