U.S. Department of Labor

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

BRB No. 19-0149

RIFAT DEDIC	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 09/12/2019
FLUOR FEDERAL GLOBAL PROJECTS	)	
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA c/o AIG GLOBAL CLAIMS	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Morris D. Davis, Administrative Law Judge, United States Department of Labor.

Clifford R. Mermell (Gillis, Mermell & Pacheco, P.A.), Miami, Florida, for claimant.

John F. Karpousis and Michael J. Dehart (Freehill, Hogan & Mahar, LLP), New York, New York, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2017-LDA-00648) of Administrative Law Judge Morris D. Davis rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*,

as extended by the Defense Base Act, 42 U.S.C. §1651 *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, a resident of Bosnia and Herzegovina, was employed as a tow truck operator by employer in Afghanistan. On September 16, 2016, claimant experienced lower back and upper right leg pain when he fell to the ground while pulling a cable from a truck. Claimant was initially treated in Afghanistan, and subsequently examined in Dubai, but soon returned to his home country where he obtained additional medical care. *See* Decision and Order at 3. Employer voluntarily paid claimant temporary total disability benefits for his orthopedic injury until February 9, 2017. 33 U.S.C. §908(b). Claimant continued to seek treatment for his back complaints and also reported symptoms of anxiety and depression. He filed a claim under the Act asserting his entitlement to temporary total disability and medical benefits for his alleged work-related orthopedic and psychological conditions.

In his Decision and Order, the administrative law judge denied claimant's claim for disability and medical benefits for his orthopedic injury, finding claimant did not establish a prima facie case of total disability as he did not demonstrate the existence of an ongoing orthopedic injury that prevents him from returning to his usual employment. The administrative law judge found claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), with regard to his psychological conditions, but that employer rebutted the presumption, and, on the record as a whole, claimant did not establish a causal connection between his psychological conditions and his employment. Consequently, the administrative law judge denied claimant's claim for disability compensation and medical benefits.

On appeal, claimant challenges the administrative law judge's denial of his claim for benefits under the Act. Employer responds, urging affirmance. Claimant has filed a reply brief.

Causation – Psychological Symptoms

The administrative law judge invoked the Section 20(a) presumption that claimant's psychological conditions are work-related based on findings that claimant suffers from anxiety and a depressive disorder and the existence of working conditions which could have caused those conditions.[1] *See U.S. Industries/Federal Sheet Metal, Inc. v. Director,*

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[1] The administrative law judge relied on the opinions of Drs. Sijercic, Selimbasic, and Jarakovic, who respectively opined that claimant suffers from "anxiety depressive

OWCP, 455 U.S. 608, 14 BRBS 631 (1982); *American Stevedoring, Ltd. v. Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001); Decision and Order at 13. The burden thus shifted to employer to rebut the presumed causal connection with substantial evidence that claimant's injuries were not caused or aggravated by his employment. *See Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008); *Obadiaru v. ITT Corp.,* 45 BRBS 17 (2011). If 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 Rainey,* 517 F.3d at 634, 42 BRBS at 12(CRT); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

In finding employer rebutted the Section 20(a) presumption, the administrative law judge relied on the opinion of Dr. Tsanadis. In order to rebut, Dr. Tsanadis's opinion must state that claimant's employment did not cause the injury or aggravate, accelerate, or combine with an underlying condition. *See Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009). Dr. Tsanadis's opinion does not so state, however. Rather, after evaluating claimant on December 4, 2017, Dr. Tsanadis opined that claimant met the criteria for "Unspecified Depressive disorder and unspecified Anxiety Disorder." EX G at 6 – 7. After reviewing claimant's deposition, Dr. Tsanadis reiterated on January 10, 2018, that claimant exhibited "some evidence of depression and anxiety."[2] EX T. Although Dr. Tsanadis stated that he "was unable to reach a conclusion regarding diagnosis because of the lack of reliability of evidence," EX BB at 39-40, he did not state that claimant does not have anxiety or a depressive disorder or that these conditions are not related to the work incident.

Thus, as a matter of law, his opinion cannot support a finding that the Section 20(a) presumption is rebutted. *See Rainey*, 517 F.3d 632, 42 BRBS 11(CRT); *see also Bath Iron Works Corp. v. Preston,* 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004) (physician who addressed claimant's mental condition but declined to comment on claimant's physical symptoms does not rebut the presumption that the physical injury was work-related). In the absence of any other evidence in the record legally sufficient to support a finding that claimant's psychological conditions are not work-related, we reverse the administrative

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disorder," *see* EX J; a "mixed anxiety depressive disorder. Adjustment problems and the effects of psychic social stressors," *see* EX DD at 35 – 36; and symptoms that are "within the PTSD frame." *See* CX 13; Decision and Order at 13.

[2] Dr. Tsanadis did state that there was "no compelling evidence that claimant experienced a significant trauma that resulted in symptomatology consistent with posttraumatic stress disorder." EX T.

law judge's finding that employer rebutted the Section 20(a) presumption and hold that claimant's depression and anxiety are work-related as a matter of law.[3] *See Rainey*, 517 F.3d at 637, 42 BRBS at 14(CRT); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.,), *cert. denied*, 429 U.S. 820 (1976); *Cairns v. Matson Terminals, Inc.,* 21 BRBS 252 (1988). Therefore, the case is remanded for consideration of the remaining issues with regard to those conditions.

Extent of Disability – Orthopedic Injury

Claimant contends his work-related orthopedic condition prevents him from performing any type of work and the administrative law judge erred in denying his claim for ongoing temporary total disability compensation.

In order to establish a prima facie case of total disability, claimant must demonstrate that he cannot return to his regular or usual employment due to his work-related injury. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *Rice v. Service Employees Int'l, Inc.*, 44 BRBS 63 (2010); *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 49 (2005). We affirm the administrative law judge's finding that claimant failed to make this prima facie showing.

We reject claimant's contention that, because an MRI of his back was interpreted as establishing the existence of dorsal protrusions, he established a prima facie case of total disability. Employer conceded that claimant sustained a work-related back injury, but claimant must establish that this condition has caused economic harm. *See Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997); *Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69(CRT) (D.C. Cir. 1990); *Nardella v. Campbell Machine*, 525 F.2d 46, 3 BRBS 78 (9th Cir. 1975). The administrative law judge gave greater weight to the opinion of Dr. Obermiller that claimant is not disabled,[4] as supported

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[3] Thus, we need not address claimant's contention that the administrative law judge erred in weighing the evidence as a whole on this issue.

[4] Dr. Obermiller, who is Board-certified in physical medicine and rehabilitation, opined that claimant does not have a disabling orthopedic injury based upon his CT scan, which did not indicate nerve impingement, and his MRI, which did not reveal nerve compression. *See* EX CC at 28 – 36; EX E.

by Dr. Kocjancic's opinion,[5] finding it is "more thoroughly reasoned and documented." Decision and Order at 17 – 18. In declining to credit the contrary testimony of Dr. Hrustic, claimant's treating physician, the administrative law judge found the objective medical testing does not support his opinion that claimant cannot return to work due to his back injury. Specifically, the administrative law judge found that claimant's CT scan showed no signs of nerve impingement or bone trauma. *Id.* at 17. By contrast, Dr. Hrustic did not adequately address Dr. Obermiller's characterization of the EMG Dr. Hrustic relied upon to recommend surgery as "deficient because it was only half complete." *Id.* Furthermore, Dr. Obermiller explained that claimant's MRI presented results contrary to the EMG and did not actually show nerve compression. *Id.*

We affirm the administrative law judge's denial of claimant's claim for additional disability compensation for his orthopedic condition. The administrative law judge is not bound to accept the opinion or theory of any particular physician; he is entitled to weigh the medical evidence and draw his own inferences. *Avondale Industries, Inc. v. Director, OWCP [Cuevas]*, 977 F.2d 186, 26 BRBS 111(CRT) (5th Cir. 1992). Moreover, the Board is not empowered to reweigh the evidence.[6] *See Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. 1994); *Mijangos v. Avondale Shipyards, Inc.,* 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The administrative law judge fully reviewed the medical evidence of record, and rationally exercised his discretion in crediting the medical opinions stating that claimant does not have a disabling orthopedic injury. Therefore, as the administrative law judge's

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[5] Dr. Kocjancic examined claimant and found normal muscle strength and reflexes, and no neurological deficits. He opined that he was unable to find any objective reason to support claimant's belief that he was unable to work. *See* EX C at 7 – 9.

[6] We reject claimant's contention that, pursuant to *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir.), *cert. denied*, 528 U.S. 809 (1999), the administrative law judge erred in declining to give "special weight" to the opinion of Dr. Hrustic as claimant's treating physician. In *Amos*, the court stated the administrative law judge was obligated to accept the opinion of the employee's surgeon as to a treatment option which other doctors had not shown to be unreasonable. *Id.*, 153 F.3d at 1054, 32 BRBS at 147-148(CRT). In this case, the administrative law judge was required to determine the weight to accord conflicting medical opinions on the issue of any disability claimant sustained as a result of his orthopedic condition. Under these circumstances, the administrative law judge was not required to credit any particular opinion on the basis of his or her status as a treating physician. *See generally Pietrunti*, 119 F.3d at 1042, 31 BRBS at 89(CRT); *Brown v. Nat'l Steel & Shipbuilding Co.*, 34 BRBS 195 (2001).

conclusions are supported by substantial evidence of record, we affirm his finding that claimant did not establish he is disabled by his work-related orthopedic injuries.[7]

Accordingly, we reverse the administrative law judge's finding that claimant's psychological conditions are not work-related and remand the case for consideration of any remaining issues regarding these conditions. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

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[7] In his brief to the Board, claimant summarily avers he is entitled to ongoing medical care for his orthopedic condition. We decline to address this assertion, as it has not been adequately briefed. *See Montoya v. Navy Exch. Serv. Command,* 49 BRBS 51 (2015).

However, as the right to medical benefits is never time-barred, *see Siler v. Dillingham Ship Repair*, 28 BRBS 38 (1994) (en banc), claimant may raise this issue before the administrative law judge on remand, as it is well-established that claimant may establish his entitlement to medical benefits even if his injury is not economically disabling so long as the treatment is necessary for it. *See Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993); *Buckland v. Dep't of the Army/NAF/CPO*, 32 BRBS 99 (1997).