U.S. Department of Labor

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

BRB No. 21-0598

ANDREW B. RWIGYEMA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
AEGIS DEFENSE SERVICES, LLC	)	
	)	DATE ISSUED: 02/15/2023
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Patrick M. Rosenow, Acting District Chief Administrative Law Judge, United States Department of Labor.

Andrew Nyombi (KNA Pearl), Silver Spring, Maryland, for Claimant.

Lawrence Postol (Postol Law Firm, P.C.), McLean, Virginia, for Employer/Carrier.

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

ROLFE and JONES, Administrative Appeals Judges:

Claimant appeals Acting District Chief Administrative Law Judge (ALJ) Patrick M. Rosenow's Decision and Order (2020-LDA-00621) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et*

seq. (Act), as extended by the Defense Base Act, 42 U.S.C. 1651 *et seq*. (DBA).[1] We must affirm the ALJ'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 native of Uganda, worked as a guard for Employer at Kandahar Air Force Base in Afghanistan from October 2011 through October 2013, and again from February 2016 through December 2018. Decision and Order (D&O) at 2. Beginning in October 2018, he presented to the clinic in Afghanistan with various health complaints; however, he returned to work and continued to work for Employer until December 23, 2018, at which time he returned to his home in Uganda. *Id*. He has not worked since. *Id*.

Claimant filed a claim for benefits on September 20, 2019. D&O at 3; Joint Exhibit (JX) 1 at 3. Claimant alleged various injuries as a result of his second term of employment with Employer: pulmonary issues (from exposure to fumes from burn pits, sandstorms, and cold temperatures); chest wall and back pain (from wearing heavy personal protection equipment and frequently climbing a guard tower); vision problems, hearing loss, and headaches (from firing a gun at a shooting range); psychological injury/post-traumatic stress disorder (PTSD) (from exposure to traumatic experiences); gastrointestinal injury; cardiovascular/hypertension injury; and erectile dysfunction.[2] D&O at 3. Claimant could not provide a specific date with respect to the onset of all alleged injuries but estimated an onset date of October 2018 for all claimed injuries except the psychological/PTSD claim, which had an estimated onset date of May 2018. *Id*.

The ALJ denied Claimant's claim in its entirety. D&O at 12. Because there was very little medical evidence to support Claimant's alleged injuries, the ALJ determined Claimant's credibility was "the single most important evidentiary factor in the case." *Id*. at 5-6. However, he found Claimant to be "fundamentally unreliable" and could accord his testimony "no probative weight" if not substantiated by independent evidence. *Id*. at 6. Likewise, the ALJ "significantly discount[ed] the probative value" of Claimant's medical evidence, as most of that evidence was based on Claimant's subjective reporting.

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Second Circuit because the district director who filed the ALJ's decision is in the Region II District Office of the Office of Workers' Compensation Programs (OWCP), which is in New York. 33 U.S.C. §921(c); *McDonald v. Aecom Tech. Corp.*, 45 BRBS 45 (2011).

[2] The ALJ included erectile dysfunction as part of Claimant's psychological/PTSD claim. D&O at 11.

Id. at 7. Having determined neither Claimant nor his medical providers could offer credible testimony, the ALJ evaluated whether Claimant was able to invoke the Section 20(a) presumption, 33 U.S.C. §920(a), as to each claimed injury. D&O at 8-12.

The ALJ concluded Claimant failed to invoke the Section 20(a) presumption for the majority of his alleged injuries due to his inability to establish a harm by a preponderance of the evidence, either because there was no objective credible evidence of a harm, or because Claimant's unreliable subjective complaints undermined the objective evidence of a harm. D&O at 8-9, 11-12.

He concluded Claimant established a harm for only two alleged injuries: his lumbar spine condition and *H. pylori*. *Id*. at 9-10. However, for the spinal injury claim, the ALJ found Claimant's lack of credibility precluded him from establishing his employment could have caused or aggravated his condition; consequently, he was unable to invoke the Section 20(a) presumption. *Id*. at 10-11. As for the *H. pylori* infection, the ALJ determined Claimant was able to invoke the Section 20(a) presumption, but Employer successfully rebutted it, and Claimant failed to carry his burden of proving the condition was related to his employment. *Id*. at 9-10. Ultimately, the ALJ denied Claimant's request for benefits for each claimed injury. *Id*. at 12.

Claimant appeals the denial of benefits. He contends the ALJ should have invoked the Section 20(a) presumption because he established harm or bodily injury, including chronic back pain, lumbar spondylosis, chest pain, dorsi muscle sprain, intercostal neuralgia, *H. pylori*/gastrointestinal injuries, major depressive disorder, itching eyes, and PTSD, and the absence of any of these conditions prior to his deployment to Afghanistan is sufficient to show his employment could have caused or aggravated each condition. He maintains Employer has failed to rebut the Section 20(a) presumption and disputes the ALJ's finding that he lacks credibility, blaming memory and cognitive issues on his compensable psychological condition. Employer responds, urging affirmance.

To be entitled to the Section 20(a) presumption linking his injuries to his employment, a claimant must sufficiently allege: 1) he has sustained a harm; and 2) an accident occurred or working conditions existed which could have caused or aggravated the harm. *Rose v. Vectrus Systems Corporation*, 57 BRBS 27 (2022) (Decision on Recon. en banc); *see, e.g., Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010)*; Brown v. I.T.T/Cont'l Baking Co.*, 921 F.2d 289, 24 BRBS 75(CRT) (D.C. Cir. 1990); *O'Kelley v. Dep't of the Army/NAF,* 34 BRBS 39 (2000). The claimant bears

an initial burden of production to invoke the Section 20(a) presumption.[3] *Rose*, 56 BRBS at 36. Credibility can play no role in addressing whether the claimant has established a prima facie case. *Id.* at 37. In this regard, the Section 20(a) invocation analysis "does not require examination of the entire record, an independent assessment of witness' credibility, or weighing of the evidence." *Id.* Instead, a claimant need only "present some evidence or allegation that if true would state a claim under the Act."[4] *Id.* Consequently, if he establishes his prima facie case, he is entitled to the presumption that his injury is work-related and compensable. *Id.*

Here, the ALJ improperly found Claimant could not invoke the Section 20(a) presumption due to lack of credibility for his hearing loss, cardiovascular problems, pulmonary issues, headaches, breathing problems, eye injury, hypertension, chest wall pain, general intestinal injury, psychological injury/PTSD, and lumbar spine injury. In doing so, he inappropriately imposed upon Claimant a heightened burden of persuasion, rather than the burden of production at invocation. *Rose*, 56 BRBS at 36-37. Nevertheless, we find this error to be harmless because the record contains substantial evidence to rebut the presumption as to each of these claimed injuries, and the totality of the record evidence supports his denial of the claim. *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988); *Reed v. The Macke Co.*, 14 BRBS 568 (1981); *Novak v. I.T.O. Corp. of Baltimore*, 12 BRBS 127 (1979).

In order to rebut the Section 20(a) presumption, an employer must present substantial evidence showing the claimant's injury did not arise out of his employment. *Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008). An employer's burden is one of production; once the employer produces substantial evidence of the absence of a causal relationship, the Section 20(a) presumption is rebutted. *Id.* Once rebutted, the presumption falls from the case, and the ALJ must weigh the relevant causation evidence on the record with the claimant bearing the burden of persuasion by a preponderance of the evidence. *Id.*

Although the record includes notes showing Claimant complained of hearing loss, cardiovascular problems, pulmonary issues, and breathing problems, the complaints are

[3] "The burden of production or 'some evidence' standard which we have set forth here is a light burden – being no greater than an employer's burden on rebuttal – meant to give the claimant the benefit of the statutory framework." *Rose*, 56 BRBS at 38.

[4] "Whether the claimant's evidence fails or carries the day is a matter to be resolved at step three when weighing the evidence, not at step one invocation." *Rose*, 56 BRBS at 38.

infrequent and sporadic, there are no diagnoses from any medical provider, and there is no evidence of provided or even recommended treatment. In addition, Claimant's headaches were treated, not as a stand-alone injury, but as part of the global treatment of his psychological condition. Employer's Exhibit (EX) 7. Furthermore, although the record contains evidence showing Claimant was either diagnosed with or treated for eye itchiness,[5] hypertension,[6] chest wall pain,[7] and general intestinal injury,[8] the record lacks any objective or corroborating evidence linking this treatment and/or diagnoses to Claimant's employment. Moreover, for the hypertension and chest wall pain, the allegations of injury or harm are undermined by Dr. Ross Myerson's characterization of Claimant's blood pressure reading as normal (EX 8 at 2) and the existence of two normal chest x-rays, taken October 4, 2018, and June 4, 2020 (EX 11 at 2; CX 29 at 2). Dr. Myerson also opined there was no evidence linking Claimant's hospitalization and treatment for peptic ulcer and esophageal reflux in July and August 2020 to his employment in Afghanistan. EX 45 at 1. The absence of evidence in the medical record can be sufficient to rebut the Section 20(a) presumption, *Universal Maritime Corp. v. Moore*, 126 F.3d 256 (4th Cir. 1997), and we find that to be the case as to these claimed injuries. Consequently, the ALJ's improper reliance on Claimant's lack of credibility in finding he failed to invoke the Section 20(a) presumption as to any of these injuries is harmless error. *Novak*, 12 BRBS 127.

The same is true for both the lumbar spine and psychological injury/PTSD claims. For the former, the ALJ found evidence of a lumbar spine injury but concluded Claimant was unable to prove his employment could have caused or aggravated it. D&O at 10-11. For the latter, despite evidence linking his claimed psychological condition/PTSD to his employment,[9] the ALJ found the subjective nature of the claimed harm, when weighed against Claimant's lack of credibility, rendered him unable to prove the harm existed at all. D&O at 11-12. As a result, he could not invoke the Section 20(a) presumption as to either claimed injury. D&O at 10-12.

[5] EX 7 at 7.

[6] EX 7 at 3; EX 8 at 2.

[7] EX 11 at 2.

[8] Claimant's Exhibit (CX) 44; CX 46.

[9] EX 7 at 1-6, 10-11.

Once again, despite the ALJ's improper credibility assessment at the invocation stage, we find his error to be harmless, as the record contains sufficient evidence to rebut the Section 20(a) presumption as to both the claimed spine and psychological injuries. *Novak*, 12 BRBS 127. With respect to the claimed lumbar spine injury, radiologist Dr. Todd L. Siegel reviewed the MRI of Claimant's spine obtained on June 4, 2020, and opined it portrayed degeneration as a "cumulative result of life's 'wear and tear' activities," with no objective evidence to suggest "underlying radiculopathy or a disabling back condition." EX 19 at 1. Likewise, orthopedic surgeon Dr. Nicholas Ahn reviewed Claimant's medical records and concluded the findings on the MRI represented age-appropriate degenerative changes, showed no trauma indication, and were not related to his employment. EX 21 at 3; Hearing Transcript (HT) at 22-24.

As for the psychological/PTSD claim, neither Employer's psychiatric expert, Dr. Jake Epker, nor Claimant's, Dr. Emmanuel Mwesiga, opined Claimant suffered from PTSD. EX 13 at 6; CX 46 at 3. Rather, Dr. Mwesiga diagnosed Claimant with major depressive disorder but did not provide an opinion as to causation (CX 46 at 3-4), and Dr. Epker diagnosed Claimant with adjustment disorder with mixed anxiety and depression (the "most benign of psychological conditions") and explicitly opined this condition was not work-related. EX 13 at 6-7. Thus, with respect to both the lumbar injury and psychological injury/PTSD, there is substantial evidence rebutting the Section 20(a) presumption. *Rochester v. George Washington Univ.*, 30 BRBS 233 (1997).

In sum, even if the ALJ had properly evaluated and invoked Section 20(a) as to the hearing loss, cardiovascular problems, pulmonary issues, headaches, breathing problems, eye injury, hypertension, chest wall pain, general intestinal injury, psychological injury/PTSD, and lumbar spine injury, the presumption for each of these claimed injuries would have fallen from the case upon presentation of Employer's rebuttal evidence, and the ALJ would have proceeded to weigh the evidence as a whole. *Reed*, 14 BRBS 568; *Novak*, 12 BRBS 127.

Here, the ALJ discussed and weighed all evidence regarding Claimant's alleged injuries and assessed its credibility, albeit prematurely. The ALJ has the authority and discretion to weigh the evidence, accepting any medical opinion in whole or in part. *Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996); *see also Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The Board cannot re-weigh the evidence; rather, if the ALJ's conclusion upon weighing the evidence is rational and supported by substantial evidence, as it is here, it must be affirmed. *Carswell v. E. Pihl & Sons*, 999 F.3d 18, 55 BRBS 27(CRT) (1st Cir. 2021), *cert. denied*, 142 S.Ct. 1110 (2022). As a result, despite the ALJ's error in weighing the evidence as part of his invocation analysis, this error is harmless, as he effectively rendered alternate findings in fully explaining how he would rule if he found Claimant had invoked the

Section 20(a) presumption as to each claimed injury. The Board has held an ALJ's failure to explicitly apply Section 20(a) is harmless error where he weighs all the evidence, and his decision is supported by substantial evidence. *Suarez v. Serv. Employees Int'l, Inc.*, 50 BRBS 33 (2016); *Cairns*, 21 BRBS 252; *Graham v. Newport News Shipbuilding & Dry Dock Co.*, 13 BRBS 336 (1981); *Novak*, 12 BRBS 127. Consequently, we affirm the ALJ's denial of benefits for hearing loss, cardiovascular problems, pulmonary issues, headaches, breathing problems, eye injury, hypertension, general intestinal injury, chest wall pain, psychological injury/PTSD, and lumbar spine injury. *Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988).

Finally, the ALJ found Claimant invoked the Section 20(a) presumption as to *H. pylori,* a form of bacteria that infects the stomach. D&O at 9. Objective medical evidence showed the presence of *H. Pylori* antibodies in Claimant's blood, drawn on January 3, 2019, and Dr. Myerson acknowledged Claimant could have been exposed to *H. pylori* bacteria while working in Afghanistan. EX 41 at 1. The ALJ rationally found this evidence sufficient to invoke the Section 20(a) presumption. *See Rose*, 56 BRBS at 36-37; *O'Kelley,* 34 BRBS 39; D&O at 9. He likewise appropriately found Employer had rebutted the presumption with Dr. Myerson's statement that *H. pylori* was prevalent in Claimant's home country of Uganda, and he could have contracted it there. *Phillips*, 22 BRBS 94; D&O at 9; EX 41 at 1. Weighing the totality of the evidence, the ALJ permissibly found Dr. Myerson to be "highly credible" (as opposed to Claimant and his physicians) and gave great weight to his opinion that it was more likely Claimant contracted the *H. pylori* bacteria in Uganda, rather than on a United States military base, given the relative conditions of each. *Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *Donovan*, 300 F.2d 741; D&O at 9-10; EX 41 at 1. As the ALJ's conclusion with respect to the *H.* pylori is rational, supported by substantial evidence, and in accordance with the law, *Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000), we affirm his determination that Claimant failed to prove, by a preponderance of the evidence, the presence of *H. pylori* antibodies in his bloodstream in January 2019 was causally related to his employment in Afghanistan.

Accordingly, we affirm the ALJ's Decision and Order denying benefits.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring:

In accordance with the Board's decision in *Rose v. Vectrus Systems Corporation*, 56 BRBS 27 (2022) (Decision on Recon. en banc), I concur.

JUDITH S. BOGGS
Administrative Appeals Judge