U.S. Department of Labor

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

BRB No. 22-0465

ROBERT L. HOLMES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MARINE REPAIR SERVICES, INCORPORATED	)	DATE ISSUED: 02/23/2024
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD.	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of Decision and Order Denying Benefits of Monica Markley, Administrative Law Judge, United States Department of Labor.

Robert L. Holmes, Lincolnville, South Carolina.

Brian P. McElreath and Erica B. McElreath (Lueder, Larkin & Hunter, LLC), Mount Pleasant, South Carolina, for Employer/Carrier.

Before: GRESH, Chief Administrative Appeals Judge, BUZZARD and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant, without representation,[1] appeals Administrative Law Judge (ALJ) Monica Markley's Decision and Order Denying Benefits (2018-LHC-01177) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (Act).[2] On appeal, Claimant generally challenges the ALJ's decision; therefore, the Benefits Review Board will review the findings adverse to him and address whether substantial evidence supports the ALJ's decision. *See Pierce v. Elec. Boat Corp.*, 54 BRBS 27 (2020). We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant, a refrigerator or "reefer" mechanic, suffered a pulmonary injury in the course of his employment on October 30, 2017, when he was exposed to a noxious smell from an unknown source in the hold of a ship, which caused burning in his chest and coughing, and made it difficult to breath. Hearing Transcript (HT) at 41-45. He typically boarded ships only while performing overtime work; his job primarily required him to be in the Refrigerator Service Area (RSA), consisting of twelve lanes under a metal canopy open on all sides, where trucks receive or unload refrigerator, or "reefer," containers. *Id.* at 40, 36-39.

Following the exposure, Claimant sought medical treatment and was released to return to his regular job. HT at 46. While receiving ongoing treatment for his pulmonary condition, *see* Claimant's Exhibits (CXs) 1-4, Claimant continued to work for Employer as a reefer mechanic until January 18, 2018, when he was terminated for cause following his third offense for improper procedure.[3] Employer's Exhibit (EX) 4 at 4. He appealed

[1] Although Claimant filed this appeal pro se, he was represented by counsel throughout the entirety of the proceedings before the Office of Administrative Law Judges (OALJ).

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant's injury occurred in South Carolina. 33 U.S.C. §921(c); *see Roberts v. Custom Ship Interiors*, 35 BRBS 65, 67 n.2 (2001), *aff'd*, 300 F.3d 510 (4th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003); 20 C.F.R. §702.201(a).

[3] Claimant had previously received two suspensions and a warning letter for improper procedure, including setting the wrong temperature on a reefer container, releasing an "out of service" container, and improperly dispatching a container that was non-compliant with the California Air Resources Board (CARB). Employer's Exhibit (EX) 4 at 1-3.

his termination through his union's grievance process; however, his termination was upheld. EX 3.

On February 13, 2018, Claimant began treating with licensed clinical psychologist Bonnie Cleaveland, Ph.D. CX 5 at 10. Claimant reported believing he was going to die during the October 2017 incident and testified he sought treatment from Dr. Cleaveland because he was no longer able to board a vessel out of fear. *Id*.; HT at 45, 69-70. On February 7, 2019, Dr. Cleaveland opined Claimant's generalized anxiety, panic attacks, and anger were related to the October 2017 workplace injury. CX 5 at 40. Conversely, Employer's psychiatrist, Dr. Jon Snipes, examined Claimant and opined he suffered from no psychological injury as a result of that incident. EX 7 at 6.

Claimant filed a claim for compensation and medical benefits for both his physical pulmonary injury and an alleged psychological injury arising out of the October 2017 workplace incident. Employer accepted the physical pulmonary injury but disputed the psychological injury. HT at 6. Following a formal hearing, the ALJ issued a Decision and Order Denying Benefits (D&O) on July 22, 2022.

The ALJ denied all benefits related to Claimant's alleged psychological injury, finding he failed to invoke the Section 20(a) presumption of compensability, 33 U.S.C. §920(a). D&O at 41-47. In the alternative, the ALJ denied all benefits relating to Claimant's alleged psychological injury because he failed to prove such an injury by a preponderance of the evidence after the Section 20(a) presumption had been invoked by Claimant and rebutted by Employer. *Id*. at 48-49. She also denied disability compensation benefits for the pulmonary injury, finding Claimant failed to show he was unable to return to his usual employment as a result of that injury and was subsequently terminated for reasons unrelated to his disability. *Id*. at 49-52.

Claimant appeals, maintaining his psychological condition is related to the October 2017 workplace incident and his inability to work is directly related to his pulmonary and psychological conditions. He further states the ALJ's decision was based on "tainted discovery" because she was unaware of "numerous OSHA complaints" about Employer's facility and argues she would have rendered a different conclusion if this evidence were admitted into the record before her.[4] Employer responds, urging affirmance.

[4] We decline to address these arguments. The alleged evidence to which Claimant refers was not in the record before the ALJ. The Board may not accept or consider new evidence, nor may it conduct a *de novo* review of the evidence. 20 C.F.R. §802.301; *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 944 (5th Cir. 1991); *Nelson v. American Dredging Co.*, 30 BRBS 205, 208 (1996); *Hansley v. Bethlehem Steel Corp.*, 9

Compensability of Alleged Psychological Injury

The ALJ began her analysis of the compensability of Claimant's psychological injury by evaluating Claimant's credibility, which she found lacking. D&O at 41-44. Specifically, she found it significant Claimant denied ever being disciplined at work to both Dr. Cleaveland and Dr. Snipes despite having recently been fired by Employer. She further found implausible his explanation at the hearing that he thought because two of his suspensions were reduced, his infractions had been excused. *Id*. at 41-42; *see* CX 5 at 10; EX 7 at 6. She found that when questioned about each disciplinary action, Claimant offered excuses relieving him of any fault, which was at odds with the disciplinary letters he received from Employer and Claimant's concession to the South Carolina Department of Employment and Workforce Appeals Tribunal that he made mistakes during the incidents that gave rise to the disciplinary action. *Id*. at 42; *see* HT 115-124; EXs 3, 5.

In addition, the ALJ found Claimant misrepresented to Dr. Snipes why he went for treatment with Dr. Cleaveland, telling him his pulmonologist referred him, when in fact Dr. Cleaveland's records reflect that Claimant's attorney referred him. *Id*.; *see* CX 5 at 9; EX 7 at 6. As for Claimant's first subjective reports of psychological trauma, specifically his belief that he was going to die when the workplace incident occurred and was no longer able to board ships due to fear, the ALJ found they did not appear in any medical report until Dr. Cleaveland's first evaluation in February 2018 (after Claimant's termination) and were absent from his statements made closer in time to the incident. *Id*. at 43; *see* CXs 1-4; CX 5 at 10.

The ALJ also found significant Claimant's presentation to an emergency room (ER) complaining that the inhaler he was prescribed the previous day was not effective, despite the ER provider's examination of the inhaler revealing it had only been used once despite the accompanying prescription advising Claimant to use it every four hours.[5] *Id*.; *see* CX 2 at 14; CX 3 at 89, 91. Further, the ALJ found Claimant's testimony that his lung condition and psychological issues were the reasons he could not return to work was

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BRBS 498.2, 499 (1978). Rather, the Board's review of an ALJ's decision is limited to consideration of evidence in the formal case record. 33 U.S.C. §921(b)(3); *Williams v. Hunt Shipyards, Geosource, Inc.*, 17 BRBS 32, 35 (1985). If a party believes new evidence is necessary to the claim, it may be able to seek modification under Section 22 of the Act, 33 U.S.C. §922. *See* 29 C.F.R. §802.301(c).

[5] The ALJ also found Claimant's testimony on this issue "revealing" because he insisted he used the inhaler more than the ER notes indicated yet also attempted to justify his minimal usage. D&O at 43; *see* HT at 98-100.

undermined by his recent applications to Employer to be rehired and the grievances he filed upon learning he was not being considered for rehiring. *Id*. at 44; *see* HT 146-147; EX 6.

The ALJ determined Claimant failed to invoke the Section 20(a) presumption of compensability as to the alleged psychological injury, based on his lack of credibility and the absence (and in some instances denial) of psychological symptoms until his initial treatment with Dr. Cleaveland in February 2018. D&O at 44-46. She also gave great weight to Employer's expert, Dr. Snipes, who evaluated Claimant and reviewed his medical and employment records and found no evidence of any psychiatric infirmity. *Id*. at 46-47; *see* EX 7. Conversely, the ALJ found Dr. Cleaveland did not explicitly provide any diagnoses but only generally referenced anxiety, fear, trauma, panic, and Post-Traumatic Stress Disorder (PTSD) in her medical notes and did not appear to perform any objective testing or review Claimant's other medical records, relying solely on his subjective reporting. *Id*.; *see* CX 5. Consequently, the ALJ found Claimant failed to establish he suffered from any psychological injury; thus, he did not establish a prima facie case of injury or invoke the Section 20(a) presumption, 33 U.S.C. §920(a). *Id*. at 47.

Alternatively, the ALJ found if Claimant had invoked the Section 20(a) presumption with respect to his alleged psychological injury, Dr. Snipes's medical report was sufficient to satisfy Employer's rebuttal burden. D&O at 48. She further determined, weighing the record evidence as a whole, Claimant failed to establish, by a preponderance of evidence, that he suffers from a psychological injury arising out of and in the course of his employment with Employer. *Id*. at 49.

A claimant is entitled to the Section 20(a) presumption linking his injuries to his employment if: 1) he 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), *appeal dismissed* (MDFL Aug. 24, 2023); *see also Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 225 (4th Cir. 2009); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 262 (4th Cir. 1997); *O'Kelley v. Dep't of the Army/NAF,* 34 BRBS 39, 40 (2000). The claimant bears an initial burden of production to invoke the presumption.[6] *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

[6] "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.

allegation that if true would state a claim under the Act."[7] *Id.* Consequently, if he establishes his prima facie case, Claimant 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 and erroneously weighed the evidence at the invocation stage of the Section 20(a) analysis. In doing so, she inappropriately imposed upon Claimant a heightened burden of persuasion, rather than a burden of production, at invocation. *Rose*, 56 BRBS at 36-37. Dr. Cleaveland's medical opinion is sufficient to carry the burden of production at invocation, as she explicitly related Claimant's anxiety, and her continued treatment of that anxiety, to the October 2017 workplace incident. CX 5 at 40. Nevertheless, as discussed below, the ALJ's error is harmless because she issued alternative permissible findings that, even if Claimant did invoke the Section 20(a) presumption, Employer rebutted it, and Claimant failed to carry his burden of persuasion based on a weighing of the evidence as a whole. *Reed v. The Macke Co.*, 14 BRBS 568, 571 (1981); *Novak v. I.T.O. Corp. of Baltimore*, 12 BRBS 127, 129-130 (1979). Therefore, we address her alternative findings.

As the ALJ observed, when a claimant invokes the Section 20(a) presumption that his injury is work-related, the burden shifts to the employer to produce substantial evidence that the claimant's injury is not work-related. D&O at 48; *see Metro Machine Corp. v. Director, OWCP [Stephenson]*, 846 F.3d 680, 684 (4th Cir. 2017); *Ceres Marine Terminals v. Director, OWCP [Jackson]*, 848 F.3d 115, 120-121 (4th Cir. 2016). An employer's burden on rebuttal is one of production, not persuasion. *Moore*, 126 F.3d at 262. Employer must "put forward as much relevant factual matter as a reasonable mind would need to accept, as one rational conclusion, that the employee's injury did not arise out of his employment." *Holiday*, 591 F.3d at 225.

The ALJ permissibly found Dr. Snipes's medical opinion – that Claimant suffers from no psychiatric ailments – constitutes substantial evidence sufficient to meet Employer's burden of production. D&O at 48; *Holiday*, 591 F.3d at 226; *Moore*, 126 F.3d at 263; *Cline v. Huntington Ingalls, Inc.*, 48 BRBS 5, 7 (2013). We therefore affirm the ALJ's alternate finding that Employer rebutted the Section 20(a) presumption relating Claimant's alleged psychological injury to his employment.

[7] "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.

As Employer rebutted the Section 20(a) presumption, the ALJ properly determined it no longer applies, and the issue of causation must be resolved based on the evidence of record as a whole, with Claimant bearing the burden of persuasion. D&O at 48; *see Moore*, 126 F.3d at 262. The ALJ is entitled to weigh the evidence and draw her own inferences from it; she has the discretion to determine which of the conflicting opinions is entitled to determinative weight, and the Board is not empowered to reweigh the evidence. *See, e.g.*, *Newport News Shipbuilding & Dry Dock Co. v. Cherry*, 326 F.3d 449, 452 (4th Cir. 2003); *Pittman Mech. Contractors, Inc. v. Director, OWCP [Simonds]*, 35 F.3d 122, 127 (4th Cir. 1994).

When weighing the evidence as a whole, the ALJ considered Claimant's lack of credibility, the absence of documented complaints of psychological symptoms for months following the workplace incident, and the well-reasoned and supported medical opinion of Dr. Snipes (as opposed to the conclusory, undocumented, and unreliable reports of Dr. Cleaveland), and concluded Claimant did not establish a work-related psychological injury by a preponderance of the evidence. D&O at 48-49. The ALJ adequately discussed all the relevant evidence and rationally concluded any alleged psychological symptoms are not work-related. As substantial evidence supports her conclusion, we affirm the ALJ's denial of benefits for Claimant's alleged psychological injury. *Simonds*, 35 F.3d at 127; *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994).

Disability Compensation for Work-Related Pulmonary Injury

In addition to seeking benefits related to his alleged psychological injury, Claimant sought disability benefits for his pulmonary injury, arguing he was unable to return to his usual work, and Employer failed to establish the availability of suitable alternate employment. D&O at 49. Specifically, Claimant argued the RSA lanes where he usually worked were filled with diesel fumes, a "trigger" that Dr. Michael Spandorfer had advised him to avoid, and upon returning to work he required assistance from his co-workers due to his symptoms. *Id.*

It is well established the claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *Gacki v. Sea-Land Service, Inc.* 33 BRBS 127, 128 (1998); *Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56, 59 (1985). In order to establish a prima facie case of total disability, the claimant bears the burden of showing he is unable to return to his usual work or the work he was performing at the time of his injury. *See, e.g., Marine Repair Services, Inc. v. Fifer*, 717 F.3d 327, 334 (4th Cir. 2013); *Norfolk Shipbuilding & Dry Dock Co. v. Hord*, 193 F.3d 797, 800 (4th Cir. 1999); *Manigault v. Stevens Shipping Co.*, 22 BRBS 332, 333 (1989). In determining whether a claimant can return to his usual work, the ALJ must compare the claimant's medical restrictions with the requirements of his usual employment. *See*

Obadiaru v. ITT Corp., 45 BRBS 17, 21 (2011). If the claimant establishes he is unable to return to his usual employment, the burden shifts to the employer to show the availability of suitable alternate employment. *Fifer*, 717 F.3d at 334; *Gacki*, 33 BRBS at 128.

The ALJ compared Claimant's pulmonary-related medical restrictions with his description of his work in the RSA lanes and found he failed to establish he was unable to return to his usual employment due to his work-related pulmonary injury. D&O at 50. Based on Dr. Spandorfer's testimony, she summarized Claimant's assigned restrictions as follows:

> Claimant should not work in closed spaces where he would encounter "a lot" of diesel fumes, exhaust, or other triggers, and he should not work in outdoor spaces that are not open air or well-ventilated where [he] would have substantial exposure to a trigger.

Id. at 51-52; *see* CX 8 at 8 (transcript pp. 26-27). The ALJ permissibly found these restrictions did not prohibit Claimant from working in the RSA area because it was not enclosed, there was no record evidence of substantial exposure to fumes in the area, and Dr. Spandorfer testified that the absence of worsening symptoms following his return to work indicates Claimant was able to return to his regular employment. *Id*. at 51-52; *see* CX 8 at 8 (transcript p. 28); *see also, e.g., Fifer*, 717 F.3d at 334; *Obadiaru*, 45 BRBS at 21.

The ALJ also placed significant weight on Claimant's lack of credibility regarding his ability to return to work, which she permissibly assessed from her review of the record as a whole and observations of Claimant during his hearing testimony. D&O at 52; *see Simonds*, 35 F.3d at 127. She noted he returned to his regular job the day following the October 2017 incident, he continued to work until he was terminated for cause in January 2018 (except for a brief disciplinary suspension) without any documented problems due to his injury, and the record lacked any evidence, other than Claimant's own testimony, that he was unable to fulfill his duties without the assistance of co-workers. *Id*. at 50, 52. Furthermore, she found the identification of diesel fumes in the RSA as a potential "trigger" originated with Claimant, not Dr. Spandorfer, who did not identify diesel fumes as a "typical" trigger during his testimony. *Id*. at 51; *see* CX 8 at 5 (transcript p. 14). The ALJ likewise found Claimant's assertions as to his physical inability to perform his usual employment undermined by his testimony that the failure of his grievances was the only reason he was not still employed, and by his subsequent applications for the same position (leading to additional grievances challenging Employer's refusal to rehire him). D&O at 50, 52; *see* HT at 146; EX 6 at 4. As substantial evidence supports the ALJ's findings and considering the deference to be accorded an ALJ's credibility determinations, we affirm her finding that Claimant did not establish an inability to return to his usual work because

of his work injury. *Jackson*, 848 F.3d at 120. We likewise affirm her rational finding that Claimant's termination for cause does not establish he cannot perform the duties of his usual employment. *Id*. at 52; *see Brooks v. Director, OWCP*, 2 F.3d 64, 65-66 (4th Cir. 1993).

Accordingly, we affirm the ALJ's Decision and Order Denying Benefits.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge