U.S. Department of Labor

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

BRB No. 20-0494

ABDULLA BARWARI Claimant-Petitioner v. TITAN CORPORATION and INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA Employer/Carrier-Respondents	)	DATE ISSUED: 01/18/2023 DECISION and ORDER

Appeal of the Decision and Order of Stewart F. Alford, Administrative Law Judge, United States Department of Labor.

Jeffrey M. Winter and Scott MacInnes (The Law Office of Jeffrey Winter), San Diego, California, for Claimant.

Michael D. Doran (Thomas Quinn, LLP), San Francisco, California, for Employer/Carrier.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Stewart F. Alford's Decision and Order (2017-LDA-00884) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (Act), and as

extended under 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 began working for Employer as a translator beginning in 2003 in Kuwait and Iraq.[2] Claimant's Petition (Cl. Pet.) at 6. He lived and worked overseas, alongside the U.S. military, experiencing the same war-time exposures. In 2005, while in Iraq, Dr. Ross McFarland examined Claimant and diagnosed him with Type II diabetes. Following tests, he recommended Claimant not remain in or return to Iraq due to the unavailability of proper medical care there. CX 11. Claimant was sent home in July 2005 and came under the care of Dr. Robert Santella. Claimant later attempted to return to work in the Middle East, but despite Dr. Santella's letter stating he was medically capable of returning to work as an interpreter,[3] he was ultimately found medically unfit to return overseas due to his diabetes after being evaluated at Fort Benning. He was temporarily disqualified until he could retest

[1] The Board's processing of this case was substantially delayed due to the COVID-19 pandemic, which impacted the Benefits Review Board's ability to obtain records from the Office of Administrative Law Judges and the Office of Workers' Compensation Programs (OWCP). Additionally, on June 30, 2022, the Board issued an Order remanding this case to the OWCP for the district director to reconstruct the record. On September 7, 2022, the Board issued an Order reinstating the appeal. The record now appears complete; and although no documents have been labeled with their exhibit numbers, we have located the documents necessary to address this appeal.

[2] This matter arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit because the ALJ's decision was filed with the OWCP District 18 office, which is in Long Beach, California. 33 U.S.C. §921(c); *McDonald v. Aecom Tech. Corp.*, 45 BRBS 45 (2011).

[3] In August 2005, Dr. Santella wrote a reinstatement letter for Claimant stating, "having ruled out and corrected all three of his potential problems, hypertension, diabetes, and airway disorders, I feel that he can return to the field and active combat conditions as an interpreter for the Armed Forces and do whatever is required of his highly specialized job." CX 23.

his A1c levels 90 days later.[4] CX 10. Claimant resigned on October 8, 2005, before the retest. He filed a claim for benefits on March 16, 2017. CX 1.

The ALJ found Claimant's diabetes and hypertension were not work-related and, consequently, Claimant's depression, allegedly brought on by his diabetes and hypertension, is also not work-related. In so finding, the ALJ invoked the Section 20(a) presumption, 33 U.S.C. §920(a), as to both Claimant's diabetes and hypertension. D&O at 35-41. He reviewed and discussed the seven physicians who treated and evaluated Claimant and found Employer rebutted the presumption for both his diabetes and hypertension with Dr. Edelman's opinion, and with Drs. Sun and Maisel's opinions, respectively. *Id.* In weighing the record as a whole, the ALJ gave greater weight to Employer's experts and found Claimant's diabetes and hypertension are not work-related. Given his finding Claimant's diabetes and hypertension are not work-related, the ALJ also found Claimant's depression allegedly stemming from those conditions is not work-related. Alternatively, the ALJ found Claimant's psychiatric records do not establish a connection between his time working for Employer and his psychological symptoms. *Id.* at 42.

Claimant appeals the denial of benefits. Employer responds, urging affirmance, and Claimant filed a reply. Claimant contends the ALJ erred in finding his diabetes and hypertension are not work-related, in requiring him to establish whether he had diabetes and hypertension before working for Employer, in finding Employer rebutted the Section 20(a) presumption for those conditions, and in finding his depression was not work-related.[5]

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[4] Elevated A1c levels are an indicator of uncontrolled diabetes. The level should be below 7 under Department of Defense standards. CX 42 at 613-614. At the time Claimant was evaluated at Fort Benning, his A1c levels were 8. CXs 8, 9, 11, 23.

[5] While Claimant generally asserts the ALJ erred in finding his hypertension is not work-related in his introductory and concluding paragraphs of his brief, he dedicated no argument, identified no fact, and cited no authority to support that contention. We therefore do not address this inadequately briefed issue. *Montoya v. Navy Exch. Serv. Command*, 49 BRBS 51 (2015). Additionally, with respect to Claimant's assertion that the ALJ erred in placing "an improper burden" on him to establish his pre-employment medical condition for purposes of determining "the origins" of his diabetes, we note the ALJ invoked the Section 20(a) presumption, 33 U.S.C. §920(a), for Claimant's diabetes. He did not make Claimant bear a heavy burden to do so. *Rose v. Vectrus Systems Corporation*, __ BRBS __, BRB No. 20-0279 (Dec. 29, 2022) (Decision on Recon. en banc) (Buzzard, J., concurring and dissenting) (Boggs, C.J., dissenting). Given our holding that Claimant's diabetes is work-related as a matter of law, and our rejection of Claimant's hypertension

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*, __ BRBS __, BRB No. 20-0279 (Dec. 29, 2022) (Decision on Recon. en banc) (Buzzard, J., concurring and dissenting) (Boggs, C.J., dissenting); *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). An "accidental injury" includes one occurring gradually as a result of continuing exposure to conditions of employment and is sufficient to sustain an award if the employment "aggravates the symptoms of the process." *Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986); *Gardner v. Bath Iron Works Corp*., 11 BRBS 556 (1979), *aff'd sub nom. Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981) (an aggravation or progression of an underlying condition is not necessary for there to be a compensable injury; an increase in symptoms resulting in disability is sufficient). Where a claimant has a pre-existing condition and raises both causation and aggravation, as here, Section 20(a) applies to whether the injury is caused directly by the claimant's employment or is the result of the aggravation of the prior condition. *See, e.g., Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004).

Once the claimant establishes the elements of a *prima facie* case, the Section 20(a) presumption is invoked. To rebut the Section 20(a) presumption, the employer must produce substantial evidence showing the injury was not caused or aggravated by the claimant's employment. *See, e.g., Duhagon v. Metro. Stevedore Co*., 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999), *aff'g* 31 BRBS 98 (1997). If it does, the presumption drops 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.* When there is no evidence contradicting a claimant's testimony regarding the work he performed, and the employer does not present substantial evidence rebutting the presumption, the ALJ may properly find the Section 20(a) presumption was invoked and not rebutted, and the injury is work-related as a matter of law. *Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011).

In this case the ALJ properly invoked the Section 20(a) presumption as to both Claimant's diabetes and hypertension based on Claimant's diabetes diagnosis and the opinion of various physicians that stress and diabetes are connected. *Rose*, slip op. at 9; D&O at 35-36, 39. That finding has not been challenged. Rather, Claimant challenges

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allegations as inadequately briefed, we need not address whether the ALJ erred in finding those conditions not work-related on the record as a whole. *See* n.7, *infra*.

rebuttal. In finding the presumption rebutted for diabetes, the ALJ relied on Dr. Edelman's opinion. D&O at 37. Dr. Edelman clearly stated Claimant's employment was not the direct cause of his diabetes. CX 40 ("[i]t is my opinion to a high degree of medical probability, that Mr. Barwari's work in Iraq including the stress and food he consumed there is not [the] cause [of] his type 2 diabetes"); CX 81.[6] However, Dr. Edelman also specifically stated: "I think he was destined to get Type 2… [i]f he gained weight over there, which I think he did, stress of being an interpreter that might have brought out diabetes sooner… ." CX 81 at 36. Additionally, he stated: "I think the biggest thing with Mr. Barwari is probably the weight gain, but stress could have helped bring on diabetes a little sooner if you look at the physiology of stress and antiinsulin hormones." *Id.* at 42. Dr. Edelman conceded the stress from work could have played a role in the earlier onset of Claimant's diabetes: "I did say it's possible that it accelerated, but I don't think I'm prepared to say it's more likely than not." *Id.* at 46. Finally, he concluded, "I can't really tell you if it's more likely than not, but [stress from overseas employment] may have contributed to [Claimant's diabetes] occurring sooner." *Id.*

In order to rebut the Section 20(a) presumption, an employer must present substantial evidence that the claimant's injury did not arise out of his employment. An equivocal opinion as to etiology is insufficient to support rebuttal. *Parsons Corp. of California v. Director, OWCP,* 619 F.2d 38, 12 BRBS 234 (9th Cir. 1980) (rebuttal requires evidence "specific and comprehensive enough to sever the potential connection between the disability and the work environment;" the standard is not met where an expert could not say exposure did not trigger or accelerate the disease); *Phillips v. Newport News Shipbuilding & Dry Dock Co*., 22 BRBS 94 (1988).

Claimant's ultimate burden is to establish it is more likely than not that his working conditions caused or aggravated his diabetes, and he successfully invoked the presumption that his work aggravated his diabetes. In response, Dr. Edleman did not explicitly contend it is more likely than not that working conditions *did not* aggravate Claimant's diabetes. He instead repeatedly acknowledged working conditions may have aggravated or accelerated Claimant's diabetes, that he did not know whether that was "more likely than not" to be the case, and that his opinion was subject to change upon reflection. Binding caselaw establishes Dr. Edleman's statement as too equivocal to sever the potential for Claimant's work to have aggravated or hastened his diabetes, and it therefore cannot rebut the Section 20(a) presumption. *Parsons Corp.,* 619 F.2d 38, 12 BRBS 234; *Phillips* 22 BRBS 94 (1988). As Dr. Edelman's opinion is the sole rebuttal opinion on the matter of

[6] Claimant does not dispute Dr. Edelman's expertise or credentials, but he does assert the ALJ confused legal causation with medical causation in finding Dr. Edelman's opinion rebutted the 20(a) presumption.

Claimant's diabetes, the presumption does not fall from the case. Thus, Claimant's diabetes was aggravated by his employment as a matter of law. *Parsons Corp.*, 619 F.2d 38, 12 BRBS 234; *see also Am. Grain Trimmers, Inc. v. Director, OWCP [Janich]*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999) (en banc), *cert. denied*, 528 U.S. 1187 (2000); *Bath Iron Works Corp. v. Director, OWCP [Shorette]*, 109 F.3d 53, 31 BRBS 19(CRT) (1st Cir. 1997); *Fortier v. Gen. Dynamics Corp.*, 15 BRBS 4 (1982), *aff'd mem.*, 729 F.2d 1441 (2d Cir. 1983) (employer failed to produce substantial evidence that claimant's lung condition and symptoms were not caused at least in part by his employment). Therefore, we reverse the ALJ's finding that Claimant's diabetes is not work-related and remand the case for a determination of his entitlement to benefits.[7]

As for Claimant's argument regarding his depression secondary to his diabetes and hypertension, we agree with Claimant's position that the ALJ's finding cannot stand. The ALJ, originally having found neither Claimant's diabetes nor hypertension work-related, denied his depression claim. *R.F. [Fear] v. CSA, Ltd.*, 43 BRBS 139 (2009) (a secondary injury is not compensable when the primary injury is found not compensable); *see also Metro Mach. Corp. v. Director, OWCP*, 846 F.3d 680, 50 BRBS 81(CRT) (4th Cir. 2017). We have held, however, that Claimant's diabetes is work-related as a matter of law. Therefore, we must vacate the ALJ's finding that Claimant's depression also cannot be work-related.

Although Claimant did not identify depression on his claim for compensation form, CX 1, his claim evolved to include depression as a result of his alleged work-related injuries. When a claimant claims a work-related primary injury as well as a secondary injury resulting from the primary injury, the Section 20(a) presumption applies to both. *Metro Mach.*, 846 F.3d 680, 50 BRBS 81(CRT); *see also U.S. Ind./Fed. Sheet Metal, Inc. v. Director, OCWP*, 455 U.S. 608 14 BRBS 631(1982); *but see Ins. Co. of the State of Pennsylvania v. Director, OWCP [Vickers],* 713 F.3d 779, 47 BRBS 19(CRT) (5th Cir. 2013); *see generally Port of Portland v. Director, OWCP [Ronne II]*, 192 F.3d 933, 33 BRBS 143(CRT) (9th Cir. 1999), *cert. denied*, 529 U.S. 1086 (2000). On remand, the ALJ must address whether Claimant's depression is a work-related sequela injury. *Seguro v. Universal Mar. Serv. Corp.*, 36 BRBS 28 (2002); *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994). To be entitled to the Section 20(a) presumption linking his secondary psychological injury to his employment, Claimant must sufficiently allege his depression "(or its aggravation or hastening) could have *naturally or unavoidably* resulted from the primary injury" (his diabetes). *Metro Mach.*, 846 F.3d at 692-693, 50 BRBS at 88(CRT) (emphasis in original). As the Board explained in *Rose*, this is not a heavy burden. *Rose*,

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[7] As Employer did not rebut the presumption regarding Claimant's diabetes, weighing the evidence as a whole is unnecessary.

slip op. at 22-23.[8] If Claimant does so, the ALJ must assess whether Employer has submitted substantial evidence of an intervening or independent cause for Claimant's depression or that it did not naturally and unavoidably result from his diabetes. *Cyr v. Crescent Wharf & Warehouse Co.*, 211 F.2d 454 (9th Cir. 1954); *Wright v. Connolly-Pac. Co.*, 25 BRBS 161 (1991), *aff'd mem. sub nom. Wright v. Director, OWCP*, 8 F.3d 34 (9th Cir. 1993). If Employer rebuts the presumption, it falls from the case and the matter must be decided on the record as a whole, with the burden of persuasion on Claimant. *Wright*, 25 BRBS 161.

Accordingly, we reverse the ALJ's finding that Claimant's diabetes is not work-related, vacate the finding that Claimant's depression is not work-related, and affirm the remainder of the ALJ's Decision and Order. We remand this case for further consideration consistent with our decision.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

[8] "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*, slip op. at 22-23.