U.S. Department of Labor

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

BRB No. 21-0245

RANDALL E. HOOD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
REEFER EXPRESS, LLC	)	
	)	DATE ISSUED: 01/31/2023
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION LIMITED	)	
	)	
Employer-Respondent	)	DECISION and ORDER

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

Lara Duerig Merrigan (Merrigan Legal), Sausalito, California, and Ralph Lorberbaum (Zipperer Lorberbaum & Beauvais), Savannah, Georgia, for Claimant.

Richard P. Salloum (Franke & Salloum, PLLC), Gulfport, Mississippi, for Employer/Carrier.

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

BUZZARD and ROLFE, Administrative Appeals Judges:

Claimant appeals Administrative Law Judge (ALJ) Monica Markley's Decision and Order Denying Benefits (2017-LHC-00039; 2017-LHC-00040; 2017-LHC-00391) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation

Act, as amended, 33 U.S.C. §901 *et seq.* (Act). 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 worked for Employer as a container and chassis mechanic and then later as a reefer mechanic working on refrigeration units.[1] Hearing Transcript (TR) at 37. He alleges three separate incidents occurred on June 10, 2015, November 30, 2015, and August 24, 2016, which resulted in pain to his back. Claimant's Petition (Cl. Pet.) at 2-4. On June 10, 2015, working as a flag man, he jumped out of the way of a container truck to avoid being run over. TR at 39. He reported the incident to his foreman and drove himself to the Concentra Emergency Care Unit, complaining of pain in his neck and back.[2] *Id.* at 40. On November 30, 2015, while leaning over a generator, he felt and heard a pop in his back and immediately notified his foreman. Claimant drove himself to the emergency room and was involved in a motor vehicle accident en route.[3] Finally, on August 24, 2016, Claimant felt and heard a pop in his back while exiting his truck; he reported the pain to his foreman who drove him to the urgent care. Cl. Pet. at 4; TR at 54. Claimant underwent various exams. He was diagnosed with mild "degenerative disc changes upper lumbar spine," "[c]hronic appearing deformities," and "cervical problems and herniated disc at C6-7," caused "directly by or contributed to by the MVA [motor vehicle accident] of 11/30/2015." He was further diagnosed with "[l]eft, chronic L5 and S1 radiculopathy" with "no active signs of active denervation" and "an early or mild, generalized sensory axonal polyneuropathic process." CXs 21, 22, 23, 25.

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit because the injury occurred in Georgia. 33 U.S.C. §921(c); *Hon v. Director, OWCP*, 699 F.2d 441 (8th Cir. 1983).

[2] Claimant filed a claim for compensation. The form, dated April 14, 2016, describes the injury on June 10, 2015, as a low back injury caused by repetitive bending and stooping over containers. CX 1. We note, however, that Claimant appears to have abandoned any working conditions claim as he did not make the argument at the hearing or in his post-hearing brief before the ALJ.

[3] Claimant was treated at OptimHealthCare. He returned for a follow up visit on December 21, 2015, where he stated that on November 30, 2015, "he felt a pop in his back after bending over." Claimant was ultimately diagnosed with "Cervical radiculopathy secondary to motor vehicle accident." CX 22 at 8.

In her January 11, 2021 decision, the ALJ found the parties stipulated Claimant's first injury, on June 10, 2015, fully healed as of October 22, 2015. Decision and Order (D&O) at 3. With respect to the later claimed injuries, she found Claimant did not establish either prong of his prima facie case and was not entitled to the Section 20(a) presumption, 33 U.S.C. §920(a). She found Claimant not credible due to his varying iterations of how the alleged incidents occurred, and she denied his claim.

Claimant appeals the ALJ's denial of benefits, arguing the ALJ incorrectly found he is not entitled to benefits for his June 2015 incident because the parties stipulated that the issue was resolved. Claimant first argues he did not stipulate to the June 2015 incident being resolved and moreover his attorney argued as much in his opening statement. Second, Claimant argues the ALJ erroneously assessed credibility during the Section 20(a) presumption analysis. Cl. Pet. at 1. Claimant alleges a misapplication of the Section 20(a) presumption because a claimant need only present some evidence of a harm and a cause. Cl. Pet. at 13. Requiring him to prove causation would mean holding claimants to a higher burden than employers and higher than what the statute intended. Cl. Pet. at 16-17. Employer responds, urging affirmance.

The ALJ found the parties stipulated the June 2015 incident was a medical-only issue and the injury had resolved, relying on Claimant's attorney's failure to raise an objection, add, correct, or clarify her statements regarding the issues in dispute.[4] D&O at 48.

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[4] The ALJ specifically stated, D&O at 48:

> Employer's counsel stated that Employer 'stipulate[s] and agree[s] that Mr. Hood sustained an injury on 6/10/15 that was a medical-only injury that he recovered fully from and was released to return to work.' (TR at 24). Counsel stated that Employer contested the other two alleged dates of injury (November 30, 2015, and August 24, 2016). Employer agreed the claims were timely filed. I noted those areas of agreement, and listed the remaining issues in dispute. (TR at 24). I asked Claimant's counsel if he had 'any additions or clarifications,' and he answered no. (TR at 25). Thus, at the hearing, Claimant did not challenge Employer's statement that one of the issues of agreement was that Claimant had suffered an injury on June 10, 2015, from which he had fully recovered. Based on his representation that he had no additions or clarifications to make, I find that Claimant forfeited any claim that he did not fully recover from his June 10, 2015 injury, and I therefore find that Claimant did in fact fully recover from the June 10, 2015 injury without loss of earnings, and he is not entitled to further compensation or medical benefits on that claim.

Stipulations are offered in lieu of evidence and therefore may be relied on to establish an element of the claim. *Ramos v. Global Terminal & Container Services, Inc*., 34 BRBS 83 (1999). They are "express waiver[s] . . . conceding for the purposes of trial the truth of some alleged fact[,]" *Mitri v. Global Linguist Solutions*, 48 BRBS 41, 44, n.9 (2014) (quoting *Vander Linden v. Hodges*, 193 F.2d 268, 279 (4th Cir. 1999)), and, as a general rule, are binding upon the parties who make them. *G.I.C. Corp., Inc. v. United States*, 121 F.3d 1447 (11th Cir. 1997). However, evidence of an objective lack of intent to be bound invalidates the stipulation, as a stipulation may not be subject to subsequent variation because the "vital feature" of a stipulation is "its conclusiveness upon the party making it." *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 592 (2013); *see, e.g., Mitri*, 48 BRBS at 43-44 (holding a stipulation that gives an employer the right to unilaterally decrease or terminate the claimant's compensation upon changes in condition is contrary to law). Accepting stipulations is within the ALJ's discretion so long as they do not evince an incorrect application of law, and they do not involve legal issues. *Simonds v. Pittman Mech. Contractors, Inc.*, 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mech. Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994); *Puccetti v. Ceres Gulf*, 24 BRBS 25 (1990).

While Claimant argues his attorney made it clear he did not waive a claim for benefits as to the June 10, 2015 incident, the hearing transcript does not reflect it. Claimant's attorney stated:

> [h]e is seeking temporary-total disability from November 30, 2015, through June 4, 2016. That's temporary-total. He's seeking temporary-total disability from August 24, 2016, to date, and continuing. He's seeking his past medical expenses, whether they be reimbursed to him, to his group insurance company, reimbursement of co-pays, and the right to get Section 7 medical care subject to order of the Court [.]

TR at 33. Claimant's attorney sought benefits for the November 30, 2015 incident and the August 24, 2016 incidents but not for the June 10, 2015 incident.

The ALJ, within her discretion, reasonably accepted the verbal stipulation between the parties during the hearing. Claimant's attorney made no objection or correction at the time of the hearing and, vitally, did not brief the issue of whether Claimant's June 2015 injury was fully healed and whether Claimant is entitled to any additional benefits for that specific incident. Cl. P-H Br. 6, 18-28. The record, therefore, supports the ALJ's determination Claimant did not sufficiently preserve the argument.

In any event, any error the ALJ may have made in relying on this stipulation is harmless because she fully addressed whether Claimant's June 2015 injury had resolved,

concluding Claimant did not establish his medical treatment or his inability to work after October 22, 2015, is due to his June 2015 injury. D&O at 48-50. She noted Claimant was primarily treated for an injury to the left side of his back following the June 2015 incident, CX 26 at 1, whereas the November 2015 injury, which Dr. Hagerty's August 22, 2016 statement attributed generally to his "incident at work," was on the right side. *Id.* at 42, 48.[5] She further noted he was released to full-duty work as of October 22, 2015, after receiving lumbar facet injections and reporting significant relief from his symptoms. *Id.*; CX 22 at 7. She therefore concluded any work-related disability stemming from the June 2015 incident resolved as of October 22, 2015, and Claimant is not entitled to any further benefits for his June 2015 injury. Substantial evidence of record supports the ALJ's finding, as Dr. McCormick stated Claimant received "significant relief" from the initial injections to his lumbar spine following the June 2015 incident and released Claimant to full duty work as of October 22, 2015. CX 22 at 7. Therefore, we affirm the denial of benefits related to the June 2015 accident.

Claimant next contends the ALJ erred in failing to invoke the Section 20(a) presumption for his alleged November 2015 and August 2016 injuries. 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); *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.[6] *Rose*, slip op. at 18. Credibility can play no role in addressing whether a claimant has established a prima facie case. *Rose*, slip op. at 21. 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.*, slip op. at 22. Instead, the claimant need

[5] Dr. Hagerty's August 22, 2016 report does not reference the right or left side of the back except for noting "[i]t was the same area as his previous area of pain." CX 26 at 34. Dr. McCormick, however, reported Claimant stated he has had right cervical spine pain since November 30, 2015. CX 22 at 8. Claimant's reports of injury identify right-sided pain from the November 2015 and August 2016 alleged incidents. EXs 11, 19.

[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*, slip op. at 22-23.

only "present some evidence or allegation that if true would state a claim under the Act."[7] *Id.* Consequently, if the claimant produces some evidence to support his prima facie case, he is entitled to the presumption that his injury is work-related and compensable. *Id.*

Here, the ALJ erred in assessing Claimant's credibility. Claimant sufficiently alleged a harm and working conditions that could have caused it. To demonstrate a harm, Claimant produced an MRI administered on December 24, 2015, following the November 30, 2015 incident, showing moderate right lateral disc protrusion at C6-7, CX 22 at 9, Dr. Joseph Hegarty's August 22, 2016 opinion that Claimant has lumbar facet syndrome and his "lumbar condition was aggravated by the incident at his job," CX 26 at 34, Dr. Hegarty's November 28, 2016 report indicating Claimant has left lumbar radiculitis, EX 21 at 5, as well as the records of a myelogram conducted on March 13, 2017, showing degenerative changes in the spine and a small broad-based central disc protrusion at T12-L1 and bulge at L3-4. CXs 1, 4, 7, 20, 21-23, 25-26, 20, 36; EXs 21, 30. Additionally, Claimant has identified work accidents related to his job duties which he states caused pain to his back, occurring on November 30, 2015, and August 24, 2016. Therefore, Claimant has produced some evidence of both a harm and accidents which could have caused the harm, thereby invoking the Section 20(a) presumption. *Rose*, slip op. at 22-23. Consequently, we reverse the ALJ's finding to the contrary and the denial of benefits and remand the case for her to address the remaining causation analysis and any other remaining issues.

Accordingly, we affirm the ALJ's finding that injury related to the June 10, 2015 incident resolved. We reverse the ALJ's denial of benefits with respect to the alleged

[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*, slip op at 23.

November 30, 2015 and August 24, 2016 injuries, and remand the case for further consideration consistent with this decision.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

BOGGS, Chief Administrative Appeals Judges, concurring:

I concur on the outcome because I am bound by the Board's decision in *Rose*.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge