U.S. Department of Labor

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

BRB No. 23-0108
and 23-0301

CALVIN F. CHAFFERS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JEFFBOAT, INCORPORATED	)	DATE ISSUED: 06/05/2024
	)	
and	)	
	)	
AMERICAN LONGSHORE MUTUAL ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits and Order Granting Benefits of Jerry R. DeMaio, Administrative Law Judge, United States Department of Labor, and the Order Approving Attorney Fee of David A. Duhon, District Director, United States Department of Labor.

Amity L. Arscott and Dana Simoni (Embry Neusner Arscott & Shafner, LLC), Groton, Connecticut, for Claimant.

Kevin A. Marks and Kent W. Patterson (Melchiode Marks King LLC), New Orleans, Louisiana, for Employer/Carrier.

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

GRESH, Chief Administrative Appeals Judge, and BUZZARD, Administrative Appeals Judge:

Employer appeals Administrative Law Judge (ALJ) Jerry R. DeMaio's Decision and Order Awarding Benefits and Order Granting Benefits (2019-LHC-00296), and District Director David A. Duhon's Order Approving Attorney Fee (LS-08313511), 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 applicable 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 from June 2005 to February 2017, in various jobs[1] at its Jeffersonville, Indiana, facility.[2] HT at 15. He testified this work exposed him to significant lung irritants,[3] EX 8, Dep. at 40, 52-54, he started to experience breathing issues in 2015 or 2016, HT at 52; EX 8, Dep. at 34, but continued to work until Employer went out of business in 2017. HT at 57, EX 8, Dep. at 14-15. Since that time, Claimant, who has several other serious health conditions,[4] has not worked. HT at 58; EX 8, Dep. at 11-13.

[1] Claimant worked as a first-class painter from 2005-2008, a paint quality inspector from 2008-2014, and a paint supervisor from 2014-2017. HT at 15, 30, 33; EX 8 at 15, 58, 66. He also worked as an Emergency Medical Technician and a shipyard competent person, and he volunteered to sandblast four or five times per month. *Id.* at 27-28, 34-36.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit because the injury occurred in Indiana. 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 stated he inhaled Methyl Ethyl Ketone, ammonia, anti-freeze, paint thinner, as well as paint, welding, and sandblasting fumes. EX 8, Dep. at 40, 52-54.

[4] Claimant has been diagnosed with numerous non-work-related conditions and was awarded Social Security disability benefits on August 26, 2019, based on several of these conditions. *Id.* at 88-89; EXs 6 and 8, Dep. at 13. The ALJ deemed Claimant's medical history sensitive and thus issued his decision "**UNDER SEAL**" because of "the sensitivity of the issues in this case." D&O at 2. He simultaneously issued an unsealed Order Granting Benefits memorializing his conclusions.

In his report dated March 28, 2021, Dr. Ankit Gupta diagnosed Claimant with a moderate restrictive lung impairment on pulmonary function testing after a telephonic interview with Claimant and a review of his medical records. CX 2; CX 4, Dep. at 10-12. At his deposition, he also diagnosed chronic obstructive pulmonary disease (COPD) based on the presence of emphysema on Claimant's CT scan. CX 4, Dep. at 10. Dr. Gupta opined Claimant's workplace exposures contributed to his lung conditions. CX 2; CX 4, Dep. at 11. Dr. William Frazier, who conducted a records review, concluded Claimant does not have any pulmonary disease (COPD, restrictive pulmonary disease, or pulmonary fibrosis) but does exhibit common symptoms of shortness of breath and a cough which could result from many non-work-related potential causes, including Claimant's underlying non-work-related health conditions. EX 2; EX 10, Dep. at 32, 53, 59, 63. He stated, "the question of disease causation for pulmonary diseases is moot" because Claimant "has not had a primary pulmonary disease confirmed."[5] EX 2.

Meanwhile, Claimant filed a claim under the Act for permanent partial disability and medical benefits for his alleged pulmonary condition, which Employer controverted. The case was forwarded to the Office of Administrative Law Judges for a formal hearing, which the ALJ held via teleconference on August 26, 2021.

In his decision, the ALJ found Claimant invoked the Section 20(a) presumption, 33 U.S.C. §920(a), connecting his lung issues to his work exposures, through his testimony and Dr. Gupta's medical evidence. He next found Employer rebutted the presumption with Dr. Frazier's testimony. Weighing the evidence as a whole, the ALJ gave the greatest weight to Dr. Gupta's opinion and concluded Claimant's pulmonary impairment is causally related to his work for Employer. Finding Dr. Gupta's pulmonary impairment rating "the best, and perhaps only, level of disability supported by the record," the ALJ awarded Claimant permanent partial disability benefits pursuant to Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23), from March 28, 2021, for a 14% respiratory impairment, and medical benefits, 33 U.S.C. §907(a).

Thereafter, Claimant's counsel filed an itemized fee petition with the district director seeking an attorney's fee under 33 U.S.C. §928(a), totaling $7,358.25 for 13.25 hours of attorney time at an hourly rate of $501, and 5 hours of paralegal time at an hourly

[5] At his deposition, Dr. Frazier reiterated it is moot to consider the conditions of Claimant's employment as a possible cause if he does not have any disabling respiratory condition. EX 10, Dep. at 64. Dr. Frazier further responded "[t]hat's true" when asked "even if there were some sort of diagnosable pulmonary disorder, injury, condition, illness, you saw nothing to link that hypothetical injury or condition or illness to conditions of employment." *Id.* at 64-65.

rate of $144, plus $456.62 in costs.[6] Employer filed objections to the fee petition. In an order dated April 18, 2023, the district director awarded Claimant's counsel an attorney's fee of $4,697.50,[7] representing 9.75 hours of attorney work at $388 per hour, 4.625 hours of paralegal work at $99 per hour, plus $456.62 in expenses.

Employer appeals the ALJ's award of permanent partial disability benefits, asserting he erroneously invoked the Section 20(a) presumption and otherwise erred in finding Claimant established a work-related respiratory condition based on the record as a whole. BRB No. 23-0108. Claimant responds, urging affirmance of the ALJ's decision. Employer filed a reply brief reiterating its contentions.

Employer also appeals the district director's award of an attorney's fee, alleging the awarded hourly rate and number of hours are excessive. BRB No. 23-0301. Claimant responds, urging affirmance of the award.[8]

BRB No. 23-0108 – Entitlement to Benefits

Employer asserts the ALJ erred in finding Claimant established both elements of his prima facie case and, therefore, in invoking the Section 20(a) presumption. It maintains Claimant did not meet the harm element because the record, and most notably Dr. Frazier's report, conclusively establishes Claimant does not have any pulmonary or lung condition. Next, it asserts that even assuming Claimant established he had such a condition, he did not meet the working conditions element because "no treating physician has even hinted, much less concluded," that any possible respiratory condition is related to Claimant's work

[6] Claimant's counsel also filed a fee petition with the ALJ, who, by order dated March 31, 2023, awarded counsel employer-paid fees and costs totaling $48,952.55. At that time, the ALJ acknowledged his supplemental decision "is neither enforceable nor payable until a final decision is issued in this case." The ALJ's fee award has not been appealed.

[7] This represents a correction of a mathematical error in the district director's calculation of the total fee awarded Claimant's counsel. The district director awarded $3,783 for attorney work (9.75 hours at $388/hour), $457.88 for paralegal work (4.625 hours at $99/hour), plus $456.62 in expenses, which totals $4,697.50, rather than, as the district director's order states, $4,695.50.

[8] The Benefits Review Board, by order dated September 13, 2023, consolidated Employer's appeals for purposes of this decision. *Chaffers v. Jeffboat, Inc.*, BRB Nos. 23-0108 and 23-0301 (Sept. 13, 2023) (unpub. Order).

for Employer. Finally, Employer asserts the ALJ erred in finding Claimant established causation based on the evidence as a whole because the record contains no identifiable disabling respiratory condition that can be related to his work. It maintains the ALJ erred in crediting Dr. Gupta's speculative opinion over the thorough and detailed explanation provided by Dr. Frazier which established Claimant did not sustain any disabling or even diagnosable pulmonary condition.

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 Am. Grain Trimmers, Inc. v. Director, OWCP [Janich]*, 181 F.3d 810, 816 (7th Cir. 1999) (en banc), *cert. denied*, 528 U.S. 1187 (2000); *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.[9] *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."[10] *Id.* Consequently, if he establishes his prima facie case, Claimant is entitled to the presumption that his injury is work-related and compensable. *Id.*

In this case, the ALJ found Claimant satisfied the harm element through his own testimony that he experiences shortness of breath upon exertion and coughing which was corroborated by both Drs. Gupta and Frazier, "as well as in many of the medical records." D&O at 9. He next found the working conditions element satisfied through Dr. Gupta's opinion that Claimant's lung condition could be causally related to his workplace exposures to sandblasting and paint fume inhalation. *Id.* As the ALJ found, the record contains substantial evidence that documents Claimant's respiratory symptoms, HT at 51-52; EX 8, Dep. at 33-35; CX 2; CX 4, Dep. at 5, 8; EXs 2, 3, 10, and includes Dr. Gupta's diagnosis of "a restrictive lung disease." CX 2; CX 4, Dep. at 8-10. Additionally, it

[9] "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.

[10] "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.

contains Claimant's testimony regarding his work exposures to lung irritants, HT at 22, 26-30, 32, 46; EX 8, Dep. at 40, 52-54, as well as Dr. Gupta's opinion that, "within a reasonable degree of medical certainty, [Claimant's] workplace exposures contributed to his lung issues;" CX 2, a statement Dr. Gupta confirmed during his deposition, CX 4 at 12.

As Claimant's burden at the invocation stage is a light one, and he testified to his work exposures and respiratory symptoms, and produced a medical opinion connecting them, we affirm the ALJ's finding that Claimant invoked the Section 20(a) presumption. *Rose*, 56 BRBS at 37; *see also Janich*, 181 F.3d at 816. We also affirm, as unchallenged, the ALJ's finding that Employer rebutted the presumption with Dr. Frazier's opinion. *Scalio v. Ceres Marine Terminals, Inc*., 41 BRBS 57, 58 (2007).

Because Employer rebutted the Section 20(a) presumption, the ALJ was required to weigh all the relevant evidence and resolve the causation issue based on the record as a whole, with Claimant bearing the burden of persuasion. *See Janich*, 181 F.3d at 814-815; *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 257, 28 BRBS 43(CRT) (1984). In doing so, the ALJ has the authority and discretion to weigh the evidence, accepting any medical opinion in whole or in part, and draw reasonable inferences therefrom. *See generally Carswell v. E. Pihl & Sons*, 999 F.3d 18, 27-28 (1st Cir. 2021), *cert. denied*, 142 S.Ct. 1110 (2022); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171, 173 (1996).

The Board may not reweigh the evidence or disregard the ALJ's choice between reasonable inferences. *Burns v. Director, OWCP*, 41 F.3d 1555 (D.C. Cir. 1994); *Mijanjos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 945 (5th Cir. 1991) ("The choice between reasonable inferences is left to the ALJ and may not be disturbed if it is supported by the evidence."). Nor will the Board interfere with an ALJ's credibility determinations unless they are "inherently incredible or patently unreasonable." *Cordero v. Triple A Mach. Shop*, 580 F.2d 1331, 1335 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). If the ALJ's conclusion upon weighing the evidence is rational and supported by substantial evidence, it must be affirmed. *Carswell*, 999 F.3d at 27-28.

Having examined the underlying bases for the conflicting causation opinions proffered by Drs. Frazier and Gupta, D&O at 10-11, the ALJ found Dr. Gupta's opinion "more persuasive overall," *id.* at 12. In this regard, he found Dr. Gupta explained the lung diffusing capacity values in Claimant's pulmonary function tests (PFTs) dated February 21, 2018, and October 16, 2019, at 55% of predicted, showed a restrictive lung disease. CXs 2, 4, Dep. at 9-10. He found Dr. Frazier rested his contrary conclusion on the post-bronchodilator total lung capacity (TLC) value seen on the February 21, 2018 PFT, without considering the pre-bronchodilator TLC values from that test, or the February 2020 PFT values. D&O at 12; *see also* EX 2 at 3. Additionally, the ALJ found Dr. Gupta explained

why a CT scan may show COPD, as Claimant's did in this case, even though the PFT values do not demonstrate an obstructive impairment and cited a medical journal article in support of his position, whereas Dr. Frazier's opinion regarding COPD is "at odds" with that article. D&O at 12; *see also* CX 4, Dep. at 12-14, 49-57. Moreover, he found that while Dr. Frazier acknowledged long term unprotected exposures to certain irritants, similar to those to which Claimant allegedly was exposed, can cause lung disease, he did not explain why these exposures did not cause or contribute to Claimant's pulmonary condition. *Id.*

Considering the ALJ's broad discretion to weigh the evidence and make credibility determinations, *Carswell*, 999 F.3d at 27-28; *Santoro*, 30 BRBS at 173, and as the ALJ's findings are supported by substantial evidence and not "inherently incredible or patently unreasonable," we affirm his decision to give the greatest weight to Dr. Gupta's opinion and to conclude Claimant's pulmonary impairment is work-related. *See generally Cordero*, 580 F.2d at 1335; *Young v. Newport News Shipbuilding & Dry Dock Co.*, 45 BRBS 35 (2011).

In the event Claimant did sustain a work-related pulmonary condition, Employer next contends he did not establish entitlement to disability benefits because none of his treating physicians considered him disabled for any work-related reason. It maintains that neither the records of Claimant's treating physicians, Drs. James Woodiel and Azmi Draw, nor those reviewed by Dr. Gupta, contain any opinion that Claimant is disabled or unable to work as a result of any work-related condition. We are not persuaded.

The ALJ determined Claimant was a voluntary retiree because he retired for reasons unrelated to his respiratory condition. D&O at 14; EX 6. He therefore applied Section 2(10) of the Act, 33 U.S.C. §902(10), which defines "disability" in the case of a voluntary retiree as a permanent impairment under the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*).

In order to obtain benefits pursuant to Section 8(c)(23), a retiree must establish he has a permanent impairment under the AMA *Guides*.[11] 33 U.S.C. §§902(10), 908(c)(23),

[11] Section 8(c)(23) provides for an award based on the percentage of permanent impairment "as determined under the *Guides* referred to in Section 2(10)." Section 2(10) defines the term "disability," for purposes of such awards, as "permanent impairment, determined (to the extent covered thereby) under the guides to the evaluation of permanent impairment promulgated and modified from time to time by the American Medical Association...." *See* 20 C.F.R §702.601(b); *see also Donnell v. Bath Iron Works Corp.*, 22 BRBS 136 (1989).

910(d)(2); *Morin v. Bath Iron Works Corp.*, 28 BRBS 205 (1994); *Carver v. Ingalls Shipbuilding, Inc.*, 24 BRBS 243 (1991). The onset date for benefits awarded under Section 8(c)(23) is the date the impairment became permanent. *Barlow v. Western Asbestos Co.*, 20 BRBS 179 (1988).

Addressing the extent of Claimant's disability,[12] the ALJ found no evidence establishing Claimant could not return to his usual work with Employer because of his lung injury, and Claimant did not so assert. Thus, the ALJ found Claimant's disability is partial. D&O at 13-14. Then, as Section 8(c)(23) of the Act requires, the ALJ considered Claimant's impairment rating based on the 6th Edition of the AMA *Guides* and permissibly credited Dr. Gupta's opinion in awarding Claimant ongoing permanent partial disability benefits based on a 14% impairment from March 28, 2021. Contrary to Employer's contention, Claimant need not demonstrate an inability to return to his usual work in order to obtain benefits under Section 8(c)(23), and Dr. Gupta's assessment of a 14% permanent respiratory impairment under the AMA *Guides* constitutes evidence of a permanent partial disability. CX 2. We therefore affirm the ALJ's award as it is rational and supported by substantial evidence. *See generally Pierce v. Elec. Boat Corp.*, 54 BRBS 27 (2020); *Larrabee v. Bath Iron Works Corp.*, 25 BRBS 185 (1991).

BRB No. 23-0301 – Attorney Fees

Employer also appeals the district director's fee award. The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, based on an abuse of discretion or not in accordance with law. *See Jeffboat, L.L.C. v. Director, OWCP [Furrow]*, 553 F.3d 487 (7th Cir. 2009).

While Employer's petition for review alleges the district director "erred in finding" it liable for what it deems is an "excessive" attorney's fee, its supporting brief does not allege any specific error committed by the district director. It merely recites the objections it previously raised before the district director and, based on those objections, requests the Board render a judgment that Claimant is entitled to no more than "$1,288.95 in fees and $56.62 in costs, for a total sum of no more than $1,345.57" – the exact same request it made before the district director.[13] *Compare* Employer and Carrier's Opposition to

[12] The ALJ found Claimant's pulmonary disability reached permanency on March 28, 2021, the date on which Dr. Gupta first opined he had a respiratory impairment. We affirm this finding as it is unchallenged on appeal. *Scalio*, 41 BRBS at 58.

[13] Employer's brief before us fails to acknowledge or discuss the district director's findings explicitly addressing those objections and, upon consideration of them, his

Application and Affidavit in Support of Attorney's Fees filed with the district director on March 1, 2023, *with* Employer and Carrier's Memorandum in Support of Their Petition for Review filed with the Board on June 26, 2023.

Absent any allegations of error committed by the district director, we decline to address Employer's arguments. 20 C.F.R. §802.211(b); *see Montoya v. Navy Exch. Serv. Command*, 49 BRBS 51, 52 n.1 (2015) (Board declined to address an issue that is inadequately briefed); *Collins v. Oceanic Butler, Inc.*, 23 BRBS 227, 229 (1990) (party failed to raise a substantial issue for the Board to review; Board affirmed the adjudicator's decision where the party merely filed a copy of a post-hearing brief as a petition for review and brief, without identifying any specific errors committed by the adjudicator).

Consequently, we affirm the district director's award of an attorney's fee of $4,697.50 to Claimant's counsel, payable by Employer, as Employer has not shown the fee is arbitrary, capricious, or an abuse of discretion. 33 U.S.C. §928(a); *see generally Furrow*, 553 F.3d at 491.

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits and Order Granting Benefits and the district director's Order Approving Attorney Fee.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

I concur in the result:

JUDITH S. BOGGS
Administrative Appeals Judge

---

reduction of the requested hourly rate for attorney work from $501 to $388 per hour, as well as reduction of numerous .25 entries to .125 hours each.