U.S. Department of Labor

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

BRB No. 22-0348

SUSAN REAVIS (Widow of WILLARD REAVIS) Claimant-Respondent v. ELECTRIC BOAT CORPORATION Self-insured Employer-Petitioner	))))))))))	DATE ISSUED: 9/22/2023 DECISION and ORDER

Appeal of the Decision and Order Denying Modification and Awarding Benefits of Carrie Bland, Administrative Law Judge, United States Department of Labor.

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

Mark P. McKenney (McKenney, Clarkin & Estey), Providence, Rhode Island, for Self-insured Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Carrie Bland's Decision and Order Denying Modification and Awarding Benefits (2020-LHC-00618) 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's deceased husband, Decedent, worked for Employer in various capacities in its test organization facilities in the shipyard beginning in 1980.[1] CX 1 at 8-10. In his position, Decedent was exposed to dust from asbestos, welders, and grinders. *Id.* at 13-15. In later years after he suffered a back injury which disqualified him from working on ships, and after he was promoted, he testified he worked in offices on a barge and in a building that contained asbestos. He also testified he was exposed to cleaning freon and other strong fumes that left him feeling out of breath. *Id.* at 29-35. Decedent first noticed respiratory issues in August 2015 when he was unable to catch his breath while riding his bike. *Id.* at 39. He subsequently visited several physicians and was initially diagnosed by Dr. Steven L. Powell with interstitial lung disease related to asbestos exposure. CX 24 at 2.

Based on Dr. Powell's diagnosis, Employer initially accepted Decedent's contention that his lung injury was caused by work exposures to asbestos dust. The district director issued a Compensation Order based on the parties' stipulations whereby Employer agreed to pay Decedent's medical bills related to his lung injury as well as $435.73 per week in disability benefits. Findings of Fact and Order, OWCP No. 01-303927 (November 22, 2017) (Compensation Order).[2] CX 3.

Subsequently, Decedent's condition worsened, necessitating a bilateral lung transplant on March 23, 2018. CX 13. More detailed analysis of the lung tissue post-surgery produced questions about whether Decedent's lung condition was related to asbestosis or idiopathic pulmonary fibrosis with usual interstitial pattern. CXs 22 at 5, 15; 24 at 1. He received follow up treatment at the Yale Interstitial Lung Disease Program, where both Drs. Powell and Antin-Ozerkis expressed doubt about his initial diagnosis of asbestosis due to the lack of pleural plaques. CXs 22 at 24-25, 24 at 1. As such, Employer refused to pay for Decedent's lung transplant. Emp. Brief at 1.

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[1] This case arises within the jurisdiction of the United States Court of Appeals for the Second Circuit because Claimant sustained his injuries in Connecticut. 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, 36 BRBS 51(CRT) (4th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003); 20 C.F.R. 702.201(a).

[2] Employer stipulated this recognition of work exposures was based on its interpretation of Dr. Danielle E. Antin-Ozerkis's initial medical reports claiming Decedent's lung condition is more likely than not asbestosis. Emp. Brief at 1.

On April 17, 2018, the parties held an informal conference to address coverage of the costs of the lung transplant, and at a second informal conference on December 6, 2018, Employer sought modification of the district director's Compensation Order. Unfortunately, Decedent's condition again worsened, and he died on December 8, 2020. CX 28.[3] Employer argued its earlier agreement that Decedent's lung condition was due to exposure to asbestos and particles was based on a mistake of fact due to the subsequent medical records indicating a lack of pleural plaques or asbestos fibers in his lungs. Emp. Brief at 2-3. Claimant also sought modification of the Compensation Order to allow for an award of permanent total disability benefits from March 23, 2018, to December 8, 2020, based on the joint stipulations. Cl. Brief at 2; JX 1.

The ALJ held a hearing on August 5, 2021, and issued her Decision and Order on April 15, 2022. In her decision, she thoroughly reviewed the facts and procedural history, and weighed the medical evidence of Claimant's experts, Drs. Susan Daum, Jerrold Abraham, and Leonard Cosmo,[4] against the evidence submitted by Employer from Drs. Victor Roggli and Michael Conway. Decision and Order (D&O) at 18. She found Dr. Daum's medical reports brief but accurate in their description of Decedent's asbestos and metal dust exposure and supported by academic research, and she found Dr. Daum's diagnosis of asbestosis persuasive due to the physician's depth of analysis. D&O at 19; CXs 8-10. The ALJ further concluded Dr. Abraham's opinion was entitled to weight because he considered Decedent's history as well as criteria provided by the American and European Thoracic Societies in reaching his conclusions that Claimant's lungs had particles related to welding and that he had pulmonary fibrosis related to work exposures. D&O at 20; CX 6 at 17-18, 33-34, 56. She similarly found Dr. Cosmo's report entitled to great weight because he detailed his findings based on examining Decedent, reviewed his work history, and analyzed his various radiology tests to conclude his work exposure to particulate dust matter could have produced his lung condition. *Id.* at 20; CX 11.

Conversely, the ALJ gave less weight to Dr. Roggli because she found he did not detail why he excluded Decedent's occupational dust exposures as a cause of his lung condition. D&O at 21. She further determined Dr. Conway's medical report deserved less weight because he relied heavily on Dr. Roggli's analysis, which she found lacking.[5] *Id.*

[3] The death certificate identifies "acute respiratory failure" and "lung transplant rejection" as the causes of death. CX 28.

[4] Dr. Cosmo examined Claimant at Employer's request but rendered an opinion favorable to Claimant's position.

[5] Dr. Conway first diagnosed possibly occupation pulmonary fibrosis but then updated his diagnosis to idiopathic pulmonary fibrosis (IPF) upon learning Dr. Roggli did

at 22. The ALJ concluded Claimant's experts deserved greater weight and supported a finding that Decedent's lung injury was caused by his employment with Employer. *Id.* Consequently, she denied Employer's request for modification, granted Claimant's request for modification, and ordered Employer to pay permanent total disability benefits for the period between March 22, 2018, and December 8, 2020, plus interest. She also awarded Claimant reimbursement of reasonable and necessary medical benefits for Decedent's lung treatment, including his lung transplant. *Id.* at 22-24.

Employer appeals, contending the ALJ misconstrued the evidence of Decedent's asbestos exposure, misunderstood the evidence regarding the contribution of dust from welding and grinding to Decedent's condition, failed to discuss Decedent's initial treating physicians' opinions, and placed the burden of proof on it with respect to undertaking further lung tissue analysis. Claimant responds, urging affirmance.

Modification pursuant to Section 22 of the Act, 33 U.S.C. §922, is permitted if the petitioning party demonstrates a mistake in a determination of fact, *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459 (1968), or a change in the claimant's physical or economic condition, *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). The sole basis for modification in a survivor's claim, as here, is proof of a mistake in a determination of fact. *Jourdan v. Equitable Equip. Co.*, 25 BRBS 317 (1992). Under Section 22, the ALJ has broad discretion to correct mistakes of fact, whether demonstrated by new evidence, cumulative evidence, or further reflection on the evidence initially submitted. *Dobson v. Todd Pacific Shipyards Corp.*, 21 BRBS 174 (1988). The party seeking modification bears the burden of demonstrating there was a mistake in a determination of fact. *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 107 (2003). Thus, Employer in this case bears the burden of demonstrating a mistake in a determination of fact. *See Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998).

Employer alleges the Compensation Order was premised on a mistaken fact about asbestos causing Decedent's lung condition. Given the request turns on whether

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not find asbestos fibers in Decedent's lung tissue, so he concluded there was not enough evidence of occupational exposures. EXs 1, 3. Dr. Roggli determined Decedent had IPF because there were no asbestos fibers in his lung tissue, and there were no pleural plaques or other markers of asbestosis. EX 5. The ALJ gave less weight to Dr. Roggli's opinion because he did not accurately count the number of years of Decedent's asbestos exposure and he relied on generalizations of how asbestosis usually presents rather than considering Decedent's specific case and conducting further testing. As Dr. Conway deferred to Dr. Roggli, the ALJ gave both opinions less weight. D&O at 21-22.

Decedent's lung injury was, in whole or in part, the result of his work exposure with Employer, a Section 20(a), 33 U.S.C. §920(a), causal analysis is applicable. Once the Section 20(a) presumption relating a claimant's harm to his employment accident or working conditions has been invoked and rebutted, as here, the presumption drops from the case, and the causation issue must be decided on the record as a whole. *See American Stevedoring, Ltd. v. Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *John W. McGrath Corp. v. Hughes*, 264 F.2d 314 (2d Cir.), *cert. denied*, 360 U.S. 931 (1959).

As the finder of fact, the ALJ is entitled to evaluate the credibility of all witnesses, weigh the medical evidence, and draw her own inferences and conclusions from the record. *See, e.g.*, *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997); *Cooper v. Offshore Pipelines Int'l, Inc.*, 33 BRBS 46 (1999). The Board may not reweigh the evidence or substitute its own views for those of the ALJ. *Bonin v. Thames Valley Steel Corp.*, 173 F.3d 843 (2d Cir. 1999). Nor will the Board interfere with an ALJ's credibility determinations unless they are inherently incredible or patently unreasonable. *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 543 (4th Cir.1988); *Cordero v. Triple A Mach. Shop*, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *see also John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961).

Employer first contends the ALJ erred in misconstruing the degree of decedent's asbestos exposure, asserting the record reflects minimal exposure consistent with Drs. Conway and Roggli's assessments. Emp. Brief at 13. We disagree. Medical records detail Decedent's work exposures to asbestos and welding dust. *See* CXs 5 at 1; 8 at 2-3; 11 at 1-3; 14 at 1-2; 21 at 7, 13; 22 at 1, 6; 23 at 1-2; 24 at 1, 9; 26 at 1. The ALJ extensively discussed these reports, the deposition and hearing testimony, and other medical evidence to assess the degree of Decedent's asbestos and welding dust exposure. D&O at 5-14. She calculated Decedent had four years of asbestos exposure in the Navy, twelve years of exposure while working for Employer on ships, and additional exposure while working in his offices on the barge and in the office building. *Id.* at 21. She gave probative weight to Decedent's and Claimant's testimonies regarding Decedent's exposure to asbestos and welding dust as well as the lack of breathing protection. *Id.* at 4-5. She also acknowledged Dr. Abraham's review of Decedent's lung tissue samples, which identified the presence of particles from welding exposure. *Id.* at 7. As the trier of fact, the ALJ has broad discretion to weigh the evidence and render findings, unless those findings are not supported by

substantial evidence or in accordance with law.[6] *Fleischmann v. Director, OWCP*, 137 F.3d 131, 32 BRBS 28(CRT) (2d Cir. 1998), *cert. denied,* 525 U.S. 981 (1998). The Board is not permitted to overturn her conclusions merely because alternative inferences could have been drawn based on a different review of the evidence. *See Ceres Marine Terminals, Inc. v. Director, OWCP [Jackson],* 848 F.3d 115, 50 BRBS 91(CRT) (4th Cir. 2016).

The record similarly supports the ALJ's decision to rely more extensively on Drs. Daum's, Abraham's, and Cosmo's opinions over those of Drs. Conway and Roggli, all of whom she found sufficiently credentialed to render opinions. D&O at 19, 21. The ALJ gave less probative weight to Drs. Conway's and Roggli's opinions because they did not explain why they downplayed Decedent's work exposures and they relied heavily on generalizations about how asbestosis usually presents without explaining how they concluded Decedent's condition "could not be one of the cases that deviated from the typical presentation." *Id.* at 21; *see* n.5, *supra*.

The record bears this out. Dr. Roggli stated Decedent has "a pattern that best fits" with usual interstitial pneumonia (UIP). Although he acknowledged "you can see [a UIP pattern] in some cases of asbestosis" and described a previous lung disease case where additional fiber analysis facilitated him diagnosing asbestosis, he nevertheless concluded Decedent does not have asbestosis because he has a "typical pattern of UIP" and further fiber analysis was unnecessary because it would not reveal "a fiber burden within the range of asbestosis." EX 6 at 21-28. However, in diagnosing asbestosis, Dr. Daum disputed Dr. Roggli's opinion that further fiber analysis would not have provided him a clearer understanding of Decedent's disease.[7] CX 8 at 2, 6-10. The ALJ found Dr. Roggli did not persuasively respond to Dr. Daum's explanation that a lack of pleural plaques on tissue samples does not indicate the absence of asbestosis, or her assessment that additional fiber analysis would have provided Dr. Roggli useful information as to the presence of asbestos

[6] Also, Employer previously stipulated Decedent was exposed to asbestos and welding dust particles during his employment. EX 7 at 1. Parties are generally bound by their stipulations. *See* 29 C.F.R. §18.51.

[7] As the ALJ found, Dr. Abraham also disputed that Decedent's disease could be characterized as "idiopathic," i.e., from an unknown cause, and stated that had further fiber analysis been performed, "it's very likely [asbestos fibers] were there in increased amounts" because "it would be extremely unlikely for someone [with Decedent's exposure history] not to have had asbestos exposure above background and consequently increased asbestos fibers retained in their lungs." Decision and Order at 19-20; CX 6 at 17-18, 45.

fibers.[8] D&O at 21-22. Dr. Conway, in turn, relied heavily on Dr. Roggli's findings to support his own conclusions. EX 1.

As the ALJ reasonably explained giving less weight to Employer's experts, and as we may not reweigh the evidence, we affirm the ALJ's reliance on Claimant's experts' opinions. *Jackson*, 848 F.3d 115, 50 BRBS 91(CRT).

Employer next contends the ALJ erred by not considering the opinions of Decedent's treating physicians, Drs. Powell and Antin-Ozerkis, in her causation analysis, as they both expressed doubt regarding the nature and extent of Decedent's occupational exposures and his corresponding lung condition. Emp. Brief at 18, 20. While the ALJ did not directly address their opinions in relation to her findings on causation, any error is harmless. She acknowledged both opinions in her earlier discussion of the evidence, D&O at 13-14, noting both doctors expressed early opinions that Decedent likely had idiopathic pulmonary fibrosis but also had asbestos exposure. CXs 22, 24. The preponderance of the evidence standard is not purely a quantitative standard; it denotes a superiority of weight and a showing of more convincing evidence. *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996). The ALJ acted within her discretion in weighing the evidence in totality, and substantial evidence supports her decision Decedent's lung condition was related to his work exposures.

[8] Employer contends the ALJ's comments regarding its experts' failure to explain why they did not conduct further testing of the lung tissue samples amounted to shifting the burden of proof away from Claimant. Emp. Brief at 24. However, this argument misconstrues the ALJ's analysis. The ALJ did not place a burden on Employer to have conducted additional tests; rather, she found Drs. Conway's and Roggli's rationale for declining to conduct further testing not credible and relied on that credibility determination as part of her reason for giving their opinions less probative weight. D&O at 21-22. Had either party felt additional testing was needed to support its position, it would have borne the burden of proffering such proof.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge