U.S. Department of Labor

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

BRB Nos. 18-0049
and 18-0049A

CLARENCE J. CEASAR, JR.	)	
	)	
Claimant-Cross-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED: Aug. 3, 2018
SEA-LAND SERVICES, INCORPORATED	)	
	)	
and	)	
	)	
SL SERVICE, INCORPORATED	)	
	)	
Employer/Carrier-Petitioners Cross-Respondents	)	
	)	
UNIVERSAL MARITIME SERVICE COMPANY	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Respondents Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Robert R. Johnston (Pusateri, Johnston, Guillot & Greenbaum, LLC), New Orleans, Louisiana, for Sea-Land Services, Incorporated and SL Service, Incorporated.

C. Douglas Wheat and Amanda N. Farley (Wheat Oppermann, P.L.L.C.), Houston, Texas, for Universal Maritime Service Company and Signal Mutual Indemnity Association.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Sea-Land Services, Incorporated (Sea-Land) appeals, and Universal Maritime Service Company (UMS) cross-appeals, the Decision and Order (2016-LHC-00939, 2016-LHC-00940) of Administrative Law Judge Patrick M. Rosenow rendered on claims filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act). We must affirm the administrative law judge'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 injured his neck and back in 1997 while working for Sea-Land. Due to these injuries, claimant underwent neck and back surgeries between 1999 and 2009, including two cervical fusions, two laminectomies, and two lumbar fusions. Tr. at 39-40. Claimant was unable to work during this time. UXs 9; 17 at 2; SX 12. In May 2010, claimant and Sea-Land settled claimant's claim for disability benefits related to the 1997 work injury; however, the parties left open the issue of future medical benefits. 33 U.S.C. §908(i); Tr. at 15. Dr. Eidman released claimant to work on October 22, 2010, and claimant returned to work as a longshoreman on October 25, 2010. UX 9 at 25. Claimant ceased working on November 2, 2010, due to a seniority problem with his new badge; he returned to work again on May 27, 2011, when the problem was corrected.[1] On July 27, 2011, while working for UMS, claimant sustained hand injuries when a fully-loaded cargo container was lowered onto them. Claimant has not worked since this incident.

[1] Claimant testified that the new badge he received on November 2, 2010, assigned him an incorrect seniority status, which limited his ability to obtain work. Tr. 40, 51-53, 98; UX 19 at 5, 24; SX 3 at 18-19; CX 4.

Relevant to this appeal, claimant alleged that the July 2011 accident resulted in injuries to both hands and his left shoulder, as well as aggravation injuries to his pre-existing neck and back conditions. Thus, claimant contended that as of July 27, 2011, UMS is liable for disability and medical benefits related to these latter injuries. Sea-Land also contended that the 2011 work accident aggravated claimant's neck and back injuries such that it is the supervening cause of claimant's injuries, which severs Sea-Land's liability for medical benefits related to these conditions.[2] UMS acknowledged that claimant injured his hands and left shoulder in the July 2011 accident, but denied that claimant's neck and back conditions were aggravated in the incident. UMS, therefore, denied liability for any disability or medical benefits related to claimant's neck and back conditions. UMS further argued that claimant is not entitled to benefits for his left shoulder injury because he abandoned treatment for this injury by declining to undergo the rotator cuff surgery Dr. Eidman had recommended.

In addressing which employer is responsible for claimant's neck and back conditions after the 2011 work injury, the administrative law judge found claimant entitled to the Section 20(a), 33 U.S.C. §920(a), presumption that his current neck and back conditions are related to the July 2011 incident, and that UMS rebutted the presumption. On the record as a whole, the administrative law judge found that claimant did not establish by a preponderance of the evidence that his neck and back conditions were aggravated by the 2011 injury with UMS. Consequently, the administrative law judge found Sea-Land remains liable for providing medical care for claimant's neck and back conditions. Decision and Order at 33.

With regard to UMS's liability under the Act, the administrative law judge found that the 2011 work-related injuries to claimant's hands and left shoulders are each totally disabling, that claimant's left shoulder condition reached maximum medical improvement on November 5, 2013, and that the record contains no evidence regarding an impairment rating for claimant's hands. Further finding that claimant did not unreasonably refuse medical treatment for his shoulder condition, the administrative law judge rejected UMS's assertion that claimant abandoned treatment for this injury and, therefore, declined to suspend claimant's disability benefits pursuant to 33 U.S.C. §907(d)(4). Decision and Order at 35; UXs 7 at 15; 8 at 3. Accordingly, the administrative law judge awarded claimant temporary total disability benefits from July 27, 2011 through November 5, 2013, and permanent total disability benefits beginning November 5, 2013. Sea-Land appeals the administrative law judge's decision. UMS responds, and Sea-Land filed a reply brief.

[2] Sea-Land also asserted entitlement to reimbursement for all neck and back treatment it covered after the July 2011 accident.

BRB No. 18-0049. UMS cross-appeals the administrative law judge's decision. No party responded. BRB No. 18-0049A.

On appeal, Sea-Land challenges the administrative law judge's finding that it remains liable for medical benefits for claimant's neck and back conditions after the July 2011 work injury. Sea-Land contends that the administrative law judge erred in finding that claimant did not suffer neck and back injuries in the 2011 work accident.

The responsible employer issue in this case first turns on whether claimant sustained back and neck injuries in the 2011 work accident. This is an issue to which the Section 20(a) presumption applies as claimant made a claim for such injuries. *See Ins. Co. of the State of Pennsylvania v. Director, OWCP* [*Vickers*], 713 F.3d 779, 47 BRBS 19(CRT) (5th Cir. 2013). If claimant suffered neck or back injuries in this accident, then the determination of the responsible employer turns on whether claimant's disability results from the natural progression of the 1997 injury, in which case Sea-Land remains liable, or whether the 2011 injury aggravated, accelerated, or combined with the prior injury to result in disability, in which case UMS is the responsible employer. *See Marinette Marine Corp. v. Director, OWCP*, 431 F.3d 1032, 39 BRBS 82(CRT) (7th Cir. 2005); *Delaware River Stevedores, Inc. v. Director, OWCP*, 279 F.3d 233, 35 BRBS 154(CRT) (3d Cir. 2002); *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991); *see also Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (en banc).

The administrative law judge found claimant entitled to the Section 20(a), 33 U.S.C. §920(a), presumption based on Dr. Eidman's opinion that the July 2011 accident aggravated claimant's back and neck conditions.[3] *See Ramsey Scarlett & Co. v. Director, OWCP*, 806 F.3d 327, 49 BRBS 87(CRT) (5th Cir. 2015); *see generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Thus, the burden shifted to employer to rebut the presumption with substantial evidence that the claimant's condition was not caused or aggravated by the 2011 accident.

[3] Dr. Eidman opined that claimant's neck and back symptoms increased after the July 2011 injury such that they required additional medication and may have increased claimant's need for surgery. UX 17 at 5, 10. Dr. Eidman explained that claimant complained of increased symptoms over the long term and an MRI, myelogram, and CT scan, taken shortly after claimant's accident in 2011, show "changes above his previous [lumbar] fusion with stenosis and a disk herniation" and changes at the "disk space level" in the cervical spine. *Id.* at 7, 10. Dr. Eidman further explained that claimant was able to work with restrictions prior to the 2011 accident but has been totally disabled since. *Id*. at 10.

See Port Cooper/T. Smith Stevedoring Co. v. Hunter, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000). Employer's burden on rebuttal is one of production only, not one of persuasion; substantial evidence is "that relevant evidence – more than a scintilla but less than a preponderance – that would cause a reasonable person to accept the fact-finding." *See Ceres Gulf, Inc. v. Director, OWCP [Plaisance]*, 683 F.3d 225, 228, 46 BRBS 25, 27(CRT) (5th Cir. 2012). The administrative law judge found that the opinions of Drs. Vanderweide, Kagan, and Brown, that claimant's neck and back conditions are unrelated to the 2011 work accident, rebut the Section 20(a) presumption. Decision and Order at 32.

Sea-Land contends the administrative law judge erred in finding that UMS produced substantial evidence to rebut the Section 20(a) presumption. Specifically, Sea-Land asserts that the opinions of Drs. Vanderweide, Kagan, and Brown are entitled to little weight because their credentials are absent from the record and their opinions are based on an incomplete review of claimant's medical records. We reject Sea-Land's assertion of error. All three physicians premised their opinions that claimant's neck and back conditions are unrelated to the 2011 work accident on a review of claimant's medical records; Dr. Brown also examined claimant. UXs 7 at 14-21; 14; 15.[4] As the administrative law judge properly considered these opinions in light of UMS's burden of production, and as the opinions constitute substantial evidence that claimant's neck and back conditions are unrelated to the 2011 employment accident, we affirm the administrative law judge's finding that UMS rebutted the Section 20(a) presumption. *See Plaisance*, 683 F.3d 225, 46 BRBS 25(CRT); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000).

Once, as here, the Section 20(a) presumption is rebutted, it no longer controls, and the issue of whether there is a causal relationship must be resolved on the evidence of record as a whole, with claimant bearing the burden of persuasion. *Plaisance*, 683 F.3d 225, 46 BRBS 25(CRT); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). The administrative law judge addressed claimant's testimony, the treatment records and opinion of Dr. Eidman, and the opinions of Drs.

[4] Dr. Vanderweide stated that there is insufficient evidence to show that claimant's underlying, pre-existing cervical and lumbar conditions were "advanced in severity" beyond their natural progression. UX 14 at 10. Dr. Kagan noted claimant's complaints of neck and back complaints to Dr. Eidman shortly before the July 11, 2011 accident and the absence of any contemporaneous complaints thereafter; he stated that aggravating injuries do not have a "delayed reaction." UX 15. Dr. Brown stated that, within a reasonable degree of medical certainty, the 2011 accident may have caused a temporary exacerbation to claimant's back pain, but did not permanently aggravate the back injury. UX 7 at 18.

Vanderweide, Kagan, and Brown. The administrative law judge found claimant's testimony that he experienced new symptoms of severe and constant neck and back pain after the July 2011 accident not credible, as contradicted by Dr. Eidman's treatment records showing treatment for the same complaints in the months leading up to the July 2011 accident.[5] Decision and Order at 31; SX 12 at 36, 53, 58, 69; UX 9 at 35. Further, the administrative law judge found Dr. Eidman's opinion that the 2011 accident increased claimant's neck and back disability unpersuasive because it lacks objective support and is premised on claimant's unreliable accounts of increased neck and back pain.[6] By contrast, the administrative law judge found the opinions of Drs. Kagan, Vanderweide, and Brown to be well-reasoned and supported by claimant's treatment records. Specifically, the administrative law judge observed: 1) Dr. Kagan explained that aggravations of pre-existing conditions would be evident at the time of the aggravation but claimant did not complain of any new or aggravated cervical or lumbar symptoms when he first treated with Dr. Eidman after the 2011 accident, UX 15; 2) Dr. Vanderweide explained that claimant's prescribed pain medications were the same before and after the accident, and any variation in dosage could be explained by claimant's acute hand and shoulder injuries, UX 14; and 3) Dr. Brown explained that claimant had chronic neck and back pain since 1997 for which he continued to treat until the 2011 injury and after, and that the mechanism of the 2011 injury as described by claimant, at most, might have resulted in a strained back muscle and temporary exacerbation of back pain, but would not result in a long-term or permanent aggravation, UX 7 at 14-21. Based on the foregoing, the administrative law judge found that claimant failed to establish that his pre-existing back and neck conditions were aggravated in the 2011 work accident with UMS. Thus, the administrative law judge found that claimant's current neck and back symptoms and associated disability, if any, are due

[5] Claimant attempted to explain the inconsistency between his testimony and Dr. Eidman's treatment records by suggesting that one of Dr. Eidman's staff falsified the treatment records out of dislike for claimant, but the administrative law judge found this explanation unlikely. The administrative law judge thought it more likely that claimant understated the extent of his pre-injury symptoms in effort to establish an aggravation injury. Decision and Order at 31.

[6] Although Dr. Eidman stated that he premised his opinion on MRI, CT, and myelogram examinations that were performed shortly after the 2011 accident, the administrative law judge found there is no record of an MRI, myelogram, or CT scan until 2016. Decision and Order at 32; UX 17 at 7, 10. Additionally, at the hearing, claimant's counsel was asked to review Dr. Eidman's complete treatment records (646 pages) and identify any reference to his performing or reviewing an MRI/CT scan after July 2011. Claimant's counsel responded by letter acknowledging that there are no such references in those records. CX 19.

to the 1997 accident with Sea-Land such that it remains liable for medical treatment for these conditions. Decision and Order at 32-33.

We reject Sea-Land's contention that the administrative law judge improperly discredited claimant's accounts of increased neck and back symptoms after the July 2011 work accident based on speculation that claimant had motive to lie about his symptoms. Contrary to Sea-Land's assertion, the administrative law judge discredited claimant's testimony as to the dissimilarity in his pre- and post-accident symptoms because it was inconsistent with Dr. Eidman's treatment records which documented the same complaints before and after the accident. Decision and Order at 30. As this finding is supported by substantial evidence, the administrative law judge rationally found claimant's subjective accounts of increased symptoms not credible. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Consequently, we affirm the administrative law judge's credibility determination. *Plaisance*, 683 F.3d at 228, 46 BRBS at 27(CRT).

We additionally reject Sea-Land's assertion that the administrative law judge erred in failing to assign controlling weight to Dr. Eidman's opinion on the record as a whole. Although an administrative law judge may give special weight to a treating physician's opinion as to medical treatment options, *see Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir.), *cert. denied*, 528 U.S. 809 (1999), he is not required to do so on other matters simply because the witness is claimant's primary physician.[7] Rather, the administrative law judge is entitled to evaluate the sufficiency of a medical opinion in view of other evidence of record. *O'Kelley*, 34 BRBS 39; *see also Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48(CRT) (4th Cir. 1998). The Board is required to uphold the factual findings of the administrative law judge if they are supported by substantial evidence. *Plaisance*, 683 F.3d at 228, 46 BRBS at 27(CRT); *Pool Co. v. Cooper*, 274 F.3d 173, 178, 35 BRBS 109, 112(CRT) (5th Cir. 2001); *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 430, 34 BRBS 35, 37(CRT) (5th Cir. 2000). As substantial evidence supports the administrative law judge's findings that the opinions of Drs. Kagan, Vanderweide, and Brown are consistent with claimant's pre- and post-injury treatment records, whereas Dr. Eidman's opinion lacks objective support and is premised on claimant's unreliable accounts of increased pain, the administrative law judge rationally gave less weight to Dr. Eidman's opinion. *Plaisance*, 683 F.3d at 228, 46 BRBS at 27(CRT); *Cooper*, 274 F.3d at 178, 35 BRBS at 112(CRT). As the opinions of Drs. Kagan,

[7] *Amos* refers to the reasonable course of treatment and not to the cause or nature and extent of disability.

Vanderweide and Brown support the administrative law judge's conclusion that claimant's current neck and back conditions are not due to the 2011 work injury with UMS, we affirm the administrative law judge's finding that Sea-Land remains liable for medical benefits for claimant's neck and back injuries. *See Siminski v. Ceres Marine Terminals*, 35 BRBS 136 (2001).

On cross-appeal, UMS challenges the administrative law judge's finding that claimant's shoulder condition reached maximum medical improvement. UMS asserts that claimant did not make a claim for permanent disability benefits and that the record does not support the administrative law judge's finding that claimant's shoulder condition achieved permanency on November 5, 2013.

Dr. Eidman recommended in February 2013 that claimant undergo shoulder surgery. Claimant had other, non-work-related medical conditions that required attention, so the surgery was not pursued immediately. Tr. at 46. Claimant also testified he was unsure he wanted to pursue it. UX 19 at 21. The administrative law judge found that claimant's shoulder condition reached maximum medical improvement on November 5, 2013, because "it is a reasonable date to designate the point at which [c]laimant decided he was not going to have the shoulder surgery . . . at least for the foreseeable future." Decision and Order at 35 n.93.

We agree that the administrative law judge erred in addressing the issue of permanency in this case. As UMS correctly states, no party raised the issue of permanency before the administrative law judge. Tr. at 21-23, 32-33; Cl. Post-Hr. Br. at 30-35; Jt. Ex. 1 (stating "N/A" to stipulation as to date of maximum medical improvement, as opposed to noting it was a contested issue). The administrative law judge may not address new issues without first notifying the parties and giving them the opportunity to offer evidence addressing the issue. *See Cornell Univ. v. Velez*, 856 F.2d 402, 21 BRBS 155(CRT) (1st Cir. 1988); *Klubnikin v. Crescent Wharf & Warehouse Co.*, 16 BRBS 182 (1984); 20 C.F.R. §702.336. Moreover, substantial evidence does not support the administrative law judge's conclusion that claimant reached maximum medical improvement as of November 5, 2013, since, Dr. Eidman's report of that date states claimant wished to proceed with surgery.[8] SX 12 at 82. Further, on November 7, 2013, Dr. Brown recommended steroid

[8] Dr. Eidman again discussed "planned" shoulder surgery with claimant on May 12, 2014. SX 12 at 86, 88. Nonetheless, the surgery had not occurred as of the date of the formal hearing, and claimant testified he is unsure about undergoing it. UX 19 at 21. If a physician believes that further treatment should be undertaken, a possibility of improvement exists, and maximum medical improvement does not occur until the treatment is complete. *See Gulf Best Electric v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004); *Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT)

injections and a course of physical therapy. UX 7 at 19; *see* Decision and Order at 35. Therefore, on the facts of this case, we vacate the award of permanent total disability benefits and modify the award to reflect claimant's entitlement to ongoing temporary total disability benefits commencing July 27, 2011. *Ferrell v. Jacksonville Shipyards, Inc.*, 12 BRBS 566 (1980).

Accordingly, the administrative law judge's award of permanent total disability benefits for claimant's shoulder injury is vacated, and the award is modified to reflect claimant's entitlement to temporary total disability benefits beginning July 27, 2011. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

(5th Cir. 1994). If surgery is anticipated, maximum medical improvement has not been reached. *Kuhn v. Associated Press*, 16 BRBS 45 (1983).