U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 17-0165

KENNETH MUTCHERSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT TERMINALS, LLC	)	DATE ISSUED: Dec. 5, 2017
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Ralph R. Lorberbaum (Zipperer, Lorberbaum & Beauvais), Savannah, Georgia, for claimant.

G. Mason White and James D. Kreyenbuhl (Brennan, Harris & Rominger, L.L.P.), Savannah, Georgia, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (2015-LHC-01995) of Administrative Law Judge Alan L. Bergstrom rendered on a claim 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 was injured on October 31, 2003, when he was struck by a large roll of paper while working in the hold of a ship. He sustained injuries to his head, back, and left leg, and developed psychological injuries.[1] Employer paid claimant temporary total disability benefits until September 17, 2004, following a functional capacity evaluation indicating claimant could return to light- to medium-duty work. In January 2005, Dr. Lorenzen released claimant to return to full-duty work. Claimant has not returned to work, citing his psychological condition and continuing back pain.

In 2006, Administrative Law Judge Malamphy awarded claimant continuing temporary total disability benefits as well as medical benefits for his work-related psychological, back, and knee conditions. Decision and Order (April 12, 2006). The Board vacated this decision and remanded the case for further consideration. *Mutcherson v. Newport Terminals, LLC*, BRB No. 06-0623 (Mar. 19, 2007). On remand, Judge Malamphy reaffirmed his prior award.[2] Decision and Order on Remand (April 29, 2008). In 2012, the parties submitted a Section 8(i), 33 U.S.C. §908(i), agreement to the district director, settling the disability claim for the work-related injuries but leaving the claim for medical benefits open.[3] The district director approved the settlement. CXs 7-10.

In 2014, claimant raised the issue of employer's liability for a specific course of treatment proposed and commenced by Dr. Chai in 2013 for claimant's back pain. Administrative Law Judge Bergstrom (the administrative law judge) found claimant did not prove that the condition being treated by Dr. Chai was caused, aggravated, or

[1] Claimant was diagnosed with a fractured left femur, a closed head injury, and transverse process fractures in his back at L1-4. CXs 11, 13. In early 2004, Dr. Lorenzen, claimant's treating physician, noted bony formations and on-going calcifications at the L2-3 fracture area. In July 2004, Dr. Lorenzen rated claimant as having a 20 percent permanent whole-body impairment due to the transverse process factures. CX 15.

[2] Following this decision, claimant sought additional treatment due to continuing back pain. Because Dr. Lorenzen had retired, claimant treated with Dr. Lorenzen's former partners, Drs. Jenkins, Roybal, and Chai.

[3] With regard to claimant's continuing complaints of back pain, examinations and objective testing between 2008 and 2013 revealed a number of issues at the L3-4, L4-5, and L5-S1 levels, including: degenerative disc disease; arthritic changes; disc bulging; disc space narrowing; herniation; mild osteophyte formation; intervertebral disc signal loss; disc protrusion; and nerve root displacement. CXs 17, 34, 36. Due to his chronic low back pain, Dr. Roybal referred claimant to Dr. Chai for treatment.

accelerated by the 2003 work injury, and he denied claimant medical benefits for Dr. Chai's treatment as of November 2013. Decision and Order at 24-25. Claimant appeals, and employer responds, urging affirmance.

The sole issue before the Board is whether the administrative law judge properly found that employer is not liable for the treatment on claimant's lower back recommended and performed by Dr. Chai. Dr. Chai diagnosed claimant with facet joint syndrome, lumbar spondylosis, myelopathy, and lumbago. He recommended radiofrequency denervation (or radiofrequency ablation (RFA)) at L4-5, and this was performed in July 2014. CX 35. Dr. Chai originally stated that the treatment was not for a work-related condition because he originally thought claimant's work injury was at the L2-3 level, the cause of the current condition was the natural degenerative process, the RFA treatment had not been approved by employer, and claimant was going to use his private insurance instead of workers' compensation to pay for the treatment. CX 18; EX 4 at exh. 1-4. However, after reviewing all of claimant's medical records, Dr. Chai explained that claimant's condition was more complex than he originally thought and that the 2003 work injury may have been a contributing factor to claimant's L4-5 condition because the work-related transverse process fractures were from L1 to L4 and he was treating L4. EX 4 at 14-15, 17, 19, 24, 29, 36, 48-49, 53, 55-56;[4] *see also* CX 19. Claimant contends the RFA treatment is for his work-related back injury and is the liability of employer. Employer disagrees, averring the administrative law judge properly relied on the opinion of its expert, Dr. Eskay-Auerbach.

On appeal, claimant contends the administrative law judge erred in finding that Dr. Eskay-Auerbach's opinion rebuts the Section 20(a), 33 U.S.C. §920(a), presumption linking his present back condition to his work injury. Specifically, claimant asserts Dr. Eskay-Auerbach's opinion does not rebut the Section 20(a) presumption because she erroneously believed the work injury was only at L2-3 when, in fact, his transverse process fractures were at L1-4, not just at L2-3. Claimant also contends the administrative law judge erred in giving greater weight to Dr. Eskay-Auerbach's opinion than to that of his treating physician, Dr. Chai, especially because Dr. Eskay-Auerbach did not examine claimant but only reviewed medical records, and in doing so, incorrectly assessed his condition. Employer asserts the administrative law judge's decision is supported by substantial evidence and should be affirmed.

Where medical benefits are claimed, the Section 20(a) presumption applies to whether the condition for which treatment is sought is work-related, but it does not apply

[4] Dr. Chai explained that the original disc collapse caused changes to the surrounding structures, and joints that have to accommodate for the failed discs can become painful, stressed, inflamed, and arthritic. EX 4 at 29.

in determining whether the claimant has established entitlement to the treatment under Section 7. 33 U.S.C. §907. The claimant must establish that treatment is reasonable and necessary for his work-related condition and that he has met the other Section 7 prerequisites to employer's liability for medical benefits. *Maryland Shipbuilding & Drydock Co. v. Jenkins*, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979); *Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989). In determining whether a condition is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after he establishes a prima facie case. To establish a prima facie case, the claimant must show that he sustained a harm or pain and that conditions existed or an accident occurred at his place of employment which could have caused the harm or pain. *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). In this case, the administrative law judge accepted the parties' stipulation that claimant sustained a work-related injury to his back in 2003 which could have caused his current lumbar spine problems. Decision and Order at 18.

Once the Section 20(a) presumption is invoked, the relevant inquiry is whether the employer produced substantial evidence of the lack of a causal nexus. *See Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008); *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003). The employer must produce facts, not mere speculation, in order to rebut the presumption of compensability. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). An employer's burden on rebuttal is one of production, not persuasion; it is an "objective test," and the determination of whether the employer has produced sufficient evidence is a legal judgment and is not dependent on credibility. *Bath Iron Works Corp. v. Fields*, 599 F.3d 47, 44 BRBS 13(CRT) (1st Cir. 2010). However, the employer cannot satisfy its burden of production simply by submitting any evidence whatsoever; it must be "substantial evidence" that a reasonable mind would accept as evidence of the non-work-relatedness of the injury. *See Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008); *Brown*, 893 F.2d 294, 23 BRBS 22(CRT); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000).

In rebuttal, employer submitted the eight-page written report of Dr. Eskay-Auerbach, wherein she summarized the records she reviewed, the earliest of which were notes of Dr. Lorenzen in 2004,[5] and set forth her opinion by answering questions posed

[5] Despite correctly identifying the date of injury as October 31, 2003, the first records Dr. Eskay-Auerbach reviewed were dated March 15, 2004. EX 1. There are earlier reports regarding claimant's work injury in the record.

by employer's counsel. First, Dr. Eskay-Auerbach stated that the RFA treatment is not related to the work injury because claimant's transverse process fracture was at "L2 or L3," claimant was released to work in December 2004, and "it is likely that the transverse process fracture had healed." EX 1. As claimant then presented with non-specific low back pain in 2008, and the records established he had degenerative changes, Dr. Eskay-Auerbach concluded that the onset several years later of "new" back pain at L4-5, in the lower region of the lumbar spine, was not related to either the work accident or to the transverse process fracture in the upper region of the lumbar spine. She also stated that the degenerative changes:

> are not attributable to the incident in question. These would have occurred over time regardless of that incident. The transverse fracture is described in the upper lumbar spine and would not predispose this gentleman to facet joint disease.

EX 1 at 7.

The administrative law judge found that Dr. Eskay-Auerbach's opinion is unequivocal and is "based on a thorough and well-documented review" of the medical records. Decision and Order at 18. Therefore, he found it sufficient to rebut the Section 20(a) presumption and to establish on the record as a whole that the condition the RFA was treating is not work-related. *Id.* Moreover, the administrative law judge found that Dr. Chai had at one time opined that the condition was not work-related, and he found there was evidence establishing that claimant's "L2-L3 transverse process had healed by December 31, 2009, when it was noted that x-ray no longer showed evidence of fracture." *Id.*

Claimant correctly avers that Dr. Eskay-Auerbach misstated the nature of claimant's original work injury. Claimant's original back injury spanned from L1 to L4. This is clear from the hospital records, CXs 11, 13, Dr. Lorenzen's notes, CX 15, and the parties' settlement application, CX 7 at 2. Based on her review of the records, however, Dr. Eskay-Auerbach reported that claimant's work injury was a transverse process fracture at L2-3. EX 1. Her report indicates that she did not review any medical records prior to Dr. Lorenzen's office note dated March 15, 2004, when he stated that bony formations were continuing to develop at L2-3. CX 15 at 6. But that particular note did not mention claimant's original injury. Thus, Dr. Eskay-Auerbach's opinion regarding the non-work-relatedness of claimant's current condition at L4-5 could be based, at least in part, on a faulty premise. Similarly, despite accurately summarizing Dr. Lorenzen's notes and diagnoses, the administrative law judge perpetuated the error by also stating that claimant's original injury was limited to the L2-3 level. Decision and Order at 8-9, 22.

As both Dr. Eskay-Auerbach and the administrative law judge appear to have misconstrued claimant's original work-related back injury by limiting it to a smaller area of his back, we vacate the administrative law judge's finding that employer rebutted the Section 20(a) presumption and his denial of medical benefits. We remand this case for reconsideration of whether Dr. Eskay-Auerbach's opinion constitutes substantial evidence rebutting the Section 20(a) presumption.

If, on remand, the administrative law judge finds that employer has not rebutted the Section 20(a) presumption, then the condition for which claimant seeks Dr. Chai's treatment is work-related as a matter of law. *Brown*, 893 F.2d 294, 23 BRBS 22(CRT); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988). The administrative law judge then must address whether the RFA treatment is reasonable and necessary for claimant's work-related injury. Claimant bears the burden of establishing that such treatment is reasonable and necessary and that he has met the other requirements of Section 7. 33 U.S.C. §907; *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996).

If, however, the administrative law judge finds that employer has rebutted the Section 20(a) presumption, the causation issue must be resolved on the record as a whole with claimant bearing the burden of persuasion by a preponderance of the evidence. *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). Contrary to claimant's contention, the administrative law judge need not give Dr. Chai's opinion "special weight" pursuant to *Amos v. Director, OWCP*, 153 F.3d 1051 (1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999).[6] *See Brown v. National Steel & Shipbuilding Co.*, 34 BRBS 195 (2001). Rather, the administrative law judge is entitled to determine the weight to be accorded to the treating physician's opinion in view of other evidence of record. *Id*; *see Jackson v. Ceres Marine Terminals, Inc.*, 48 BRBS 71 (2014), *aff'd sub nom. Ceres Marine Terminals, Inc. v. Director, OWCP*, 848 F.3d 115, 50 BRBS 92(CRT) (4th Cir. 2016). The administrative law judge has the sole authority to weigh conflicting evidence and to make credibility determinations. *See Del Monte Fresh Produce v. Director, OWCP* [*Gates*], 563 F.3d 1216, 43 BRBS 21(CRT) (11th Cir. 2009). As the issue at this juncture is the work-relatedness of claimant's condition and not the reasonableness of treatment, *Amos* is inapplicable. *See* n.6, *supra*.

[6] *Amos* discusses the weight to be accorded to the treating physician's opinion when the patient is faced with two or more valid medical treatment alternatives. The court stated it is the patient, in consultation with his own doctor, who has the right to choose his own course of treatment. *See also Monta v. Navy Exch. Serv. Command*, 39 BRBS 104 (2005).

In view of the fact that claimant's original back injury was at L1-4, on remand, the administrative law judge should readdress whether claimant satisfied his burden of proving the work-relatedness of the back condition for which the RFA treatment was prescribed.[7] If he concludes that the condition treated by Dr. Chai is not a work-related condition, employer is not liable for treatment rendered by Dr. Chai since November 2013. If, however, the administrative law judge finds that claimant has met his burden and established his condition is work-related, then he must address whether Dr. Chai's treatment is necessary and reasonable for claimant's work-related condition. 33 U.S.C. §907; *see Schoen*, 30 BRBS 112; *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (1993).

Accordingly, the administrative law judge's Decision and Order – Denying Benefits is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[7] An administrative law judge may assess whether physicians' opinions are rationally based on their underlying documentation, *S.K.* [*Kamal*] *v. ITT Industries, Inc.*, 43 BRBS 78 (2009), *aff'd in part and rev'd in part mem.*, No. 4:09-MC-348, 2011 WL 798464 (S.D. Tex. Mar. 1, 2011), but may not substitute his judgment for that of the physicians, *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997).