U.S. Department of Labor

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

BRB No. 18-0434

MARIA DE LA LUZ VALDEZ	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NAVY EXCHANGE SERVICE COMMAND	)	DATE ISSUED: 02/28/2019
	)	
and	)	
	)	
ABERCROMBIE, SIMMONS and GILLETTE	)	
	)	
Self-Insured Employer/Administrator-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Compensation and Benefits of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Jeffrey M. Winter and Kim Ellis (Law Office of Jeffrey M. Winter), San Diego, California, for claimant.

William N. Brooks II (Law Offices of William N. Brooks), Long Beach, California, for self-insured employer/administrator.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Compensation and Benefits (2015-LHC-00841) of Administrative Law Judge Richard M. Clark 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.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant tripped over a concrete parking abutment and fell on August 27, 2014, during the course of her employment for employer as a receptionist/cashier in the barber shop at the San Diego Naval Base. The parties stipulated that claimant sustained injuries to her left upper extremity and left knee and that employer paid claimant compensation for temporary total disability, 33 U.S.C. §908(b), from August 28 to December 3, 2014. Decision and Order at 2. Claimant averred that she also injured her neck, low back, and left hip, and that the accident caused complex regional pain syndrome (CRPS) and carpal tunnel syndrome (CTS) to her left arm. *Id*. Claimant asserted she is entitled to ongoing total disability compensation because she is unable to return to her usual employment with employer due to her work injuries.

The administrative law judge found the evidence sufficient to invoke the Section 20(a) presumption, 33 U.S.C. §920(a), regarding the disputed injuries and that employer rebutted the presumed causal connection. Decision and Order at 26-27, 29-30. He concluded that claimant did not show by a preponderance of the evidence that any of the disputed conditions are related to her work accident. *Id*. at 26-30. He further determined that claimant's work-related left wrist fracture and left shoulder sprain reached maximum medical improvement on December 3, 2014, and that her left knee abrasion had healed by the time of Dr. London's October 28, 2014 examination. *Id.* at 32-34. He found claimant was capable of returning to her usual employment on December 4, 2014, and does not need additional medical treatment for her work injuries. *Id*. at 35. Accordingly, the administrative law judge denied the claim.

Claimant appeals the administrative law judge's finding that employer rebutted the Section 20(a) presumption with respect to the disputed neck, back, CRPS, and CTS injuries.[1] Claimant also avers the administrative law judge erred by inferring from the parties' stipulation that she was temporarily totally disabled only from August 28 to December 3, 2014, and that she reached maximum medical improvement on December 4, 2014, and was capable of returning to work. Employer responds that claimant's arguments are without merit. Claimant filed a reply brief.

[1] Claimant does not challenge the administrative law judge's rejection of her claim for a left hip injury.

Section 20(a) Rebuttal

Once, as here, the Section 20(a) presumption is invoked, it is presumed that claimant's injuries are related to the work accident. The burden then shifts to employer to rebut this presumption. *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010). The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has held that an employer's burden on rebuttal is to produce "evidence specific and comprehensive enough to sever the potential connection between the disability and the work environment." *Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998). The inquiry at rebuttal concerns "whether the employer submitted evidence that could satisfy a reasonable fact finder that the claimant's injury was not work-related." *Ogawa*, 608 F.3d at 651, 44 BRBS at 50(CRT). Thus, an employer's burden on rebuttal is one of production, not persuasion. *Id*.

a. Neck and CRPS/CTS

The administrative law judge relied on Dr. London's October 28, 2014 opinion that "it's not medically probable" that claimant injured her neck in the work accident. Decision and Order at 26; JXs 10 at 144, 147, 149, 170; 33 at 439; 34 at 467. Dr. London's examination recorded no signs of fracture or injury, with normal cervical lordosis and no cervical tenderness. The administrative law judge also relied on the August 29, 2014 report of Physician Assistant (PA) Guzman, which noted a full range of motion and no neck pain, as well as a negative CT scan that day of claimant's head and neck. JX 9 at 104. He further noted that Dr. Tran found on October 7, 2014, that claimant's neck was symmetrical without any masses, and that Dr. Schweller noted full neck mobility on December 29, 2014. JXs 7 at 19; 15 at 215.

The administrative law judge also relied on Dr. London's opinion that claimant does not have CRPS or CTS. Decision and Order at 30; JX 34 at 469-470. At his deposition, Dr. London testified that claimant did not have muscle atrophy, and that a diagnosis of CRPS was contraindicated by her wearing of a wrist brace because most CRPS patients are bothered by anything touching their skin. JX 34 at 469. The administrative law judge additionally relied on Dr. Kupfer's reports from November 2015 to March 2016 that there are "no hyperhidrosis or other vasomotor changes" and Dr. London's testimony that these findings further indicate that claimant does not have CRPS. JXs 8 at 71-100; 34 at 469. Regarding the claim for CTS, the administrative law judge gave weight to the negative Tinel's sign at claimant's left wrist and elbow noted by PA Guzman on August 29, 2014, and by Dr. Kim on February 29, 2016, which, according to Dr. London, indicates there is no objective evidence of CTS. Decision and Order at 30; JXs 9 at 105; 24 at 305; 34 at 463, 465, 470.

We affirm the finding that employer produced substantial evidence sufficient to rebut the Section 20(a) presumption with respect to the claimed neck, CRPS and CTS injuries. The opinion of Dr. London, in conjunction with the examination findings of PA Guzman and Drs. Tan, Schweller, Kupfer, and Kim, constitute substantial evidence of the absence of a connection between the claimed conditions and the work accident.[2] *Ogawa*, 608 F.3d at 651, 44 BRBS at 50(CRT) ("The ALJ's task is to decide, as a legal matter, whether the employer submitted evidence that could satisfy a reasonable factfinder that the claimant's injury was not work-related."); *Cline v. Huntington Ingalls, Inc.*, 48 BRBS 5 (2013). Moreover, the administrative law judge's conclusion that claimant did not establish by a preponderance of the evidence that she suffered a work-related neck injury, CRPS, or CTS is affirmed as unchallenged on appeal. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

b. Low back injury

Claimant challenges the administrative law judge's finding that employer rebutted the Section 20(a) presumption with regard to her back injury. Claimant avers that there is not substantial evidence to rebut, because she has a pre-existing low back condition, Dr. London did not address whether this pre-existing condition was aggravated by the work injury, and there is no evidence that her back pain following the work injury was the result of the natural progression of her pre-existing back condition.

As it applies to rebuttal of the Section 20(a) presumption, where aggravation of an underlying condition is claimed, an employer must present substantial evidence of the absence of aggravation. *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Bath Iron Works Corp. v. Fields*, 599 F.3d 47, 44 BRBS 13(CRT) (1st Cir. 2010); *Newport News Shipbuilding and Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009). In *Duhagon*, the claimant alleged aggravation of a pre-existing back condition. The administrative law judge found the Section 20(a) presumption rebutted based on the opinion of Dr. Bernstein that the claimant did not sustain "any injury to his back and did not worsen his underlying condition." This finding was affirmed.

[2] We reject claimant's contention that Dr. London's opinion regarding her alleged neck injury is equivocal because Dr. London initially opined that claimant may have sustained a mild cervical strain. *Compare* JX 10 at 149 *with* JX 34 at 467. Dr. London was specifically asked about this statement at his June 28, 2016 deposition. JX 34 at 467. He stated, "I think based on her medical records after August 27, 2014, it's not medically probable." *Id.* Inasmuch as Dr. London explicitly addressed and revised his initial opinion, the administrative law judge had the discretion to give weight to his deposition testimony and the supporting objective findings to conclude that employer met its burden of production.

Duhagon, 169 F.3d at 618, 33 BRBS at 3(CRT). The Ninth Circuit agreed that Dr. Bernstein's testimony rebutted the presumption. The court also noted that Dr. Bernstein pointed to the claimant's pre-injury CT scan and post-injury MRI showing no change in the severity of the claimant's back condition and that the claimant had failed to report a back injury until over a month after the work injury. *Id*.

In this case, the administrative law judge permissibly relied on claimant's delay in reporting back pain,[3] the opinions of Drs. London and Lenihan that claimant did not injure her back in the fall,[4] and objective evidence that claimant's condition is similar to its pre-accident state.[5] Although the administrative law judge did not explicitly address aggravation in his rebuttal analysis, he did discuss aggravation in weighing the sufficiency of Dr. Kim's opinion, whose reports he found are not as thoughtful, well-reasoned, and detailed as those of Dr. London.[6] Decision and Order at 23. Dr. Kim opined that the work

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[3] Claimant did not report any back pain at her emergency room examinations on August 27, 2014, the date of injury, on August 29, 2014, or to PA Guzman, who also examined her on August 29, 2014. JXs 9 at 104-105; 12. Claimant first reported back pain to PA Guzman on September 5, 2014. JX 9 at 107-108. At this time, PA Guzman noted spasm, tenderness, and decreased range of motion. *Id*. at 108.

[4] Dr. London answered "No" when asked whether claimant sustained any injury to her low back due to her August 2014 fall, explaining that his opinion is based on medical records stating that the low back was not involved, the delay in the onset of reported pain, and her prior medical history. Decision and Order at 28; JX 34 at 367, 467. Dr. Lenihan noted on September 11, 2014, that claimant had a history of low back pain that was "giving her a flare," but he opined that her low back condition is unrelated to the work injury. JX 11 at 178, 180.

[5] At multiple examinations at Borrero Medical Group between 2009 and June 2014, claimant reported low back pain and objective findings were noted. EX 10 at 160-166; *see also* JX 13. Dr. London opined that claimant's description of her low back pain was consistent with objective findings on the lumbar x-rays taken prior to August 2014. JX 34 at 461. Moreover, Dr. Schweller's December 29, 2014 report and PA Guzman's August 29, 2014 report each found that claimant had a full range of motion in her lower back. JX 7 at 18-19.

[6] The administrative law judge addressed claimant's credibility and that of the medical examiners. He stated that claimant's testimony was "suspect due to contradictions in the record between her various statements, some of the medical evidence, and the sub rosa surveillance film showing her using her left hand and upper extremity." Decision and Order at 20-21. He stated that he would "give her testimony little weight except where the record independently corroborates her statements." *Id*. The administrative law judge determined that the causation opinions of Dr. Kupfer, claimant's treating physician, were

injury aggravated claimant's pre-existing low back and neck conditions. JX 33 at 437, 445-446. The administrative law judge found that Dr. Kim "did not adequately explain why he found aggravation when he evaluated Claimant almost a year and a half after the incident even though the initial reports did not record neck and back pain." Decision and Order at 23. As it is supported by substantial evidence, we affirm the administrative law judge's finding that employer rebutted the Section 20(a) presumption that claimant's back condition was not further injured in the work accident.[7] *Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT); *see also Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT).

Maximum Medical Improvement

Claimant next contends the administrative law judge erred by interpreting the parties' stipulation that she was temporarily totally disabled from August 28 to December 3, 2014, to indicate that claimant's left wrist had fully healed by December 3, 2014. *See* Decision and Order at 2, 33. Claimant thus avers the administrative law judge erred in failing to analyze the disputed issue of the nature and extent of her work-related disability after December 3, 2014. Claimant also contends the administrative law judge erred in crediting Dr. London's assessment of the nature and extent of her disability and by ignoring evidence of continuing disability after December 3, 2014.

The administrative law judge acknowledged claimant's contention that she has been totally disabled from the date of injury. Decision and Order at 31. In rejecting this contention, he considered the maximum medical improvement opinions of Drs. Kim, Kupfer and London and credited Dr. London's opinion that claimant could have returned to her usual employment approximately four weeks after he examined her on October 28,

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also "suspect" because he gave weight to claimant's subjective complaints and his reports were not reliable or thorough. *Id*. at 22-23. The administrative law judge found Dr. Kim "credible," but that "his opinions were not as rational compared to the other evidence in the record, and appeared to be based more on the subjective complaints of Claimant." *Id*. at 23. The administrative law judge found Dr. London's reports "to be more thorough and his opinions better explained and more consistent with the evidence in the record." *Id*. at 24. The administrative law judge gave Dr. London's opinion "substantial weight and significantly more weight than Dr. Kim and Dr. Kupfer." *Id*. He noted that the other medical opinions were credible from a treatment perspective, but did not address causation. *Id*. at 24 n.16. The administrative law judge's findings in these respects are affirmed as they are not "inherently incredible or patently unreasonable." *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).

[7] We also affirm the administrative law judge's unchallenged conclusion that claimant did not establish by a preponderance of the evidence that she suffered a work-related back injury. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

2014, as the other doctors relied on claimant's subjective complaints to find that she continued to be disabled. *Id*. at 32; JX 34 at 469; *see* n.6, *supra*. He found the parties' stipulation that claimant was temporarily totally disabled until December 3, 2014, "reasonable . . . given Dr. London's opinion that she would have been fully capable of returning to work four weeks after (his October 28, 2014 exam)." Decision and Order at 33. The administrative law judge concluded that, "[C]onsistent with the evidence and the stipulation of the parties, I find that Claimant reached maximum medical improvement for any work-related injury by December 3, 2014." *Id.* at 32.

The administrative law judge also addressed the evidence of disability for each of claimant's three work injuries. He credited Dr. London's opinion that claimant's left wrist fracture had healed by the time of his examination on October 28, 2014.[8] Decision and Order at 32-33; JX 10 at 147, 149. He declined to credit opinions of continuing shoulder disability because the surveillance video shows that claimant was exaggerating any shoulder injury. Decision and Order at 33. He instead relied on Dr. London's opinion that claimant may have sustained a shoulder sprain that had healed by the time of his October 28, 2014 examination without any permanent disability. The administrative law judge stated, "consistent with the evidence and the stipulation of the parties, Claimant reached maximum medical improvement for any shoulder sprain on December 3, 2014." *Id*. The administrative law judge also relied on Dr. London's negative findings regarding claimant's left knee abrasion, which he found supported by the x-ray evidence. *Id*. Accordingly, the administrative law judge found that claimant's left knee abrasion or sprain had healed with no permanent disability by the date of Dr. London's October 28, 2014 examination. *Id*. at 34.

The administrative law judge next addressed the extent of claimant's work injuries. He found claimant had pre-existing work restrictions, which claimant described as standing and sitting as needed every 15 minutes, no carrying boxes,[9] and using a chair with back support. Decision and Order at 34. He credited Dr. London's opinion that claimant could return to her usual employment, which he found within her pre-existing work restrictions. *Id*. at 34-35.

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[8] After crediting Dr. London's opinion, the administrative law judge concluded, "pursuant to the stipulation of the parties, I find that [c]laimant's left wrist was healed and she reached [maximum medical improvement] for the left wrist on December 3, 2014." Decision and Order at 33.

[9] The administrative law judge stated that claimant should not lift over 10 pounds. Decision and Order at 35.

We reject claimant's contention that the administrative law judge improperly interpreted the parties' stipulation to the exclusion of the medical evidence regarding the nature and extent of disability. Dr. London's opinion constitutes substantial evidence in support of the administrative law judge's finding that claimant's work injuries had reached maximum medical improvement by December 3, 2014. *Misho v. Global Linguist Solutions*, 48 BRBS 13 (2014); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999). The administrative law judge summarized the opinions of Drs. Kupfer and Kim that claimant has ongoing additional work restrictions that prevent her from returning to her usual work. Decision and Order at 34. He was within his discretion to give greater weight to Dr. London's opinion that claimant could have returned to work four weeks after his October 28, 2014 examination. *See Rhine v. Stevedoring Services of America*, 596 F.3d 1161, 44 BRBS 9(CRT) (9th Cir. 2010). An administrative law judge is not required to accept the opinion of any particular medical examiner but is entitled to independently weigh the evidence and draw reasonable conclusions therefrom. *See Ogawa*, 608 F.3d at 650, 44 BRBS at 49(CRT). The Board is not empowered to reweigh the evidence and must accept the rational inferences and findings of fact of the administrative law judge that are supported by the record. *See, e.g.*, *Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT); *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 25 BRBS 85(CRT) (9th Cir. 1991); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988). As the administrative law judge's finding that claimant's work injuries reached maximum medical improvement and she was capable of returning to her usual employment on December 4, 2014, are supported by substantial evidence, they are affirmed. *Ogawa*, 608 F.3d at 651, 44 BRBS at 50(CRT).

Accordingly, the administrative law judge's Decision and Order Denying Compensation and Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge