U.S. Department of Labor

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

BRB No. 15-0410

MARTIN E. BUTTS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: June 20, 2016
	)	
APM TERMINALS, INCORPORATED / UNIVERSAL MARITIME SERVICES	)	
	)	
and	)	
	)	
VIRGINIA INTERNATIONAL TERMINALS, INCORPORATED	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employers/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Dana Rosen, Administrative Law Judge, United States Department of Labor.

Charlene A. Morring (Montagna Klein Camden, LLP), Norfolk, Virginia, for claimant.

Lawrence P. Postol (Seyfarth Shaw LLP), Washington, D.C., for APM Terminals, Incorporated/Universal Maritime Services and Signal Mutual Indemnity Association, Limited.

R. John Barrett and Lisa L. Thatch (Vandeventer Black, L.L.P.), Norfolk, Virginia, for Virginia International Terminals, Incorporated and Signal Mutual Indemnity Association, Limited.

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

PER CURIAM:

Claimant appeals the Decision and Order (2014-LHC-00358, 2014-LHC-00359) of Administrative Law Judge Dana Rosen 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 injured his right knee on January 25, 2006, while working for Universal Maritime Services (UMS) as a Rubber Tire Gantry Crane Operator.[1] Tr. at 51. Claimant alleges he suffered an injury to his right knee on May 7, 2012, while employed by Virginia International Terminals (VIT) as a Remote Control Crane Operator. Tr. at 57. Claimant testified he was required to proceed to the grassy area behind the parking lot for a fire drill. He stated that while walking to the parking lot he began to experience excruciating pain in his right knee. Tr. at 59-60. Claimant did not immediately report the injury to VIT.[2] VX 3. On May 10, 2012, a dump truck hit the back of claimant's car and

[1] As a result of this injury, claimant underwent two surgeries performed by Dr. Neff in 2006 and 2007. Dr. Neff placed him on permanent work restrictions of no kneeling, squatting, and ladder climbing. CX 11. In an April 24, 2008 Decision and Order, Administrative Law Judge Bergstrom awarded claimant temporary partial disability benefits from June 1 to November 14, 2007. In a November 28, 2008 Decision and Order, Administrative Law Judge Krantz awarded claimant temporary total disability benefits from June 1 to September 30, 2007, and temporary partial disability benefits from October 1 to November 14, 2007. UMS subsequently paid claimant temporary total disability benefits from November 15, 2007 to May 27, 2008, and permanent partial disability benefits for a nine percent impairment to the leg. UX 1. UMS made its last payment to claimant for permanent partial disability on February 18, 2009. *Id*. The record does not reflect that UMS's payments to claimant for disability benefits as of November 15, 2007 were made pursuant to a compensation order. UXs 1, 4, 5.

[2] Claimant first reported the injury to VIT on May 17, 2012. VX 3. Further, although claimant testified he reported the injury on May 7, 2012 to Ms. Townsend, the claims adjuster for his 2006 injury, Tr. at 60, Ms. Townsend testified that claimant first notified her of an injury due to a fire drill on May 17, 2012. *Id.* at 109, 115. Ms. Townsend further stated that, although claimant called on May 9, 2012, and told her his knee was hurting, claimant gave her no information or facts concerning a fire drill. *Id*. at 108-116, 120.

pushed it into a pole. VX 1; Tr. at 62. Claimant went to the emergency room complaining of pain in both knees. VX 14 at 18. On June 4, 2012, claimant filed a claim for benefits against VIT for his right knee injury.[3] VX 7. Claimant alleged he was temporarily totally disabled from May 18, 2012 to February 13, 2013, and from February 15 to March 2, 2013.[4] Claimant returned to his usual job as an operator on February 14, 2013, for the day. He has worked continuously since March 3, 2013.

Claimant contended that his right knee pain and related subsequent medical treatment, including the September 2012 surgery, as well as any lost wages resulting therefrom, are related to either the natural progression of the 2006 UMS compensable injury or the aggravation caused by the fire drill at VIT. VIT contended that claimant did not sustain a compensable injury on May 7, 2012, and that claimant's right knee problems are the result of either the car accident on May 10, 2012, the 2006 UMS compensable injury, or a natural progression of arthritis pre-existing the 2006 injury. UMS contended that claimant's May 2012 knee pain and subsequent surgery were unrelated to his 2006 right knee injury; rather, it argued that claimant's 2012 knee problems were due entirely to claimant's pre-existing osteoarthritis, which was not caused, affected, or aggravated by his 2006 injury. UMS argued in the alternative that the May 10, 2012 car accident was a supervening cause of claimant's disability, that claimant is not credible and that, because Dr. Wardell premised his opinion on claimant's unreliable statements, Dr. Wardell's opinion cannot be credited. UMS also averred that claimant's claim against it is time-barred and that he is not entitled to medical benefits.

The administrative law judge found that claimant established a prima facie case against both employers, that both employers rebutted the Section 20(a) presumption, and that claimant did not carry his burden on the record as a whole to establish by a preponderance of evidence that his 2012 knee condition is related to his work for either employer. 33 U.S.C. §920(a); Decision and Order at 64, 72. Accordingly, the administrative law judge denied benefits.[5] Decision and Order at 72-73. On appeal, claimant asserts the administrative law judge erred in finding the employers rebutted the

[3] It appears UMS was added as a party to the case sometime in 2013.

[4] Dr. Wardell excused claimant from work from May 18 to November 12, 2012. CXs 3, 21; VX 15 at 50. Dr. Wardell performed a right knee arthroscopy on September 11, 2012. CX 2. Dr. Wardell placed claimant's knee condition at maximum medical improvement on November 13, 2012. CX 4 at 19.

[5] The administrative law judge did not address UMS's assertions that claimant's claim against it is time-barred.

Section 20(a) presumption and in weighing the evidence on the record as a whole in favor of both employers.

In order to be entitled to the benefit of the Section 20(a) presumption, 33 U.S.C. §20(a), a claimant must establish a prima facie case by showing that he sustained a harm and that an accident occurred or working conditions existed which could have caused or aggravated the harm. *See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996). Where, as here, the claimant has established his prima facie case, the burden shifts to the employer to present substantial evidence that the claimant's injury was not caused or aggravated by the work injury. *See Holiday*, 591 F.3d 219, 43 BRBS 67(CRT). The employer may rebut the Section 20(a) presumption by presenting substantial evidence that the claimant's disabling condition was caused by an intervening cause which was not the natural or unavoidable result of the claimant's original work injury. *See Davison v. Bender Shipbuilding & Repair Co.*, 30 BRBS 45 (1994)*; Bass v. Broadway Maintenance*, 28 BRBS 11 (1994); *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). If the administrative law judge finds that the Section 20(a) presumption is rebutted, it no longer controls, and the issue of causation must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994); *Moore*, 126 F.3d 256, 31 BRBS 119(CRT).

The Claim Against VIT

After invoking the Section 20(a) presumption, the administrative law judge found VIT rebutted it with: 1) the reports of employer's claims adjuster establishing that claimant did not attribute his right knee pain to the fire drill until after the May 10, 2012 car accident, even though he called Ms. Townsend on May 9, 2012 to complain of knee pain; 2) the contemporaneous medical treatment records showing claimant complained of bilateral knee pain and injuries to both knees after the May 10, 2012 car accident; 3) claimant's recorded statement to the GEICO adjuster that he injured both knees in the car accident; 4) Dr. Wardell's opinion attributing claimant's right knee condition to the 2006 right knee injury; 5) Dr. Cohn's opinion that claimant's knee problems were a result of degenerative arthritis that pre-dated May 2012 and not due to the fire drill; and 6) Dr. Cavazos's opinion that claimant's current right knee condition is due to pre-existing osteoarthritis and not due to the fire drill. Decision and Order at 53-64; VX 14 at 18; UX 13 at 5, 7; UX 21; VX 2 at 4; CX 4 at 11-12, 29-30; CX 15 at 18; CX 7 at 8-9; VX 16 at 3, 34.

Claimant asserts the administrative law judge erred in finding VIT rebutted the Section 20(a) presumption. We reject claimant's assertion. The administrative law judge properly found that employer offered substantial evidence in the form of the opinions of Drs. Cavazos and Cohn and of evidence of knee pain after the car accident that claimant's knee condition was not caused or contributed to by the May 7, 2012 fire drill. *Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *see also Cline v. Huntington Ingalls, Inc.*, 48 BRBS 5 (2013). We therefore affirm the administrative law judge's finding that VIT rebutted the Section 20(a) presumption.

On the record as a whole, the administrative law judge found claimant is not a credible witness.[6] The administrative law judge found that this factor, in conjunction with the contemporaneous records and the medical opinions weighed against claimant's contention that his knee condition is due to the fire drill. Specifically, as no doctor attributed claimant's post-May 2012 right knee condition to the May 7 fire drill, and as the only evidence of record linking claimant's right knee injury to the fire drill is his own testimony, which the administrative law judge found inconsistent and unpersuasive, the administrative law judge found claimant failed to establish a compensable injury on May 7, 2012. Decision and Order at 64. In this respect, the administrative law judge observed that Dr. Wardell stated that the 2012 surgery was not related to the alleged fire drill injury, as the only lesions in claimant's knee resulted from the 2006 injury. CX 4 at 13-14.

[6] Claimant's assertions that he experienced right knee pain due to the fire drill were belied by the testimony of Ms. Townsend, *see* n.2, *supra*. Decision and Order at 52-53; Tr. at 109. Further, although claimant alleged he was on his way to a medical appointment for his knee on May 10, 2012, when his car was struck by a dump truck, there is no evidence in the record of a missed appointment. Decision and Order at 53. Additionally, although claimant testified he did not injure his right knee in the car accident, Tr. at 62, the hospital emergency room records noted that claimant complained of bilateral knee pain, and the recorded conversation with the insurance adjuster revealed that claimant stated he injured "both knees" in the auto accident. Decision and Order at 53-54; VX 14 at 18; UX 13 at 5-7; UX 21; VX 2 at 4-6. As claimant's testimony regarding the onset and cause of his knee pain in May 2012 conflicted with the contemporaneous records of the claims adjuster, insurance adjuster, and emergency room medical records, and because claimant did not tell his work-injury doctors about the car accident or his car-accident doctors about his work injuries, Decision and Order at 55; Tr. at 64-65, 82, the administrative law judge found unpersuasive and not credible claimant's testimony that his knee pain was caused by the May 7 fire drill. Decision and Order at 64.

We reject claimant's assertion that the administrative law judge erred in weighing the record as a whole. It is well established that the administrative law judge has the discretion to determine the weight to be accorded to the evidence and to draw inferences therefrom. *See Pittman Mech. Contractors, Inc. v. Director, OWCP [Simonds]*, 35 F.2d 122, 28 BRBS 89(CRT) (4th Cir. 1994); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Further, the administrative law judge's credibility determinations must be affirmed unless they are "inherently incredible or patently unreasonable." *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). In this case, the administrative law judge rationally credited the contemporaneous records documenting claimant's complaints of right knee pain following the car accident over his subsequent inconsistent statements that the fire drill caused his knee pain. *Simonds*, 35 F.2d 122, 28 BRBS 89(CRT); *Cordero*, 580 F.2d 1331, 8 BRBS 744. Moreover, there is no medical evidence to support claimant's claim of injury at work on May 7, 2012. Thus, in the absence of any credible evidence on the record as a whole linking claimant's knee condition to the May 7, 2012 fire drill, the administrative law judge rationally found that claimant failed to establish he suffered a compensable injury at VIT. *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999). We therefore affirm the denial of benefits on claimant's claim against VIT.

The Claim Against UMS

With respect to the claim against UMS, the administrative law judge invoked the Section 20(a) presumption based on her findings that claimant's testimony and medical treatment records establish he suffered right knee pain in May 2012, which Dr. Wardell attributed to claimant's compensable 2006 work-related right knee injury at UMS. Decision and Order at 65. The administrative law judge found that UMS rebutted the Section 20(a) presumption because the contemporaneous records of employer's claims adjuster, the GEICO insurance adjuster, and emergency room medical records from the May 10, 2012 car accident "break the chain of causation" between claimant's current right knee pain and the 2006 work accident. Decision and Order at 66, 71. Additionally, the administrative law judge found the presumption rebutted by the opinion of Dr. Cavazos that claimant's current knee condition is unrelated to any traumatic injury, including the 2006 work injury. Decision and Order at 71.

In weighing the evidence as a whole, the administrative law judge gave greater weight to the opinions of Drs. Cavazos and Cohn than to that of Dr. Wardell, claimant's treating physician. The administrative law judge found Dr. Wardell's natural-progression theory unpersuasive and inconsistent with the record because claimant's treatment records indicated that his knee was asymptomatic prior to the May 2012 car accident but

symptomatic thereafter,[7] and because claimant specifically attributed his right knee pain to the May 2012 fire drill incident rather than to the 2006 work injury. Decision and Order at 67, 69; CX 5-1; VX 2 at 6-7; VX 14 at 18; UX 13 at 5-7. Moreover, the administrative law judge credited the opinion of Dr. Cavazos,[8] as supported by the opinion of Dr. Cohn,[9] that claimant's current condition is due to the progression of osteoarthritis of the medial compartment and that the medial compartment was not involved in, affected, or aggravated by the 2006 knee injury. Decision and Order at 70-71.

Claimant asserts the administrative law judge erred in finding UMS rebutted the Section 20(a) presumption. We reject claimant's assertion. The opinion of Dr. Cavazos, that claimant's knee condition is unrelated to the 2006 work injury constitutes substantial evidence rebutting the Section 20(a) presumption. *Moore*, 126 F.3d 256, 31 BRBS 119(CRT). Moreover, the administrative law judge rationally relied on the evidence concerning the May 10, 2012 car accident to find that employer offered substantial evidence that claimant's 2012 knee condition was not due to the natural progression of the 2006 injury. *Davison,* 30 BRBS 45. We, therefore, affirm the administrative law judge's finding that UMS rebutted the Section 20(a) presumption.

Claimant contends the administrative law judge erred in weighing the evidence as a whole, asserting that more weight should have been given to Dr. Wardell's opinion because he is claimant's treating physician. We reject this contention. Although an administrative law judge may give special weight to a treating physician's opinion, *see*

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[7] In so finding, the administrative law judge observed that, in the two years prior to the crash, claimant reported right knee pain to his physicians only on September 10, 2010, and February 4, 2011. CX 4 at 30-31. Although Dr. Wardell did not examine claimant on those dates, he attributed the pain to the 2006 injury. *Id*. at 31-32. Claimant was also examined on January 1, 2012, and did not complain of knee pain. UX 11 at 4.

[8] Dr. Cavazos conducted a thorough review of claimant's treatment records since the 2006 injury. He concluded that only the lesion to the femoral trochlear groove is related to the 2006 injury and that the 2012 surgery was due to symptoms at the right medial femoral condyle. As the medical literature does not establish a causal relationship between a partial arthroscopic meniscectomy, a procedure which claimant underwent in 2006 after his injury, and the development of symptomatic osteoarthritis, Dr. Cavazos opined that claimant's 2012 need for surgery was unrelated to the 2006 injury. UXs 22, 27; VX 16.

[9] Dr. Cohn evaluated claimant on June 6, 2012, and confirmed that he has pre-existing bicompartmental, if not tricompartmental, arthritis of his knee. CX 15 at 17.

Amos v. Director, OWCP, 153 F.3d 1051, *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999), she is not required to credit such an opinion where there is contrary probative evidence in the record. *See Monta v. Navy Exchange Service Command*, 39 BRBS 104 (2005). Unlike the situation in *Amos*, the issue here is not the choice between two reasonable courses of treatment such that a treating physician may have more insight. *Amos*, 153 F.3d at 1054, 32 BRBS at 147(CRT). The administrative law judge is tasked with weighing the evidence and drawing inferences and conclusions based on that evidence. *Simonds*, 35 F.2d 122, 28 BRBS 89(CRT); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *Donovan*, 300 F.2d 741. The Board may not reweigh the evidence, *Miffleton v. Briggs Ice Cream Co.*, 12 BRBS 445 (1980), *aff'd*, 659 F.2d 252 (D.C. Cir. 1981), or disregard an administrative law judge's finding merely because other inferences could have been drawn from the evidence. *Simonds*, 35 F.2d 122, 28 BRBS 89(CRT); *Mijangos*, 948 F.2d at 944, 25 BRBS at 80(CRT); *Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994).

In this case, the administrative law judge addressed the record in its entirety, assessed claimant's credibility and weighed the conflicting medical opinions as to the cause of claimant's 2012 knee pain and surgery. Determining that Dr. Cavazos's opinion is well-reasoned, unequivocal, and consistent, the administrative law judge rationally gave it greater weight than Dr. Wardell's opinion. As Dr. Wardell's opinion is the only evidence of record linking claimant's current knee condition to his 2006 injury with UMS, and as the administrative law judge has reasonably given Dr. Wardell's opinion less weight, we affirm her finding that claimant failed to carry his burden of establishing based on the record as a whole that he sustained a compensable injury.[10] *Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT); *Hice v. Director, OWCP*, 48 F. Supp. 2d 501 (D. Md. 1999). Therefore, we affirm the denial of additional disability compensation and medical benefits.

[10] In light of our disposition of this case, we need not reach UMS's assertion that claimant's claim against it is time-barred under Section 22, 33 U.S.C. §922.

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

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge