U.S. Department of Labor

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

BRB No. 17-0557

JOHN GARCIA	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: June 27, 2018
	)	
AAR AIRLIFT GROUP, INCORPORATED	)	
	)	
and	)	
	)	
ALLIED WORLD ASSURANCE COMPANY c/o BROADSPIRE	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Barry R. Lerner (Barnett, Lerner, Karsen & Frankel, P.A.), Ft. Lauderdale, Florida, for claimant.

Joanna N. Pino and Zascha Blanco Abbott (Sioli Alexander Pino), Miami, Florida, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2016-LDA-00702) of Administrative Law Judge Daniel F. Solomon 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 Defense Base Act, 42 U.S.C. §1651 *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 when he slipped down a ladder during the course of his employment in Afghanistan on February 10, 2016. He continued working for employer on restricted duty until March 15, 2016, when he returned to the U.S. for specialized knee treatment. EX 22 at 3. Once home, claimant's wife suggested that he see his internist, Dr. Ginter, because he was acting abnormally. EX 39 at 99. Claimant underwent testing which showed he sustained a stroke in April 2016; claimant sustained a second stroke in June 2016. Claimant filed a claim alleging his strokes and disabling knee condition are work-related. CX 2. Employer controverted the claim; it subsequently withdrew its controversion of the right knee claim and commenced payment of temporary total disability benefits, 33 U.S.C. §908(b), and medical benefits, 33 U.S.C. §907. The sole issue before the administrative law judge was the compensability of claimant's strokes.

In his decision, the administrative law judge noted that claimant had a transient ischemic attack (TIA), or mini-stroke, in 2012.[1] Decision and Order at 6; EXs 26 at 5-6; 27 at 2. However, claimant was medically cleared from 2011 to 2016 to work for employer in Afghanistan. EX 39 at 79. After the February 2016 knee injury, claimant was diagnosed in April 2016 as having sustained a cerebral vascular accident (CVA),[2] or stroke, and he sustained a second CVA in June 2016. EXs 11 at 5; 24 at 1-3. In July 2016, claimant's treating neurologist, Dr. Chowdhary, diagnosed claimant as having Anticardiolipin Syndrome, which is a blood disorder that predisposes him to blood clots and strokes. CX 9 at 9.

The administrative law judge found it undisputed that claimant did not sustain a head injury when he injured his right knee at work and there is no evidence claimant experienced unusual stress related to the knee injury. Decision and Order at 26. However, the administrative law judge also found "there is competent medical testimony that the conditions at the accident site and from the events surrounding the compensable knee injury could have led to stress, which could have caused, in part, the strokes." *Id*. The administrative law judge thus found claimant entitled to the Section 20(a) presumption that his strokes are work-related. 33 U.S.C. §920(a).

[1] A TIA is characterized by a complete recovery with no permanent cerebral injury. EX 41 at 25.

[2] A CVA is characterized as resulting in permanent injury to the brain. EX 41 at 25.

The administrative law judge found that the opinion of Dr. Rashdan, an interventional cardiologist, does not rebut the Section 20(a) presumption, as he is not an expert in neurology and must defer to the opinion of Dr. Chowdhary. Decision and Order at 27. The administrative law judge therefore concluded the strokes are work-related and that claimant is entitled to medical benefits for this condition. *Id*. at 27-28.

On appeal, employer contends the administrative law judge erred in addressing a claim based on stress because claimant did not allege prior to filing his trial brief that his strokes are related to work stress. Employer also argues that the administrative law judge's finding that claimant's strokes are work-related is not supported by substantial evidence. Claimant responds, urging affirmance. Employer filed a reply brief.[3]

Employer asserts it did not receive sufficient notice of claimant's assertion that his strokes were caused by work-related stress. In his pre-hearing statement on June 22, 2016, and his pre-trial statement on April 17, 2017, claimant asserted that "the stroke arose as a natural unavoidable consequence of the knee injury." CX 5; EXs 11 at 5; 12 at 5. At their depositions on March 1 and March 17, 2017, respectively, claimant's counsel questioned Dr. Rashdan and Dr. Chowdhary about stress as an aggravating factor for causing or contributing to a stroke. Both these doctors ruled out the knee accident as directly causing a stroke because there was no evidence of head or neck trauma at the time of the injury. EXs 37 at 9; 40 at 11(38), 14(53); 41 at 16-17. However, they testified that stress can be a factor in causing a stroke.[4] EXs 40 at 4-6 (17-18), 11 (38-40); 41 at 31-33. Thereafter, claimant specifically asserted in his trial brief, filed on May 26, 2017, that his strokes were caused, aggravated or accelerated by his stressful working conditions in Afghanistan, including acute stress from the knee injury. Cl. Tr. Br. at 3, 20, 27. Employer's trial brief, filed on June 6, 2017, acknowledges this specific contention. Emp. Tr. Br. at 45, 72. There was no formal oral hearing in this case. 20 C.F.R. §702.346.

Employer's contention that it had insufficient notice that claimant was raising stress as a cause his strokes is belied by the aforementioned documents. *See Meehan Service Seaway Co. v. Director, OWCP*, 125 F.3d 1163, 31 BRBS 114(CRT) (8th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998). If employer believed that claimant's trial brief raised a new issue, its remedy was to inform the administrative law judge of its position and move to

[3] We deny employer's request that the Board take judicial notice of medical articles it submitted with its appellate brief. These articles were not offered into the evidentiary record before the administrative law judge. Thus, claimant has not had the opportunity to respond to them, nor the administrative law judge to assess their reliability. *Casey v. Georgetown University Medical Center*, 31 BRBS 147 (1997); 20 C.F.R. §802.301(b).

[4] Employer's counsel was present at these depositions.

hold the record open if additional evidence was required. In his decision, the administrative law judge stated, "claimant contends that his stroke was caused, aggravated or accelerated by stressful work in Afghanistan." Decision and Order at 4. There is no basis for finding that the administrative law judge erred in his addressing a claim based on stress. Accordingly, employer's contention of error is rejected.

Employer also contends the administrative law judge's finding that claimant's strokes are work-related is not supported by substantial evidence. The administrative law judge invoked the Section 20(a) presumption on the ground that claimant's work-related knee injury could have caused stress, which could have contributed to the strokes, given claimant's pre-existing condition.[5] He gave weight to the deposition testimony of Dr. Chowdhary that stress is a possible risk factor in this case and of Dr. Rashdan that stress can aggravate any medical condition. Decision and Order at 23-24; EXs 40 at 11 (39-40); 41 at 31-32. The administrative law judge also found that, although there is no record of unusual stress related to the knee injury and no recorded symptoms stemming from the work accident, that does not mean that claimant did not have any stress. Decision and Order at 26. He gave weight to claimant's post-accident stroke symptoms, Dr. Chowdhary's testimony that claimant might not have been aware of his stroke until after he examined him on April 21, 2016, and the physician's testimony that stress "could have" contributed to claimant's strokes to find that "conditions at the accident site and from events surrounding the compensable knee injury could have led to stress, which could have caused, at least in part, the strokes." *Id*.

In order to be entitled to the Section 20(a) presumption, claimant must establish a prima facie case by showing that he suffered a harm and that either a work-related accident occurred or that working conditions existed which could have caused or aggravated the harm. *See Noble Drilling Co. v. Drake*, 795 F.2d 478, 19 BRBS 6(CRT) (5th Cir. 1986); *see generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Although claimant is not required to affirmatively prove that the work accident or working conditions in fact caused the harm, it is claimant's burden to establish both the "harm" and "accident/working conditions" prongs of his prima facie case. *Noble Drilling Co.*, 795 F.2d at 481, 19 BRBS at 7-8(CRT); *see Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). If claimant is alleging a secondary injury, that is, that the work-related knee injury caused stress which contributed to the strokes, he must present evidence that the strokes could have "naturally or unavoidably" resulted from the knee injury/stress in order to invoke the Section 20(a) presumption. *See* 33 U.S.C. §902(2);

[5] We note that the administrative law judge did not address claimant's contention that his working conditions in Afghanistan contributed to the stroke.

Metro Machine Corp. v. Director, OWCP [Stephenson], 846 F.3d 680, 50 BRBS 81(CRT) (4th Cir. 2017). Claimant's theory as to how the injury arose must go beyond "mere fancy." *Champion v. S & M Traylor Bros.*, 690 F.2d 285, 295 (D.C. Cir. 1982); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990).

The harm element of claimant's prima facie case is satisfied by the evidence that claimant sustained strokes within a few months of leaving Afghanistan. However, employer contends there was no finding of actual stress that could have caused or contributed to claimant's stroke. Pet. for Rev. at 61. We agree. The administrative law judge stated only that there could have been stress. Decision and Order at 26. He did not state what "conditions at the accident site and from events surrounding the compensable knee injury" are sufficient to support claimant's contention that his strokes could be stress-related. *Id.* To invoke the Section 20(a) presumption, claimant must establish that he in fact experienced stress that could have caused or contributed to the strokes. *Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 296, 24 BRBS 75, 80(CRT) (D.C. Cir. 1990) (referring to claimant's burden as "minimal"); *Sanders v. Alabama Dry Dock & Shipbuilding Co.*, 22 BRBS 340 (1989) (claimant failed to establish he was under stress); *see also Brown v. Pacific Dry Dock*, 22 BRBS 384 (1989). Accordingly, we vacate the administrative law judge's finding that claimant established the working conditions element for invocation of the Section 20(a) presumption. On remand, the administrative law judge should clarify the scope of the stress claim and determine if claimant experienced work-related stress that could have contributed to his strokes. *Lacy v. Four Corners Pipe Line*, 17 BRBS 139 (1985); *see generally Pedroza v. BRB*, 624 F.3d 926, 44 BRBS 67(CRT) (9th Cir. 2010) (claim based on legitimate personnel action is not compensable); *Raiford v. Huntington Ingalls Industries, Inc.*, 49 BRBS 61 (2015).

If the administrative law judge again finds the Section 20(a) presumption invoked, he must also address anew whether employer produced substantial evidence to rebut the Section 20(a) presumption. *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). The administrative law judge found that employer did not rebut the Section 20(a) presumption with the opinion of Dr. Rashdan, an interventional cardiologist. Decision and Order at 27; EX 41 at 6, 22. Dr. Rashdan opined that claimant's strokes were not due to the knee injury or to stress from knee pain. EX 41 at 16-17, 32; *see also* EX 37. The administrative law judge found that Dr. Rashdan is not qualified as an expert in neurology and that he does not treat patients for Anticardiolipin Syndrome. As Dr. Rashdan stated that claimant should follow up with a neurologist, the administrative law judge concluded that Dr. Rashdan must defer to the opinion of Dr. Chowdhary and that Dr. Rashdan's opinion therefore does not rebut the Section 20(a) presumption. Decision and Order at 27; EX 41 at 19-20, 23.

We cannot affirm the conclusion that Dr. Rashdan's opinion is insufficient to rebut the Section 20(a) presumption. To meet its burden, employer must introduce "such relevant evidence as a reasonable mind might accept as adequate to support a finding that workplace conditions did not cause the accident or injury." *Rainey v. Director, OWCP*, 517 F.3d 632, 637, 42 BRBS 11, 14(CRT) (2d Cir. 2008) (internal quotes and citations omitted); *American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000). However, in addressing the sufficiency of the evidence at rebuttal, the weighing of conflicting evidence or of the credibility of evidence "has no proper place in determining whether [employer] met its burden of production." *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 651, 44 BRBS 47, 50(CRT) (9th Cir. 2010). "Instead, at the second step the [administrative law judge'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." *Id.*; *see also Bath Iron Works Corp. v. Fields*, 599 F.3d 47, 44 BRBS 13(CRT) (1st Cir. 2010) (the determination of whether employer produced substantial evidence is a legal judgment not dependent on credibility); *Cline v. Huntington Ingalls, Inc.*, 48 BRBS 5 (2013).

In this case, as it appears the administrative law judge was weighing Dr. Rashdan's opinion against Dr. Chowdhary's, we must vacate the conclusion that Dr. Rashdan's opinion does not rebut the Section 20(a) presumption. In addition, employer properly notes that the administrative law judge did not assess the sufficiency of Dr. Chowdhary's opinion as rebuttal evidence.[6] *See* EX 40. Therefore, on remand, if necessary, the administrative law judge should re-evaluate whether either of these opinions, or any other evidence of record, constitutes substantial evidence that claimant's strokes were not related to the "stress" that is the basis of claimant's claim for compensation.[7] *See generally O'Kelley*, 34 BRBS 39; *Dangerfield v. Todd Pacific Shipyards Corp.*, 22 BRBS 104 (1989). If the Section 20(a) presumption is rebutted, claimant bears the burden of establishing by a preponderance of the evidence that his strokes are related to the claimed work accident or working conditions. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997).

[6] The fact that Dr. Chowdhary stated that stress "could have" contributed to a stroke does not compel the conclusion that his opinion cannot rebut the Section 20(a) presumption. *See generally Bath Iron Works Corp. v. Director, OWCP [Harford]*, 137 F.3d 673, 32 BRBS 45(CRT) (1st Cir. 1998).

[7] Where aggravation of a pre-existing condition is at issue, employer must submit substantial evidence that the claimed work events did not aggravate the pre-existing condition in order to rebut the Section 20(a) presumption. *See, e.g., Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009).

Accordingly, we vacate the administrative law judge's Decision and Order awarding medical benefits for claimant's strokes. We remand the case for the administrative law judge to address the work-relatedness of claimant's strokes in accordance with this decision.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge

_____
JONATHAN ROLFE
Administrative Appeals Judge