U.S. Department of Labor

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

BRB No. 14-0184

RICHARD KOZEK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: Mar. 24, 2015
ELECTRIC BOAT CORPORATION	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of Decision and Order Denying Benefits of Colleen A. Geraghty, Administrative Law Judge, United States Department of labor.

Melissa Riley (Embry and Neusner), Groton, Connecticut, for claimant.

Edward W. Murphy (Morrison Mahoney LLP), Boston, Massachusetts, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2013-LHC-01213) of Administrative Law Judge Colleen A. Geraghty rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq*. (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant worked for employer, first as an electrician and later as a planner, from 1956 until he retired in December 1995, during which time he indicates he was exposed to methyl ethyl ketone (MEK), trichloroethylene (TCE), inhibisol, asbestos, and fumes resulting from the vulcanization of rubber. On January 5, 2012, claimant was diagnosed with bladder cancer, and on March 26, 2012, he underwent robotic partial cystectomy surgery. Claimant filed a claim under the Act, alleging that his cancer is due,

at least in part, to the multiple work-related exposures he experienced while working for employer.

In her Decision and Order, the administrative law judge found claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), that his bladder cancer is causally related to his employment. The administrative law judge found, however, that employer rebutted the presumption. The administrative law judge then weighed the evidence as a whole and determined that claimant did not establish a causal relationship between his cancer and his employment. Accordingly, the administrative law judge denied the claim for benefits.

On appeal, claimant challenges the administrative law judge's findings that employer rebutted the Section 20(a) presumption and that, based on the record as a whole, claimant failed to meet his burden of establishing a causal relationship between his cancer and his employment with employer. Employer responds, urging affirmance of the administrative law judge's denial of benefits.

Section 20(a) of the Act, 33 U.S.C. §920(a), provides a claimant with a presumption that his disabling condition is related to his employment if he establishes a prima facie case by proving that he sustained a harm and that conditions existed or an accident occurred at his place of employment which could have caused the harm. *Rainey v. Director, OWCP*, 517 F.3d 632, 634, 42 BRBS 11, 12(CRT) (2d Cir. 2008); *American Stevedoring, Ltd. v. Marinelli*, 248 F.3d 54, 64-65, 35 BRBS 41, 49(CRT) (2d Cir. 2001); *see also Bath Iron Works Corp. v. Fields*, 599 F.3d 47, 44 BRBS 13(CRT) (1st Cir. 2010). Once the claimant establishes a prima facie case, Section 20(a) applies to relate the disabling injury to the employment, and the employer can rebut this presumption by producing substantial evidence that the claimant's condition was not caused or aggravated by his employment. *Rainey*, 517 F.3d at 634, 42 BRBS at 12(CRT); *Marinelli*, 248 F.3d at 65, 35 BRBS at 49(CRT). If a work-related injury aggravates, exacerbates, accelerates, contributes to, or combines with a pre-existing condition, the entire disabling condition is compensable. *Rainey*, 517 F.3d at 636, 42 BRBS at 13(CRT). If the employer rebuts the Section 20(a) presumption, 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. *Rainey*, 517 F.3d at 634, 42 BRBS at 12(CRT); *Marinelli*, 248 F.3d at 65, 35 BRBS at 49(CRT); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

In this case, the administrative law judge found the opinions of Drs. Choueiri and Pulde sufficient to rebut the Section 20(a) presumption. Claimant challenges these findings, asserting that these opinions are "highly equivocal, unsubstantiated and flawed" such that they cannot sever the presumed causal relationship between claimant's cancer and his employment. We reject claimant's contention. Employer's burden on rebuttal is

one of production only, not one of persuasion. *Rainey*, 517 F.3d at 637, 42 BRBS at 14(CRT). An employer satisfies this burden of production when it presents "'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." *Id.* (quoting *American Grain Trimmers, Inc. v. Director, OWCP [Janich]*, 181 F.3d 810, 817, 33 BRBS 71, 76 (CRT) (7th Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000)); *see Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *Fields*, 599 F.3d at 55, 44 BRBS at 17(CRT). The opinion of a physician, that to a reasonable degree of medical certainty, no relationship exists between an injury and the claimant's employment, has been held to be sufficient to rebut the presumption. *See O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000).

The administrative law judge rationally found that the opinions of Drs. Choueiri and Pulde constitute substantial evidence, which a reasonable mind could accept as supporting a finding that claimant's cancer is not causally related to his employment with employer, sufficient to rebut the Section 20(a) presumption. Decision and Order at 5-9, 11. Dr. Choueiri, who reviewed many of claimant's medical reports, opined that "it is my opinion with a reasonable degree of medical certainty that [claimant's] employment by [employer] from 1956 to 1995 and his alleged workplace exposures did not cause, hasten or accelerate his bladder cancer." *See* EXs 1; 6 at 17 (dep.). Dr. Pulde similarly opined, within a reasonable degree of medical certainty, that there is no evidence that claimant's workplace exposures caused or contributed to his cancer. *See* EX 7 at 29-32, 43-44; Exhibit 1 at 18. Both physicians attributed claimant's cancer primarily to his smoking cigarettes. As the administrative law judge properly considered these opinions in light of employer's burden of production, and as these opinions constitute substantial evidence that claimant's work-related exposures did not cause or contribute to his bladder cancer, we affirm the administrative law judge's finding that the Section 20(a) presumption is rebutted. *See Rainey*, 517 F.3d 632, 42 BRBS 11(CRT); *O'Kelley*, 34 BRBS 39.

Claimant also challenges the administrative law judge's finding that he did not establish a causal relationship between his cancer and his work-related employment exposures based on the record as a whole. In her decision, the administrative law judge weighed the medical opinions, reports and testimony of the medical experts and concluded that claimant failed to carry his burden of persuasion. *See* Decision and Order at 11-13. Specifically, the administrative law judge found that claimant presented no epidemiological studies, articles or other evidence demonstrating a causal relationship between MEK, TCE, inhibisol and asbestos exposures and the development of bladder cancer, and that claimant's expert, Dr. Zizza, did not cite any specific articles, studies or databases to support his opinion that these exposures contributed to claimant's condition. *Id.* at 12. In contrast, the administrative law judge found that Drs. Choueiri and Pulde referenced various reliable sources, specifically, the International Agency for Research

on Cancer (IARC), National Institute of Health (NIH), Agency for Toxic Substances and Disease Registry (ATSDR), and the American Congress of Governmental Industrial Hygienists (ACGIH), in opining that MEK, TCE, inhibisol and asbestos are not bladder carcinogens.[1] Pursuant to these findings, the administrative law judge concluded that claimant failed to establish by a preponderance of the evidence that his exposure to MEK, TCE, inhibisol and asbestos caused or contributed to his bladder cancer. *Id.* With regard to claimant's claim that his cancer is causally related to his inhalation of fumes during the vulcanization process, the administrative law judge found that: 1) the IARC monograph relied on by claimant addressed British workers employed in the rubber industry generally before 1950; 2) a study from Sweden in 1987 found a standardized mortality ratio (SMR) of 1.26, which is an elevated, but not significant, association between vulcanization and bladder cancer ; and 3) claimant failed to establish that he was exposed to aromatic amines, which are risk factors for bladder cancer. *Id.* at 12. The administrative law judge thus concluded that claimant did not meet his burden with regard to his working with rubber products. *Id.* at 12-13.

We reject claimant's contention that the administrative law judge erred in her evaluation of the evidence.[2] In her decision, the administrative law judge fully and thoroughly addressed all the relevant evidence.[3] It is well established that the

[1] The administrative law judge further found that Dr. Zizza did not address Dr. Choueiri's opinion that evidence of a toxic accumulation in claimant's bladder would have been present had claimant's exposures contributed to his condition. Decision and Order at 12.

[2] We reject claimant's argument that the administrative law judge's decision fails to satisfy the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A). In this case, the administrative law judge, after setting forth at length claimant's testimony and the reports and depositions of Drs. Zizza, Choueiri and Pulde, addressed that evidence in light of the standard espoused by the United States Court of Appeals for the Second Circuit. Her decision, therefore, complies with the APA. Decision and Order at 3-13. To the extent claimant contends the administrative law judge erred in not resolving doubt in his favor, *see* Cl. Br. at 40, 47, 55, the "true doubt" rule regarding evidence in equipoise has been invalidated by the Supreme Court. *See Greenwich Collieries*, 512 U.S. 257, 28 BRBS 43(CRT). Moreover, the administrative law judge did not find the evidence of record to be in equipoise but, rather, that claimant's evidence is insufficient to sustain his burden of proof in this case. *See* Decision and Order at 12-13.

[3] Claimant asserts that the administrative law judge erred in applying the decision of the Second Circuit in *Maiorana v. U.S. Mineral Products Co.*, 52 F.3d 1124 (2d Cir. 1995), in this case, as claimant alleges that *Maiorana* puts a higher burden of proof on the

administrative law judge is entitled to evaluate the credibility of all witnesses and to draw her own inferences and conclusions from the evidence. *See John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *see also Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Moreover, it is impermissible for the Board to reweigh the evidence or to substitute its own views for those of the administrative law judge. *Volpe v. Northeast Marine Terminals,* 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982). The administrative law judge's finding that claimant did not establish that his bladder cancer is related to his employment exposures is based on a rational weighing of the medical evidence and is supported by substantial evidence in the form of the opinions of Drs. Choueiri and Pulde. We therefore affirm the administrative law judge's determination that claimant failed to meet his burden of establishing a causal relationship between his bladder cancer and his employment with employer. *See Coffey v. Marine Terminals Corp.,* 34 BRBS 85 (2000).

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plaintiff than that required under the Act. In *Maiorana*, the court addressed standard mortality ratios, and explained that epidemiological evidence is "indispensable in toxic and carcinogenic tort actions where direct evidence is lacking." *Id.* at 1128. The administrative law judge found that claimant presented no epidemiological studies, articles or other evidence in support of his claim that his cancer is work-related, and that Dr. Zizza's opinion was entitled to less weight than those of Drs. Choueiri and Pulde. *See* Decision and Order at 12. In this regard, the administrative law judge did not require that claimant prove his case by a standard higher than that of the "preponderance of the evidence."

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

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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GREG J. BUZZARD
Administrative Appeals Judge