U.S. Department of Labor

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

BRB No. 17-0643

KEVIN SMITH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PAT ENGINEERING ENTERPRISES, WLL	)	
	)	
Employer-Petitioner	)	DATE ISSUED: May 30, 2018
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

Samuel S. Frankel, Jr. (Barnett, Lerner, Karsen & Frankel, P.A.), Fort Lauderdale, Florida, for claimant.

Scott A. Decius (Decius Law Firm), Bloomfield Hills, Michigan, for employer.

Leonard H. Gerson (Kate S. O'Scannlain, Solicitor of Labor; Maia S. Fisher, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order and the Decision and Order on Reconsideration (2015-LDA-00901) 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 started working for employer as a construction project manager at Al Udeid Air Base in Qatar in October of 2013. CX 15 at 21-23, 31. On February 10, 2014, claimant suffered an injury when he slipped off an unsecured ramp and fell onto his buttocks. *Id*. at 37. Claimant testified at his deposition that he reported the accident the following day to Ms. Kenkri, the assistant general manager. *Id*. at 41.

Following the incident, claimant's back pain worsened. He testified that his work included lifting, bending, stooping, climbing, and walking on uneven ground. CX 15 at 47. When his pain did not subside, he went to the Hamad Medical Center in Qatar about one week after the accident. He chose not to undergo treatment there because of the "bad conditions" at the hospital. *Id*. at 43-44.

Claimant testified that approximately ten days after the accident, he contacted Philip Ogden, a Director for Employer, about his ongoing back problems and Mr. Ogden recommended an orthopedist, Dr. Stanley Jones. CX 15 at 45-46; CX 16 at 309. Claimant stated that he attempted to visit Dr. Jones but the medical facility would not accept his insurance. CX 15 at 49. He forwarded the estimate of his medical costs to Ms. Kenkri, who took no action. *Id*. at 50. Shortly thereafter, on March 11, 2014, claimant was terminated from his employment.

Claimant saw Dr. Park in Dubai on July 5, 2014, for low back and right leg pain. Dr. Park sent claimant for an x-ray and MRI of his lumbar spine. CX 14. Dr. Shah interpreted these tests as revealing degenerative changes in the cervical and lumbar region along with a "prominent disk bulge at the L4-5 level with a small annular tear." CX 12 at 2-3. Claimant was examined by Dr. Shim in Dubai, initially on July 8, 2014 and again on August 9, 2014. Dr. Shim noted that claimant's back condition and clinical transforaminal stenosis was degenerative in nature but that his working conditions accelerated his need for medical care as he was working at a construction site which required climbing ladders or scaffolds. CX 13 at 2. Dr. Shim concluded that claimant was able to work but should not walk more than 500 meters. *Id*. Claimant did not see a physician again until May 31, 2016, when he reported to Dr. Shim with complaints of worsening lower back pain

radiating down both legs. *Id.* at 3. Dr. Shim concluded that claimant's back pain "started to aggravate" after his fall in February 2014. *Id.*

Claimant filed a claim for benefits under the Act in July or August 2014. CX 1; CX 2. While the claim was pending before the Office of Administrative Law Judges, employer filed an application for Section 8(f) relief, 33 U.S.C. §908(f), with the district director, who denied the application on February 13, 2015.

Employer controverted the claim on the ground that claimant did not give it timely notice of his injury under Section 12 of the Act, 33 U.S.C. §912.[1] The administrative law judge rejected employer's contention, finding that employer had knowledge of the injury on or before February 23, 2014. He also concluded that even if claimant did not provide timely notice, employer did not show it was prejudiced by the lack of such notice under Section 12(d)(2). Decision and Order at 8. The administrative law judge found that claimant's deposition testimony is credible and that statements of employer's witnesses are less reliable because they were not subject to cross-examination.[2] *Id.* at 7-8. The administrative law judge concluded that claimant is entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), that his back condition is related to the slip and fall accident. *Id.* at 10. The administrative law judge also found that claimant established a prima facie case of total disability because Dr. Shim stated that claimant's job required climbing ladders or scaffolds and walking on uneven terrain, which he cannot do. *Id.* at 10-11. He further noted that Dr. Shim stated claimant's condition had not reached maximum medical improvement. The administrative law judge concluded that employer did not submit any evidence of suitable alternate employment and, accordingly, awarded claimant ongoing temporary total disability benefits from July 8, 2014.[3]

[1] Continental Insurance Company filed a motion for summary decision seeking to be removed as a party to this case. The administrative law judge granted the motion on November 23, 2015, because it was undisputed that Continental's policy to insure employer expired prior to claimant's accident. Employer was not insured for Defense Base Act coverage after that date. Decision and Order at 5.

[2] Employer submitted letters from its Executive Director and its Safety Manager and an email and an affidavit from Mr. Ogden, stating that claimant never reported any accident while at work. CX 16 at 19, 325-326; CX 17.

[3] On reconsideration, the administrative law judge affirmed the award for temporary total disability benefits but revised the Decision and Order on a number of issues unrelated to this appeal. Decision and Order on Reconsideration at 5-6.

On appeal, employer argues: the administrative law judge erred in finding that claimant complied with Section 12 of the Act; claimant is not credible as to the occurrence of the accident and his disabling symptoms; and it is entitled to Section 8(f) relief. Claimant filed a response brief, urging affirmance. The Director, Office of Workers' Compensation Programs, also filed a response brief, arguing solely that employer is not entitled to Section 8(f) relief.

Employer contends that claimant's claim should be barred because it did not receive timely notice of the injury under Section 12 of the Act. Employer states that it did not receive any notice of the alleged work-related injury until claimant filed his LS-203 claim form in August 2014. Employer cites letters from its safety manager, Lawrence Omisakin, its executive director, Shrawan Tiwari, and an email and an affidavit from Mr. Ogden, that they were not aware of any accident occurring on site and that claimant never reported any incident or accident. *See* CX 16 at 19, 325-326; CX 17. Mr. Ogden also denied that he referred claimant to an orthopedist. CX 17. Employer also relies on its Daily Log, reporting no accidents on or around February 10, 2014, when claimant asserts the accident occurred. CX 16 at 107.

Section 12 of the Act provides that notice of an injury should be given in writing to the district director and to the employer within 30 days after the date of the injury or the date of awareness of a relationship between the injury and claimant's employment. 33 U.S.C. §912(a), (b); *see Dyncorp Int'l v. Director, OWCP [Mechler]*, 658 F.3d 133, 45 BRBS 61(CRT) (2d Cir. 2011); 20 C.F.R. §§702.211, 212(a), 214. Failure to give timely notice will bar the claim unless one of the exceptions under Section 12(d) applies. 33 U.S.C. §912(d); 20 C.F.R. §702.216. Under Section 12(d), failure to give written notice to the district director and employer will not bar the claim if: (a) the employer had actual knowledge of the injury; (b) the employer was not prejudiced by late or lack of notice; or (c) the district director excuses failure to file the notice. The Section 20(b) presumption applies to Section 12 so that, in the absence of substantial evidence to the contrary, it is presumed that employer was given sufficient notice of the injury. 33 U.S.C. §920(b); *Steed v. Container Stevedoring Co.*, 25 BRBS 210 (1991). Thus, employer bears the burden of showing that it had no knowledge of the injury during the filing period and was prejudiced by the lack of proper notice. *Sheek v. General Dynamics Corp.*, 18 BRBS 151 (1986), *modifying on recon. Sheek v. General Dynamics Corp.*, 18 BRBS 1 (1985).

The administrative law judge noted there is no evidence that claimant gave written notice of his injury to the district director. Decision and Order at 8. However, the administrative law judge concluded that employer had actual knowledge or notice of claimant's injury on or before February 23, 2014, well within thirty days of the accident. *See id.* Finally, the administrative law judge found that even if claimant failed to give adequate notice, employer did not show that it was prejudiced by any late notice.

We reject employer's contention that the administrative law judge erred in finding that claimant's claim is not barred under Section 12. The administrative law judge concluded that claimant credibly testified that he reported the accident to employer's personnel within days of the occurrence. CX 15 at 40-41. He also found the letter and affidavit statements from employer's representatives less reliable than claimant's testimony because claimant was subject to cross-examination and employer's representatives were not.[4] Decision and Order at 8. Additionally, the administrative law judge stated that Mr. Ogden's credibility was impeached because of the email in which he recommended Dr. Jones.[5] *See* CX 16 at 309.

The administrative law judge as the fact-finder is entitled to weigh the evidence and determine the credibility of witnesses. The Board is not empowered to reweigh the evidence or second-guess an administrative law judge's credibility determinations. *See Sealand Terminals v. Gasparic*, 7 F.3d 321, 28 BRBS 7(CRT) (2d Cir. 1993). The administrative law judge's decision to credit claimant's testimony over the letter and affidavit statements of employer's representatives is not unreasonable or irrational. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). The administrative law judge's conclusion that employer had knowledge of claimant's injury is supported by claimant's testimony and by the rational inference he drew from Mr. Ogden's email. *See Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *Vinson v. Resolve Marine Services*, 37 BRBS 103 (2003). Therefore, we affirm the conclusion that employer had actual knowledge of claimant's injury pursuant to Section 12(d)(1).

In addition, the administrative law judge correctly noted that employer bears the burden of showing that it was prejudiced by a lack of timely notice, which employer failed to do. Employer's cursory allegation of prejudice is insufficient as a matter of law to bar the claim due to lack of timely written notice. *See Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *Bustillo v. Southwest Marine, Inc.*, 33 BRBS 15 (1999). Moreover, employer has not raised this issue on appeal. The administrative

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[4] Employer's representatives denied any knowledge of claimant's accident or his injury. CX 16 at 19, 325-326; CX 17.

[5] Mr. Ogden denied knowledge of an injury and denied recommending a physician. However, claimant submitted a copy of an email dated February 23, 2014 from Mr. Ogden to claimant stating in its entirety, "From one of my hockey friends. There's a good Ortho in Al Ahli called Dr Stanley Jones." CX 16 at 309; CX 17. Thus, although the email does not mention the accident, it does contain a physician recommendation by Mr. Ogden to claimant.

law judge's finding that the claim is not barred pursuant to Section 12 is therefore affirmed. *See id.*

Employer further contends the administrative law judge's finding that claimant is entitled to temporary total disability is not supported by substantial evidence because employer disputes the occurrence of the accident. Employer again challenges claimant's credibility but also relies on the July 6, 2014 report of Dr. Shah that stated claimant had suffered from low back pain and bilateral leg pain since January 2014, which was prior to the alleged accident.

Pursuant to Section 20(a) of the Act, it is presumed that an injury is causally related to claimant's employment. 33 U.S.C. §920(a). In order to invoke the Section 20(a) presumption, a claimant must establish that he suffered harm and that conditions existed or an accident occurred at work that could have caused, aggravated, or accelerated the condition. *See Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008). Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut it with substantial evidence that claimant's harm was not caused or aggravated by the work accident. *Id.*, 517 F.3d at 634, 42 BRBS at 12(CRT).

In this case, as noted, the administrative law judge found claimant's testimony to be credible. Therefore, the administrative law judge found that claimant did, in fact, slip and fall off a ramp while on duty in Qatar. Decision and Order at 10. Moreover, claimant has been diagnosed with degenerative disc disease and an annular tear at L4-5 and Dr. Shim stated that the fall aggravated claimant's back pain. CX 13. The administrative law judge thus concluded that claimant is entitled to the Section 20(a) presumption that his accident caused his harm. We affirm this finding as it is supported by substantial evidence. A claimant's credible testimony may suffice to establish a prima facie case. *See, e.g., Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988). Moreover, claimant offered medical evidence that the work accident aggravated his pre-existing back pain.

We further affirm the administrative law judge's conclusion that claimant's injury is work-related because employer did not submit any evidence to rebut the presumption. Dr. Shim specifically stated that claimant's accident and his working conditions aggravated his condition. *See* CX 13. Dr. Shah's report that claimant's back and leg pain originated in January 2014 is insufficient to rebut the Section 20(a) presumption because it does not address aggravation. *See Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009). Absent substantial evidence that claimant's condition was not caused or aggravated by his work accident, the Section 20(a) presumption is not rebutted. *C&C Marine Maint. Co. v. Bellows*, 538 F.3d 293, 42 BRBS 37(CRT) (3d Cir. 2008). We therefore affirm the administrative law judge's conclusion that claimant established that his back condition is work-related. *Id.*

Claimant bears the burden of establishing the extent of his disability. *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997). Once a claimant demonstrates an inability to return to his usual work because of his work-related injury, he is considered totally disabled under the Act and the burden shifts to employer to demonstrate the availability of suitable alternate employment. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991).

In this case, the administrative law judge accepted Dr. Shim's statement dated August 9, 2014 that claimant had not reached maximum medical improvement. He also found that Dr. Shim concluded that claimant's back injury prevents him from walking for more than ten minutes and that claimant's job requirements involved walking on uneven ground and climbing ladders and scaffolds. Decision and Order at 10. Accordingly, the administrative law judge found that claimant cannot return to his usual work. *Id.* at 11. The administrative law judge found that employer did not offer any evidence of suitable alternate employment and that, therefore, claimant is temporarily totally disabled. *Id.*

Employer contends the administrative law judge's finding that claimant is totally disabled is unsupported by the evidence. Employer asserts that claimant did not seek any treatment immediately after his injury, and that because claimant did not seek any medical treatment from 2014 to 2016 his testimony concerning the severity of his condition cannot be credited.

We reject employer's contentions. The administrative law judge was well within his discretion to accept claimant's testimony that he sought treatment following his accident at the Hamad Medical Center and from Dr. Jones within two weeks after the accident, even though he ended up not receiving treatment on either occasion. Moreover, the apparent lack of medical treatment between 2014 and 2016 does not require a finding that claimant is not disabled due to his work injury. *See* CX 15 at 43-44, 49; *see also Pittman Mechanical Contractors, Inc. v. Director, OWCP [Simonds]*, 35 F.2d 122, 28 BRBS 89(CRT) (4th Cir. 1994) (affirming an administrative law judge's finding of a work-related injury where claimant delayed seeking treatment because he did not immediately realize the severity of the injury).

We also affirm as supported by substantial evidence the administrative law judge's conclusion that claimant is unable to return to his usual work. The administrative law judge based his conclusion on employer's description of claimant's work requirements, *see* EX 17 at 8, and the opinion of Dr. Shim that claimant's back injury precludes him from these activities, *see* CX 13. *See Devor v. Dep't of the Army*, 41 BRBS 77 (2007). In addition, employer did not submit any evidence of suitable alternate employment. The administrative law judge's finding that claimant established that he is temporarily totally

disabled is therefore affirmed.[6] *Hite v. Dresser Guiberson Pumping,* 22 BRBS 87 (1989); *Clophus v. Amoco Prod. Co.*, 21 BRBS 261 (1988).

Employer also contends that it is entitled to Section 8(f) relief. We reject this contention, as Section 8(f) is inapplicable where, as here, the claimant's disability is only temporary.[7] 33 U.S.C. §908(f)(1); *Jenkins v. Kaiser Aluminum & Chemical Sales, Inc.*, 17 BRBS 183 (1985).

Accordingly, the administrative law judge's Decision and Order and Decision and Order on Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

[6] Employer does not challenge the finding that claimant has not reached maximum medical improvement.

[7] Therefore, we need not address the Director's other bases for the inapplicability of Section 8(f) relief. *See* 33 U.S.C. §908(f)(3) (employer must raise claim when permanency is first at issue); 33 U.S.C. §908(f)(2)(A) (the Special Fund cannot be liable where employer does not comply with 33 U.S.C. §932(a)).