U.S. Department of Labor

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

BRB No. 18-0253

TRAMOND M. BOURGEOIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
FAB-CON, INCORPORATED	)	
	)	DATE ISSUED: 11/15/2018
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Larry W. Price, Administrative Law Judge, United States Department of Labor.

David C. Whitmore (Blake Jones Law Firm, L.L.C.), New Orleans, Louisiana, for claimant.

Edward S. Johnson and Robert B. Acomb III (Johnson, Yacoubian & Paysse), New Orleans, Louisiana, for employer/carrier.

Before: BOGGS, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2017-LHC-00284) of Administrative Law Judge Larry W. Price 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 alleged he was injured during the course of his employment on navigable waters on May 31, 2014, when the lift boat tilted and he was hit by dislodged equipment. He claimed to have sustained injuries to his right shoulder, right ankle, low back, and psyche. He filed a claim for temporary total disability benefits from the date of injury. The administrative law judge found that claimant sustained work-related injuries to his shoulder, back, and ankle, but not his psyche, and that all injuries resolved as of November 4, 2014, and claimant could return to his usual work. He awarded claimant temporary total disability benefits from June 1 through November 4, 2014, based on an average weekly wage of $445.95, and he awarded medical benefits through November 4, 2014, for the right ankle sprain, right shoulder tendinitis and AC joint sprain, and low back strain/spasms. 33 U.S.C. §§907, 908(b).

Claimant appeals the administrative law judge's findings that he did not suffer a labrum tear or lumbar facet arthrosis as a result of the work accident. Claimant also challenges the administrative law judge's average weekly wage finding.[1] Employer urges the Board to affirm the decision.[2]

Claimant contends the administrative law judge erred in finding that the work accident did not cause greater shoulder and back injuries, and, thus, erred in limiting the award of benefits to the period prior to November 4, 2014. In determining whether a condition is work-related, a claimant is aided by the Section 20(a), 33 U.S.C. §920(a), presumption, which may be invoked only after he establishes a prima facie case that he sustained a harm or pain and that conditions existed or an accident occurred at his place of employment which could have caused the harm or pain. *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Once the Section 20(a) presumption is invoked, the employer can rebut it by producing substantial evidence establishing the lack of a causal nexus. *Ortco Contractors,*

[1] Claimant does not challenge any findings related to the alleged psychological injury, and those findings are affirmed. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

[2] In its response brief, employer also asserted that the administrative law judge erred in finding the status and situs requirements satisfied. These contentions were not raised in a cross-appeal and will not be addressed by the Board because they do not support the decision below. *Reed v. Bath Iron Works Corp.*, 38 BRBS 1 (2004).

Inc. v. Charpentier, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). If the administrative law judge finds that the employer has rebutted the Section 20(a) presumption, the causation issue must be resolved on the record as a whole with the claimant bearing the burden of persuasion by a preponderance of the evidence. *Ceres Gulf, Inc. v. Director, OWCP [Plaisance]*, 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

With regard to claimant's shoulder injury, claimant asserts error in the administrative law judge's decision to credit the opinion of Dr. Sweeney, employer's expert, over that of his treating physician, Dr. Johnston, to conclude he did not sustain a tear of the labrum in the work accident. The administrative law judge found that claimant established, based on Dr. Johnston's opinion, a prima facie case that his labrum tears, which necessitated surgery, were due to the work accident. Decision and Order at 26-27; *see* 33 U.S.C. §920(a); *see generally R.F. [Fear] v. CSA, Ltd.*, 43 BRBS 139 (2009); *Perry v. Carolina Shipping Co*., 20 BRBS 90 (1987). However, he then found that the MRIs contemporaneous with the injury and Dr. Sweeney's opinion rebut the Section 20(a) presumption. Decision and Order at 26-27. On the record as a whole, the administrative law judge credited the rebuttal evidence and concluded that claimant sustained only the right shoulder tendinitis and sprain in the accident, which had healed. Decision and Order at 26-27.

Claimant contends his 2014 work injury caused the tear in his labrum and the need for the surgery he underwent in 2017. Claimant correctly states that the report dated June 24, 2014, of the high resolution MRI indicates a questionable "tear of the ventral lip of the cartilaginous glenoid labrum" whereas the initial, lower resolution, MRI of June 2, 2014, does not. CXs 6-7; EXs 19-20. Dr. Johnston found and repaired a superior and a posterior tear of the labrum during arthroscopy on March 2, 2017, stating that this was consistent with the ventral tear shown on the June 24 MRI. CX 4. Prior to his deposition in 2017, Dr. Sweeney conducted a records review, which included a review of the actual MRI films. He stated that the films showed the labrum "in very good appearance" and clearly demonstrated "that the posterior and superior labrum of the shoulder was intact" in June 2014. EX 22 at 30-32. Dr. Sweeney's opinion of the MRI films constitutes substantial evidence rebutting the Section 20(a) presumption, and we affirm this finding. *See Plaisance*, 683 F.3d 225, 46 BRBS 25(CRT); *Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT); *Victorian v. International-Matex Tank Terminals*, 52 BRBS 35 (2018).

In considering the record as a whole, the administrative law judge credited Dr. Sweeney's opinion. Dr. Sweeney explained that, although it was possible that Dr.

Glorioso, who interpreted the MRIs, could have interpreted the superior tear as a ventral tear, a false negative was unlikely due to the clarity of the MRI films which showed no posterior or superior tears. EX 22 at 33-34. As Dr. Johnston acknowledged that an intervening injury was possible, CX 27 at 24-25, it was rational for the administrative law judge to find Dr. Sweeney's explanation more persuasive than Dr. Johnston's opinion that the tears occurred in the work accident and to conclude on the record as a whole that claimant's work injury did not cause the labrum tears or the need for surgery.[3] Decision and Order at 26. The administrative law judge is entitled to weigh the conflicting evidence. *See generally Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995). Because his conclusion is supported by substantial evidence, it is affirmed. *See generally Victorian*, 52 BRBS at 41-42; *Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001); *Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000). Therefore, as the condition is not work-related, we affirm the denial of disability and medical benefits for the labrum tears.

With regard to his back condition, claimant contends the administrative law judge erred in failing to find that the accident caused facet arthrosis in addition to back spasms. The administrative law judge stated that Dr. Johnston's diagnosis of facet arthrosis is based solely on claimant's subjective complaints, which he found are not credible.[4] Decision and

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[3] Contrary to claimant's contention, the administrative law judge need not give Dr. Johnston's opinion "special weight" pursuant to *Amos v. Director, OWCP*, 153 F.3d 1051 (1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999). *Amos* addressed the weight accorded to the treating physician's opinion when the patient is faced with two or more valid medical treatment alternatives. The court stated it is the patient, in consultation with his own doctor, who has the right to choose his own course of treatment. *See also Monta v. Navy Exch. Serv. Command*, 39 BRBS 104 (2005). As the issue is the work-relatedness of claimant's condition and not the reasonableness of treatment, *Amos* is inapplicable at this juncture. The fact-finder is entitled to weigh the medical evidence and draw his own inferences from it and is not bound to accept the opinion or theory of any particular medical examiner. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962).

[4] The administrative law judge found claimant to be "presentable and amenable" but not credible. He noted claimant's inconsistent descriptions of the accident, CXs 1-2, 5, 10; EX 15, 17; Tr. at 22, and tendency to exaggerate the degree of his pain – noted by doctors, EXs 14-15, 17 – which lessened his credibility. The administrative law judge also disbelieved claimant's claims of being unable to work, finding him to be complacent with his situation and unwilling to engage in steady employment. Accordingly, the administrative law judge gave no weight to claimant's subjective complaints of pain and relied only on objective evidence. Decision and Order at 22-23. The administrative law

Order at 27. Thus, he found the Section 20(a) presumption does not apply because claimant does not have this condition. *Id.* Although claimant correctly asserts that facet arthrosis was reported on the June 2 MRI, the second MRI, taken on June 24, 2014, was "unremarkable" and revealed only "[s]traightening of the lumbar lordosis which may have a component of muscle spasm." CX 7. Because the June 24 MRI films were of a higher resolution than those taken on June 2, Dr. Sweeney stated that they foreclosed the possibility of claimant's having facet arthrosis.[5] EX 22 at 29-30, 39; *see* Decision and Order at 10. As substantial evidence supports his conclusion that claimant does not have facet arthrosis and sustained nothing more than temporary back spasms as a result of the work injury, the administrative law judge's denial of additional benefits for claimant's back condition is affirmed.[6] *Victorian*, 52 BRBS at 41-42.

Claimant also contends the administrative law judge erred in finding $445.95 to be his average weekly wage at the time of his injury. He argues that it was improper for the administrative law judge to consider the total aggregate earnings of 88 riggers and divide that total by 88 and then by 52 to arrive at the average weekly wage because some of those riggers earned less per hour than he did and some did not work substantially the whole of the year. Claimant's assertion that the administrative law judge's calculation is flawed is not persuasive.

The goal of Section 10 of the Act, 33 U.S.C. §910, is to arrive at a dollar figure that reasonably represents the amount a claimant was earning at the time of his injury. Sections

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judge's credibility determination is rational and, therefore, is affirmed. *Bis Salamis, Inc. v. Director, OWCP [Meeks]*, 819 F.3d 116, 50 BRBS 29(CRT) (5th Cir. 2016); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963).

[5] Further, the administrative law judge noted that, following the examination on November 4, 2014, Dr. Sweeney observed claimant comfortably move his back with full range of motion, which was in direct contradiction to how he moved it during the examination when directed by Dr. Sweeney. EXs 14, 22.

[6] Claimant does not allege error in the administrative law judge's finding that his right ankle sprain, right shoulder tendinitis and AC joint sprain, and low back strain/spasms resolved as of November 4, 2014 without residual impairment or the need for further medical treatment. Therefore, this conclusion is affirmed. *Scalio*, 41 BRBS 57; *see McCaskie v. Aalborg Ciserv Norfolk, Inc.*, 34 BRBS 9 (2000); *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996).

10(a) and 10(b) are the statutory provisions applicable in determining an employee's average annual earnings where the injured employee's work is regular and continuous. The computation of average annual earnings is made pursuant to subsection (c) if subsection (a) or (b) cannot be reasonably and fairly applied. 33 U.S.C. §910(a)-(c); *Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000); *LeBlanc v. Cooper/T. Smith Stevedoring, Inc.*, 130 F.3d 157, 31 BRBS 195(CRT) (5th Cir. 1997). An administrative law judge has broad discretion when applying Section 10(c) to calculate a claimant's average weekly wage. *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 32 BRBS 91(CRT) (5th Cir. 1998); *Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1987).

Claimant was injured on May 31, 2014, seven weeks after his start date. For this period of time, claimant earned $11 per hour for a total of $5,704.88. He contends the administrative law judge should have taken that amount and divided it by seven to arrive at an average weekly wage of $814.91. Alternatively, he asserts, the administrative law judge should have considered the wages of only the full-year riggers to arrive at an average weekly wage of $816.92.

Employer submitted evidence of the earnings of 88 other riggers in its employ, some of whom earned and worked more than claimant and some of whom earned and worked less. From May 2013 through May 2014, employer paid a total of $2,040,658.67 to its 88 riggers. EX 8. Employer also submitted evidence establishing that claimant was a sporadic worker who did not file tax returns between 2004 and 2014, EX 7, due to his low earnings.

The administrative law judge properly found that Section 10(a), (b) cannot be "reasonably and fairly applied" because the necessary criteria are absent. Decision and Order at 33. In applying Section 10(c),[7] he noted: 1) claimant has a history of sporadic work, never working a full year or a substantial portion of a year, at one job; 2) claimant has not filed income taxes because his earnings have been too low; and 3) riggers generally are 26-week, not 52-week, workers. *Id.* at 32-33. As he found claimant did not

[7] Section 10(c) 33 U.S.C. §910(c), states that the claimant's:

> average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

demonstrate a capacity to work the entire year as a rigger or to earn wages reasonably represented by an average weekly wage of $814.91, the administrative law judge concluded that taking an average of the amount paid to all of employer's riggers, which takes into account all hourly rates and continuities of employment, reasonably represents claimant's annual earning capacity at the time of his injury. *Id.* at 34.

Claimant has not demonstrated error in the administrative law judge's application of Section 10(c) or in the resulting average weekly wage. The administrative law judge rationally took into account claimant's earning history, the wages of similar employees, and the unlikelihood of full-year employment. His calculation of claimant's average weekly wage as $445.95 is supported by substantial evidence of record and therefore is affirmed. *See generally Staftex Staffing v. Director, OWCP [Loredo]*, 237 F.3d 404, 34 BRBS 44(CRT), *modified in part on reh'g*, 237 F.3d 409, 35 BRBS 26(CRT) (5th Cir. 2000); *Jasmine v. Can-Am Protection Group, Inc.*, 46 BRBS 17 (2012); *Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011).

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge