BRB No. 12-0111

HECTOR LEYVA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL, INCORPORATED	)	DATE ISSUED: 11/29/2012
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

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

David C. Barnett (Barnett & Lerner, P.A.), Ft. Lauderdale, Florida, for claimant.

Jerry R. McKenney and Frank W. Gerold (Legge, Farrow, Kimmitt, McGrath & Brown, L.L.P.), Houston, Texas, for employer/carrier.

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2011-LDA-0025) 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.*, as extended by the Defense Base Act (DBA), 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 supported by substantial evidence, are rational, and are 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 worked for employer as a mechanic in Iraq. On July 8, 2007, he injured his shoulders during the course of his employment. He was given pain medication and returned to work; when the pain worsened, claimant obtained modified duty and continued working until April 2008 when he returned to the United States for medical treatment. Claimant's treating physician, Dr. Kendrick, diagnosed bilateral rotator cuff tendinitis and performed arthroscopic surgery on claimant's left shoulder on November 7, 2008.[1] Emp. Exs. 9, 19. Employer voluntarily paid medical benefits, as well as temporary total disability benefits from May 2, 2008, through May 19, 2010, when its expert opined that claimant could return to work. Jt. Ex. 1. Claimant filed a claim for additional total and partial disability benefits under the Act, contending he was unable to return to work until he found alternate employment within his restrictions in November 2010.

During the course of the proceedings before the administrative law judge, a question arose as to the qualifications of Dr. Brown, who was appointed as an independent medical examiner (IME) by the Department of Labor (DOL). *See* 33 U.S.C. §907(i). The administrative law judge found, summarily, that Dr. Brown had performed an examination for an insurance carrier within the two years preceding claimant's evaluation and, thus, should not have been appointed as an IME. While the administrative law judge stated the standard remedy in such case is to appoint another IME, he found that claimant had discovered this information less than two weeks prior to the hearing and instead sought to have Dr. Brown's report and testimony stricken or given less weight. Rather than striking the reports and testimony, the administrative law judge stated he would give Dr. Brown's opinion less weight than he normally would give an IME's opinion. Decision and Order at 5.

On the merits, the administrative law judge found claimant's condition to have reached maximum medical improvement on May 11, 2010, based on the parties' stipulations as supported by the opinion of Dr. Gabel, employer's expert. As to the extent of claimant's disability, the administrative law judge found that while Dr. Kendrick believed claimant cannot return to work, Dr. Kendrick did not explain any of his opinions, and he had not evaluated claimant since June 2, 2009. Thus, the administrative law judge found that claimant did not show that his inability to return to his usual work is related to his injury, giving "greater weight to the combined opinions of Drs. Gabel and Brown that Claimant's condition is a degenerative condition and not related to the July 2007 work injury." Decision and Order at 7. The administrative law judge stated that claimant's shoulder pain would have existed regardless of the work injury due to the natural progression of the pre-existing degenerative conditions. As he found that claimant failed to establish a work-related inability to return to his usual work, the

[1]Claimant's right shoulder did not need surgery.

administrative law judge denied benefits subsequent to the date claimant's condition reached maximum medical improvement. Decision and Order at 7-8.

Claimant appeals, contending the administrative law judge erred in admitting Dr. Brown's opinion into evidence. Alternatively, claimant asserts that the administrative law judge should not have given such great weight to Dr. Brown's opinion after having found his IME appointment improper. Additionally, claimant contends the administrative law judge erred in finding his current condition and inability to return to work to be related solely to a non-work-related degenerative condition. Employer responds, urging affirmance.

Section 7(i)

After having been treated by Dr. Kendrick until June 2, 2009, and having been evaluated by Dr. Gabel in May 2010, claimant was examined by DOL-selected Dr. Brown in September 2010 due to his continuing pain. Emp. Ex. 1 (DOL referral letter to Dr. Brown). Dr. Brown filed a report on September 20, 2010, addressed to DOL. He summarized claimant's injury, having reviewed medical records, he set forth claimant's complaints and the examination findings, and he answered the questions posed by DOL.[2] Cl. Ex. 10. Included with this report was Dr. Brown's work capacity evaluation setting forth claimant's work restrictions: no reaching over the shoulder, no pulling, and lifting limited to 25 pounds. Cl. Ex. 10 at 6. On October 27, 2010, Dr. Brown issued a report addressed to "Ms. Koch." He stated that he was asked to review some additional medical records. However, he stated that other than a few pre-injury records involving routine office visits for such things as broken eyeglasses and nausea, there was only one report addressing claimant's shoulders and that was from an injury in 2007 when he pulled a muscle.[3] Thus, Dr. Brown concluded that the additional reports essentially added no new information, and his opinion was unchanged from his September report. Cl. Ex. 10 at 7-8.

[2]Dr. Brown's report mistakenly stated that he was answering questions "put forth by the carrier[.]" Cl. Ex. 10 at 4.

[3]The "additional" evidence reviewed by Dr. Brown does not appear to be in the record. Moreover, the July 13, 2007, note to which Dr. Brown referred is likely related to claimant's July 8, 2007, injury at issue in this case as it is within the same time frame.

On June 16, 2011, the parties deposed Dr. Brown. Claimant contends it was then that he first learned of Dr. Brown's October 2010 report to Ms. Koch[4] and that, in fact, it had been written at the request of employer's counsel.[5] During the course of the deposition, the parties learned that Dr. Brown is hired to perform independent medical examinations through a company called MES Solutions, where his examinations occur and his reports are sent. He stated he generally is not informed who makes the request for an examination, nor does he care, and he is paid by MES. Nevertheless, based on a list of prior cases requiring his testimony, Dr. Brown surmised that the majority of the evaluations on the list, if not all, were requested by insurance companies through MES. Cl. Ex. 11 at 35-36. On the grounds of Dr. Brown's prior work as well as his peer review report for employer, claimant objected to Dr. Brown's being an impartial examiner under Section 7(i) and moved to strike his opinions. *Id.* at 37. Nonetheless, claimant introduced Dr. Brown's two reports and his deposition transcript into evidence, as did employer, and the exhibits were admitted without objection. Tr. at 6-9. In his post-hearing report, claimant reiterated his motion to strike Dr. Brown's reports and testimony or, alternatively, to give them little or no weight.

The administrative law judge found that DOL should not have appointed Dr. Brown as an IME. After summarizing Section 7(i) of the Act, 33 U.S.C. §907(i), the administrative law judge stated that the normal remedy of having another IME appointed was not requested because "Dr. Brown's involvement with IME performed on behalf of Carrier was not known until two weeks prior to trial." Decision and Order at 5. He acknowledged claimant's motion to strike the reports and testimony and then stated: "I find Dr. Brown should not have been appointed as an IME and, accordingly, Dr. Brown's testimony and reports are entitled to less probative weight [than] normally associated with an IME." *Id.* Claimant contends the administrative law judge erred in not striking Dr. Brown's opinion and in giving it any weight.

Section 7(i) of the Act provides:

> Unless the parties to the claim agree, the Secretary *shall not* employ or select any physician for the purpose of making examinations or reviews under subsection (e) of this section who, during such employment, or during the period of two years prior to such employment, has been

[4]Contrary to claimant's assertion, the evidence establishes that employer sent claimant's counsel a copy of the October report in its answers to interrogatories in May 2011. Emp. Ex. 17.

[5]Dr. Brown's office made inquiries of MES during the deposition and learned who requested the October 2010 report. Cl. Ex. 10 at 60.

> employed by, or accepted or participated in any fee relating to a workmen's compensation claim from any insurance carrier or any self-insurer.

33 U.S.C. §907(i) (emphasis added). The regulation, 20 C.F.R. §702.411(c), reiterates this rule, excluding the "workmen's compensation" criterion:

> No physician selected to perform impartial examinations shall be, or shall have been for a period of 2 years prior to the examination, an employee of an insurance carrier or self-insured employer, or who has accepted or participated in any fee from an insurance carrier or self-insured employer, unless the parties in interest agree thereto.

The Board has emphasized that the mandatory language of the Act precludes such a doctor from being an independent examiner. *L.D. [Dale] v. Northrop Grumman Ship Systems, Inc.*, 42 BRBS 1, *recon. denied*, 42 BRBS 46 (2008); *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990); *Jones v. I.T.O. Corp. of Baltimore*, 9 BRBS 583 (1979) (Smith, C.J., dissenting).

In *Dale*, 42 BRBS 1, the claimant was referred for an examination by a doctor chosen by the district director. The claimant submitted documents to the district director which he contended showed that the doctor was not a qualified IME pursuant to Section 7(i) and refused to be examined. The Board vacated the district director's suspension of benefits due to claimant's refusal and remanded the case for him to reconsider the plain language of the Act in determining whether the doctor was qualified to be an impartial examiner. *Dale*, 42 BRBS 1. On the employer's motion for reconsideration, the Board declined to further interpret Section 7(i) but clarified that it prohibits from performing examinations for DOL those doctors who have "been employed by, accepted or participated in any fee from an insurance carrier relating to a claim under the Act." *Dale*, 42 BRBS at 48.

We must vacate the administrative law judge's denial of benefits and remand the case for further findings regarding Dr. Brown's status. Based on the facts discussed above, as argued by claimant, the administrative law judge summarily found Dr. Brown unqualified to be an IME. However, in support of its argument urging affirmance of the administrative law judge's decision, employer asserts, on the same facts, that Dr. Brown's opinion was properly admitted and considered, as he performed examinations through an independent company and was not paid directly by employer or carrier, and there is no evidence that the examinations were in workers' compensation cases. Therefore, employer asserts, Dr. Brown is qualified as an IME under Section 7(i), and his opinion should not be stricken from the record. As the administrative law judge did not make any detailed findings of fact on this issue, we remand the case for him to do so.

On remand, the administrative law judge must discern all the relevant facts and apply the Act and its implementing regulation to determine whether Dr. Brown's appointment as an IME was proper.[6] *Dale*, 42 BRBS 1; *Jones*, 9 BRBS 583 (absent a finding on IME qualifications, too many variables remained, such as whether another IME would render the same opinion and whether that opinion would have been credited). If the administrative law judge finds that Dr. Brown should not have been appointed as an IME, then, because Section 7(i) provides that a doctor who has performed examinations for an employer or carrier "shall not" be an impartial examiner, the administrative law judge must strike Dr. Brown's reports and testimony from the record and remand the case for the district director to appoint another IME, or he must arrive at another remedy to which the parties agree. *Jones*, 9 BRBS at 586. If the administrative law judge finds Dr. Brown to be a qualified impartial examiner, then Dr. Brown's opinion may be weighed along with the other medical opinions of record. *Cotton*, 23 BRBS at 385-387.

Disability

Claimant also contends the administrative law judge erred in finding a non-work-related degenerative condition the cause of claimant's inability to return to his usual work, asserting this finding is not supported by substantial evidence. We agree. In determining whether an injury 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. To establish a prima facie case, the claimant must show 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); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). The Section 20(a) presumption also applies to relate a degenerative condition to the work injury. *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); *Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991). Once the Section 20(a) presumption is invoked, the relevant inquiry is whether the employer produced substantial evidence of the lack of a causal nexus between the claimant's work and his injury. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999).

[6]In addition to the IME issue, on remand, the administrative law judge may address the significance, if any, of claimant's introducing Dr. Brown's reports and testimony into evidence and defense counsel's request for a second opinion from Dr. Brown.

In this case, it is undisputed that claimant injured his shoulders at work. Drs. Brown and Gabel both reported that claimant's continuing pain is due to degenerative changes in his shoulders and that his work injury had resolved. Cl. Ex. 10; Cl. Ex. 11 at 43, 54; Emp. Ex. 9. Although Dr. Brown stated that asymptomatic conditions may become symptomatic due to trauma, therapy, or surgery, he did not know if claimant's degenerative condition pre-existed the work injury. Cl. Ex. 11 at 53-54. Dr. Gabel concluded that claimant now has a degenerative condition that is causing his continued pain, but his report is silent as to when that condition may have become symptomatic or what may have caused it. *See* Emp. Ex. 9. Dr. Kendrick merely agreed via check-box that if the degenerative condition pre-existed the work injury, then the work injury aggravated it. Cl. Ex. 12; Emp. Ex. 19. With or without Dr. Brown's opinion, there is no evidence in the record establishing that claimant's degenerative condition pre-dated his work injury. Thus, the record lacks substantial evidence to support the administrative law judge's statement that:

> Due to the inherent nature of Claimant's condition, his shoulder pain would have existed regardless of his employment with Employer. *The natural progression of preexisting degenerative conditions* produced Claimant's current shoulder condition, not any work-related injury or accident.

Decision and Order at 7 (emphasis added). There is an x-ray report dated December 27, 2007, which indicates there are no degenerative changes in claimant's left shoulder, Emp. Ex. 8 at 4, and an MRI report dated June 16, 2008, which indicates mild focal tendinitis in the left shoulder, Emp. Ex. 16 at 1.

As the administrative law judge did not apply the Section 20(a) presumption to claimant's current bilateral shoulder condition, we vacate his finding that claimant's inability to work is due to a non-work-related condition. *See Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998). On remand, the administrative law judge must apply the Section 20(a) presumption with respect to the shoulder condition that allegedly restricts claimant from performing his usual work. *Hunter*, 227 F.3d 285, 34 BRBS 96(CRT); *Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000). If the administrative law judge finds that claimant's shoulder condition is work-related, he must address any remaining issues.[7]

[7]The administrative law judge must make an explicit finding regarding claimant's ability to return to his usual work. *See generally Louisiana Ins. Guar. Assoc. v. Director, OWCP [Harvey]*, 614 F.3d 179, 44 BRBS 53(CRT) (5th Cir. 2010).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is vacated, and the case is remanded for consideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge