U.S. Department of Labor

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

BRB No. 18-0557

ELIZABETH POWELL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL, INCORPORATED	)	DATE ISSUED: 08/08/2019
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Carrie A. Bland, Administrative Law Judge, United States Department of Labor.

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

Joanna N. Pino and Efrain Carlos (Sioli Alexander Pino), Miami, Florida, for employer/carrier.

William M. Bush (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, 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: BOGGS, Chief Administrative Appeals Judge, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2016-LDA-00735) of Administrative Law Judge Carrie A. Bland rendered on a claim filed pursuant to 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 in 2007, first in accounting and then in the security department. She was assigned to Fallujah, Iraq, and then to Baghdad. On December 9, 2012, claimant received an influenza vaccine at the clinic in Iraq, which she said was a mandatory requirement. Claimant testified at her deposition that she began to experience lower extremity numbness and weakness "right after the flu shot."[1] EX 28 at 33; *but see* n.8, *infra*.

Later in December 2012, claimant was sent home to Lakeland, Florida, for a customary rest period. While in Lakeland, she went to see her primary care doctor for pain and swelling in her legs. EX 28 at 28. The doctor found she did not have any blood clots, advised her to rest, then cleared her to return to work. She returned to Iraq at the end of December.

Claimant continued to work in spite of increasing leg pain. On October 20, 2013, she informed her supervisor that she was not feeling well. On November 5, 2013, she was sent home to the United States for further tests because the clinic in Iraq could not identify

[1] Claimant testified she had never received a flu vaccine before, although her medical records indicate she received one on December 15, 2008. EX 43 at 21. In addition, claimant stated she had not previously experienced weakness in her legs, EX 28 at 65, but the administrative law judge noted she had reported leg pain and swelling around her knees after a long flight in 2008. *See* Decision and Order at 25 (citing EX 33 at 494).

the cause of her symptoms. EX 28 at 44. She underwent an MRI and was diagnosed with inflammation in the spinal cord, or transverse myelitis (TM). She spent two months in the hospital undergoing treatment and was discharged in January 2014. Thereafter, claimant saw a neurologist, Dr. Gonzalez, who diagnosed her with TM and neuromyelitis optica (NMO).[2] EXs 28, 53. She testified she is cared for at home by her mother and sister and has received Social Security disability benefits since 2014. EX 28 at 50, 61.

Claimant filed a claim for benefits under the Act. The parties agreed to a decision on the record and the scheduled hearing was cancelled. They agreed that claimant suffers from NMO. Moreover, Drs. Nadareishvili and Robertson both opined it was possible that claimant's flu vaccine caused her to develop NMO. Decision and Order at 19. Thus, the administrative law judge applied the Section 20(a) presumption that claimant's NMO is related to the flu vaccine she received at work. 33 U.S.C. §920(a). The administrative law judge found employer rebutted the presumption based on the opinion of Dr. Rosen, who stated it is very unlikely that the flu vaccine caused claimant's NMO. Decision and Order at 21-22.

The administrative law judge proceeded to discuss the various scientific studies in evidence. Decision and Order at 22-24. She did not give Dr. Nadareishvili's opinion any weight because the study he relied on did not support his opinion. She further found his conclusions are based on an inaccurate recitation of the progression of claimant's symptoms. *See id.* at 24-25. The administrative law judge found, in contrast, that Dr. Rosen's opinion is supported by the scientific studies and claimant's treatment records and, therefore, accorded full weight to her opinion. *See id.* at 25. Thus, on weighing the evidence as a whole, the administrative law judge concluded that claimant failed to establish that the flu vaccine caused her to develop NMO. She therefore denied benefits. *See id.* at 26.

Claimant appeals, contending the administrative law judge erred in finding employer rebutted the Section 20(a) presumption and she did not establish a causal relationship between her NMO and the vaccine based on the record as a whole. Claimant also urges the Board to vacate the administrative law judge's Decision and Order and remand the case to be heard by a different, constitutionally appointed administrative law judge pursuant to *Lucia v. Sec. & Exch. Comm'n*, 585 U.S. __, 138 S. Ct. 2044 (2018).[3]

[2] Neuromyelitis optica is also referred to as Devic's disease. The administrative law judge generally used the term neuromyelitis optica (NMO) to refer to all of claimant's conditions.

[3] *Lucia* involved a challenge to the appointment of an administrative law judge at the Securities and Exchange Commission (SEC). U.S. Const. art. II, §2, cl. 2. The

Employer filed a response, urging affirmance of the administrative law judge's decision on the merits and contending claimant forfeited her *Lucia* argument by failing to raise it before the administrative law judge. The Director, Office of Workers' Compensation Programs, also filed a brief, addressing only claimant's *Lucia* contention, asserting it has been untimely raised.

Claimant asserts she has timely raised the *Lucia* issue to the Board because it is raised in her first brief to the Board and is a purely legal issue based upon a new Supreme Court decision. We agree with employer and the Director that claimant's *Lucia* challenge is forfeited because she did not raise it before the administrative law judge. It is well established that Appointments Clause issues are "non-jurisdictional" and, as such, are subject to the doctrines of waiver and forfeiture. *See Jones Bros., Inc. v. Sec'y of Labor*, 898 F.3d 669 (6th Cir. 2018); *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 574 F.3d 748, 755-56 (D.C. Cir. 2009); *see also Lucia*, 138 S. Ct. at 2055 ("one who makes a *timely* challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to relief.") (emphasis added).

Lucia was decided two months before the administrative law judge issued her Decision and Order, but claimant failed to raise her arguments while the claim was pending before the administrative law judge. *See Kiyuna v. Matson Terminals, Inc.*, __ BRBS __, BRB No. 19-0103 (June 25, 2019). If claimant had timely raised the Appointments Clause issue before the administrative law judge, she could have considered the issue and, if appropriate, provided the relief claimant is requesting by referring the case back to the Office of Administrative Law Judges for assignment to a different, properly appointed administrative law judge to hold a new hearing and issue a decision based on the record developed at that hearing. *See Energy West Mining Co. v. Lyle*, __ F.3d __, No. 18-9537, 2019 WL 2934065 (10th Cir. July 9, 2019) (declining to address Appointments Clause issue raised for the first time before the court). Instead, claimant waited to raise the issue until after the administrative law judge issued an adverse Decision and Order. *See In re DBC*, 545 F.3d 1373 (Fed. Cir. 2008) (finding an Appointments Clause challenge waived where it could have been raised to the Patent and Trademark Board but was not); *Kiyuna*, slip op. at 4 (affirming administrative law judge's finding that claimant forfeited the *Lucia* issue by raising it for the first time on reconsideration after an adverse decision). Moreover, the Board has previously rejected the assertion that *Lucia* constitutes a "change in law." *See Luckern v. Richard Brady & Assoc.*, 52 BRBS 65, 68 n.3 (2018); *see also Lucia*, 138 S. Ct. at 2053 ("*Freytag* says everything necessary to decide this case.") (citing *Freytag v.*

Supreme Court held that SEC administrative law judges are "inferior officers" subject to the Appointments Clause. 138 S. Ct. at 2055 (citing *Freytag v. Comm'r*, 501 U.S. 868 (1991)).

Comm'r, 501 U.S. 868 (1991)). Because the issue can be waived or forfeited, we reject claimant's contention that her Appointments Clause argument is one of "pure law" that must be addressed on appeal regardless of whether it was timely raised below. *Kiyuna*, slip op. at 3.

The Supreme Court has recognized that, in applying the doctrines of waiver and forfeiture, courts should proceed on a case-by-case basis to determine whether the circumstances of a particular case warrant excusing the failure to timely raise an issue. *See, e.g., Freytag* 501 U.S. at 879 ("We conclude that this is one of those rare cases in which we should exercise our discretion to hear petitioners' challenge to the constitutional authority of the Special Trial Judge."). We decline to excuse claimant's forfeiture of the issue, as she has not raised any basis for our doing so. *See Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962) (cautioning against excusing forfeited arguments because of the "obviously sound policy of preventing litigants from abiding the outcome of a lawsuit and then overturning it if adverse upon a technicality of which they were previously aware"). Accordingly, we deny claimant's motion to vacate the administrative law judge's decision based on *Lucia*.

Turning to the merits, claimant challenges the administrative law judge's finding that employer rebutted the Section 20(a) presumption. She contends Dr. Rosen's opinion is not substantial evidence for rebuttal because she did not examine claimant personally, admitted she is not a specialist in neurology, and did not express an opinion as to whether it was possible that another aspect of claimant's working conditions in Iraq could have aggravated her condition.

Where, as here, claimant has invoked the Section 20(a) presumption by establishing she sustained a harm and conditions existed at work which could have caused the harm, the burden shifts to employer to rebut the presumption by producing substantial evidence that the injury was not caused by claimant's working conditions. *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990);[4] *O'Kelley v. Dep't of*

[4] In *Brown*, 893 F.2d at 298, 23 BRBS at 24(CRT), the United States Court of Appeals for the Eleventh Circuit, within whose jurisdiction this case arises, stated that the employer did not rebut the Section 20(a) presumption because it did not present evidence "ruling out the possibility" of a relationship between the injury and claimant's work. Other circuits have since rejected the "ruling out" standard. *See, e.g., Conoco v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999) (rejecting "ruling out" standard but determining that it was ultimately harmless error because substantial evidence supported the administrative law judge's finding); *Bath Iron Works Corp. v. Director, OWCP [Shorette]*, 109 F.3d 53, 31 BRBS 19(CRT) (1st Cir. 1997). The Board has held, pursuant to *Brown*, that the opinion of a physician, given to a reasonable degree of medical

the Army/NAF, 34 BRBS 39 (2000). The administrative law judge found employer rebutted the presumption through the opinion of Dr. Rosen, who opined it is very unlikely that the flu vaccine caused claimant to develop NMO because there is no medical literature to support the development of NMO following an influenza vaccination. EXs 27 at 21; 29 at 5. Dr. Rosen explained that NMO is an autoimmune disease caused by an immunologic abnormality. EX 27. The administrative law judge also noted Dr. Rosen's extensive experience in causation theory.[5] Decision and Order at 22.

We find claimant's contentions with respect to rebuttal unpersuasive. While Dr. Rosen did not physically examine claimant, the administrative law judge was not required to discount her opinion on this basis. *See generally Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 500-501, 29 BRBS 79, 80-81(CRT) (5th Cir. 1995) (the administrative law judge is entitled to determine the weight to be accorded to the evidence and where the testimony of medical experts is at issue, she is entitled to accept any part of an expert's testimony or reject it completely). We also reject claimant's argument that Dr. Rosen's opinion is not sufficient to rebut the presumption because she did not address whether claimant's "working conditions" could have aggravated her condition. Claimant did not allege that her general working conditions in Iraq played a role in her injury or submit evidence regarding her living and working conditions and their relationship to her disease. An employer is not required to rebut a claim that was not made. *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). The administrative law judge permissibly determined that Dr. Rosen's opinion is based on "reasoned medical judgment" and is substantial evidence sufficient to rebut the Section 20(a) presumption because she stated claimant's NMO is not related to the flu shot. *See O'Kelley*, 34 BRBS at 41-42; *see also Bath Iron Works Corp. v. Director, OWCP [Harford]*, 137 F.3d 673, 32 BRBS 45(CRT) (1st Cir. 1998); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). As the administrative law judge's conclusion is rational, supported by substantial evidence, and in accordance with law, we affirm the finding that employer rebutted the Section 20(a) presumption.

If employer rebuts the presumption, it falls out of the case and claimant bears the burden on the record as a whole of establishing that her injury was caused by her working

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certainty that no relationship exists between an injury and claimant's work, is sufficient to rebut the presumption. *See O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000).

[5] Dr. Rosen is Board-certified in Internal Medicine and has 18 years of experience as a medical toxicologist. She is often asked to opine on adverse events from medications, including vaccinations. EX 27 at 1; EX 29 at 4.

conditions.[6] *Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *see Bis Salamis, Inc. v. Director, OWCP [Meeks]*, 819 F.3d 116, 50 BRBS 29(CRT) (5th Cir. 2016); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). Claimant challenges the administrative law judge's weighing of the evidence as a whole. She argues the administrative law judge drew her own medical conclusions in reviewing the scientific studies and improperly substituted her opinion for that of Dr. Nadareishvili. Claimant also assigns error to the administrative law judge's finding that Dr. Rosen's opinion is entitled to greater weight than that of Dr. Nadareishvili, who opined that claimant's condition was caused by the flu vaccine.

Claimant's arguments are unavailing. In weighing the evidence as a whole, the administrative law judge reviewed the scientific studies employer submitted. She noted that a few of the studies suggested a possible connection between autoimmune diseases and vaccines, but none found cases of NMO related to the flu vaccine.[7] Decision and Order at 24. The administrative law judge restated the studies' ultimate conclusions or noted why the cited study was irrelevant to the claim. *Id.* at 22-24. She did not misreport the conclusions of the studies.

Nor did the administrative law judge substitute her own opinion for that of Dr. Nadareishvili. The administrative law judge as the fact-finder has the discretion to evaluate

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[6] In this respect, claimant incorrectly avers the administrative law judge erred in focusing on "actual causation" because in occupational disease cases it is necessary to prove only that the employment event had the "potential to cause" the disease. Claimant's argument conflates responsible employer law with causation law, and the cases claimant cites, *Lustig v. U.S. Dep't of Labor*, 881 F.2d 593, 22 BRBS 159(CRT) (9th Cir. 1989); *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955); *Good v. Ingalls Shipbuilding, Inc.*, 26 BRBS 159 (1992), are inapposite to a causation analysis.

[7] The Karussis/Petrou Study on which Dr. Nadareishvili relied states there is a possible correlation between the flu vaccine and the development of optical neuritis. It notes several instances of patients developing a disease with NMO-like symptoms following the administration of the HPV vaccine. Dr. Rosen stated this study does not cite any instances where such symptoms followed the flu vaccine, noting, moreover, that actual NMO and NMO-like symptoms are very different things. EX 29 at 9. Other studies looked into possible relationships between vaccines and other autoimmune diseases, such as multiple sclerosis. The administrative law judge summarized the studies' ultimate findings and correctly found that none of the studies identified cases of NMO following the administration of a flu vaccine. Decision and Order at 23-24.

the evidence and draw her own inferences and conclusions from it. *See Hullinghorst Industries, Inc. v. Carroll*, 650 F.2d 750, 759-760, 14 BRBS 373, 380 (5th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982) (an administrative law judge is entitled to draw from the evidence "the inferences he deems most reasonable in light of the evidence as a whole and the common sense of the situation"). In deciding to give less weight to Dr. Nadareishvili's opinion, the administrative law judge noted that the study he relied on did not support his conclusion, *see* n.7, *supra*, and further found his summary of the development of claimant's symptoms inconsistent with the contemporaneous medical records.[8] Decision and Order at 24-25. Her reasons for giving less weight to Dr. Nadareishvili's opinion are rational and supported by substantial evidence. The administrative law judge found, in contrast, that Dr. Rosen's opinion is supported by the scientific studies and claimant's treatment history. She acted well within her discretion in determining the respective weight to be given the opinions of Dr. Nadareishvili and Dr. Rosen. *See Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Perini Corp. v. Heyde*, 306 F. Supp. 1321 (D.R.I. 1969). The administrative law judge's finding that Dr. Rosen's opinion is entitled to greater weight than Dr. Nadareishvili's is therefore affirmed.

We conclude, however, that the case must be remanded because, as claimant submits, the administrative law judge did not consider all the medical opinions of record. Dr. Robertson, claimant's treating physician, stated that "there is a very reasonable causal relationship between her mandatory vaccination and the onset of neuromyelitis optica." CX 11 at 7. Dr. Tang, who also treated claimant, stated that claimant "developed transverse myelitis most likely secondary to the vaccination." CX 10 at 2, 13. The administrative law judge mentioned Dr. Robertson's opinion but neither accepted nor rejected it. *See* Decision and Order at 12. She did not address Dr. Tang's opinion. As the administrative law judge did not discuss all the relevant evidence of record, we must vacate her conclusion on weighing the evidence as a whole. On remand, the administrative law judge must fully address the opinions of Drs. Robertson and Tang and any other relevant evidence as to

[8] Dr. Nadareishvili stated that claimant developed symptoms such as lower extremity numbness along the timeline one would expect for NMO, eleven days after receiving the flu vaccine. The administrative law judge found, however, that claimant's initial symptoms in December 2012 were not numbness, but rather pain and swelling in her right calf following her flight to the U.S. from Iraq, which she had previously experienced in April 2008 as well. *See* Decision and Order at 24-25 (citing EX 33 at 518). Dr. Rosen noted claimant's earlier experience of similar symptoms and found it was not reasonable to conclude that these symptoms in December 2012 were indicators of NMO. EX 29 at 9-10.

whether claimant's NMO is related to the flu vaccine she received at work.[9] *See Gremillion v. Gulf Coast Catering Co.*, 31 BRBS 163 (1997) (Brown, J., dissenting on other grounds); *see also* 5 U.S.C. §557(c)(3)(A).

Accordingly, we deny claimant's motion to vacate the administrative law judge's decision and remand the case to a different administrative law judge based on *Lucia*, 138 S. Ct. 2044. We affirm the administrative law judge's finding that employer rebutted the Section 20(a) presumption, vacate her conclusion on the record as a whole, and remand the case to the administrative law judge for further findings consistent with this decision.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

[9] Nurse Practitioner Lise Casady also concluded that there is a causal relationship between claimant's vaccination and her NMO. CX 15 at 7. The administrative law judge did not address Nurse Casady's opinion.