U.S. Department of Labor

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

BRB No. 20-0396

LABINKA HOWARD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DYNCORP INTERNATIONAL	)	
	)	
and	)	
	)	
ALLIED WORLD NATIONAL ASSURANCE COMPANY c/o BROADSPIRE	)	DATE ISSUED: 01/31/2022
	)	
Employer/Carrier	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Order Suspending Compensation Under Section 7(d)(4) of the Act of David Duhon, District Director, United States Department of Labor.

Scott L. Thaler (Grossman Attorneys at Law), Boca Raton, Florida, for Claimant.

Ann Marie Scarpino (Seema Nanda, 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: BUZZARD, GRESH and JONES, Administrative Appeals Judges.

BUZZARD, Administrative Appeals Judge:

Claimant appeals District Director David Duhon's Order Suspending Compensation Under Section 7(d)(4) of the Act (OWCP No. 07-308416) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 et seq. (Act).[1] We must affirm the district director's conclusions unless they are shown to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See Carter v. Merritt Ship Repair,* 19 BRBS 94 (1986).

Claimant filed a claim under the Act for physical and psychological injuries allegedly sustained in the course of her overseas work with Employer. Administrative Law Judge (ALJ) Clement J. Kennington found Claimant established her psychological injuries but not her physical injuries are work-related and awarded her temporary total disability benefits from May 30, 2016, to May 11, 2018, ongoing permanent total disability benefits from May 11, 2018, and medical benefits. The Benefits Review Board affirmed the ALJ's findings that Claimant's entitlement to total disability benefits commenced May 30, 2016, her psychological conditions became permanent on May 11, 2018, and the short-term jobs she held did not constitute ongoing suitable alternate employment. *Howard v. Dyncorp Int'l,* BRB Nos. 19-0475/A (April 28, 2020) (unpub.). The Board, however, reversed the ALJ's finding that Claimant's physical injuries are not work-related and vacated his finding that she is entitled to temporary total disability benefits for the periods of her short-term employment. *Id.* The case was therefore remanded to the Office of Administrative Law Judges (OALJ) for consideration of Claimant's entitlement to temporary partial disability benefits during that time. *Id.* The Board denied Claimant's motion for reconsideration. *Howard v. Dyncorp Int'l,* BRB Nos. 19-0475 (June 12, 2020) (unpub. Order).

On April 22, 2020, while the case was pending with the Board, Employer served Claimant with a "Notice of Independent Medical Examination" instructing her to report for a psychological examination with Dr. Robert Yohman on May 26, 2020, in Houston, Texas. Claimant objected to the examination, prompting Employer to request an informal conference to resolve the issue. On May 12, 2020, a claims examiner issued a recommendation that Claimant attend the examination with Dr. Yohman. Claimant controverted the recommendation, leading Employer to request the district director to issue an order suspending Claimant's compensation for her refusal to undergo the scheduled

[1] The Board's processing of this case was substantially delayed due to the COVID-19 pandemic, which impacted the Board's ability to obtain records from the Office of Administrative Law Judges and the Office of Workers' Compensation Programs.

examination with Dr. Yohman. Following an informal conference, a claims examiner concluded in a Memorandum of Informal Conference dated June 17, 2020, that based on the claims examiner's May 12, 2020 recommendation, and Claimant's unreasonable and unjustified refusal to attend the appointment, an Order should be issued to suspend payment of Claimant's compensation benefits under Section 7(d)(4), 33 U.S.C. §907(d)(4), until she attends the next medical examination that Employer schedules. On June 29, 2020, the district director issued the Order suspending Claimant's compensation, at issue in this appeal.

On appeal, Claimant contends the district director erred as a matter of law in suspending payment of her compensation benefits because he did not have jurisdiction over the case at the time he issued his Order. Citing *L.D.* [*Dale*] *v. Northrop Grumman Ship Systems, Inc.*, 42 BRBS 1, *recon. denied*, 42 BRBS 46 (2008), for the proposition that "only the entity before whom the case is pending may issue an order suspending compensation," she asserts, because the case on the underlying merits of her entitlement to benefits was pending before the Board on appeal from the ALJ at the same time Employer requested an order suspending payment of her compensation benefits, only the Board or the ALJ had the authority or jurisdiction to address Employer's request. Claimant alternatively contends the district director did not apply the proper legal standard or provide any analysis or explanation for his decision to suspend payment of her compensation benefits under Section 7(d)(4).

In response, the Director asserts that under the circumstances of this case, Section 7(d)(4) of the Act and its accompanying regulation at 20 C.F.R. §702.410(c) should be read as granting broad authority to the district director to address Claimant's refusal to attend the scheduled examination with Dr. Yohman. Nevertheless, he agrees with Claimant that the district director did not apply the correct legal standard in determining whether payment of Claimant's compensation benefits should be suspended. He therefore argues the case should be remanded to the district director to apply the appropriate legal analysis as set out in *B.C.* [*Casbon*] *v. Int'l Marine Terminals*, 41 BRBS 101 (2007). We agree with the Director's positions.

Authority to Suspend Payment of Compensation

Section 7(d)(4) provides:

> If at any time the employee unreasonably refuses to submit to medical or surgical treatment, or to an examination by a physician selected by the employer, the Secretary or administrative law judge may, by order, suspend the payment of further compensation during such time as such refusal

> continues, and no compensation shall be paid at any time during the period of such suspension, unless the circumstances justified the refusal.

33 U.S.C. §907(d)(4); *see also* 20 C.F.R. §702.410(c). This section gives both the district director and ALJ authority to address the reasonableness of a claimant's refusal to submit to an employer-requested medical examination.[2] *See generally Dale*, 42 BRBS 1; *Casbon*, 41 BRBS 101. Nevertheless, there is no allowance for simultaneous jurisdiction over the issue. *Dale*, 42 BRBS at 4.

While Claimant is correct that *Dale* holds "only the entity before whom the case is pending may issue an order suspending compensation," this holding undermines her position that either the Board or ALJ, not the district director, has jurisdiction over the question of whether payment of her compensation benefits should be suspended. First, neither the Act nor its implementing regulations provides the Board with any authority to suspend a claimant's compensation for failing to attend a medical examination, *see, e.g.*, 33 U.S.C. §921; 20 C.F.R. §802.301(a), leaving that authority instead with the district director or the ALJ, 33 U.S.C. §907(d)(4); 20 C.F.R. §702.410(c). Second, a comparison of the procedural history in *Dale* versus this case reveals why the district director is the appropriate adjudicator to address the suspension issue at this juncture.

[2] As the Act and regulations explicitly provide district directors and ALJs the authority to suspend compensation under certain circumstances, *see, e.g.*, 33 U.S.C. §§907(d)(4), (f), 20 C.F.R. §702.410(b), (c), we reject Claimant's contention that the district director's suspension of payment of her compensation benefits improperly modifies the ALJ's award of benefits, something that may only be done through Section 22 modification proceedings, 33 U.S.C. §922. In pursuit of Section 22 modification, an employer may obtain evidence of a change of a claimant's condition by scheduling the claimant to undergo a medical examination. The Act and accompanying regulations direct that a claimant's unreasonable refusal to attend such an examination may result in a suspension of payment of the claimant's compensation benefits during the period of non-compliance, 33 U.S.C. §§907(d)(4); 20 C.F.R. §702.410(c), and an adjudicatory process is in place which must be followed before any suspension of payment of benefits may occur. *Malone v. Int'l Terminal Operating Co.*, 29 BRBS 109 (1995). While a suspension of payment of benefits may appear similar to a Section 22 modification, as both can result in a reduction of benefits owed and paid to the claimant, they are actually distinct processes and procedures with differing outcomes. The suspension of payment of a claimant's compensation benefits is not permanent, but controllable by the claimant's compliance, and, as noted above, the Act and regulations specifically allow the suspension without any reference to, and therefore separate and apart from, the Section 22 modification process.

The claimant in *Dale* injured his back while working for the employer and sought benefits under the Act. The parties subsequently reached an agreement on the claimant's entitlement and the employer began paying compensation. Years later, after the employer had claimant examined by a physician of its choosing, the employer stopped paying his compensation and offered him modified employment. When the claimant declined his employer's offer of modified employment, the matter was brought before a district director who held an informal conference and scheduled the claimant for an independent medical examination by a physician of the district director's choosing. The explicit purpose of that examination was to help the district director resolve the medical questions raised in the case. *See* 33 U.S.C. §907(e). The claimant objected to the medical examination and requested the matter be referred to an ALJ for a hearing. While the case was before an ALJ, the district director issued an order suspending the claimant's compensation, *see* 33 U.S.C. §907(f), due to his ongoing refusal to submit to the previously scheduled medical examination.

The Board stated:

> while both district directors and administrative law judges have suspension authority under the Act, neither the Act nor the regulations state that jurisdiction over this issue exists simultaneously with both the district director and the administrative law judge. To the contrary, there are no provisions in the Act establishing simultaneous jurisdiction over any specific issue.

Dale, 42 BRBS at 4. Consequently, the Board held "only the entity before whom the case is pending may issue an order suspending compensation." *Id.* It thus remanded the case to the ALJ because he, not the district director, had jurisdiction over the claim because the district director had already transferred the matter to the ALJ before issuing the suspension order.[3] *Id.*

As this procedural history reflects, *Dale* involved interrelated questions, raised simultaneously, on both the suspension of benefits and the claimant's underlying entitlement to benefits.[4] By the time the district director suspended the claimant's

[3] The Board also stated 20 C.F.R. §702.410(b) "distinctly gives to both district directors and administrative law judges the authority to suspend an employee's compensation for failure to attend a medical examination scheduled by the Secretary." *Dale*, 42 BRBS at 3.

[4] As previously noted, the claimant in *Dale* was already receiving benefits on his underlying claim pursuant to an agreement with the employer. He later underwent a

compensation, he had already transferred "the case," i.e., suspension of payment of the claimant's compensation benefits and the underlying entitlement issues, to the ALJ. Thus, the Board held that "upon referral" to the ALJ, authority over the suspension "transferred" to the ALJ and he "should rule on the suspension issue along with any other disputed issues concerning claimant's entitlement to benefits." *Dale*, 42 BRBS at 4.

In the present appeal, however, authority or jurisdiction over the question of whether payment of Claimant's benefits should be suspended has never been transferred to the ALJ. Employer's request that Claimant attend a medical examination by Dr. Yohman, and its subsequent request that payment of her benefits be temporarily suspended for failing to do so, were both made *after* the ALJ issued his decision and order awarding benefits, at which time an appeal on Claimant's underlying entitlement to benefits was already pending with the Board. Similarly, the district director issued his order temporarily suspending payment of benefits while that appeal was still pending with the Board: 17 days after the Board's June 12, 2020 order denying reconsideration, and thus prior to the time its decisions became final. *See* 20 C.F.R. §§802.406 (Board decision is not final until 60 days after issuance), 802.407 (where there is a timely-filed motion for reconsideration, the Board decision does not become final until 60 days after its order on reconsideration.). No party requested the district director transfer the suspension of benefits question to the ALJ. Furthermore, although Claimant eventually requested the ALJ issue a protective order shielding her from attending the medical examination, the ALJ properly acknowledged he did not have jurisdiction because Claimant had already filed an appeal of the district director's suspension order with the Board. ALJ Order (July 30, 2020).

Moreover, while the suspension of payment of the claimant's benefits for failing to attend the scheduled medical examination in *Dale* was inextricably linked to concurrent litigation on his entitlement to benefits, the suspension of benefits question at issue in the present appeal is wholly distinct from, and unrelated to, the separate litigation on Claimant's underlying entitlement to benefits. The Board could not have considered a new medical report from Dr. Yohman, that Employer requested and secured only after the ALJ issued his decision on Claimant's entitlement, and it would have had no bearing on the

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medical examination by a doctor of the employer's choosing, prompting the employer to stop paying compensation benefits on the basis that he was now physically capable of performing modified work duties that it had offered him. When the question of the claimant's ongoing entitlement to benefits was brought before the district director, he ordered the claimant to undergo a medical examination by a doctor of the district director's choosing. The purpose of the examination was to enable the district director to make an informed decision on whether to accept the employer's argument that the claimant was no longer entitled to benefits because he was now capable of working.

Board's ultimate disposition of the appeal or its remand instructions to the ALJ. 20 C.F.R. §802.301. Nor is there any process or procedure by which Employer could have interjected a newly acquired report from Dr. Yohman into the case after the Board remanded it to the ALJ. *See* n.2, *supra* (explaining an employer may secure new evidence to *modify* an award through separate Section 22 modification proceedings).

Because the Board lacks any authority to suspend a claimant's compensation for failing to attend a medical examination, *see, e.g.*, 33 U.S.C. §921; 20 C.F.R. §802.301(a), and the ALJ is without authority or jurisdiction over the matter in this case, we reject Claimant's arguments to the contrary. As the suspension of the payment of benefits question was properly raised to the district director, 33 U.S.C. §907(d)(4); 20 C.F.R. §702.410(c), and never transferred to the ALJ, *Dale* dictates "the case" was pending before the district director at the time he suspended payment of benefits and must be remanded to him if Claimant's assertion is correct that he failed to properly analyze the issue.[5] *Dale*, 42 BRBS at 3.

Merits of Suspension of Compensation

For the following reasons, we agree with Claimant and the Director that the district director erred in suspending the payment of benefits. Section 7(d)(4) of the Act gives the district director the discretion to suspend compensation during any period in which a claimant unreasonably refuses to submit to medical or surgical treatment or to an employer's or the Secretary's expert's examination. 33 U.S.C. §907(d)(4); *Jefferson v. Marine Terminals Corp.*, 55 BRBS 21 (2021). The provision sets forth a dual test for determining whether compensation payments may be suspended as a result of a claimant's

[5] Our dissenting colleague suggests jurisdiction of the suspension of payment of benefits question was already before the ALJ, and thus must be remanded to him because he previously granted a motion from Employer to compel Claimant to undergo a medical examination with Dr. Yohman. But she overlooks that due to medical and scheduling issues, *Employer* rescheduled the medical examination of Claimant with another physician, Dr. Paul, who did in fact examine Claimant and issue an opinion supportive, at least in part, of her claim. Employer did not raise any further issues regarding its interest in having Dr. Yohman examine Claimant or having payment of her benefits suspended until *after* the ALJ issued his decision on the underlying merits of Claimant's entitlement to benefits and the subsequent appeal was pending before the Board. Even Dr. Paul's medical report post-dates the ALJ's decision on the merits of Claimant's entitlement to benefits and could have had no bearing on the Board's disposition of the subsequent appeal. In addition, the ALJ's own determination that he lacked jurisdiction over the suspension of the payment of benefits question has no apparent bearing on our colleague's argument to the contrary.

failure to undergo an examination or treatment. *Malone v. Int'l Terminal Operating Co.*, 29 BRBS 109 (1995). Initially, the burden of proof is on the employer to establish the claimant's refusal to undergo a medical examination is objectively unreasonable. If the employer meets this burden, the burden shifts to the claimant to show the circumstances subjectively justified his refusal. *Jefferson*, 55 BRBS at 23-24; *Casbon*, 41 BRBS 101; *Dodd v. Crown Central Petroleum Corp.*, 36 BRBS 85 (2002); *Malone*, 29 BRBS 109.

The district director's Order consists of framing the issue as a resolution of Employer's "request for an Order suspending compensation benefits in accordance with" Section 7(d)(4), a "FINDINGS OF FACT" section encapsulating a brief procedural history of Employer's efforts in scheduling Claimant for a medical examination with Dr. Yohman, and his conclusion suspending compensation. More specifically, the district director's "ORDER" states:

> In accordance with Section 7(d)(4) of the Act it is hereby Ordered that the Employee's compensation in this claim shall be suspended beginning May 22, 2020, for the Employee's unreasonable refusal to attend a medical examination by a physician selected by the Employer and Carrier. Such suspension shall continue for the duration of the Employee's unreasonable refusal, and no compensation shall be payable at any time during the period of such suspension.

Order Suspending Comp. at 2. Absent from the district director's order is any legal analysis applying the facts to the dual test. Because the district director did not explain why he concluded Claimant's compensation payments should be suspended as a result of her refusal to attend a medical examination with Dr. Yohman, we vacate his Order Suspending Compensation Under Section 7(d)(4) of the Act and remand the case to him to provide the appropriate legal analysis. *Jefferson*, 55 BRBS at 26; *Casbon*, 41 BRBS 101; *Malone*, 29 BRBS 109.

Accordingly, we vacate the district director's Order Suspending Compensation Under Section 7(d)(4) of the Act and remand this case to him for further consideration consistent with this opinion.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

I concur:

DANIEL T. GRESH
Administrative Appeals Judge

JONES, Administrative Appeals Judge, concurring and dissenting:

I concur with the majority's conclusion that the district director had the authority to issue an order suspending compensation while the appeal of the merits of this case was pending before the Board. I also concur with the determination that the district director did not properly analyze the issue, so the law requires the Board remand the case for further consideration of whether Claimant's refusal to attend a medical appointment with Dr. Yohman was unreasonable. However, I disagree with the decision to remand the case to the district director; in accordance with the Board's decision in *Dale*, the case should be remanded to the ALJ.

Dale specifically precludes simultaneous jurisdiction stating: "only the entity before whom the case is pending may issue an order suspending compensation." *Dale*, 42 BRBS at 4. Because the OALJ is "the entity before whom the case is pending," the ALJ presiding over the remand is the authority who presently "may issue an order suspending compensation." *Dale*, 42 BRBS at 4; *see Healy Tibbitts Builders, Inc. v. Cabral*, 201 F.3d 1090, 33 BRBS 209(CRT) (9th Cir.), *cert. denied*, 531 U.S. 956 (2000); *Durham v. Embassy Dairy*, 40 BRBS 15 (2006); *Sans v. Todd Shipyards Corp.*, 19 BRBS 24 (1986).

The merits on remand and the suspension issue are not sufficiently separate so as to warrant bifurcation of the claim in contravention of this plain language.

I also disagree with the Director's argument that the district director's particular familiarity with the relevant facts compels remand to him. Familiarity is not the appropriate test. Even if it were, the OALJ also has knowledge regarding Claimant's refusal to meet with Dr. Yohman, and, therefore, the suspension issue. An ALJ has addressed two motions on the subject examination. At the outset of the September 13, 2018 hearing, the ALJ granted Employer's motion to compel Claimant's attendance at an appointment with Dr. Yohman. *See* Dir. Br. at 2 n.3. Then, in 2020, he rejected Claimant's motion for a protective order from having to attend Dr. Yohman's exam solely because he did not have jurisdiction over the matter due to this appeal. ALJ Order (July 30, 2020) at 1.

Because the majority is remanding this portion of the case to the district director, this case will now be pending with both adjudicatory levels authorized to address the suspension issue.[6] To avoid bifurcation and potentially inconsistent results, consistent with *Dale*, this case should be remanded to the ALJ to address the suspension of benefits. *Jefferson*, 55 BRBS at 26; *Casbon*, 41 BRBS 101.

MELISSA LIN JONES
Administrative Appeals Judge

[6] On September 28, 2021, Administrative Law Judge Angela F. Donaldson issued an Order acknowledging the Board's remand of the case and directing the parties to confer and decide, within 14 days, as to whether they wish to submit briefs on the relevant remand issue. At this time, it is unclear what, if any, additional action has been taken on remand.