U.S. Department of Labor

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

BRB No. 22-0466

LABINKA HOWARD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DYNCORP INTERNATIONAL	)	
	)	
and	)	
	)	
ALLIED WORLD NATIONAL ASSURANCE COMPANY c/o BROADSPIRE	)	DATE ISSUED: 05/20/2024
	)	
Employer/Carrier	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Order Suspending Compensation on Remand from Benefits Review Board and Order Denying Claimant's Request for Reconsideration of Order Suspending Compensation on Remand from the Benefits Review Board 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: GRESH, Chief Administrative Appeals Judge, BUZZARD and JONES, Administrative Appeals Judges.

GRESH, Chief Administrative Appeals Judge, and JONES, Administrative Appeals Judge:

Claimant appeals District Director David Duhon's Order Suspending Compensation on Remand from Benefits Review Board (Order on Remand) and Order Denying Claimant's Request for Reconsideration of Order Suspending Compensation on Remand from the Benefits Review Board (OWCP No. 07-308416) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (Act), as extended by the Defense Base Act, 42 U.S.C. §§1651-1655 (DBA). We must affirm the district director's conclusions unless they are arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See Carter v. Merritt Ship Repair,* 19 BRBS 94 (1986). This case is before the Benefits Review Board for a third time.[1]

Claimant sought benefits for physical and psychological injuries allegedly sustained in 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. On appeal, the 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

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit because Claimant filed her claim with the district office located in New Orleans, Louisiana. 33 U.S.C. §921(c); *McDonald v. Aecom Tech. Corp.*, 45 BRBS 45 (2011).

that time. *Id.* The Board denied Claimant's motion for reconsideration. *Howard v. Dyncorp Int'l*, BRB No. 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. This ultimately resulted in an informal conference, after which a claims examiner concluded 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 scheduled. On June 29, 2020, the district director issued the Order suspending Claimant's compensation. Claimant appealed the district director's suspension order to the Board. In its January 31, 2022 decision, the Board affirmed the district director's authority to issue the suspension but vacated his order because he did not provide "any legal analysis applying the facts to the dual test [for suspending benefits]" as set forth in Section 7(d)(4) and discussed in *Jefferson v. Marine Terminals Corp.*, 55 BRBS 21 (2021), and *Malone v. Int'l Terminal Operating Co.*, 29 BRBS 109 (1995). *Howard v. Dyncorp Int'l* [*Howard II*], BRB No. 20-0396 (Jan. 31, 2022) (unpub.). The case was therefore remanded to the district director to reconsider the suspension under the appropriate standard. *Id.*, slip op. at 8-9.

On remand, the district director determined Claimant's refusal to attend Employer's medical examination was unreasonable, and he suspended her compensation from May 22, 2020, the date Claimant expressed her refusal to attend a May 26, 2020 appointment with Dr. Yohman. The district director also instructed Employer to reschedule that appointment within 30 days of his order, stating if no appointment is scheduled, Claimant can seek to amend his suspension order. Order on Remand at 1-2. He denied Claimant's motion for reconsideration by order dated June 30, 2022.

Meanwhile, on May 9, 2022, Claimant's counsel advised the district director that Claimant would attend an appointment with Employer's selected physician, Dr. Yohman, set for July 19, 2022. Following Claimant's attendance at the appointment, the district director issued an order on July 21, 2022, reinstating Claimant's compensation starting May 9, 2022. Claimant thereafter filed this appeal of the district director's 2022 orders resulting in the suspension of her compensation between May 22, 2020, and May 9, 2022.

On appeal, Claimant contends the district director erred as a matter of law in suspending her compensation benefits. She maintains the district director's rationale for finding her refusal unreasonable[2] does not comply with the Board's instructions to "provide

[2] According to Claimant, the district director, without explanation, stated her refusal was unreasonable because she had argued he had no jurisdiction to suspend benefits and

the appropriate legal analysis" by "applying the facts to the dual test" described in *Jefferson*, 55 BRBS at 23-24, and to explain why he reached his conclusion. Claimant, therefore, requests reversal of the district director's suspension of compensation and reinstatement of compensation from May 22, 2020, through May 9, 2022. The Director, Office of Workers' Compensation Programs (the Director), responds urging affirmance of the district director's orders. He states the district director, despite not specifically citing *Jefferson*, nevertheless applied the appropriate analysis to satisfy the *Jefferson* test.

Section 7(d)(4) of the Act affords 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 expert's examination. 33 U.S.C. §907(d)(4);[3] *Jefferson*, 55 BRBS at 23-24. Determining whether a claimant's refusal is "unreasonable" involves a two-step inquiry. *Jefferson*, 55 BRBS at 23-24;[4] *Malone*, 29 BRBS at 110. First, the employer must make an initial showing that the claimant's refusal to undergo medical or surgical treatment is unreasonable; the reasonableness of a claimant's actions must be appraised in objective terms at this stage. If the employer meets its burden, the claimant, in order to avoid a suspension of benefits, must show the circumstances justify her refusal; appraisal of the justification of the claimant's actions is a subjective inquiry.[5] *Id.*

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because she argued Employer was inappropriately doctor-shopping by trying to get Claimant re-evaluated by Dr. Yohman instead of Dr. Paul.

[3] Section 7(d)(4) states:

> 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).

[4] The Board stated: "The 'reasonableness' of a refusal is an objective inquiry that examines whether an ordinary person in the claimant's position would object to the treatment. 'Justification' is a subjective inquiry that evaluates the individual claimant's particular reasons for refusing to submit to treatment." *Jefferson*, 55 BRBS at 23-24.

[5] The justification step addresses a subjective issue which relies heavily on an individual claimant's thoughts and perspective, as well as facts and circumstances created

In *Howard II*, the Board held the district director's June 2020 order did not contain "any legal analysis applying the facts" to the Section 7(d)(4) dual test. *Howard II*, slip op. at 8. 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," the Board vacated his order suspending compensation and instructed him "to provide the appropriate legal analysis." *Id.*

On remand, the district director set forth comprehensive "FINDINGS OF FACT" again summarizing the procedural history related to Employer's request for an updated examination and to Claimant's refusal to attend an appointment scheduled with Dr. Yohman in May 2020. Order on Remand at 1-2. Specifically, Employer previously scheduled an appointment for Claimant with Dr. Yohman on April 10, 2018. Emp's May 8, 2020 Request for Telephonic Informal Conference at 4. Claimant was unable to attend that appointment because "she was on narcotic medication" relating to a recent shoulder surgery, and she did not attend a rescheduled appointment for June 21, 2018, as it conflicted with another doctor's appointment. *Id.* On September 12, 2018, Employer filed a motion with the ALJ to compel Claimant to attend an appointment with Dr. Yohman, which the ALJ granted at the outset of the September 13, 2018 formal hearing. *Id.* Because Employer was unable to obtain an appointment for Claimant with Dr. Yohman within the 30-day time frame allotted by the ALJ, it instead scheduled an appointment with Dr. Gregory Paul. *Id.* In his October 2, 2018 report, which post-dates the ALJ's initial decision in this case, Dr. Paul opined Claimant was temporarily disabled due to her psychological condition. However, the ALJ's adjudication of the claim never considered Dr. Paul's 2018 report because, as he noted, neither party submitted it into evidence. In 2020, Employer sought to secure an updated medical opinion from Dr. Yohman. Although Claimant agreed to attend a new appointment, she insisted it be with Dr. Paul and not Dr. Yohman. This dispute prompted Employer's serving its April 22, 2020 notice on Claimant. *Id.* at 6.

The district director acknowledged the Board's January 2022 decision instructing him "to explain why [he] found the Claimant's refusal to attend the Employer's Second Medical Examination unreasonable." Order on Remand at 1. He then found the facts established Employer's request was reasonable and Claimant's refusal was unreasonable in that her logic for the refusal was flawed and warranted suspension of benefits under Section 7(d)(4) until such time she attended an examination by Dr. Yohman.

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contemporaneously with the period when the claimant refused to attend her scheduled appointment. *Jefferson*, 55 BRBS at 26. Specifically, it involves the question of "was Claimant justified in behaving as she did." *Id.*; *see also Hrycyk*, 11 BRBS 238, 242 (1979).

In reaching this conclusion, the district director found: there is no dispute raised that Employer was not legally entitled to schedule Claimant for an appointment with Dr. Yohman or that Claimant initially refused to attend Dr. Yohman's appointment "without a reason;" her argument that the district director lacked jurisdiction or authority to suspend benefits was, as the Board articulated in its decision, not persuasive; she incorrectly asserted, again as the Board noted in its decision, Employer could not require a second examination without first seeking Section 22 modification, 33 U.S.C. §922;[6] and that Claimant's allegation that Employer was inappropriately "doctor shopping" was belied by the fact that the ALJ had previously issued an order compelling Claimant to attend an appointment with Dr. Yohman. Order on Remand at 2. Upon reconsideration, the district director again found Claimant "provided no reasonable justification for her refusal to attend" Dr. Yohman's scheduled appointment. He further instructed that if Claimant "keeps the appointment scheduled on July 19, 2022, an amended order ending the suspension of benefits effective the May 9, 2022 date will be issued." Recon. Order at 2.

Contrary to Claimant's contention on appeal, the district director sufficiently explained his rationale for determining Claimant was unreasonable in refusing to submit to Dr. Yohman's examination. Having considered the circumstances surrounding Employer's request for an updated examination and Claimant's refusal to attend Dr. Yohman's May 2020 examination, the district director "accepted" Employer's "position" that Claimant's refusal violates Section 7(d)(4) of the Act as unreasonable. Order on Remand at 2. In reaching this conclusion, the district director found the facts refute Claimant's beliefs that Employer's request for an updated medical opinion involved an inappropriate attempt at "doctor shopping," or an invalid means to alter the ALJ's 2019 award of benefits, *id.*; *see also Howard I*, slip op. at 4, n. 2. This constitutes, contrary to our dissenting colleague's opinion, a sufficient finding that Employer satisfied its burden of showing Claimant's refusal is objectively unreasonable. Next, as the district director noted, Claimant presented no reason for refusing the examination. Based on this and having found Claimant's subjective reasons otherwise unpersuasive and defective, he rationally concluded Claimant failed to establish that his refusal to attend the examination was reasonable or justified and, therefore, found Claimant was in violation of Section 7(d)(4). Order on Remand at 2; *see B.C. [Casbon] v. Int'l Marine Terminals*, 41 BRBS 101, 104 (2007). As such, we conclude the district director complied with the Board's remand instructions in that his "legal analysis applying the facts to the dual test" is not

[6] In this regard, the district director noted Claimant was provided "guidance and recommendations" by the claims examiner at the June 17, 2020 informal conference that "Section 7 allows the Employer to schedule Second Medical Examinations" and he was also advised at that time "that Employer could not use such an examination to reduce or stop benefits without modification of the ALJ's order." Order on Remand at 2.

arbitrary or capricious and he adequately "explained why he concluded Claimant's compensation payments should be suspended as a result of her refusal to attend a medical examination with Dr. Yohman." *Howard II* at 8. We therefore affirm the district director's suspension of Claimant's disability benefits from May 22, 2020, through May 9, 2022, as it is in accordance with law and within his discretion.[7] *Casbon*, 41 BRBS at 104.

Accordingly, we affirm the district director's Order Suspending Compensation on Remand from Benefits Review Board and Order Denying Claimant's Request for Reconsideration of Order Suspending Compensation on Remand from the Benefits Review Board.[8]

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to affirm the suspension of Claimant's benefits. Under Section 7(d)(4) of the Act, a district director or ALJ may

[7] Once refusal is found to be unreasonable and not justified, the district director retains the discretion to suspend benefits. 33 U.S.C. §907(d)(4); *Jefferson*, 55 BRBS at 24; *Hrycyk*, 11 BRBS at 241-243. If he determines suspension is warranted, as he did here, benefits cease as of the date of refusal and recommence on the date of compliance. *Casbon*, 41 BRBS at 104. In this case, the district director reinstated Claimant's benefits as of the date she agreed to comply instead of the date she attended the appointment; this is a reasonable discretionary determination which we affirm as unchallenged on appeal. *Scalio v. Ceres Marine Terminals, Inc*., 41 BRBS 57, 58 (2007).

[8] In the event a party appeals the Board's decision in this case, which arises in the Fifth Circuit that requires appeals of the Board's Defense Base Act decisions be filed first with the appropriate United States District Court, the Board requests notification of any

temporarily suspend a claimant's benefits if she "unreasonably refuses" to submit to a medical examination by an employer's medical expert, unless the circumstances "justified the refusal." 33 U.S.C. §907(d)(4); *Jefferson v. Marine Terminals Corp.*, 55 BRBS 21 (2021).

The Board has consistently construed this section as setting forth a "dual test" for determining whether benefits may be suspended. *Malone v. Int'l Terminal Operating Co.*, 29 BRBS 109 (1995). First, the employer must prove the claimant's refusal to attend the medical examination is objectively unreasonable. Second, if the employer meets its burden, the claimant must prove the circumstances subjectively justified the refusal. *Jefferson*, 55 BRBS at 23-24; *B.C.* [*Casbon*] *v. Int'l Marine Terminals*, 41 BRBS 101 (2007); *Dodd v. Crown Central Petroleum Corp.*, 36 BRBS 85 (2002); *Malone*, 29 BRBS 109. Thus, under the objective inquiry, the employer must show that an "ordinary reasonable person would not refuse" the examination; the subjective inquiry, however, "focuses narrowly on the individual claimant" and her "particular reasons" for refusing. *Malone*, 29 BRBS 109; *see also Hrycyk v. Bath Iron Works Corp.*, 11 BRBS 238 (1979).

Relevant to this appeal, Claimant filed a claim under the Defense Base Act and ultimately established entitlement to benefits for injuries sustained while working for Employer overseas. *Howard v. Dyncorp Int'l*, OALJ No. 2017-LDA-00632 (May 21, 2019), *aff'd in part, reversed in part*, BRB Nos. 19-0475/A (April 28, 2020) (unpub.), *recon. denied* (June 12, 2020). During that litigation, ALJ Kensington granted Employer's request for Claimant to undergo an examination by a physician of Employer's choosing, Dr. Yohman. Due to scheduling issues, Employer opted to have Claimant examined by a different physician, Dr. Paul, who issued an opinion supportive, at least in part, of the compensability of Claimant's injuries. Judge Kensington's D&O at 74. After ALJ Kensington awarded benefits but while an appeal was pending before the Board, Employer sought to have Claimant examined a second time, but by Dr. Yohman. Emp's Notice of Independent Medical Examination dated April 22, 2020. Claimant agreed to see Dr. Paul a second time but refused to see Dr. Yohman, prompting Employer's initiation of the current litigation over whether her benefits should be suspended during the period of refusal. Cl's Motion for Protective Order dated June 24, 2020; *see also* Emp's May 8, 2020 Request for Telephonic Informal Conference at 3; Emp's Request for Suspension of Benefits dated June 2, 2020; ALJ Patrick M. Rosenow's Order dated July 30, 2020.

In the Board's prior decision, this panel held the district director erred in suspending Claimant's benefits because he did not conduct "any legal analysis applying the facts" of

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appeal that is filed from the petitioner, as the district courts often do not provide such notice to the Board.

this case to Section 7(d)(4)'s dual test. We thus remanded the claim for the district director to apply the proper legal standard and explain his decision. *Howard v. Dyncorp Int'l*, BRB No. 20-0396 (Jan. 31, 2022) (unpub.).

On remand, the district director again suspended Claimant's benefits, finding her decision "unreasonable" for two reasons. First, her initial refusal to undergo a medical examination by Dr. Yohman was "without a reason" and, relatedly, her subsequent explanation that Employer was doctor-shopping between Drs. Paul and Yohman was unpersuasive. Second, she had previously been advised by the district director that "continued refusal would result in an order suspending" her benefits. Neither of these reasons, however, reflects a proper application of the dual test.

The district director's first rationale, that Claimant initially did not provide a persuasive reason for refusing to attend Dr. Yohman's examination, relates to the second step of the dual test, i.e., whether the claimant has established the circumstances subjectively justified her refusal. Suspending a claimant's benefits for failing to provide a persuasive reason for not attending a medical examination, as the district director did in this case, bypasses the first step in the dual test and errantly relieves the employer of its burden to prove that the claimant's refusal is objectively unreasonable. *Jefferson*, 55 BRBS at 23-24; *Casbon*, 41 BRBS at 104; *Malone*, 29 BRBS at 110.

The district director's second rationale, that he had previously advised Claimant that her benefits could be suspended if she continued to refuse, has no bearing on whether Employer established the unreasonableness of her decision. It simply echoes the potential legal consequences under the Act *if* her decision is ultimately found unreasonable. 33 U.S.C. §907(d)(4).

Absent from the district director's decision, and the majority's analysis in this appeal, is any discussion of how Employer satisfied *its burden* to prove that it was objectively unreasonable for Claimant to refuse to attend a second Employer-requested medical examination by Dr. Yohman rather than Dr. Paul.

I therefore dissent.

GREG J. BUZZARD
Administrative Appeals Judge