U.S. Department of Labor

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

BRB No. 20-0243

WESLEY N. DUNDLOW	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 09/18/2020
HUNTINGTON INGALLS INDUSTRIES, INCORPORATED	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

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

Ira M. Steingold (Steingold & Mendelson), Suffolk, Virginia, for Claimant.

Christopher R. Hedrick and Bradley D. Reeser (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured Employer.

Before: BOGGS, Chief Administrative Appeals Judge, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals Administrative Law Judge Larry W. Price's Decision and Order (2019-LHC-00536) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (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 applicable law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant sustained a lumbar spine injury, diagnosed by Dr. Timothy Hutchinson as a low back strain, while working at Employer's shipyard on November 16, 2017. Employer's shipyard clinic (clinic) initially released Claimant to return to full-duty work on November 28, 2017, but then extended Claimant's work restrictions based on his representation that back pain precluded him from returning to work. The clinic also

referred Claimant to a neurologist and scheduled an appointment with Dr. Bryan Fox, an orthopedist. CX 20. Claimant, instead, sought treatment from Dr. Manish Patel, an orthopedic surgeon, who diagnosed chronic back pain, prescribed medication and physical therapy, and referred Claimant to a spine specialist. CX 26, 27. The specialist, Dr. Nickolas Pezzella, diagnosed a lumbar herniated disc and lumbar degenerative disc disease, released Claimant to return to full-duty work on May 1, 2018,[1] and referred Claimant to pain management specialist Dr. Beth M. Winke.[2] CXs 40-53. In her May 17, 2018 report, Dr. Winke stated Claimant's "presentation is very atypical for lumbar disc problem and radiculopathy," prompting her to opine Claimant "is either malingering or has significant psych involvement" and agreed with Dr. Pezzella's assessment that Claimant is capable of returning to full-duty work. CXs 72-74. Claimant presented Dr. Pezzella's return to full-duty work note at the clinic on May 1, 2018. CXs 21-23. On May 7, 2018, the clinic imposed restrictions based on Claimant's complaints of pain, stated there is "no work inside [the] shipyard," and instructed Claimant to "see Dr. Pezzella." CX 22. Claimant, however, never returned to Dr. Pezzella and has not returned to work.

Claimant next sought treatment in June 2018 from neurosurgeon Dr. Ran V. Singh,[3] who, in turn, referred Claimant to neurologist Dr. Rajiv B. Nanavaty.[4] CXs 79, 87.

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[1]Dr. Pezzella based his full-duty work release on the lack of any diagnostic tests explaining Claimant's symptoms and on Claimant's aborted March 30, 2018 Functional Capacity Evaluation (FCE). The individual conducting the FCE, Wayne McMasters, "aborted the evaluation" because he found Claimant "unreliable with marked inconsistencies and distracted improvement in performance." EX 2.

[2]Dr. Pezzella also referred Claimant to his partner, Dr. Mark B. Kerner, a specialist in back surgery, who opined Claimant had "no consistent objective neurologic deficit" or "pathology to explain a peroneal neuropathy or an L2 or L3 radiculopathy on his MRI." EX 6. Dr. Kerner saw nothing requiring surgical intervention and stated he "would treat [Claimant] aggressively in physical therapy." *Id.*

[3]Dr. Singh diagnosed Claimant with lumbar radiculopathy and a herniated disc. On July 18, 2018, Dr. Singh concluded Claimant's MRI studies did not explain Claimant's clinical presentation, Claimant did not require surgery, and Claimant needed psychiatric care. CX 79.

[4]On July 12, 2018, Dr. Nanavaty diagnosed almost voluntary left leg tremors – no signs of any known movement disorder; lumbar radiculopathy, though "I cannot explain any of his current symptoms based on that;" and "psychiatric disorders conversion disorder most likely." CXs 80-86. In his report dated September 12, 2019, Dr. Nanavaty reiterated he saw "no signs of any known movement disorder" to explain Claimant's tremors. CX 88. He also noted the observations of psychiatrist, Dr. Mann, that Claimant is more likely malingering or has a somatization disorder. *Id.*

Claimant also received treatment from orthopedic surgeon, Dr. David G. Goss, who diagnosed lower back pain and displacement of a lumbar intervertebral disc, and performed a posterior lumbar laminectomy and decompression L5-S1 with discectomy on November 14, 2018. CXs 90-119. Claimant thereafter was treated by Dr. Ashley D. Kent on April 3, 2019, who opined the atrophy of Claimant's left foot was due to a partial nerve injury and Claimant's left and right leg tremors were secondary to a psychiatric cause. CXs 124-126.

Meanwhile, Employer paid Claimant temporary total disability benefits for November 20, 2017, and from December 13, 2017 through April 30, 2018. A controversy ensued, with Claimant alleging his work-related back condition has steadily worsened since the date of injury and requesting Employer resume payment of temporary total disability benefits and pay medical benefits. Employer countered that Claimant is owed no further benefits because he was released to return to full-duty work as of May 1, 2018, and because any unpaid medical bills are for unauthorized treatment.

In his decision, the administrative law judge found Claimant did not establish a prima facie case of total disability as he did not demonstrate an inability to return to his usual work due to his work-related injury after he was released to full-duty work by Dr. Pezzella on May 1, 2018. He thus denied Claimant's claim for disability benefits after May 1, 2018. Addressing Claimant's request for medical benefits, the administrative law judge found Dr. Pezzella, who remains Claimant's authorized treating physician, did not refer Claimant to Drs. Singh, Nanavaty, Kent, or Gross, nor did Claimant ever request authorization from Employer prior to seeking treatment with those physicians. In light of this, he found Employer is not responsible for any medical costs after the May 17, 2018 treatment with Dr. Winke. The administrative law judge further declined to consider Claimant's assertion that the psychiatric cause of his alleged bilateral leg tremors is a consequence of the November 16, 2017 work injury, because it was not included on his claim form, it was raised for the first in Claimant's post-hearing brief, and alternatively, because no doctor opined Claimant's psychiatric conditions developed due to the work injury. Accordingly, the administrative law judge denied Claimant's claim for additional benefits.

On appeal, Claimant challenges the administrative law judge's rejection of his claim relating to his psychiatric conditions and denial of disability and medical benefits for his back condition. Employer responds, urging affirmance of the administrative law judge's decision, either because Claimant's Petition for Review and brief do not comply with 20 C.F.R. §802.211, or because the administrative law judge's findings are supported by substantial evidence of record.

We first address Employer's request to dismiss Claimant's appeal because his brief does not comply with the requirements of Section 802.211.[5] The Board has held that a brief filed by a party represented by counsel must address the administrative law judge's decision and demonstrate why, in terms of law and evidence, he believes the finding is not supported by substantial evidence or in accordance with law. *Montoya v. Navy Exch. Serv. Command*, 49 BRBS 51, 52 n.1 (2015); *Collins v. Oceanic Butler, Inc.*, 23 BRBS 227, 229 (1990). Mere allegations of error are not sufficient to invoke Board review. *Collins*, 23 BRBS at 229; *Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 214, 218 (1988).

Claimant merely cites evidence allegedly favorable to his case and does not raise any specific errors purportedly made by the administrative law judge in weighing the evidence or applying the law. Cl. Brief at 1-4. Instead, as Employer states, Claimant's contentions are largely couched in terms of "requests" it has for the Board to "find" his alleged psychiatric condition and resulting leg tremors are work-related and to "authorize" medical treatment for those conditions, as well as for the treatment and surgical procedure performed by Dr. Goss, and to "authorize" temporary total disability benefits from December 13, 2017. *Id.* The Board is not empowered to make independent findings of fact based on record evidence. 33 U.S.C. §921(b)(3); 20 C.F.R. §802.301(a); *see, e.g., Volpe v. Northeast Marine Terminal Corp.*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982). Consequently, as Claimant has failed to adequately challenge the administrative law judge's findings of fact, we affirm the administrative law judge's decision. 20 C.F.R. §802.211(b); *see Plappert v. Marine Corps Exch.*, 31 BRBS 109 (1997), *aff'g on recon en banc*, 31 BRBS 13 (1997). Nevertheless, our review

[5]Section 802.211 of the Benefit Review Board's regulations, entitled "Petition for Review," states: "Within 30 days after the receipt of an acknowledgment of a notice of appeal issued pursuant to §802.210, the petitioner shall submit a petition for review to the Board which petition lists the specific issues to be considered on appeal." 20 C.F.R. §802.211(a). Subsection (b) states:

> Each petition for review shall be accompanied by a supporting brief, . . . which: Specifically states the issues to be considered by the Board; presents, with appropriate headings, an argument with respect to each issue presented with references to transcripts, pieces of evidence and other parts of the record to which the petitioner wishes the Board to refer; a short conclusion stating the precise result the petitioner seeks on each issue and any authorities upon which the petition relies to support such proposed result.

20 C.F.R. §802.211(b). Subsection (d) provides "[f]ailure to submit a petition for review and brief within the 30-day period or to comply with any part of this section may, in the discretion of the Board, cause the appeal to be deemed abandoned (*see* §802.402)." 20 C.F.R. §802.211(d).

of the administrative law judge's decision reveals his findings of facts and conclusions of law are rational, supported by substantial evidence and in accordance with law.

A claimant establishes a prima facie case of total disability by demonstrating he is unable to return to his usual employment due to his work injury. *See, e.g., Norfolk Shipbuilding & Dry Dock Co. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999). The administrative law judge is entitled to determine the weight to be given to conflicting medical evidence. *Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994). The Board may not reweigh the evidence, but must affirm a decision supported by substantial evidence and in accordance with law. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP* [*Brickhouse*], 315 F.3d 286, 36 BRBS 85(CRT) (4th Cir. 2002).

The administrative law judge discussed the relevant evidence pertaining to Claimant's ability to work and gave rational reasons for crediting the full-duty return to work opinion of Dr. Pezzella, as corroborated by Dr. Winke, and for according no weight to Claimant's testimony or to any contrary medical opinions proffered after Dr. Pezzella's release because those opinions were premised largely on Claimant's subjective complaints, which are not credible.[6] Decision and Order at 2-10; *see, e.g., Ceres Marine Terminals, Inc. v. Director, OWCP* [*Jackson*], 848 F.3d 115, 50 BRBS 91(CRT) (4th Cir. 2016). Although Dr. Goss answered "yes" when asked whether the disc herniation he treated and the November 18, 2018 surgery he performed on Claimant were related to the November 2017 work injury, CXs 118-120, the administrative law judge rationally accorded "little weight" to Dr. Goss's opinion because he lacked an accurate picture of Claimant's prior treatment. Decision and Order at 10. In this regard, the administrative law judge found Claimant reported to Dr. Goss that physical therapy and pain management had failed to alleviate his symptoms when in fact Claimant did not complete physical therapy or receive pain management treatment. *Id.* Consequently, as it is supported by substantial evidence, we affirm the administrative law judge's finding Claimant did not establish a prima facie case of total disability after May 1, 2018, and the resulting denial of disability benefits from that date.[7]

[6]The administrative law judge rationally found Claimant lacked credibility because he "repeatedly exaggerated his symptoms to his doctors," and his descriptions of constant pain at a 10/10 level are belied by other objective evidence of record. Decision and Order at 8. For instance, the administrative law judge found Claimant told Dr. Patel his pain was a 10/10, but Dr. Patel reported Clamant had a full range of motion with normal muscle strength and a normal gait. *Id.* He also noted Drs. Kerner, Wilke, and Nanavaty made similar statements reflecting that Claimant's symptoms were not in accordance with their observations and the objective testing. *Id.*

[7]We affirm the denial of benefits for Claimant's alleged work-related psychological condition because he does not contest the administrative law judge's finding that he failed

With respect to medical benefits, Section 7(d) of the Act states an employer is not liable for medical benefits "unless employer shall have refused or neglected a request" for treatment. 33 U.S.C. §907(d). Where a claimant's request for authorization is refused by the employer, the claimant is released from the obligation of continuing to seek approval for his subsequent treatment and thereafter need only establish that the treatment he subsequently procured on his own initiative was reasonable and necessary for the work injury in order to be entitled to such treatment at the employer's expense. *See Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986). Once the claimant has made his initial, free choice of a physician, *see* 33 U.S.C. §907(b), he may change physicians only upon obtaining the prior consent of the employer, carrier, or district director. 33 U.S.C. §907(c)(2); 20 C.F.R. §702.406; *Hunt v. Newport News Shipbuilding & Dry Dock Co.*, 28 BRBS 364 (1994), *aff'd mem.*, 61 F.3d 900 (4th Cir. 1995).

The administrative law judge found although Dr. Pezzella released Claimant to return to full-duty work on May 1, 2018, he nevertheless continued to serve as his authorized treating physician. In this regard, the administrative law judge found Dr. Pezzella neither discharged nor released Claimant from his care, but instead explicitly stated he would continue to see Claimant on an as needed basis. Additionally, the administrative law judge found Dr. Pezzella did not send Claimant to see Drs. Singh, Nanavaty, Kent, or Goss, nor did Claimant seek authorization from Employer or the district director to seek treatment with any of those physicians. We affirm these findings as they are supported by substantial evidence, including the testimony of Claimant, his mother, and Employer's claims examiner, Tonya Himley. HT at 24-25, 49-51, 73, 78, 82, 89-92. Consequently, as Employer did not refuse a request for treatment and Clamant did not request authorization from Employer or the district director prior to receiving treatment from Drs. Singh, Mann, Nanavaty, Kent, and Goss, we affirm the administrative law judge's finding that Employer is not liable for any medical treatment after Claimant's visit with Dr. Winke on May 18, 2018, as it accords with law. 33 U.S.C. §907(d)(1); *Ranks v. Bath Iron Works Corp.*, 22 BRBS 301 (1989).

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to make a timely claim for this injury; Claimant first raised this issue in his post-hearing brief to the administrative law judge. Decision and Order at 11. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

Accordingly, we affirm the administrative law judge's Decision and Order.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge