U.S. Department of Labor

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

BRB No. 17-0407

WILLIAM MUGERWA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
AEGIS DEFENSE SERVICES	)	
	)	DATE ISSUED: Apr. 27, 2018
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Order Granting Employer/Carrier Motion to Compel Claimant to Sign Releases for Medical Records and the Supplementary Order Concerning Release of Claimant's Medical Records and Issuance of Protective Order of William T. Barto, Administrative Law Judge, United States Department of Labor.

Tara K. Coughlin and Troy D. Green (Law Offices of Tara K. Coughlin), Harris Township, Michigan, for claimant.

James M. Mesnard (Seyfarth Shaw, L.L.P.), Washington, D.C., for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order Granting Employer/Carrier Motion to Compel Claimant to Sign Releases for Medical Records and the Supplementary Order Concerning Release of Claimant's Medical Records and Issuance of Protective Order (2016-LDA-00808) of Administrative Law Judge William T. Barto 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, 42 U.S.C. §1651 *et seq*. (the Act).[1] The administrative law judge's discovery determinations will be upheld unless the challenging party establishes they are arbitrary, capricious, based on an abuse of discretion, or not in accordance with law. *See Irby v. Blackwater Security Consulting*, 44 BRBS 17 (2010); *Olsen v. Triple A Machine Shops, Inc.*, 25 BRBS 40 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP*, 996 F.2d 1226 (9th Cir. 1993).

Claimant, a Ugandan citizen and resident, alleges he was injured while working for employer as a security guard in Afghanistan. On February 24, 2016, claimant left Afghanistan to return home because his contract ended. The next day, he was admitted to the hospital with epigastric pain, and diagnosed with acute gastritis. He was released four days later. In April 2016, claimant was diagnosed with an epigastric hernia which he alleges is work-related. Employer denies the compensability of this condition. Claimant filed a claim under the Act in May 2016; employer has not paid any benefits.

In December 2016, employer's counsel sent an email to claimant's counsel in the United States, requesting that claimant sign two medical release forms. Claimant refused. Claimant responded to employer's Interrogatories and Request for Production of Documents in February 2017, however, producing what he asserts are all relevant medical records. Employer was not satisfied. Because the administrative law judge has no subpoena power in Uganda, *see* 29 C.F.R. §18.56(b)(2), (3), employer again asked claimant to sign the medical releases; when claimant refused, employer filed with the administrative law judge a motion to compel claimant to sign them. The administrative law judge granted employer's motion. He then received claimant's response and supplemental response to the motion to compel and claimant's motion for a protective order. The administrative law judge treated these pleadings as a motion for reconsideration and issued a supplemental order, again granting employer's motion to compel but setting temporal limitations on the evidence claimant must produce. Claimant appeals the orders, and employer responds, urging affirmance.[2]

In his first Order, dated March 2, 2017, the administrative law judge addressed Section 18.51(a) of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (the OALJ Rules), 29 C.F.R. §18.51(a), which provides for discovery in proceedings before the Office of Administrative Law Judges.

[1] The Board accepted this interlocutory appeal in an Order dated May 23, 2017.

[2] Since the issuance of the administrative law judge's supplemental order, employer has both scheduled and cancelled an appointment for claimant with a doctor of its choice, and the administrative law judge has postponed the hearing.

The administrative law judge stated that an employer's investigation need not be limited merely because a claimant asserts he has provided all relevant information and there is nothing further to produce. Thus, the administrative law judge concluded that the medical records employer alleges might exist, even if not admissible, could be discoverable, and he ordered claimant to sign the medical releases. Order at 2.

The administrative law judge's Supplementary Order, dated March 28, 2017, explained that federal courts are split on whether judges have the authority to compel litigants to sign medical releases, noting that none of the cases cited by claimant involved the Defense Base Act, the OALJ Rules, or the law of the United States Court of Appeals for the Second Circuit, within whose jurisdiction this case arises. The administrative law judge also explained that discovery is on-going, and claimant's assertion that he has already sent employer all relevant medical records does not foreclose employer's other means of discovery. Supp. Order at 2. Citing 29 C.F.R. §18.61(a)(1), the administrative law judge stated that a party is entitled to request that the opposing party produce documents within his custody or control, that claimant's medical records are within his "control," and that claimant can authorize their release. Although a party generally is able to use subpoenas to obtain documents in the possession of a third party, such as a doctor, the administrative law judge noted he lacks the authority to compel a subpoena in a foreign country;[3] therefore, he concluded that a compelled medical release "may be the only means" by which employer can obtain the records at issue in this case. *Id.* at 3.

With respect to claimant's assertion that the releases in question give employer unregulated and unfettered access to his providers and records, the administrative law judge stated that claimant has waived his privileges because he placed his physical health at issue by filing a claim. The administrative law judge stated that if claimant objects to the release of particular medical records, he must produce materials for *in camera* review by the administrative law judge and provide affidavits and declarations to establish why the information is to be protected. Supp. Order at 3. In light of these findings, the administrative law judge concluded he has the authority to compel claimant to sign the requested medical releases; however, he narrowed the scope of the releases, specifically limiting the records to those created no more than three years before claimant's alleged injury. *Id.* at 4.

[3] Pursuant to 29 C.F.R. §18.56(b)(2), (3), the administrative law judge's subpoena power is limited to service in the United States or to a United States national or resident who is in a foreign country. *See also Aristocrat Leisure Ltd. v. Deutsche Bank Tr. Co. Americas*, 262 F.R.D. 293, 305 (S.D.N.Y. 2009) (subpoena rules, Fed. R. Civ. P. 45 and 28 U.S.C. §1783, are not applicable to foreign nationals).

Claimant contends the administrative law judge abused his discretion by compelling him to sign medical releases exceeding the permitted methods of discovery. He also asserts the releases are overbroad and give employer permission to conduct *ex parte* communications with his doctors and uncontrolled access to his medical records, leading to the release of irrelevant and prejudicial information. Employer argues this is the only way it can obtain discovery from claimant's doctors because discovery tools only apply to parties and subpoenas are not available in this case. Additionally, employer asserts that the releases are not overbroad and that claimant has not objected to the release of specific documents or explained to the administrative law judge *in camera* why specific information should be protected.

Initially, we reject claimant's contention that medical releases exceed the permitted methods of discovery. The regulation applicable to the administrative law judge's duties under the Act, 20 C.F.R. §702.338, provides:

> The administrative law judge shall inquire fully into the matters at issue and shall receive into evidence the testimony of witnesses and any documents which are relevant and material to such matters.

See also 33 U.S.C. §927(a).[4] Section 23(a) of the Act and Section 702.339 of the regulations state that "[i]n making an investigation[,] the administrative law judge shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, . . . but may make such investigation or inquiry or conduct such hearing in such manner as to best ascertain the rights of the parties." 33 U.S.C. §923(a); 20 C.F.R. §702.339;[5] *see also* 33 U.S.C. §919(d); *Casey v. Georgetown Univ. Med. Ctr.*, 31 BRBS 147 (1997); *Picinich v. Seattle Stevedore Co.*, 19 BRBS 63 (1986). Because the Act and

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[4] Section 27(a) provides that the administrative law judge:

> shall have power to preserve and enforce order during any such proceedings; to issue subpoenas for, to administer oaths to, and to compel the attendance and testimony of witnesses, or the production of books, papers, documents, and other evidence, or the taking of depositions before any designated individual competent to administer oaths; to examine witnesses; and to do all things conformable to law which may be necessary to enable him effectively to discharge the duties of his office.

[5] Section 702.339 refers to Section 554 of the Administrative Procedure Act, 5 U.S.C. §554. That section, as well as Sections 556 and 557, 5 U.S.C. §§556-557, address adjudications, evidence, and decisions, specifically stating that the transcript and exhibits constitute the exclusive record on which a decision must be based.

its regulations are more expansive than the more general OALJ rules,[6] the parties are not limited to the discovery tools specifically listed in the OALJ Rules.[7] *See generally Metropolitan Stevedore Co. v. Brickner*, 11 F.3d 887, 27 BRBS 132(CRT) (9th Cir. 1993); *Maraney v. Consolidation Coal Co.*, 37 BRBS 97 (2003); *Goicochea v. Wards Cove Packing Co.*, 37 BRBS 4 (2003).

Administrative law judges have broad discretion in authorizing parties to obtain relevant evidence. *Casey*, 31 BRBS 147; 20 C.F.R. §§702.338-702.339; 29 C.F.R. §18.12.[8] As the administrative law judge correctly stated, claimant's compliance with the discovery employer has propounded does not limit employer's right to see additional

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[6] Section 18.10(a) of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (the OALJ Rules) provides in pertinent part:

> To the extent that these rules may be inconsistent with a governing statute, regulation, or executive order, the latter controls. If a specific Department of Labor regulation governs a proceeding, the provisions of that regulation apply, and these rules apply to situations not addressed in the governing regulation. The Federal Rules of Civil Procedure (FRCP) apply in any situation not provided for or controlled by these rules, or a governing statute, regulation, or executive order.

29 C.F.R. §18.10(a). Section 18.61 of the OALJ Rules is comparable to FRCP 34 (production of documents), and Section 18.56 is comparable to FRCP 45 (subpoenas).

[7] The OALJ Rules identify interrogatories, requests for the production of documents or things, physical and mental examinations, requests for admissions, and oral and written depositions, as the means for obtaining relevant information. 29 C.F.R. §§18.60-18.65.

[8] Section 18.12 of the OALJ Rules, 29 C.F.R. §18.12, provides that the administrative law judge has the power to "regulate the course of the proceedings" which includes "compel[ling] the production of documents . . . within a party's control[.]" 29 C.F.R. §18.12(b)(1), (3). With regard to the scope of discovery, 29 C.F.R. §18.51(a) states:

> Unless otherwise limited by a judge's order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense – including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the judge may order discovery of any matter relevant to the subject matter involved in the proceeding.

evidence – at least until such time as claimant objects and the administrative law judge finds that further discovery is unwarranted. 20 C.F.R. §§702.338-702.339; 29 C.F.R. §18.51(b)(4)(i) - (iii).[9] Therefore, medical release forms are a permitted method for discovery.

As medical release forms are a permitted method for discovery, we next address claimant's assertion that the administrative law judge lacks the authority to compel him to sign medical release forms. Courts are split over whether a judge has the authority to compel a party to sign medical release forms under the Federal Rules of Civil Procedure (FRCP). *Compare Mir v. L-3 Communications Integrated Systems, L.P.*, 319 F.R.D. 220 (N.D. Tex. 2016) (compelling medical releases under FRCP 34 because plaintiff has control over his medical documents even when they are not in his possession), *and E.E.O.C. v. Nichols Gas & Oil, Inc.*, 256 F.R.D. 114 (W.D.N.Y. 2009) (balancing competing privacy and fairness interests under FRCP 26, court ordered parties to propose agreeable scope of medical releases), *with Fields v. West Virginia State Police*, 264 F.R.D. 260 (S.D. W.Va. 2010) (FRCP do not grant authority to issue motion to compel signing of medical releases), *and Neal v. Boulder*, 142 F.R.D. 325 (D. Colo. 1992) (motion to compel denied because records not in plaintiff's "custody" or "control;" signing releases would permit *ex parte* communications).

Weighing the competing interests identified in these cases, we hold that administrative law judges have the authority to compel claimants to sign narrowly-tailored medical releases when it is reasonable under the circumstances to do so. 33 U.S.C. §§923, 927; 20 C.F.R. §§702.338-702.339; 29 C.F.R. §18.56(b)(2), (3). Such a rule balances the need to disclose relevant information against the privacy concerns implicated by the release of potentially sensitive medical documents. *See Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 36 BRBS 35(CRT) (7th Cir. 2002) (adopting the Director's view that an

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[9] Limits must be placed on discovery when:

> (i) The discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
> (ii) The party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
> (iii) The burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

29 C.F.R. §18.51(b)(4)(i) - (iii).

administrative law judge must determine the reasonableness of a request to compel medical releases under the circumstances of the case).[10]

We also reject claimant's contention that the administrative law judge should have stricken the requests to sign the releases because the requests were unsigned. Section 18.50(d), 29 C.F.R. §18.50(d), requires that every discovery request be signed by at least one of the party's representatives. Signing certifies that the request is complete and correct, is consistent with the rules, is not for an improper purpose, and is not unreasonable or unduly burdensome. Failure to sign means that the other party has no duty to act upon the request, and the administrative law judge must strike the request unless the signature is promptly supplied. 29 C.F.R. §18.50(d). Although employer's requests were initially sent via email, dated December 28, 2016, and February 28, 2017,[11] and had no handwritten signature, the emails each contained a pre-set signature block which included employer's counsel's name, address, phone number, fax number, and email address, as required by the regulation. 29 C.F.R. §18.50(d)(1). The motion to compel is dated February 22, 2017, prior to the second email request; it is signed by hand and includes copies of the releases. Therefore, the requests complied with the regulation, and the administrative law judge properly accepted them. *Id.*

Additionally, we reject claimant's assertion that his agreement to submit to a medical examination with a physician of employer's choosing negates the need for the medical releases. The fact that employer can have claimant undergo a medical examination does not preclude employer from using a variety of discovery methods to obtain relevant medical records. *See* 20 C.F.R. §§702.338-702.339; 29 C.F.R. §§18.60-18.65.

Lastly, we address claimant's contention that compelling him to sign the medical releases was unreasonable in this case. As there is no controlling precedent under the Act, we again look to other courts for guidance. Federal district courts have broad discretion in addressing motions to compel, and their decisions will not be disturbed unless there was

[10] Notably, we do not hold, as a matter of law, that the lack of subpoena power over foreign citizens automatically justifies compelling a claimant to sign medical releases. Rather, it is a factor for the administrative law judge to consider in determining the overall reasonableness of a request. Employer is a sophisticated agent and presumably weighed the advantages of contracting with Ugandan nationals against the inherent complexities of litigating against a foreign national. Its failure to account for the materialization of a clearly foreseeable risk does not, *per se*, entitle it to a remedy that we believe should be sparingly granted.

[11] Additional email communications regarding the releases are dated March 27, April 11, April 18, and April 19, 2017.

an abuse of discretion. *Grand Cent. Partnership, Inc. v. Cuomo*, 166 F.3d 473, 488 (2d Cir. 1999); Fed. R. Civ. P. 26.

The party who initially objects to the propounded discovery bears the burden of showing why the discovery should be denied. *Fin. Guar. Ins. Co. v. Putnam Advisory Co., LLC*, 314 F.R.D. 87 (S.D.N.Y. 2016). Specifically, "the resisting party" must show via evidence that, despite liberal construction of the discovery rules, the requested discovery is not relevant or is overbroad, burdensome, or oppressive. *Id.* at 88; *Swackhammer v. Sprint Corp., PCS*, 225 F.R.D. 658, 661 (D. Kan. 2004) (unless a request is overbroad on its face, party resisting discovery must show overbreadth, including any objection to the temporal scope of the request). If the objection is proven, the burden shifts to the requesting party to show that the information is relevant and necessary. *Mason Tenders District Council of Greater New York v. Phase Constr. Services, Inc.*, 318 F.R.D. 28 (S.D.N.Y. 2016); *Henderson v. Holiday C.V.S., L.L.C.*, 269 F.R.D. 682, 686 (S.D. Fla. 2010).

Claimant refused to sign the two releases in this case, contending they seek improper information and will allow employer to engage in "unfettered" *ex parte* communications with his medical providers.[12] Claimant is correct: the medical releases are grossly overbroad on their faces and appear to be designed to harass or intimidate as much as to obtain relevant information. *See generally Priest v. Rotary*, 98 F.R.D. 755 (N.D. Cal. 1983) (discovery requests "approach[ing] outer bounds of relevance" denied under FRCP 26(c) due to potential to harass and intimidate); *Watson v. State Farm Mutual Automobile Ins. Co.*, Civil No. 09-12573 (E.D. Mich. 2010) (2010 WL 2287148) (overly broad discovery request "cross[ed] the line into questions designed to annoy and harass" under FRCP 26); 29 C.F.R. §18.51; Fed. R. Civ. P. 26(b), (c).

The release forms grant employer permission to obtain unlimited medical and other sensitive information from unlimited sources for no identifiable or legitimate reason. For example, the Tangiers Release states:

[12] Claimant specifically asserts that the releases employer submitted do not limit who is authorized to contact his providers, how they are authorized to make contact, or what information they may obtain and disseminate. He also avers that signing these releases will: circumvent the rules for discovery; treat foreign claimants differently from U.S. claimants; allow for the collection of overbroad and irrelevant information; produce cumulative evidence; allow for unregulated access to and dissemination of medical information because, unlike in the U.S., there are no rules governing access to and release of information in Uganda; do more harm than good; and subject claimant to harassment, job loss, discrimination, or shame, if potentially prejudicial and sensitive information is made available. Cl. Br. at 13-16.

> This authorization applies to information about: [claimant's] past, present, or future physical or mental health or condition. . . . [and] includes information on the diagnosis and treatment of mental illness and the use of alcohol, drugs and tobacco. . . .

Cl. Br. at exh. 1. It authorizes a range of persons and entities to release claimant's information, "including physicians, insurers, *consumer reporting agencies, travel organizers, airlines, hotels*," as well as "*any other person* who may have knowledge about this claim[,]" stating that the information "may be used or disclosed to evaluate *any claim* for benefits." *Id.* (emphasis added). The Tangiers Release also would have claimant authorize *employer, or any of its associated representatives*, such as its insurer or plan administrators, "to contact by telephone, in person, or in writing any Health Care Provider and authorize such Health Care Provider to discuss and/or provide reports. . . ." *Id.* (emphasis added). And, finally, it would require those providers to release information with respect to *claimant "or any of [his] dependents* which may have a bearing on the benefits payable under this or any other plan providing benefits or services." *Id.* (emphasis added).

The AIG Release is similarly egregious. It would have claimant "expressly authorize and direct all of [his] physicians and health care providers, now and in the future to disclose [his] protected health information to Chartis Insurance." Cl. Br. at exh. 2. This means releasing his "entire Medical Record and all of [his] protected health records and medical information [*including reports about psychiatric assessments, communicable diseases, and HIV/AIDs*]." *Id.* (emphasis added). By their straightforward terms, these forms would authorize an expansive release of plainly irrelevant medical and personal records, even with the temporal limitation placed by the administrative law judge. The resulting invasion of privacy far outweighs any reasonable purpose such broad releases could serve in defending this claim. *Old Ben*, 292 F.3d 533, 36 BRBS 35(CRT). Accordingly, we vacate the administrative law judge's orders granting employer's motion to compel claimant to sign the medical release forms, and we remand this case for further consideration.

On remand, employer must first establish a reasonable inference of the existence of additional relevant records in light of claimant's assertion that he has produced all relevant records. *See, e.g.*, *Mason Tenders*, 318 F.R.D. at 42 (in the face of a denial of the existence of or control over documents, the requesting party must produce specific evidence challenging the assertion). If the administrative law judge finds that claimant has acted in good faith by producing his relevant medical records and employer has not shown the likely existence, relevance, and necessity of the additional requested medical information, the medical release forms are unnecessary, and the administrative law judge should deny employer's motion to compel. *See Putnam Advisory*, 314 F.R.D. at 89; *Henderson*, 269 F.R.D. at 689. If, however, the administrative law judge finds that claimant has acted in

good faith but employer has shown the relevance and necessity of medical information held by a medical provider, or if employer establishes claimant has not acted in good faith, then the medical releases may be warranted. *See Henderson*, 269 F.R.D. at 686-691. If they are needed, the administrative law judge must greatly narrow their scope or must order the parties to work together to generate mutually-agreeable medical release forms. *Sherlock v. Fontainebleau*, 229 F.Supp.3d 1277 (S.D. Fla. 2017).[13] If claimant refuses to sign the narrowed medical release forms, then the administrative law judge may grant employer's motion to compel. *See Putnam Advisory*, 314 F.R.D. at 90-91; *Henderson*, 269 F.R.D. at 690-692; *Mason Tenders*, 318 F.R.D. at 42-43.

[13] In *Sherlock*, the court required the parties to propose jointly-drafted HIPAA-compliant orders that would protect and assist both sides. *Sherlock*, 229 F.Supp.3d at 1284; *see also E.E.O.C.*, 256 F.R.D. 114. The court stated that the orders should authorize a heath care provider to release only specific information, for a specific purpose, and for a limited time. *See Sherlock*, 229 F.Supp.3d at 1283. It may be necessary for employer to propound additional interrogatories or written deposition questions to identify the proper providers. Consistent with the principles outlined in *Sherlock*, the information addressed by any such jointly-proposed release forms should be limited to claimant's "relevant medical records at issue in [this] specific [claim]" and should not include extraneous information unrelated to claimant's medical condition, such as hotel or travel records, or medical records related to other people, such as claimant's dependents. *See id.*, 229 F.Supp.3d at 1279. Moreover, to prevent "unfettered" *ex parte* communications, the releases should regulate those communications. *See, e.g., Caldwell v. Chauvin*, 464 S.W.3d 139, 148 (Ky. 2015) (holding that HIPAA does not prohibit *ex parte* communications with treating physicians but does regulate the information that can be disclosed in such conversations).

Accordingly, the administrative law judge's conclusion that he has the authority to issue an order compelling a claimant to sign medical releases as a part of the discovery process is affirmed, but his Order Granting Employer/Carrier Motion to Compel Claimant to Sign Releases for Medical Records and Supplementary Order Concerning Release of Claimant's Medical Records and Issuance of Protective Order are vacated. The case is remanded to the administrative law judge for further action in accordance with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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GREG J. BUZZARD
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge