U.S. Department of Labor

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

BRB No. 18-0257

RYAN A. TEER Claimant-Petitioner v. HUNTINGTON INGALLS, INCORPORATED, PASCAGOULA OPERATIONS Self-Insured Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED: 05/15/2019 DECISION and ORDER

Appeal of the Decision and Order of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

D.A. Bass-Frazier (Huey Law Firm, LLC), Mobile, Alabama, for claimant.

Donald P. Moore (Franke & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

Daniel Cobert (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: BUZZARD, GILLIGAN and ROLFE Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2016-LHC-00199) of Administrative Law Judge Patrick M. Rosenow 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*. (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 fractured both ankles on October 21, 2001, during the course of his employment with employer when he fell from the deck of a ship down an open missile silo. Claimant underwent numerous surgeries, requiring the use of a wheelchair. Ultimately, he required bilateral below-the-knee amputations. His right leg in February 2011; his left leg in February 2014. Tr. at 28-29, 33.

Claimant was living with his parents in their home (the "Teer residence") at the time of the 2001 work injury. In 2003, he requested that employer pay for modifications to the Teer residence, which included construction of an accessible bedroom and bathroom addition. EX 5 at 4-5. Prior to a hearing scheduled in May 2004, employer agreed to reimburse claimant's parents $35,743 for the cost of the addition. EX 9.

Claimant married in 2007; he and his wife lived at the Teer residence until 2010. Tr. at 49. They moved out at his mother's request after she remarried and the living situation became "strained."[1] *Id*. at 29. Claimant and his wife moved in with her grandfather, whose home was wheelchair accessible. *Id*. at 29-30. Claimant's wife purchased a home in 2013 for $98,500, with her grandfather co-signing the mortgage. *Id.* at 32, 48-49. Claimant requested that employer provide modifications to his wife's home in October 2014, which employer denied. CX 6. The claim proceeded to a hearing before the administrative law judge. After the hearing on June 10, 2016, the record was left open for further development regarding claimant's future medical care and the cost of remodeling his new residence. Tr. at 75-77.

In his decision, the administrative law judge rejected employer's contentions that claimant forfeited entitlement to further home modifications pursuant to Section 7(d), 33 U.S.C. §907(d), by failing to seek employer's authorization to move to a new home, and that modifying a second home was not reasonable and necessary for claimant's work injuries. The administrative law judge found, however, that claimant chose to abandon the

[1] Claimant's father died in March 2003. EX 11 at 5.

value of the employer-paid modifications to the Teer residence and that employer's liability for modifications to his new residence, therefore, "is limited by the dollar amount it expended in modifying the previous house." Decision and Order at 15. The administrative law judge held employer liable for modifications to claimant's new home, less a credit of $35,743. With respect to the extent of the necessary modifications, the administrative law judge gave "more weight" to employer's proposed modifications but he declined to order specific modifications because such determinations are within the discretionary authority of the district director.

On appeal, claimant challenges the administrative law judge's decision to give employer a credit for its prior modifications to the Teer residence and his giving weight to the home modification plan submitted by employer. Employer responds that the administrative law judge's decision is rational and supported by substantial evidence.[2] The Director, Office of Workers' Compensation Programs (the Director), responds that the Board should reverse the award of the credit and that the administrative law judge's home modification findings are without legal effect as he properly determined that authority to order specific modifications resides with the district director.[3] Employer filed a response averring that the credit was properly awarded and the district director is bound by the administrative law judge's findings of fact as to the scope of the home modifications.

Section 7(a) of the Act states that "[t]he employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. §907(a). In order for a medical expense to be assessed against the employer, the expense must be reasonable and necessary for treatment of the work injury. *Ramsey Scarlett & Co. v. Director, OWCP [Fabre]*, 806 F.3d 327, 49 BRBS 87(CRT) (5th Cir. 2015); *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996). Reasonable and necessary medical expenses may include house modifications. *Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989) (modifications to the

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[2] Employer also submitted a motion to strike evidence that claimant submitted with his appeal, which the Board stated it would address in its decision. *Teer v. Huntington Ingalls, Inc., Pascagoula Operations*, BRB No. 18-0257 (Jul. 3, 2018) (Order). It is well established that the Board may consider only evidence admitted into the record before the administrative law judge. *See*, *e.g.*, *Meinert v. Fraser, Inc.*, 37 BRBS 164 (2003); 33 U.S.C. §921(b)(3); 20 C.F.R. §802.301(c). Thus, we grant employer's motion to strike claimant's evidence.

[3] By Order issued November 27, 2018, the Board ordered the Director to file a brief in response to claimant's appeal.

claimant's house necessitated by his work-related disability, including ramps, widened doorways and accessible plumbing fixtures, are covered under Section 7).

Claimant contends there no statutory basis allows an employer to recover previously paid medical benefits through a credit, such as awarded here. Alternatively, claimant argues, based on the facts of this case, that allowing employer a credit is not reasonable. The Director agrees with claimant and urges the Board to reverse the administrative law judge's decision giving employer a credit for the cost of the addition to the Teer residence.

We agree with claimant and the Director that no statutory basis exists for the credit awarded in this case. The Act's specific credit provisions are not applicable to medical expenses.[4] Moreover, there is no basis to find any "extra-statutory" credit applicable here, as such "credit doctrines" have been strictly limited. *See New Orleans Stevedores v. Ibos*, 317 F.3d 480, 36 BRBS 93(CRT) (5th Cir. 2003), *cert. denied*, 540 U.S. 1141 (2004) (no credit for amounts received in settlement with other potentially liable employers); *ITO Corp. v. Director, OWCP [Aples]*, 883 F.2d 422, 22 BRBS 126(CRT) (5th Cir. 1989) (no credit for permanent partial disability settlement with prior employer against amounts due for permanent total disability with subsequent employer); *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (en banc) (credit doctrine applies to successive schedule awards); *see generally Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates]*, 519 U.S. 248, 31 BRBS 5(CRT) (1997) (double recoveries not strictly prohibited).

The administrative law judge found no evidence that claimant moved in order to impose on employer liability for additional expenses or based on a "personal preference" to live elsewhere.[5] Decision and Order at 14 n.41. Rather, after employer modified the Teer residence, he found "circumstances arose that made it no longer reasonable for [claimant] to continue living in that house" and these circumstances "were also largely

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[4] Section 3(e) provides a credit for state workers' compensation payments received by claimant, Section 14(j) provides a credit for advance installments of compensation, and Section 33(f) provides a credit for third-party recoveries. 33 U.S.C. §§903(e), 914(j), 933(f); *see Aurelio v. Louisiana Stevedores, Inc.*, 22 BRBS 418 (1989), *aff'd mem.*, 924 F.2d 1055 (5th Cir. 1991) (table).

[5] Accordingly, the administrative law judge's analogy to a claimant who replaces a working wheelchair based on personal preference misses the mark. Decision and Order at 14. Based on the facts of this case as found by the administrative law judge, this is not a situation where claimant moved to a new residence to reap the value of the upgrade to his prior residence.

beyond [claimant's] control."[6] *Id*. We decline to extend the credit doctrine under these circumstances and hold it is reasonable and consistent with law for employer to pay the cost of renovating claimant's current residence for wheelchair accessibility. *See Dupre*, 23 BRBS 86. Accordingly, we reverse the administrative law judge's award to employer of a $35,743 credit for the amount expended to renovate the Teer residence.

Claimant next challenges the administrative law judge's decision to credit the home modification plan submitted by employer over the plan he submitted. Claimant also contends the district director, and not the administrative law judge, has the sole authority to determine the extent of the "reasonable and necessary" modifications. The Director responds that the administrative law judge acknowledged that his preference for employer's modification plan was mere dicta and correctly concluded that the district director has the sole authority to determine the scope of the home modifications.

Having found that modifications to claimant's current home are necessary for his work injury, the administrative law judge addressed in depth the home modification plans submitted by each party. He concluded that employer's plan is "more likely than not to be reasonable, appropriate and necessary" than claimant's plan.[7] Decision and Order at 16. He then stated, however, that "discretionary decisions related to individual line items and modalities of medical care are not amenable to adjudication in a formal hearing process,

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[6] In awarding employer a credit for the amount it paid to renovate the Teer residence, the administrative law judge found it relevant that claimant's mother sold him a joint tenancy with right of survivorship in her house in December 2003 for $10 in order to have employer pay for the home renovations. Decision and Order at 14; *see* Tr. at 58-61. He noted that after employer paid for the renovations necessary to accommodate claimant's work-related disability claimant gave his joint interest, which had increased in value due to the renovations, back to his mother in 2008 for no consideration. Decision and Order at 14. The administrative law judge found that claimant's decision to abandon the monetary value of employer's modifications "was within his control." *Id.* at 14-15.

[7] Claimant submitted a modification plan by T. Allen Reimer involving major demolition and reconstruction consistent with the Americans with Disabilities Act. Mr. Reimer estimated his plan would cost between $124,000 and $165,000. CX 11 at 14. Employer submitted a plan by Christopher Walker to modify claimant's master bedroom, master bathroom, and kitchen, and install a chair lift in the second bathroom, the total cost of which he estimated as approximately $44,100. EX 17 at 13-15. Mr. Walker also estimated that Mr. Reimer's plans, which included demolition and construction of an addition and an exterior storage shed, could be constructed for approximately $79,100. *Id.* at 16, EX 19 at 11, 20.

but better suited for resolution by the District Director." *Id*. at 17. The administrative law judge stated:

> the fundamental disagreements between the parties were legal ones concerning whether (1) Claimant waived his right to the renovation under Section 7(d); (2) the modifications sought by Claimant are reasonable, appropriate, and necessary when compared to the modifications proffered by Employer; (3) Employer is entitled to a credit for prior modifications.
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> The second disagreement in particular raises what could be deemed at best mixed questions of fact and law. The arguments over specific modifications are exactly the type of issues reserved for the District Director. Accordingly, I decline to order specific modifications.

Id. He concluded that employer is liable for home modifications "subject to the proper exercise of discretionary authority by the District Director." *Id.* at 18.

We agree with claimant and the Director that the administrative law judge's addressing the merits of the parties' home modification plans is without effect and he correctly stated that the district director has the sole authority to determine the extent of the necessary modifications. Section 7(b) of the Act states in pertinent part:

> The Secretary shall actively supervise the medical care rendered to injured employees, . . . , shall have authority to determine the necessity, character, and sufficiency of any medical aid furnished or to be furnished . . . .

33 U.S.C. §907(b). Section 702.407 of the regulations provides:

> The Director, OWCP, through the district directors and their designees, shall actively supervise the medical care of an injured employee covered by the Act. Such supervision shall include:
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> (b) The determination of the necessity, character and sufficiency of any medical care furnished or to be furnished the employee, including whether the charges made by any medical care provider exceed those permitted under the Act.

20 C.F.R. §702.407(b). Thus, issues regarding the character and sufficiency of necessary home modifications are within the purview of the district director.[8] *McCurley v. Kiewest Co.*, 22 BRBS 115 (1989); *see also Jackson v. Universal Maritime Service Corp.,* 31 BRBS 103 (1997) (Brown, J., concurring). Moreover, the district director is not bound by the administrative law judge's musings on this issue. *See generally Omar v. Masar Transp. Co.*, 46 BRBS 21 (2012); *see also Healy Tibbitts Builders, Inc. v. Cabral*, 201 F.3d 1090, 33 BRBS 209(CRT) (9th Cir.), *cert. denied,* 531 U.S. 378 (2000). Therefore, the administrative law judge properly remanded the case to the district director to determine the scope of the modifications to claimant's current residence required by his work injury, which are payable by employer without a credit for its prior payments to modify the Teer residence.

[8] An administrative law judge has the authority to decide disputed factual issues that arise in a claim for medical benefits, such as the necessity of care for the work injury. These issues are characterized by the need for fact-finding and the weighing of evidence. In contrast, medical issues involving the exercise of discretion are within the purview of the district director. *Compare Jackson v. Universal Maritime Serv. Corp.*, 31 BRBS 103 (1997) (Brown, J., concurring) *with Sanders v. Marine Terminals Corp.*, 31 BRBS 19 (1997) (Brown, J., concurring). In this case, the necessity of home modifications has been established. Thus, the district director, in the exercise of sound discretion, is charged with selecting the modifications. His decision is appealable directly to the Board. *Jackson*, 31 BRBS at 107-108.

Accordingly, we reverse the administrative law judge's award to employer of a credit of $35,743 against any home modifications to claimant's current residence and affirm the administrative law judge's remanding of the case to the district director to determine the extent of home modifications.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge