BRB No. 14-0024

WALTER HERRING	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL, INCORPORATED	)	DATE ISSUED: Aug. 26, 2014
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Order Granting Motion for Summary Decision of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Walter Herring, Santo, Texas, *pro se*.

Limor Ben-Maier, John L. Schouest and Victor J. Burnette (Kelley Kronenberg), Houston, Texas, for employer/carrier.

Before: HALL, Acting Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Order Granting Motion for Summary Decision (2013-LDA-00257, 2013-LDA-00258, 2013-LDA-00259, 2013-LDA-00260) of Administrative Law Judge Clement J. Kennington 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). In an appeal by a claimant without representation by counsel, the Board will review the administrative law judge's decision to determine if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are in

accordance with law. If they are, they must be affirmed. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In 1982, claimant suffered a crush injury to his left ankle that left him vulnerable to conditions such as venous insufficiency, stasis ulcerations, and cellulitis. EX N to Emp. Mot. For Sum. Decision.[1] Claimant had been employed by employer in various overseas locales since the 1990s.[2] On June 1, 2005, claimant filed a claim for benefits under the Act, alleging that, on July 9, 2003, while working in Iraq, he developed a rash on both feet and ulcer-like bumps all over his body. EX C. Claimant contended that, due to complications from this skin condition, he returned to the United States for treatment on November 11, 2003. EX D. Claimant came to believe that this skin condition was leishmaniasis.[3] On March 16, 2006, claimant's treating physician, Dr. Singh, prepared a letter stating that claimant contracted leishmaniasis in Kuwait or Iraq and that he was disabled by this condition from November 21, 2003 through December 17, 2004, at which time he returned to full-duty work.[4] EX E. Claimant apparently is seeking total disability benefits for the period from November 2003 to December 17, 2004, and ongoing total disability benefits from some time in 2008, due to leishmaniasis. Claimant filed letters and medical documents with the OALJ in support of his belief that the 1999 ankle injury was due to leishmaniasis contracted in Kosovo, and that he contracted a second type of leishmaniasis in Kuwait and Iraq.

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[1] Citations to all exhibits refer to attachments to employer's Motion for Summary Decision.

[2] In 1999, claimant sustained a left ankle injury in Kosovo that aggravated his previous left foot condition. Employer voluntarily paid claimant temporary total disability benefits for this injury from November 16, 1999 through January 31, 2000. EX G.

[3] Leishmaniasis is a parasitic disease found in rodents and is transmitted to humans by the bite of infected female sand flies. There are several forms of the disease; claimant's claim apparently is for cutaneous leishmaniasis, as this results in skin lesions. EX M.

[4] On June 4, 2008, claimant sustained a dental injury in Iraq. Employer authorized medical treatment for this injury. EX H. On June 24, 2008, claimant again aggravated his left ankle condition at work. He was diagnosed with cellulitis. EX I. Employer voluntarily paid claimant temporary total disability benefits from July 3 through September 22, 2008. EXs I, J.

The case was referred to the Office of Administrative Law Judges in 2013.[5] On July 10, 2013, the administrative law judge issued a notice of hearing and pre-hearing order. In a motion dated July 23, 2013, employer moved for summary decision, with supporting documentation. The record indicates that claimant was properly served with the motion for summary decision, but did not respond.[6]

The administrative law judge thoroughly reviewed the documentation submitted with employer's motion for summary decision. The administrative law judge found that claimant never suffered from leishmaniasis. Thus, the administrative law judge found there is no genuine issue of material fact to be decided and that employer, the moving party, is entitled to a decision in its favor as a matter of law. Therefore, the administrative law judge granted employer's motion for summary decision and canceled the October 28, 2013 hearing. Order at 9.

Claimant, without the assistance of counsel, appeals the administrative law judge's summary decision in favor of employer. Employer responds, urging affirmance of the administrative law judge's decision.[7]

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[5] Claimant's claim was continued by the Office of Administrative Law Judges a number of times between 2006 and 2012 due to claimant's failure to cooperate with discovery. The case was remanded to the district director at least twice. Claimant dismissed two different attorneys, and proceeded without counsel before the administrative law judge. EXs O-S, U.

[6] The administrative law judge's office contacted claimant by telephone on August 6, 2013, in order to ascertain whether he had received the administrative law judge's pre-hearing order and employer's Motion for Summary Decision. Claimant denied receiving the administrative law judge's Order or employer's motion. However, claimant confirmed his address; the documents were sent to the correct address. The administrative law judge's office gave claimant until August 16, 2013 to file an answer to employer's motion, but claimant terminated the phone call before acknowledging the deadline. *See* Order at 2; Memorandum to File dated August 6, 2013. Claimant's due process rights were not abridged as he was given an opportunity to respond to employer's motion. 29 C.F.R. §18.40(a).

[7] Employer also challenges the timeliness of claimant's appeal, asserting that it never received a notice of appeal. On October 9, 2013, during the government shutdown due to the lapse in appropriations, the Board received a box of documents from claimant. This box was received within 30 days of the filing of the administrative law judge's Order granting employer's motion for summary decision. On October 28, 2013, the Board issued an Order construing the receipt of the documents as an appeal, but also informing claimant that he must notify the Board, within 10 days, of his intention to

In determining whether to grant a party's motion for summary decision, the administrative law judge must determine, after viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the moving party is entitled to summary decision as a matter of law. *Morgan v. Cascade General, Inc.*, 40 BRBS 9 (2006); *see also O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55 (2d Cir. 2002); *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *Buck v. General Dynamics Corp.*, 37 BRBS 53 (2003); *Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1 (1990); 29 C.F.R. §§18.40(c), 18.41(a).

The administrative law judge framed the issue as whether claimant suffers or suffered from leishmaniasis, which is the injury claimant alleges he sustained during his employment in Kosovo and/or Kuwait and Iraq. The administrative law judge found that no disputed issue of material fact exists because the evidence establishes that claimant has never had leishmaniasis. Order at 8. In this regard, the administrative law judge relied on the treatment records and/or opinions of Drs. Stroud, Twomey and Mudaliar. In 2004, after claimant returned to the United States from Iraq, he treated with Dr. Stroud, a dermatologist. Dr. Stroud treated claimant with medication for probable scabies, notwithstanding that a test for scabies was negative; claimant's condition improved after one round of Elimite, a drug prescribed to treat scabies. Dr. Stroud also diagnosed stasis dermatitis of the left lower leg. EX L. Dr. Twomey reviewed claimant's medical records in 2005 and 2011 on behalf of employer. Dr. Twomey opined that claimant likely had scabies in 2004, based on his recovery following standard treatment for scabies. Dr. Twomey also opined that claimant did not have leishmaniasis because that disease does not cause "body-wide pruritic bumps" like those sustained by claimant. EXs N, DD. Dr. Twomey stated that the cellulitis in claimant's left lower leg in 2004 was due to his 1981 crush injury. EX DD. Dr. Mudaliar examined claimant on September 10, 2010 for the Texas Rehabilitation Commission. She observed that claimant has generalized joint pain and arthritis in his right knee. Dr. Mudaliar stated claimant does not have any evidence of leishmaniasis. EX EE.

In viewing the evidence most favorable to claimant, as required by law, the administrative law judge discussed the evidence indicating that claimant suffered from

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appeal the administrative law judge's Order. On November 14, 2013, the Board received a copy of a letter claimant wrote to Secretary of Labor Perez, in which claimant referenced his claim for total disability due to leishmaniasis as pending before the Board. Thus, on January 8, 2014, the Board construed the letter to the Secretary as claimant's notice of his intent to pursue the appeal. Pursuant to 20 C.F.R. §802.208(c), the documents and subsequent letter adequately demonstrate that an appeal was timely filed.

leishmaniasis. On March 16, 2006, Dr. Singh signed a letter stating that claimant contracted leishmaniasis in Kuwait and Iraq in 2003, which disabled him from November 2003 until December 2004. EX E. On November 8, 2008, Dr. Singh wrote that claimant has been under his care for leishmaniasis since July 2004, that the leishmaniasis led to a worsening of claimant's arthritis, and that claimant is totally disabled. EX X. Dr. Singh reiterated this opinion on December 10, 2009. However, the administrative law judge rationally rejected this evidence, as Dr. Singh recanted his opinion. *See* Order at 8-9. On June 13, 2011, Dr. Singh wrote to another physician that he had "no supportive evidence to substantiate the diagnosis of leishmaniasis" in claimant. EX W. At his deposition on April 18, 2013, Dr. Singh also recanted his diagnosis. He admitted he had not treated claimant for leishmaniasis. EX V at 26. He testified that someone from his office staff likely wrote the letters for his signature and that his opinion that claimant had leishmaniasis was derived from claimant's statement to him that a previous physician had diagnosed that disease. *Id*. at 25. Dr. Singh testified he had no evidence to substantiate a diagnosis of leishmaniasis and that he did not dispute the opinion of employer's expert, Dr. Twomey, that claimant does not have leishmaniasis. *Id*. at 19, 33, 37.

The administrative law judge also noted that claimant's June 5, 2012 laboratory results showed the presence of leishmaniasis antibodies in claimant's blood. However, Dr. Singh stated: (1) this was a secondary test for multiple conditions that can result in a false positive for leishmaniasis; (2) it was not the best test for leishmaniasis; and (3) a biopsy is the best test for determining whether there is a living microorganism in the person's system, and the biopsy performed on claimant in 2004 was negative. *See* EX V at 14, 21; May 21, 2004 pathology report. Employer's expert, Mr. Gillette,[8] opined that claimant did not have leishmaniasis because he did not undergo the specific laboratory test required to make the diagnosis and it cannot be diagnosed by clinical exam or gross inspection of the lesion. Mr. Gillette also opined that a positive serologic test, like the one claimant underwent, is not necessarily indicative of a leishmaniasis infection.[9] EX M. Thus, the administrative law judge found that claimant never received a definitive laboratory diagnosis of leishmaniasis.

We affirm the administrative law judge's conclusion that claimant has never had leishmaniasis. The administrative law judge fully discussed the evidence presented with employer's motion for summary decision in the light most favorable to claimant. *See generally Morgan*, 40 BRBS 9. The administrative law judge did not err in finding there is no genuine issue of material fact concerning a diagnosis of leishmaniasis, given the

[8] Mr. Gillette has a Master of Science in Tropical Medicine degree. EX BB.

[9] Mr. Gillette stated that the generally accepted test for diagnosing leishmaniasis is PCR testing, which claimant did not undergo. EX M.

absence of any creditable evidence that claimant has had leishmaniasis. *See O'Hara*, 294 F.3d 55; *Buck*, 37 BRBS 53. Consequently, as there is no evidence from which the administrative law judge could conclude that claimant has had leishmaniasis, we affirm the administrative law judge's denial of benefits for this condition.

Nonetheless, we must remand this case to the administrative law judge for further consideration of whether it was appropriate to deny claimant's claim entirely pursuant to employer's motion for summary decision. Although the administrative law judge fully addressed and properly denied claimant's claim for leishmaniasis, he did not address claimant's claim for a work-related injury occurring in July 2003. In a packet of evidence claimant sent to the OALJ in February 2013, is a treatment note from employer's clinic in Iraq stating that claimant received "follow-up" medical care on July 23, 2003, to assess claimant's response to antibiotic treatment for a cellulitic infection to claimant's left ankle.[10] Claimant continued to seek treatment for this ankle condition, and, in September 2003, he was diagnosed with chronic venous insufficiency and venous ulceration.[11] In early November 2003, employer cleared claimant to return to the United States; the "Yes" box for the entry entitled "Unresolved injury/illness" was checked. EX D. On November 20, 2003, employer filed a First Report of Injury form, listing the injury as "Foot pain, swelling, ulcerations."[12] As stated above, on June 1, 2005, claimant filed a claim for benefits under the Act, alleging that, on July 9, 2003, while working in Iraq, he developed a rash on both feet and then ulcer-like bumps all over his body.[13] EX C. Claimant listed Dr. Stroud as his treating physician for this injury and he checked the "no" box on the claim form when asked if he was still disabled by this injury. As the exhibits attached to employer's motion demonstrate, Dr. Stroud treated claimant in 2004 for skin conditions, namely suspected scabies and probable stasis dermatitis of claimant's left lower leg; claimant was referred for wound care for the latter condition. EX L at 3-9. Dr. Twomey stated in 2011 that claimant was disabled by his November 2003 episode of

[10] Claimant did not submit this evidence in response to employer's motion for summary decision, but it had been sent to the OALJ, perhaps in furtherance of proceedings before a settlement judge. The settlement judge proceeding concluded on April 16, 2013, when the judge concluded that agreement was not possible. Moreover, the documents were created by employer's medical personnel, but employer did not include them in the documents attached to its motion for summary decision.

[11] *Id.*

[12] *Id.*

[13] Employer had controverted a claim for "foot pain, swelling and ulcerations" on January 19, 2005.

cellulitis. EX N at 2. In his January 31, 2005, report, Dr. Twomey addressed a possible causal relationship between claimant's work and his "skin breakdown at his left ankle region," stating that if claimant had returned to the United States because of this condition, the cellulitis "would probably be related" to his employment. EX DD at 2. It appears that claimant returned to overseas work overseas at least by April 2005 after this episode.

In view of claimant's lack of legal representation, the administrative law judge should have addressed if, in the light most favorable to claimant, there are genuine issues of material fact as to whether the 2005 claim for benefits encompassed the ulcerative condition of claimant's left lower extremity commencing in July 2003, and, if so, whether that condition was related to his work in Iraq and was disabling. *Morgan*, 40 BRBS at 13; *Dunn v. Lockheed Martin Corp.*, 33 BRBS 204 (1999). Consequently, we vacate the denial of the claim in its entirety and remand the case for further consideration of these issues. If there exist genuine issues of material fact, the administrative law judge cannot dispose of the case on a motion for summary decision, but must hold an evidentiary hearing. *Walker v. Todd Pac. Shipyards*, 47 BRBS 11 (2013), *vacating in pert. part on recon.* 46 BRBS 57 (2012).

Accordingly, we affirm the administrative law judge's grant of summary decision in employer's favor on claimant's claim that he suffers from leishmaniasis. However, we vacate the conclusion that no genuine issues of material fact exist in this case, and we remand this case further consideration consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge