U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0053

[redacted]	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
	)	
GLOBAL LINGUIST SOLUTIONS	)	
	)	
and	)	
	)	
ZURICH AMERICAN INSURANCE COMPANY	)	DATE ISSUED: Dec. 7, 2015
	)	
Employer/Carrier-Petitioners	)	
	)	
DYNCORP INTERNATIONAL	)	
	)	
and	)	
	)	
CONTINENTAL INSURANCE COMPANY	)	
	)	
Employer/Carrier	)	DECISION and ORDER

Appeal of the Order on Motion for Summary Decision and the Order Denying Reconsideration of Christopher Larsen, Administrative Law Judge, United States Department of Labor.

Amie C. Peters (Blue Water Legal PLLC), Edmonds, Washington, for claimant.

Keith L. Flicker and Daniel J. Louis (Flicker, Garelick & Associates, LLP), New York, New York, for Global Linguist Solutions and Zurich American Insurance Company.

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

PER CURIAM:

Global Linguist Solutions (employer) appeals the Order on Summary Decision and the Order Denying Reconsideration [redacted] of Administrative Law Judge Christopher Larsen rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant filed a claim seeking benefits under the Act for post-traumatic stress disorder (PTSD) which, he alleged, arose as a result of his employment in [redacted]. Before a formal hearing was held, the parties reached a Section 8(i), 33 U.S.C. §908(i), agreement, subsequently approved by Administrative Law Judge McGrath, entitling claimant to compensation benefits payable by both employer and DynCorp International. In addition, employer agreed to its liability for "any future medical benefits under 33 U.S.C. §907, including psychiatric care, psychological therapy, prescription medication and mileage." *See* Decision and Order Approving Settlement of Administrative Law Judge McGrath (March 4, 2013).

A dispute between claimant and employer soon arose regarding employer's liability for specific medical treatments. Claimant sought reimbursement for yoga classes, massage therapy, and acupuncture treatments which he averred were medically necessary to treat his work-related PTSD. Additionally, claimant asserted that his sleep apnea is work-related. Employer denied its liability for these claimed charges and, on February 4, 2014, the claim was transferred to the Office of Administrative Law Judges (OALJ); the case was assigned to Administrative Law Judge Larsen (the administrative law judge).

On May 20, 2014, claimant filed a motion for summary decision with the administrative law judge wherein he presented evidence that his post-settlement treatments and apnea are related to his work-related PTSD. Claimant contended that his documented charges are employer's liability because employer, in the approved settlement agreement, agreed to pay for "any future medical benefits." Two days later, on May 22, 2014, the administrative law judge issued a Notice of Hearing and Pretrial Order (Notice of Hearing) setting a formal hearing for November 10, 2014 and informing the parties that they must exchange expert reports no later than 30 days before the scheduled hearing.

Because settlement negotiations between the parties were undertaken, employer did not immediately respond to claimant's motion for summary decision.[1] On August 8, 2014, employer filed its initial objections to claimant's motion, noting it was awaiting claimant's response to its settlement offer. *See* Emp. Opp. to Cl. Mot. for Summ. Dec. at 2-3. As to claimant's claim for sleep apnea, employer informed the administrative law judge that it would attempt to expedite a sleep specialist's evaluation of claimant and that this medical report would be submitted within the time period for discovery set forth in the May 22, 2014 Notice of Hearing. *Id.* at 6-7. Additionally, employer contended that the various types of treatment for which claimant sought reimbursement were not authorized treatments for his work-related PTSD and, moreover, that a genuine issue of material fact existed as to whether those treatments were medically necessary. *Id*. at 7-8.

In an Order on Motion for Summary Decision dated August 18, 2014, the administrative law judge first assumed that claimant's medical evidence supported his claim for medical benefits. The administrative law judge then questioned employer's delay in seeking to evaluate the reasonableness and necessity of claimant's post-settlement medical care. Stating that the May 22, 2014 Notice of Hearing did not modify employer's obligation to timely respond to claimant's motion for summary decision, the administrative law judge directed employer to provide evidence in support of its objections to claimant's motion on or before September 9, 2014.

On September 8, 2014, employer e-mailed to the administrative law judge additional objections to claimant's motion for summary decision. In this second filing, employer stated that it had experienced difficulty in securing a medical evaluation for claimant [redacted],[2] but that it had scheduled an evaluation for September 23, 2014, and that the physician performing this evaluation could provide the necessary medical report within the discovery time period set forth in the administrative law judge's May 22, 2014 Notice of Hearing. Emp. Sept. 8, 2014 email to Judge Larsen. Employer thus requested that the administrative law judge withhold a decision on claimant's motion for summary decision until the exchange of exhibits occurred.

[1] On appeal, the parties agreed that employer did not have to respond to claimant's motion for summary decision until August 12, 2014. *See* Emp. Br. at 4-5; Cl. Resp. Br. at 3. Claimant, however, states that employer was required to have developed its evidence in opposition to his motion by that date. Cl. Resp. Br. at 3.

[2] Claimant had previously conceded that he resides in an "isolated location" which requires that he "travel extensively" for his medical care. *See* Cl. May 20, 2014 Mot. for Summ. Dec. at 3.

On September 17, 2014, the administrative law judge issued an Order on Motion for Summary Decision wherein he acknowledged employer's scheduled examination on September 23, 2014, but again admonished employer regarding the timeliness of its discovery efforts in light of its responsibility to timely respond to claimant's motion for summary decision. Stating that "[o]n the chance that the [employer's] scheduled examination might reveal some fact or opinion useful to [employer] in opposing [claimant's] pending Motion," the administrative law judge extended the date for employer to respond to claimant's motion to September 26, 2014, three days after claimant's scheduled examination. Sept. 17, 2014 Order on Motion for Summary Decision at 2.

On September 29, 2014, the administrative law judge granted claimant's motion for summary decision, stating that employer had filed no evidence in opposition to claimant's motion. Specifically, the administrative law judge stated summarily that employer "must pay for Claimant's claimed treatments for PTSD, including, but not limited to, treatment for sleep apnea, as well as for yoga, massage therapy, family therapy, and acupuncture treatment." Sept. 29, 2014 Order on Motion for Summary Decision at 2.

Employer timely sought reconsideration of the administrative law judge's September 29, 2014, Order. In support of its motion, employer provided the medical report of Dr. Schneider, who examined claimant on September 23, 2014, and asserted that it had thus provided evidence in a timely manner of a genuine issue of material fact in compliance with the administrative law judge's May 22, 2014 Notice of Hearing. In an Order Denying Reconsideration issued on October 24, 2014, the administrative law judge denied employer's motion, noting that employer had not sought an extension of the September 26, 2014, deadline.

On appeal, employer challenges the administrative law judge's decision to grant claimant's motion for summary decision. Claimant responds, urging affirmance.[3] Employer has filed a reply brief.

In challenging the administrative law judge's Orders, employer asserts that the administrative law judge's actions prejudiced its ability to complete the discovery necessary to properly defend claimant's claim that his sleep apnea is related to his PTSD and that yoga classes, massage therapy, and acupuncture treatments are necessary to treat

[3] Claimant has filed a motion to strike footnote three in employer's brief. Employer has filed a response to this motion. As the substance of footnote three is not relevant to the issue raised by employer, claimant's motion to strike is denied. 20 C.F.R. §802.219.

his PTSD. Employer additionally contends that the administrative law judge did not address the difficulty it experienced, [redacted], in scheduling claimant for a medical examination by an appropriate specialist. We agree with employer that, on the documentation presented, the administrative law judge's decision to grant claimant's motion for summary decision cannot be affirmed.

The purpose of the summary decision procedure is to promptly dispose of actions in which there is no genuine issue as to any material fact. *Dunn v. Lockheed Martin Corp.*, 33 BRBS 204 (1999). In determining whether to grant a motion for summary decision, the fact-finder must determine, after reviewing 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. *See generally Han v. Mobil Oil Corp.*, 73 F.3d 872 (9th Cir. 1995). In addition, the trier-of-fact must draw all inferences in favor of the non-moving party. *T.W. Elec. Service, Inc. v. Pacific Elect. Contractors*, 809 F.2d 626 (9th Cir. 1987); *Dunn*, 33 BRBS at 207.

In this case, employer informed the administrative law judge that its delay in filing objections to claimant's motion for summary decision was predicated on the parties' ongoing settlement negotiations; employer immediately filed its initial objections with the administrative law judge once those negotiations reached an impasse on or about August 8, 2014. Moreover, the parties appear to be in agreement that claimant's isolated residence in [redacted] has made obtaining medical care a challenge. *See* Cl. May 20, 2014 Mot. for Summ. Dec. at 3; Emp. Sept. 8, 2014 email Judge Larsen. Although the administrative law judge was informed of these developments, he did not take these mitigating factors into consideration in setting deadlines for employer's response to claimant's motion for summary decision.[4] As these factors arguably contributed to employer's delay in conducting the discovery necessary to address claimant's claim for additional benefits under the Act, the administrative law judge's failure to consider these factors constitutes an abuse of his discretion.[5] *See generally Patterson v. Omniplex*

[4] Instead, the administrative law judge repeatedly accused employer's counsel of dilatory behavior.

[5] In his August 18, 2014 Order, the administrative law judge stated that claimant's present claim for benefits under the Act is not "an entirely new claim for benefits." *See* Aug. 18, 2014 Order on Motion for Summary Decision at 3. This statement is inaccurate because claimant's present claim seeks reimbursement for yoga classes, massage therapy and acupuncture treatments, services that were not specifically addressed in the parties' settlement agreement for claimant's PTSD. Employer retained the right to challenge the necessity of the new treatments, as it is cannot be liable for unnecessary treatment. 33 U.S.C. §907(a); *see generally Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004). Additionally, claimant's present claim raises for the first time

World Services, 36 BRBS 149 (2003). In this regard, we note that the administrative law judge did allow employer until close-of-business on September 26, 2014 to conclude its discovery and submit its objections to claimant's motion. On its face, however, this deadline was unreasonable in light of claimant's scheduled September 23, 2014 medical evaluation, as it would have required the doctor to prepare his report, and employer to receive, review, and process that report and prepare its defense, within three days of claimant's evaluation.

Moreover, the administrative law judge's grant of summary decision does not comply with the then-applicable regulatory criterion that "a final decision . . . shall include a statement of: Findings of fact and conclusions of law, and the reasons therefor, on all issues presented. . . ." 29 C.F.R. §18.41(a)(2) (2014).[6] The administrative law judge merely granted claimant's motion for summary decision due to employer's failure to respond by September 26. The administrative law judge did not state that there was an absence of a genuine issue of material fact and why claimant was entitled to a decision in his favor as a matter of law. *Dunn*, 33 BRBS 204.

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the issue of whether his sleep apnea is related to his work injury. Employer is not liable for medical treatment that is unrelated to the work injury. *See Davison v. Bender Shipbuilding & Repair Co., Inc.*, 30 BRBS 45 (1996). While Section 23(a) of the Act, 33 U.S.C. §923(a), and Section 702.339, 20 C.F.R. §702.339, of the Act's implementing regulations provide that the administrative law judge is not bound by common law or statutory rules of evidence, Section 702.338, 20 C.F.R. §702.338, provides that the administrative law judge has a duty to inquire fully into matters at issue and receive into evidence all relevant and material testimony and documents. In this case, the administrative law judge's decision to curtail employer's discovery time without considering mitigating factors, and his decision to not address employer's evidence on reconsideration, deprived employer of its ability to defend claimant's claim. *See generally E.B. [Biner] v. Atlantico, Inc.*, 42 BRBS 40 (2008).

[6] On June 18, 2015, new OALJ regulations went into effect. The new regulation governing summary decision is found at 29 C.F.R. §18.72 (2015). This provision states that the movant must show "that there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law," and that the administrative law judge "should state on the record the reasons for granting or denying the motion." 29 C.F.R. §18.71(a) (2015). The new regulation also states that if the nonmovant shows that "it cannot present facts to justify its opposition," the administrative law judge may: "(1) Defer considering the motion or deny it; (2) Allow time to obtain affidavits or declarations or to take discovery; or (3) Issue any other appropriate order." 29 C.F.R. §18.71(d) (2015).

Consequently, as the administrative law judge did not consider the mitigating factors documented by employer as affecting its ability to respond to claimant's motion, and as the administrative law judge abused his discretion in allowing employer only three days following its medical evaluation of claimant to file its objections to claimant's motion for summary decision, we vacate the administrative law judge's grant of summary decision and remand the case. On remand, employer should be permitted to submit its objections to claimant's motion for summary decision within a reasonable time period. On remand, the administrative law judge's actions must comply with the new regulation. *See* 29 C.F.R. §18.72 (2015). If claimant's motion for summary decision is denied, the administrative law judge must hold an evidentiary hearing. *Morgan v. Cascade General, Inc.*, 40 BRBS 9 (2006).

Lastly, we grant employer's request that the case be assigned to a different administrative law judge. Accordingly, we direct that, on remand, the case be assigned to a new administrative law judge. *See Bogdis v. Marine Terminals Corp.,* 23 BRBS 136 (1989); *Wade v. Gulf Stevedore Corp.*, 8 BRBS 335 (1978); *see also* 20 C.F.R. §802.405(a).

Accordingly, the administrative law judge's Order on Motion for Summary Decision and Order Denying Reconsideration are vacated, and the case is remanded for further consideration consistent with this decision.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge