U.S. Department of Labor

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

BRB No. 17-0232

CHRISTOPHER McGUCKIN	)
	)
Claimant-Petitioner	)
	)
v.	)
	)
GLOBAL TERMINAL & CONTAINER SERVICES, INCORPORATED	)
	) DATE ISSUED: Dec. 21, 2017
and	)
	)
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED, c/o ACCLAIM RISK MANAGEMENT	)
	)
Employer/Carrier-Respondents	) DECISION and ORDER

Appeal of the Decision and Order Relating to Employer's Request for Modification of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Christopher W. McGuckin, Lake Worth, Florida.

Robert N. Dengler (Flicker, Garelick & Associates, LLP), New York, New York, for employer/carrier.

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

PER CURIAM:

Claimant, who is without legal representation, appeals the Decision and Order Relating to Employer's Request for Modification (2014-LHC-02015) of Administrative Law Judge Adele Higgins Odegard 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). In an appeal by a claimant without legal representation, we will review the findings of fact and conclusions of law to determine if they are rational,

supported by substantial evidence, and 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).

On February 7, 2006, claimant sustained multiple injuries in an accident at work. Claimant underwent right knee surgery in January 2008; he also received pain management therapy and psychiatric treatment for his work-related conditions. EXs 1, 4, 6, 8. In March 2011, pursuant to Section 8(i), 33 U.S.C. §908(i), employer agreed to pay claimant compensation for a closed period of temporary partial disability, 33 U.S.C. §908(e).[1] CX 34 at 919-921. The district director approved the settlement. At the same time, but in a separate document not subject to Section 8(i), the parties stipulated that claimant was entitled to continuing temporary total disability compensation, 33 U.S.C. §908(b), from January 12, 2011 at the maximum compensation rate of $1,073.64. The district director issued a Compensation Order based on the parties' stipulations. *Id.* at 925-928.

On September 15, 2014, employer sought Section 22 modification, 33 U.S.C. §922, of the stipulated Compensation Order. The issues before the administrative law judge were the extent of claimant's disability, his wage-earning capacity, and his entitlement to medical benefits. Decision and Order at 4.

In her decision, the administrative law judge found that claimant is unable to return to his usual longshore employment due to his work-related orthopedic, neurologic and psychiatric injuries. Decision and Order at 33. The administrative law judge determined claimant's work and vocational restrictions and compared them with the jobs employer submitted to establish the availability of suitable alternate employment. *Id.* at 34-40. She found that claimant is capable of performing three of the jobs employer identified in its three labor market surveys, which paid hourly wages between $10 and $12. *Id.* at 40. The administrative law judge determined that the average hourly wage of the three suitable positions of $11 establishes claimant's post-injury wage-earning capacity as $440 per week from November 17, 2015, which is the earliest date that employer identified a suitable position. *Id.* at 41.

The administrative law judge found that employer is liable for treatment related to claimant's left knee injury, for which he underwent surgery and for which she found he was temporarily totally disabled from June 5, 2015 to January 11, 2016. Decision and Order at 42-44; *see* 33 U.S.C. §907. However, she found claimant did not establish that

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[1] The approved Section 8(i) settlement agreement provided that employer would pay claimant temporary partial disability compensation of $900 per week from May 27, 2007 to January 11, 2011.

his right shoulder rotator cuff tear and multiple cardiac conditions are related to the February 2006 work injury. *Id*. at 42-46. The administrative law judge awarded temporary total disability benefits until the stipulated date of maximum medical improvement of July 30, 2014. Thereafter, the administrative law judge awarded claimant permanent total disability benefits, 33 U.S.C. §908(a), until June 4, 2015; temporary total disability from June 5, 2015 to January 11, 2016, while claimant recuperated from his left knee surgery; and ongoing permanent partial disability benefits, 33 U.S.C. §908(c)(19), (21), from January 12, 2016, based on the two-thirds of the difference between claimant's average weekly wage of $2,149.35 and his post-injury wage-earning capacity of $440, plus the reasonable and necessary costs for the June 5, 2015 left knee surgery. *Id*. at 47.

Claimant appeals the administrative law judge's decision.[2] Employer responds, urging affirmance.

Section 22 provides the only means for changing otherwise final decisions; modification pursuant to this section is permitted based on a mistake of fact in the initial decision or a change in claimant's physical or economic condition. *See Metropolitan Stevedore Co. v. Rambo [Rambo I],* 515 U.S. 291, 30 BRBS 1(CRT) (1995). The party requesting modification due to a change in condition has the burden of showing the change in condition. *See, e.g., Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997). The standard for determining the extent of claimant's disability is the same in a modification proceeding as in the initial proceeding. *Del Monte Fresh Produce v. Director, OWCP,* 563 F.3d 1216, 43 BRBS 21(CRT) (11th Cir. 2009); *Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990).

Suitable Alternate Employment

Where, as here, claimant is unable to return to his usual employment due to his work injuries, the burden shifts to employer to establish the availability of suitable alternate employment. *See Pietrunti v. Director, OWCP*, 119 F.3d 1035, 1041, 31 BRBS 84, 88(CRT) (2d Cir. 1997). In order to meet this burden, employer must demonstrate that, within the geographic area where claimant resides, jobs are available which claimant, by virtue of his age, education, work experience and physical restrictions can perform and which he can compete for and reasonably secure. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *see also New Orleans (Gulfwide)*

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[2] Claimant was represented by counsel at the hearing and his counsel filed claimant's notice of appeal. By Order issued on April 6, 2017, the Board granted counsel's request to withdraw from further representation.

Stevedores v. Turner, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). In determining whether an employer establishes the availability of suitable alternate employment, the administrative law judge must compare the requirements of the jobs identified with the claimant's physical restrictions and vocational factors. *Pietrunti*, 119 F.3d 1035, 31 BRBS 84(CRT); *see also Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 35 BRBS 7(CRT) (5th Cir. 2001); *Montoya v. Navy Exch. Serv. Command*, 49 BRBS 51 (2015).

In determining claimant's work restrictions, the administrative law judge credited the opinions of Drs. Patil, Toriello, Katz and Miskin.[3] Decision and Order at 34. The administrative law judge also did not credit the total disability opinion of claimant's treating physician, Dr. Carfora. *Id.* at 31-32. The administrative law judge found that Dr. Carfora relied more on claimant's subjective limitations and pain rather than on objective findings. *Id.* at 31. The administrative law judge also found Dr. Carfora less qualified to render a psychiatric evaluation than Dr. Miskin, because the latter is a board-certified psychiatrist. *Id.* at 31-32.

Determinations regarding the weight to be accorded to the medical evidence are the province of the administrative law judge. *See John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). The administrative law judge permissibly credited the work restrictions imposed by Drs. Katz, Patil, Toriello and Miskin, and substantial evidence of record supports his finding that claimant is limited to light-duty employment with the additional restrictions imposed by these doctors. *See Calbeck v. Strachan Shipping Co.,* 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *see generally Pimpinella v. Universal Maritime Service, Inc.*, 27 BRBS 154 (1993). Therefore, we affirm this finding.

Employer submitted labor market surveys conducted in October 2014, November 2015, and February 2016, which identified 26 available positions.[4] EX 10. The administrative law judge found that three of the jobs employer identified are suitable: U-

[3] The administrative law judge credited Dr. Patil's opinion that claimant can work at light duty with a general weight restriction of 25 pounds, Dr. Toriello's opinion that claimant is unable to squat or pivot with his left knee, Dr. Katz's opinion that claimant is unable to sit for long periods, and Dr. Miskin's opinion that claimant cannot work at heights or operate large power machinery. CX 29 at 104-105; EXs 1 at 24; 3 at 7; 4 at 59.

[4] The administrative law judge found that all 26 jobs meet claimant's physical restrictions. Decision and Order at 36-39. However, the administrative law judge found that she would not consider positions that are more than 50 miles from claimant's residence or require a one-hour commute. *Id.* at 39.

Haul Customer Service; Front Desk Attendant at Guru Therapeutic Spa; and Marketing Representative at Renewal by Anderson.[5] *Id*. at 40.

The administrative law judge is vested with the authority to make findings of fact and to draw rational inferences from the record; the Board may not substitute its views for those of the administrative law judge. *See*, *e.g.*, *Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 36 BRBS 15(CRT) (9th Cir. 2002); *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999). In this case, the administrative law judge's findings that claimant has the vocational skills and physical ability to work as a front desk attendant at Guru Therapeutic Spa and marketing representative at Renewal by Anderson are rational and supported by substantial evidence. Given the suitability of these positions, her error in finding suitable the U-Haul customer service position is harmless.[6] Therefore, we affirm the administrative law judge's conclusion that employer established the availability of suitable alternate employment. *See Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *see Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 107 (2003); *Seguro v. Universal Maritime Serv. Corp.*, 36 BRBS 28 (2002). However, as the administrative law judge commenced claimant's permanent partial disability award on the date of the November 16, 2015 labor market survey that identified the U-Haul position, and the front desk and marketing representative positions were subsequently identified in employer's February 10, 2016 labor market survey, we modify the administrative law judge's award to provide for total disability compensation until February 10, 2016. *See Palombo*, 937 F.2d at 76-77, 25 BRBS at 9-12(CRT).

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[5] The administrative law judge did not give weight to the opinion of Harry Magee, a vocational consultant, who testified that claimant was unable to work full time. Decision and Order at 41. She found that Mr. Magee gave more weight to reports by claimant's treating physicians, whose medical assessment of claimant's work restrictions she did not credit. *Id*. The administrative law judge's discounting Mr. Magee's vocational opinion is rational and within her discretion. *See generally Seguro v. Universal Maritime Service Corp.*, 36 BRBS 28 (2002).

[6] The description for the U-Haul position states that the duties include serving customers and using a computer to prepare contracts and invoices. EX 10 at 39-40. The administrative law judge found that claimant has no demonstrated customer service or computer skills. *See* Decision and Order at 39-40.

Wage-Earning Capacity

The Act requires that a claimant's permanent partial disability award be based on a comparison between the claimant's average weekly wage at the time of injury, and his post-injury wage-earning capacity as injured. 33 U.S.C. §908(c)(21), (h); *Sestich*, 289 F.3d 1157, 36 BRBS 15(CRT); *see also Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 18 BRBS 100(CRT) (D.C. Cir.), *cert. denied*, 479 U.S. 1094 (1986). Accordingly, the Act contemplates that the current dollar amount of claimant's post-injury wage-earning capacity be adjusted backward in time to account for post-injury inflation and general wage increases that occurred after the injury. *See Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990); *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980). This adjustment allows post-injury wage-earning capacity to be compared on an equal footing to the pre-injury average weekly wage. *Sestich*, 289 F.3d at 1161, 36 BRBS at 18(CRT). In this case, the administrative law judge did not adjust the post-injury wage-earning capacity of $440 per week to the wages paid at the time of injury. Accordingly, we remand the case for the administrative law judge to make this determination.

Medical Benefits

Section 7(a) of the Act, 33 U.S.C. §907(a), states that "[t]he employer shall furnish such medical, surgical and other attendance or treatment . . . medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require." *See Ballesteros v. Willamette W. Corp.,* 20 BRBS 184 (1988). In order for a medical expense to be awarded, it must be reasonable and necessary for the treatment of work-related injuries.[7] *See Davison v. Bender Shipbuilding & Repair Co.,* 30 BRBS 45 (1996); 20 C.F.R. §702.402. It is claimant's burden to prove the elements of his claim for medical benefits. *See Ingalls Shipbuilding, Inc., v. Director, OWCP*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993); *Schoen v. United States Chamber of Commerce*, 30 BRBS 112 (1996). In this regard, the Section 20(a) presumption is applicable to link claimant's medical conditions to the work-related injury. *Suarez v. Service Employees Int'l, Inc.*, 50 BRBS 33 (2016); *see also Metro Machine Corp. v. Director, OWCP [Stephenson]*, 846 F.3d 680, 50 BRBS 81(CRT) (4th Cir. 2017) (Section 20(a) applies to issue of work-relatedness of secondary injuries).

[7] We decline to address claimant's contentions about his "intestinal prolapse" as his attorney withdrew the claim for this at the hearing, Tr. at 44-45, and for his right knee, as a claim for an injury to this body part was not presented to the administrative law judge.

A. *Right Shoulder*

Claimant's March 22, 2013 MRI showed a partial right rotator cuff tear, which claimant alleged was due to the work accident. The administrative law judge credited the opinion of Dr. Toriello over the opinions of Drs. Katz, Rovner and Carfora to find that claimant's rotator cuff tear is not related to the February 2006 work injury. Dr. Toriello stated that, given the 2008 MRI results, it is unlikely that the current rotator cuff tear is due to the work injury, rather than to age-related degenerative changes. EX 17 at 15-16. Dr. Toriello based this opinion on the minimal findings on the 2008 MRI. *Id.* The administrative law judge found that Dr. Toriello's opinion is consistent with the radiologist's interpretation of the 2008 MRI. Decision and Order at 45. She found Dr. Katz's interpretation of the 2008 MRI as showing at least a partial rotator cuff tear was inconsistent with that of the radiologist. *Id.* The administrative law judge did not credit Dr. Rovner's opinion that this injury is work-related because she found it conclusory and based on a review of limited evidence. *Id.*; *see* CX 16. She also did not credit Dr. Carfora's opinion of a work-related shoulder condition because Dr. Carfora does not have specialized training in orthopedics. Decision and Order at 45. The administrative law judge is entitled to determine the weight to be accorded to the conflicting evidence, and she rationally credited the opinion of Dr. Toriello. *See generally John W. McGrath Corp.*, 289 F.2d 403. As the administrative law judge's finding is supported by substantial evidence, we affirm the denial of medical benefits for this condition because it is not work-related.[8]

B. *Cardiac Conditions*

Claimant alleged that he had no prior heart conditions before the work injury and that his cardiomyopathy and heart failure are related to the use of opioids prescribed to treat his work injuries. The administrative law judge stated that claimant has a history of multiple cardiac conditions: congestive heart failure, cardiomyopathy, defibrillator implant, tachycardia, and hypertension. Decision and Order at 45; *see* CX 33; EX 16. The administrative law judge found that Dr. Kavesteen's treatment records do not indicate the cause of these conditions, nor did Drs. Patil, Toriello and Katz opine on their

[8] Although the administrative law judge did not apply the Section 20(a) presumption to this issue, the error is harmless as Dr. Toriello's opinion is sufficient to rebut the Section 20(a) presumption, and the administrative law judge proceeded to weigh the evidence as a whole. *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000).

origin.[9] *Id*. at 45-46. Based on the absence of supporting evidence, the administrative law judge found that claimant did not establish a causal connection between any of his heart conditions and the February 2006 work injury. *Id*. at 46.

We vacate the administrative law judge's denial of medical benefits for claimant's cardiac conditions. Dr. Kavesteen opined that claimant's congestive heart failure and the need for a defibrillator "are most likely" related to opioids prescribed from 2006 to 2013 for claimant's back pain and for sleep apnea. CX 33 at 869. The record also includes claimant's treatment with Dr. Goth, a pain management specialist, who prescribed opioids. CX 23. This evidence is relevant to the elements of claimant's prima facie case – evidence that claimant's cardiac condition *could be* due to the treatment for the work injury – and thus is relevant to whether claimant invoked the Section 20(a) presumption. *See generally Metro Machine Corp.*, 846 F.3d 680, 50 BRBS 81(CRT) (claimant must produce evidence that secondary injury could have naturally or unavoidably resulted from the work injury). Therefore, we remand the case for the administrative law judge to address the applicability of Section 20(a) to this issue, and if necessary, any other issues relating to the compensability of the medical treatment claimed for claimant's cardiac condition.

[9] In an Order issued on April 26, 2016, the administrative law judge granted employer's motion to exclude Dr. Carfora's deposition testimony that addressed claimant's heart conditions. Order at 2. Employer objected to this part of Dr. Carfora's deposition testimony opining on the cause of claimant's heart conditions because claimant did not provide advance notice that Dr. Carfora would offer an opinion on this issue and it averred that this testimony went beyond the scope of her treatment. *Id*. at 1. The administrative law judge inferred that the motion was unopposed because claimant, who was represented by counsel at the time, did not respond to it. *Id*. We affirm the exclusion of Dr. Carfora's testimony as the administrative law judge did not abuse her discretion in so doing. *See Cooper v. Offshore Pipelines Int'l, Inc.*, 33 BRBS 46 (1999).

Accordingly, the administrative law judge's findings as to claimant's post-injury wage-earning capacity and claimant's entitlement to medical benefits for his cardiac conditions are vacated, and the case is remanded for further findings in accordance with this opinion. The administrative law judge's award of benefits is modified to provide for permanent total disability compensation from January 12 through February 10, 2016. In all other respects, the administrative law judge's Decision and Order Relating to Employer's Request for Modification is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge