BRB No. 12-0264

CHRISTOPHER T. PAGE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BAE SYSTEMS SOUTHEAST SHIPYARDS	)	DATE ISSUED: 01/25/2013
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Summary Decision of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Jonathan Israel, Jacksonville, Florida, for claimant.

James F. Moseley, Jr., and Stanley M. Weston (Moseley, Prichard, Parrish, Knight & Jones), Jacksonville, Florida, for self-insured employer.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Summary Decision (2012-LHC-00017) of Administrative Law Judge Stuart A. Levin 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 supported by substantial evidence, are rational, and are 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's hand was injured on November 22, 2000, during the course of his employment. He underwent surgery and was treated by several physicians. On May 7, 2001, the doctor removed the screws from claimant's hand and rated him with a 14 percent permanent impairment. In 2004, due to his pain, claimant was put on temporary total disability status by his doctor; he underwent further testing, spinal cord stimulation, and a functional capacity evaluation; and, the physician treating him for pain determined that his condition reached maximum medical improvement in 2006. In August 2007, Dr.

Couch, claimant's treating pain management specialist, approved four alternate jobs as within claimant's capabilities. Employer voluntarily paid claimant temporary total disability and permanent partial disability benefits.

Claimant sought additional benefits.[1] Employer disputed the claim, arguing that claimant's hand condition had reached maximum medical improvement, that there is no evidence he is unable to work due to his hand injury, and that no additional compensation was owed, claimant having been fully paid under the schedule.[2] In preparation for the hearing, employer, on October 7, 2011, hand-delivered to claimant's counsel authorizations for claimant to execute to release his income and other social security records. On November 1, 2011, by hand-delivery, employer sent claimant's counsel a request for document production and a set of interrogatories. On November 18, 2011, not having received the signed authorizations, employer, by hand-delivery, re-sent the authorizations for release of social security information. Also by hand-delivery, on December 8, 2011, employer informed counsel that it had not received answers to any of its requests and asked that it receive answers by December 13. On December 16, 2011, because it had not heard from claimant's counsel regarding any of its communications, and the hearing was scheduled for January 27, 2012, employer filed an Emergency Motion to Compel and a Motion for Summary Decision with the administrative law judge. A notation on the cover letter stated that claimant's counsel was copied with the motions, and the service sheet indicated he was served by hand-delivery.

On January 5, 2012, the administrative law judge granted employer's motion to compel, ordering claimant to respond to the interrogatories and document production requests that employer had made on November 1, 2011, and requiring claimant to execute the various authorizations requested by employer to allow it access to records and information. The administrative law judge stated that, as claimant had not responded to the discovery requests within 30 days, and employer showed good cause for the motion to compel, claimant had until January 13, 2012, to respond. The administrative law judge also granted employer's motion for a continuance of the hearing.

On January 13, 2012, after having received no response from claimant to the discovery requests, the motion to compel, or the motion for summary decision, the administrative law judge granted employer's motion for summary decision in its favor. The administrative law judge set forth the procedures for responding to such motions, *see* 29 C.F.R. §18.40(c), stating more than once that claimant was given the opportunity to respond and "although the applicable rules caution otherwise," claimant filed no

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[1]It appears there are, or have been, issues of entitlement to a psychological evaluation and to additional temporary and permanent total disability benefits.

[2]Employer noted that the most recent LS-18 pre-hearing statement did not mention a psychological condition.

response: he presented no evidence to support his request for additional compensation or to show the existence of a genuine issue of material fact. Accordingly, the administrative law judge dismissed claimant's claim. Order at 2-3. Claimant appeals the administrative law judge's Order, and employer responds, urging affirmance.

Claimant challenges the Order on two grounds. First, he asserts there are genuine issues of material fact, including whether all his conditions have reached maximum medical improvement and whether the jobs identified by employer are suitable for him, and he argues that the exhibits employer attached to its motion for summary decision are not "evidence" establishing the facts asserted. Second, he states he did not receive a copy of the motion for summary decision and for that reason was unable to respond; as a result, the administrative law judge's dismissal of the claim denied his right to due process. Employer responds, stating that it need not file "affidavits" in support of its motion. Rather, it need only submit evidence that supports its motion. Additionally, it asserts that, if evidence exists to counter its exhibits, such as that which might demonstrate a psychological disability or whether the jobs are unsuitable, claimant should have submitted it. With regard to the claim that claimant did not receive a copy of the motion, employer asserts that counsel's admission that the motion to compel was in his files tends to belie his statement of non-receipt of the motion for summary decision, as the two motions were delivered in one package, the courier submitted an affidavit that he delivered a package to claimant's counsel on the date in question, and, despite his receipt thereof, counsel did not respond to the motion to compel either.

Initially, we reject claimant's assertion that the exhibits attached to employer's motion for summary decision are not "evidence" to be considered by the administrative law judge. 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 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). A party moving for summary decision may make such motion "with or without supporting affidavits." 29 C.F.R. §18.40(a). The responding party "may not rest upon the mere allegations or denials of such pleading. Such response must set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. §18.40(c). Thereafter, the administrative law judge may enter a summary decision for either party:

> if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.

29 C.F.R. §18.40(d). Thus, employer's documents were properly submitted in support of its motion and those documents, barring any evidence to the contrary, may be relied upon by the administrative law judge in rendering a decision on employer's motion for summary decision. *See, i.e., Smith v. Labor Finders*, 46 BRBS 35 (2012); *R.V. [Villaverde] v. J. D'Annunzio & Sons*, 42 BRBS 63 (2008), *aff'd mem. sub nom. Villaverde v. Director, OWCP,* 335 F.App'x 79 (2d Cir. 2009); *Irby v. Blackwater Security Consulting, LLC*, 41 BRBS 21 (2007); *B.E. [Ellis] v. Electric Boat Corp.*, 42 BRBS 35 (2008); *Buck v. General Dynamics Corp./Electric Boat Div.,* 37 BRBS 53 (2003).

Claimant contends, however, that he was not served with employer's motion for summary decision and, therefore, could not respond to it. The regulations give a party 10 days from the date of service of the motion to respond to the motion, 29 C.F.R. §18.40(a); thus, claimant must be given an opportunity to respond, so as to not violate his due process rights. *See generally Hess & Clark, Div. of Rhodia, Inc. v. Food & Drug Administration*, 495 F.2d 975 (D.C. Cir. 1974); *Niazy v. The Capitol Hilton Hotel*, 19 BRBS 266 (1987). As employer acknowledges, the administrative law judge has not addressed claimant's allegation that he did not receive the motion for summary decision.[3] This allegation raises an issue of fact which must be addressed by the administrative law judge. *See Sullivan v. St. John's Shipping Co., Inc.*, 36 BRBS 127 (2002). Therefore, we vacate the administrative law judge's Summary Decision, and we remand this case for him to address claimant's assertion that he did not receive employer's motion for summary decision. If, on remand, the administrative law judge finds that claimant was served with the motion for summary decision, then it is clear from the administrative law judge's orders that claimant was given the opportunity to respond and did not.[4] If,

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[3]Contrary to employer's assertion, however, claimant's failure to file a motion for reconsideration on the issue is not fatal to his claim. *See generally Aetna Casualty & Surety Co. v. Director, OWCP*, 97 F.3d 815, 30 BRBS 81(CRT) (5th Cir. 1996); *Galle v. Ingalls Shipbuilding, Inc.*, 33 BRBS 141 (1999), *aff'd sub nom. Galle v. Director, OWCP,* 246 F.3d 440, 35 BRBS 17(CRT) (5th Cir. 2001), *cert. denied*, 534 U.S. 1002 (2001); *Kuhn v. Associated Press,* 16 BRBS 46 (1983); 20 C.F.R. §802.206(f).

[4]In the event the administrative law judge finds that claimant was given the opportunity to respond, but did not, there has been no violation of claimant's due process rights. For the sake of judicial efficiency, based on the record before us, we reject claimant's assertion that the administrative law judge erred in granting employer's motion for summary decision. Claimant did not identify any disputed issue of material fact. Based on the evidence presented by employer, claimant suffered a hand injury for which he was paid temporary total disability benefits and permanent partial disability benefits pursuant to the schedule. Claimant cannot return to his usual work due to his hand injury, but employer identified four alternate jobs which claimant's doctor approved

however, the administrative law judge finds that claimant was not served with the motion for summary decision, pursuant to the regulations, claimant must be properly served with the motion and be given 10 days to respond. The administrative law judge should then consider employer's motion for summary decision in light of claimant's response. 29 C.F.R. §§18.40, 18.41.

Accordingly, the administrative law judge's Summary Decision is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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for him. With regard to any psychological injury, the only evidence submitted indicated that psychological testing in 2002 was normal and that the results of psychological testing in 2004 were unknown. Absent evidence showing otherwise, the administrative law judge did not err in concluding that claimant is not totally disabled and has received all compensation to which he is entitled. Accordingly, it was proper for the administrative law judge to grant employer's motion for summary decision based on the evidence before him and to dismiss claimant's claim. *See Smith v. Labor Finders*, 46 BRBS 35 (2012); *Irby v. Blackwater Security Consulting, LLC*, 41 BRBS 21 (2007); *Buck v. General Dynamics Corp./Electric Boat Div.,* 37 BRBS 53 (2003).