U.S. Department of Labor

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

BRB No. 16-0078

RODNEY SALISBURY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: Aug. 25, 2016
ELECTRIC BOAT CORPORATION	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Scott N. Roberts (The Law Office of Scott Roberts, LLC), Groton, Connecticut, for claimant.

Robert J. Quigley, Jr. (McKenney, Quigley, Izzo & Clarkin, LLP), Providence, Rhode Island, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2014-LHC-01208, 2015-LHC-00338, 00339) 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*. (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 injured his right knee on April 8, 2011, during the course of his employment as a welder. Claimant was transferring himself by ladder to another compartment when his knee twisted and he heard a pop. He was examined at employer's facility and sent home. Claimant wore a knee brace and, for two weeks, was

placed on light-duty, with restrictions against climbing, twisting and squatting. He then resumed his usual work.

On September 11, 2013, claimant filed a claim under the Act, alleging he sustained an injury on September 10, 2013. CX 7. Claimant alleged that he sustained a cumulative trauma right knee injury from his post-April 2011 work, which required repetitive kneeling, squatting, crawling and climbing. In January 2014, claimant also filed a claim for the April 2011 injury. EX 4. In June 2014, employer voluntarily paid claimant compensation of $4,317.70 for a two percent right leg impairment, 33 U.S.C. §908(c)(2), based on claimant's average weekly wage of $1,124.40 as of April 8, 2011,[1] with a corresponding compensation rate of $749.60. EX 1. Claimant continued to seek compensation for a two percent impairment based on his average weekly wage on September 10, 2013, $1,405.23, with a corresponding compensation rate of $936.84; claimant asserted entitlement to additional compensation of $1,078.61.

In his decision, the administrative law judge found that Dr. Willetts's October 30, 2013 letter report and supplementary June 4, 2015 letter to claimant's attorney "do not show whether or to what extent Claimant's work activities aggravated the underlying condition or caused any additional disability." Decision and Order at 5. The administrative law judge concluded, based on claimant's testimony and the medical records, that claimant did not demonstrate any increased knee impairment following the initial April 8, 2011 right knee injury for which he was already fully compensated by employer. *Id*. Accordingly, the administrative law judge denied the claim for additional compensation.

On appeal, claimant challenges the administrative law judge's denial of the claim for additional compensation. Employer responds that the administrative law judge's findings are supported by substantial evidence and in accordance with law.

We agree with claimant that the administrative law judge's decision cannot be affirmed. Claimant sought to establish he has a leg impairment related to a September 10, 2013 cumulative trauma injury. Thus, the administrative law judge erred by not initially determining whether claimant established a work injury on this latter date as claimed. *See generally L.W.* [*Washington*] *v. Northrop Grumman Ship Systems, Inc.*, 43 BRBS 27 (2009); *Downey v. General Dynamics Corp.*, 22 BRBS 203 (1989). Accordingly, we vacate the administrative law judge's denial of the claim for compensation for a September 10, 2013 work injury, and we remand the case for the administrative law judge to address the relevant evidence and determine whether claimant established he sustained a work-related cumulative trauma injury on September

[1] Employer also paid an additional $431.77 for its late payment of compensation. *See* 33 U.S.C. §914(e).

10, 2013.[2] If the administrative law judge finds that claimant established a work-related injury on September 10, 2013, claimant then has the burden to show that his two percent knee impairment is due, at least in part, to this work injury.[3] *See generally Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981); *see also King v. Director, OWCP*, 904 F.2d 17, 23 BRBS 85(CRT) (9th Cir. 1990); *Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011).

In this respect, the administrative law judge found that the letters Dr. Willets wrote to claimant's counsel, "do not show whether or to what extent Claimant's work activities [after April 8, 2011] aggravated the underlying condition or caused any additional disability." Decision and Order at 5. Claimant was examined by Dr. Willetts on October 30, 2013. Dr. Willets diagnosed a twisting right knee injury on April 8, 2011, with a probable meniscal tear, and he stated that claimant has a two percent impairment of the right lower extremity under the American Medical Association *Guides to the Evaluation of Permanent Impairment*. CX 5 at 6. By letter, claimant's counsel asked Dr. Willetts whether claimant's post-April 2011 work activities "worsened his symptoms and pain in the right knee and if that contributed to his impairment." CX 4 at 2. Dr. Willetts responded that claimant told him that his "[work] activities did worsen his symptoms and, in my opinion, they did contribute to the basis for his 2% right lower extremity impairment." *Id*. Thus, contrary to the administrative law judge's finding, Dr. Willetts's June 2015 letter attributes the two percent impairment rating he gave claimant's right knee, in part, to his working conditions after the 2011 traumatic injury. The administrative law judge is correct that Dr. Willetts's statement does not address the extent of the contribution by claimant's post-April 2011 working conditions, but this inquiry is irrelevant to establishing that claimant's right knee impairment is due, in part, to his working conditions after the April 8, 2011 work injury. The only relevant inquiry is whether the 2013 injury is "a cause" of claimant's disability, not whether it is "the cause." *Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 193, 33 BRBS 65, 67(CRT) (5th Cir. 1999); *Myshka v. Electric Boat Corp.*, 48 BRBS 79, 81-82 (2015).

[2] We note that, if claimant establishes a prima facie case, the Section 20(a) presumption, 33 U.S.C. §920(a), is applicable to a claim for a cumulative trauma work injury. *See generally Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981); *see generally Gencarelle v. General Dynamics Corp.*, 892 F.2d 173, 23 BRBS 13(CRT) (2d Cir. 1989). If the Section 20(a) presumption applies, the burden is on employer to rebut it with substantial evidence that claimant's harm is not related to his employment. *See, e.g., Sprague v. Director, OWCP*, 688 F.2d 862, 15 BRBS 11(CRT) (1st Cir. 1982).

[3] Employer has not disputed that claimant has a two percent right leg impairment based on Dr. Willetts's opinion to that effect. *See* CXs 4 at 2, 5 at 6.

Therefore, we vacate the administrative law judge's finding that claimant's post-April 8, 2011 work activities did not contribute to his two percent right knee impairment. If, on remand, claimant establishes he sustained a cumulative trauma work injury in September 2013, the administrative law judge must address whether that injury contributed to his leg impairment.

We also agree with claimant that the administrative law judge mistakenly observed that compensating him at a higher average weekly wage would result in a double recovery. In his decision, the administrative law judge stated:

> To allow recovery in this case would be to allow for a double recovery when Claimant has shown only an increase in weekly compensation and no additional damage thereby, turning the aggravation doctrine on its head in contravention of Fifth Circuit precedent as noted above.

Decision and Order at 5. The administrative law judge accurately summarized claimant's precise argument for being owed additional compensation totaling $1,078.61. *Id*. at 4. Claimant conceded that employer is entitled to a dollar-for-dollar credit for its prior voluntary payment of $4,317.70, and he sought only additional compensation based on an allegedly higher average weekly wage in September 2013. *See Director, OWCP v. Bethlehem Steel Corp.* [*Brown*], 868 F.2d 759, 22 BRBS 47(CRT) (5th Cir. 1989); *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*); *Bomback v. Marine Terminals Corp.*, 44 BRBS 95, 99 (2010). Thus, the administrative law judge misstated that awarding claimant additional compensation would "allow for double recovery." Should the administrative law judge find on remand that claimant's right leg impairment is due, in part, to the claimed September 10, 2013 work injury, he must award benefits based on claimant's average weekly wage at the time of this injury. Employer is entitled to a credit of $4,317.70 against any compensation found due. *See Myshka*, 48 BRBS at 81-82.

Accordingly, the administrative law judge's Decision and Order is vacated and the case is remanded for further proceedings in accordance with this decision.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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GREG J. BUZZARD
Administrative Appeals Judge

_____
RYAN GILLIGAN
Administrative Appeals Judge