U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 17-0289

GIUSEPPE CUTIETTA	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
NATIONAL STEEL AND SHIPBUILDING COMPANY	)	
	)	
	)	DATE ISSUED: Feb. 6, 2018
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Roy D. Axelrod (Law Office of Roy Axelrod), San Diego, California, for self-insured employer.

Ann Marie Scarpino (Kate S. O'Scannlain, Solicitor of Labor; Maia S. Fisher, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (2011-LHC-00473) of Administrative Law Judge Paul C. Johnson, Jr., 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). This case is before the Board for the second time.

Claimant sustained a cumulative traumatic lower back injury over the course of his decades-long work for employer through September 29, 2003. Claimant did not return to his former position as a shipwright after this date and employer voluntarily paid periods of temporary total and partial disability. A dispute arose regarding claimant's entitlement to benefits, with employer also filing an application for Section 8(f) relief, 33 U.S.C. §908(f).

The administrative law judge, in his decision dated May 19, 2014, awarded claimant periods of temporary total and permanent total disability benefits, as well as ongoing permanent partial disability benefits from March 1, 2005. The administrative law judge, however, found that claimant forfeited his right to compensation from October 13, 2010 to April 27, 2013, pursuant to 33 U.S.C. §908(j), and he awarded employer a credit pursuant to 33 U.S.C. §903(e) for reimbursement payments it made to the California Employment Development Department (EDD). The administrative law judge also denied employer's request for Section 8(f) relief, a finding which employer appealed.[1]

Pertinent to this appeal, the Board affirmed the administrative law judge's denial of employer's claim for Section 8(f) relief based on claimant's congenital spinal condition. However, as the administrative law judge did not address employer's claim for Section 8(f) relief based on claimant's having sustained prior back injuries while in its employ, the Board remanded the case for consideration of this theory of entitlement to Section 8(f) relief.[2] *Cutietta v. National Steel & Shipbuilding Co.*, 49 BRBS 37 (2015),

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[1]Claimant cross-appealed the administrative law judge's decision. The Board affirmed the administrative law judge's finding that claimant's disability became partial on March 1, 2005, except for the period claimant was enrolled in a vocational rehabilitation program, reversed the administrative law judge's award of a Section 3(e) credit, and remanded the case for the administrative law judge to address whether, pursuant to Section 8(j)(2)(B), claimant's omission of his earnings was knowing and willful. *Cutietta v. National Steel & Shipbuilding Co.*, 49 BRBS 37 (2015), *aff'd on recon.* (Nov. 16, 2015) (unpub. Order).

[2]Addressing employer's alternative basis for Section 8(f) relief, the Board stated that: 1) a work-related condition may constitute a manifest, pre-existing, permanent partial disability for purposes of Section 8(f); (2) an employer is eligible for Section 8(f) relief where the employee's pre-existing disability and second injury both arise from the course of employment with the same employer; and (3) the record contained evidence

aff'd on recon. (Nov. 16, 2015) (unpub. Order).

On remand, the administrative law judge found employer failed to establish that claimant's prior incidents of back pain constituted a "pre-existing permanent partial disability." The administrative law judge thus denied the claim for Section 8(f) relief.[3]

On appeal, employer challenges the administrative law judge's finding that it did not satisfy the pre-existing permanent partial disability element for Section 8(f) relief. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's finding. Employer filed a reply brief.

A "pre-existing partial disability" for purposes of Section 8(f) can be an economic disability under 33 U.S.C. §908(c)(21) or a scheduled loss specified in 33 U.S.C. §908(c)(1)-(20),[4] but it may also be "such a serious physical disability in fact that a cautious employer would have been motivated to discharge the handicapped employee because of a greatly increased risk of employment-related accident and compensation liability." *Todd Pacific Shipyards Corp. v. Director, OWCP* [*Mayes*], 913 F.2d 1426, 1430, 24 BRBS 25, 29-30(CRT) (9th Cir. 1990) (quoting *C & P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 513, 6 BRBS 399, 415 (D.C. Cir. 1977)); *see also Lawson v. Suwannee Fruit & Steamship Co.*, 336 U.S. 198 (1949); *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 25 BRBS 85(CRT) (9th Cir. 1991). The mere fact that claimant may have previously sustained an injury, however, does not

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that claimant had a series of low back pain complaints and/or that he sustained back injuries over the course of his work for employer. The Board thus instructed the administrative law judge to address employer's alternative theory for entitlement to Section 8(f) relief, stating that, under its theory, employer must "establish that claimant sustained a 'second' injury, i.e., an aggravation [as opposed to the natural progression of a prior injury]; that claimant's disability is not due solely to that second injury; and that claimant's disability is materially and substantially greater due to the pre-existing disability." *Cutietta*, 49 BRBS at 44.

[3]The administrative law judge also concluded that claimant did not forfeit compensation pursuant to Section 8(j) for the period from October 13, 2010 through April 27, 2013.

[4]As the Director notes, there is no evidence that claimant suffered either a prior loss under the schedule or an economic disability before he ceased working for employer in September 2003 due to his cumulative trauma injury.

necessarily establish the existence of a serious, lasting physical condition.[5] *Director, OWCP v. Belcher Erectors, Inc.*, 770 F.2d 1220, 17 BRBS 146(CRT) (D.C. Cir. 1985); *Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983).

Employer contends that claimant reported to employer that he hurt his back in specific work incidents on April 4, 1989, May 17, 1989, July 29, 1989, July 21, 1995, and November 21, 2000, which belies the administrative law judge's conclusion that claimant did not report any specific back injuries. Employer adds that, in contrast to the administrative law judge's determination, it need not establish claimant sustained a discrete, single injury in order to meet the pre-existing permanent partial disability element of Section 8(f). Moreover, employer contends the record contains evidence of claimant's treatment for back pain at employer's medical dispensary and with private physicians, which establishes that claimant had symptomatic, moderate degenerative disc disease in his lumbar spine which required treatment prior to September 2003, thereby satisfying the pre-existing permanent disability element of Section 8(f).

In addressing Section 8(f) on remand, the administrative law judge stated that he "must now establish whether Employer demonstrated that claimant sustained a prior permanently disabling back injury while in its employ." Decision and Order on Remand at 8. The administrative law judge found that although claimant had previous complaints of back pain/injuries, he returned to work without restrictions after recovering from each of those injuries. UTX 49 at 476 - 477, 500, 503; UTXs 51 – 53; *see also* HT at 31, 33, 34. The administrative law judge thus concluded that employer did not satisfy the pre-existing permanent partial disability element for Section 8(f) relief. Decision and Order on Remand at 10.

We conclude that the administrative law judge did not fully apply the correct legal standard in determining that claimant did not have a pre-existing permanent partial disability. Therefore, we cannot affirm the denial of Section 8(f) relief. The administrative law judge correctly noted that the mere existence of a prior injury alone does not establish the pre-existing permanent partial disability element, *see generally*

[5]Thus, employer's contention that the administrative law judge erred in failing to apply *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991), and *Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986), is misplaced. These cases involve the determination of the responsible employer and state that the claimant's sustaining an episode of pain due to conditions of employment may suffice to constitute an "injury" with a given employer. These cases do not address the "pre-existing permanent partial disability" requirement for Section 8(f) relief, nor the case precedent stating that mere injury alone may be insufficient to meet this standard.

Todd Shipyards Corp. v. Director, OWCP [*Cortez*], 793 F.2d 1012, 19 BRBS 1(CRT) (9th Cir. 1986), and his finding that claimant returned to his usual work after each reported incident of back pain is supported by substantial evidence. *See* UTX 49 at 476-477, 500, 503; UTXs 51-53; *see also* HT at 31-34; *Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974.

Nonetheless, employer correctly avers that the administrative law judge did not address the medical evidence with respect to whether claimant had "some serious, lasting physical problem" such that a cautious employer would have been motivated to discharge the employee because of an increased risk of liability. *Devor v. Dep't of the Army*, 41 BRBS 77 (2008); *see Lockheed Shipbuilding*, 951 F.2d 1143, 25 BRBS 85(CRT) (substantial evidence supported the administrative law judge finding that claimant had a pre-existing permanent partial disability where claimant failed to completely recover from his back injuries and continued to have back problems for seven years after returning to work); *Beumer v. Navy Personnel Command*, 39 BRBS 98 (2005); *Smith v. Gulf Stevedoring Co.*, 22 BRBS 1 (1988). In this regard, the administrative law judge too narrowly focused on whether the evidence establishes that claimant sustained a prior specific injury during his career with employer. *See* Decision and Order on Remand at 8, 10. It is not necessary for purposes of the "pre-existing permanent partial disability" inquiry that employer establish that claimant had discrete work injuries.[6] *See generally Currie v. Cooper Stevedoring Co.*, 23 BRBS 420 (1990) (an asymptomatic condition may constitute a pre-existing permanent partial disability for purposes of Section 8(f)); *Dugas v. Durwood Dunn, Inc.*, 21 BRBS 277 (1988). It is well established that a condition need not be economically disabling to be a pre-existing permanent partial disability for the purposes of Section 8(f) relief. *See Lawson*, 336 U.S. 198; *Director, OWCP v. General Dynamics Corp.*, 982 F.2d 790, 26 BRBS 139(CRT) (2d Cir. 1992). A pre-existing condition that puts claimant at risk for further and more extensive injuries may constitute a pre-existing disability. *Dugan v. Todd Shipyards, Inc.*, 22 BRBS 42 (1989). The administrative law judge may rely on evidence post-dating the "subsequent injury" to establish the pre-existing permanent partial disability element. *See Wiggins v. Newport News Shipbuilding & Dry Dock Co.*, 31 BRBS 142 (1997); *Currie*, 23 BRBS 420; *Dugan*, 22 BRBS 42.

Accordingly, we vacate the administrative law judge's finding that employer did not satisfy the pre-existing permanent partial disability element. We remand the case for the administrative law judge to address whether employer established that claimant had a serious, lasting physical condition under the "cautious employer" test. *See Beumer*, 39 BRBS at 103. If, on remand, the administrative law judge determines that employer

[6] In order to be entitled to Section 8(f) relief, however, employer must establish that claimant sustained a "second, work-related injury." *See* n.2, *supra.*

established the pre-existing permanent partial disability element, he must address whether employer established the contribution element, *see Cutietta*, 49 BRBS at 44; n.2, 7 *supra*"[7], and the manifest element, *see Bunge Corp. v. Director, OWCP* [*Miller*], 951 F.2d 1109, 25 BRBS 82(CRT) (9th Cir. 1991).

Claimant's counsel has filed an itemized fee petition for services rendered before the Board in claimant's prior appeal in this case. BRB No. 14-0335A; 20 C.F.R. §802.203(c). Counsel seeks an attorney's fee totaling $22,248.48, representing 6.6 hours of attorney services by Eric Dupree at an hourly rate of $500, 63.1 hours of attorney services by his associate, Paul Myers, at an hourly rate of $300, and $18.48 in expenses. Employer has not filed objections to counsel's fee petition.

In the prior appeal, claimant, though unsuccessful on the disability issue, prevailed by: 1) defeating employer's efforts to have his appeal dismissed as untimely; 2) securing a reversal of the administrative law judge's award of a Section 3(e) credit to employer in the amount of $5,317.88; and 3) obtaining a remand on the Section 8(j) forfeiture issue, which subsequently resulted in the administrative law judge's rescinding the forfeiture, thus eliminating a $42,057.16 credit to employer. Counsel concedes claimant's partial success on appeal and accounts for it by applying "a write-off based on the amount of identifiable briefing time spent on winning versus losing issues."[8] Brief in Support of Fee Petition at 2. The fee requested by counsel is commensurate with the degree of success obtained and is reasonable for the necessary work performed in that appeal.[9] 20 C.F.R. §802.203(e). We, therefore, award claimant's counsel an attorney's fee totaling

[7]If, as in this case, claimant is permanently partially disabled, employer must establish that claimant's disability "is materially and substantially greater than that which would have resulted from the subsequent injury alone." *Marine Power & Equipment v. Dep't of Labor* [*Quan*], 203 F.3d 664, 33 BRBS 204(CRT) (9th Cir. 2000); *Director, OWCP v. Coos Head Lumber & Plywood Co.,* 194 F.3d 1032, 33 BRBS 131(CRT) (9th Cir 1998). Section 8(f) is not applicable where claimant's disability results from the natural progression of the prior condition. *Sumler v. Newport News Shipbuilding & Dry Dock Co.,* 36 BRBS 97 (2002).

[8]Mr. Dupree's hours were reduced by .4 and Mr. Myers's reduced by 35.2 for work each performed on the unsuccessful disability issue. Fee Petition Ex. 18.

[9]In view of the absence of any objections, we find that counsel's fee petition contains adequate documentation supporting his requested hourly rates of $500 for Mr. Dupree and $300 for Mr. Myers. *See* Fee Petition Exs. 1-18; 20 C.F.R. §802.203(d)(4). However, the Board's award in this matter is of no precedential value given that counsel's fee request is unopposed.

$22,248.48 for work performed in the prior appeal, payable directly to counsel by employer. 33 U.S.C. §928; 20 C.F.R. §802.203.

Accordingly, the administrative law judge's denial of Section 8(f) relief is vacated, and the case is remanded for further consideration consistent with this opinion. Claimant's counsel is awarded a fee of $22,248.48 for work performed before the Board in BRB Nos. 14-0335/A, to be paid directly to claimant's counsel by employer.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge