U.S. Department of Labor

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

BRB No. 15-0404

STACY L. GRIMLAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DYNCORP INTERNATIONAL, L.L.C.	)	DATE ISSUED: July 5, 2016
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order and the Order Denying Motion for Reconsideration of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

David C. Barnett (Barnett, Lerner, Karsen & Frankel, P.A.), Fort Lauderdale, Florida, for claimant.

John L. Schouest and Dana Ladner (Schouest, Bamdas, Soshea & Ben-Maier, P.L.L.C.), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order and the Order Denying Motion for Reconsideration (2012-LDA-00413) of Administrative Law Judge Lee J. Romero, 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *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).

The facts of this case are not in dispute. Claimant was injured on September 6, 2010, while working for employer in Afghanistan when a bomb exploded near his head. He suffered a traumatic brain injury and left hemiparesis, and the parties agree he is permanently totally disabled.[1] Doctors have determined that claimant will need medical and attendant care for the remainder of his life.[2] Because medical providers agreed that institutionalizing claimant would be detrimental, claimant's parents were trained to, and do, provide 24-hour attendant care, for which employer pays them. EX 7; Stipulations; *see* 20 C.F.R. §702.412(b). Because their house was unable to be modified to accommodate claimant's needs, claimant's parents donated a parcel of their land, on which employer built a house for claimant. The dispute before the administrative law judge was whether employer is liable for the following costs: electricity, water, air conditioning, land telephone line, carbon monoxide monitoring, fire monitoring, "general maintenance," property taxes, homeowner's insurance, and expenses associated with the court-appointed guardian of claimant's estate.[3]

Upon conducting a review of what has been considered "medically necessary" under Section 7(a) of the Act, 33 U.S.C. §907(a); *see*, *e.g.*, *Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989), as well as a review of the law in various states, the administrative law judge concluded that the general rule is as follows: an employer is liable for expenses that a medical provider has deemed "medically necessary;" however, the employer's liability is limited by the amount exceeding that which the injured employee was paying for those expenses prior to his injury. Decision and Order at 26; *see*, *e.g.*, *Pringle v. Mayor & Alderman of Savannah*, 478 S.E.2d 139 (Ga. Ct. App. 1996) (difference between former and current rental payments); *Frederick Electronics v. Petitjean*, 619 So.2d 14 (Fla. Dist. Ct. App. 1993) (difference between utility bills before and after addition of electronic equipment used to treat the compensable condition); *Polk*

[1] He also suffers from: left hemianopsia (decreased vision/blindness); left spasticity; left hemisensory deficit; severe connective disorder, seizure disorder, and decreased hearing.

[2] Employer has paid claimant total disability and medical benefits since September 6, 2010.

[3] Claimant's mother opened a temporary guardianship in February 2012 in the court in Johnson County, Texas. EX 10; *see* Tex. Est. Code Ann. §1023.001. On July 17, 2014, the guardianship became permanent. Claimant's mother is the permanent guardian of claimant's person, and Kirsten Holmes, Esq., was appointed by the court to be the guardian of claimant's estate. EX 9.

County Bd. of Comm'rs v. Varnado, 576 So.2d 833 (Fla. Dist. Ct. App. 1991) (evidence needed to show household items are "medically necessary"). As claimant's doctor, Dr. Solomon, deemed electricity, water, air conditioning, land telephone line, carbon monoxide monitoring, fire monitoring, and "general maintenance" "medically necessary" for claimant's injury, CX 4, the administrative law judge held employer liable for these costs. Because claimant lived at home with his parents when he was not working and, thus, was not paying rent or utility costs before his injury, the administrative law judge held employer liable for the amounts claimed in their entirety, as they pertain to claimant's new house. With regard to "general maintenance," the administrative law judge admonished the parties to use good judgment to determine what would be included therein. Decision and Order at 27.

The administrative law judge denied claimant's claim that employer is liable for guardianship costs, property taxes, and homeowner's insurance. With respect to the guardianship costs, the administrative law judge found that claimant identified two state cases on the subject, only one of which addressed a similar issue. Therefore, the administrative law judge stated:

> In light of the fact that the parties failed to provide adequate caselaw dictating a resolution of this issue, and an independent exhaustive search of precedent on this matter produced little guidance, the undersigned determines that the two above-detailed state cases regarding the responsibility of guardianship expenses are instructive. As the caselaw is in equipoise, however, I find that there is insufficient support to render a finding in favor of Claimant. More specifically, Claimant has not met his burden by a preponderance of the evidence in establishing the guardian costs are the burden of Employer/Carrier.

Decision and Order at 29-30. In a footnote, the administrative law judge advised the parties to seek clarification from the Johnson County Texas Court that appointed the guardian. *Id.* at 30 n.4. The administrative law judge also found that employer is not liable for property taxes on, and homeowner's insurance for, claimant's property because they were not deemed "medically necessary" by claimant's doctor. *Id.* at 30. The administrative law judge denied claimant's motion for reconsideration.

Claimant appeals the administrative law judge's finding the employer is not liable for guardianship costs, property taxes, and homeowner's insurance. Specifically, claimant contends that the need for the guardianship was directly caused by his compensable injuries and, therefore, is compensable under Section 7(a). He also contends that, because the house was built as a "medical necessity," the obligation to pay taxes and insurance premiums also must be considered "medically necessary;" in this respect, claimant contends that, if he has to pay the insurance premiums, he is insuring

employer's risk of loss.[4] Employer responds, averring that Texas law, under which the guardianship was formed, applies to hold the estate liable for guardianship fees and that the administrative law judge properly rejected claimant's assertion that employer is liable for the claimed expenses. Employer thus urges affirmance of the administrative law judge's decision. Claimant filed a reply brief, asserting that use of Texas law is improper because obligation for these costs, which flow naturally from the compensable injuries, falls within the purview of Section 7. Employer filed a sur-reply, stating that Texas law is unquestionably applicable, as there would be no guardianship in place without it, and that the obligation to pay taxes and insurance does not flow naturally from the injury, as work-related injuries do not generally obligate employers to pay an injured worker's property taxes or homeowner's insurance – and those items were not included in the parties' stipulations wherein employer agreed to build a house for claimant.[5]

Section 7(a) of the Act provides:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. §907(a). The pertinent regulations provide:

> It is the duty of the employer to furnish appropriate medical care . . . for the employee's injury, and for such period as the nature of the injury or the process of recovery may require.

20 C.F.R. §702.402. "Medical care"

> shall include medical, surgical, and other attendance or treatment, nursing and hospital services, laboratory, X-ray and other technical services, medicines, crutches, or other apparatus and prosthetic devices, and any

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[4] On September 9, 2014, the administrative law judge issued a temporary order on medical benefits requiring employer to pay Ms. Holmes $5,000 to pay the taxes and insurance on claimant's home. The Order was to remain in effect until another order issued. As the administrative law judge issued an order to the contrary, now on appeal before the Board, the temporary order is no longer in effect.

[5] In an Order dated January 7, 2016, the Board denied claimant's motion to strike the sur-reply and granted claimant the opportunity to respond. On January 12, 2016, claimant declined to respond, stating the issues were thoroughly briefed.

other medical service or supply, including the reasonable and necessary cost of travel incident thereto, which is recognized as appropriate by the medical profession for the care and treatment of the injury or disease.

20 C.F.R. §702.401(a); *see also* 20 C.F.R. §702.412(b).

In order for a medical expense to be assessed against the employer under Section 7(a) of the Act, the expense must be both reasonable and necessary for treatment of a work injury, and the claimant bears the burden of establishing both the reasonableness and the necessity of the expense. *Ramsey Scarlett & Co. v. Director, OWCP* [*Fabre*], 806 F.3d 327, 49 BRBS 87(CRT) (5th Cir. 2015); *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996); *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). To be "medically necessary," under Section 7(a) of the Act, the item or medical care must be "recognized as appropriate by the medical profession for the care and treatment of the injury or disease." 20 C.F.R. §702.401(a). A claimant establishes a prima facie case for compensable medical treatment where a qualified physician indicates the treatment is necessary for the work-related condition. *Turner v. Chesapeake & Potomac Telephone Co.*, 16 BRBS 255 (1984). For example, the following items have been approved as "medical care" under Section 7(a) because they were determined to be "reasonable and necessary" for the treatment of work-related conditions: house modifications;[6] attendant care;[7] biofeedback therapy;[8] van with an automatic lift;[9] moving expenses;[10] and parking fees and tolls.[11]

In this case, the administrative law judge determined that employer is not liable for property taxes and homeowner's insurance because no physician stated such expenses are "medically necessary." Decision and Order at 30. This is the proper test for determining

[6] *Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989).

[7] *M. Cutter Co., Inc. v. Carroll*, 458 F.3d 991, 40 BRBS 53(CRT) (9th Cir. 2006); *Falcone v. General Dynamics Corp.*, 21 BRBS 145 (1988).

[8] *Barbour v. Woodward & Lothrop, Inc.*, 16 BRBS 300 (1984).

[9] *Day v. Ship Shape Maintenance Co.*, 16 BRBS 38 (1983).

[10] *Miranda v. Excavation Constr., Inc.*, 13 BRBS 882 (1981) (Kalaris, J., dissenting).

[11] *Castagna v. Sears, Roebuck & Co.*, 4 BRBS 559 (1976), *aff'd mem.*, 589 F.2d 1115 (D.C. Cir. 1978).

whether employer is liable for the requested costs. *See*, *e.g.*, *Ramsey Scarlett & Co.*, 806 F.3d 327, 49 BRBS 87(CRT). As there is no evidence of record that any physician determined that claimant's property taxes and homeowner's insurance are "medically necessary" for the treatment of claimant's work-related condition, we affirm the administrative law judge's finding. *See generally Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9 (2001), *aff'd mem.*, 32 F.App'x 126 (5th Cir. 2002). We reject claimant's assertion that Section 7(a) should be interpreted so broadly as to encompass all expenses which have not been specifically deemed "medically necessary" merely because they derive from items a doctor has deemed "medically necessary." Claimant must establish the reasonableness and necessity of every claimed treatment or expense. *Schoen*, 30 BRBS 112.

With regard to costs associated with the guardianship, claimant asserts that employer should reimburse his estate these costs because there is a direct causal relationship between his work-related injuries and the need for a guardianship.[12] Thus, claimant argues that but for his injuries he would not require a guardian. We reject claimant's contention and affirm the administrative law judge's denial of guardianship costs, albeit on grounds different from those espoused by the administrative law judge.[13]

The guardianship in this case arose in a Texas county court. Tex. Est. Code Ann. §1001.001 *et seq.* Under Texas law, guardians of both the person and of the estate are entitled to reasonable fees for their services and to reimbursement of expenses paid on behalf of the guardianship.[14] *Id.*, §§1155.002-1155.003. Although the administrative law

[12] Other than giving the district director the authority to require an attorney to seek the appointment of a guardian for a minor or a mentally incompetent claimant, or stating that the timeliness provisions for filing a claim do not apply if such a claimant does not have a guardian, the Act does not address guardians or guardianship costs. 33 U.S.C. §§911, 913(c); 20 C.F.R. §702.222(a).

[13] The proper test is not a "but for" test: not all expenses a claimant incurs post-injury are to be borne by his employer merely because he would not have incurred them but for his injury. As discussed, the proper test under Section 7(a) is medical necessity. Generally speaking, a claimant's disability benefits are "wage replacement" from which he pays his other living expenses.

[14] The fees and expenses generally are paid out of the guardianship estate. Tex. Est. Code Ann. §§1155.002-1155.003, 1155.101. If an attorney is serving as a guardian and is also providing legal services, as does Ms. Holmes, she must file with the court a fee petition that identifies the services as either legal or guardianship services. The court will set both the guardianship fee and the attorney's fee. Tex. Est. Code Ann. §1155.052; *see generally In re Guardianship of Whitt*, 407 S.W.3d 495 (Tex. Ct. App. 2013).

judge and claimant cited state cases in analyzing this issue, we find it unnecessary to address state law to determine whether the guardianship costs in this case are compensable under Section 7 of the Act.

The administrative law judge compared *Southeastern Concrete Floor v. Charlton*, 584 So.2d 574 (Fla. Dist. Ct. App. 1991) (under the claimant's workers' compensation claim, the employer was held liable for guardianship expenses related to the guardianship, to medical expenses, and to the workers' compensation claim because the need for the guardianship was due to the work injury), and *Mohn v. Kentucky Fried Chicken*, 994 P.2d 99 (Okla. Civ. App. 1999) (under the workers' compensation claim, the employer was not liable for guardianship expenses because the payment of guardian fees and expenses is not "medical" and because the claimant did not present evidence that her incapacity was due to her work injury).[15] The administrative law judge concluded that this case law is in equipoise, and therefore is insufficient to support claimant's claim by a preponderance of the evidence. Decision and Order at 29-30. As we have discussed, this is not the proper test for determining employer's liability for medical benefits under Section 7(a). The test is medical necessity. Accordingly, we cannot affirm the administrative law judge's rationale with respect to his denial of claimant's request for guardianship costs.[16] However, claimant did not present any evidence that the guardianship costs are "medically necessary" for the treatment of claimant's work-related disability. Therefore, as a matter of law, claimant has not shown that employer is liable for them under Section 7(a) of the Act, and we affirm the administrative law judge's denial of the request for reimbursement of claimant's guardianship costs. *See generally Ezell v. Direct Labor, Inc.*, 37 BRBS 11 (2003).

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[15] Claimant contends *Mohn* supports his position, as there can be no dispute of the causal relationship between his injuries and his need for a guardian. However, this contention ignores the court's primary holding that the language of the Oklahoma state statute pertaining to medical benefits is not broad enough to include guardianship fees.

[16] Evidence may be weighed and found to be evenly balanced; thus, it may be considered in "equipoise" and not sufficient to meet a claimant's burden of establishing his claim by a preponderance of the evidence. *See*, *e.g.*, *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996). The rationale of any particular court decision, however, may be accepted or not, but the "equipoise" of the case law does not dictate the failure of a claimant's claim.

Accordingly, the administrative law judge's Decision and Order and Order Denying Motion for Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge