U.S. Department of Labor

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

BRB No. 17-0279

JOHN SPELLER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PORTS AMERICA/ P & O PORTS VIRGINIA, INCORPORATED	)	
	)	
	)	DATE ISSUED: Mar. 7, 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 Awarding Benefits of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Ralph Rabinowitz, Norfolk, Virginia, for claimant.

Christopher R. Hedrick and Bradley D. Reeser (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

Jennifer L. Feldman (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: BOGGS, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2016-LHC-00067) 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).

Claimant injured his face, neck and back in November 2010, during the course of his employment with Ceres Marine Terminals (Ceres). EXs 1 at 15; 2 at 1. He returned to work approximately three months later in March 2011. EXs 1 at 60; 5. On February 4, 2013, claimant alleged that he sustained a second injury to his neck during the course of his employment with employer. Claimant has not worked since.

Pursuant to the parties' stipulations, the district director entered a Compensation Order (Order) on December 31, 2014, which stated that claimant sustained a second work injury with employer on February 4, 2013, and that claimant was entitled to compensation for temporary total disability from February 5, 2013 to September 30, 2014, based on an average weekly wage of $522.17. CX 6. Subsequently, claimant filed a claim seeking additional temporary total disability benefits until May 20, 2015, and continuing compensation for permanent total disability thereafter.

In response, employer asserted that the Order should be vacated pursuant to Section 22, 33 U.S.C. §922, based on a mistake of fact, because employer's assent to the stipulated Order was premised on claimant's agreement to enter into a Section 8(i) settlement, 33 U.S.C. §908(i), on which claimant subsequently reneged.[1] Through its modification petition, employer sought to have the administrative law judge address the cause of claimant's disabling neck condition and whether claimant was entitled to total disability compensation from August 22, 2013 to September 30, 2014. Employer also controverted claimant's claim to ongoing total disability benefits.

In his decision, the administrative law judge found that the alleged circumstances purportedly leading to employer's agreement to the stipulated Order do not constitute "a mistake in fact" subject to modification under Section 22. Decision and Order at 28-29. The administrative law judge also rejected employer's contention that claimant was

[1] Employer asserted that claimant agreed to waive further compensation and medical benefits in exchange for $114,000, plus approximately $6,000 in outstanding medical bills and an attorney's fee. *See* EX 13. Employer states that claimant demanded an Order awarding temporary total disability compensation so that he would receive a work credit for time missed and thereby obtain fringe benefits from his union.

precluded by the doctrine of equitable estoppel from binding employer to its stipulation that claimant sustained a compensable injury in February 2013. The administrative law judge then addressed claimant's entitlement to total disability compensation from the date of injury. He found that employer did not establish that claimant was only partially disabled after August 22, 2013, and, alternatively, that claimant showed due diligence in seeking suitable work. *Id*. at 29-30. He further found that claimant is entitled to compensation for temporary total disability from October 1, 2014 to May 20, 2015, and to continuing permanent total disability compensation thereafter. *Id*. at 32-35; 33 U.S.C. §908(a), (b). The administrative law judge also found employer entitled to Section 8(f) relief, 33 U.S.C. §908(f). *Id*. at 35-37.

On appeal, employer challenges the administrative law judge's denial of its Section 22 petition for modification. Employer also contends the administrative law judge's decision is not in conformance with the Administrative Procedure Act (APA), 5 U.S.C. §557. Claimant responds, urging affirmance of the administrative law judge's decision in all respects. The Director, Office of Workers' Compensation Programs (the Director), responds that any error in the administrative law judge's denial of employer's modification request on the grounds stated is harmless, as the administrative law judge addressed on the merits the issues employer raised. Employer filed a reply brief.

Employer first contends the administrative law judge erred by not finding a mistake of fact to permit him to consider the terms of the settlement by modification. The Director responds that the administrative law judge addressed the Section 22 issues raised by employer. Specifically, in awarding employer Section 8(f) relief, the administrative law judge rejected the Director's contention that claimant did not sustain a second work injury on February 4, 2013. The Director asserts that the administrative law judge also addressed employer's alternate contention, i.e., that claimant was only partially disabled after August 22, 2013. Decision and Order at 29-30, 36. We agree with the Director.

The administrative law judge properly found that the district director's Order was subject to modification because it did not constitute a Section 8(i) settlement. Decision and Order at 27-28; *see Ramos v. Global Terminal & Container Services, Inc.*, 34 BRBS 83 (1999); *Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196 (1989). However, the administrative law judge denied modification on the issue of whether the stipulated compensation order was contingent on claimant's agreement to enter into a Section 8(i) settlement. The administrative law judge stated that this issue did not raise a "mistake in fact" because employer's agreeing to the entry of the Order, prior to entering into the settlement, was a strategic decision that is not relevant to claimant's entitlement to benefits under the Act. *Id*. at 29.

The scope of modification, based on a mistake of fact, is broad. *See O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971); *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459 (1968). Although employer argued that there was a mistake of fact on the basis that claimant misled it into agreeing to the stipulated Order, substantively, employer sought modification of the stipulation-based findings regarding causation and the extent of claimant's disability as of August 22, 2013. *See* Emp. Post-Hearing Br. at 43-47. These stipulation-based findings are subject to modification. *Sharpe v. Director, OWCP*, 495 F.3d 125 (4th Cir. 2007); *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 107 (2003). In fact, the administrative law judge agreed with employer that the Order was subject to Section 22 modification. Decision and Order at 28-30. The administrative law judge addressed employer's contentions and evidence regarding the extent of claimant's disability. He also determined that claimant sustained a second injury on February 4, 2014, in the context of addressing employer's request for Section 8(f) relief. *Id.* at 28, 36. Accordingly, we need not address employer's contention that the district director's Order was subject to modification on the issue of claimant's alleged reneging on the agreement to settle the case under Section 8(i). *See generally Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 253 (4th Cir. 2016); *see also Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773, 21 BRBS 33(CRT) (5th Cir. 1988) (claimant can withdraw from unapproved settlement).

Employer further contends the administrative law judge did not adequately address its contention that there is a mistake in fact concerning the stipulation that claimant sustained a second injury on February 4, 2013. In addressing, and awarding, employer's claim for Section 8(f) relief, the administrative law judge stated:

> The record clearly establishes that a second injury occurred on February 4, 2013. Mr. Speller has credibly and consistently testified as to how and when his second injury occurred. (TR at 33; EX 11-22). Evidence in the record shows he went to the emergency room the same day of the injury to seek medical attention and the recorded account of how he was injured is consistent with his testimony. (EX 3-4). Claimant attended an appointment with Dr. Wardell on February 6, 2013 where Mr. Speller again described the workplace injury. (CX 2-3). Dr. Wardell diagnosed Claimant with a cervical spine sprain and dorsolumbar spine sprain. Dr. Skidmore only performed a neurologic examination of Mr. Speller one time following the second injury. (EX 1-103). Although it is somewhat troubling that Claimant did not tell Dr. Skidmore about the second injury, his failure to do so does not establish that Mr. Speller did not actually suffer a second injury.

Decision and Order at 36. Additionally, the administrative law judge credited Dr. Wardell's opinion that the February 2013 injury aggravated claimant's pre-existing neck

condition. Decision and Order at 37; *see* CXs 2 at 1, 13; 20 at 8, 13. The administrative law judge is entitled to assess the credibility of claimant's testimony and to determine the weight to be accorded to the evidence of record. *Pittman Mechanical Contractors, Inc. v. Director, OWCP* [*Simonds*], 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994). Substantial evidence supports the conclusion that claimant sustained a second work injury on February 4, 2013 that aggravated his pre-existing condition. *Richardson v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 74 (2005), *aff'd mem. sub nom. Newport News Shipbuilding & Dry Dock v. Director, OWCP*, 245 F. App'x 249 (4th Cir. 2007). Any error in the administrative law judge's failure to address this issue explicitly in terms of Section 22 is harmless as the findings preclude modification of the prior stipulation that the February 2013 accident occurred. *Sea "B" Mining Co.*, 831 F.3d at 253. Therefore, we reject employer's contention.

Employer next contends, pursuant to the APA,[2] that in assessing the extent of claimant's disability the administrative law judge erred by not explaining his finding that claimant's subjective complaints are credible.[3] Employer also contends the administrative law judge erred by not addressing Dr. Skidmore's May 2013 opinion that claimant is not disabled.

The administrative law judge acknowledged employer's contentions that "Claimant's subjective complaints of pain are unreliable due to inconsistencies between his testimony and medical records" and that "Claimant's complaints of pain are subjective and . . . he misrepresented the extent of his injuries following the 2013 accident." Decision and Order at 31, 32. As discussed above, the administrative law judge explicitly noted that claimant failed to tell Dr. Skidmore about the February 2013

[2] The APA requires an administrative law judge's decision to include a discussion of the "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A); *see See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96(CRT) (4th Cir. 1994).

[3] Employer contends the administrative law judge did not account for the following evidence: claimant testified at a deposition that his symptoms had resolved within three or four months after the November 2010 work injury with Ceres, but this is contradicted by his prior deposition testimony and his medical records, *compare* EX 11 at 27-28 *with* CX 20 at 22, 24; *see also* EXs 1; 7; 8 at 12; 9; 10; 14; claimant underreported his vocational history to employer's vocational expert, *compare* EX 6 at 3-4 *with* EX 11 at 41-43; and, at a medical examination on May 28, 2013, requested by Ceres, claimant denied having sustained a new injury notwithstanding his assertion of a second injury on February 4, 2013. EXs 1 at 114-115; 7 at 21-23.

injury. However, the administrative law judge found that Dr. Wardell's records consistently note a decrease in neck rotation after the February 4, 2013 injury and that claimant remained unable to work, whereas he was able to work with restrictions after the November 2010 injury.[4] *Id.* at 32. The administrative law judge rejected employer's contention that Dr. Wardell's goniometric and dynametric tests showing that claimant's condition worsened after the February 2013 injury are unreliable, finding they were objective evidence of claimant's inability to perform his usual work. *Id.* Moreover, the administrative law judge acknowledged that Dr. Wardell's disability assessment is based primarily on claimant's subjective complaints of pain, and he rejected employer's contention that an award cannot be based on subjective complaints. The administrative law judge stated that claimant credibly testified as to his need for Percocet and the effects this drug has on his ability to work.[5] *Id.* at 34.

With respect to claimant's ability to work, the administrative law judge found that Dr. Wardell did not release claimant to work in any capacity until March 2014. Decision and Order at 29-30, 33; *see* CXs 2 at 9-10; 20 at 30. The administrative law judge found that employer did not establish the availability of suitable alternate employment during the period claimant was able to work (March 2014 to May 2015), a finding employer does not challenge on appeal. Decision and Order at 29-30, 33. Dr. Wardell opined on May 20, 2015 that claimant cannot perform any work. CXs 2 at 13; 20 at 35. The administrative law judge stated that "Employer has presented no medical opinion evidence to support its assertion [claimant] is not permanently disabled." Decision and Order at 34. Thus, the administrative law judge found that employer did not establish a mistake in fact with respect to the disability award entered in the stipulated Order and that claimant established his entitlement to ongoing total disability benefits. *Id.* at 29-30, 34-35.

We reject employer's contention that the administrative law judge erred by not more fully addressing its challenge to claimant's credibility. The administrative law judge was fully cognizant of employer's contentions regarding claimant's credibility. *See* Decision and Order at 4, 31-32. The administrative law judge properly noted that a disability award may be premised on a claimant's subjective complaints. *Eller & Co. v. Golden*, 620 F.2d 71, 12 BRBS 348 (5th Cir. 1980). Moreover, the Board will not

[4] As noted *supra*, the administrative law judge found that claimant went to the emergency room on the date of injury and claimant's account of the accident in testimony and in the emergency room record was consistent. Decision and Order at 36.

[5] The administrative law judge found that claimant credibly testified he takes Percocet for pain three times a day, which makes him sleepy and in need of a nap. Decision and Order at 34 (citing Tr. at 36).

interfere with the administrative law judge's credibility determinations unless they are "inherently incredible or patently unreasonable." *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). The administrative law judge addressed employer's challenge to the subjective nature of claimant's complaints, but he permissibly found claimant's testimony credible and supported by Dr. Wardell's records. *See Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001); *see also Pittman Mechanical Contractors, Inc.*, 35 F.3d 122, 28 BRBS 89(CRT).

We also reject employer's contention that the administrative law judge erred in disregarding Dr. Skidmore's May 28, 2013 opinion that claimant could return to work without restrictions, EX 7 at 22-23, before finding that claimant was permanently totally disabled from May 21, 2015. Dr. Skidmore conducted examinations for Ceres, the employer on the risk for the November 2010 work injury, in December 2010, June 2011, February 2012, September 2012, and May 2013. EX 1. The administrative law judge discussed Dr. Skidmore's reports and deposition testimony in his recitation of the evidence. Decision and Order at 9-12, 21-22. Employer contends that Dr. Skidmore's opinion as to claimant's ability to work as of May 2013 should have been considered by the administrative law judge as of the time he found maximum medical improvement established in May 2015. However, having previously rejected employer's arguments that claimant's condition was not aggravated by the work injury and that claimant is not disabled thereby, the bases on which Dr. Skidmore's opinion is premised are without foundation. Moreover, Dr. Skidmore did not provide an opinion as to claimant's ability to work near in time to his date of maximum medical improvement.[6] Therefore, in the context of claimant's disability status as of May 2015, employer has not established error in the administrative law judge's conclusion that it did not offer any "medical opinion evidence to support its assertion that Mr. Speller is not permanently disabled." *Id.* at 34; *see Marinelli*, 34 BRBS 112.

In sum, we hold that the administrative law judge sufficiently addressed employer's challenge, pursuant to Section 22, to the stipulations that claimant sustained a second injury on February 4, 2013 and was totally disabled thereby through September 30, 2014.[7] Substantial evidence supports the administrative law judge's conclusion that

[6] Dr. Skidmore's opinion related to claimant's condition as of May 2013; the issue before the administrative law judge in this context was claimant's condition in May 2015.

[7] We note, again, that other than its contentions concerning claimant's credibility and Dr. Skidmore's opinion, employer does not challenge the administrative law judge's conclusions concerning the claimant's disability status, including the findings that suitable alternate employment was not established and that claimant diligently sought

employer is not entitled to modification of those stipulations. *See generally Island Operating Co., Inc. v. Director, OWCP* [*Taylor*], 738 F.3d 663, 47 BRBS 51(CRT) (5th Cir. 2013) (affirming grant of modification because it was supported by substantial evidence). Moreover, substantial evidence supports the administrative law judge's ongoing award of total disability benefits. *J.R.* [*Rodriguez*] *v. Bollinger Shipyard, Inc.*, 42 BRBS 95 (2008), *aff'd sub nom. Bollinger Shipyards, Inc. v. Director, OWCP*, 604 F.3d 864, 44 BRBS 19(CRT) (5th Cir. 2010); *see also Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

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JUDITH S. BOGGS
Administrative Appeals Judge

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GREG J. BUZZARD
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge

work when he was released to do so. These findings are affirmed. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).