U.S. Department of Labor

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

BRB No. 19-0538

MICAH RAMSEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PORTS AMERICA GULFPORT, INCORPORATED	)	
	)	
	)	DATE ISSUED: 04/08/2020
and	)	
	)	
PORTS INSURANCE COMPANY, INCORPORATED	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Order to Pay Cost of Medical Examination Under Section 7 (e) of the Act of David Duhon, District Director, United States Department of Labor.

William S. Vincent, Jr. and W. Jared Vincent (Law Office of William S. Vincent, Jr.), New Orleans, Louisiana, for claimant.

Donald P. Moore (Franke & Salloum, PLLC), Gulfport, Mississippi, for employer/carrier.

Before: BUZZARD, ROLFE and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order to Pay Cost of Medical Examination Under Section 7(e) of the Act (Case No. 07-313700) of District Director David Duhon rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33

U.S.C. §901 *et seq.* (the Act). We must affirm the district director's determinations unless they are shown to be arbitrary, capricious, based on an abuse of discretion, or not in accordance with law. *Weikert v. Universal Maritime Service Corp.*, 36 BRBS 38 (2002); *Sans v. Todd Shipyard Corp.*, 19 BRBS 24 (1986).

Claimant filed a claim for benefits for a work injury he sustained on July 30, 2018. Following employer's controversion of the district director's December 18, 2018 written recommendation, the claim was transferred to the Office of Administrative Law Judges and the parties began to obtain medical evidence. Because the opinions of the parties' physicians differed, claimant requested the district director schedule an independent medical examination (IME) pursuant to Section 7(e) of the Act, 33 U.S.C. §907(e). Employer objected that this would delay the scheduled formal hearing.

On July 2, 2019, the claims examiner scheduled claimant for an IME with Dr. George Murphy on July 16, 2019. Employer was ordered to pay the $1,500 fee for the examination.

Employer immediately sought reconsideration of the claims examiner's decision, averring, inter alia, that Dr. Murphy is not "independent" because his brother and nephew are partners in the medical practice of claimant's treating physician, Dr. William Sherman. Employer also objected to its liability for the cost of the examination. Dr. Murphy examined claimant on July 16, 2019.

In his Order dated August 6, 2019, the district director rejected employer's contention that Dr. Murphy is not an independent examiner. He ordered employer to pay the cost of the examination pursuant to Section 7(e).

On appeal, employer contends the district director abused his discretion in appointing Dr. Murphy as the IME. Claimant responds, urging the Board to reject employer's contention. Employer filed a reply brief asserting that recusal rules similar to those applicable to judges should apply to independent medical examiners.

Section 7(e) of the Act states in pertinent part:

> In the event that medical questions are raised in any case, the Secretary shall have the power to cause the employee to be examined by a physician employed or selected by the Secretary and to obtain from such physician a report containing his estimate of the employee's physical impairment and such other information as may be appropriate. . . . The Secretary shall have the power in his discretion to charge the cost of examination or review under this subsection to the employer, if he is a self-insurer, or to the insurance

> company which is carrying the risk, in appropriate cases, or to the special fund in section 944 of this title.

33 U.S.C. §907(e); *see Augillard v. Pool Co.*, 31 BRBS 62 (1997). The regulation implementing this subsection, entitled "Evaluation of medical questions; impartial specialists," provides:

> In any case in which medical questions arise with respect to the appropriate diagnosis, extent, effect of, appropriate treatment, and the duration of any such care or treatment, for an injury covered by the Act, the Director, OWCP, through the district directors having jurisdiction, shall have the power to evaluate such questions by appointing one or more especially qualified physicians to examine the employee, or in the case of death to make such inquiry as may be appropriate to the facts and circumstances of the case. The physician or physicians, including appropriate consultants, should report their findings with respect to the questions raised as expeditiously as possible. Upon receipt of such report, action appropriate therewith shall be taken.

20 C.F.R. §702.408. Section 702.411 is entitled "Special examinations; nature of impartiality of specialists." Generally, it states the examinations must be "accomplished in a manner designed to preclude prejudgment by the impartial examiner." 20 C.F.R. §702.411. It prohibits attendance by any physician selected by employer or "previously connected with the case," identifies the type of information the district director can provide to the impartial examiner, and prohibits physicians paid or utilized by employers and carriers from performing IMEs. *Id*. Finally, Section 702.412(a) permits the district director to "charge the cost of the examination or review to the employer." 20 C.F.R §702.412.

Employer asserts the district director abused his discretion in scheduling an IME with Dr. George Murphy. Employer challenges his impartiality because his brother and nephew are members of claimant's treating physician's practice.[1] At a minimum, employer contends an appearance of partiality exists such that the district director should have selected another physician.

We reject employer's assignment of error as it has failed to show the district director abused his discretion in selecting Dr. Murphy to perform the IME in this case. The district

[1] Employer does not contend on appeal that there was an absence of a "medical question" under Section 7(e). The district director found there was a disagreement between the opinions of claimant's treating physician and employer's examining physician.

director found employer failed to offer evidence Dr. Murphy could not be an objective examiner merely because his family members practice with claimant's treating physician, Dr. Sherman. *See* Recommendation at 2; Order at 2. The district director stated he has found Dr. Murphy to be objective, noting in some cases he has disagreed with his brother's opinion. Order at 2. He also noted employer has the option of deposing Dr. Murphy if it desires additional information concerning his examination of claimant. *Id.* Employer has not established the district director misapplied the Act or implementing regulations or made a clear error in judgment in scheduling an IME with Dr. Murphy and ordering employer to pay for the examination. *See Meinert v. Fraser, Inc.*, 37 BRBS 164 (2003) (Board reviews district director's discretionary determinations to ensure compliance with the Act and regulations). If this case proceeds to a formal hearing before an administrative law judge, employer is free to make contentions concerning the weight to be afforded Dr. Murphy's opinion.[2] *Ceres Marine Terminals, Inc. v. Director, OWCP*, 848 F.3d 115, 50 BRBS 91(CRT) (4th Cir. 2016), *aff'g Jackson v. Ceres Marine Terminals, Inc.*, 48 BRBS 71 (2014) (administrative law judge not required to give dispositive weight to IME performed under Section 7(e)).

Finally, employer argues a "physician being able to be unbiased is no different than a judge," Emp. Reply Brief at 2, such that a doctor creates an appearance of impropriety when related to another doctor who has treated a claimant or who is in a practice with a doctor who has treated a claimant. An IME physician is tasked with reviewing records, examining a claimant, and providing a professional opinion which a judge can give controlling weight, some weight, or no weight. There is little similarity to the role a judge plays when rendering a decision in a case wherein a party, lawyer, person vested in the outcome, or material witness is related to the judge. Consequently, we reject employer's argument.

[2] While the appeal was pending before the Board, employer filed a motion to supplement the record with Dr. George Murphy's deposition and a treatment record completed by Dr. Chadwick Murphy. By Order dated January 15, 2020, the Board declined to consider these documents as it is not permitted to receive new evidence. 20 C.F.R. §802.301(b). In addition, Employer has now moved the Board to remand the case to the district director for consideration of its new evidence under Section 22 of the Act, 33 U.S.C. §922. Claimant opposes employer's motion. We deny employer's motion as it has not demonstrated the district director's Order is subject to the provisions of Section 22. Moreover, as discussed *infra*, if this case proceeds to a formal hearing, employer may offer its evidence for the administrative law judge to consider its admissibility and relevance to the credibility of Dr. Murphy's opinion. 20 C.F.R. §702.338.

Accordingly, we affirm the district director's Order to Pay Cost of Medical Examination Under Section 7 (e) of the Act.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge