U.S. Department of Labor

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

BRB No. 21-0100

TERRY D. REESE, SR. Claimant-Petitioner v. VIRGINIA INTERNATIONAL TERMINALS, LLC and SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED c/o SAGE ADJUSTING, LLC Employer/Carrier-Respondents CP & O, LLC and PORTS INSURANCE COMPANY, INCORPORATED Employer/Carrier-Respondents	)	DATE ISSUED: 04/28/2021 DECISION and ORDER

Appeal of the Decision and Order Granting Employers' Motions for Summary Decision of Dana Rosen, Administrative Law Judge, United States Department of Labor.

Lamarr Brown, Princess Anne, Maryland, for Claimant.

F. Nash Bilisoly (Vandeventer Black, LLP), Norfolk, Virginia, for Virginia International Terminals, LLC, and Signal Mutual Indemnity Association, Ltd.

Christopher R. Hedrick (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for CP & O, LLC and Ports Insurance Company, Incorporated.

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

PER CURIAM:

Claimant appeals Administrative Law Judge Dana Rosen's Decision and Order Granting Employers' Motions for Summary Decision (2019-LHC-002764, 2019-LHC-00767, 2019-LHC-00841, 2019-LHC-00842) rendered on claims filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (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 applicable law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This case arises out of several claims for injuries Claimant sustained in 2005 and 2006 while working for Virginia International Terminals (VIT) and in 2011 and 2014 while working for CP & O. The parties engaged in three confidential mediation sessions,[1] which resulted in a settlement of all claims. Claimant signed the settlement agreement on January 3, 2018, along with a statement asserting, "I have no further questions or doubt concerning this matter. The dollar amount of the settlement is adequate and there has been no intimidation, pressure, coercion or duress by anyone against me in my consideration of this settlement." EX 1 (to Emp. Motion for Summary Decision) at 19. On February 2, 2018, the district director issued an Order approving the settlement in which Claimant received a total of $140,000.00 for all his claims against both employers. Claimant did not appeal the district director's Order, and the settlement became final after 30 days, pursuant to Section 8(i), 33 U.S.C. §908(i).

[1] Claimant was represented by counsel at each of the mediation sessions. He fired his first attorney, Robert Walsh, after the first two sessions and was represented by another attorney, Ralph Rabinowitz, at the third mediation session on November 2, 2017, which eventually resulted in the settlement.

Almost a year later, on January 18, 2019, Claimant without the assistance of counsel filed a motion to withdraw the settlement and have his claims reopened on the grounds that the settlement was obtained by fraud and duress. CP & O filed a motion to exclude privileged and confidential statements that were made in conjunction with the mediation sessions. The administrative law judge noted that prior to each mediation session, the parties, including Claimant who was represented by counsel at each session, signed an agreement that all statements made in the course of mediation are privileged and are inadmissible in any legal proceeding. Order Granting Employer's Motion at 6. She cited the applicable Office of Administrative Law Judges (OALJ) rules that apply to discovery and settlement discussions, 29 C.F.R. §§18.52, 18.85, 18.51, 18.13, and determined public policy mandates the confidentiality of mediations in order to allow the parties to freely participate. *See* Order Granting Employer's Motion at 6-8. She granted CP & O's motion for a protective order preventing disclosure of the mediation discussions. Claimant appealed to the Board, which dismissed Claimant's appeal as interlocutory. *Reese v. Virginia Int'l Terminals*, BRB No. 19-0518 (Dec. 18, 2019).

Both VIT and CP & O filed motions for summary decision with the administrative law judge seeking dismissal of Claimant's motion to set aside the settlement, arguing the settlement became final after 30 days and Claimant certified he did not sign the settlement under duress. Claimant responded to Employers' motions, asserting "fraud upon the court" in the approval of the settlement. The administrative law judge found there were no genuine issues of material fact because the undisputed facts demonstrate Claimant initialed the provisions in the settlement agreement stating the settlement terminated all claims for compensation and the settlement was not procured by fraud or duress. He further was represented by counsel at the mediations, his counsel also signed the settlement agreement, and he did not appeal the district director's order approving the settlement. The administrative law judge therefore granted Employers' motions for summary decision and denied Claimant's petition to set aside the settlement agreement.

On appeal, Claimant, represented by a lay representative, contends the administrative law judge erred in granting Employers' motions for summary decision. He asserts the settlement was inadequate and should be set aside because it was obtained through fraud on the court. Claimant also alleges bias on the part of the administrative law judge in granting Employers' motion for a protective order preventing disclosure of the mediation discussions which culminated in the 2018 settlement, and in denying him a hearing on the merits. Both Employers respond, urging affirmance of the administrative law judge's decision.

In determining whether to grant a motion for summary decision, the fact-finder must review the evidence in the light most favorable to the non-moving party and assess whether there are any genuine issues of material fact and whether the moving party is entitled to

summary decision as a matter of law. *Morgan v. Cascade General, Inc.*, 40 BRBS 9 (2006). A party responding to a motion for summary decision must set forth specific facts showing that there is a genuine issue of material fact in order to be entitled to a hearing on the merits. 29 C.F.R. §18.72. The respondent must produce at least some "significant probative evidence tending to support" his claim. *First Nat'l Bank v. Cities Serv. Co.,* 391 U.S. 253, 290 (1968).

Section 8(i) of the Act, 33 U.S.C. §908(i), provides for the discharge of an employer's liability for benefits when an application for settlement is approved by the district director or an administrative law judge. A settlement agreement must be approved by the fact-finder within 30 days of the submission of the agreement, unless the settlement is inadequate, was procured by duress, or is not in conformance with the regulatory criteria. 20 C.F.R. §§702.241-702.243.

Once approved, settlements are not subject to the Act's modification provisions. 33 U.S.C. §922; *Downs v. Director, OWCP*, 803 F.2d 193, 19 BRBS 36(CRT) (5th Cir. 1986); *Diggles v. Bethlehem Steel Corp.*, 32 BRBS 79 (1998). Similarly, settlements cannot be unilaterally rescinded after they have been approved. *Porter v. Kwajalein Services, Inc.*, 31 BRBS 112 (1997), *aff'd on recon.*, 32 BRBS 56 (1998), *aff'd sub nom. Porter v. Director, OWCP*, 176 F.3d 484 (9th Cir.) (table), *cert. denied*, 528 U.S. 1052 (1999). However, the Board has stated there may be a possibility of re-opening a settlement as a matter of equity if a party establishes the settlement was fraudulently secured. *Downs v. Texas Star Shipping Co., Inc.*, 18 BRBS 37, 39-40 (1986), *aff'd sub nom. Downs v. Director, OWCP*, 803 F.2d 193, 19 BRBS 36(CRT) (5th Cir. 1986).

There is no dispute the settlement in this case became final 30 days after the district director approved it and no party timely appealed. Thus, the settlement cannot be modified or unilaterally rescinded. *See Losacano v. Electric Boat Corp.*, 48 BRBS 49 (2014); *Porter*, 31 BRBS at 112. Instead, Claimant asserts the settlement is inadequate because it did not compensate him for a permanent partial disability to his shoulders or medical treatment for nerve damage he sustained as a result of his work-related neck injury. Contrary to Claimant's assertion, the 2018 settlement encompassed the injuries Claimant suffered to his neck and shoulders and specifically included "consideration for future permanent disability." Settlement at 13. It also stated it resolved "all past, present, and future medical issues under the Longshore Act." *Id.* Claimant and his counsel at the time both signed the agreement attesting the settlement amount was adequate. Moreover, any challenge to the adequacy of the settlement was required to be raised within the Section 21(a), 33 U.S.C. §921(a), appeal period. The administrative law judge therefore properly concluded the order approving the settlement is final and may not be overturned on the grounds of inadequacy.

We look next to those challenges which the Section 21(a) statute of limitations may permit based on equitable considerations. Claimant alleges the settlement was obtained through "fraud upon the court." The administrative law judge viewed the facts in the light most favorable to Claimant as the non-moving party and concluded Claimant did not establish that the 2018 settlement was obtained through either fraud or duress. We affirm the administrative law judge's finding.

A finding of "fraud on the court" permits a court to exercise its inherent equitable powers to set aside a final judgment if the court finds "it was the product of one party's deliberately planned and carefully executed scheme that severely undermined the integrity of the judicial process." *Fox ex rel. Fox v. Elk Run Coal Co.*, 739 F.3d 131, 136 (4th Cir. 2014) (quoting *Hazel-Atlas Glass Co. v. Hartford-Empire Co.,* 322 U.S. 238, 245-46 (1944)). The harm in "fraud on the court" is one which "involve[s] far more than an injury to a single litigant" but rather involves "a wrong against the institutions set up to protect and safeguard the public institutions in which fraud cannot complacently be tolerated consistently with the good order of society." *Id.* at 136 (quoting *Hazel-Atlas*, 322 U.S. at 246). Fraud on the court encompasses situations such as "bribery of a judge or juror, or improper influence exerted on the court by an attorney, in which the integrity of the court and its ability to function impartially is directly impinged." *Id.* (quoting *Great Coastal Express, Inc. v. Int'l Brotherhood of Teamsters*, 675 F.2d 1349, 1356 (4th Cir. 1982)). Fraud between parties is not considered fraud on the court, "even if it involves perjury by a party or witness." *Id.* (quoting *In re Genesys Data Technologies, Inc.*, 204 F.3d 124, 130 (4th Cir. 2000)).

Claimant bases his fraud allegation on a letter dated December 22, 2016 his former counsel, Mr. Walsh, sent to Administrative Law Judge Paul Johnson, who presided over the case at that time, which stated the parties had reached a settlement.[2] The letter asked Judge Johnson to remand the case to the district director for approval of the settlement agreement; Judge Johnson remanded the case on January 4, 2017. CX 4. Claimant contends his former counsel and Employers perpetrated fraud on the OALJ by causing the OALJ to deny him a hearing on the merits of his claim when he had not yet agreed to the settlement.[3] Claimant has not submitted evidence to corroborate his allegation that the

[2] Claimant also contends the December 22, 2016 letter does not meet the requirements of 20 C.F.R. §702.242 for a valid settlement application. We reject Claimant's argument as the letter did not constitute the application for a settlement and therefore the provisions of Section 702.242 do not apply.

[3] As noted, *supra*, the parties did not reach agreement on the final settlement until on or after November 2, 2017.

letter sent by his former counsel misrepresented that the parties had reached a settlement at that time; however, even if the letter was a misrepresentation, it would not meet the high bar necessary to establish fraud on the court as the letter did not affect the integrity of the claims process. A letter sent by Claimant's former counsel more than a year prior to Claimant's signing the actual 2018 settlement would not invalidate the agreement. The final settlement terms were reached when Claimant was represented by a different attorney, and the district director ultimately approved those terms based in part on attestations from Claimant and his then-counsel that the settlement was freely entered into, was adequate, and fully resolved his claims. Notably, Claimant has not provided any explanation why he should not be bound by his own signed statement certifying that the settlement was in his best interests and not obtained through fraud or duress. The administrative law judge reasonably concluded Claimant's unsupported allegations do not establish fraud or duress of any kind.

We next address Claimant's challenge to the administrative law judge's Order granting CP & O's motion for a protective order preventing disclosure of the mediation discussions. Claimant asserts the mediation discussions contain evidence of fraud and malpractice by one of his former attorneys.[4] In granting the motion for a protective order, the administrative law judge found Claimant did not present any reason why he should not be bound by the confidentiality agreements he signed. She therefore granted CP & O's motion for a protective order and excluded the mediation discussions from the record. Claimant contends the administrative law judge erred because she did not address the relevance of the evidence of the mediation discussions before excluding them.

We reject Claimant's contention. An administrative law judge has broad discretion concerning the admission of evidence. *See* 33 U.S.C. §923; *Olsen v. Triple A Machine Shops, Inc.,* 25 BRBS 40 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP*, 996 F.2d 1226 (9th Cir. 1993). Any decisions made by the administrative law judge regarding the admission or exclusion of evidence are reversible only if the challenging party shows them to be arbitrary, capricious, or an abuse of discretion. *See, e.g., Patterson v. Omniplex World Services*, 36 BRBS 149 (2003); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999). Moreover, relevance alone is not the sole requirement governing the admission of evidence before an administrative law judge. *See, e.g.*, 29 C.F.R. §18.51 (stating discovery is permitted for "any nonprivileged matter," and stating relevant information need not be admissible if it is not "reasonably calculated to lead to the discovery of *admissible* evidence) (emphasis added); 29 C.F.R. §18.52 (permitting an administrative law judge to issue a protective order prohibiting disclosure of certain materials for good cause); 29 C.F.R. §18.85 (permitting

[4] To the extent Claimant is asserting a malpractice claim, we note neither the OALJ nor the Board is the proper forum for such a claim.

an administrative law judge to limit disclosure of privileged communications or classified matters). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has recognized the importance of confidentiality of settlement discussions as it "allows parties to exchange genuine views." *In re Anonymous*, 283 F.3d 627 (4th Cir. 2001).

Claimant signed the mediation agreement stating "[a]ll statements made during the course of mediation are privileged … non-discoverable and inadmissible for any purpose in any legal proceeding." CX 6. Claimant was represented by counsel when he signed the confidentiality agreement. He also has not provided any explanation or basis for his assertion that the mediation discussions are relevant to his otherwise unsupported allegations of fraud. Claimant has not established the administrative law judge's protective order was either arbitrary or capricious or constituted an abuse of discretion. The administrative law judge reasonably concluded Claimant was bound by the confidentiality agreement which he signed and therefore excluded the mediation discussions from the record. We affirm the administrative law judge's Order granting CP & O's protective motion.

Claimant lastly alleges bias on the part of the administrative law judge in denying him a hearing on the merits, alleging the existence of an "ex parte communication" between Employers' counsel and the administrative law judge of which he was not informed.[5] The Administrative Procedure Act prohibits ex parte communications "relevant to the merits of the proceeding" between any interested party outside the agency and an administrative law judge or any agency employee who "may reasonably be expected to be involved in the decisional process of the proceeding." 5 U.S.C. §557(d)(1)(B); *see also State of North Carolina, Envtl. Policy Inst. v. EPA*, 881 F.2d 1250 (4th Cir. 1989).

We reject Claimant's assertions. Claimant has not provided any evidence to support his claim that an ex parte communication relevant to the merits of his claim occurred nor has he provided any actual support for his allegations of bias on the part of the administrative law judge. Adverse rulings alone are insufficient to show judicial bias. *See Olsen*, 25 BRBS 40. Moreover, Claimant's unsupported allegations alone are insufficient to create a genuine issue of material fact sufficient to defeat the motions for summary decision; without this, Claimant is not entitled to a hearing. *Buck v. Gen. Dynamics Corp./Elec. Boat Div.*, 37 BRBS 53 (2003).

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[5] Claimant alleges the "ex parte communication" was a request made by the administrative law judge for a format change to a document which had been submitted by CP & O.

Claimant has not identified any error committed by the administrative law judge. Accordingly, we affirm the administrative law judge's Decision and Order Granting Employers' Motions for Summary Decision.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge