U.S. Department of Labor

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

BRB No. 20-0432

ROBERT ROLLO

Claimant-Petitioner

v.

SERVICE EMPLOYEES
INTERNATIONAL INCORPORATED

and

INSURANCE COMPANY OF THE STATE
OF PENNSYLVANIA c/o AIG GLOBAL
CLAIMS

Employer/Carrier-
Respondents

DATE ISSUED: 02/17/2021

DECISION and ORDER

Appeal of the Order Granting Employer's Motion for Summary Decision and Denying Claimant's Cross-Motion for Summary Decision of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

Michael A. Rosenhouse (Rosenhouse Law Office), Rochester, New York, for Claimant.

Lawrence P. Postol (Postol Law Firm, P.C.), McLean, Virginia, for Employer/Carrier.

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

PER CURIAM:

Claimant appeals Administrative Law Judge Francine L. Applewhite's Order Granting Employer's Motion for Summary Decision and Denying Claimant's Cross-

Motion for Summary Decision (2018-LDA-00684) rendered on a claim filed pursuant to 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*. (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).

Claimant suffered a "crush injury" to his left foot ("Lisfranc injury") on January 29, 2005, when he dropped a pallet on it during the course of his employment as an ice plant foreman with Employer at Al Assad Air Base in Iraq. He ultimately stopped working in May or June 2005 on the advice of his physician. Claimant has undergone numerous surgeries on his left foot in the United States and the United Kingdom and, allegedly, developed related right foot, back, and neck problems; he has not returned to work. Cl. Br. at 7; Cl. Cross-Motion for Summary Decision (Cross-M/SD) at 2; Settlement at 1, 3, Exh. 3.

Employer voluntarily paid Claimant temporary total disability benefits beginning on June 5, 2005. Settlement at 3. On September 6, 2013, the parties participated in mediation and reached an agreement. Order at 2. Claimant signed the agreement on October 9, 2013; Employer's representative signed it on October 22, 2013. Employer continued to pay Claimant benefits until November 17, 2013, after the district director approved the parties' Section 8(i), 33 U.S.C. §908(i), settlement.[1] Notice of Final Payment (Nov. 19, 2013).

The detailed agreement provided the following: 1) Employer paid $12,701.07 for a mobility chair; 2) in 2011, Employer paid $1,387.03 for medical care; 3) Employer paid approximately $49,000 for two surgeries in the U.S.; 4) Claimant will receive: a) a $250,000 lump sum for future permanent disability compensation; b) $24,340 annually,

[1] The district director approved the settlement on November 15, 2013, but issued an amended approval order on November 21, 2013, due to an error in the initial order. Orig. Comp. Order (Nov. 15, 2013); Amended Comp. Order (Nov. 21, 2013); Letter dated Nov. 18, 2013. Employer paid Claimant benefits based on a maximum compensation rate of $1,047.16, for over 440 weeks, for a total pre-settlement payment of $497,255.36. Notice of Final Payment (Nov. 19, 2013); Settlement at 3. Additionally, Claimant is a citizen of Scotland who lives outside Edinburgh. He applied for, and receives, a United Kingdom government Personal Independence Payment (formerly Disability Living Allowance), and he is entitled to free medical care. *See* Settlement at 1, Exh. 4 at 8; Cl. Cross-M/SD at 2.

guaranteed for 25 years (October 2014 to October 2038);[2] and c) a $50,000 lump sum payment for home modifications; and 5) Claimant's then-counsel, George Escobedo, will receive $35,000 as a fee. This results in a settlement for $708,500 ($250,000 + $458,500) in disability benefits and $200,000 ($150,000 "set aside" + $50,000 renovations) for medical-related costs, in addition to the $497,255.36 Claimant received prior to the settlement. Settlement at 5-7. The settlement further stated Claimant "carefully considered" and fully understood the settlement, certified it was not procured by fraud or duress and was in his best interests, acknowledged it is not subject to modification, and gave it his "express approval[.]" Settlement at 6, 8. No party appealed the order approving this settlement, and the administrative law judge found it became final on December 22, 2013. Order at 6.

In 2016, Claimant retained new counsel and, in 2017, he filed a Petition to Set Aside the compensation order approving the settlement. Order at 4; Emp. Br. at 15. Claimant challenged many aspects of the settlement, asserted it was procured by fraud or duress and was inadequate, and sought to set it aside.[3] He asked instead to be awarded compensation and medical benefits for permanent total disability based on the "indisputable" evidence supporting such award.

The Office of Workers' Compensation Programs (OWCP) denied Claimant's request, informing counsel on multiple occasions that the settlement was final and fully discharged Employer's liability. Claimant appealed the denials to the Board, and on March 27, 2018, the Board dismissed Claimant's appeal.[4] The case was then referred to the Office of Administrative Law Judges (OALJ).

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[2] Of this 25-year payout totaling $608,500, $150,000 is to be set aside for medical care. Settlement at 5.

[3] For example, Claimant asserted the documents attached to the settlement were misleading and fraudulent and did not demonstrate any disputes between the parties or explain how the settlement was adequate. He also asserted the settlement lacked a current medical evaluation and was signed under duress.

[4] The Board concluded the district director's letter denying the petition to set aside the 2013 settlement, dated April 11, 2017, was not a final and appealable "decision" or "order." The Board took no position on Claimant's challenges to the settlement but noted the district director does not have the authority to address the disputed factual issues Claimant raised. *Rollo v. Service Employees Int'l, Inc.*, BRB No. 17-0353 (Mar. 27, 2018).

Employer filed a Motion for Summary Decision (M/SD) on November 9, 2018, with the OALJ, contending the settlement is final and there is no basis to challenge or re-open it. Claimant filed a combined opposition and cross-motion for summary decision, challenging the agreement on grounds of duress, fraud, and inadequacy, asserting there is no time bar to making his challenges, and requesting an award of permanent total disability benefits. Employer's opposition, Claimant's reply, and Employer's sur-reply followed.

The administrative law judge addressed each of Claimant's complaints, rejecting his arguments of economic duress, fraud, general duress, inadequacy, and fraud on the court.[5] Order at 6-8. She concluded "there is no ability to set aside the settlement agreement" which became final on December 22, 2013. *Id.* at 5-6 (citing *Diggles v. Bethlehem Steel Corp.*, 32 BRBS 79 (1998)). Alternatively, the administrative law judge found Claimant's claim must be dismissed for lack of subject matter jurisdiction, as she has no authority to re-open the case. *Id.* at 8. She granted Employer's motion, denied Claimant's cross-motion, and dismissed Claimant's petition to set aside the settlement. *Id.* Claimant appeals the decision, and Employer responds, urging affirmance. Claimant has filed a reply brief.

Claimant contends the administrative law judge erred in granting Employer's motion. In short, he asserts the 2013 settlement was procured by fraud, signed under duress, and was inadequate, and it should be set aside and he should be awarded permanent total disability benefits. Claimant asserts the administrative law judge committed the following errors: 1) holding there was no fraud against the court under the Federal Rules of Civil Procedure, Fed. R. Civ. P. (FRCP) 60(d)(3), merely because Claimant was represented by counsel; 2) finding Claimant was "guilty of unreasonable delay;" 3) holding Claimant was not under economic duress at the time he signed the settlement agreement; 4) alternatively holding she lacked subject matter jurisdiction; and 5) not awarding Claimant permanent total disability benefits.[6]

In ruling on a party's motion for summary decision, the administrative law judge must determine, after viewing the evidence in the light most favorable to the non-moving

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[5] The administrative law judge addressed Employer's motion, viewing the evidence in the light most favorable to Claimant. She did not directly address Claimant's cross-motion for summary decision. Order at 4, 7.

[6] Claimant also filed a breach of fiduciary duty and malpractice claim against his former attorney. *Rollo v. Escobedo, et al.*, No. SA-17-CA-645 (W.D.Tex.). The claim is purportedly on hold pending completion of the administrative proceedings in this case. Cl. Br. at 4.

party, 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); *see also O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55 (2d Cir. 2002); *Brockington v. Certified Elec., Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *R.V. [Villaverde] v. J. D'Annunzio & Sons*, 42 BRBS 63 (2008), *aff'd sub nom. Villaverde v. Director, OWCP*, 335 F. App'x 79 (2d Cir. 2009); *Buck v. General Dynamics Corp.*, 37 BRBS 53 (2003); *Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1 (1990); 29 C.F.R. §18.72. To defeat a motion for summary decision, the non-moving party must "come forward with specific facts" to show "there is a genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd., v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). If the administrative law judge *could* find for the non-moving party, or if it is necessary to weigh evidence or make credibility determinations on the issue presented, summary decision is inappropriate. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248 (1986); *Walker v. Todd Pac. Shipyards*, 47 BRBS 11 (2013), *vacating in pert. part on recon.*, 46 BRBS 57 (2012).

Section 8(i) of the Act, 33 U.S.C. §908(i), governs settlements of claims. A settlement agreement must be approved within 30 days of its submission unless it is inadequate, procured by duress, or not in conformance with the regulatory criteria. *See Losacano v. Electric Boat Corp.*, 48 BRBS 49 (2014); *Richardson v. Huntington Ingalls, Inc.*, 48 BRBS 23 (2014); *McPherson v. National Steel & Shipbuilding Co.*, 26 BRBS 71 (1992), *aff'g on recon. en banc,* 24 BRBS 224 (1991); 20 C.F.R. §§702.241-702.243. Once approved, the effect of the settlement is to completely discharge the employer's liability for the claimant's injury. 33 U.S.C. §908(i)(3); *Diggles*, 32 BRBS 79; 20 C.F.R. §702.243(b). Additionally, once a settlement is approved and the time for appeal to the Benefits Review Board has expired, it is binding on the parties and not subject to rescission. *Diggles*, 32 BRBS 79; *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*, 196 F.3d 484 (9th Cir.) (table), *cert. denied*, 528 U.S. 1052 (1999). Settlements also are not subject to Section 22, 33 U.S.C. §922, modification. The Board, however, has stated there may be a possibility of re-opening a settlement as a matter of equity if a party establishes it was fraudulently secured. *Downs v. Texas Star Shipping Co., Inc.*, 18 BRBS 37 (1986), *aff'd sub nom. Downs v. Director, OWCP*, 803 F.2d 193, 19 BRBS 36(CRT) (5th Cir. 1986).

In this case, the administrative law judge addressed each of Claimant's arguments, viewing the facts in the light most favorable to Claimant, and determined the settlement was final and Claimant had not identified any reason to dispute its validity. We affirm.

There is no question the settlement in this case became final 30 days after the district director approved it and no party appealed. Consequently, it may not be modified or unilaterally rescinded. *Losacano*, 48 BRBS 49; *Porter*, 31 BRBS 112. Claimant's attempts to revisit the settlement with assertions about the lack of a true dispute at the time of the settlement and the lack of a "recent" medical report attached to the settlement application go to the validity of the settlement agreement, and once a settlement becomes final, allegations pertaining to the deficiency of the documentation underlying the settlement are not a basis to reopen the final settlement. *Diggles*, 32 BRBS 79. Similarly, Claimant's assertions of inadequacy and duress should have been made within the Section 21(a), 33 U.S.C. §921(a), appeal period, as they also go to the validity of the agreement. *Id.* The administrative law judge properly found the order approving the settlement is final.

We look next to those challenges which the Section 21(a) statute of limitations, potentially, do not bar, as they are based on equitable considerations.

Fraudulent Inducement

To the extent a claim relying on *Downs* is not time-barred, the administrative law judge considered all the relevant evidence in the light most favorable to Claimant and found nothing indicated the settlement was obtained by fraud. Order at 7-8. The elements of fraudulent inducement are generally equivalent to the elements of proper fraud. *See, e.g., Wall v. CSX Transp., Inc.*, 471 F.3d 410, 415-416 (2d Cir. 2006) (listing the elements of fraudulent inducement as: 1) a material false representation collateral to a contract; 2) known by the defendant to be false; 3) reasonable reliance by the plaintiff inducing his entry into the contract; and 4) injury); *Mandarin Trading Ltd. V. Wildenstein*, 944 N.E. 2d 1104, 1008 (N.Y. 2011) (listing the elements of fraudulent representation as: 1) misrepresentation or material omission known by the defendant to be false; 2) made for the purpose of inducing the plaintiff's reliance; 3) justifiable reliance by the plaintiff; and 4) injury).[7]

The facts support the administrative law judge's conclusion that Claimant's allegations do not establish these elements. Though he signed the agreement, Claimant now claims he had concerns about the settlement prior to signing it, but he decided to sign it and challenge it "at a later time." Emp. M/SD Exh. 5 at 236 (stating he had decided to

[7] While the Board has held it will not reopen a settlement based on general allegations of inadequacy, it has left open the question of whether it has the equitable power to reopen a settlement in cases of fraud or duress. *See Rochester v. George Washington Univ.*, 30 BRBS 233, 236 n.3 (1997) (refusing to reopen settlement, noting that because, like *Downs*, there were no allegations of fraud or misrepresentation, "[e]quitable concerns [did] not come into play.") Whether or not the Board has the equitable power to reopen in such circumstances does not affect the resolution of this case, however, because, even assuming we have such authority, Claimant cannot establish fraud or duress.

sign and then challenge it). Nevertheless, he did not act for years after signing the agreement, despite his alleged concerns. And if he knew the settlement was inadequate and/or based on a falsehood at the time he signed, and chose to sign anyway, it necessarily undermines any subsequent allegation that Employer induced him with a lie, or that he justifiably relied on a lie in determining the settlement was acceptable. Moreover, Claimant was represented by counsel when he signed the agreement, he certified there was no fraud, and he declared the settlement was in his best interests. None of those original certifications are demonstrably false on their face, and they completely belie his current allegations. The administrative law judge thus reasonably determined Claimant's unsupported subsequent allegations denying his original certifications cannot establish fraudulent inducement. *See Richardson*, 48 BRBS 23; *Lambert v. Atlantic & Gulf Stevedores*, 17 BRBS 68 (1985).

Economic Duress

Claimant alleges he signed the settlement agreement under economic duress, as he was threatened with the cessation of benefits, and the administrative law judge erred in not so finding. He asserts this amounted to Employer's coercing him into signing by taking advantage of his economic situation. Cl. Br. at 26 (citing *Rubin v. Laser*, 703 N.E.2d 453, 459 (Ill. App. 1998)). Claimant submitted emails to support his assertion.[8]

To the extent an "economic duress" challenge differs from a general "duress" challenge, which must be made within the Section 21(a) appeal period, we reject Claimant's contention. "Economic duress occurs where 'undue or unjust advantage has been taken of a person's economic necessity or distress to coerce him into making [an] agreement.' These circumstances must be sufficiently extreme to overbear the will of the plaintiff." *Rubin*, 703 N.E.2d at 459 (internal citations omitted); *see also Davis & Assocs., Inc. v. Health Mgmt. Servs., Inc.*, 168 F. Supp. 2d 109, 114 (S.D.N.Y. 2001). A party trying to prove economic duress bears a heavy burden and must do so promptly, as the "burden necessarily increases proportionately with the delay[.]" *Int'l Halliwell Mines, Ltd. v. Cont'l Copper & Steel Ind., Inc.*, 544 F.2d 105, 108 (2d Cir. 1976).

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[8] In an email dated September 17, 2013, Mr. Escobedo informed Claimant that Employer would dispute his claim and, therefore, cease payments if Claimant did not sign what Mr. Escobedo declared was the "largest settlement" he had ever negotiated. Mr. Escobedo advised Claimant "this is probably the best settlement you'll get from the Carrier . . . can it be better? Of course, but we'll be going into unchartered territory and I think more risk for you." The risk of loss or lower recovery on the merits is frequently a basis for a claimant's decision to settle a claim. *See Richardson v. Huntington Ingalls, Inc.*, 48 BRBS 23 (2014).

The administrative law judge found Claimant did not make any "deprivations of free will" allegations. She also relied on Claimant's certification that the settlement was not procured under duress, he was represented by an attorney of his choice, and he was in his own home when he signed it. She also found he did not seek "prompt redress" for any alleged wrongdoing. Order at 7. The facts are as the administrative law judge found: Claimant admitted he signed the settlement agreement in his own home and was not under physical or emotional duress. Emp. M/SD Exh. 5 at 133, 237. Additionally, Employer paid Claimant benefits continuously until the settlement was approved, at which time it paid the lump sum payment and, thereafter, made annual payments. We also note Claimant's deposition testimony where he acknowledged he had additional sources of money to sustain him during a trial if Employer had ceased paying benefits during any adjudication. Emp. M/SD Exh. 5 at 133, 237. Therefore, the administrative law judge rationally determined Claimant has not shown he was under "economic duress" at the time he signed the settlement agreement. *See Halliwell Mines*, 544 F.2d at 108; *Rubin*, 703 N.E.2d at 459.

FRCP 60(b)

Rule 60(b) permits a party to seek relief from a judgment or order based on "fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party." FRCP 60(b)(3); *see* 29 C.F.R. §18.10(a) (FRCP "apply in any situation not provided for or controlled by these rules, or a governing statute, [or] regulation"). Motions made under Rule 60(b)(3), however, must be made "no more than a year after the entry of the judgment or order or the date of the proceeding." FRCP 60(c)(1). Claimant filed his motion to set aside the settlement in February 2017 – over three years after the district director filed his approval order in November 2013. As Claimant failed to meet the one-year deadline, the administrative law judge properly held Rule 60(b)(3) does not apply. Order at 6; FRCP 60(c)(1). Regardless, Claimant cannot establish fraud, as set forth above.

FRCP 60(d)

FRCP 60(d) gives courts authority to "set aside a judgment for fraud on the court." FRCP 60(d)(3). This "inherent power . . . allows a federal court to vacate its own judgment upon proof that a fraud has been perpetrated upon the court." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991). The Rule 60(c) time limitations do not apply to a "fraud on the court" claim. *United States v. Sierra Pac. Indus.*, 100 F. Supp. 3d 948, 954 (E.D. Cal. 2015), *aff'd sub nom. United States v. Sierra Pac. Indus., Inc.*, 862 F.3d 1157 (9th Cir. 2017); FRCP 60(c), (d)(3).

Claimant contends Employer, in conjunction with his former attorney, perpetrated fraud on the OWCP and caused the district director to approve a fraudulent settlement, and the administrative law judge erred finding otherwise.[9] With respect to Rule 60(d)(3), the administrative law judge stated:

> Rule 60(d)(3) allows the Court to set aside a judgment for 'fraud on the court' and this sub-section is not limited by a year time period. 'Fraud on the court' must be so subversive as to involve 'an intentional plot to deceive the judiciary' and 'touch on the public interest.' (*Fox ex rel. Fox v. Elk Run Coal Co.*, 739 F.3d 131, 136 (4th Cir. 2014)). This claim, based on a settlement agreement at the [OWCP] level, where the Claimant was represented by counsel, does not involve a fraud on the court.

Order at 6. We agree: Claimant cannot prevail on a "fraud on the court" claim based on this record.

"Fraud on the court is not your 'garden-variety fraud.'" *Fox ex rel. Fox v. Elk Run Coal Co.*, 739 F.3d 131, 135 (4th Cir. 2014) (quoting *George P. Reintjes Co. v. Riley Stoker Corp.*, 71 F.3d 44, 48 (1st Cir.1995)). There must be intent to deceive the court, and the ramifications often go beyond affecting just the individual litigants. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246 (1944), *overruled on other grounds by Standard Oil Co. v. United States*, 429 U.S. 17 (1976). A "fraud on the court" finding is "typically confined to the most egregious cases [where there is] bribery of a judge or juror, or improper influence exerted on the court," and may involve a "deliberately planned and carefully executed scheme to defraud" the court. *Hazel-Atlas*, 322 U.S. at 245; *Great Coastal Exp., Inc. v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 675 F.2d 1349, 1356 (4th Cir. 1982). Proving such fraud requires meeting a high but narrow bar. *Fox*, 739 F.3d at 136; *Great Coastal*, 675 F.2d at 1356. The relevant inquiry is whether there has been a harm to the integrity of the judicial process. *Sierra Pac. Indus.*, 100 F. Supp. 3d at 955-956.

Because the inquiry for "fraud on the court" involves whether there was a scheme against the court of such severity to "subver[t] the legal process," and this case involved a settlement between parties who were represented by counsel, "the integrity of the court and its ability to function impartially" has not been "directly impinged." *Fox*, 739 F.3d at 136.

[9] Claimant is incorrect in asserting the administrative law judge did not consider the relevant evidence. She stated she did so in her discussion under "fraudulent inducement." Order at 7.

Claimant's allegations ignore the fact that this is an adversarial process, and the parties elected to resolve their disputes without formal adjudication.[10]

The crux of Claimant's argument – that his counsel and Employer misled the district director into believing Claimant injured only his left foot and could perform sedentary work – is belied by the settlement agreement's explicit acknowledgement of the parties' dispute over whether he also injured other body parts and was totally disabled. *See* Settlement at 2, 5 (¶¶ 4, 23, 24). The parties stated they reached an acceptable agreement to resolve their dispute without a formal hearing, and the district director approved it, reasonably relying on their assertions in the settlement agreement, including Claimant's certification that it was not procured by fraud or duress and was in his best interests. *Richardson*, 48 BRBS 23. Claimant's assertion-in-hindsight, that the district director would not have approved the settlement but for the alleged fraudulent "misrepresentations" or misinterpretations by counsel and Employer, is insufficient to meet the heavy burden necessary to prove a "fraud on the court" violation.[11] *See Fox*, 739 F.3d at 138.

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[10] Contrary to Claimant's assertion, even if he was successful in invalidating the settlement, he would not be *entitled* to permanent total disability benefits. That matter was not adjudicated and is clearly disputed by Employer.

[11] Even non-disclosure and perjury have been found *not* to rise to the level of fraud on the court. *Sierra Pac. Indus.*, 100 F. Supp. 3d at 955-956.

Consequently, we affirm the administrative law judge's Order Granting Employer's Motion for Summary Decision and Denying Claimant's Cross-Motion for Summary Decision.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge