



BRB No. 20-0167

JELANI A. GARRETT)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DYNCORP INTERNATIONAL)	
)	
and)	
)	
ALLIED WORLD ASSURANCE)	DATE ISSUED: 06/30/2021
COMPANY)	
)	
Employer/Carrier-)	
Respondent)	
)	
INSURANCE COMPANY OF THE STATE)	
OF PENNSYLVANIA (AIG))	
)	
Carrier/Respondent)	ORDER on
)	RECONSIDERATION

Claimant, who is without representation by an attorney, has filed a timely motion for reconsideration of the Benefits Review Board’s decision in this case, *Garrett v. Dyncorp Int’l*, BRB No. 20-0167 (Apr. 26, 2021) (Jones, J., dissenting in part). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407 Claimant moves for reconsideration of the Board’s affirmance of the administrative law judge’s findings that his spinal conditions are not work-related and the denial of travel expenses from his residence in Austin, Texas, to Denver, Colorado, for pulmonary treatment. *Garrett*, slip op. at 6-10, 16-17. Neither Employer/Allied nor Employer/AIG has responded to Claimant’s motion.

Claimant avers the Board erred in affirming the administrative law judge’s finding that the evidence addressing the cause of his spinal conditions is in equipoise and therefore Claimant did not meet his burden of proving a work-related back injury. Claimant contends

there is no evidence he had any spinal conditions before beginning work in Afghanistan in January 2005; therefore, the administrative law judge erred in giving weight to Dr. William Nemeth's opinion that his spinal conditions are degenerative or congenital and that his neck and back complaints are related to pre-existing spondylosis and scoliosis because his opinion has no medical foundation. Claimant also contends the administrative law judge erred by not mentioning his spondylolysis in his Preliminary Findings and the Board erred by not including this condition in its footnote note listing some of Claimant's spinal conditions.¹

In his decision, the administrative law judge determined Dr. Nemeth's opinion offsets the contrary opinions of Drs. John Kim and Louis Seade and that the evidence regarding the work-relatedness of Claimant's back conditions is in equipoise. Dr. Kim and Dr. Seade opined Claimant's spinal conditions were caused or aggravated by his work in Afghanistan. Dr. Nemeth examined Claimant on June 28, 2016, and was deposed by the parties' representatives on July 25, 2018. He stated he reviewed the May 11, 2009 report of Dr. Ali Al-Hameed who stated that a back MRI showed only mild scoliosis with back stiffness, which required no active treatment.² SCX 1 at 9; AWACX 3 at 2. A February 2006 lumbar MRI was interpreted as showing mild spondylosis with minimal disc herniation. SCX 1 at 1. Dr. Nemeth opined at his deposition that Claimant's spondylolysis is a congenital condition that existed before his employment overseas because spondylolysis is congenital 95 percent of the time. Nemeth dep. at 14-15. He defined spondylosis as a degenerative disc disease, spondylolysis as a lesion of the disc connection between the front and the back part of the spine at one level, and spondylolisthesis as slippage related to spondylolysis. *Id.* at 10. He explained that, while spondylosis can be traumatic in origin, Claimant's spondylosis and progression to spondylolysis and spondylolisthesis are congenital as Claimant also has congenital scoliosis. *Id.* at 9-10. Dr. Nemeth diagnosed degenerative disc disease from C-3 to C-7 and from L-4 to S-1, spondylolysis with spondylolisthesis at L5-S1, and thoracolumbar scoliosis. *Id.* at 11. He unequivocally opined these conditions are "either degenerative or congenital abnormalities and had absolutely nothing to do with workplace activity." *Id.*

As stated in the Board's decision addressing the administrative law judge's finding that Claimant did not establish his spinal conditions are related to his employment, we may not reweigh the evidence but may assess only whether substantial evidence supports the

¹ Claimant notes his previous attorney also did not mention spondylolysis in his Post-Hearing Brief. *See* Cl. Post-Hearing Br. at 21-22, 25-26; *Garrett*, slip op. at 9 n. 11.

² Dr. Nemeth's report also states that he reviewed Claimant's cervical, thoracic and lumbar MRI reports from 2015. AWACX 3 at 2; *see* SCX 1 at 40-42, 49-52.

administrative law judge's decision. *Garrett*, slip op. at 10. The administrative law judge permissibly found Dr. Nemeth's opinion indicates Claimant had an underlying degenerative condition, even if it was not previously diagnosed, and that all of Claimant's back problems are due to this condition. He also permissibly found the medical evidence on the issue of the work-relatedness of Claimant's back conditions, pro and con, is evenly balanced and, therefore, Claimant failed to establish by a preponderance of the evidence that his back conditions are work-related. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994); *Garrett*, slip op. at 9 & n.12. Claimant has not established error in this conclusion and we deny his motion for reconsideration on this point.³

Claimant also avers the Board erred in affirming the denial of reimbursement for \$10,810.80 of travel expenses incurred to obtain treatment for his deployment-related pulmonary condition at National Jewish Hospital in Denver. Claimant notes Dr. Freddie Morales stated in his July 2016 and October 2017 reports that treatment in Denver would be reasonable and necessary, and contends the administrative law judge did not properly evaluate this opinion.⁴ AWACX 4 at 7-8; 8 at 6-7. Alternatively, Claimant contends he should be reimbursed for travel expenses incurred prior to the date of Dr. Morales July 25, 2018 deposition when he opined that Claimant's receiving treatment at National Jewish Hospital in Denver was not medically necessary.

The Board affirmed as supported by substantial evidence the administrative law judge's denial of the requested travel expenses based on Dr. Morales's statement that Claimant "volunteered" to receive treatment at National Jewish Hospital and that doing so

³ Any error in not separately listing spondylolysis (as differentiated from spondylosis) among Claimant's cervical, thoracic and lumbar conditions is harmless, and we reject Claimant's unsupported assertion that the administrative law judge deliberately concealed this as a material fact. There also is no evidence the administrative law judge exhibited bias. *See generally Orange v. Island Creek Coal Co.*, 786 F.2d 724 (6th Cir. 1986); *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); *Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988).

⁴ Using identical language in these reports, Dr. Morales stated, "[T]he claimant should receive specialized treatment by a pulmonary physicians (sic) familiarized with deployment related lung disease, which are few in the nation." AWACX 4 at 8; 8 at 7. The administrative law judge acknowledged this statement. Final Decision and Order at 6. Dr. Morales also answered in the affirmative that the treatment Claimant received in Denver was reasonable and necessary. AWACX 4 at 7; 8 at 6.

was not medically necessary.⁵ *Garrett*, slip op. at 15-16 (citing Morales July 25, 2018 Dep. at 10; AWACX 8). We decline to reverse that holding as it accords with law. *Id.* To the extent Dr. Morales changed his opinion as to the necessity of Claimant's traveling to Denver for treatment, the administrative law judge permissibly relied on his later statement that traveling to Denver for treatment was not medically necessary.

Accordingly, we deny Claimant's motion for reconsideration. 20 C.F.R. §§801.301(c), 802.409.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

⁵ The administrative law judge awarded medical expenses for treatment at National Jewish Hospital. Final Decision and Order at 7.