U.S. Department of Labor

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

BRB No. 20-0066

BRIAN V. WARCH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 03/23/2020
CERES MARINE TERMINALS, INCORPORATED	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Theodore W. Annos, Administrative Law Judge, United States Department of Labor.

Bruce B. Eisenstein (Law Offices of Bruce B. Eisenstein), Baltimore, Maryland, for claimant.

Lawrence P. Postol (Postol Law Firm, P.C.), McLean, Virginia, for self-insured employer.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2018-LHC-00635) of Administrative Law Judge Theodore W. Annos 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 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).

On December 6, 2016, claimant injured his right knee while unlashing cars from a ship. Tr. at 15-16. Dr. Franchetti diagnosed a work-related bucket handle tear of the medial meniscus with traumatic synovitis and recommended claimant undergo arthroscopy. CX 7. Claimant also was evaluated by Dr. Pollak, who agreed claimant suffered a medial meniscus tear as a result of the workplace accident and concurred with the surgical recommendation. CX 8.

Dr. Franchetti performed arthroscopic surgery on claimant's right knee on March 1, 2017. CX 4. After the surgery, claimant had physical therapy for a number of months. On August 10, 2017, claimant was examined by employer's expert, Dr. Cohen, who opined claimant could return to work without restrictions and stated claimant's ongoing complaints were primarily due to pre-existing osteoarthritis and not the work injury. EX 18. Claimant returned to work on August 31, 2017. Claimant testified he cannot climb ladders, squat, or kneel, and also has difficulty climbing stairs. Tr. at 26. He stated he can work a full 10 to 15 hour shift only about three days a week and is limited to light work. *Id.* at 28, 31.

Claimant sought permanent partial disability benefits for a 40 percent impairment to his right knee based on Dr. Franchetti's opinion, while employer alleged claimant suffered only a two percent impairment based on the opinions of Drs. Pushkin and Brigham.[1] Employer sought to introduce into the record a 2012 disciplinary consent order issued against Dr. Franchetti by the Maryland State Board of Physicians. The administrative law judge noted he is not bound by common law or statutory rules of evidence and admitted the consent order into evidence because he found it relevant to the issues in the case. Decision and Order at 4-5.

Dr. Franchetti opined claimant has a 40 percent leg impairment under the Fourth Edition of the American Medical Association *Guides to the Evaluation of Permanent Impairment* (1995) (AMA *Guides*). The administrative law judge gave Dr. Franchetti's opinion little weight because he found it poorly reasoned and inconsistent with the objective medical findings and claimant's reported activities and abilities. Decision and Order at 15-16. He gave greater weight to the opinions of Drs. Pushkin and Brigham, who each assigned claimant a two percent impairment rating to his right knee under the Sixth Edition of the AMA *Guides* (2007).[2] Decision and Order at 17. He concluded their ratings

[1] The parties agreed claimant was totally disabled from December 7, 2016 to August 15, 2017. Decision and Order at 5-6. They also agreed he has a permanent impairment to his right lower extremity; however, they differed as to the percentage of disability.

[2] Dr. Pushkin examined claimant on behalf of employer on December 12, 2017. Employer had Dr. Brigham perform a records review of all medical documents admitted

are consistent with the objective medical findings. He noted, however, they failed to account for claimant's pre-existing arthritis, which, he found, contributed to a greater disability than that caused by his work injury alone. Under the aggravation rule, he added three percentage points for claimant's arthritis, resulting in a total permanent impairment of five percent. 33 U.S.C. §908(c)(2).

Claimant appeals the administrative law judge's decision. Employer filed a response brief, urging affirmance.

Claimant first contends the administrative law judge erred by admitting the consent order into the record, citing Md. Code Ann. Health Occ. §14-410, and a Fourth Circuit case, *Certain Underwriters at Lloyd's, London v. Cohen*, 785 F.3d 886 (4th Cir. 2015). Maryland's statute states that orders of the Board of Physicians are not admissible in civil or criminal actions except by consent. Md. Code §14-410; *see Cohen*, 785 F.3d at 894.[3] The administrative law judge found the Maryland statute is not binding because it is a state statutory rule of evidence which is not applicable in this federal administrative proceeding. Decision and Order at 4-5. He concluded the consent order was relevant to matters at issue in the case and therefore admitted it into evidence. *Id.* at 5.

We reject claimant's contention as the administrative law judge correctly concluded he is not bound by the Maryland statute. Pursuant to Section 23(a) of the Act, an administrative law judge is not bound by common law or statutory rules of evidence. 33 U.S.C. §923(a); *see also* 33 U.S.C. §919(d); 20 C.F.R. §702.339. The regulation at 20 C.F.R. §702.338 states in relevant part, "The administrative law judge shall inquire fully into the matters at issue and shall receive in evidence the testimony of witnesses and any documents which are relevant and material to such matters." *See also* 29 C.F.R. §18.402. Thus, an administrative law judge is afforded wide discretion in admitting evidence into the record. *See, e.g., Collins v. Electric Boat Corp*., 45 BRBS 79 (2011). Any decision regarding the admission or exclusion of evidence is reversible only if shown to be arbitrary, capricious, or based on an abuse of discretion. *Patterson v. Omniplex World Services*, 36 BRBS 149 (2003). The administrative law judge permissibly found the consent order relevant to the issues in this case and acted within his discretion in admitting it into

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in the case, including the assessments by Drs. Franchetti and Pushkin. He issued a report dated January 29, 2018.

[3] *Cohen* was a civil diversity action applying Maryland state law to the rescission of disability insurance policies and as such is not controlling.

evidence. *Collins*, 45 BRBS at 82; 20 C.F.R. §702.338. We therefore affirm the administrative law judge's admission of the consent order into evidence.

Claimant also assigns error to the administrative law judge's conclusion that he has only a five percent impairment of his right knee. He contends the administrative law judge should have accepted Dr. Franchetti's opinion over those of Drs. Pushkin and Brigham.

Awards under the schedule, the exclusive remedy for permanent partial disability for parts of the body enumerated therein, are based on medical ratings of the degree of permanent physical impairment. 33 U.S.C. §908(c)(2); *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980); *Gilchrist v. Newport News Shipbuilding & Dry Dock Co.*, 135 F.3d 915, 32 BRBS 15(CRT) (4th Cir. 1998). An administrative law judge is not bound by any particular standard or formula in arriving at an impairment rating in cases involving orthopedic injuries and may base his determination on credible medical opinions and observations as well as on the claimant's symptoms and physical effects of his injury. *White v. Newport News Shipbuilding & Dry Dock Co*., 633 F.2d 1070, 12 BRBS 598 (4th Cir. 1980); *Cotton v. Army & Air Force Exch. Services*, 34 BRBS 88 (2000); *Pimpinella v. Universal Maritime Services, Inc*., 27 BRBS 154 (1993). The administrative law judge may rely on medical opinions that rate a claimant's impairment under the AMA *Guides*' criteria, as it is a standard medical reference. *See Pisaturo v. Logistec, Inc.*, 49 BRBS 77 (2015); *Brown v. National Steel & Shipbuilding Co.*, 34 BRBS 195 (2001).

The administrative law judge determined Dr. Franchetti's 40 percent rating is entitled to little weight because it is poorly reasoned and inconsistent with objective medical findings and claimant's reported abilities.[4] Decision and Order at 15. He also permissibly concluded that Dr. Franchetti's reliance on the Fourth Edition of the AMA

[4] Dr. Franchetti's opinion of a 40 percent impairment is comprised of: 13 percent thigh atrophy; 2 percent post-meniscectomy; and 25 percent "persistent pain, objective clinical weakness, loss of endurance and loss of function." CX 1. The administrative law judge noted claimant's most recent X-rays showed "minimal irregularity on the underside of the patella," and other physical examinations showed claimant had no clinical instability, no pain or instability with varus or valgus stress, and slightly reduced to good range of motion. *See* Decision and Order at 15-16. He found Dr. Franchetti's assessment relied too heavily on the July 2017 functional capacity evaluation of Physical Therapist Robert Buhr, which limited claimant's ability to work primarily due to an unrelated shoulder condition. CX 6. The administrative law judge also emphasized Dr. Franchetti's impairment rating is inconsistent with claimant's testimony that he is able to be on his feet for most of the workday and can stand for four hours without a break. Decision and Order at 16.

Guides made his opinion less persuasive because Dr. Franchetti did not explain why use of this edition is more appropriate than more recent editions.[5] *Id.* at 16. The administrative law judge gave greater weight to the two percent impairment ratings assigned by Drs. Pushkin and Brigham, finding them consistent with objective findings and claimant's reported activities and abilities.[6] He also noted they applied the methodology of the Sixth Edition of the AMA *Guides* in a proper manner.[7] *Id*. at 17.

We affirm the administrative law judge's award for a five percent permanent leg impairment. The administrative law judge acted within his discretion in rejecting Dr. Franchetti's opinion. *See, e.g., Newport News Shipbuilding & Dry Dock Co. v. Cherry*, 326 F.3d 449, 37 BRBS 6(CRT) (4th Cir. 2003) (administrative law judge entitled to weigh the medical evidence). He permissibly concluded Dr. Franchetti's opinion is entitled to little weight because it is inconsistent with objective test results and claimant's own description of his abilities, and Dr. Franchetti did not explain his reliance on an older medical reference as opposed to the more recent updated versions. The administrative law judge permissibly accepted the opinions of Drs. Pushkin and Brigham because they are consistent with objective medical findings and, thus, better reasoned. *White*, 633 F.2d at 1074, 12 BRBS at 606-607. Claimant asks the Board to reweigh the evidence, which we are not permitted to do. *See Pittman Mech. Contractors, Inc. v. Director, OWCP [Simonds]*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994). As it is rational, supported

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[5] The administrative law judge specifically stated he was not discrediting Dr. Franchetti's opinions "outright" on the basis of the disciplinary order and did not thereafter identify the order as a basis for affording any diminished weight to the physician's opinion. *See* Decision and Order at 5, 16 n.57. Thus, any error in admitting the order would be harmless because the administrative law judge did not rely on that order in giving Dr. Franchetti's opinion little weight. *See* Decision and Order at 4, 15-16.

[6] The administrative law judge found Dr. Pushkin's opinion is consistent with his findings that claimant's examination revealed tenderness, but no effusion or pivot shift, and only slightly reduced range of motion. *See* Decision and Order at 11.

[7] As noted, however, the administrative law judge properly compensated claimant's pre-existing arthritis under the aggravation rule. He did so by adding three percentage points to the impairment calculated by Drs. Pushkin and Brigham. Decision and Order at 18-19. He permissibly reached this determination by comparing claimant's "mild" arthritis to the impairment ratings in the Sixth Edition of the AMA *Guides*, which he "used as a reference and not as an authoritative standard or formula." *Id*. Claimant has not identified error in this conclusion. *See White v. Newport News Shipbuilding & Dry Dock Co.*, 633 F.2d 1070, 1074, 12 BRBS 598, 606-607 (4th Cir. 1980).

by substantial evidence, and in accordance with the law, we affirm the administrative law judge's determination that claimant has a five percent permanent impairment to his right knee. *See Cotton*, 34 BRBS at 90.

Accordingly, we affirm the administrative law judge's Decision and Order Awarding Benefits.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge