U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 16-0387

JAMES C. WILLIAMS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HUNTINGTON INGALLS, INCORPORATED (PASCAGOULA OPERATIONS)	)	DATE ISSUED: Apr. 19, 2017
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Robert E. O'Dell, Vancleave, Mississippi, for claimant.

Paul B. Howell (Franke & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2015-LHC-01074, 01672) of Administrative Law Judge Clement J. Kennington rendered on a claim filed pursuant to the provisions of 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).

Claimant injured his neck during the course of his employment as a welder on July 21, 1992 and on May 14, 1993. He was treated for the first neck injury by Dr. Stewart and by Dr. Wiggins for the second injury. He executed a choice of physician form for each injury. EXs 3; 14 at 1. On June 11, 1993, Dr. Wiggins released claimant

to return to work with no permanent disability or work restrictions. EX 30 at 8-10. Claimant did not seek further treatment until September 24, 2014, when he returned to Dr. Wiggins complaining of chronic neck pain. *Id*. at 13. Dr. Wiggins diagnosed cervical spondylosis without myelopathy. *Id*. at 16, 21. On October 30, 2014, claimant signed a form stating Dr. Wiggins was his choice of physician. EX 14 at 2. Claimant returned to work until he retired on December 19, 2014. Tr. at 51-52. Claimant alleged that he retired due to the natural progression of his work-related neck injuries, and he sought compensation and medical benefits under the Act. *See* Cl. Post-hearing Br. at 5-6; *see also* EXs 7, 18.

In his decision, the administrative law judge found claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), linking his current neck condition to his 1992 and 1993 employment injuries. The administrative law judge found that employer rebutted the presumption based on the opinion of Dr. Wiggins that claimant's 2014 neck symptoms are not related to the prior work injuries, and the fact that claimant had not sought treatment for his neck from 1993 to 2014. Decision and Order at 14; EX 30 at 43, 46(b). The administrative law judge found, based on the record as a whole, that claimant did not submit any medical evidence stating that his current neck symptoms are related to his work injuries. Decision and Order at 15. Therefore, the administrative law judge denied the claim. The administrative law judge concluded that the remaining issues raised by the parties were moot and stated he would not address them. *Id*. at 16.

On appeal, claimant challenges: 1) the administrative law judge's not admitting into evidence the informal conference recommendations, which addressed claimant's choice of physician; 2) the administrative law judge's not adopting the claims examiners' recommendations that claimant had not been provided a choice of physician for the May 1993 neck injury; 3) alternatively, the administrative law judge's not addressing whether Dr. Wiggins was claimant's choice of physician for the May 1993 injury; and, 4) the administrative law judge's not allowing claimant the opportunity for evaluation by his chosen physician before addressing the causation issue. Employer responds that the issues claimant raises on appeal are moot in view of the administrative law judge's conclusion that claimant's current neck condition is not related to his work injuries. Claimant filed a reply brief in support of his appeal.

We reject claimant's challenge to the administrative law judge's exclusion of the informal conference recommendations, which addressed claimant's choice of physician, and claimant's assertion that the administrative law judge was obligated to follow the recommendations therein. The regulation at 20 C.F.R. §702.317(c) expressly precludes the district director from transmitting to the administrative law judge any informal

conference memoranda or recommendations.[1] Formal hearings before an administrative law judge are de novo; he may not rely on the district director's recommendations. *McCurley v. Kiewest Co.*, 22 BRBS 115 (1989); *Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988); *see also* 5 U.S.C. §557.

With respect to the causation issue, the administrative law judge found, based on the record as a whole, that claimant failed to offer any evidence that his current neck condition is related to his prior work injuries. Claimant does not directly contest this finding, which is supported by substantial evidence of record.[2] *See, e.g., Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *see generally Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007). Claimant does allege, however, that the administrative law judge prematurely addressed the causation issue. Claimant contends the administrative law judge was required to first address his contention that Dr. Wiggins was not his free choice physician and that he should be permitted to see Dr. David Lee before the claim is adjudicated.

We reject claimant's contention. The administrative law judge's finding that claimant's current neck condition is unrelated to his employment injuries precludes him from obtaining medical benefits under Section 7 of the Act, 33 U.S.C. §907. *See generally Bis Salamis, Inc. v. Director, OWCP* [*Meeks*], 819 F.3d 116, 50 BRBS 29(CRT) (5th Cir. 2016). Assuming, arguendo, that claimant was not provided the opportunity to freely select his physician,[3] the lack of a causal relationship between his

[1] "[T]he materials transmitted must not include any recommendations expressed or memoranda prepared by the district director pursuant to §702.316." 20 C.F.R. §702.317(c).

[2] Dr. Wiggins stated that claimant's neck symptoms in 2014 are not related to the 1992 injury given the delay in onset of symptoms, and that the 1993 injury had been only a temporary aggravation of the 1992 injury. EX 30 at 8-10, 42, 46(a)-(b).

[3] Evidence of record demonstrates that claimant selected Dr. Stewart as his physician for the 1992 injury. EX 3. Employer referred claimant to Dr. Wiggins for a second opinion, EX 30 at 1; claimant testified at his deposition that he thought Dr. Stewart had made the referral. EX 36 at 18; *see also* Tr. at 37. Claimant selected Dr. Wiggins as his physician for the 1993 injury. EX 14 at 1. Claimant testified that he chose Dr. Wiggins in 1993 because he had seen him before. Tr. at 28. Similarly, claimant testified that he chose Dr. Wiggins as his physician in 2014 because he had seen him before and he was unfamiliar with other doctors on the list employer presented him. *Id.* at 34-36. If a claimant has had his initial free choice of physician, *see* 33 U.S.C. §907(b), he may change physicians only upon obtaining the prior consent of the employer, carrier, or district director. 33 U.S.C. §907(c)(2); 20 C.F.R. §702.406; *see*

work accidents and his present injury precludes him from selecting his free choice at employer's expense. *Gold v. Director, OWCP*, 424 F. App'x 274 (5th Cir. 2011) (claimant's "right to a physician of his choosing did not vest upon his mere notice [of injury] to employer, but required proof that he was injured as defined by the statute."); *see generally Amerada Hess Corp. v. Director, OWCP*, 543 F.3d 755, 42 BRBS 41(CRT) (5th Cir. 2008). Therefore, the administrative law judge was not required to address the choice of physician issue before addressing whether claimant's neck condition is causally related to the prior work injuries.[4] Accordingly, we affirm the denial of the claim.[5]

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

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JUDITH S. BOGGS
Administrative Appeals Judge

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GREG J. BUZZARD
Administrative Appeals Judge

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Hunt v. Newport News Shipbuilding & Dry Dock Co., 28 BRBS 364 (1994), *aff'd mem.*, 61 F.3d 900 (4th Cir. 1995).

[4] Essentially, claimant seeks to have employer pay for a medical opinion to support his litigation position. Claimant may seek another medical opinion at his own expense and request modification of the administrative law judge's causation finding. 33 U.S.C. §922.

[5] We also reject claimant's challenge to the administrative law judge's admitting into evidence the affidavit of Joseph Anderson, a claims administrator for employer, regarding the procedures in 1993 for offering injured workers a choice of physicians. Claimant's contention that the affidavit is hearsay because Mr. Anderson had no personal knowledge of employer's procedures in 1993 goes to the weight of his opinion and not its admissibility. *See, e.g., Allen v. Agrifos, LP*, 40 BRBS 78 (2006).

JONATHAN ROLFE
Administrative Appeals Judge