U.S. Department of Labor

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

BRB No. 14-0431

ROBERT SCHAFER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JOHN S. MEEK CONSTRUCTION COMPANY	)	DATE ISSUED: Apr. 12, 2018
	)	
and	)	
	)	
CHUBB INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Preston Easley, Christopher Bulone, and Levi Plesset (Law Offices of Preston Easley), San Pedro, California, for claimant.

Gus David Oppermann V and Mary Lou Summerville (Wheat Oppermann, P.L.L.C.), Houston, Texas, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2013-LHC-00820) of Administrative Law Judge Richard M. Clark 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 sustained cumulative injuries to his knees, hips, back, and left shoulder, over the course of his 30-plus years as a pile driving working foreman. Hearing Transcript (HT) at 21-22. As a result of increased pain he experienced while performing pile driving work, he switched to a working foreman position with employer in 2011.[1] HT at 22. On May 2, 2012, upon finishing a four-day job in San Pedro, California, claimant testified that he could no longer work due to his pain. *Id.* at 29-30. Claimant declined employer's subsequent request to supervise a pile driving job in Los Angeles Harbor, and has not worked since May 2, 2012. *Id.* at 24, 28, 30, 31.

Claimant thereafter sought treatment for his work-related pain, culminating in recommendations from Dr. Levine that he undergo right and left knee replacement surgeries, as well as possible surgical treatment for his back and left shoulder conditions. CX 11. On January 29, 2014, claimant had right knee replacement surgery by Dr. Levine. *Id.* Claimant stated that his right knee was doing well following the surgery but that he remained in considerable pain from his left knee, left shoulder, and back. HT at 37-39.

Employer began paying claimant temporary total disability benefits on December 1, 2013, and ultimately paid for the January 29, 2014 right knee replacement surgery. Claimant filed a claim for benefits under the Act. The parties stipulated to claimant's entitlement to disability and medical benefits for his work-related injuries. A dispute arose as to the date of claimant's injury, however, with claimant contending his cumulative trauma injuries continued through his last day of work for employer on May 2, 2012, and employer countering that the date of injury should be fixed as of November 10, 2010, or some date in 2011.[2]

The administrative law judge concluded that claimant's date of injury is May 2, 2012, because the credible evidence establishes claimant was able to work full time until that date, after his last period of employment caused significant pain. Pursuant to the

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[1]Claimant testified that employer responded to his 2011 declaration that he could no longer physically perform pile driving work by telling "me that they needed me to work on the job site in order to put me out there and keep me busy." HT at 22. In his capacity as a working foreman, claimant remained responsible for physically demanding work, including rotating concrete pilings, pulling barges by hand, operating pneumatic air drills and chipping guns, climbing up and down piers for barge work, and managing project safety. *Id.* at 21-25.

[2]Chubb Insurance was employer's carrier at the time of claimant's last day of work on May 2, 2012. Seabright Insurance Company previously was employer's carrier. Seabright was notified of claimant's claim but did not attend the formal hearing.

parties' stipulation, the administrative law judge found that claimant's average weekly wage as of that date was $1,631.28. Accordingly, the administrative law judge awarded claimant ongoing temporary total disability benefits from May 2, 2012, as well as medical benefits for his work-related injuries.

On appeal, employer challenges the administrative law judge's conclusion that claimant's date of injury is May 2, 2012. Employer contends that claimant's date of injury was in 2010 or 2011 and that his average weekly wage should be calculated as of this earlier time.[3] Employer also avers the administrative law judge's award of medical benefits is overbroad. Claimant responds, urging affirmance of the administrative law judge's decision. Employer has filed a reply brief.

We reject employer's contention that the administrative law judge erred in finding that claimant's average weekly wage should be computed as of May 2, 2012. A claimant's average weekly wage is determined at the "time of injury" and, in a cumulative trauma case, the date of the last aggravation constitutes the "time of injury." 33 U.S.C. §910; *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990); *Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986); *cf.*

[3]Because employer alleges that claimant's wages declined after these dates, the issue employer raises on appeal makes sense only if employer were also raising a responsible carrier issue. This is not the case, however, and employer, arguably, has failed to demonstrate how it is "adversely affected or aggrieved" by the administrative law judge's decision on this issue. 20 C.F.R. §802.201(a). In its January 13, 2014 LS-18 Form, employer raised as an issue "Date of injury/Responsible Carrier." In its February 28, 2014 Pre-hearing Statement, employer does not identify responsible carrier as an issue. Employer averred that claimant's injury and disability occurred "long before January 1, 2012" because claimant's earnings in 2011 were significantly lower ($72,260, as compared to over $100,000 in 2008-2010). The issue of responsible carrier was not discussed at the formal hearing, nor in employer's post-hearing brief. *See* Emp. Post-Hearing Brief (June 13, 2014). The administrative law judge did not discuss a responsible carrier issue and employer does not raise the issue in its Petition for Review and brief. When claimant pointed out the incongruity of employer's average weekly wage contention, employer replied that claimant correctly notes that a different carrier would be responsible if employer's contention is accepted, but that this "is simply of no relevance to the inquiry at hand. The other carrier was given notice of the 2006 to 2011 injuries, participated in an Informal Conference, and thereafter, the other Carrier chose to ignore these proceedings in the Formal Hearing and this appeal." Emp. Reply Br. at 2-3. Moreover, the fact that, according to employer, "claimant would benefit from a date of accident" in 2010 or 2011, is of no significance in that claimant did not appeal the administrative law judge's decision. *Id.* at 1.

Director, OWCP v. General Dynamics Corp. [*Morales*], 769 F.2d 66, 17 BRBS 130(CRT) (2d Cir. 1985) (where increased disability is due to natural progression, average weekly wage is computed at time of accidental injury).

In reaching his conclusion, the administrative law judge acted within his discretion by crediting the opinion of claimant's treating surgeon, Dr. Levine, over the inconsistent opinions of Dr. London.[4] *See, e.g.*, *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010). Dr. Levine opined in his November 8, 2012 report that, "within reasonable medical certainty," claimant "developed symptoms as a result of the repetitive trauma occurring in the course of his employment over 35 years of work as a pile driver/foreman" for employer. CX 11. Dr. Levine additionally testified at his August 28, 2013 deposition that claimant's work-related orthopedic conditions were caused in some measure by the cumulative trauma he experienced over the course of his last six years of work with employer. CX 14 at 27-29, 32. Moreover, the administrative law judge rationally relied on claimant's testimony to the effect that his last job with employer worsened his condition. Decision and Order at 3, 7. Claimant described the activities of that job, HT at 24-25, including "pull[ing] as hard as you could to get the barges into position and I really felt it at that time . . . I just couldn't handle the work anymore." *Id.* at 25. When asked by his attorney, "Which activity caused the most pain on that job?," claimant answered, "I would say pulling the barges was the really (sic) kicker for me." *Id.* at 27. The administrative law judge rejected employer's contention that claimant's lower wages in 2011 were necessarily indicative of earlier disability, as he found the earnings could have been attributable to a slowdown in employer's work. Decision and Order at 8.

Substantial evidence supports the administrative law judge's conclusion that claimant's cumulative trauma conditions were aggravated by his last employment with employer such that his average weekly wage should be computed at that time. *Lopez*, 23 BRBS 295. Employer has not raised any reversible error in the administrative law judge's

[4]The administrative law judge found Dr. London's April 25, 2013 opinion that claimant sustained repetitive trauma to his low back and knees as a result of his work activities through his last day of employment on May 2, 2012, *see* CX 13, conflicted with his subsequent deposition testimony that claimant's ultimate disability was the result of the "natural progression of his initial injuries" and would have occurred notwithstanding his continued work with employer in 2012, *see* EX 11 at 10-20. Decision and Order at 7. The administrative law judge concluded that Dr. London's opinions are entitled to diminished weight because he did not adequately explain the reasons for the change in his opinion and did not otherwise persuasively articulate "why he thinks the date of injury should be fixed prior to May 2, 2012." *Id.* The administrative law judge found that Dr. London was merely agreeing with employer's attorney's leading statements. *Id.*

consideration and weighing of the evidence.[5] *Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT). Therefore, we affirm the administrative law judge's finding that claimant's average weekly wage as of May 2, 2012, is $1,631.28, as that figure is based on the parties' stipulation. *See* ALJ X 2 at 6; Decision and Order at 2.

Employer also challenges the administrative law judge's award of medical benefits as overbroad because the award is not limited to "reasonable and necessary" treatment for claimant's "work-related" injuries.[6] Employer's liability for medical benefits is limited to that which is appropriate for the claimant's work-related injuries. *See* 33 U.S.C. §907; 20 C.F.R. §702.402; *see generally M. Cutter Co., Inc. v. Carroll*, 458 F.3d 991, 40 BRBS 53(CRT) (9th Cir. 2006); *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999). Employer has the opportunity to raise issues pertaining to the non-work-relatedness, reasonableness, and/or necessity of any medical expenses as requests for treatment/reimbursement arise. 20 C.F.R. §702.407; *see generally Marshall v. Pletz*, 317 U.S. 383 (1943); *Siler v. Dillingham Ship Repair*, 28 BRBS 38 (1994).

[5]Although the administrative law judge's decision does not set out the full legal framework for the issue raised in this case, the rationale for his conclusion is clear, and it comports with applicable law. Given the nature of employer's appeal in this case, *see* n. 3, *supra*, we discern no reversible error in the decision.

[6]The administrative law judge stated, "Employer shall pay Claimant for any medical expenses incurred during the course of treatment for his injuries, and the reasonable and necessary future medical benefits arising out of the work-related injuries to his knees, hips, left shoulder, and lower back." Decision and Order at 9.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge