

BRB No. 01-0872

MICHAEL J. HENNESSEY)
)
 Claimant-Petitioner)
)
 v.)
)
 BATH IRON WORKS) DATE ISSUED: August 7, 2002
 CORPORATION)
)
 Self-Insured)
 Employer-Respondent) DECISION and ORDER

Appeal of the Decision and Order and the Order Denying Reconsideration and Correcting Clerical Error of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

William N. Batty (Law Offices of William N. Batty, P.C.), Bedford, Massachusetts, for claimant.

Stephen Hessert (Norman, Hanson & DeTroy, L.L.C.), Portland, Maine, for self-insured employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order and the Order Denying Reconsideration and Correcting Clerical Error (97-LHC-1973) of Administrative Law Judge Jeffrey Tureck 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 findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence and in accordance with law. *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant began experiencing difficulties with his wrists and arms in the mid-1980's; he did not seek medical attention, however, until October 1994 when he was diagnosed with mild carpal tunnel syndrome and flexor tendinitis. CX 23. Despite ongoing treatment and employer's attempts

to adjust claimant's working conditions to meet the restrictions placed on him by his treating physician, claimant was dismissed by employer on January 30, 1997. Claimant thereafter filed a claim for temporary total disability compensation and medical benefits under both the Act and Maine Workers' Compensation Act, 39-A ME.REV.STAT.ANN. (1993), alleging that as a result of a cumulative trauma disorder he is incapable of performing his usual employment duties as an estimator for employer. The Maine State Board issued a decision on claimant's state claim on June 30, 2000, finding claimant entitled to compensation for a work-related disability.¹ The State Board issued an order denying reconsideration on December 10, 2000. These decisions were on appeal to the Maine Law Court at the time the administrative law judge issued his decision in the instant case.

In his Decision and Order, the administrative law judge initially rejected employer's contention that because this claim had been decided by the Maine State Board, collateral estoppel effect must be given to this decision. Specifically, the administrative law judge found that as the state decision was not final, the doctrine of collateral estoppel could not be applied to the claim before him. The administrative law judge then found, *inter alia*, that despite any condition claimant may suffer from his carpal tunnel syndrome, employer had adjusted his work requirements to meet the restrictions placed upon him by Dr. Vigna, his treating physician. The administrative law judge therefore concluded that, as claimant suffered no loss in wage-earning capacity subsequent to May 24, 1996, he is not entitled to disability compensation under the Act. The administrative law judge also determined that claimant's condition had reached maximum medical improvement by April 9, 1999. Lastly, as claimant had offered no evidence of the degree of physical impairment, the administrative law judge determined that claimant is not entitled to compensation under the schedule, 33 U.S.C. §908(c)(1), and that employer is not liable for the medical bills incurred by claimant for his treatment by Dr. Hochberg or for physical therapy since he had failed to seek the proper authorization. *See* 33 U.S.C. §907. On reconsideration, the administrative law judge again addressed the issue of collateral estoppel, the application of which was now advocated by claimant, and again found that the doctrine did not apply since the decision of the state tribunal still was not final. The administrative law judge also stated that claimant lacked standing to advocate the application of collateral estoppel for the first time on reconsideration.

On appeal, claimant challenges the administrative law judge's determination that the doctrine

¹The Maine State Board found that claimant's condition arose out of his employment with employer and that claimant was entitled to partial disability benefits from July 17 to November 21, 1996, total disability benefits from November 22, 1996 through January 21, 1997, and partial disability benefits thereafter based upon a residual wage earning capacity of \$11,000 per year. *See* CX 40.

of collateral estoppel is not applicable to the instant case. Additionally, claimant challenges the administrative law judge's finding that he is not entitled to permanent disability benefits, as claimant alleges he did not claim entitlement to such benefits. Employer responds, urging affirmance of the administrative law judge's decisions.

The procedural history of claimant's federal and state claims for compensation is straight forward. The administrative law judge initially heard claimant's claim under the Act in the summer of 1999, but left the record open by agreement of the parties. During this period of time, employer argued for application of the doctrine of collateral estoppel, while claimant opposed this position.² The Maine Board issued its decision on June 30, 2000, awarding claimant compensation for continuing partial disability; claimant thereafter filed a motion for supplemental findings of fact and conclusions of law with the State Board, seeking reconsideration of the decision. Following the denial of claimant's motion for reconsideration on December 28, 2000, claimant filed a petition for appellate review of the State Board decision with the Maine Law Court. That appeal was pending at the time the administrative law judge issued his decision on June 4, 2001, denying the benefits sought by claimant under the Act. In seeking reconsideration before the administrative law judge, claimant reversed his prior position and argued that the doctrine of collateral estoppel should be applied to the findings of the State Board. Claimant contended certain findings of fact should be given collateral estoppel effect even though he had appealed the decision. On appeal before the Board, while acknowledging that his appeal of the state decision remained pending when the administrative law judge issued his decisions, claimant now contends that the State Board's findings related to causation, permanency, and the extent of his disability were final and thus binding upon the administrative law judge.³ We reject claimant's position and, for the reasons that follow, we affirm the administrative law judge's finding on this issue.

The traditional doctrine of collateral estoppel bars re-litigation of any issue that a party had a full and fair opportunity to litigate in an earlier action and that was finally decided in that action. *DeCosta v. Viacom Int'l, Inc.*, 981 F.2d 602, 604 (1st Cir.), *cert. denied*, 509 U.S. 923 (1993). Under this principle, a party is barred from re-litigating an issue decided in prior litigation if: (1) the issues

²Specifically, claimant argued consistently that collateral estoppel did not apply to bar the administrative law judge from reaching the merits of his claim, stating that collateral estoppel is not applicable for several reasons including the differences in the burdens of proof and legal standards between the federal and state statutes, *citing Bath Iron Works Corp. v. Director, OWCP*, 125 F.3d 18, 31 BRBS 109(CRT)(1st Cir. 1997); *Wilson v. Norfolk & Western RR Co.*, 32 BRBS 57 (1998), [*rev'd mem.*, 243 F.3d 539 (4th Cir. 2001(table))]; *Carroll v. Hanover Bridge Marina*, 17 BRBS 176 (1985); *Hunigman v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 141 (1978), and the fact that the decision of the State of Maine Workers' Compensation Board was not final. *See* Hearing Brief on Behalf of the Employee at 16-18.

³Employer conceded the issue of causation before the administrative law judge.

at stake are identical in both cases; (2) the issue was actually litigated in the prior litigation; and (3) the determination of the issue in the prior litigation was a critical and necessary part of the judgment in the earlier action. *DeCosta*, 981 F.2d 602; *see generally Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971); *Lawlor v. National Screen Service Corp.*, 349 U.S. 322 (1955); *Ortiz v. Todd Shipyards Corp.*, 25 BRBS 228 (1991). In order for collateral estoppel effect to be given to the findings of the first forum by an administrative law judge deciding a claim under the Act, the same legal standards must be applicable in both forums. *See Plourde v. Bath Iron Works Corp.*, 34 BRBS 45 (2000). Thus, collateral estoppel effect may be denied because of differences in the burden of proof. *Bath Iron Works Corp. v. Director, OWCP [Acord]*, 125 F.3d 18, 31 BRBS 109(CRT)(1st Cir. 1997). The point of collateral estoppel is that the first determination is binding not because it is right but because it is first and was reached after a full and fair opportunity between the parties to litigate the issue. *Acord*, 125 F.3d at 22, 31 BRBS at 112(CRT).

It is undisputed that claimant's appeal of the State Board's decision was pending during all times claimant's claim was before the administrative law judge. In support of his allegation of error, however, claimant avers that regardless of the status of his state appeal, the State Board's findings of fact are "final" and must be given collateral estoppel effect.⁴ Claimant's appeal of the State Board's decision to the Maine Law Court raised, *inter alia*, the issue of the extent of his disability, *i.e.*, his physical restrictions and the availability suitable employment, thus establishing by his own actions that the determinations on these issues reached by the State Board are not final. *See Letter Requesting Appellate Review*, dated February 12, 2001. Accordingly, as the State Board's decision regarding the extent of claimant's disability was not final at the time the administrative law judge issued his decisions on claimant's federal claim, we affirm his determination that the doctrine of collateral estoppel does not bar his reaching the merits of this case.⁵ *See Restatement (Second) of Judgments* §§13, 27 (1982); *see also Interconnect Planning Corp. v. Feil*, 774 F.2d 1132 (Fed. Cir. 1985); *Button v. Peoples Heritage Savings Bank*, 666 A.2d 120 (Me. 1995).

⁴While findings of fact from one forum must be accepted in another forum, *see Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 12 BRBS 828 (1980), the extent of claimant's disability is a mixed question of law and fact. *See Barlow v. Western Asbestos Co.*, 20 BRBS 179 (1988). Thus, the legal standards for determining disability would have to be the same in both forums for collateral estoppel to apply. *Plourde v. Bath Iron Works Corp.*, 34 BRBS 45 (2000).

⁵Thus, we need not address employer's contention, raised in its response brief, that the administrative law judge properly found on reconsideration that claimant waived his right to advocate the application of issue preclusion. The administrative law judge's finding was based on claimant's initial opposition to the application of collateral estoppel, and thus his failure to raise it as an affirmative defense at the initial hearing. *See generally Taylor v. Plant Shipyards Corp.*, 30 BRBS 90 (1996).

Claimant also appeals the administrative law judge's finding that his medical condition is permanent. Specifically, claimant alleges that, as he did not raise the issue of his entitlement to permanent disability benefits before the administrative law judge, the administrative law judge erred in considering this issue. We disagree. The administrative law judge rationally determined that although claimant did not seek compensation for permanent disability, employer averred that claimant's condition had reached maximum medical improvement. *See* Decision and Order at 13; HT at 7; EX 11. As the issue of the nature of claimant's disability was thus raised by employer below, we hold that the administrative law judge committed no error in addressing this issue. Additionally, we affirm the administrative law judge's finding that claimant's condition became permanent as of April 9, 1999, based upon the medical opinions of Drs. Vigna and Esponnette, as this finding is rational, supported by substantial evidence, and in accordance with law. *See generally Carlisle v. Bunge Corp.*, 33 BRBS 133 (1999), *aff'd*, 227 F.2d 934, 34 BRBS 79(CRT)(7th Cir. 2000); *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988).

Accordingly, the administrative law judge's Decision and Order and Order Denying Reconsideration and Correcting Clerical Error are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge