U.S. Department of Labor

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

BRB No. 15-0035

JEREMY SCHOFIELD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
FEDERAL MARINE TERMINALS	)	
	)	DATE ISSUED: Aug. 31, 2015
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Granting Benefits of Pamela J. Lakes, Administrative Law Judge, United States Department of Labor.

John F. Sharpless (Law Office of Michael J. Winer, P.A.), Tampa, Florida, for claimant.

Richard P. Salloum (Franke & Salloum, PLLC), Gulfport, Mississippi, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits (2013-LHC-01421) of Administrative Law Judge Pamela J. Lakes 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).

On June 5, 2006, claimant injured his back while working for employer. In 2007, claimant underwent two unsuccessful disc replacement surgeries by Dr. Fischman, leaving claimant with severe pain. In 2008, Drs. Tresser and Echevarria performed a third, corrective surgery. Despite this successful surgery, claimant testified he remained in a lot of pain. Tr. at 31-33. Due to his ongoing pain, claimant treated with Dr. Barsa, a pain management physician, from 2009 to 2011, and with Dr. Attias, also a pain management physician, from 2011 to 2013. In 2010, Administrative Law Judge Mosser approved a Section 8(i) settlement wherein claimant received $325,000 in disability benefits and employer remained liable for future medical benefits. 33 U.S.C. §908(i); EX 1. In July 2012, employer questioned the need for claimant's continuing receipt of narcotic medication, and employer requested an informal conference. EX 12 at 3.

Claimant's treating physicians prescribed narcotic pain medicine and placed claimant on a spinal cord stimulator. Between March 2010 and January 2014, claimant tested positive for marijuana and methadone, which had not been prescribed, as well as for higher than normal levels of prescription opiates and oxycodone.[1] Dr. Chaumont, an anesthesiologist and pain management specialist, evaluated claimant on March 13, 2012, and Dr. Forman, a psychiatrist, evaluated claimant on July 3, 2012, on behalf of employer. Dr. Chaumont opined that claimant is not a good candidate for opiod therapy and recommended that future treatment be targeted toward non-narcotic options. EX 5 at 5. Dr. Forman initially declined to make any recommendations with respect to claimant's pain-management treatment but later agreed with Dr. Chaumont that claimant is not a good candidate for opioid therapy. EX 11 at 26, 29. Based on claimant's positive drug screens and the opinions of Drs. Chaumont and Forman, by letter dated September 19, 2012, employer contested liability for claimant's narcotic therapy and declined to pay for any more narcotic prescriptions. Although employer acknowledged its liability under Section 7 of the Act, 33 U.S.C. §907, as well as under the Section 8(i) settlement agreement, for claimant's continuing medical treatment, including pain management, it argued that the use of narcotic medications was not reasonable or necessary to treat claimant's work-related pain. EX 16.

The administrative law judge found that claimant credibly testified that he experiences pain on a daily basis as a result of his work accident and that he would not be able to function without the use of his medications, narcotics included. Decision and Order at 16-18. Because employer's experts opined that claimant is not a good candidate for opioid therapy and recommended that non-narcotic medications be used instead, and claimant's treating physicians opined that some form of narcotic pain treatment continues

[1] When sent for confirmatory testing, some of claimant's drug screens yielded inconclusive results. Tr. at 99. Not all of claimant's positive drug screens were sent for confirmatory testing. EX 5 at 2; EXs 19, 34, 40.

to be necessary at this time, the administrative law judge found that claimant was presented with two valid treatment options, and that claimant has the right to choose his own course of treatment. *Id.* at 17-18. The administrative law judge concluded claimant's use of narcotic medications to treat his work-related back condition is reasonable and necessary and that employer remains liable for the cost of claimant's narcotic-medication prescriptions.

Employer appeals the administrative law judge's Decision and Order, and claimant responds, urging affirmance. Employer filed a reply brief. Employer does not dispute that claimant is entitled to pain management treatment for his work-related injury. Rather, it asserts that the continued prescription of narcotics is unnecessary and unreasonable given claimant's positive drug screens and the availability of non-narcotic treatment options.

Section 7 of the Act, 33 U.S.C. §907, provides that an employer is liable for medical expenses that are reasonable and necessary to treat a work-related injury. A claimant establishes a prima facie case for compensable medical treatment where a qualified physician states that the treatment is necessary for a work-related condition. *See Ingalls Shipbuilding, Inc. v. Director, OWCP* [*Baker*], 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993); 20 C.F.R. §702.402. The administrative law judge has the authority to determine the reasonableness and necessity of medical treatment based on the evidence of record, *Weikert v. Universal Maritime Service Corp.*, 36 BRBS 38 (2002), and the discretion to weigh conflicting evidence and to draw inferences from the evidence. *See Del Monte Fresh Produce v. Director, OWCP [Gates]*, 563 F.3d 1216, 43 BRBS 21(CRT) (11th Cir. 2009); *see also Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). "When the [claimant] is faced with two or more valid medical alternatives, it is the [claimant], in consultation with his own doctor, who has the right" to select the treatment. *Amos v. Director, OWCP*, 153 F.3d 1051, 1054, 32 BRBS 144, 147(CRT) (9th Cir. 1998), *amended*, 164 F.3d 480 (9th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999); *see also Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 830 n.3 (2003).

To support its contention that the administrative law judge failed to account for the "overwhelming medical evidence which militated [against] [c]laimant's continued use of long term narcotics," Petition for Review at 1, employer references multiple pieces of evidence. Contrary to employer's assertion, the administrative law judge accurately summarized and addressed this evidence in her decision. Decision and Order at 5, 12-13. With respect to the surveillance video in particular, the administrative law judge found it did not establish that claimant is feigning his pain or an inability to perform daily activities. *Id*. at 16. Rather, she found it showed claimant operating his fishing boat, carrying a cooler, and standing, sitting, bending and crouching on the boat, but it did not

demonstrate whether claimant used his medications prior to performing these activities, or how much force claimant needed to carry the cooler. Further, she found claimant did not use any excessive exertion to stand, sit, or bend on the boat, and claimant credibly explained and demonstrated at the hearing how crouching provided some relief from his pain. *Id*.; Tr. at 95. The administrative law judge rationally found claimant to be a credible witness who experienced trauma to his body from undergoing two failed surgeries, one successful corrective surgery, and two invasive stimulator procedures, and she credited his testimony that he experiences pain on a daily basis and would not be able to function without the use of his narcotic medications. Decision and Order at 16, 18; Tr. at 35, 40, 47-48; *see Mijangos*, 948 F.2d 941, 25 BRBS 78(CRT) (the administrative law judge determines the credibility of witnesses; the Board may not reweigh the evidence); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

Although employer's medical experts opined that claimant's pain is best managed with non-narcotics, EXs 5, 11, the administrative law judge found it was speculative to suggest that claimant would be able to achieve the same degree of pain management if his narcotics were abruptly discontinued. Decision and Order at 18. Claimant's treating physicians, Drs. Barsa and Attias, stated that, despite claimant's positive drug tests, treatment with narcotic medications was, and continues to be, medically necessary to treat his pain. EX 5 at 13-14, 27; EX 7 at 11, 24. The administrative law judge rationally relied on the opinions of claimant's treating physicians and found that claimant's use of narcotic medications is reasonable and necessary to treat claimant's work-related pain.[2] In so finding, the administrative law judge properly explained that where a claimant is presented with two valid treatment options, a treating physician's opinion may be entitled to greater weight as he is employed to cure and has a greater opportunity to know and observe the patient as an individual.[3] *Amos*, 153 F.3d at 1054, 32 BRBS at 147(CRT);

[2] The administrative law judge rejected employer's assertion that continued treatment with narcotic medications is unreasonable under the medical guidelines of the American Pain Society because claimant's positive drug screens demonstrate aberrant behavior. As the administrative law judge is not bound by the guidelines of the American Pain Society, she found this argument to be a red herring. *Weikert*, 36 BRBS 38; Decision and Order at 18. Further, the record reflects that, despite claimant's positive drug screens, Dr. Barsa testified that claimant did not engage in aberrant behavior, EX 5 at 23, and Dr. Attias testified that claimant adhered to his opiates contract and there was no indication claimant abused the medications he had been prescribed. EX 7 at 28, 62, 64.

[3] Drs. Barsa and Attias agreed with Dr. George, a pharmacologist and toxicologist, that long-term use of narcotic medications can lead to dependency and other negative side effects. EX 5 at 15, 26; EX 7 at 21-23. The administrative law judge accurately

Monta v. Navy Exch. Serv. Command, 39 BRBS 104 (2005). As the administrative law judge's finding is supported by claimant's credited testimony and the opinions of Drs. Barsa and Attias and accords with law, we affirm the determination that employer remains liable for the cost of claimant's narcotics prescriptions. *Monta*, 39 BRBS 104.

Accordingly, the administrative law judge's Decision and Order Granting 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

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cited Dr. Attias's deposition testimony that he is working with claimant to reduce and ultimately eliminate his use of narcotics. Decision and Order at 18; EX 7 at 19-20, 60.