U.S. Department of Labor

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

BRB No. 16-0044

ROGELIO HERNANDEZ-GARCIA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ICE FLOE, LLC, dba NICHOLS BROTHERS	)	DATE ISSUED: Aug. 30, 2016
	)	
and	)	
	)	
AMERICAN LONGSHORE MUTUAL ASSOCIATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Christopher Larsen, Administrative Law Judge, United States Department of Labor.

Matthew S. Sweeting, Tacoma, Washington, for claimant.

Nina M. Mitchell (Holmes Weddle & Barcott, PC), Seattle, Washington, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits (2014-LHC-01160) of Administrative Law Judge Christopher Larsen 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 if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant allegedly sustained bilateral knee injuries while working for employer as a painter on November 2, 2011. Claimant underwent arthroscopic left knee surgery on April 30, 2012. He has not returned to gainful employment as a result of his continued complaints of left knee discomfort. Claimant filed a claim seeking ongoing disability and medical benefits under the Act. Employer conceded that claimant injured his left knee, but disputed the extent of that injury as well as claimant's claim for ongoing medical benefits.

In his Decision and Order, the administrative law judge found that claimant injured only his left knee on November 2, 2011, that claimant became totally disabled as a result of his left knee condition on December 21, 2011, and that this disability ended on November 29, 2012, the date his condition reached maximum medical improvement.[1] The administrative law judge denied claimant's specific request that employer be held liable for the cost of an additional arthroscopic inspection of his left knee, and he found claimant entitled to medical benefits only until his date of maximum medical improvement. Consequently, the administrative law judge awarded claimant temporary total disability and medical benefits from December 21, 2011 to November 29, 2012. 33 U.S.C. §§908(b); 907.

On appeal, claimant challenges the administrative law judge's termination of disability and medical benefits as of the date his left knee condition reached maximum medical improvement, November 29, 2012. Employer responds, urging affirmance of the administrative law judge's decision.

Claimant initially contends the administrative law judge erred in finding that he was capable of resuming his usual employment duties as a painter on November 29, 2012. Claimant contends the administrative law judge erred in failing to address all of the relevant evidence regarding his ability to return to work. We agree.

Claimant bears the burden of establishing he is disabled by his work-related injury. *See Anderson v. Todd Shipyards, Inc.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1980). In order to establish a prima facie case of total disability, claimant must prove that he is unable to return to his usual work due to the work injury. *See Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS

[1] The administrative law judge additionally found that while claimant's notice of injury to employer was untimely pursuant to Section 12(a), 33 U.S.C. §912(a), employer was not prejudiced by claimant's late notice. *See* 33 U.S.C. §912(d). As employer does not challenge this finding on appeal, it is affirmed. *See Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

47(CRT) (9th Cir. 2010); *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988).

In finding that claimant was capable of returning to his usual employment duties as a painter as of November 29, 2012, the administrative law judge summarily relied on the report of Neil Bennett, employer's vocational expert, who, in turn, relied upon a report authored by Theodore Becker, PhD. *See* Decision and Order at 20; EX 18. However, the opinion of Dr. Becker does not address claimant's ability to return to his usual work as of the date of maximum medical improvement.[2] Moreover, Mr. Bennett did not opine that claimant could return to his usual work as of that date.[3] In addition, as claimant correctly asserts, the administrative law judge did not discuss the contrary evidence of record, specifically the reports of physicians who opined that claimant's left knee condition restricted his performance of certain physical activities.[4] In this regard, the record reflects that Dr. Leavitt, on November 29, 2012, January 7, 2013, and April 18, 2013, placed restrictions on claimant. On the later date, Dr. Leavitt stated claimant was medically cleared to return to light-duty work, but was to remain off work if light-duty was not available. CXs 3 at 89, 91; 5 at 104-105.[5] Dr. Kinahan, on March 7, April 2, and

[2] Dr. Becker's curriculum vitae identifies his specialty as "Human Performance/Physical Capacity/Disability Evaluation." EX 9. In a report dated October 20, 2014, Dr. Becker indicates that he examined claimant at length on September 10, 2014, but did not review any medical records regarding claimant's knee condition. Dr. Becker opined that claimant was capable of "Medium to Medium+" work activities at the time of his testing. EX 8 at 291. In his report dated February 2, 2015, Mr. Bennett stated that, in his opinion, "Dr. Becker's scenario allows [claimant] to work at his prior occupation of Marine Painter." EX 18 at 566.

[3] Mr. Bennett opined, based on Dr. Leavitt's opinion, that claimant "[f]rom November 29, 2012 to April 13, 2013, . . . was limited to sedentary level work," EX 18 at 567, and that between April 13, 2013 and February 25, 2014, claimant was capable of light work with restrictions, based on medical opinions of Drs. Leavitt, Johnson and Billington. *Id.*

[4] Rather, the administrative law judge stated, without analyzing the credibility of these individual medical opinions, that "[a]part from his own unreliable testimony, and medical opinions based on his unreliable reports of his injury and his history, there is nothing in the record before me to suggest that he could not perform his old job … after he reached maximum medical improvement." Decision and Order at 20.

[5] On November 29, 2012 and January 7, 2013, Dr. Leavitt checked boxes on State of Washington Insurer Activity Prescription Forms indicating that claimant was prohibited from squatting, kneeling or crawling, and was restricted to "seldom" climbing

September 11, 2013, placed restrictions on claimant.[6] He stated claimant was not released to any work between March 7 and May 2, 2013. CX 4 at 95, 100. On September 11, 2013, Dr. Kinahan stated claimant may perform modified work, if it is available. CX 6 at 108. On September 27, 2013, Dr. Skalley placed restrictions on clamant and opined that claimant may perform modified duty through October 31, 2013.[7] CX 7 at 109. Dr. Johnson, on April 9, 2014, placed restrictions on claimant and approved only sedentary work.[8] CX 8 at 123, 125. Dr. Billington, who examined claimant on employer's behalf, stated on September 11, 2014, that claimant has restrictions against repetitive stooping, bending, squatting, kneeling, crouching and climbing ladders.[9] EX 3 at 202.

The administrative law judge did not address all of the relevant medical evidence regarding claimant's disability status, and the reports of Dr. Becker and Mr. Bennett do not constitute substantial evidence that claimant was not disabled at all as of the date of maximum medical improvement. Therefore, we must vacate the denial of additional benefits and remand the case for the administrative law judge to address this evidence. *See generally H.B. Zachry Co. v. Quinones*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000) (the Administrative Procedure Act requires the fact-finder to address all relevant evidence on material issues of fact); *see also Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988); *Williams v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 61 (1985). On remand, the administrative law judge must determine what residual restrictions, if any, claimant had as a result of his work injury after he reached maximum

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ladders. CX 3 at 89, 91. On April 18, 2013, Dr. Leavitt indicated claimant could occasionally twist, bend/stoop, squat/kneel, and frequently stand/walk and climb. CX 5 at 105.

[6] On March 2, April 7 and September 11, 2013, Dr. Kinahan prohibited claimant from squatting, kneeling and crawling, and restricted him to "occasional" climbing ladders. CX 4 at 95, 100; CX 6 at 108.

[7] Dr. Skalley restricted claimant to "seldom" climbing ladders and crawling, and to occasional standing/walking, twisting, bending and squatting. CX 7 at 109.

[8] Dr. Johnson opined that claimant was capable of only sedentary work. With regard to claimant's employability, Dr. Johnson further stated that claimant would need the freedom to get up and change positions frequently. CX 8 at 123, 125.

[9] Dr. Billington stated these restrictions are due to claimant's pre-existing degenerative knee condition and not due to the work injury. However, he also stated that the work injury aggravated claimant's pre-existing condition. EX 3 at 201-202.

medical improvement, and compare the requirements of claimant's usual work with those restrictions in order to determine if claimant made his prima facie case of total disability for any period after November 29, 2012, recognizing that claimant bears the burden of proof on these issues. *See generally Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *Newport News Shipbuilding & Dry Dock Co. v. Riley*, 262 F.3d 227, 35 BRBS 87(CRT) (4th Cir. 2001); *Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988).

Claimant also challenges the administrative law judge's denial of his claim for ongoing medical benefits. Claimant avers employer is liable for a second diagnostic arthroscopic evaluation of his left knee in order to determine whether the medial meniscus of that knee is torn.

Section 7(a) of the Act, 33 U.S.C. §907(a), states that "[t]he employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." *See M. Cutter Co., Inc. v. Carroll*, 458 F.3d 991, 40 BRBS 53(CRT) (9th Cir. 2006); *Ballesteros*, 20 BRBS 184. Claimant's entitlement to medical care is not predicated on the existence of a compensable disability; rather, claimant is entitled to medical benefits for his work-related condition so long as he establishes that the treatment sought is necessary for his work-related injury. *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. Thus, the administrative law judge erred to the extent that he denied all future care merely because claimant's condition reached maximum medical improvement. *See* Decision and Order at 16-19. Employer remains liable for necessary medical care provided claimant complies with the requirements of Section 7 and its implementing regulations.

With regard to claimant's entitlement to a second arthroscopic procedure, the following facts are relevant. On April 30, 2012, Dr. Leavitt performed surgery on claimant's left knee and opined that claimant did not sustain a torn meniscus. CX 3 at 46, 75-87. Claimant continued to complain of knee pain following this surgical procedure.[10] Dr. Leavitt referred claimant to Dr. Kinahan for a second opinion. Dr. Kinahan recommended, and referred claimant for, "an updated MRA of the left knee." *See* CX 4 at 93. On March 20, 2013 a left knee MRI arthrogram with contrast was taken and was interpreted by Dr. Stambaugh as indicating a "1 cm nondisplaced horizontal cleavage tear

[10] In early January 2013, claimant allegedly contacted Whidbey Orthopedics for an appointment. After reviewing claimant's orthopedic records and operative report, Dr. Livermore reportedly determined that his general orthopedic practice had nothing further to offer claimant and he suggested that claimant contact a knee specialist. *See* CX 4 at 92.

junction of posterior horn and body medial meniscus." CX 4 at 97. After the arthrogram, Dr. Kinahan met with claimant and suggested that claimant return to Dr. Leavitt "for a possible repeat arthroscopy and partial meniscectomy." CX 4 at 99. On April 18, 2013, Dr. Leavitt reviewed the March 20, 2013 MRI and stated he did not observe a tear;[11] he stated that he had nothing further to offer claimant surgically and suggested that claimant see a third physician. CX 5 at 103. On September 11, 2013, Dr. Kinahan, although disagreeing with Dr. Leavitt regarding the presence of a meniscus tear, agreed with Dr. Leavitt that surgery would not be of benefit to claimant. CX 6 at 107. Dr. Johnson opined on April 9, 2014, after examining claimant and reviewing his medical records, that claimant should undergo a diagnostic left knee arthroscopy which, if it revealed the presence of a meniscus tear, may lead to claimant's requiring a partial medial meniscectomy. CX 8 at 125.

In his decision, the administrative law judge acknowledged that if a meniscus tear was found to be present, it "might lend objective support to [claimant's] subjective complaints" of pain. Decision and Order at 18. The administrative law judge found that while the "competent doctors do not agree on the significance of [claimant's] March, 2013, MRI arthrogram, . . . the medical testimony is virtually unanimous on the best method for resolving [the question of whether claimant has a meniscus tear]: a properly performed arthroscopic inspection of the meniscus." *Id.* Nonetheless, the administrative law judge failed to address whether claimant established the necessity of such a procedure to diagnose and/or treat claimant's knee injury and any resulting pain,[12] and denied the claimed medical treatment because claimant had reached maximum medical improvement and Dr. Kinahan opined that "further treatment" would not be helpful.[13] *Id.* at 19.

The administrative law judge's conclusion is not in accordance with law, as a claimant may be entitled to medical benefits which are necessary as a result of his injury irrespective of his disability status, *Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989),

[11] Three additional physicians interpreted claimant's March 20, 2013 MRI: Dr. Serra opined that there is a 90 to 95 percent probability of a tear, Tr. at 141-143; Dr. McFarland diagnosed no tear but, rather, intra-substance degeneration, *id.* at 201-202; and Dr. Billington found no tear. CX 18 at 171.

[12] The administrative law judge, instead, undertook an analysis of whether some doctors were suggesting that Dr. Leavitt failed to properly diagnose and treat claimant's condition during the course of the April 30, 2012 surgery. Decision and Order at 18-19.

[13] In fact, Dr. Kinahan stated "further surgery" would not be warranted, not that "further treatment" would not be warranted. CX 6 at 107.

and in reaching his conclusion he failed to fully analyze the medical opinion evidence as to whether exploratory arthroscopic surgery is warranted in connection with claimant's injury. *See generally Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir.), *cert. denied*, 528 U.S. 809 (1999). On remand, therefore, the administrative law judge must address whether claimant established the necessity of, and employer's liability for, a second arthroscopic procedure for the treatment of claimant's work-related knee injury. 33 U.S.C. §907; *Baker*, 991 F.2d 163, 27 BRBS 14(CRT).

Accordingly, the administrative law judge's denial of disability and medical benefits to claimant after November 28, 2012, is vacated, and the case is remanded for further proceedings consistent with this opinion. In all other respects, the Decision and Order of the administrative law judge 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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RYAN GILLIGAN
Administrative Appeals Judge