U.S. Department of Labor

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

BRB Nos. 16-0641
and 0641A

WARREN MACDONALD	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
TEMCO, LLC	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	DATE ISSUED: Aug. 3, 2017
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	
	)	
ILWU-PMA WELFARE PLAN	)	
	)	
Intervenor	)	DECISION and ORDER

Appeals of the Amended Decision and Order of William J. King, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Robert E. Babcock and James R. Babcock (Holmes Weddle & Barcott, P.C.), Lake Oswego, Oregon, for employer/carrier.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Amended Decision and Order (2014-LHC-01257) of Administrative Law Judge William J. King 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 slipped and fell on a gangplank and injured his left arm and shoulder on January 27, 2013. He was off work from January 28, 2013 to June 12, 2014. During this time, he underwent surgeries to repair the injuries to his left bicep, elbow and hand, and his left shoulder. JXs 8, 18, 29, 31. On September 5, 2013, employer notified claimant of a medical examination it scheduled for him on September 14, 2013, which claimant did not attend on the advice of his attorney. Tr. at 87; JX 1. Consequently, employer suspended claimant's compensation and medical benefits. JX 2. Thereafter, claimant received indemnity benefits and medical coverage from the ILWU-PMA Welfare Plan (the Plan). Claimant eventually returned to light-duty longshore work at a higher wage than he earned prior to the work injury. JXs 4, 5.

In his Amended Decision and Order,[1] the administrative law judge rejected claimant's contention that the work injury aggravated a pre-existing asymptomatic neck condition. Amended Decision and Order (Decision and Order) at 12-13. The administrative law judge found that claimant has a four percent permanent impairment to his left upper extremity and he rejected claimant's request for a nominal award for his work-related shoulder condition. *Id*. at 11, 13-14. The administrative law judge found that employer did not establish that claimant's refusal to attend the September 14, 2013 medical examination was unreasonable. *Id*. at 14; 33 U.S.C. §907(d)(4). Accordingly, the administrative law judge awarded claimant compensation for temporary total disability from January 28, 2013 to June 12, 2014, 33 U.S.C. §908(b), and for a four percent permanent partial disability of the left arm, 33 U.S.C. §908(c)(1), (19).[2]

On appeal, claimant challenges the administrative law judge's schedule award for his left arm impairment and the denial of a nominal award for his shoulder condition. Employer responds that the administrative law judge's findings on these issues are

[1] Pursuant to employer's motion for reconsideration of the original decision, the administrative law judge struck his initial decision and issued an amended decision to correct factual and legal errors. Order Granting Respondent's Motion for Reconsideration/Clarification at 2-3.

[2] Employer was ordered to reimburse the Plan for its weekly indemnity payments to claimant and its payment of medical expenses, and to reimburse claimant for mileage expenses and out-of-pocket medical costs.

rational and supported by substantial evidence. Claimant filed a reply brief. Employer cross-appeals the administrative law judge's finding that it was not entitled to suspend claimant's benefits after claimant refused to attend the September 2013 medical examination. Claimant responds, urging affirmance. Employer filed a reply brief.

Claimant challenges the administrative law judge's crediting of the four percent impairment rating of Dr. Ferris, contending the administrative law judge erred in discounting Dr. Vessely's five percent rating. The administrative law judge found that Dr. Ferris's rating was based on claimant's diminished left grip strength, perceived weakness of the left hand, and mild hypoesthesia. Decision and Order at 11; *see* EX 15 at 45, 50, 53**.** The administrative law judge found that Dr. Vessely's impairment rating is "based . . . on subjective complaints which are not consistent with either his own objective testing or clinical observations." Decision and Order at 11.

We reject claimant's contention of error. In addition to relying on claimant's complaints of weakness, Dr. Vessely relied on the AMA *Guides for the Evaluation of Permanent Impairment* for a biceps tendon rupture and on claimant's loss of grip strength. *See* CX 1 at 14-15; 5 at 30. The administrative law judge gave less weight to claimant's testimony regarding his symptoms and arm pain because it was not consistent with Dr. Vessely's grip strength testing or with his opinion, based on the clinical and surgical findings, that claimant is capable of working at a higher level than the light-duty work he was performing. Decision and Order at 10; *see* Tr. at 69-70; CX 1 at 16. As Dr. Vessely's impairment rating is based, at least in part, on claimant's subjective complaints, which the administrative law judge permissibly found are not credible, the administrative law judge rationally gave less weight to Dr. Vessely's five percent rating rather than to the four percent rating of Dr. Ferris.[3] *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Because claimant did not establish entitlement to the higher rating and the administrative law judge's finding is supported by substantial evidence, we affirm the administrative law judge's award for a four percent left arm impairment, pursuant to Section 8(c)(1). *See generally Pimpinella v. Universal Maritime Service, Inc.*, 27 BRBS 154 (1993).

Claimant also challenges the denial of a nominal award for his shoulder injury. A nominal award under Section 8(h), 33 U.S.C. §908(h), is appropriate when an employee's work-related injury has not diminished his current wage-earning capacity but he establishes there is a significant potential that the injury will cause a reduced wage-earning capacity in the future. *Metropolitan Stevedore Co. v. Rambo* [*Rambo II*], 521

[3] Dr. Ferris stated he gave claimant the benefit of the doubt as to his claim of weakness. CX 1 at 15.

U.S. 121, 31 BRBS 54(CRT) (1997); *Keenan v. Director, OWCP*, 392 F.3d 1041, 38 BRBS 90(CRT) (9th Cir. 2004).

In denying a nominal award, the administrative law judge found that claimant did not show "a significant potential for a change in the functional capacity of his shoulder." Decision and Order at 13. The administrative law judge credited the last office note of claimant's treating physician, Dr. Colorito, which stated that claimant was essentially back to full strength, cleared to return to work without restriction, and no long-term permanent disability was anticipated. *Id.*; *see* JX 37 at 229. The administrative law judge also credited claimant's deposition testimony that he had not sought shoulder treatment since his last visit to Dr. Colorito on August 27, 2014, and that the only medication he takes is Advil. EX 17 at 105; *see* JX 37. The administrative law judge further credited Dr. Vessely's opinion that claimant could perform at a higher level of physical activity than light-duty and that work hardening may be of benefit. *See* CX 1 at 15.

In support of his contention that the administrative law judge erred in denying a nominal award, claimant states that he sustained a significant shoulder injury for which he underwent surgery and was off work for 17 months. Claimant asserts that he is limited from taking regular-duty jobs, as evidenced by the acceptance of his union and the Pacific Maritime Association of his request for light-duty "button-pushing" jobs.

In order to establish entitlement to a nominal award claimant must establish that, as a result of his shoulder condition, he has a significant potential of a future loss of wage-earning capacity due to his shoulder condition. *See Rambo II*, 521 U.S. at 127-128, 31 BRBS at 57(CRT). In *Keenan*, the United States Court of Appeals for the Ninth Circuit, in whose jurisdiction this case arises, discussed *Rambo* and stated that, "[T]he existence of a permanent partial disability . . . is a crucial factor. The [Supreme] Court held that, because Rambo's physical condition had not improved to the point of full recovery, the possibility of future economic loss had been sufficiently raised." *Keenan*, 392 F.3d at 1046, 38 BRBS at 94(CRT). In *Keenan*, the claimant had a residual shoulder impairment, preventing him from heavy or repetitive overhead work and making strength-related activities difficult. In reversing the denial of a nominal award, the Ninth Circuit stated, "[M]ost importantly, it is factually uncontroverted that Keenan's injury is both permanent and substantial" and the "significance of the injury" is a substantial factor in determining entitlement to a nominal award. *Id.*, 392 F.3d at 1047, 38 BRBS at 94(CRT).

The facts in this case are dissimilar from those in *Keenan*. The administrative law judge found that, after August 27, 2014, claimant's left shoulder injury was no longer physically disabling. Decision and Order at 14. The administrative law judge rationally credited Dr. Colorito's opinion that "[n]o long-term permanent disability [is] anticipated"

and his releasing claimant to return to work without restrictions. JX 37 at 299. The administrative law judge found this opinion supported by the results of claimant's physical examination. Decision and Order at 13 & n.72. The administrative law judge further relied on the opinion of Dr. Vessely that claimant is capable of working at a greater level of physical activity than light-duty. CX 1 at 15. Dr. Vessely also stated that claimant did not need further diagnostic testing or active treatment. *Id.* at 16. Claimant's reliance on the initial extent of his left shoulder injury is irrelevant given the medical assessment of his left shoulder after he concluded treatment.[4] As substantial evidence supports the administrative law judge's finding that claimant did not establish the likelihood of a potential change in the functional capacity of his shoulder condition, we affirm the denial of a nominal award.[5] *B.H.* [*Holloway*] *v. Northrop Grumman Ship Systems, Inc.*, 43 BRBS 129 (2009).

Employer appeals the administrative law judge's finding it did not establish that claimant unreasonably refused to attend the medical examination it scheduled for September 14, 2013, and that employer, therefore, was not entitled to suspend benefits from September 9, 2013 to January 22, 2015, pursuant to Section 7(d)(4).[6] In his

[4] We reject claimant's contention that the case should be remanded for the administrative law judge to address the "possibly" conflicting opinion of Dr. Lynch, who examined claimant on employer's behalf. Dr. Lynch stated that the work injury to claimant's shoulder permanently worsened claimant's rotator cuff and labral conditions, EX 16 at 81, but that claimant could resume activities as tolerated and requires no additional medical treatment or restrictions. *Id.* at 82-83. In response to employer's question whether there is a "significant potential" that claimant's condition will worsen, Dr. Lynch replied that claimant's rotator cuff tear may progress due to natural degeneration. *Id.* at 83. This opinion does not undermine the administrative law judge's reliance on the opinions of Drs. Colorito and Vessely.

[5] Accordingly, we need not address claimant's arguments regarding the administrative law judge's finding that he did not show significant potential for change in the availability of light-duty work.

[6] Section 7(d)(4) provides:

> If at any time the employee unreasonably refuses to submit to medical or surgical treatment, or to an examination by a physician selected by the employer, the Secretary or administrative law judge may, by order, suspend the payment of further compensation during such time as such refusal continues, and no compensation shall be paid at any time during the period of such suspension, unless the circumstances justified the refusal.

decision, the administrative law judge noted that the employer's carrier knew claimant was represented by counsel, yet it failed to send counsel a copy of the September 5, 2013 notice of the medical examination. Decision and Order at 14; *see* EX 1; JX 1. The administrative law judge also found that the notice was "unnecessarily close in time to the exam" and contained less than complete information.[7] Decision and Order at 14; *see* EX 1. The administrative law judge also found that carrier's policy that claimant's counsel must pay a $25 fee for a copy of its file "is petty and short-sighted."[8] Decision and Order at 14; *see* JX 1 at 2. In sum, the administrative law judge found employer did not establish that claimant's refusal to attend the medical examination was "entirely unreasonable" and that claimant, therefore, was entitled to benefits until he returned to work. *Id*.

The initial burden of proof to support a suspension of benefits under Section 7(d)(4) is on the employer, who must establish that claimant's refusal is unreasonable. If that burden is met, the burden shifts to claimant to establish that circumstances justified the refusal. *B.C.* [*Casbon*] *v. Int'l Marine Terminals*, 41 BRBS 101 (2007); *Malone v. Int'l Terminal Operating Co.*, 29 BRBS 109 (1995).

Employer challenges the administrative law judge's reliance on the timeliness of the notice of the examination and its failure to copy claimant's counsel, since counsel had sufficient notice such that he advised claimant not to attend and claimant had no conflicts that would have prevented him from attending. *See* Tr. at 87; EX 17 at 102. Moreover, employer argues that claimant's counsel also had ample opportunity to obtain claimant's medical records prior to the date of the scheduled medical examination in September 2013, as his representation commenced in July 2013. JX 1 at 1.

It is well-established that an administrative law judge may draw his own inferences and conclusions from the evidence. *See Duhagon v. Metropolitan Stevedore*

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33 U.S.C. §907(d)(4).

[7] The notice did not state the examining doctor's full name, his specialty, and the body parts to be examined. EX 1.

[8] Conversely, the administrative law judge found that claimant's counsel's policy of refusing to pay the $25 fee puts "his perception of the 'greater good' above the interest of his client." Decision and Order at 14. Moreover, the administrative law judge found that counsel bears partial responsibility for employer's terminating claimant's benefits inasmuch as he advised claimant not to attend the medical examination without reaching out to the carrier to negotiate a compromise regarding the timeliness and content of the medical examination notice and the carrier's $25 administrative fee. *Id*.

Co., 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995). In this case, the administrative law judge's reliance on the untimeliness of the examination notice, its lack of detail, and employer's failure to copy claimant's counsel was not irrational. Moreover, the administrative law judge properly considered that claimant was heeding the advice of his counsel that he not attend the medical examination. Accordingly, the administrative law judge acted within his discretion to conclude from the record that employer did not establish that claimant's conduct was unreasonable. *See generally Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010). Therefore, we affirm the administrative law judge's finding that employer was not entitled, pursuant to Section 7(d)(4), to suspend claimant's compensation.

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

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge