U.S. Department of Labor

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

BRB No. 19-0009

RICK J. MARTIN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SUNDIAL MARINE TUG & BARGE WORKS, INCORPORATED	)	DATE ISSUED: 12/19/2019
	)	
and	)	
	)	
SAIF CORPORATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER on RECONSIDERATION

Appeal of the Decision and Order on Remand of Steven B. Berlin, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz and Genavee Stokes-Avery (Law Offices of Charles Robinowitz), Portland, Oregon, for claimant.

Jill Gragg (SAIF Corporation), Salem, Oregon, for employer/carrier.

Before: BOGGS, Chief Administrative Appeals Judge, ROLFE and GRESH, Administrative Appeals Judges.[1]

[1] Administrative Appeals Judge Daniel T. Gresh is substituted on the panel for Administrative Appeals Judge Ryan Gilligan, who is no longer with the Board. 20 C.F.R. §802.407(a).

PER CURIAM:

Claimant has filed a timely motion for reconsideration of the Board's Decision and Order in this case, *Martin v. Sundial Marine Tug & Barge Works, Inc.*, BRB No. 19-0009 (July 8, 2019) (unpub.). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. We vacate the Board's decision and substitute the following decision affirming the administrative law judge's decision on remand.

This case is before the Board for a second time. Claimant sustained injuries to his knees as a result of a work accident on February 4, 2004. He was released to regular duty work without restrictions on March 5, 2004. Based on MRI results showing ligament damage, Dr. Johnson performed surgery on both knees on May 27, 2004. He released claimant for modified work on August 10, 2004, and to regular duty with no restrictions, effective May 25, 2005. Dr. Johnson stated there was not much else he could offer claimant. Claimant subsequently sought treatment with Dr. Bollom without employer's authorization. Dr. Bollom reviewed claimant's medical records and concluded there was nothing he could add to Dr. Johnson's analysis. Dr. Duff, who diagnosed degenerative joint disease of the knees, opined claimant's knees were at maximum medical improvement on May 25, 2005, and no further treatment was likely to be helpful. He rated claimant's permanent impairment for each knee at seven percent. Dr. Johnson concurred with this impairment rating.

Claimant returned to Dr. Bollom in October 2005. Following an MRI on April 21, 2006, he advised claimant that, while surgery probably would not help his right knee, a debridement and micro-facture surgery on the left knee could be helpful. Nonetheless, Dr. Bollom performed surgical procedures on both knees in 2008.

In his initial decision, the administrative law judge found claimant sustained work-related injuries to his knees and his right ankle, hand, and wrist.[2] With regard to claimant's 2004 knee injuries, the administrative law judge awarded claimant temporary total disability benefits from May 12 through August 16, 2004, temporary partial disability benefits from August 16, 2004 through April 19, 2005, and permanent partial disability

[2] Although not pertinent to this appeal, claimant sustained sprains of his right wrist, thumb and ankle as a result of an accident at work on October 2, 2006. In its decision, the Board affirmed the denial of additional medical benefits for the treatment of claimant's right wrist and ankle injuries. *Martin v. Sundial Marine Tug & Barge Works, Inc.*, BRB No. 13-0231, slip op. at 8-9 (Feb. 25, 2014) (unpub.).

benefits pursuant to the schedule for each leg, based on Dr. Duff's seven percent permanent impairment ratings. 33 U.S.C. §908(b), (c)(2), (e). The administrative law judge found claimant's average weekly wage for the 2004 and 2006 work injuries is $892.83. Lastly, the administrative law judge found claimant entitled to medical benefits after August 15, 2006, for treatment of his left knee condition, including surgery, but not for the August 2008 right knee surgery. *See* 33 U.S.C. §907.

Claimant appealed the administrative law judge's calculation of his average weekly wage and the denial of medical benefits for Dr. Bollom's treatment of his right knee after August 15, 2006. *See* n.2, *supra*.

In its first decision, the Board affirmed the administrative law judge's reliance on Section 10(a), 33 U.S.C. §910(a), to determine claimant's average weekly wage, but modified his finding to $899.60, rather than $892.83, to correct a calculation error. *Martin v. Sundial Marine Tug & Barge Works, Inc.*, BRB No. 13-0231, slip op. at 4-6 (Feb. 25, 2014) (unpub.). The Board vacated the administrative law judge's finding that claimant is not entitled to medical benefits for his right knee condition and remanded for further consideration of whether Dr. Johnson's August 15, 2006 note referring claimant to Dr. Bollom was for treatment of both knees and, if so, whether claimant's right knee surgery was reasonable and necessary for the treatment of his work injury. *Id.*, slip op. at 6-7.

In his decision on remand, the administrative law judge found Dr. Johnson referred claimant for treatment of the left knee only. Decision and Order on Remand at 16-18. He found Dr. Johnson noted he was being consulted on recommended surgical treatment for claimant's left knee, reviewed the MRI of that knee, and gave a referral for left knee surgery to Dr. Bollom.[3] *Id.* at 17. The administrative law judge also relied on Dr. Douglas's office note three months after Dr. Johnson's referral,[4] which stated Dr. Johnson was recommending left knee surgery. Because Dr. Johnson did not refer claimant for right knee surgery and claimant did not seek authorization from employer for such a procedure, the administrative law judge found employer not liable for the cost of that surgery. He also determined surgery was not reasonable and necessary treatment for claimant's right knee injury. *Id.* at 18-21.

[3] Dr. Johnson's notes state that the carrier "denied request for [claimant] to see Dr. Timothy Bollom . . . [claimant] received appropriate care w/ Dr. Johnson." EX 38.

[4] Dr. Douglas is claimant's family practice physician. He managed claimant's medications. CX 17; EXs 36, 71.

On appeal, claimant challenged the administrative law judge's denial of medical treatment for his right knee and the administrative law judge's average weekly wage determination. Employer filed a response brief asserting claimant's contentions are meritless. Claimant filed a reply brief.

In its July 8, 2019 Decision and Order, the Board affirmed the administrative law judge's finding that the right knee surgery was not reasonable or necessary treatment for claimant's work-related injury. *Martin*, slip op at 4-5 (July 8, 2019). The Board also affirmed the modified average weekly wage calculation on the basis of the law of the case doctrine. *Id.* at 6.

Claimant timely moves for reconsideration of the Board's affirmance of the finding that right knee surgery was not reasonable and necessary treatment. 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407(a). Employer filed a letter referring the Board to its response to claimant's initial petition for review, urging rejection of claimant's contention.

We decline to address claimant's contention on reconsideration and vacate the Board's prior opinion affirming the administrative law judge's finding that right knee surgery was not reasonable and necessary treatment. We substitute for our prior decision this opinion addressing claimant's contention, raised in his initial Petition for Review and brief, that the administrative law judge erred in denying medical benefits for the right knee based on his finding that Dr. Johnson's August 2006 referral to Dr. Bollom was for only left knee surgery and that claimant did not have a referral or authorization for right knee surgery. Claimant avers this determination is not supported by substantial evidence and makes no sense in light of the facts that he complained of bilateral knee pain, the referral is not explicitly limited to the left knee, and employer's declining to authorize the referral was not explicitly limited to the left knee. Cl. Pet. for Rev. at 6-9. 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).

Section 7 of the Act generally describes an employer's duty to provide medical services necessitated by its employee's work-related injury, employer's rights regarding control of those services, and the Secretary's duty to oversee them. Section 7(d) of the Act, 33 U.S.C. §907(d), states the prerequisites for employer's liability for payment or reimbursement of medical expenses claimant incurs. Specifically, in order to be entitled to payment for medical treatment, claimant must first request employer's authorization for

the medical services performed by any physician.[5] *Nardella v. Campbell Machine, Inc.*, 525 F.2d 46, 3 BRBS 78 (9th Cir. 1975); *see also Maryland Shipbuilding & Dry Dock Co. v. Jenkins*, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979); *Ranks v. Bath Iron Works Corp.*, 22 BRBS 302 (1989). If claimant does not seek authorization, the inquiry is over – employer is not liable for the treatment. *Parklands, Inc. v. Director, OWCP*, 877 F.2d 1030, 1035, 22 BRBS 57, 65(CRT) (D.C. Cir. 1989); *Jenkins*, 594 F.2d at 406, 10 BRBS at 6-7; *Nardella*, 525 F.2d at 49-52, 3 BRBS at 81-82.

In his decision on remand, the administrative law judge summarized the pertinent evidence. Decision and Order on Remand at 16-17. He determined Dr. Johnson was claimant's treating orthopedist, but claimant saw Dr. Bollom in May and October 2005 without a referral from Dr. Johnson or employer's authorization. Tr. at 137; CX 16 at 25, 18. Claimant returned to Dr. Bollom in June 2006. CXs 19-20. Dr. Bollom stated, "[I] think the right knee would be difficult to improve upon with an arthroscopic procedure . . . for the left knee, one could consider arthroscopic debridement and probable microfracture . . . I certainly think the left side could be helped more than the right . . . ." CX 20. The administrative law judge found this opinion unambiguously stated that Dr. Bollom was willing to consider surgery for the left knee, but it would be difficult for a surgical procedure to improve the right knee. Decision and Order on Remand at 17. Claimant returned to Dr. Johnson in August 2006 to request a referral to Dr. Bollom for further treatment. CX 21. The administrative law judge determined Dr. Johnson's office note stated claimant sought a referral to Dr. Bollom for surgical treatment of his left knee. He gave claimant the referral after examining claimant's left knee and reviewing the left knee MRI. EX 38. Dr. Johnson also referred claimant to Dr. Douglas in August 2006 for possible pain management. CX 22. Dr. Douglas noted in September 2006 that Dr. Johnson had recommended left knee surgery, which employer denied. CX 39. The administrative law judge found, "[N]othing in the record suggests any conclusion other than that Dr. Johnson understood that he was referring Claimant for surgery on his left knee and left knee alone. The referral did not concern the right knee." Decision and Order on Remand

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[5] Section 7(d)(1) states:

> (d)(1) An employee shall not be entitled to recover any amount expended by him for medical or other treatment or services unless --
>
> > (A) the employer shall have refused or neglected *a request* to furnish such services and the employee has complied with subsections (b) and (c) of this section and the applicable regulations . . . .

33 U.S.C. §907(d)(1) (emphasis added).

at 18. The administrative law judge also found employer never authorized the right knee surgery and that Dr. Bollom operated without authorization or referral. *Id*. Thus, in the absence of a request for prior authorization for right knee surgery, the administrative law judge found that employer is not liable for the surgery. We affirm.

The administrative law judge is entitled to draw reasonable inferences from the record evidence. *See generally Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 27(CRT) (9th Cir. 1988). Contrary to claimant's contention, the administrative law judge's finding that Dr. Johnson referred claimant to Dr. Bollom for treatment of only the left knee is rational and supported by substantial evidence. Dr. Johnson's August 15, 2006 office note states:

> [Claimant] returns today with persisting bilateral knee pain. *He has recently seen another physician regarding his left knee who suggested arthroscopic surgery*. In reviewing his notes there is an MRI, which noted osteochondral defects of both medical and lateral femoral condyles possible horizontal cleavage tear of the posterior horn medical meniscus and grade III arthritic changes in the medial compartment. These findings are certainly consistent with the patient's symptoms and he would like a referral to another physician to pursue further treatment. Referral made to Dr. Bollom and I will see him back as needed.

CX 21 at 35 (emphasis added). At the time of the referral, Dr. Bollom had recommended only left knee surgery. CX 20. Dr. Johnson's August 15, 2006 office note refers only to left knee surgery, despite claimant's complaint of bilateral knee pain. CX 21 at 35. Dr. Douglas's note similarly refers only to the denial of authorization for the left knee surgery. CX 39. Therefore, we affirm the finding that claimant did not request authorization from employer for right knee surgery prior to undergoing the procedure with Dr. Bollom in August 2008. *See, e.g., Rhine v. Stevedoring Services of America*, 596 F.3d 1161, 44 BRBS 9(CRT) (9th Cir. 2010) (Board must affirm a finding supported by substantial evidence). As the Act requires that a claimant seek prior authorization for medical treatment and claimant did not do so, we affirm the administrative law judge's finding that employer is not liable for claimant's right knee surgery. *Parklands*, 877 F.2d at 1035, 22 BRBS at 65(CRT); *Jenkins*, 594 F.2d at 406, 10 BRBS at 6-7; *Nardella*, 525 F.2d at 49-52, 3 BRBS at 81-82.

Claimant next contends the Board erred in its prior decision by affirming the administrative law judge's method of calculating his average weekly wage. The Board has held it will adhere to its initial decision when a case is before it for a second time unless there has been a change in the underlying factual situation, intervening controlling authority demonstrates the initial decision was in error, or the first decision was clearly

erroneous and to let it stand would produce a manifest injustice. *See, e.g.*, *Kirkpatrick v. B.B.I., Inc.*, 39 BRBS 69 (2005); *Gladney v. Ingalls Shipbuilding, Inc.*, 33 BRBS 103 (1999); *Schaubert v. Omega Services Industries*, 32 BRBS 233 (1998). In its prior decision, the Board fully addressed the administrative law judge's claimant's average weekly wage determination. *Martin*, slip op. at 3-6 (Feb. 25, 2014). This holding constitutes the law of the case and, as there is no legal or factual basis for finding this doctrine inapplicable, we decline to further address claimant's contentions regarding his average weekly wage. *Irby v. Blackwater Security Consulting*, 44 BRBS 17 (2010); *Kirkpatrick*, 39 BRBS 69.

Accordingly, claimant's motion for reconsideration is denied. 20 C.F.R. §802.409. We vacate the Board's July 8, 2019, Decision and Order and affirm the administrative law judge's Decision and Order on Remand for the reasons stated herein.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge