U.S. Department of Labor

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

BRB No. 16-0306

LAWRENCE ROGERS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: Feb. 28, 2017
NORFOLK SOUTHERN CORPORATION	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Order Approving Settlement of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Lawrence Rogers, Norfolk, Virginia.

Christopher R. Hedrick and Bradley D. Reeser (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant, who is not represented by legal counsel, appeals the Order Approving Settlement (2015-LHC-00718) of Administrative Law Judge Paul C. Johnson, Jr., 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). In an appeal by a claimant who is not represented by an attorney, we will review the administrative law judge's decision to determine if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are in accordance with law. If they are, they must be affirmed. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 20 C.F.R. §802.211(e).

Claimant worked as an equipment operator for employer. On September 9, 2009, he suffered injuries to his right shoulder and low back while securing an incoming vessel to the shipping pier. Although his shoulder healed, he has had continued difficulty with his low back and is unable to return to his usual work. Claimant states employer paid

disability and medical benefits until January 15, 2015. Thereafter, the parties proceeded to settlement negotiations.[1] In February 2016, claimant, without an attorney, and employer reached an agreement and submitted their settlement application to the administrative law judge for approval pursuant to Section 8(i) of the Act, 33 U.S.C. §908(i).

In the agreement, claimant and employer identified claimant's injury to his back, and stated that claimant had been paid the appropriate amount of compensation and medical benefits prior to the date he was assigned permanent work restrictions.[2] The parties stated there are disputes as to the nature and extent of disability that was caused by claimant's work injury, his entitlement to medical and vocational benefits, and whether there was a Section 49, 33 U.S.C. §948a, discrimination violation. In light of these disputes, as well as the amount that was already paid to claimant by employer, and the "possibility of future compensation payments," Settlement App. at 3, the parties reached a settlement and also provided that employer would pay an attorney's fee to claimant's former attorney, Mr. Mulroney.[3] In addition to the details of the agreement, the settlement application states: "The Claimant has given careful consideration to this settlement and believes this settlement to be in his best interest at this time." Settlement App. at 5. The settlement application also contains a paragraph entitled "Claimant's Request for Approval" in which he acknowledges that the settlement will terminate employer's liability for additional compensation and medical payments and will resolve any charge of discrimination. The paragraph concludes:

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[1] During the initial portion of the settlement negotiation process, claimant was represented by counsel. However, on October 19, 2015, the administrative law judge granted counsel's request to withdraw, and the settlement mediation closed without resolution.

[2] Employer's Notice of Final Payment indicates that employer paid claimant over $121,000 in temporary total and temporary partial disability benefits. Emp. Br. at exh. 2. However, the settlement application states that claimant had been paid benefits for various periods of temporary total and permanent total disability for his injury, totaling over $158,000, and that compensation was correctly paid until the time claimant was assigned permanent work restrictions, at which point a dispute arose over the nature and extent of claimant's disability. Settlement App. at 2.

[3] The settlement agreement requires employer to pay $112.954.52 to claimant for disability compensation, $68,093.48 for future medical benefits, $100 for mileage, and $100 for satisfaction of any claim under 33 U.S.C. §948a. Additionally, employer will pay claimant's former counsel $20,000 in full satisfaction of his application for fees and costs. Settlement App. at 2-3, 7.

> I have no further questions or doubts concerning this matter. The dollar amount of the settlement is *assumed adequate* and there has been no intimidation, pressure, coercion or duress by anyone against me in my consideration to request this settlement.

Settlement App. at 11 (emphasis added). Claimant initialed and signed the settlement application where required. In addition, he signed a "Release" and a "Request for Approval of Settlement." Emp. Br. at exh. 12; Approval Order at appendix.[4] The fully-executed settlement application was filed on February 19, 2016.

Prior to that date, claimant had sent to the administrative law judge a copy of the settlement application signed by claimant but not by counsel for employer, and a letter dated February 10, 2016. The letter stated that a settlement had been reached and that employer would submit the fully-executed agreement. *See* Approval Order at 1. In the letter, claimant requested that his former counsel's $20,000 fee specifically be evaluated for adequacy in light of his having withdrawn due to "perceived misrepresentation." Further, while noting that he had voluntarily signed the document "under the assumption" it is adequate, claimant asked the administrative law judge to "validate or disprove the assumption" according to the regulations. Cl. Reply. Br. at exh. 6b.

The administrative law judge approved the compromise fee of $20,000 agreed upon by employer and Mr. Mulroney. The administrative law judge stated that counsel is entitled to a fee for work performed because his services contributed to the successful outcome. The administrative law judge also found that the settlement itself is adequate and was not procured by duress based on claimant's own statements and his participation throughout the settlement process. Approval Order at 1-2. Accordingly, the administrative law judge approved the settlement and awarded claimant $181,248 to be paid by employer. *Id.*; 33 U.S.C. §908(i); 20 C.F.R. §§702.241-702.243; n.3, *supra*. Claimant appeals the administrative law judge's approval, seeking "re-evaluation" of the settlement and asserting it is not adequate because he was not informed of the "true value" of his claim and the amount does not cover his future medical expenses. He also challenges the payment of a fee to his former attorney. Employer responds, urging affirmance. Claimant filed a reply "brief," and employer filed a sur-reply.

[4] The request for approval document specifically asked the administrative law judge to approve the settlement, acknowledging that claimant has a right to pursue a claim in litigation. Claimant further stated: "I am asking you to approve the settlement amount submitted by stipulations to your office as a (sic) representing adequate consideration for myself; and, that further, my request for this approval is not the result of duress."

Section 8(i), 33 U.S.C. §908(i), provides for the settlement of "any claim for compensation under this chapter."[5] It explicitly states that the district director or the administrative law judge "shall approve the settlement within thirty days unless it is found to be inadequate or procured by duress." 33 U.S.C. §908(i)(1).[6] Where a claimant seeks to terminate his compensation claim for a sum of money, the Section 8(i) settlement procedures, as delineated in the Act's implementing regulations, must be followed. *Norton v. National Steel & Shipbuilding Co.*, 25 BRBS 79 (1991), *aff'd on recon. en banc*, 27 BRBS 33 (1993) (Brown, J., dissenting); 20 C.F.R. 702.241-702.243.[7] The regulations ensure that the approving official has the information necessary to determine whether the settlement is inadequate or procured by duress. *McPherson v.*

[5] Section 8(i), 33 U.S.C. §908(i), is the only means for compromising an employer's obligation to pay benefits under the Act, creating an exception to Section 15(b), 33 U.S.C. §915(b) ("No agreement by an employee to waive his right to compensation under this Act shall be valid."), and to Section 16, 33 U.S.C. §916, which provides that no assignment, release, or commutation of compensation and benefits is valid except as provided in this Act.

[6] Section 8(i)(1) provides:

> Whenever the parties to any claim for compensation under this chapter, including survivors[']benefits, agree to a settlement, the deputy commissioner or administrative law judge shall approve the settlement within thirty days unless it is found to be inadequate or procured by duress. Such settlement may include future medical benefits if the parties so agree. No liability of any employer, carrier, or both for medical, disability, or death benefits shall be discharged unless the application for settlement is approved by the deputy commissioner or administrative law judge. If the parties to the settlement are represented by counsel, then agreements shall be deemed approved unless specifically disapproved within thirty days after submission for approval.

[7] Section 702.242(a) requires the settlement application to be in the form of a stipulation signed by all parties, be self-sufficient, contain a brief summary of the facts of the case including a description of the incident, a description of the nature of the injury including the degree of impairment and/or disability, a description of the medical care rendered to date of settlement, and a summary of compensation paid. 20 C.F.R. §702.242(a). Section 702.242(b) requires that the application contain, *inter alia*, the reasons for the settlement and its terms, the issues in dispute, information on whether or not the claimant is working or is capable of working, and a "statement explaining how the settlement amount is considered adequate." 20 C.F.R. §702.242(b).

National Steel & Shipbuilding Co., 26 BRBS 71 (1992), *aff'g on recon. en banc* 24 BRBS 224 (1991); *see generally Bonilla v. Director, OWCP*, 859 F.2d 1484, 21 BRBS 185(CRT) (D.C. Cir. 1988), *amended*, 866 F.2d 451 (D.C. Cir. 1989). A settlement must be approved or disapproved in its entirety unless the parties have included a severability clause permitting portions to be approved independently. *Losacano v. Electric Boat Corp.*, 48 BRBS 49 (2014); 20 C.F.R. §702.243(e). Once approved, the effect of a settlement is to completely discharge the employer's liability for the claimant's injury. 33 U.S.C. §908(i)(3).

Claimant asks the Board to "re-evaluate" the settlement and to reverse the administrative law judge's approval of it so that an "adequate" settlement can be determined.[8] Specifically, claimant asserts he was never told the "value" of his claim and that the regulation at 20 C.F.R. §702.243 was not followed.[9] To the extent claimant is asserting that the negotiated settlement amount should have been compared to an actuarial value, we reject claimant's assertion. This case was not litigated and no final compensation order was issued prior to the parties' settlement agreement; therefore, Section 702.243(g), 20 C.F.R. §702.243(g), which requires a "present value" calculation, does not apply.[10] *Richardson v. Huntington Ingalls, Inc.*, 48 BRBS 23 (2014). Although

[8] We reject claimant's challenge to the amount of the attorney's fee approved for Mr. Mulroney. First, claimant lacks standing to challenge the compromise fee, as the finding is not adverse to him; he is not liable for the fee to counsel under this settlement. *See generally Omar v. Al Masar Transp. Co.*, 46 BRBS 21 (2012); *Sharpe v. George Washington University*, 18 BRBS 102 (1986). Further, as the administrative law judge found, counsel provided services that contributed to claimant's ultimate success, thus entitling counsel to a fee. There was no abuse of discretion in approving the agreed-upon fee, and, in any event, the administrative law judge is not permitted to alter any part of a settlement agreement, including a fee award. *Losacano v. Electric Boat Corp.*, 48 BRBS 49 (2014).

[9] We reject claimant's contention that the district director should have taken various actions with regard to the settlement agreement. The settlement application was submitted to, and approved by, the administrative law judge. The regulations require *either* the administrative law judge *or* the district director to take the same actions with regard to evaluating a Section 8(i) settlement. 20 C.F.R. §702.241 *et seq.* The district director's internal procedures for evaluating Section 8(i) settlements, however, are not binding on the administrative law judge.

[10] Section 702.243(g) (emphasis added) states:

> *In cases being paid pursuant to a final compensation order, where no substantive issues are in dispute,* a settlement amount which does not equal

that subsection does not apply, we agree there are some regulatory concerns with the administrative law judge's Approval Order.[11] Nevertheless, given claimant's lack of legal representation and the potentially detrimental consequences that could arise upon disturbing the parties' settlement, we decline to reverse or vacate the administrative law judge's Approval Order. Instead, we remand the case to give claimant the opportunity to raise these issues before the administrative law judge if he so chooses.

Claimant, who was not represented by an attorney during the settlement negotiations, "assumed" the adequacy of what he had negotiated but expected the administrative law judge to evaluate the settlement further. Claimant expressed this expectation in correspondence and implied it in the settlement agreement itself. *See* Settlement App. at 11; Letter to Judge dated Feb. 10, 2016. The Board's decision in *Richardson* states that the administrative law judge must assure that the settlement between an unrepresented claimant and his employer meets the necessary criteria and is adequate. *Richardson*, 48 BRBS 23;[12] *see generally Oceanic Butler, Inc. v. Nordahl*, 842

> the present value of future compensation payments commuted, computed at the discount rate specified below, shall be considered inadequate unless the parties show that the amount is adequate. The probability of death of the beneficiary before the expiration of the period during which he or she is entitled to compensation shall be determined according to the most current United States Life Table. . . . The discount rate shall be equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of 52 weeks U.S. Treasury Bills settled immediately prior to the date of the submission of the settlement application.

[11] The settlement application forwarded to the Board does not contain a current medical report, 20 C.F.R. §702.242(b)(5), and the administrative law judge did not explicitly apply the criteria for approving a settlement under the Act, 20 C.F.R. §702.243(f).

[12] In *Richardson*, the Board affirmed the administrative law judge's approval of the settlement because the administrative law judge generally considered the regulations at 20 C.F.R. §§702.241-702.243, and the claimant was represented by counsel, who presumably advised her as to the pros and cons of the agreed-upon amount. The Board held that the administrative law judge reasonably concluded that the claimant was entitled to rely on the advice of her attorney in agreeing to a settlement under the Act. Thus, it was reasonable for the administrative law judge to rely on their opinions as to the adequacy of the settlement amount. The Board noted, however, that a more paternalistic approach may be necessary for claimants who are not represented by counsel. *Richardson*, 48 BRBS at 26-27.

F.2d 773, 21 BRBS 33(CRT) (5th Cir. 1988); *Bomback v. Marine Terminals Corp.*, 44 BRBS 95 (2010).[13]

As claimant may not fully understand the consequences of disturbing the administrative law judge's approval of the settlement agreement, we shall provide some guidance. Generally, under the Act, if any part of a settlement is disapproved, the entire settlement is disapproved. *Losacano*, 48 BRBS 49; 20 C.F.R. §702.243(e).[14] Claimant has already been fully paid by employer; therefore, if he does not want the administrative law judge to revisit the adequacy of the settlement, the parties remain in the status quo – claimant would be entitled to, and employer would be liable for, nothing more. If, however, claimant opts to have the administrative law judge re-evaluate the settlement, he must understand the consequences of that option; claimant may receive a lesser amount and have to repay the benefits to employer.

If claimant wants the administrative law judge to reassess the adequacy of the settlement, the parties must ensure that a medical report in accordance with the regulation is sent to the administrative law judge and becomes part of the "self-sufficient" settlement package, and the administrative law judge must apply the appropriate regulatory criteria in rendering a decision on the adequacy of the agreement.[15] 20 C.F.R. §§702.242(b)(5), 702.243(f). The administrative law judge may approve or disapprove the current settlement but must explain his reasons specifically taking into account, at a minimum, the regulatory criteria. If he approves the settlement, the parties maintain the status quo; claimant and counsel retain the amounts they have been paid, and employer is relieved of further liability. If the administrative law judge disapproves the settlement, Section 702.243(c) of the regulations gives the parties the options of renegotiating the settlement or adjudicating the claim. 20 C.F.R. §702.243(c). Under either a renegotiation or an adjudication scenario, claimant should understand that he is not guaranteed greater benefits and, possibly, could obtain significantly less or nothing at all.

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[13] In *Bomback*, a case where the claimant was represented by an attorney, the Board vacated the administrative law judge's summary approval of a settlement which would have entitled the claimant to future medical benefits of $15,000. The Board held that the administrative law judge did not determine whether the settlement agreement complied with the regulations at 20 C.F.R. §§702.242, 702.243, by adequately documenting claimant's need for future medical treatment as well as the cost for such services or sufficiently address whether $15,000 represents an amount which is adequate for those purposes.

[14] This settlement does not contain a severability clause; thus, it must be approved or disapproved in its entirety. *Losacano*, 48 BRBS 49.

[15] There appears to be no dispute that the agreement was not made under duress.

Depending on the administrative law judge's reasons for disapproving the settlement agreement, the parties may be able to reach agreement only for a lesser amount. Under those circumstances, claimant would have to repay employer the excess settlement proceeds. If the case is adjudicated and claimant is awarded fewer benefits than the amount to which he was entitled under the initial settlement agreement, employer would get a Section 14(j), 33 U.S.C. §914(j), credit for the amounts it has already paid. Depending on the amount awarded, Section 14(j) would postpone or terminate claimant's receipt of any future compensation payments. *Universal Maritime Service Corp. v. Spitalieri*, 226 F.3d 167, 34 BRBS 85(CRT) (2d Cir. 2000), *cert. denied*, 532 U.S. 1007 (2001); *Floyd v. Penn Terminals, Inc.*, 37 BRBS 141 (2003) (proceeds paid pursuant to a vacated settlement agreement are advance payments of compensation within the meaning of Section 14(j)); *Weber v. S.C. Loveland Co.*, 35 BRBS 190 (2002), *aff'g and modifying on recon.* 35 BRBS 75 (2001) (an employer who has made advance payments of compensation is to be reimbursed out of unpaid installments of compensation). Additionally, if the settlement is disapproved, the issue of an attorney's fee for claimant's former attorney would be re-opened.

Accordingly, the case is remanded to the administrative law judge for further action in accordance with this decision.

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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JONATHAN ROLFE
Administrative Appeals Judge