U.S. Department of Labor

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

BRB No. 15-0358

VICKIE C. BAXTER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CSA, LIMITED	)	DATE ISSUED: Jan. 19, 2016
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, c/o AIG CLAIMS, INCORPORATED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Granting in Part and Denying in Part Medical Benefits of Dana Rosen, Administrative Law Judge, United States Department of Labor.

Howard S. Grossman and Michael J. Ferrin (Grossman Attorneys at Law), Boca Raton, Florida, for claimant.

John F. Karpousis (Freehill Hogan & Mahar, LLP), New York, New York, for employer/carrier.

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

PER CURIUM:

Claimant appeals the Decision and Order Granting in Part and Denying in Part Medical Benefits (2014-LDA-00189) of Administrative Law Judge Dana Rosen rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which 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 was employed by employer as a warehouse supervisor in Kuwait when, on April 8, May 1, and May 20, 2010, she was involved in automobile accidents which resulted in injuries to her neck, back and knees. Claimant remained in Kuwait following these incidents, where she received medical treatment which included pain medication, an MRI, and nerve blocks in her lower back. On February 7, 2011, claimant's contract with employer ended and she returned to the United States. A dispute subsequently arose regarding employer's liability for medical treatments sought by claimant; specifically, claimant sought, and employer declined to pay for, surgery on her left knee, a third MRI on her back, and a dorsal spinal column stimulator.[1]

In her Decision and Order, the administrative law judge found claimant entitled to a third MRI on her back and medial patellofemoral reconstruction surgery on her left knee, payable by employer. The administrative law judge determined, however, that employer is not liable for a dorsal spinal column stimulator as claimant did not establish that this device is reasonable and necessary for the treatment of her work-related back condition.

On appeal, claimant challenges the administrative law judge's denial of her request that employer be held liable for the cost of a dorsal spinal column stimulator. Employer responds, urging affirmance. Claimant filed a reply brief.

Section 7 of the Act, 33 U.S.C. §907, generally describes an employer's duty to provide medical and related services and costs necessitated by its employee's work-related injury, employer's rights regarding control of those services, and the Secretary's duty to oversee them. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). In this regard, Section 7(a) of the Act 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." 33 U.S.C. §907(a); *see Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). In order for a medical expense to be awarded, it must be reasonable and necessary for the treatment of the work injury. *See Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996); *Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989); *Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130 (1981); 20 C.F.R. §702.402. While a claimant may establish her prima facie case for compensable medical treatment when a qualified physician indicates that treatment is necessary for a work-related condition, *see Romeike v. Kaiser Shipyards*, 22

[1] Employer has voluntarily paid claimant temporary total disability compensation from July 7, 2010, through the present time. 33 U.S.C. §908(b).

BRBS 57 (1989), whether a particular medical expense is necessary is a factual issue within the administrative law judge's authority to resolve. *See Weikert v. Universal Maritime Serv. Corp*., 36 BRBS 38 (2002); *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988).

In her decision, the administrative law judge found that a dorsal spinal column stimulator (hereinafter spinal stimulator) is not reasonable and necessary treatment for claimant's back condition, and she consequently found that employer is not liable for the cost of that device. In making this determination, the administrative law judge accorded substantial weight to the opinions of Drs. Bernard, Gorum, and Osborn. Dr. Bernard, an orthopedic surgeon who examined claimant on May 19, 2011, testified in his June 10, 2014 deposition that, as his review of claimant's MRI films revealed a degenerative, but not a herniated, disc, claimant was not a candidate for a spinal stimulator at the time he examined claimant. CX 35 at 6-9. Dr. Gorum, a Board-certified neurologist who examined claimant on August 5, 2011, similarly testified in his June 20, 2014 deposition that, as claimant's MRI demonstrated early degenerative disc disease but no disc herniation and the September 2013 EMG indicated a "soft" objective finding, he would not recommend the use of a spinal stimulator to treat claimant's back complaints.[2] EX R at 7. Dr. Osborn, a Board-certified orthopedic surgeon who examined claimant on July 25, 2013, testified that in the absence of a history of surgery or clinical findings of radiculopathy, claimant did not meet the criteria for the use of a spinal stimulator. Moreover, Dr. Osborn testified that claimant's September 2013 EMG results would not change his opinion regarding the need for a spinal stimulator, since in the presence of a normal MRI there are a number of possible causes for a positive EMG. CX 38 at 5. In contrast to these opinions, Dr. Dawson, who is Board-certified in pain management and physical medicine and rehabilitation, opined that claimant should undergo a third MRI to determine whether surgery was warranted to treat her back condition and that a trial spinal stimulator was recommended in an attempt to reduce claimant's use of pain medication.[3] In this regard, Dr. Dawson testified that back pain alone justified the use of a spinal stimulator trial to treat claimant. CX 36 at 9, 14-15. The administrative law judge concluded that the weight of the medical evidence supports a finding that a spinal stimulator is not reasonable or necessary for the treatment of claimant's back condition. Decision and Order at 65 – 70.

[2] The September 25, 2013 EMG performed on claimant's back was interpreted as showing lumbar sacral radiculopathy at L5-S1. CX 30 at 1-2.

[3] Dr. Dawson was claimant's treating physician through May 5, 2014. CX 36 at 14.

We reject claimant's challenge to the administrative law judge's finding that employer is not liable for the cost of a spinal stimulator trial.[4] In adjudicating a claim, it is well established that an administrative law judge is entitled to weigh the medical evidence and is not bound to accept the opinion or theory of any particular witness. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). In her decision, the administrative law judge rationally evaluated the evidence of record, and claimant has not established reversible error in her conclusions. The administrative law judge acted within her discretion in crediting the opinions of Drs. Bernard, Gorum, and Osborn, rather that of Dr. Dawson.[5] *Id*. While, as claimant asserts on appeal, neither Drs. Bernard, Gorum nor Osborn used the precise terms "reasonable" or "necessary" in addressing the use of a spinal stimulator to treat claimant's back condition, each physician opined, after examining claimant, that he would either not recommend such treatment or that claimant was not a candidate for such a device. *See* CX 35; EX R; CX 38. These credited opinions thus support the administrative law judge's conclusion that the use of a spinal stimulator is not reasonable and necessary for the treatment of claimant's work-related back condition. Therefore, as it is supported by substantial evidence, we affirm the administrative law judge's finding that employer is not liable for the cost of a spinal stimulator.[6] *See Scott v. C & C Lumber Co., Inc.*, 9 BRBS 815 (1978); *see generally*

[4] Claimant asserts that neither employer nor the administrative law judge addressed the difference between a spinal stimulator trial, which was recommended by Dr. Dawson, and spinal stimulator surgery, which would follow if the trial proved to be successful. Any distinction in this regard is moot, as all of the medical witnesses addressed whether a spinal stimulator constitutes an appropriate method of treating claimant's back condition.

[5] Claimant avers that the reports of Drs. Bernard, Gorum, and Osborn are not in compliance with Federal Rules of Civil Procedure 26(a)(2)(B) and 37(c)(1), and that the administrative law judge erred in not sustaining her objection to these opinions. We reject this contention. Administrative law judges in general are not bound by formal rules of practice and procedure, *see* 33 U.S.C. §923(a), but "shall receive in evidence . . . any documents which are relevant and material . . . ." 20 C.F.R. §702.338; *see also* 20 C.F.R. §702.339; *Casey v. Georgetown University Medical Center*, 31 BRBS 147 (1997).

[6] We reject claimant's assertion that, in light of the decision of the United States Court of Appeals for the Ninth Circuit in *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), the administrative law judge improperly denied claimant's request for a spinal stimulator trial. Unlike the factual situation presented in *Amos*, where the opinion of the employee's treating surgeon was not shown by the testimony of other doctors to be unreasonable, *see id.*, 153 F.3d at 1054, 32 BRBS at 147-148(CRT), employer in this case presented the opinions of Drs. Bernard, Gorum, and Osborn, each of whom opined

Brooks v. Newport News Shipbuilding & Dry Dock Co., 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993).

Accordingly, the administrative law judge's Decision and Order Granting in Part and Denying in Part Medical Benefits is affirmed.

SO ORDERED.

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JUDITH S. BOGGS
Administrative Appeals Judge

_____
RYAN GILLIGAN
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge

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that a spinal stimulator was not recommended for claimant's condition. *See Brown v. Nat'l Steel & Shipbuilding Co.*, 34 BRBS 195 (2001).