U.S. Department of Labor

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

BRB No. 14-0402

FORREST J. HATCHER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DYNALECTRIC COMPANY	)	DATE ISSUED: July 20, 2015
	)	
and	)	
	)	
FIREMAN'S FUND INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Petitioners	)	
	)	DECISION and ORDER

Appeal of the Order Granting Claimant's Motion for Reconsideration and the Order Amending the 2/25/14 Order Granting Claimant's Motion for Reconsideration and Denying in All Other Respects Employer's Motion for Reconsideration of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Forrest J. Hatcher, Falls Church, Virginia, *pro se.*

David D. Hudgins (Hudgins Law Firm, P.C.), Alexandria, Virginia, for employer/carrier.

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

PER CURIAM:

Employer appeals the Order Granting Claimant's Motion for Reconsideration and the Order Amending the 2/25/14 Order Granting Claimant's Motion for Reconsideration and Denying in All Other Respects Employer's Motion for Reconsideration (2006-DCWC-00008) 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.* (1982), as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§501, 502 (1973)

(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).

This case has a lengthy procedural history. On October 6, 1976, claimant sustained a back injury while working for employer. Employer voluntarily paid claimant temporary total disability benefits for approximately three weeks, after which time claimant returned to work. Claimant thereafter sought, and employer paid for, chiropractic care in an effort to alleviate his ongoing back pain.

On July 2, 1996, employer filed a Notice of Controversion contesting the reasonableness and necessity of claimant's ongoing chiropractic treatment. In a Decision and Order dated January 5, 1999, Administrative Law Judge Miller held employer liable for medical expenses arising as a result of claimant's October 6, 1976, injury, including one chiropractic treatment per week. This decision was affirmed by the Board. *Hatcher v. Dynalectric Co.*, BRB Nos. 99-0499/A (Feb. 10, 2000).

Claimant subsequently sought reimbursement from employer for travel expenses incurred to attend his medical appointments, the cost of mattresses, and the installation and yearly maintenance of a hot tub and dehumidifier in his home. In a Decision and Order dated January 28, 2009, Administrative Law Judge Rae found that employer was not liable for the cost of claimant's hot tub, dehumidifier or mattresses, or for reimbursement of claimant's travel expenses. Although the issue was not raised by the parties, Judge Rae found that the alleged qualifying conditions set forth by Judge Miller in awarding claimant ongoing chiropractic treatment no longer existed, and he consequently concluded that employer was no longer liable for claimant's chiropractic treatment.[1]

[1] In his January 1999 Decision and Order, Judge Miller awarded claimant up to one chiropractic treatment per week, payable by employer. The finding that this treatment was necessary was based, in part, on medical evidence that the treatment aided claimant's ability to work. In the Order section of his decision, however, Judge Miller ordered that chiropractic care was to continue until such time as claimant's spinal subluxation was corrected or claimant's job no longer required him to perform strenuous physical labor. *See* Judge Miller's January 5, 1999 Decision and Order at 10-11. Finding that neither of these two prerequisites was still present, Judge Rae found that employer was no longer liable for chiropractic treatments as of March 1, 2008. *See* Judge Rae's January 28, 2009 Decision and Order at 9-10.

Claimant, without the assistance of counsel, appealed Judge Rae's decision to the Board. The Board vacated Judge Rae's findings that employer is not liable for claimant's chiropractic treatment and travel expenses, and remanded the case for further consideration of these issues. In all other respects, the Board affirmed Judge Rae's decision. *Hatcher v. Dynalectric Co.*, BRB No. 10-0313 (Dec. 15, 2010).[2] In a Decision and Order on Remand dated November 20, 2012, Judge Rae found that: 1) based on the language of Judge Miller's Decision and Order, claimant is not entitled to reimbursement for chiropractic care from employer as of March 1, 2008, since claimant was last employed in February 2008; and 2) claimant had not provided sufficient proof of his travel costs for chiropractic treatment between September 16, 2006 and March 1, 2008.

Claimant appealed Judge Rae's November 20, 2012 Decision on Remand. However, as claimant also had filed a motion for reconsideration of Judge Rae's decision, the Board dismissed claimant's appeal on the ground that it was prematurely filed. 20 C.F.R. §802.206(f).

The case was reassigned to Administrative Law Judge Johnson (hereinafter, the administrative law judge). On February 25, 2014, the administrative law judge issued an Order Granting Claimant's Motion for Reconsideration wherein he determined, after considering Judge Miller's 1999 decision, that claimant remains entitled to chiropractic care at employer's expense. The administrative law judge addressed at length and rejected employer's contention that Judge Miller had conditioned claimant's entitlement to chiropractic treatment on his continued employment. The administrative law judge further found that the chiropractic services are reasonable and necessary for the manual manipulation of claimant's work-related subluxation, and he, consequently, reinstated the award of chiropractic treatment and for the travel expenses incurred for these appointments.

Employer moved for reconsideration of this Order. The administrative law judge denied employer's motion for reconsideration on the issue of the meaning of Judge

[2] Specifically, the Board stated that, as the record established that the issue of employer's continuing obligation to pay for claimant's ongoing chiropractic treatments pursuant to Judge Miller's January 1999 Decision and Order had not been raised prior to or at the hearing by either party, Judge Rae could not properly address this new issue in his decision without giving the parties prior notice that he intended to do so. With regard to claimant's travel expenses, the Board determined that claimant, contrary to Judge Rae's statement, had in fact requested reimbursement from employer. *Hatcher*, slip op. at 4-5.

Miller's decision. In further denying employer's motion on the issue of its liability for specific bills of Dr. Piorkowski, the administrative law judge stated that employer

> chose to narrowly focus its litigation efforts on the issue of the proper interpretation of Judge Miller's 1999 award, and having lost on this point, is now attempting to raise additional challenges to [c]laimant's entitlement to chiropractic care in its motion for reconsideration.

July 15, 2014 Order at 7. Thus, the administrative law judge declined to address employer's contention regarding the propriety of specific bills and treatment of Dr. Piorkowski, observing that, contrary to employer's position, it could have raised this issue at the remand hearing before Judge Rae.[3]

Employer appeals the two orders of Administrative Law Judge Johnson, challenging his finding that it remains liable for claimant's chiropractic care. Claimant, who is presently without legal counsel, has not responded to employer's appeal.

Initially, we reject employer's contention that the administrative law judge erred in granting claimant's motion for reconsideration of Judge Rae's decision because none of the grounds for granting reconsideration pursuant to Federal Rule of Civil Procedure 59(e) were met. Section 23(a) of the Act, 33 U.S.C. §923(a), and the regulation at 20 C.F.R. §702.339, provide that the administrative law judge is not bound by formal or technical rules of procedure except those provided in the Act. *See also* 33 U.S.C. §919(d). Thus, the administrative law judge has the discretion to grant reconsideration of an issue decided in the original decision even if none of the conditions of FRCP 59(e) is met. In this regard, we also reject employer's contention that the administrative law judge addressed on reconsideration issues beyond the scope of the Board's remand to Judge Rae. The Board remanded the case for Judge Rae to give the parties notice that he would address the issue of employer's continuing obligation to provide chiropractic care; the Board's decision did not constrain the parties to limit their contentions to the meaning of Judge Miller's opinion. *See Hatcher*, BRB No. 10-0313, slip op. at 4-5. At the November 12, 2012 hearing, claimant clearly contended that he is entitled to continuing chiropractic care, irrespective of whether or not he is working. *See* Nov. 12, 2012 Tr. at

[3] The administrative law judge granted employer's motion for reconsideration in part, amending his February 25, 2014 Order to reflect that employer need not reimburse either Dr. Piorkowski or claimant for medical treatment or travel expenses which employer had previously paid.

117-118, 124;[4] July 15, 2014 Order at 5. When Judge Rae ruled against claimant on this issue based on his interpretation of Judge Miller's decision, claimant was entitled to seek reconsideration of Judge Rae's decision and Judge Johnson had the discretion to rule in claimant's favor. *See generally Duran v. Interport Maintenance Corp.*, 27 BRBS 8 (1993).

Moreover, we reject employer's contention that the administrative law judge erred in holding it liable for continuing chiropractic care. 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). Section 7(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.

33 U.S.C. §907(a); *see Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). The Act does not require that an injury be economically disabling in order for a claimant to be entitled to medical expenses, but only that the injury be work-related. *See Ingalls Shipbuilding, Inc. v. Director, OWCP* [*Baker*], 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993); *Buckland v. Dep't of the Army/NAF/CPO*, 32 BRBS 99 (1997); *Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989). However, in order for medical expenses to be assessed against employer, the treatment for the work injury must be necessary. *See*, *e.g.*, *Baker*, 991 F.2d 163, 27 BRBS 14(CRT); *Ezell v. Direct Labor, Inc.*, 37 BRBS 11 (2003); *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996); 20 C.F.R. §702.402 (1984). The compensability of care provided by a "chiropractor" is limited "to treatment consisting of manual manipulation of the spine to correct a subluxation shown by X-ray or clinical findings." 20 C.F.R. §702.404 (1984) *see N.T.* [*Thompson*] *v. Newport News Shipbuilding & Dry Dock Co.*, 43 BRBS 71 (2009) (hot packs, electrical muscle stimulation and intersegmental traction necessary for manual manipulation of subluxation are compensable); *R.C.* [*Carter*] *v. Caleb Brett, L.L.C.*, 43 BRBS 75 (2009) (massage therapy by non-physician ordered by chiropractor is compensable, as claimant had subluxation); *Bang v. Ingalls Shipbuilding, Inc.*, 32 BRBS 183 (1998) (no subluxation; employer not liable for chiropractic services).

[4] Judge Rae first held a hearing on remand in November 2011. The transcription company failed to provide a copy of the transcript of that hearing, so Judge Rae held a second hearing on November 12, 2012. He issued his decision on remand six days later.

Employer has not established that the administrative law judge's award of continuing chiropractic care is inconsistent with Judge Miller's decision or is contrary to the Act and regulations. The administrative law judge rationally found that Judge Rae's, and employer's, reading of Judge Miller's decision, as limiting employer's liability for chiropractic treatment to the period during which claimant was employed, was inconsistent with the whole of Judge Miller's decision and the Act. *See* Feb. 25, 2014, Order at 9-10. The administrative law judge discussed at length the basis for Judge Miller's award of chiropractic treatment, *id.* at 6-9, and employer has not identified any reversible error in this analysis. *See generally Stetzer v. Logistec of Connecticut, Inc.*, 547 F.3d 459, 42 BRBS 55(CRT) (2d Cir. 2008). Moreover, the administrative law judge correctly found that conditioning medical treatment solely on a claimant's employment status is contrary to the Act. *See Baker*, 991 F.2d 163, 27 BRBS 14(CRT); *Buckland*, 32 BRBS 99; *Romeike*, 22 BRBS 57.

In addition, the district director continues to actively supervise the medical care of an injured employee. Such supervision includes the "necessity, character and sufficiency of any medical care furnished or to be furnished" to claimant, as well as the "further evaluation of medical questions arising" with respect to medical care for the injury. 20 C.F.R. §702.407 (1984). In this respect, the parties are not constrained by statutes of limitations in raising issues concerning medical care. *See generally Marshall v. Pletz*, 317 U.S. 383 (1943); *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 637 F.3d 280, 45 BRBS 9(CRT) (4th Cir.), *cert. denied*, 132 S.Ct. 757 (2011); *Siler v. Dillingham Ship Repair*, 28 BRBS 38 (1994). If findings of fact concerning the necessity of treatment are required, the matter must be referred to an administrative law judge. *Weikert v. Universal Maritime Serv. Corp.*, 36 BRBS 38 (2002). These principles are exemplified by the proceedings in this case. In 2006, claimant sought additional medical benefits in the form of a hot tub, mattresses and dehumidifier, as well as travel expenses. In August 2006, the case was referred by the district director to the Office of Administrative Law Judges. At this juncture, Judge Rae *sua sponte* raised in his 2009 decision the issue of employer's continuing liability for the chiropractic treatment awarded by Judge Miller.[5] Pursuant to the Board's 2010 remand order that the parties be given notice of this issue and an opportunity to present evidence, the parties were free at this juncture to argue the necessity of continuing chiropractic treatment irrespective of Judge Miller's findings. Although employer focused "its litigation efforts on the proper interpretation of Judge Miller's 1999 award," *see* July 15, 2014 Order at 7, claimant contended before Judge Rae that chiropractic care remained necessary irrespective of his

[5] Employer controverted its liability for the mattresses, hot tub, dehumidifier, and travel expenses, but did not, prior to the issuance of Judge Rae's decision, controvert its continuing liability for claimant's chiropractic care.

employment status, *see* Nov. 12, 2012 Tr. at 117-118. Judge Johnson, upon receipt of claimant's motion for reconsideration of Judge Rae's 2012 decision, thus did not err in reconsidering the compensability of continued chiropractic care.[6] *See generally Stetzer*, 547 F.3d 459, 42 BRBS 55(CRT).

With respect to the continuing award of chiropractic treatment, the administrative law judge addressed the evidence presented by claimant and found that the chiropractic care provided to claimant by Dr. Piorkowski is related to and necessary for claimant's diagnosed spinal subluxation stemming from his 1976 work injury. *See* February 25, 2014 Order at 9-12; July 15, 2014 Order at 5-7. The administrative law judge found there is no evidence that claimant does not have a subluxation, that there was any intervening injury, or that the treatment was not necessary. The administrative law judge rationally found that, in addition to the manual manipulation of claimant's spine, the electrical muscle stimulation, intersegmental/mechanical traction, and therapeutic exercise treatments are compensable, as they are related to the manual manipulation treatment. *Thompson*, 43 BRBS 71; 20 C.F.R. §702.404 (1984). Therefore, the administrative law judge properly held employer liable to claimant for his documented out-of-pocket expenses and for ongoing "adequately documented" continuing chiropractic care and associated travel expenses. 33 U.S.C. §907(a). As the administrative law judge's award is supported by substantial evidence of record and in accordance with law, it is affirmed. *Carter*, 43 BRBS 75; *Thompson*, 43 BRBS 71.

[6] Should employer obtain evidence that claimant's chiropractic treatment is not reasonable or necessary for the care of claimant's work-related subluxation, or that claimant no longer has a subluxation, it may raise before the district director the issue of its continuing liability for the medical treatment. 20 C.F.R. §702.407 (1984). In addition, employer retains the right to challenge the cost of the treatment. 20 C.F.R. §702.414 (1984); *see generally Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004).

Accordingly, the administrative law judge's Order Granting Claimant's Motion for Reconsideration and the Order Amending the 2/25/14 Order Granting Claimant's Motion for Reconsideration and Denying in All Other Respects Employer's Motion for Reconsideration are affirmed.

SO ORDERED.

_____
BETTY JEAN HALL, Chief
Administrative Appeals Judge

_____
GREG J. BUZZARD
Administrative Appeals Judge

_____
RYAN GILLIGAN
Administrative Appeals Judge