U.S. Department of Labor

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

BRB No. 15-0454

SARA BRECKON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DYNCORP INTERNATIONAL, LLC	)	
	)	
and	)	DATE ISSUED: July 19, 2016
	)	
INSURANCE COMPANY OF THE SATE OF PENNSYLVANIA c/o AIG GLOBAL CLAIMS SERVICES, INCORPORATED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Jonathan S. Beiser (Ashcraft & Gerel, LLP), Rockville, Maryland, for claimant.

Hilary K. Jonczak (The Law Offices of Scott L. Astrin), Maitland, Florida, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2014-LDA-00073) of Administrative Law Judge Lee J. Romero, 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *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 worked for employer in Iraq as a lead communications technician. The parties stipulated that claimant sustained a work injury in mid-April 2013 when she noticed pain in her back and left hip after running for exercise**.** Claimant treated herself conservatively, but sought medical treatment on June 10, 2013, in Baghdad for pain in her left buttock and down the back of her left leg. Employer was notified of her condition the next day.

Claimant left Iraq on July 1, 2013, for a regularly scheduled return to the United States; she sought treatment from her family doctor, Dr. Adams, who prescribed physical therapy. Employer placed claimant on a medical leave of absence on July 12, 2013, and paid claimant compensation benefits under the Act. EX 6; *see* 33 U.S.C. §908(b). Claimant obtained temporary employment in July with Public Safety Communications that lasted until March 2014. Claimant resigned her position with employer in August 2013. Tr. at 28-29; EXs 12 at 1; 24 at 55-56.

In August 2013, Dr. Adams diagnosed piriformis syndrome, which is caused by the piriformis muscle in the buttocks compressing the sciatic nerve. CX 2 at 14. Dr. Adams imposed physical restrictions, and claimant underwent physical therapy. *Id.* at 15; EX 21 at 10. Claimant's approved regimen included running on a treadmill. On December 2, 2013, Dr. Adams opined that claimant's condition was at maximum medical improvement, and she released claimant to "full-duty work without restriction;" claimant was to return on an as-needed basis. EX 20 at 4-6, 41. Employer, therefore, terminated its voluntary compensation payments. EX 7.

On January 5, 2014, claimant sent an email to Mikki Tharp, a claims examiner for employer's insurance carrier. Claimant stated her injury had not healed completely and that she must minimize activities for 3-5 days when she has a flare-up. She noted that piriformis syndrome has "a high likelihood of reoccurrence," and that she must be cautious with daily activities that could aggravate her condition. EX 13. At the formal hearing, claimant testified that in January 2014 she entered the Idaho Army National Guard Officer Candidate School. Claimant testified that she went for a three mile run outdoors in preparation for the physical demands of the program and that she knew "that running outside requires more engagement from different muscles than running on a treadmill." Tr. at 32. Claimant testified that her pain from this activity was worse than it had been previously, and she returned to Dr. Adams for treatment on January 24, 2014. Dr. Adams placed claimant on indefinite light-duty work restrictions and prescribed physical therapy. EX 20 at 8, 12. Employer terminated its payment of medical bills, and claimant filed a claim on January 28, 2014, for medical treatment and disability compensation. EXs 5, 7.

In his decision, the administrative law judge found that, while claimant established she sustained a work injury in April 2013, her present condition is due to an "intervening

cause." Specifically, the administrative law judge found that claimant's increased pain following her running outdoors on January 11, 2014, occurred because claimant failed to take reasonable precautions against re-injury. Decision and Order at 23, 25 n.5, 27. Accordingly, the administrative law judge found that employer is relieved of liability for disability and medical benefits as of January 11, 2014. *Id*. at 28.

On appeal, claimant challenges the administrative law judge's finding that the exacerbation of her work injury in January 2014 was an "intervening cause" of her disability, which terminated employer's liability for additional medical benefits and disability compensation. Employer responds that the administrative law judge's finding of an intervening injury is supported by substantial evidence and that claimant is not entitled to additional compensation or medical benefits.

If a claimant with a work-related injury sustains a subsequent injury or aggravation outside of work, employer is liable for the entire disability and for medical expenses due to both injuries if the subsequent injury is the natural or unavoidable result of the original work injury. 33 U.S.C. §902(2); *see Colburn v. General Dynamics Corp*., 21 BRBS 219 (1988); *Bailey v. Bethlehem Steel Corp*., 20 BRBS 14 (1987), *aff'd mem*., 901 F.2d 1112 (5th Cir. 1990). Where the subsequent disability is not the natural or unavoidable result of the work injury, but is the result of an intervening cause, employer is relieved of liability for the disability attributable to the intervening cause. *Cyr v. Crescent Wharf & Warehouse*, 211 F.2d 454 (9th Cir. 1954); *Wright v. Connolly-Pacific Co.*, 25 BRBS 161 (1991), *aff'd mem. sub nom. Wright v. Director, OWCP*, 8 F.3d 34 (9th Cir. 1993); *Marsala v. Triple A South*, 14 BRBS 39 (1981); *see also Plappert v. Marine Corps Exch.*, 31 BRBS 109 (1997), *aff'g on recon en banc* 31 BRBS 13 (1997).

A claimant must show a degree of due care with regard to her work injury and take reasonable precautions to guard against re-injury. *See generally Cyr*, 211 F.2d 454; *Jackson v. Strachan Shipping Co.*, 32 BRBS 71 (1998); *Grumbley v. Eastern Associated Terminals Co.*, 9 BRBS 650 (1979). It is well-established that the administrative law judge has the discretion to draw inferences from and to determine the weight to be accorded to the evidence of record. *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); *see also Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22(CRT) (5th Cir. 1994); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The Board is not empowered to reweigh the evidence on the ground that the evidence is susceptible to other findings and inferences, but must accept the rational inferences and findings of fact of the administrative law judge which are supported by the record. *See, e.g., Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 25 BRBS 85(CRT) (9th Cir. 1991); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988).

In this case, the administrative law judge acted within his discretion to find that claimant's January 5, 2014 email to Ms. Tharp and her testimony showed her awareness that she had not fully recovered from her injury, that her injury had a high degree of recurrence, and that running outside was more strenuous than running on a treadmill. Decision and Order at 27; EX 13 at 1. Notwithstanding this awareness, the administrative law judge found that claimant chose to attempt to run outdoors because of the physical demands of the Officer Candidate School program. Decision and Order at 28; Tr. at 32; CX 2 at 27. We cannot say that this finding is irrational or unsupported by record evidence. *See generally Director, OWCP v. Jaffe New York Decorating*, 25 F.3d 1080, 28 BRBS 30(CRT) (D.C. Cir. 1994). Accordingly, we affirm the administrative law judge's finding that claimant "failed to exercise due care" by running outside and thereby re-injuring her back and left hip. We thus affirm the administrative law judge's conclusion that claimant's January 11, 2014 non-work-related injury was an intervening cause. Therefore, employer is relieved of liability for any increased disability due to her intervening injury. *Wright*, 25 BRBS 161; *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9 (2001), *aff'd mem.*, 32 F.App'x 126 (5th Cir. 2002).

We also reject claimant's appeal of the administrative law judge's denial of additional disability compensation related to the April 2013 injury. The Act defines the term "disability" as "*incapacity because of injury* to earn the wages which the employee was receiving at the time of injury…." *See* 33 U.S.C. §902(10) (emphasis added). If claimant's employment relationship with employer was terminated for reasons unrelated to the work injury, claimant's subsequent inability to earn her prior wages can be attributable to her decision to voluntarily end her employment relationship. *Moody v. Huntington Ingalls, Inc.*, 50 BRBS 9 (2016); *Harmon v. Sea-Land Service, Inc.*, 31 BRBS 45 (1997). The administrative law judge's finding that claimant voluntarily resigned her job for reasons unrelated to her April 2013 work injury is supported by substantial evidence of record. *See* Tr. at 28-29; EX 24 at 55-56. The parties stipulated that employer paid claimant compensation for temporary total disability from July 12, 2013 to December 2, 2013, when Dr. Adams released claimant to return to work without restrictions. Decision and Order at 3. As claimant voluntarily left her employment with employer in August 2013 and there is no evidence that claimant's work injury prevented her return to her usual employment after employer terminated its compensation payments and before claimant suffered the intervening injury, claimant has not established a prima facie case of total disability. *See Moody*, 50 BRBS 9; *Gacki v. Sea-Land Service, Inc.*, 31 BRBS 45 (1997). Accordingly, we affirm the administrative law judge's denial of additional disability compensation.

Claimant also contends that the administrative law judge erred in terminating employer's liability for medical benefits after January 10, 2014. In his decision, the administrative law judge stated:

> In the present matter, claimant suffered a compensable work injury in mid-April 2013. Claimant has established that the treatment sought for her initial injury to her lower back and left hip, recommended by Dr. Adams, was reasonable and necessary. As discussed above, claimant also suffered a subsequent non-work-related injury on January 11, 2014. Nevertheless, Employer/Carrier are relieved from all liability attributable to the subsequent injury due to claimant's failure to take reasonable precautions to guard against re-injury.
>
> Accordingly, I find and conclude that claimant is only entitled to reasonable and necessary medical care and treatment for her work-related injury to her lower back and left hip from mid-April 2013 through January 10, 2014.

Decision and Order at 33.

We cannot affirm the conclusion that the intervening event on January 11, 2014 necessarily terminated employer's liability for medical benefits. Employer remains liable for medical benefits related to the work injury notwithstanding the occurrence of an intervening event. *See Colburn*, 21 BRBS 219; *Leach v. Thompson's Dairy, Inc.*, 13 BRBS 231 (1981). The administrative law judge did not determine if any of the treatment claimant received after January 11, 2014 was necessitated by the original work injury, even though claimant stated in the credited January 5, 2014 email to Ms. Tharp that her injury had not fully healed. Therefore, we must vacate the denial of additional benefits and remand the case for further findings.

The record shows that claimant treated with Dr. Adams after the January 11, 2014 injury and underwent additional physical therapy, and that Dr. Adams referred claimant to Dr. Nilsson, because claimant was not making progress. CX 2 at 27-31; EX 20 at 19-20. Dr. Nilsson ordered a hip MRI, which showed a superior labral tear. EX 20 at 25. Dr. Nilsson diagnosed left leg proximal hamstring tendinopathy and hamstring syndrome. *Id.*; *see also* EX 22 at 6. Dr. Nilsson opined on July 3, 2014, that claimant's "predicament more likely than not started with her injury in Iraq and was not a pre-existing condition at that time, nor a new injury when it was exacerbated." CX 2 at 41-42. Dr. Adams opined on April 7, 2014, "[I] believe that her current back issues are due to a recurrence of her original injury, due to acute exacerbation from return to duty, rather than a new injury." CX 2 at 35.

It is claimant's burden to establish that medical care is reasonable and necessary for the treatment of the work-related injury. 33 U.S.C. §907(a); *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993) (table); *see generally Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). On remand,

the administrative law judge must address the relevant evidence and determine whether, or to what extent, claimant's need for medical treatment after the January 11, 2014 intervening injury was due to her April 2013 work injury such that employer is liable for the treatment. *See Hicks v. Pacific Marine & Supply Co.*, 14 BRBS 549 (1981).

Accordingly, the administrative law judge's denial of medical benefits after January 10, 2014, is vacated and the case is remanded for further findings in accordance with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

_____
BETTY JEAN HALL, Chief
Administrative Appeals Judge

_____
GREG J. BUZZARD
Administrative Appeals Judge

_____
JONATHAN ROLFE
Administrative Appeals Judge