U.S. Department of Labor

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

BRB No. 16-0561

CLAUDIA M. ALEXANDER Claimant-Petitioner v. NAVY EXCHANGE SERVICE COMMAND (NEXCOM) Self-Insured Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED: July 19, 2017 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and the Order Granting in Part, and Denying in Part, Motion for Reconsideration of Christopher Larsen, Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan, II (Longshore Claimants' National Law Center), Washington, D.C., Lara Merrigan (Merrigan Legal), San Rafael, California, and Eric A. Dupree, Coronado, California, for claimant.

Arthur A. Leonard (Aleccia & Mitani), Long Beach, California, for self-insured employer.

Kathleen H. Kim (Nicholas C. Geale, Acting Solicitor of Labor; Maia S. Fisher, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

HALL, Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order Awarding Benefits and the Order Granting in Part, and Denying in Part, Motion for Reconsideration (2014-LHC-02014) of Administrative Law Judge Christopher Larsen 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 Non-Appropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *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).

The facts of this case are not in dispute. In 2010, claimant began working for employer as an accounts payable supervisor. In this position, she spent five to seven hours per day using her computer keyboard and one to two hours per day holding the telephone. By July 30, 2013, claimant had developed disabling symptoms, diagnosed as bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome. Claimant has not returned to work. Employer paid claimant temporary total disability benefits from August 1, 2013, through February 27, 2014, 33 U.S.C. §908(b), and medical benefits, 33 U.S.C. §907. After employer discontinued disability benefits, claimant filed a claim under the Act. The administrative law judge awarded claimant compensation for temporary total disability, as well as past and future medical benefits. His Decision and Order, dated May 9, 2016, provided that:

> Employer shall pay to Claimant compensation for her temporary total disability from August 1, 2013, through the present and continuing, but no longer than five years, based upon an average weekly wage of $841.90, such compensation to be computed under § 8(b) of the Act.

Decision and Order at 25. Claimant moved for reconsideration, challenging, among other things, the order limiting the award to five years. By Order on Reconsideration, dated June 16, 2016, the administrative law judge revised the order to read:

> Employer shall pay to Claimant compensation for her temporary total disability from August 1, 2013, to the date of maximum medical improvement, based upon an average weekly wage of $841.90, such compensation to be computed under § 8(b) of the Act.

Order on Recon. at 3.

Claimant appeals, asserting that the order limiting her entitlement to temporary total disability benefits only until "the date of maximum medical improvement" is contrary to law and is not an enforceable final order. Employer responds, urging

affirmance. The Director, Office of Workers' Compensation Programs (the Director), responds in support of claimant and urges the Board to modify the order to award ongoing benefits. Employer replies, opposing the Director's position. We agree with claimant and the Director that the administrative law judge's order improperly limits claimant's award.

Section 19 of the Act requires an administrative law judge to "reject a claim or make an award in respect of a claim." 33 U.S.C. §919(c), (e); *Luttrell v. Alutiiq Global Solutions*, 45 BRBS 31 (2011); 20 C.F.R. §702.348. In the case of an award, the "order" must direct the payment of benefits. *Aitmbarek v. L-3 Communications*, 44 BRBS 115, 120 n.8 (2010); *Hoodye v. Empire/United Stevedores*, 23 BRBS 341 (1990). The administrative law judge awarded claimant temporary total disability benefits. Section 8(b) of the Act states: "Temporary total disability: In case of disability total in character but temporary in quality 66 2/3 per centum of the average weekly wages shall be paid to the employee *during the continuance* thereof." 33 U.S.C. §908(b) (emphasis added). In a case where a claimant has not reached maximum medical improvement and is totally disabled, the proper award is one for ongoing temporary total disability benefits. *Luttrell*, 45 BRBS 31; *Hoodye*, 23 BRBS 341.

Claimant and the Director correctly contend that the administrative law judge's order is not in accordance with law because an award that continues only until "the date of maximum medical improvement" contravenes Section 22 of the Act, 33 U.S.C. §922, and is not enforceable by claimant. In *Mitri v. Global Linguist Solutions*, 48 BRBS 41 (2014), the Board held that the administrative law judge improperly accepted a stipulation providing for the payment of temporary total disability benefits "until the Claimant is placed at maximum medical improvement or returns to work." The Board reasoned that such a stipulation gives the employer the authority to terminate or reduce the claimant's benefits without the employer's seeking modification and securing a new compensation order, in contravention of Section 22 of the Act.[1] *Mitri*, 48 BRBS at 43-44. Contrary to the administrative law judge's reasoning, *Mitri* is not distinguishable on the ground that it involved a stipulation.[2] Rather, if the record before the administrative law judge does not contain factual evidence, which a stipulation replaces, regarding a

[1] The Board held that this and another stipulation allowing employer to reduce or terminate benefits upon securing a labor market survey or a full-duty medical release improperly permitted employer to determine the changes in condition that warranted a decrease in benefits. *Mitri*, 48 BRBS at 43-44.

[2] We reject employer's contention that *Mitri* was wrongly decided and we decline its invitation to revisit it.

date certain for the termination of temporary total disability benefits,[3] such benefits must be awarded on a continuing basis and the award remains in effect unless and until it is modified pursuant to Section 22. *Hoodye*, 23 BRBS at 341; *see also Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000) (the Act permits ongoing temporary partial disability award, subject to the five-year maximum). Section 22 provides the sole means by which a compensation award can be modified, increased, decreased, or terminated upon the showing of a change in condition, such as claimant's condition reaching maximum medical improvement, or a mistake in a determination of fact.[4] *See Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995); *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971); *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459 (1968).

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[3] Such as, evidence regarding a date of maximum medical improvement, a date claimant's disability ended altogether, or the date suitable alternate employment was established. 33 U.S.C. §908(a), (c), (e).

[4] Section 22, 33 U.S.C. §922, states:

> Upon his own initiative, or upon the application of any party in interest (including an employer or carrier which has been granted relief under section 908(f) of this title), on the ground of a change in conditions or because of a mistake in a determination of fact . . . [the administrative law judge] may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case (including a case under which payments are made pursuant to section 944(i) of this title) in accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the deputy commissioner with the approval of the Secretary. This section does not authorize the modification of settlements.

In addition, under the current order, claimant would not be able to seek enforcement of the "award" in the event employer unilaterally terminated compensation.[5] In order for an award to be enforceable, a sum certain must be calculable without resort to "extra-record facts" regarding claimant's disability status. *See* 33 U.S.C. §§914(f), 918(a), 921(d); *Severin v. Exxon Corp.*, 910 F.2d 286, 24 BRBS 21(CRT) (5th Cir. 1990); *Mitri*, 48 BRBS 41.

Based on the foregoing, we agree with claimant and the Director that the administrative law judge's order, which extinguishes temporary total disability benefits on an unspecified future date of maximum medical improvement, is contrary to law.[6] *Mitri*, 48 BRBS at 43-44; *Hoodye*, 23 BRBS at 343-344. Consequently, we modify the administrative law judge's award to reflect the following:

> Employer shall pay to Claimant compensation for her temporary total disability from August 1, 2013, to the present and continuing, based upon an average weekly wage of $841.90, such compensation to be computed and due in accordance with Section 8(b) of the Act.

[5] We note that if an employer decides to terminate compensation payments due under an award, it risks liability for a Section 14(f) penalty. *See, e.g., Honaker v. Mar Com Inc.*, 44 BRBS 5 (2010); *M.R. [Rusich] v. Electric Boat Co.*, 43 BRBS 35 (2009); *Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 214 (1988); *Richardson v. General Dynamics Corp.*, 19 BRBS 48 (1986). .

[6] The potential that employer will overpay claimant due to the length of time necessary to resolve a motion for modification is not a basis for encouraging unilateral termination of benefits. We note that Section 22 permits employer to recover an overpayment through a credit for excess payments. *Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000); *Universal Maritime Service Corp. v. Spitalieri*, 226 F.3d 167, 34 BRBS 85(CRT) (2d Cir. 2000), *cert. denied*, 532 U.S. 1007 (2001).

Accordingly, the administrative law judge's award of benefits is modified as stated above. In all other respects, the administrative law judge's Decision and Order Awarding Benefits and the Order Granting in Part, and Denying in Part, Motion for Reconsideration are affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur:

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GREG J. BUZZARD
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring in the result:

In view of Board precedent, *see Mitri v. Global Linguist Solutions,* 48 BRBS 41 (2014), I concur in the result reached by my colleagues in this case.

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JUDITH S. BOGGS
Administrative Appeals Judge