U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 17-0600

ADRIENNE R. HUDSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HUNTINGTON INGALLS, INCORPORATED (PASCAGOULA OPERATIONS)	)	DATE ISSUED: July 10, 2018
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Virginia L. LoCoco (LoCoco & LoCoco, P.A.), D'Iberville, Mississippi, for claimant.

Paul B. Howell (Franke & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

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

HALL, Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order (2016-LHC-00685) of Administrative Law Judge Larry W. Price 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). 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 was injured on May 22, 2014, while working for employer as a shipfitter, when she slipped on a ladder and twisted her right knee.[1] An MRI showed claimant had tri-compartmental osteoarthritis in her knee, an osteochondral lesion, and a torn lateral meniscus. EX 13 at 8-9. On July 8, 2014, Dr. Harrison performed arthroscopic surgery on claimant's right knee to debride two partial tears to the menisci, both of which he attributed directly to the May 2014 work injury.[2] CX 15 at 8, 23, 44. Claimant continued to treat with Dr. Harrison, who diagnosed a five percent permanent impairment to the leg on October 31, 2014, and released claimant to unrestricted work as of November 3, 2014. EX 16 at 70-74. In February 2015, claimant fell while attempting to get out of the shower. *Id.* at 75. On March 2, 2015, she returned to Dr. Harrison's office complaining of increased right knee pain, for which he recommended a Synvisc injection. *Id.* at 77-78. Dr. Harrison opined that the need for a Synvisc injection was due to the aggravation of claimant's pre-existing arthritis caused by the February 2015 fall in the shower. *Id*. at 81. Based on Dr. Harrison's opinion, employer refused to authorize the Synvisc injections.

Relevant to this appeal, the parties stipulated to a work injury on May 22, 2014. They disputed the extent of claimant's disability and her entitlement to Synvisc injections. Although Dr. Harrison opined that claimant's work injury resulted in a five percent permanent impairment to the lower extremity, the administrative law judge found this rating to be incorrect because Dr. Harrison stated he calculated claimant's impairment using the guidelines set forth in the American Medical Association *Guides to the Evaluation of Permanent Impairment* (6th ed. 2007) (AMA *Guides*), but also conceded that the AMA *Guides* specify an impairment rating of seven to 13 percent for two partial meniscectomies. Decision and Order at 17; CX 15 at 45. The administrative law judge found that an impairment rating of 10 percent represented the extent of claimant's impairment due to her acute injuries, as it accounts for claimant's continued complaints of pain since the surgery and Dr. Harrison's findings on physical examination on October 31, 2014.[3] Decision and Order at 17; *see* CX 15 at exh. 8. As the record contained no evidence

[1] Prior to working for employer, claimant had undergone two surgeries, a partial medial meniscectomy and a repair of a torn anterior cruciate ligament, to her right knee due to high school and college basketball injuries. She passed pre-employment evaluations and had no work restrictions.

[2] Dr. Harrison repaired a 10 percent tear of the medial meniscus and a 90 percent tear of the lateral meniscus. CX 16 at 17-18.

[3] On this date, Dr. Harrison opined that claimant's work-related knee condition reached maximum medical improvement. On physical examination, he observed that claimant experienced pain with range of motion, tenderness over pes tendons, small effusion, and mild decrease in surrounding muscle strength. EX 16 at 70-82.

that claimant's torn menisci aggravated her underlying arthritis, the administrative law judge found claimant was not entitled to an impairment rating which included her pre-existing arthritis. Decision and Order at 18. Further, based on Dr. Harrison's opinion that the Synvisc injection was recommended to treat an aggravation of claimant's underlying arthritis caused by the February 2015 fall in the shower, which was not related to the work injury, the administrative law judge found that employer was not liable for the injection. *Id*. Claimant appeals the administrative law judge's findings regarding the extent of her disability and entitlement to a Synvisc injection. Employer responds, urging affirmance.

Claimant asserts the administrative law judge erred in failing to apply the aggravation rule and failed to compensate her for the full extent of her knee impairment, which includes her work-related torn menisci and her pre-existing arthritis. Claimant alleges Dr. Harrison's opinion establishes that the full extent of her disability is in the range of 16 to 34 percent.

Under the aggravation rule, if a work-related injury aggravates, accelerates, or combines with a pre-existing impairment to produce a disability greater than that which would have resulted from the employment injury alone, the entire resulting disability is compensable. *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (en banc); *Fishel v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 520 (1981), *aff'd*, 694 F.2d 327, 15 BRBS 52(CRT) (4th Cir. 1982); *Primc v. Todd Shipyards Corp.*, 12 BRBS 190 (1980). This doctrine does not require that the employment injury cause a pre-existing condition to progress or that it combine in more than an additive way. *Nash*, 782 F.2d at 517-518, 18 BRBS at 49-50(CRT); *Port of Portland v. Director, OWCP*, 932 F.2d 836, 839-840, 24 BRBS 137, 140-141(CRT) (9th Cir. 1991). The aggravation rule does not permit apportionment between work-related and non-work-related causes merely because the percentage of impairment attributable to each cause may be ascertained from the record. *Fishel*, 694 F.2d 327, 15 BRBS 52(CRT). Thus, as applied to disability awards under the schedule, a claimant's compensable disability is the aggregate impairment to the schedule member, inclusive of any pre-existing impairment. *Nash*, 782 F.2d at 517-518, 18 BRBS at 49-50(CRT); *Port of Portland*, 932 F.2d at 839-840, 24 BRBS at 140-141(CRT); *Fishel*, 694 F.2d 327, 15 BRBS 52(CRT).

We agree with claimant that the administrative law judge failed to fully consider the aggravation rule in assessing the extent of her disability and that this error may have affected the outcome of the case. Specifically, in arriving at a 10 percent permanent impairment, the administrative law judge assessed only the portion of claimant's disability directly attributable to her work injury.[4] However, claimant's compensable disability

[4] The administrative law judge's finding that claimant's work injury alone resulted in a 10 percent impairment is not challenged on appeal.

includes her work-related knee impairment plus any pre-existing impairment she may have in that knee due to arthritis. *Nash*, 782 F.2d at 517-518, 18 BRBS at 49-50 (CRT); *Port of Portland*, 932 F.2d at 839-840, 24 BRBS at 140-141(CRT); *Fishel*, 694 F.2d 327, 15 BRBS 52(CRT). Although claimant asserted Dr. Harrison assessed a 16 to 34 percent pre-existing impairment due to arthritis, and employer asserted Dr. Harrison assessed zero percent pre-existing impairment or, at most, a one to 13 percent pre-existing impairment due to arthritis, CX 15 at 29-30, 61-62, the administrative law judge did not resolve the parties' dispute. Consequently, it is unclear whether the administrative law judge's legal error in failing to address the aggravation rule affected the outcome of this case. Accordingly, we must remand the case for further consideration.

On remand, the administrative law judge must address whether claimant's combined disability is greater than that caused by her work injury alone. *See Nash*, 782 F.2d at 519 n. 10, 18 BRBS at 51 n.10(CRT); *Port of Portland*, 932 F.2d at 839-840, 24 BRBS at 140-141(CRT); *Fishel*, 694 F.2d 327, 15 BRBS 52(CRT). In so doing, the administrative law judge must resolve the parties' dispute regarding whether Dr. Harrison assessed a pre-existing impairment due to arthritis and, if so, to what extent. Further, the administrative law judge must bear in mind that it is claimant's burden to establish the extent of her disability. *See Potomac Electric Power Co. v. Director, OWCP [PEPCO]*, 449 U.S. 268, 14 BRBS 363 (1980); *Pisaturo v. Logistec, Inc*., 49 BRBS 77 (2015). In assessing the extent of claimant's disability in a scheduled injury case other than one involving hearing loss, an administrative law judge is not bound by any particular standard or formula. *See, e.g., King v. Director, OWCP*, 904 F.2d 17, 23 BRBS 85(CRT) (9th Cir. 1990); *Cotton v. Army & Air Force Exch. Services*, 34 BRBS 88 (2000); *Pimpinella v. Universal Maritime Services, Inc*., 27 BRBS 154 (1993). Although the Act does not require impairment ratings to be made pursuant to the AMA *Guides* in this type of case, the administrative law judge may, nevertheless, rely on medical opinions that rate a claimant's impairment under these criteria, as it is a standard medical reference. *See Brown v. National Steel & Shipbuilding Co.*, 34 BRBS 195 (2001); *Jones v. I.T.O. Corp. of Baltimore*, 9 BRBS 583 (1979). However, he may not substitute his opinion for that of a medical expert. *See generally Pisaturo*, 49 BRBS 77.

Claimant also contends the administrative law judge erred in denying employer's liability for the Synvisc injection. Because we have vacated the administrative law judge's award, which did not specifically address whether claimant's employment injury combined with her pre-existing arthritis in an additive way, we agree with claimant that the denial of Synvisc injection liability also must be vacated.

Section 7 of the Act, 33 U.S.C. §907, provides that an employer is liable for medical expenses that are reasonable and necessary to treat a work-related injury. It is the claimant's burden to establish that medical expenses are reasonable and necessary treatment for her work injury. *Ramsey Scarlett & Co. v. Director, OWCP* [*Fabre*], 806

F.3d 327, 49 BRBS 87(CRT) (5th Cir. 2015). A claimant establishes a prima facie case for compensable medical treatment where a qualified physician states that the treatment is necessary for a work-related condition. *See Ingalls Shipbuilding, Inc. v. Director, OWCP* [*Baker*], 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993); 20 C.F.R. §702.402. An employer is not liable if the treatment for the claimed condition was necessitated by an intervening event. *See Shell Offshore v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998); *Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046, 15 BRBS 120(CRT) (5th Cir. 1983); *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). The United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, has applied two standards in determining whether an event constitutes a supervening cause. *Shell Offshore*, 122 F.3d 312, 31 BRBS 129(CRT);[5] *Lira*, 700 F.2d 1046, 15 BRBS 120(CRT); *Atlantic Marine, Inc. v. Bruce*, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981). One standard requires the supervening cause to originate entirely outside of the employment and to overpower and nullify the work injury. *Voris v. Texas Employers Ins. Ass'n*, 190 F.2d 929 (5th Cir. 1951). The second standard holds that if a work injury is worsened by an independent cause, it could constitute a supervening injury. *Mississippi Coast Marine, Inc. v. Bosarge*, 637 F.2d 994, 12 BRBS 969, *modified on reh'g on other grounds*, 657 F.2d 665, 13 BRBS 851 (5th Cir. 1981).

In addressing whether the recommended Synvisc injection is compensable, the administrative law judge considered only whether the treatment was reasonable and necessary for claimant's meniscal tears. Because Dr. Harrison stated that the injection was to treat an aggravation of claimant's pre-existing arthritis and not the work-related tears,[6] the administrative law judge found claimant did not establish a prima facie case for compensable medical treatment. Decision and Order at 18. Thus, the administrative law judge found employer is not liable for the treatment and did not reach the parties' dispute regarding whether the February 2015 fall in the shower was a supervening cause of injury.[7]

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[5]In *Shell Offshore*, the Fifth Circuit declined to decide which standard is the operative standard, as, on the facts of that case, the employer did not meet either standard for a supervening cause. *Shell Offshore*, 122 F.3d 312, 31 BRBS 129(CRT).

[6] Dr. Harrison's opinion is the only evidence of record that addresses what condition the Synvisc injection was recommended to treat.

[7] While the case was before the administrative law judge, employer argued that it was not liable for the Synvisc injection because "[t]he only medical evidence in this case on this issue is the opinion of Dr. Harrison who concluded that the Synvisc injection ordered on March 2, 2015, was due to an independent intervening fall in the shower rather than due to the natural or unavoidable effects of the employment injury on May 22, 2014." Emp. Br. at 5 (May 3, 2017). Employer further pointed out that claimant "never alleged that the fall in the shower was due to her leg collapsing due to the injury." *Id*. By contrast,

However, as explained above, if claimant's combined right knee condition is compensable under the aggravation rule, then Dr. Harrison's recommendation to treat claimant's painful underlying arthritis with a Synvisc injection means that employer's liability for the treatment turns on whether claimant's knee pain is a continuation of pain caused by her compensable work injury or was worsened, overpowered, and nullified by a subsequent, independent cause. Although Dr. Harrison stated that any work-related aggravation to claimant's arthritis would have resolved following surgery, and he attributed claimant's need for a Synvisc injection to the February 2015 fall in the shower only, the administrative law judge did not address claimant's assertion that her knee condition was exactly the same three weeks after the fall in the shower (when Dr. Harrison recommended a Synvisc injection) as it was in the three months following her surgery (in August, September, and October 2014).[8] Cl. Br. at 5 (May 19, 2017).

Because we must remand this case for further consideration as to the extent of claimant's disability in light of the aggravation rule, and because the administrative law judge's findings on remand may affect his analysis as to the compensability of the recommended Synvisc injection, we vacate his finding that this treatment is not compensable. If, on remand, the administrative law judge finds that claimant has a pre-existing impairment due to arthritis such that it combined with her work injuries under the aggravation rule, the administrative law judge must address whether the Synvisc injection was necessitated by claimant's compensable injury or by a supervening event under the standards enunciated in *Voris* and *Bosarge*. *See Bosarge*, 637 F.2d 994, 12 BRBS 969; *Voris*, 190 F.2d 929. If, however, the administrative law judge finds that claimant did not establish a pre-existing impairment due to arthritis that was aggravated by her work injury, he need not reconsider this issue as the record contains no evidence attributing claimant's need for the Synvisc injection to a compensable condition. *Baker*, 991 F.2d 163, 27 BRBS 14(CRT).

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claimant argued that Dr. Harrison's opinion is insufficient to carry employer's burden of establishing that the fall in the shower was a supervening cause of injury because the medical records show that her condition was exactly the same before the fall in the shower and three weeks after, when she sought treatment, and because Dr. Harrison "did not state that claimant's disability was overpowered or nullified by her fall in the shower." Cl. Br. at 5 (May 19, 2017).

[8] Claimant additionally notes in her appellate brief that Dr. Harrison treated her same symptoms of knee pain in September 2014 with a steroid injection; however, the pain returned and was present during claimant's October 31, 2014 exam, on which date Dr. Harrison placed claimant's right knee condition at maximum medical improvement. Cl. Br. at 11; EX 16 at 66-67, 70.

Accordingly, we vacate the administrative law judge's Decision and Order in part, and we remand the case for further findings in accordance with this decision.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur:

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JONATHAN ROLFE
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, dissenting:

I respectfully dissent from my colleagues' decision to remand the case for further findings with respect to the extent of claimant's disability and the compensability of the Synvisc injection. Although the aggravation rule ensures that a claimant is entitled to compensation for the full extent of any disability, the administrative law judge here rationally found that claimant failed to submit evidence establishing she is entitled to a higher impairment rating based on an aggravation of her pre-existing arthritis. *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (en banc); *Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137(CRT) (9th Cir. 1991); *Fishel v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 520 (1981), *aff'd*, 694 F.2d 327, 15 BRBS 52(CRT) (4th Cir. 1982). Although Dr. Harrison confirmed general ranges of impairments under the AMA *Guides* for moderate-to-severe arthritis, he did not assign an impairment rating specific to claimant's arthritis or her overall knee condition.[9] Moreover,

[9] With respect to claimant's pre-existing arthritis, Dr. Harrison initially deposed that claimant could not have a pre-existing impairment in the absence of any work injury, symptoms, or inability to perform her job. CX 15 at 29-30. Upon further questioning by claimant's counsel, he "guess[ed]" that claimant's pre-existing impairment would have been mild and that a mild impairment would warrant a one to 13 percent impairment rating under the AMA *Guides*. *Id*. at 30-31. Upon reviewing claimant's May 22, 2014 x-ray, Dr. Harrison deposed that claimant has moderate-to-severe arthritis. *Id*. at 61-62. Dr. Harrison also agreed with claimant's counsel that, under the AMA *Guides*, moderate arthritis warrants a 16 to 24 percent impairment rating and severe arthritis warrants a 26 to 34 percent impairment rating. *Id*. at 62.

Dr. Harrison explained that any aggravation of claimant's pre-existing arthritis due to her work injury was temporary and had resolved, and that the only impairment rating he assigned specific to claimant's knee condition was for her acute work-related injuries. CX 15 at 40-41; EX 16 at 73. Thus, on this record, I would hold that claimant did not establish either an impairment due to pre-existing arthritis or to a combination of work-related and pre-existing impairments. Accordingly, I would affirm the administrative law judge's award based on claimant's work injury alone.

As claimant did not establish that her underlying arthritis is compensable under the aggravation rule, I also would affirm the denial of the Synvisc injection. Dr. Harrison opined that the injection was necessitated by an aggravation of claimant's arthritis caused by the February 2015 fall in the shower, and claimant testified on deposition that she could not recall why she fell. EX 16 at 77-78, 81; EX 25 at 50. As the record contains no evidence relating claimant's fall in the shower to her work injury, claimant has not established that the aggravation of her arthritis resulted from the work-related injury. *See Ins. Co. of the State of Pennsylvania v. Director, OWCP [Vickers]*, 713 F.3d 779, 47 BRBS 19(CRT) (5th Cir. 2013); *Mississippi Coast Marine, Inc. v. Bosarge*, 637 F.2d 994, 1000, 12 BRBS 969, 974, *modified on reh'g on other grounds*, 657 F.2d 665, 13 BRBS 851 (5th Cir. 1981). Thus, employer is not liable for the Synvisc injection, as it was not for treatment of claimant's work injury. *Davison v. Bender Shipbuilding & Repair Co.*, 30 BRBS 45 (1996). Given claimant's failure of proof, I would affirm the administrative law judge's decision in full.

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JUDITH S. BOGGS
Administrative Appeals Judge