U.S. Department of Labor

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

BRB No. 19-0009

RICK J. MARTIN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 07/08/2019
SUNDIAL MARINE TUG & BARGE WORKS, INCORPORATED	)	
	)	
and	)	
	)	
SAIF CORPORATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Steven B. Berlin, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz and Genavee Stokes-Avery, Portland, Oregon, for claimant.

Jill Gragg (SAIF Corporation), Salem, Oregon, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (2010-LHC-00142, 00143) of Administrative Law Judge Steven B. Berlin rendered on a claim filed pursuant to 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).

This case is before the Board for a second time. Claimant sustained injuries to his knees as a result of a work accident on February 4, 2004. He was released to regular duty without restrictions on March 5, 2004. Based on MRI results showing ligament damage, Dr. Johnson performed surgery on both knees on May 27, 2004. He released claimant for modified work on August 10, 2004, and to regular duty with no restrictions, effective May 25, 2005. Dr. Johnson stated there was not much else he could offer claimant. Claimant subsequently sought treatment with Dr. Bollom, who, after reviewing claimant's medical records, concluded there was nothing he could add to Dr. Johnson's analysis. Dr. Duff diagnosed degenerative joint disease of the knees. He opined claimant's knees were at maximum medical improvement on May 25, 2005, and no further treatment was likely to be helpful. Dr. Duff rated claimant's permanent impairment for each knee at seven percent. Dr. Johnson concurred with this impairment rating.

Claimant returned to Dr. Bollom in October 2005. Following an MRI on April 21, 2006, he advised claimant that, while surgery probably would not help his right knee, a debridement and micro-facture surgery on the left knee could be helpful. In August 2006, Dr. Johnson referred claimant to Dr. Bollom, who performed surgical procedures on both knees in 2008.

In his initial decision, the administrative law judge found claimant sustained work-related injuries to his knees and his right ankle, hand, and wrist.[1] With regard to claimant's 2004 knee injuries, the administrative law judge awarded claimant temporary total disability benefits from May 12 through August 16, 2004, temporary partial disability benefits from August 16, 2004 through April 19, 2005, and permanent partial disability benefits pursuant to the schedule for each leg, based on Dr. Duff's seven percent permanent impairment ratings. 33 U.S.C. §908(b), (c)(2), (e). The administrative law judge found claimant's average weekly wage for the 2004 and 2006 work injuries is $892.83. Lastly, the administrative law judge found claimant entitled to medical benefits after August 15,

[1] Although not pertinent to this appeal, claimant sustained sprains of his right wrist, thumb and ankle as a result of an accident at work on October 2, 2006. In its decision, the Board affirmed the denial of additional medical benefits for the treatment of claimant's right wrist and ankle injuries. *Martin v. Sundial Marine Tug & Barge Works, Inc.*, BRB No. 13-0231, slip op. at 8-9 (Feb. 25, 2014).

2006, for treatment of his left knee condition, but not for the August 2008 right knee surgery. *See* 33 U.S.C. §907.

Claimant appealed the administrative law judge's calculation of his average weekly wage and the denial of medical benefits for the treatment of his right knee by Dr. Bollom after August 15, 2006. *See* n.1, *supra*.

In its decision, the Board affirmed the administrative law judge's reliance on Section 10(a), 33 U.S.C. §910(a), to determine claimant's average weekly wage, but modified his finding to $899.60, rather than $892.83, to correct a calculation error. *Martin v. Sundial Marine Tug & Barge Works, Inc.*, BRB No. 13-0231, slip op. at 4-6 (Feb. 25, 2014). The Board vacated the administrative law judge's finding that claimant is not entitled to medical benefits for his right knee condition and remanded for further consideration of whether Dr. Johnson's August 15, 2006 treatment note referring claimant to Dr. Bollom was for treatment of both knees and, if so, whether claimant's right knee surgery was reasonable and necessary for the treatment of his work injury. *Id*., slip op. at 6-7.

In his decision on remand, the administrative law judge found Dr. Johnson referred claimant for treatment of the left knee only. Decision and Order on Remand at 16-18. Dr. Johnson noted he was being consulted on surgical treatment for claimant's left knee, reviewed the MRI of that knee, and gave a referral for surgery to Dr. Bollom. *Id*. at 17. He also relied on Dr. Douglas's office note three months after Dr. Johnson's referral,[2] which stated Dr. Johnson was recommending left knee surgery. The administrative law judge determined surgery was not reasonable and necessary for claimant's right knee injury. Decision and Order on Remand at 18-21. He found Dr. Bollom's note stating right knee surgery was a "reasonable approach" is inconsistent with his prior opinion, the opinion of Dr. Duff, and the recommendations and course of treatment provided by Dr. Johnson, and Dr. Bollom did not explain the basis for his changed opinion. *Id*. at 18. Accordingly, the administrative law judge denied claimant's request that employer pay for the right knee surgery.

On appeal, claimant challenges the administrative law judge's denial of medical treatment for his right knee and again challenges the administrative law judge's average weekly wage determination. Employer filed a response brief asserting claimant's contentions are meritless. Claimant filed a reply brief.

[2] Dr. Douglas is a family practice physician. He managed claimant's medications. CX 17; EXs 36, 71.

Claimant first contends the administrative law judge erred by finding the surgery performed by Dr. Bollom in August 2008 was not reasonable and necessary treatment for his work-related right knee injury.[3]

Section 7(a) provides that an employer is liable for reasonable and necessary medical expenses for treatment of a work-related injury. *See, e.g., M. Cutter Co., Inc. v. Carroll*, 458 F.3d 991, 40 BRBS 53(CRT) (9th Cir. 2006). Section 7(d) of the Act, 33 U.S.C. §907(d), sets forth prerequisites for employer's liability for payment or reimbursement of medical expenses incurred by claimant. *See Maryland Shipbuilding & Dry Dock Co. v. Jenkins*, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979). Under Section 7(d), an employee is entitled to recover medical expenses if he requests employer's authorization for surgical treatment, the employer refuses the request, and the treatment thereafter procured on the employee's own initiative is reasonable and necessary for treatment of the work injury. *See* 33 U.S.C. §907(d); *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *see also Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986); 20 C.F.R. §702.406. However, where the administrative law judge determines the treatment is unreasonable or unnecessary, the employer is not liable for the cost of treatment. *Hunt v. Newport News Shipbuilding & Dry Dock Co.*, 28 BRBS 364 (1994), *aff'd mem.*, 61 F.3d 900 (4th Cir. 1995); *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); *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988).

After finding Dr. Johnson referred claimant to Dr. Bollom for only the left knee surgery and employer did not authorize right knee surgery, the administrative law judge rejected Dr. Bollom's opinion that right knee surgery "is a reasonable approach." Decision and Order on Remand at 18; CX 33 at 58. In reaching this conclusion, the administrative law judge determined Drs. Johnson and Bollom were treating physicians for claimant's bilateral knee conditions. He found Dr. Johnson's opinion entitled to greater weight because he has more experience treating claimant. Decision and Order on Remand at 20. Specifically, Dr. Bollom examined claimant three times between May 2005 and June 2006, and once in July 2008 before performing the left knee surgery, which, the administrative law judge found, shows he lacked "ongoing, frequent contact, developing diagnostics, and observations of how various treatments worked." *Id.* In contrast, the administrative law

[3] Claimant also challenges the administrative law judge's finding that Dr. Johnson referred him to Dr. Bollom for treatment of only the left knee. We need not address this finding given our disposition of the administrative law judge's determination that the right knee surgery was not reasonable and necessary.

judge found Dr. Johnson examined claimant nine or ten times in 2004 and 2005, performed surgeries on both knees, waited long enough to see the results, tried and observed other non-surgical treatments, and, while he supported claimant's request for left knee surgery, he never advised claimant to undergo right knee surgery. CXs 7-15, 21. Dr. Johnson opined he had nothing more to offer claimant, and he urged claimant to modify his activity to limit his pain symptomatology. *Id*. at 19; *see* CX 15 at 22. In 2005, Drs. Bollom and Duff agreed with Dr. Johnson's prognosis and treatment. CX 16 at 26-27; EX 32 at 45-46. The administrative law judge found Dr. Bollom's revised opinion that the right knee surgery was reasonable unsupported by the clinical evidence or the opinions of Drs. Johnson and Duff, and he performed the surgery prior to observing the results of claimant's left knee surgery.[4] Decision and Order on Remand at 20. The administrative law judge, therefore, concluded the right knee surgery was not reasonable and necessary for the treatment of claimant's work injury. *Id*. at 21.

In weighing the evidence, an administrative law judge may give special weight to a treating physician's opinion. *Amos v. Director, OWCP*, 153 F.3d 1051, 1054, 32 BRBS 144, 147(CRT) (9th Cir. 1998), *amended*, 164 F.3d 480 (9th Cir.), *cert. denied*, 528 U.S. 809 (1999). However, he is not required to credit such an opinion where there is contrary, probative evidence in the record. *See Monta v. Navy Exch. Serv. Command*, 39 BRBS 104 (2005). The administrative law judge is tasked with weighing the evidence and drawing inferences and conclusions based on that evidence. *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999). The Board may not reweigh the evidence, *Miffleton v. Briggs Ice Cream Co.*, 12 BRBS 445 (1980), *aff'd*, 659 F.2d 252 (D.C. Cir. 1981), or disregard an administrative law judge's finding merely because other inferences could have been drawn from the evidence. *Pittman Mech. Contractors, Inc. v. Director, OWCP* [*Simonds*], 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994); *see also Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994). In this case, the administrative law judge was entitled to consider the absence of any underlying rationale for Dr. Bollom's right knee surgery opinion in contrast to the medical opinions of Drs. Johnson and Duff and clinical evidence of record. *Brown v. National Steel & Shipbuilding Co.*, 34 BRBS 195 (2001); *see also Monta*, 39 BRBS 104. Therefore, we

[4] In October 2005, Dr. Bollom suggested microfracture surgery was an option if an MRI showed grade IV changes. CX 18 at 30. Although an MRI in April 2006 did not show grade IV changes, Dr. Bollom opined claimant could "consider" left knee surgery and a steroid injection for the right knee. CXs 19 at 31-33, 26 at 34. He also opined, after reviewing the MRI, "[I] think the right knee would be difficult to improve upon with an arthroscopic procedure." CX 20 at 34.

affirm the administrative law judge's finding that the right knee surgery was not reasonable or necessary for claimant's work-related injury as it is supported by substantial evidence.

Claimant next contends the Board erred in its prior decision by affirming the administrative law judge's method of calculating his average weekly wage. The Board has held it will adhere to its initial decision when a case is before it for a second time unless there has been a change in the underlying factual situation, intervening controlling authority demonstrates the initial decision was in error, or the first decision was clearly erroneous and to let it stand would produce a manifest injustice. *See*, *e.g.*, *Kirkpatrick v. B.B.I., Inc.*, 39 BRBS 69 (2005); *Gladney v. Ingalls Shipbuilding, Inc.*, 33 BRBS 103 (1999); *Schaubert v. Omega Services Industries*, 32 BRBS 233 (1998). In its prior decision, the Board fully addressed the administrative law judge's claimant's average weekly wage determination. *Martin*, slip op. at 3-6. This holding constitutes the law of the case and, as there is no legal or factual basis for finding this doctrine inapplicable, we decline to further address claimant's contentions regarding his average weekly wage. *Irby v. Blackwater Security Consulting*, 44 BRBS 17 (2010); *Kirkpatrick*, 39 BRBS 69.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge