U.S. Department of Labor

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

BRB No. 19-0173

EUGENIO RODRIGUEZ	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 07/26/2019
NATIONAL STEEL AND SHIPBUILDING COMPANY	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Jeffrey M. Winter and Kim Ellis (Law Office of Jeffrey M. Winter), San Diego, California, for claimant.

Barry W. Ponticello and Renee C. St. Clair (England Ponticello & St. Clair), San Diego, California, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits (2017-LHC-00115, 00116) of Administrative Law Judge Jennifer Gee 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).

Claimant sustained bilateral work-related knee injuries on August 7, 2009. As a result, Dr. Levine performed surgeries on both knees in 2009, and a second procedure on claimant's left knee in September 2012. Employer accepted liability, culminating with the district director's Compensation Order dated October 3, 2011.[1] Following the 2009 procedures, claimant returned to full-duty work for employer in June 2010 and primarily continued in that capacity until July 18, 2013, when Dr. Levine removed him from work due to recurrent swelling and pain in both knees. Dr. Levine subsequently recommended a third surgery for claimant's left knee. However, Dr. Adsit, on September 23, 2013,[2] and Dr. Serocki, on October 7, 2014, each opined that the surgical recommendation was not medically reasonable or necessary. Dr. Levine released claimant to modified work on November 1, 2013, but he never returned to work. Employer terminated claimant on July 18, 2014. Employer paid him temporary total disability benefits from July 19, 2013 through May 10, 2015, and temporary partial disability benefits from May 11 through July 30, 2015, referencing the 2009 injuries. EX 1.

Meanwhile, Dr. Levine performed a second right knee arthroscopy on February 19, 2014, and opined, on August 11, 2014, that claimant's right knee had reached maximum medical improvement with a 16 percent impairment.[3] Dr. David, who issued reports dated November 7, 2017 and April 19, 2018, agreed with Dr. Levine's recommendation that claimant undergo arthroscopic surgery to address a new tear in the medial meniscus of the left knee, revealed through an arthrogram conducted on November 30, 2017. Employer authorized this surgery.

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[1]The district director issued the Compensation Order based on the parties' stipulations: claimant sustained bilateral cumulative trauma injuries to his knees while working for employer on August 7, 2009; employer provided medical benefits pursuant to Section 7(a) of the Act, 33 U.S.C. §907(a); and claimant is entitled to permanent partial disability scheduled awards, payable by employer, for a 13 percent left knee impairment and a 12 percent right knee impairment. 33 U.S.C. §908(c)(2).

[2]Dr. Adsit instead recommended physical therapy and a home exercise program and stated that claimant's left knee remained at maximum medical improvement dating back to April 1, 2013.

[3]Employer paid medical benefits relating to this 2014 procedure, though it is unclear whether it paid claimant any additional permanent partial disability benefits under the schedule based on the increased impairment to claimant's right knee from 12 to 16 percent. EX 9.

On June 4, 2014, claimant filed a claim for additional benefits for the 2009 bilateral knee injuries, which were the subject of the district director's October 3, 2011 Compensation Order. CX 1. On September 10, 2015, approximately one month after employer made its last payment of compensation pursuant to the district director's 2011 compensation order, claimant filed a claim for a "new" cumulative trauma injury to his left knee due to his work for employer through July 18, 2013. *Id.* Employer controverted this claim on the ground that claimant did not sustain any additional cumulative trauma to his left knee as a result of his work from 2010 to 2013, and that claimant's present need for medical treatment stems entirely from the previously accepted claim for the August 2009 work injuries. EX 1 at 2.

The administrative law judge found claimant entitled to the Section 20(a) presumption that his July 18, 2013 cumulative trauma left knee injury is work-related. 33 U.S.C. §920(a). She found employer rebutted the presumption with substantial evidence of the absence of a causal relationship between claimant's harm and his work for employer from 2010 to 2013. She also found claimant did not show, by a preponderance of the evidence, that his working conditions through July 18, 2013, aggravated his pre-existing 2009 left knee injury. Accordingly, she denied claimant's claim for medical benefits and compensation.

On appeal, claimant challenges the administrative law judge's findings that employer rebutted the Section 20(a) presumption and that Dr. Levine's opinion does not establish on the record as a whole a causal relationship between claimant's present left knee condition and his work for employer from 2010 through July 18, 2013. Claimant also contends the administrative law judge did not adequately address whether he is entitled to additional benefits for his 2009 bilateral knee injuries. Employer responds, urging affirmance of the denial of benefits. Claimant has filed a reply brief.

We reject claimant's contentions regarding the alleged cumulative trauma left knee injury sustained during his work for employer from 2010 to 2013, as claimant has not demonstrated reversible error in the administrative law judge's conclusions. 20 C.F.R. §802.404(b). Dr. Adsit's opinion, that claimant's work for employer from 2010 through July 18, 2013, did not result in a new cumulative trauma injury to claimant's left knee or aggravate or accelerate his 2009 work-related bilateral knee injuries, constitutes substantial evidence that claimant's left knee injury was not caused, aggravated, or accelerated by the conditions of his work with employer from 2010 to 2013. We, therefore, affirm the administrative law judge's finding that Dr. Adsit's opinion rebuts the Section 20(a) presumption. *See Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010)*; Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998). As claimant bears the burden of persuasion on the record as a

whole, and the administrative law judge permissibly found Dr. Levine's opinion insufficient to meet claimant's burden,[4] *Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT), we affirm her finding that claimant did not demonstrate he suffered a new cumulative trauma to his left knee as a result of his work for employer from January 2010 through July 18, 2013. We, therefore, affirm the administrative law judge's denial of the claim for a new cumulative trauma injury. *Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT).

However, claimant's alternative contention has merit. He maintains that if the evidence does not establish a "new" cumulative trauma injury while working from 2010 to 2013, it is sufficient to establish that his disability after July 18, 2013, and ongoing need for medical benefits, is related to his August 7, 2009 work injury, and therefore, is compensable. Employer counters by asserting that claimant is arguing for the first time in this appeal that his claim was a request for modification of the district director's 2011 Compensation Order. Employer adds that since claimant did not raise a modification claim before the administrative law judge, the Board is precluded from addressing claimant's contention on appeal.

Section 22, 33 U.S.C. §922, provides the only means for changing otherwise final compensation orders. It authorizes the fact-finder, "upon [her] own initiative, or the application of any party-in-interest . . . on the grounds of a change in conditions or because of a mistake in a determination of fact," to reopen a claim and issue a new compensation order.[5] An award based on the stipulations of the parties, *see* 20 C.F.R. §702.315, is not a

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[4]The administrative law judge found that while Dr. Levine's reports are entitled to "significant weight," they are insufficient to meet claimant's burden on causation because they only reflect an August 7, 2009 date of injury and do not address whether claimant's work from 2010 to 2013 played a role in the present condition of his left knee, i.e., those reports do not address whether the work from 2010 to 2013 resulted in a new cumulative trauma injury to claimant's left knee or resulted in an aggravation or acceleration of claimant's August 7, 2009 left knee injury. Moreover, the administrative law judge gave "less weight" to Dr. Levine's deposition testimony, including his agreement with claimant's counsel that claimant's continued work after 2009 would aggravate claimant's cumulative condition, because Dr. Levine "often provided brief responses to long hypotheticals" without any explanation or reference to claimant's medical records or his examinations of claimant. Decision and Order at 23-24.

[5]Section 22 of the Act provides in relevant part:

> Upon his own initiative, or upon the application of any party in interest ... on the ground of a change in conditions or because of a mistake in a determination of fact by the [district director], the [administrative law judge]

Section 8(i) settlement and is therefore subject to modification. *See, e.g., Ramos v. Global Terminal & Container Services, Inc.*, 34 BRBS 83 (1999); *Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196 (1989); *Madrid v. Coast Marine Constr. Co.*, 22 BRBS 148 (1989); *Lawrence v. Toledo Lake Front Docks*, 21 BRBS 282 (1988); *Stock v. Management Support Assoc.*, 18 BRBS 50 (1986).

It is undisputed that the 2011 Compensation Order resolved the claim relating to the 2009 work injuries. *See* HT at 7-8; Decision and Order at 2. Employer's final payment of compensation for the August 7, 2009, injury was on July 30, 2015. CX 4 at 19. Thus, both the June 2014 and September 2015 filings are timely for purposes of modification, so long as it can be discerned that an actual claim for additional compensation relating to the 2009 bilateral knee injuries was being made. *See* 33 U.S.C. §922 (modification of an award must be requested "at any time within one year of the last payment of compensation, whether or not a compensation order has been issued, or within one year of the rejection of a claim"); *see, e.g., Fireman's Fund Ins. Co. v. Bergeron*, 493 F.2d 545 (5th Cir. 1974); *Cobb v. Schirmer Stevedoring Co.*, 2 BRBS 132 (1975), *aff'd*, 577 F.2d 750 (9th Cir. 1978) (table).

Claimant clearly sought additional benefits for the 2009 injuries in his June 2014 LS-203 claim form, i.e., he alleged a change in his condition.[6] *Bath Iron Works Corp. v. Director, OWCP [Jones]*, 193 F.3d 27, 34 BRBS 1(CRT) (1st Cir. 1999); *see* CX 1. Although his 2015 claim sought benefits for a "new" cumulative trauma injury to his left knee with a date of injury of July 18, 2013, employer defended the claim on the basis that

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> 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 . . . and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. . . .

33 U.S.C. §922 (emphasis added).

[6]It is not clear why the administrative law judge referred to this as a "duplicate claim" for the 2009 injury. Decision and Order at 4 n.5. This is not a concept used under the Longshore Act and an application for modification need not be on any specified form. *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459, 465 n.8 (1968) ("It is irrelevant for purposes of § 22 that the petitioner labeled her second action a claim for compensation rather than an application for review so long as the action in fact comes within the scope of the section.").

his condition relates entirely to the 2009 work injury.[7] Additionally, at the May 17, 2018 formal hearing, the parties stated their positions in a manner consistent with a natural progression theory. Claimant's counsel stated: "[i]t's claimant's contention that he is entitled to temporary disability benefits as a result of either the 2009 date of injury or the 2013 date of injury." HT at 23-24. Employer's counsel stated: "[t]he evidence will show in this matter that we have, in essence, 2009 bilateral injury claims;" employer authorized and paid for multiple surgeries relating to those 2009 claims; the district director's compensation order "addressed issues of temporary disability and permanent disability" with regard to the 2009 injuries;[8] and the "overwhelming evidence" will show that "all of [claimant's] problems and issues relate to the 2009 date of injury." HT at 25.

Thus, we reject employer's contention that claimant is raising a modification claim for the first time on appeal. Claimant timely filed an "application" for modification of the 2011 compensation order alleging entitlement to additional disability compensation. *See* 33 U.S.C. §922; *Gillus v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 93 (2003), *aff'd*, 84 F. App'x 333 (4th Cir. 2004). Consequently, we remand the case to the administrative law judge for modification proceedings. On remand, the administrative law judge must determine whether claimant established the requisite change in conditions or mistake in fact necessary for modification. 33 U.S.C. §922; *Metropolitan Stevedore Co. v. Rambo* [*Rambo I*], 515 U.S. 291, 30 BRBS 1(CRT) (1995). In this respect, she should apply the same standards as in an original proceeding. *See*, *e.g.*, *Christie v. Georgia-Pacific Co.*, 898 F.3d 952, 52 BRBS 23(CRT) (9th Cir. 2018); *Del Monte Fresh Produce v. Director, OWCP*, 563 F.3d 1216, 43 BRBS 21(CRT) (11th Cir. 2009); *Harmon v. Sea-Land Service, Inc.*, 31 BRBS 45 (1997).

[7]Employer's January 26, 2016 notice of controversion to claimant's September 10, 2015 claim states, in part, it "is asserting that claimant did not sustain a new cumulative trauma injury and claim is being denied; claimant's need for medical treatment stems from the accepted claim with date of injury 08/07/2009." EX 1 at 2.

[8]The joint stipulations refer to periods of temporary total disability paid by employer, but the compensation order itself addressed only claimant's entitlement to scheduled awards of permanent partial disability benefits and stated that employer "shall continue to provide" medical benefits relating to the 2009 bilateral knee injuries. EX 2 at 28-29.

Accordingly, the administrative law judge's denial of benefits on claimant's claim for a cumulative trauma injury to his left knee on July 18, 2013, is affirmed. The case is remanded to the administrative law judge for modification proceedings relating to claimant's 2009 bilateral knee injuries.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge