U.S. Department of Labor

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

BRB No. 17-0026

REESE HAYNES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SSA/COOPER	)	DATE ISSUED: June 30, 2017
	)	
and	)	
	)	
HOMEPORT INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Reese Haynes, Summerville, South Carolina.

Richard P. Salloum (Franke & Salloum, PLLC), Gulfport, Mississippi, for employer/carrier.

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

PER CURIAM:

Claimant, appearing without representation, appeals the Decision and Order Denying Benefits (2014-LHC-00661) of Administrative Law Judge Alan L. Bergstrom 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). In an appeal by a claimant without legal representation, we will review the findings of fact and conclusions of law to determine if they are rational, supported by substantial evidence, and in accordance with law. If they are, they must be affirmed. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant appeals the denial of his motion for modification, 33 U.S.C. §922, in which he sought additional compensation and medical benefits for back and foot injuries he asserted are related to his original work injury. Claimant injured his right foot and ankle at work on February 20, 1992; he also alleged he sustained a back injury. In his 1994 decision on those original claims, Administrative Law Judge Morin found that claimant was entitled to compensation for a 26 percent right foot impairment, 33 U.S.C. §908(c)(4), but denied the claim for a work-related back injury. *Haynes v. Ryan-Walsh, Inc.*, 1993-LHC-03335 (July 29, 1994). Claimant appealed the administrative law judge's exclusion of container royalty payments from the calculation of his average weekly wage. *Haynes v. Ryan-Walsh, Inc.*, BRB No. 94-3939 (May 31, 1995). The Board held that the administrative law judge erred in this regard, and it modified claimant's average weekly wage consistent with the parties' stipulation regarding claimant's average weekly wage inclusive of container royalty payments. *Haynes*, slip op. at 4. Employer made its last compensation payment to claimant on June 9, 1995. Decision and Order at 3.

On July 3, 2013, claimant filed a motion for Section 22 modification of Judge Morin's decision. Decision and Order at 3. Claimant alleged that his work-related right ankle/foot condition had worsened and caused right foot drop, which resulted in an altered gait that caused or aggravated his back condition. Claimant sought an increased permanent partial disability award and medical benefits for his right ankle/foot and back conditions. *Id*. at 4.

In his decision on claimant's modification request, Administrative Law Judge Bergstrom (the administrative law judge) denied the claim for an increased disability award. The administrative law judge found that claimant did not timely file his request for Section 22 modification. Decision and Order at 20. The administrative law judge further found that claimant did not establish, based on the record as a whole, that his right foot drop and lumbar spine condition are due to the February 1992 work injury. Thus, he found that claimant is not entitled to medical treatment for these conditions. *Id*. at 20-28. The administrative law judge also found that claimant is not entitled to reimbursement for the treatment he received for his foot injury after Dr. Lowery released him from treatment in 1993, as claimant failed to seek prior authorization for treatment. *Id.* at 28-31.

Section 22

Claimant stipulated that he filed his motion for Section 22 modification of Judge Morin's July 1994 decision on July 3, 2013, and that employer made its last compensation payment on June 9, 1995. JX 1; *see* Decision and Order at 3. The administrative law judge, therefore, concluded that claimant is not entitled to additional disability benefits for his right ankle/ foot condition because he did not timely file for modification. Decision and Order at 20.

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 [administrative law judge], 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 . . . 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). Thus, a request for modification of an award under Section 22 must occur within one year of the last payment of compensation or the last rejection of the claim, whichever is later. *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 43 BRBS 179 (2010), *aff'd*, 637 F.3d 280, 45 BRBS 9(CRT) (4th Cir.), *cert. denied*, 565 U.S. 1058 (2011); *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491 (4th Cir. 1999); *Moore v. Int'l Terminals, Inc.*, 35 BRBS 28 (2001).

As claimant's written modification request was made approximately 13 years after employer's last compensation payment (the later event), the administrative law judge properly denied claimant's petition for modification of the permanent partial disability award as untimely. *See Alexander v. Avondale Industries, Inc.*, 36 BRBS 142 (2002); *Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988). Consequently, we affirm the administrative law judge's determination that claimant did not timely file a request for modification and his denial of any additional disability benefits.[1]

Medical Benefits/Causation

A claim for medical benefits is not subject to any time limitations contained in the Act. *See* 33 U.S.C. §907(a); *Wheeler*, 637 F.3d at 290, 45 BRBS at 16(CRT). Therefore, we next address the administrative law judge's finding that claimant's foot drop is not related to the work injury and that claimant is not entitled to medical benefits for the back condition that allegedly results from the foot drop.

[1] As claimant is not entitled to additional compensation, we need not address the administrative law judge's finding that claimant submitted no credible evidence of an increase in his 26 percent impairment rating.

The administrative law judge found claimant entitled to the presumption that his foot drop is due to the 1992 work accident. *See Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); Decision and Order at 20. Thus, the burden shifted to employer to present substantial evidence that claimant's foot drop was not due to the work injury. *Holiday*, 591 F.3d 219, 43 BRBS 67(CRT). If the presumption is rebutted, it no longer controls, and the issue of causation must be resolved on the evidence of record as a whole, with claimant bearing the burden of establishing the work-relatedness of his injury. *Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

The administrative law judge found that employer rebutted the Section 20(a) presumption based on the opinions of Drs. Lowery and Wilson that claimant's right foot drop is not related to the work injury, and the supporting EMG and nerve conduction studies performed by Dr. Patel. Decision and Order at 20-22.

In weighing the evidence as a whole, the administrative law judge stated that claimant relied on his own testimony and the opinion of Dr. Wilson to establish the work-relatedness of his foot drop. Decision and Order at 23. The administrative law judge found that claimant has a history of making subjective complaints that are unsupported by medical evidence. *Id*.; *see* EX 7. The administrative law judge also found that, in connection with his compensation claim, claimant inaccurately reported his history regarding a 1975 work injury and car accidents in 1985, 1987 and 1990. *Id*. at 24; EXs 18 at 9-10; 39 at 23-25. The administrative law judge concluded that claimant's testimony cannot be credited. *Id*. The administrative law judge found that, although Dr. Wilson initially opined that claimant's foot drop was related to the 1992 work injury, he subsequently stated he could draw no such conclusion after learning that claimant did not develop the foot drop until 2010. *Id*. at 25; *see* CXs 2, 3; EX 39 at 31, 35. Dr. Wilson, therefore, revised his opinion and attributed claimant's foot drop to nerve root compression at L3, L4, and L5. EX 39 at 36. The administrative law judge found Dr. Wilson's revised opinion "entitled to full weight." Decision and Order at 26. The administrative law judge also found Dr. Lowery's opinion "well-reasoned and well-documented." *Id*. at 26-27. Dr. Lowery opined that claimant's foot drop was not related to the 1992 work injury, but to his back condition, and he opined that there otherwise had been no change in the condition of claimant's right ankle/foot between November 1992 and his examination of claimant in September 2014. EXs 12 at 21; 14 at 6, 10. The administrative law judge thus concluded that claimant did not establish that his right foot drop and lower back condition are related to the 1992 work injury.

The administrative law judge properly found that the opinions of Dr. Lowell and Dr. Patel, and the revised opinion of Dr. Wilson, that claimant's foot drop is not related to

the 1992 work injury, constitute substantial evidence to rebut the Section 20(a) presumption. *Moore*, 126 F.3d at 263, 31 BRBS at 123(CRT); *see O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). Moreover, the Board must respect the administrative law judge's credibility determinations and his weighing of the evidence and the inferences and conclusions drawn therefrom. *See generally Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988). In this case, the administrative law judge's finding that claimant failed to establish, based on the record as whole, that his foot drop is related to the work injury is rational, supported by substantial evidence in the form of the opinions of Drs. Lowell, Wilson, and Patel and in accordance with law. *Hice v. Director, OWCP*, 48 F.Supp. 2d 501 (D.Md. 1999); *Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001). Accordingly, we affirm the administrative law judge's finding that claimant's foot drop and any related consequences are not due to the 1992 work accident. Therefore, we also affirm the administrative law judge's denial of medical benefits for these conditions. *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).

Medical Benefits/Authorization

The administrative law judge denied claimant's claim for reimbursement of medical expenses for treatment after 1993 allegedly for claimant's work-related foot/ankle injury. The administrative law judge found that claimant was treated for his work injury by his free-choice physician, Dr. Lowery, until November 1993, and that claimant did not seek further treatment from Dr. Lowery. The administrative law judge further found, based on the testimony of Martha Ohlinger, carrier's claims manager, that claimant did not request authorization for any further treatment. The administrative law judge concluded that claimant did not comply with Section 7(d) of the Act, 33 U.S.C. §907(d), and, even assuming, arguendo, the work-relatedness of the treatment, that employer is not liable for reimbursing claimant.[2]

Section 7(d) of the Act states that an employer is not liable for medical benefits "unless employer shall have refused or neglected a request" for treatment. 33 U.S.C. §907(d). We affirm the administrative law judge's finding that Dr. Lowery's releasing claimant to return to work in November 1993 was not a refusal by employer to authorize treatment. *Slattery Assoc. v. Lloyd*, 725 F.2d 780, 16 BRBS 44(CRT) (D.C. Cir. 1984). Moreover, Ms. Ohlinger's testimony constitutes substantial evidence supporting the

[2] In addition, claimant testified that Medicare paid for some of the treatment. The administrative law judge properly noted that claimant cannot receive reimbursement under these circumstances. Decision and Order at 31 n.31; *Nooner v. National Steel & Shipbuilding Corp.*, 19 BRBS 43 (1986).

administrative law judge's conclusion that claimant did not seek authorization for any treatment after 1993.[3] *Ranks v. Bath Iron Works Corp*., 22 BRBS 301 (1989). Therefore, we affirm the administrative law judge's finding that employer did not refuse to treat claimant and that claimant did not request authorization from employer or the district director for any subsequent work-related medical treatment. *See* Decision and Order at 27-31. The denial of the reimbursement claim is affirmed. *Maryland Shipbuilding & Dry Dock Co. v. Jenkins*, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge

_____
JONATHAN ROLFE
Administrative Appeals Judge

[3] The administrative law judge also noted that there is no evidence in the record to support claimant's testimony that he contacted the Department of Labor about medical care, as the first communication from claimant was the 2013 motion for modification. Decision and Order at 30.