U.S. Department of Labor

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

BRB No. 14-0255

GIOVANNI SCAVO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
AMERICAN STEVEDORING, INCORPORATED	)	DATE ISSUED: Mar. 18, 2015
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Oleg Nekritin and Robert J. DeGroot, Newark, New Jersey, for claimant.

Christopher J. Field (Field Womack & Kawczynski, LLC), South Amboy, New Jersey, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2012-LHC- 02120) of Administrative Law Judge Lystra A. Harris 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 supported by substantial evidence, rational, 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 injured his right knee while working as a hustler driver for employer on January 21, 2010. He had previously injured this knee in 2007 and underwent reconstructive surgery in 2008. Following the 2010 injury, claimant underwent additional surgery. Employer voluntarily paid claimant temporary total disability benefits from January 22, 2010, through May 31, 2011, as well as medical benefits. The parties stipulated that claimant's knee condition reached maximum medical improvement on May 31, 2011, and claimant returned to his usual employment on June 1, 2011. The parties could not agree on the extent of claimant's permanent impairment.

The administrative law judge concluded that claimant has a 15 percent permanent impairment to his right knee, crediting the opinion of Dr. Bercik, employer's expert, because his opinion was detailed and consistent with claimant's subjective complaints. She gave no weight to the opinion of Dr. Meer, who is Board-certified in rehabilitative medicine, that claimant has a 47 percent impairment because he last examined claimant in December 2008, prior to claimant's 2010 injury, and nothing in the record established that he had reviewed any post-December 2008 medical or treatment records. The administrative law judge also rejected the opinion of claimant's treating orthopedic surgeon, Dr. Baum, that claimant has a 45 percent impairment, concluding that, although he is claimant's treating physician, his opinion as to the extent of claimant's impairment is "conclusory and not well-reasoned or detailed." Decision and Order at 13. Claimant appeals the administrative law judge's decision, and employer responds, urging affirmance.

Claimant contends the administrative law judge erred in assessing the extent of claimant's impairment by crediting the opinion of Dr. Bercik over the opinions of Drs. Baum and Meer. Claimant also contends the administrative law judge erred by evaluating the opinions of Drs. Baum and Meer under the standards of the AMA *Guides to the Evaluation of Permanent Impairment.*

It is well established that an administrative law judge is entitled to evaluate the credibility of all witnesses and has considerable discretion in evaluating and weighing the evidence of record. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). It is solely within her discretion to accept or reject all or any part of any testimony according to her judgment. *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). In reviewing findings of fact, the Board may not reweigh the evidence, but may inquire only into the existence of substantial evidence to support the findings. *South Chicago Coal & Dock Co. v. Bassett*, 104 F.2d 522 (7th Cir. 1939), *aff'd*, 309 U.S. 251 (1940); *Miffleton v. Briggs Ice Cream Co.*, 12 BRBS 445 (1980), *aff'd*, 659 F.2d 252 (D.C. Cir. 1981) (table). We affirm the administrative law judge's decision because claimant has not established

reversible error in the administrative law judge's weighing of the evidence and the decision is supported by substantial evidence of record.

In this case, the administrative law judge fully explained her rationale for giving dispositive weight to Dr. Bercik's opinion.[1] Decision and Order at 13-14. In rendering a decision on the extent of a claimant's disability, an administrative law judge is not bound by any particular standard or formula. *See, e.g., Cotton v. Army & Air Force Exch. Services*, 34 BRBS 88 (2000); *Pimpinella v. Universal Maritime Service 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 opinions, such as Dr. Bercik's, that rate a claimant's impairment under these criteria, as it is a standard medical reference. *See Jones v. I.T.O. Corp. of Baltimore*, 9 BRBS 583 (1979). In giving less weight to Dr. Baum's opinion that claimant has a 45 percent impairment, the administrative law judge found that Dr. Baum failed to explain how he derived the percentage rating.[2] Decision and Order at 13. Any error in the administrative law judge's also assessing Dr. Baum's opinion against the criteria of the AMA *Guides*, when it is not clear from the record that the doctor rated claimant under those criteria, is harmless in this case, as the administrative law judge validly found Dr. Baum's opinion to be conclusory and rationally gave greater weight to the opinion of Dr. Bercik. The administrative law judge's decision is supported by substantial evidence of record. Therefore, we affirm the award of benefits to claimant for a 15 percent impairment to his lower extremity. 33 U.S.C. §908(c)(2); *see generally Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994); Decision and Order at 12-13; EX 7 at 4; EX 10 at 10, 19.

[1] The administrative law judge explained that Dr. Bercik had seen claimant six times, including after both the 2007 and 2010 injuries. Dr. Bercik concluded that claimant had a 10 percent permanent impairment after the first injury, which increased to 15 percent as a result of the second injury. Dr. Bercik determined there was no change in the range of motion of claimant's knee, although there was tenderness at the lateral joint line and the predicted degree of impairment due to the 2011 arthroscopic surgery. The administrative law judge determined that Dr. Bercik's opinion is consistent with claimant's subjective complaints and his return to work without restrictions. Decision and Order at 13-14; EX 10.

[2] The administrative law judge rationally accorded no weight to Dr. Meer's opinion because he did not evaluate claimant's condition after the 2010 injury at issue in this claim.

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

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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GREG J. BUZZARD
Administrative Appeals Judge