U.S. Department of Labor

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

BRB No. 16-0398

SCOTT STAHLA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NORTHLAND SERVICES, INCORPORATED	)	
	)	
	)	DATE ISSUED: Mar. 24, 2017
and	)	
	)	
SEABRIGHT INSURANCE, INCORPORATED	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

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

Charles Robinowitz, Portland, Oregon, for claimant.

Before: BOGGS, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand of Administrative Law Judge Jennifer Gee 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).

This case is before the Board for the second time. To recapitulate, claimant was

employed by employer as a crane operator.[1] Tr. at 62-63. He suffered a traumatic bitemporal hematoma on February 8, 2005 when he sustained a fall while a passenger on a ferry taking him to a job site in St. Paul, Alaska. *Id.* at 65; CX 1. Claimant underwent surgery for the hematoma.

Following this injury, claimant obtained treatment at a Phoenix, Arizona facility that provides rehabilitative services for those recovering from neurological injuries. On May 25, 2005, claimant suffered his first epileptic seizure. He suffered a third epileptic seizure on July 3, 2005, during which he fell onto a hot sidewalk pavement and remained unconscious long enough to sustain second to third degree burns on his left hand and acute left hand cellulitis with leukocytosis. Following this injury, he developed a weakness of his left upper extremity with problems bending his ring finger and with the lateral motion of his left wrist. On October 25, 2006, claimant was arrested for driving under the influence and, in the course of his arrest, fell and struck his head, resulting in a second traumatic brain injury. Since 2007, claimant has worked intermittently. In January 2011, claimant found work as a telemarketer.

Claimant sought benefits under the Act. In a decision dated March 13, 2012, the administrative law judge concluded that claimant's first traumatic brain injury was work-related and that this injury caused claimant's epilepsy, which caused his left hand injury and contributed to his second traumatic brain injury. 1st Decision and Order at 15, 17. The administrative law judge accepted the parties' stipulations that claimant reached maximum medical improvement on March 28, 2006, that claimant has a "15% permanent partial disability of his left upper extremity," and that claimant is able to perform alternate work and is not permanently totally disabled as of February 17, 2010. *Id.* at 2. The administrative law judge awarded claimant temporary total disability benefits from February 8, 2005 through March 28, 2006 and permanent total disability benefits from March 27, 2006 to March 2, 2007. *Id.* at 23. The administrative law judge concluded that, after March 2, 2007, claimant was entitled to permanent total disability benefits during the periods he was unemployed but entitled to only permanent partial disability benefits during those times when he was working. *Id.* at 21. She specifically stated that claimant was entitled to 36.6 weeks of compensation based on his proportionate loss of use of his "left upper extremity" under Section 8(c)(3) of the Act for his hand injury. *Id.* at 26. However, in the Order section, the administrative law judge noted this award was not payable until claimant's entitlement to unscheduled partial disability benefits dipped below the statutory maximum compensation rate of $1,047.16. *Id.* at 29.

[1] A more complete recitation of claimant's injuries, treatment and work history is detailed in the administrative law judge's decisions and the Board's prior decision. We recount only those facts which are necessary to this appeal.

Claimant filed an appeal with the Board, challenging the administrative law judge's finding that he was only partially disabled from February 8 to March 2, 2008. *Stahla v. Northland Services, Inc.*, BRB No. 12-0517 (July 11, 2013), slip op. at 3. He also argued that he was entitled to permanent total disability benefits for each period subsequent to March 2, 2007 when he was not working. *Id.* The Board held that, pursuant to the decision of the United States Court of Appeals for the Ninth Circuit in *Wausau Ins. Cos. v. Director, OWCP*, 114 F.3d 120, 31 BRBS 41(CRT) (9th Cir. 1997), the administrative law judge erred in finding that the value of the room and board claimant received in exchange for work while he was in treatment at Crossroads, a rehabilitation facility, established that he had a wage-earning capacity from February 8, 2008 through March 2, 2008. *Stahla*, slip op. at 6. The Board therefore directed the administrative law judge to reconsider claimant's wage-earning capacity during the periods when he received room and board in exchange for working at Crossroads. The Board also remanded the case for clarification with regard to the type of benefits to which claimant was entitled for the various periods he did and did not work after March 2, 2007. *Id.* at 4.

Claimant filed a motion for reconsideration of the Board's decision, seeking clarification regarding his entitlement to concurrent awards of scheduled and unscheduled permanent partial disability benefits for periods subsequent to March 2, 2007. The Board held that the administrative law judge should award claimant concurrent awards consisting of his unscheduled permanent partial disability award for his seizure disorder to be paid at the maximum rate of $1,047.16, plus a pro-rated portion of his "scheduled award," as long as the total amount of the concurrent awards does not exceed the higher maximum rate in effect for permanent total disability. *Stahla v. Northland Services, Inc.*, BRB No. 12-0517 (Sept. 26, 2013), Order at 2.

On remand, the administrative law judge reaffirmed her previous conclusion that claimant is unable to return to his usual work and that employer has not established suitable alternate employment, such that claimant is totally disabled for the purposes of the Act. The administrative law judge also concluded that claimant was only partially disabled during those times when he actually earned some wages, thereby demonstrating his earning capacity. Decision and Order on Remand at 10. She further determined that for the period between February 8, 2008 and March 2, 2008, during which claimant was in treatment, but received room and board at Crossroads in exchange for services, claimant had no actual earnings and thus remained totally disabled. *Id.* at 11. The administrative law judge recalculated claimant's earning capacity for the periods when he was actually working and compared that to the maximum compensation rates under Section 6(b), 33 U.S.C. §906(b), to determine the compensation claimant was entitled to for his unscheduled traumatic brain injury. *Id.* at 18.

The administrative law judge reiterated that claimant was also permanently partially disabled due to the injury to his left hand. Decision and Order on Remand at 18. She stated that, prior to February 20, 2006, when that injury reached maximum medical improvement, the resulting disability was temporary and subsumed into claimant's temporary total disability resulting from his traumatic brain injury. The administrative law judge also addressed claimant's assertion, set forth in a letter to the administrative law judge on remand, that claimant is entitled to 46.8 weeks of compensation for his "15 percent permanent partial disability of the left arm." *See* Cl. Letter dated Aug. 18, 2014. She noted that she had accepted the parties' stipulation that the disability from claimant's left hand injury became permanent as of February 20, 2006 with a rating of a 15 percent impairment to claimant's upper extremity. *Id.* The administrative law judge further stated that the parties' stipulation that the 15 percent impairment was to claimant's "left upper extremity" could relate to either claimant's left arm or left hand. *Id.* at 19, n. 17. She summarized the discussion at the hearing leading to the stipulation, stating that claimant testified that he had hurt his "left hand" and that, when she asked if the stipulation was for a 15 percent permanent partial disability to claimant's left hand, claimant's counsel asserted it was to the arm and the administrative law judge then suggested "left upper extremity," which was agreed to. She noted that the medical report on which the stipulation was based provided a 15 percent impairment rating for claimant's left upper extremity. *Id.*; CX 44 at 163. She therefore reaffirmed her earlier decision that claimant's award for his scheduled impairment to his left upper extremity was for an injury to claimant's left hand because claimant testified that he had injured his hand, noting that the determination was not appealed nor did the Board instruct her to reconsider that finding. Decision and Order on Remand at 19, n. 17. The administrative law judge ultimately concluded that claimant is entitled to receive partial payment of his scheduled permanent partial disability award during his periods of unscheduled permanent partial disability, equal to the difference between the applicable maximum compensation rate and the weekly rate he was entitled to for his unscheduled permanent partial disability. *Id.* at 20.

On appeal, claimant contends the administrative law judge erred as a matter of law in interpreting the stipulation of a "15 percent impairment of the left upper extremity" as 15 percent of the left hand and not 15 percent of the left arm. He also challenges the administrative law judge's failure to advise the parties in advance of her decision to interpret the stipulation in this manner. Employer has not filed a response brief.

We decline to address the merits of claimant's appeal, as claimant waived the issue of the propriety of the administrative law judge's interpretation of the stipulation because he failed to raise it in his first appeal to the Board. It is well-established that a party generally may not raise a new issue on appeal to the Board. *See, e.g., Turk v. Eastern Shore R.R. Inc.*, 34 BRBS 27 (2000); *see also Partenweederei, MS Belgrano v. Weigel*, 313 F.2d 423, 425 (9th Cir. 1962), *cert. denied*, 373 U.S. 904 (1963) (stating that

"[i]t is sound policy to require that all claims be presented to the trial court, and not raised for the first time on appeal"). This doctrine also bars a party from challenging an adverse finding of an administrative law judge in a second appeal where the party had the opportunity to raise the issue before and failed to do so. *See Verderane v. Jacksonville Shipyards, Inc.*, 14 BRBS 220.15 (1981), *modified*, BRB No. 76-244 (Oct. 16, 1984), *aff'd on other grounds*, 772 F.2d 775, 17 BRBS 154(CRT) (11th Cir. 1985) (employer's failure to raise notice issue in its first appeal precludes it from raising the issue in its second appeal); *Burbank v. K.G.S., Inc.*, 13 BRBS 467 (1981) (declining to address the issue of the Director's standing to bring the initial appeal because the issue had not been raised in the earlier appeal and "a piecemeal consideration of issues violates the principles of finality and judicial efficiency.").

We hold that the proper time for claimant to challenge the administrative law judge's interpretation of the parties' stipulation regarding claimant's impairment to the "left upper extremity" was in his first appeal to the Board, as the administrative law judge's finding was adverse to claimant at that time. We emphasize that the administrative law judge's first decision stated that claimant was entitled to 36.6 weeks of compensation based on the proportionate loss of use of his left upper extremity. *See* 1st Decision and Order at 26. Her decision specifically cited Section 8(c)(3) of the Act, 33 U.S.C. §908(c)(3), which refers to the hand, and 36.6 weeks equates to 15 percent of the 244 weeks of compensation awardable for a permanent impairment to the hand. *See* 1st Decision and Order at 26. We note that compensation for an injury to the arm, to which claimant asserts entitlement, would have been for 46.8 weeks, for 15 percent of 312 weeks of compensation for the loss of an arm under Section 8(c)(1) of the Act, 33 U.S.C. §908(c)(1). Claimant was entitled to appeal the calculation of the number of weeks of compensation he would receive for the injury to his upper left extremity in his first appeal to the Board because it was a finding adverse to claimant at the time.[2] Claimant failed to raise the issue to the Board and, accordingly, is barred from raising it now in this second appeal. *Verderane*, 14 BRBS 220.15; *Burbank*, 13 BRBS 467.

Claimant argues that the administrative law judge's reference in her first decision to the 15 percent of 244 weeks could have been taken to be a "clerical error" as there was no discussion of the issue. We find claimant's argument to be unconvincing. In her first decision, the administrative law judge cited the specific section of the statute regarding scheduled injuries to the hand, 33 U.S.C. §908(c)(3), and stated that the total number of weeks of compensation to be paid was based on 15 percent of 244 weeks, i.e., for

[2] This finding was adverse to claimant notwithstanding that the scheduled award was not immediately payable to claimant because claimant was first totally disabled due to his other injuries and was then receiving the maximum compensation rate for his unscheduled injuries.

impairment to the hand, and not 312 weeks, i.e., for impairment to the arm. 1st Decision and Order at 26. We cannot accept that the administrative law judge's calculation for claimant's scheduled injury could be seen as an unintentional error because she identified the exact section of the statute and the appropriate number of weeks of compensation given a 15 percent impairment rating. We are satisfied that any careful reading of the administrative law judge's first decision would have made clear that the administrative law judge had in fact interpreted the stipulation to reflect a 15 percent impairment to the left hand and not the left arm. We conclude, therefore, that the proper time for claimant to challenge the finding was in the initial appeal of the administrative law judge's first decision.[3]

Claimant also challenges the administrative law judge's conclusion that her initial finding that claimant had a 15 percent impairment of the left hand is the law of the case. *See* Decision and Order on Remand at 19, n. 17. We reject claimant's contention. Generally, trial court decisions on issues that were not addressed on appeal are considered settled for purposes of any future proceedings. *See King v. Director, OWCP*, 904 F.2d 17, 23 BRBS 85(CRT) (9th Cir. 1990); *Cowgill v. Raymark Industries, Inc.*, 832 F.2d 798 (3d Cir. 1987). The Board did not address the administrative law judge's calculation of the number of weeks of compensation claimant is entitled to for his hand injury because it was not appealed.[4] That portion of the administrative law judge's first decision accordingly stands. Therefore, we must reject claimant's appeal in the instant matter. *Verderane*, 14 BRBS 220.15; *Burbank*, 13 BRBS 467. Accordingly, the administrative law judge's Decision and Order on Remand is affirmed.

Claimant's attorney has filed an itemized application for an attorney's fee for services rendered in the first appeal of this case, BRB No. 12-0517.[5] He seeks a total of $6,805.50 for 14.25 hours of his own work at an hourly rate of $466 and one hour of work by his legal assistant at $165 per hour.[6] Claimant's counsel submitted affidavits

[3] We note as well that claimant failed to raise this issue in his motion for reconsideration to the Board where payment of the scheduled award was explicitly addressed.

[4] "The unreversed determinations of the trial court normally continue to work an estoppel." *Cowgill v. Raymark Industries, Inc.*, 832 F.2d 798, 802 (3d Cir. 1987).

[5] The legal services itemized in the application for attorney's fees reflect legal services performed in 2012, 2013, 2014 and 2016.

[6] Claimant's counsel initially filed a declaration of attorney's fees on June 2, 2016 seeking an hourly rate of $450. He later filed an amended declaration of attorney's fees on October 25, 2016, asserting he is entitled to an hourly rate of $466 to reflect the fact

and other evidence in support of his amended declaration requesting an hourly rate of $466. Employer has not filed objections to counsel's fee petition.

Claimant's counsel is entitled to a fee payable by employer for work in BRB No. 12-0517 because claimant obtained greater compensation on remand by virtue of that appeal. 20 C.F.R. §802.203(a), (c).

It is well-established that an attorney's reasonable hourly rate is "to be calculated according to the prevailing market rates in the relevant community." *Blum v. Stenson*, 465 U.S. 886, 895 (1984); *see also Shirrod v. Director, OWCP*, 809 F.3d 1082, 49 BRBS 93(CRT) (9th Cir. 2015). The Board has recently approved an hourly rate of $450 for work performed by counsel between 2013 and 2016 in the relevant community of Portland, Oregon. *Modar v. Maritime Services Corp.*, BRB No. 13-0319 (Oct. 12, 2016) [*Modar 1*]; *see also Hill v. CLD Pacific Grain*, BRB No. 14-0281 (Nov. 18, 2016); *Modar v. Maritime Services Corp.*, BRB No. 14-0282 (Nov. 9, 2016) [*Modar 2*]; *Seachris v. Brady Hamilton Stevedore Co.*, BRB No. 11-0104 (Oct. 17, 2016). For the reasons expressed in *Modar I*, we conclude that an hourly rate of $450 is appropriate for all attorney services in this case. In addition, we approve the requested paralegal rate of $165.[7] 20 C.F.R. §802.203(d)(4).

We approve a fee for 14.25 hours of attorney work and one hour of legal assistant work, as requested. This time is reasonably commensurate with the necessary work performed in successfully pursuing claimant's prior appeal in this case. *See* 20 C.F.R. §802.203(e). Consequently, we award claimant's counsel an attorney's fee of $6,577.50.

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that most of the time spent on this case was in 2012 and there has since been a four-year delay in compensating his services. *See* Amended Declaration of Attorney's Fees.

[7] In *Modar 1*, claimant's counsel also requested and was granted an hourly rate of $165 for his paralegal.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed. We award claimant's counsel an attorney's fee of $6,577.50 for work in BRB No. 12-0517, to be paid directly to counsel by employer. 33 U.S.C. §928; 20 C.F.R. §802.203.

SO ORDERED.

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JUDITH S. BOGGS
Administrative Appeals Judge

_____
GREG J. BUZZARD
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge