U.S. Department of Labor

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

BRB No. 17-0418

GEORGE N. GINDO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 03/15/2019
AECOM NATIONAL SECURITY PROGRAMS, INCORPORATED f/k/a McNEIL TECHNOLOGIES, INCORPORATED	)	
	)	
and	)	
	)	
CONTINENTAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	ORDER on MOTION for RECONSIDERATION

Claimant has filed a timely Motion for Reconsideration of the Board's Decision and Order in *Gindo v. Aecom Nat'l Sec. Programs, Inc.*, 52 BRBS 51 (2018). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. Employer filed a response brief to which claimant filed a motion to strike and a reply brief.[1] Employer filed a response to claimant's motion to strike and a sur-reply brief.[2]

[1] Claimant filed his motion for reconsideration of the Board's decision on November 9, 2018. Employer submitted its response on December 10, 2018. Claimant filed a motion to strike employer's response because it was untimely filed and a reply brief on January 7, 2019. Although 20 C.F.R. §802.407 does not provide a timeframe for filing a response to a motion for reconsideration, 20 C.F.R. §802.219 addresses "motions." Section 802.219(e) states that responses to motions should be filed within 10 days of receipt of the motion. Nonetheless, we deny claimant's motion to strike. Claimant filed a substantive reply to the response, and the Board has the discretion to accept briefs filed out of time. 20 C.F.R. §802.217(a).

[2] Employer replies that the exhibits appended to claimant's motion to strike and reply brief are not in the record and, therefore, should not be considered by the Board. We agree. The Board may not consider on appeal evidence outside the record. *See* 33 U.S.C. §921(b)(3); *Meinert v. Fraser, Inc.*, 37 BRBS 164 (2003). Accordingly, we will not consider the documents appended to claimant's motion and reply.

On appeal, claimant challenged the administrative law judge's findings that his post-traumatic stress disorder (PTSD) injury is an "occupational disease" and that he is a "voluntary retiree" such that his average weekly wage must be determined under Section 10(d)(2)(B) of the Act, 33 U.S.C. §910(d)(2)(B). The Board affirmed these findings. *Gindo*, 52 BRBS at 53-56.

In his motion for reconsideration, claimant avers that PTSD "does not fit the mold of an occupational disease" because war-zone attacks are neither insidious nor subtle, and thus constitute multiple traumas. Cl. Mot. for Recon. at 34. Claimant asserts "he should not be entitled to a lower compensation rate because he suffered through a larger number of traumatic incidents than a claimant who is only haunted by one event." *Id.*

The Board thoroughly discussed this issue in its decision. *Gindo*, 52 BRBS at 52-54. There is no authority for claimant's contention that the causative agent for an occupational disease must be "insidious and subtle." *Id.* at 54. Moreover, that the working conditions in Iraq were known to be hazardous in general is not the critical factor. The critical factor is that claimant was not aware that the stressful war zone conditions to which he was exposed had harmed him until well after he last worked in Iraq. *Id.* In addition, the number of traumatic events claimant experienced is not relevant. Delayed-onset PTSD could result from a single traumatic event. The Act was specifically amended in 1984 to permit the compensability of delayed-onset occupational diseases and claimant has not identified error in the characterization of his medical condition as such. *See, e.g.*, 33 U.S.C. §§902(10), 908(c)(23), 910(d)(2), 913(b)(2). Accordingly, we reject claimant's contention that his PTSD is not an occupational disease.

Claimant next avers his retirement should not be considered "voluntary" just because his PTSD had not progressed to the point that a doctor opined it was totally disabling until July 2014. Claimant argues that, as the administrative law judge found that his symptoms began in September 2013, and these symptoms included a lack of concentration, energy and motivation, then his PTSD "logically" impeded his ability to find a job after his unemployment compensation ended in February 2013 and his "retirement" was not voluntary because it was related to his PTSD.

Section 702.601(c) states: "[R]etirement shall mean that the claimant . . . has voluntarily withdrawn from the workforce and that there is no realistic expectation that such person will return to the workforce." 20 C.F.R. §702.601(c). The administrative law judge found that, although claimant's symptoms were manifest in September 2013, "the medical record shows claimant's symptoms as worsening gradually over time," and became disabling later. Decision and Order at 13. It is claimant's burden to establish he was disabled by his work injury and when the disability commenced. *See Louisiana Ins. Guar. Assoc. v. Director, OWCP [Harvey]*, 614 F.3d 179, 44 BRBS 53(CRT) (5th Cir. 2010). The administrative law judge found that the absence of medical evidence of disability and the activities in which claimant engaged after his unemployment compensation ended support the conclusion that claimant was an "active retiree" at the time his PTSD became disabling. *Gindo*, 52 BRBS at 55-56. The Board cannot reweigh the evidence or draw its own inferences from the record. *See generally Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). Accordingly, we

reject claimant's contention that the administrative law judge erred in finding that he was not disabled by PTSD until July 23, 2014, which was more than one year after his voluntary retirement. *Jones v. U.S. Steel Corp.*, 22 BRBS 229 (1989); *Smith v. Ingalls Shipbuilding Div./Litton Systems Inc.*, 22 BRBS 46 (1989).

Claimant also avers the administrative law judge erred in addressing the applicability of Section 10(d)(2) because employer first raised the issue in its closing brief and in finding that claimant was a voluntary retiree within the meaning of Section 10(d)(2) after accepting the parties' stipulation that claimant became temporarily totally disabled on July 23, 2014. We reject these contentions. No formal hearing was held in this case and the parties filed closing briefs on the order of the administrative law judge. The parties' briefs address all aspects of the issues before the administrative law judge, including whether claimant's injury is an occupational disease and how his average weekly wage should be calculated.[3] The administrative law judge did not err in addressing the statutory provisions applicable to average weekly wage based on his finding that claimant has an occupational disease. In addition, as a voluntary retiree with an occupational disease, claimant's entitlement to compensation is limited to permanent partial disability under Section 8(c)(23). Thus, to the extent the parties stipulated that claimant became temporarily totally disabled in July 2014, the stipulation could not have been accepted because it evinces an incorrect application of law. *Mitri v. Global Linguist Solutions*, 48 BRBS 41 (2014). Therefore, we reject claimant's contentions.

Accordingly, claimant's motion for reconsideration is denied. The Board's decision is affirmed. 20 C.F.R. §802.409.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

[3] Claimant argued for Section 10(a), 33 U.S.C. §910(a). Employer argued for Section 10(d)(2).