BRB No. 11-0616

CRAIG CROWLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL, INCORPORATED	)	DATE ISSUED: 05/24/2012
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

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

Matthew T. Singer, St. Louis, Missouri, for claimant.

Keith L. Flicker, Richard L. Garelick and Brendan E. McKeon (Flicker, Garelick & Associates, LLP), New York, New York, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2008-LDA-00303) 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *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, are rational, and are 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, while working for employer in Tikrit, Iraq, as a labor foreman on April 22, 2006, sustained a left scrotal hernia, which restricted him from working and prompted his return to the United States for surgery. Claimant initially opted not to have surgery because employer had not authorized the procedure and he did not wish to pay for it. On February 15, 2007, employer authorized surgery. Claimant filed a claim for benefits which proceeded to a formal hearing on February 27, 2007. The parties stipulated, inter alia, that employer would pay temporary total disability benefits commencing January 4, 2007. The only issue remaining was whether claimant was entitled to temporary total disability benefits for the period from April 26, 2006 to January 3, 2007.

In her decision, the administrative law judge granted claimant's motion for summary decision, finding that claimant was temporarily totally disabled during the period in question. The administrative law judge also rejected employer's contention that claimant's compensation should be suspended because claimant unreasonably refused to undergo medical care pursuant to Section 7(d)(4) of the Act, 33 U.S.C. §907(d)(4). Thus, the administrative law judge awarded claimant temporary total disability benefits, a Section 14(e) assessment, 33 U.S.C. §914(e), on benefits due and unpaid from April 26 to May 20, 2006, and interest. In its decision, the Board rejected employer's contention that the administrative law judge erred in finding that claimant was totally disabled and it thus affirmed the award of temporary total disability benefits from April 26, 2006 through January 3, 2007. *C.C. [Crowley] v. Service Employees Int'l, Inc.*, BRB No. 07-0970 (Apr. 30, 2008) (unpub.).

Claimant underwent hernia surgery in August 2007, which was performed by Dr. Counter. In October 2007, claimant complained to Dr. Counter of post-operative pain while moving or twisting. Claimant reported similar complaints to Dr. Kellogg on December 4, 2007, when he was examined at employer's request. Dr. Kellogg opined that claimant's work injury had reached maximum medical improvement and that claimant could return to work. EX 1 at 9. Thereafter, employer terminated claimant's compensation payments and filed a notice of controversion. Claimant subsequently moved to the Philippines; he received treatment from Dr. Miranda for pain in the groin and testicular areas. Dr. Miranda opined that claimant has chronic post-operative groin pain related to nerve entrapment and that claimant could not return to his former employment for employer. CX 6 at 6A. The case was referred to the Office of Administrative Law Judges (OALJ) in June 2008 and a hearing was conducted in June 2009.

In her decision, the administrative law judge found that claimant's work injury reached maximum medical improvement on December 5, 2007. The administrative law judge found that claimant has a permanent disability due to groin and testicular pain

related to the work injury, which prevents him from returning to his former job for employer. Since employer did not offer any evidence of suitable alternate employment, the administrative law judge found claimant entitled to compensation for permanent total disability commencing December 6, 2007. 33 U.S.C. §908(a). The administrative law judge found employer responsible for reimbursing claimant for all medical expenses he incurred relating to his April 22, 2006 work injury and for any reasonable and necessary medical care in the future that is needed to treat his pain. *See* 33 U.S.C. §907. The administrative law judge rejected employer's contention that her prior decision awarded claimant compensation only for a closed period of temporary total disability from April 26, 2006 through January 3, 2007, and she found employer liable for a Section 14(f) assessment, 33 U.S.C. §914(f), on past-due compensation payable from the date employer terminated claimant's compensation on December 6, 2007.

On appeal, employer challenges the award of permanent total disability compensation and medical benefits. Employer also challenges the Section 14(f) assessment. Claimant has not filed a response brief.[1]

Employer challenges the administrative law judge's crediting of Dr. Miranda's opinion that claimant is unable to return to his usual employment and her rejection of Dr. Kellogg's opinion that claimant has no work-related restrictions and can return to work. Additionally, employer alleges that the administrative law judge inappropriately used different standards in evaluating the opinions of Drs. Kellogg and Miranda,[2] and that the administrative law judge improperly ignored evidence of claimant's lack of credibility.

In her decision, the administrative law judge found that, while Dr. Miranda initially examined claimant for the purposes of providing an evaluation after the first hearing, claimant subsequently returned to Dr. Miranda for further treatment and asked

[1]Claimant obtained counsel after the close of the briefing schedule.

[2]Employer argues that the administrative law judge unfairly discredited Dr. Kellogg's opinion for failure to perform a pain inventory but she did not consider this omission an impediment to crediting Dr. Miranda's opinion. Similarly, the administrative law judge discredited Dr. Kellogg's opinion as the community standard for pain treatment despite his years of practice and board certification, and credited Dr. Miranda's opinion, despite the absence of evidence of his credentials, education and certification.

that he serve as the treating physician.[3] CX 6 at 1, 8. The administrative law judge noted that Dr. Miranda repeatedly stated that claimant required further treatment and testing for his groin pain. *Id*. at 11-13. The administrative law judge also found credible claimant's complaints based on his bringing written questions to his physicians regarding his pain. Decision and Order at 18; *see* CXs 5 at 1; 6 at 8. The administrative law judge determined that, while the parties did not offer medical records pre-dating Dr. Kellogg's December 4, 2007 report, it is evident from that report and Dr. Counter's December 27, 2007 report that "claimant's complaints of groin pain have been consistent, even after the hernia surgery, despite Dr. Kellogg's claims to the contrary." Decision and Order at 16; *see* CX 5 at 1-2; EX 1 at 5-6. Moreover, the administrative law judge found that, at his deposition, Dr. Kellogg admitted that "claimant was documented as having consistently complained about pain even after his hernia surgery and that he was only pain free when he was sedentary." Decision and Order at 18 (emphasis in original); *see* EX 5 at 52-53. The administrative law judge also addressed Dr. Counter's statement that as of December 27, 2007, claimant could resume "activity without restrictions." CX 5 at 2. The administrative law judge found, "it is clear from the context of [Dr. Counter's] progress note that he did not intend for the claimant to plunge right into regular activities or even his former work" because he "recommended a slow increase in activity to include walking and bicycle riding as he is able, and to gradually resume jogging if he is also comfortable with longer sustained walk." Decision and Order at 16; CX 5 at 2.

The administrative law judge rejected Dr. Kellogg's opinion that claimant can return to work without restrictions. EX 1 at 9. The administrative law judge found that Drs. Counter and Miranda recommended further evaluation to determine the cause of claimant's groin pain, but Dr. Kellogg refused to suggest further evaluation or consider the effects of continued pain on claimant's activities, even though he acknowledged "post-operative left scrotal and testicular pain." Decision and Order at 17; *see* EX 1 at 9. The administrative law judge determined that Dr. Kellogg's deposition testimony concerning claimant's pain was contradictory and inconsistent.[4] Decision and Order at

[3]The examination was requested by David Barnett, who represented claimant prior to the transfer of the claim to the Office of Administrative Law Judges in June 2008. *See* ALJX 1.

[4]The administrative law judge provided examples to support this finding. For instance, the administrative law judge noted that Dr. Kellogg diagnosed post-operative primary left scrotal and testicular pain, and the records he reviewed and summarized in his report show continued pain complaints, yet Dr. Kellogg opined that claimant's pain was "not consistent enough pain to recommend any type of therapy, either a pain program or otherwise." Decision and Order at 18; EX 5 at 59. The administrative law judge also noted Dr. Kellogg's opinion that claimant did not require pain medication; however, his examination of claimant lasted only 10 minutes, and he did not conduct a

17-19. Regarding employer's contention on appeal that the administrative law judge erred by questioning Dr. Kellogg's qualifications, the administrative law judge stated that Dr. Kellogg is board-certified in general surgery, but had not treated patients in over 20 years. Decision and Order at 18; *see* EX 5 at 7, 40. Thus, for that reason, the administrative law judge found "it hard to believe that [Dr. Kellogg] is qualified to express an opinion as to what the community standard is for treating any type of medical problem, little less a problem involving undiagnosed pain." Decision and Order at 18.

The administrative law judge also rejected employer's contention that the opinion of Dr. Miranda, "a physician in the Philippines whose qualifications and education are unknown and who did not present testimony," should be disregarded. Employer's Post-Hearing Brief at 34. The administrative law judge found it irrelevant that Dr. Miranda is Filipino and does not practice in the United States, as it was reasonable for claimant to seek treatment where he lived. The administrative law judge found it "very rare" for the record to contain the curriculum vitae of a treating physician unless he testifies,[5] and she accorded determinative weight to Dr. Miranda's opinion as claimant's treating physician, as he spent several days evaluating claimant's condition and treating him. Decision and Order at 20; *see* CX 6. Accordingly, in concluding that claimant cannot return to his usual job, the administrative law judge credited, over the opinion of Dr. Kellogg, the opinion of Dr. Miranda that claimant's residual groin pain makes him unable to return to his former job. Decision and Order at 22; *see* CX 6 at 6A, 14.

It is claimant's burden to establish his inability to perform his usual work due to his work injury. *See, e.g., Padilla v. San Pedro Boat Works*, 34 BRBS 49 (2000). In this case, the administrative law judge rationally credited the opinion of Dr. Miranda over that of Dr. Kellogg, based on his status as claimant's treating physician. *See Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir.), *cert. denied*, 528 U.S. 809 (1999). Additionally, the administrative law judge rationally interpreted Dr. Counter's report as not addressing claimant's ability to return to his former employment, *see* CX 5 at 2, and found that claimant consistently complained of pain. *See* CXs 5-6. As the administrative law judge fully addressed the

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pain inventory or pain scale or otherwise outline claimant's perception of his pain. Decision and Order at 18-19; EX 5 at 60-61. The administrative law judge found "incomprehensible" that, while Dr. Kellogg testified that claimant's pain had persisted beyond three months and that, under such a circumstance he would recommend further therapy, Dr. Kellogg stated that a pain consultation is not appropriate without knowing the cause of the pain. Decision and Order at 19; EXs 1 at 9; 5 at 57.

[5]The administrative law judge noted that, similarly, Dr. Counter's curriculum vitae was not offered into evidence.

relevant medical evidence as well as the evidence demonstrating the consistency of claimant's pain complaints over time, she was not further required to address more specifically claimant's testimony regarding his groin pain and ability to work. *See generally Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001); *see also James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000). Moreover, the administrative law judge permissibly found that Dr. Kellogg is less qualified to render an opinion on the "community standard" for treating claimant's pain complaints since he is a general surgeon who has not treated patients in over 20 years, and that the absence in the record of Dr. Miranda's curriculum vitae is not a basis to disregard his opinion, as claimant's treating physician, that he is unable to return to work. *See Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010). Accordingly, we affirm the administrative law judge's rational crediting of the opinion of Dr. Miranda, and her finding that claimant is unable to return to his former employment for employer as a labor foreman, as it is supported by substantial evidence. Since employer did not offer any evidence of suitable alternate employment, we therefore affirm the administrative law judge's award of compensation for permanent total disability commencing December 6, 2007. *Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994).

Employer next challenges the administrative law judge's finding that a Section 14(f) assessment is owed for payments due from the date it terminated claimant's compensation on December 6, 2007. Employer argues that, pursuant to the administrative law judge's prior decision that awarded claimant compensation for a closed period of temporary total disability from April 26, 2006 through January 3, 2007, there was not an ongoing compensation award that is a precondition for a Section 14(f) assessment. Additionally, employer contends that the administrative law judge lacked the authority to impose a Section 14(f) assessment because claimant did not initially make a claim for an assessment to the district director.

We reject employer's contention that in the administrative law judge's prior decision she awarded compensation only for a closed period of temporary total disability. Although the issue previously before the administrative law judge, and the Board, was claimant's entitlement to temporary total disability from April 26, 2006 through January 3, 2007, the administrative law judge's Order Granting Motion for Summary Decision issued on July 26, 2007, accepted the stipulation that employer was paying compensation for temporary total disability commencing January 4, 2007, and the Order section provided in pertinent part:

> 1. The Employer, Service Employees International and Insurance Company of the State of Pennsylvania, its carrier, shall make payments to the

> Claimant for his temporary total disability beginning April 26, 2006, based on his average weekly wage of $1,512.20.

C.C. v. Service Employees Int'l, Inc., 2007-LDA-00008, slip op. at 12 (July 26, 2007). In her decision, the administrative law judge found that, by these terms of her Order, claimant was awarded continuing compensation for temporary total disability and that employer is liable for a Section 14(f) assessment as it failed to pay these benefits when they became due after December 6, 2007. Decision and Order 25-27. The administrative law judge's finding that claimant was awarded continuing compensation is supported by the parties' stipulation and the plain language of her prior Order. *See generally Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000).

However, we agree with employer that, because claimant did not first make a claim for an assessment to the district director, the administrative law judge lacked the authority to impose a Section 14(f) assessment. The administrative law judge apparently raised this issue sua sponte. *See generally* 20 C.F.R. §§702.336(b), 702.338. Claimant's Pre-Hearing Statement, dated May 21, 2008 before the case was transferred to the OALJ, does not list Section 14(f) as an issue. ALJX 1. Moreover, it is well established that a claim for a Section 14(f) assessment must be made to the district director in the first instance. *M.R [Rusich] v. Electric Boat Corp.*, 43 BRBS 35, 39 (2009); *Shoemaker v. Schiavone & Sons, Inc.*, 11 BRBS 33 (1979); *see also* 33 U.S.C. §918(a); 20 C.F.R. §702.372; *Richardson v. General Dynamics Corp.*, 19 BRBS 48, 50 n. 1 (1986). In this case, there is nothing in the administrative file showing that claimant instituted proceedings for a default order before the district director. The administrative law judge thus did not have the authority on the facts presented to award a Section 14(f) assessment. *See generally Bray v. Director, OWCP*, 664 F.2d 1045, 14 BRBS 341 (5th Cir. 1981); *see also Kelley v. Bureau of National Affairs*, 20 BRBS 169 (1988). Therefore, we vacate the administrative law judge's award of a Section 14(f) assessment for payments due after employer unilaterally terminated compensation payments on December 6, 2007.[6]

[6]Pursuant to Section 18(a), 33 U.S.C. §918(a), claimant may, within one year of employer's alleged default, initiate enforcement proceedings before the district director in order to determine whether employer is liable for an assessment under Section 14(f). *See also* 20 C.F.R. §702.372.

Accordingly, the administrative law judge's finding that employer is liable for a Section 14(f) assessment is vacated. In all other respects, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge