

BRB No. 08-0701

B.G.)
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 Claimant-Petitioner)
)
 v.)
) DATE ISSUED: 10/30/2008
 GREYSTAR CORPORATION)
)
 Self-Insured)
 Employer-Respondent) DECISION and ORDER

Appeal of the Decision and Order of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

B.G., Lake Arthur, Louisiana, *pro se*.

John H. Hughes (Allen & Gooch), Lafayette, Louisiana, for self-insured employer.

Before: SMITH, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant, without representation by counsel, appeals the Decision and Order (2006-LHC-02007) of Administrative Law Judge Patrick M. Rosenow 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 representation, we will review the administrative law judge's findings of fact and conclusions of law to ascertain if they are supported by substantial evidence, are rational, and are in accordance with law. If they are, they must be affirmed. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant alleged that he injured his left shoulder at work on October 7, 2005. Claimant was diagnosed with a rotator cuff tear for which he underwent surgery in November 2005. Employer controverted the claim and did not pay any compensation or medical benefits, asserting that claimant did not injure himself at work.

Claimant proceeded without an attorney as of October 10, 2006. The hearing was postponed several times as the administrative law judge attempted to obtain claimant's cooperation with pre-hearing matters. On May 9, 2008, the administrative law judge issued an Order to Exclude Evidence stating that, due to claimant's failure to comply with the pre-hearing orders or to respond to a show cause order, "all evidence which Claimant could have reasonably disclosed pre-hearing is excluded" from the record. Thereafter, employer filed a motion for summary decision, averring that claimant was not injured at work and that there were no genuine issues of material fact requiring a formal hearing. Claimant did not respond to employer's motion.

The administrative law judge granted employer's motion for summary decision. The administrative law judge found that as claimant failed to respond to employer's motion, he also failed to establish the existence of a genuine issue of material fact as to whether an accident occurred at work that could have caused his shoulder injury. The administrative law judge found that documents employer attached to its motion establish that claimant's injury is not related to his work. Therefore, the administrative law judge denied the claim on the merits. Claimant appeals the denial of benefits. Employer has filed a motion to hold claimant liable for its attorney's fees and costs pursuant to Section 26 of the Act, 33 U.S.C. §926.

We affirm the administrative law judge's pre-hearing orders. The administrative law judge acted to secure the rights of both parties during the pre-hearing period. The administrative law judge gave claimant several opportunities to obtain evidence and to comply with pre-hearing orders. When claimant failed to respond to a show cause order issued on April 7, 2008, or to supply his witness and exhibit lists, the administrative law judge issued on May 9, 2008, an "Order to Exclude Evidence." This order excluded from evidence any documents "claimant could have reasonably disclosed pre-hearing." We affirm this order, as the administrative law judge has the discretion to exclude even relevant and material evidence for failure to comply with the terms of a pre-hearing order. *See Burley v. Tidewater Temps, Inc.*, 35 BRBS 185 (2002); *Durham v. Embassy Dairy*, 19 BRBS 105 (1986). Moreover, claimant never presented to the administrative law judge any documents in support of his claim for benefits and therefore prejudice to claimant is not established.

We next address the administrative law judge's grant of employer's motion for summary decision. The administrative law judge fully advised claimant of his obligation to respond to the motion with statements, affidavits, or other materials demonstrating the existence of issues of fact requiring a hearing. The administrative law judge advised claimant that failure to respond could result in the denial of claimant's claim. Order to Show Cause (May 27, 2008). Claimant did not respond. The administrative law judge subsequently denied claimant's claim on the merits because he failed to make out his

prima facie case. Specifically, the administrative law judge found that claimant did not put forth any evidence of an accident at work that could have caused his shoulder condition. The administrative law judge noted that employer's evidence demonstrates that the shoulder injury was not due to a work accident. Therefore, the administrative law judge denied the claim.

Under the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, any party may move for summary decision at least twenty days before the hearing. 29 C.F.R. §18.40(a). "A party opposing the motion may not rest upon the mere allegations or denials of such pleading. Such response must set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. §18.40(c); *see Roberts v. Cardinal Services, Inc.*, 266 F.3d 368 (5th Cir. 2001), *cert. denied*, 535 U.S. 954 (2002); *Buck v. General Dynamics Corp./Electric Boat Corp.*, 37 BRBS 53 (2003); *Dunn v. Lockheed Martin Corp.*, 33 BRBS 204 (1999). If the pleadings, affidavits, material obtained through discovery or otherwise, or matters officially noticed show that there is no genuine issue of material fact, the administrative law judge may enter summary decision for either party. 29 C.F.R. §§18.40(d), 18.41(a). In determining if summary decision is appropriate, the court must look at the record in the light most favorable to the party opposing the motion, and must draw all inferences in favor of the party opposing the motion. *O'Hara v. Weeks Marine*, 294 F.3d 55, 61 (2^d Cir. 2002).

Employer attached to its motion notes from a doctor's visit claimant had on October 18, 2005, 11 days after the alleged work accident. At this examination, claimant complained of shoulder pain of two months' duration. The chart note also states that claimant's shoulder had hurt for "years" off and on. Mot. for Summary Decision at Ex. 2-8. Dr. Blanda examined claimant on October 25, 2005. On the information sheet claimant filled out, he left blank the line that asked, "If your symptoms were because of an accident or injury, please explain." *Id.* at Ex. 3-9. Claimant responded "No" to the box containing the question, "Is this a workers' comp injury." *Id.* at Ex. 3-11. Dr. Blanda noted a "long standing" history of shoulder problems; he recommended a surgical repair of the rotator cuff tear. *Id.* at Ex. 3 at 7-8. Dr. Blanda filled out a form so that claimant could receive short-term disability benefits while he recovered from surgery. Dr. Blanda certified on November 29, 2005, that the disability is not related to claimant's employment. *Id.* at Ex. 3 at 18.

As employer's evidence demonstrates that claimant did not attribute his shoulder condition to any work accident, it was incumbent upon claimant to put forth statements, affidavits or evidence in response to employer's motion in order to establish the existence of a genuine issue of a fact. Claimant did not respond in any fashion. Therefore, the

administrative law judge found that claimant did not make out a *prima facie* case and denied the claim.

We affirm the administrative law judge's grant of employer's motion for summary decision. It is claimant's burden to establish not only that he has a physical harm, but also that an accident at work occurred, or that working conditions existed, that could have caused his harm. *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Claimant did not provide to the administrative law judge any statements or evidence from which the administrative law judge could have concluded that his work could have caused or aggravated claimant's shoulder condition. Thus, the administrative law judge properly found that employer established the absence of any genuine issues of material fact. *Buck*, 37 BRBS 53. Moreover, as claimant failed to establish an essential element of his claim for benefits, employer is entitled to summary decision as a matter of law. *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 27(CRT) (9th Cir. 1988); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996). Therefore, we affirm the denial of claimant's claim.

We deny employer's motion for attorney's fees and costs pursuant to Section 26 of the Act, which authorizes an assessment against a party which pursues a claim in bad faith.¹ The United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, held in *Boland Marine & Manufacturing Co. v. Rihner*, 41 F.3d 997, 29 BRBS 43(CRT) (5th Cir. 1995), that only a "court," and not the Board or the administrative law judge has the authority to assess costs pursuant to Section 26. *See also Metropolitan Stevedore Co. v. Brickner*, 11 F.3d 887, 27 BRBS 132(CRT) (9th Cir. 1993). The Fifth Circuit also discussed a court's inherent power to assess an attorney's fee against a party for that party's "bad faith conduct." *Rihner*, 41 F.3d at 1005, 29 BRBS at 49(CRT). Contrary to employer's contention, it is clear from the court's decision in *Rihner* that this is an equitable power possessed by a court. The Fifth Circuit discussed the Act's specific attorney's fee provisions in Section 28, 33 U.S.C. §928, and

¹ Section 26 states:

If the court having jurisdiction of proceedings in respect of any claim or compensation order determines that the proceedings in respect of such claim or order have been instituted or continued without reasonable ground, the costs of such proceedings shall be assessed against the party who has so instituted or continued such proceedings.

33 U.S.C. §926.

held that the statute did not extend to the Board the equitable authority to assess attorney's fees against claimant for bad faith conduct.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed. Employer's motion for attorney's fees and costs pursuant to Section 26 is denied.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge