U.S. Department of Labor

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

BRB No. 19-0240

DOUGLAS L. DRIVER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
L-3 COMMUNICATIONS/MPRI	)	
	)	DATE ISSUED: 10/09/2019
and	)	
	)	
ACE AMERICAN INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	ORDER

Appeal of the Decision and Order Approving Interim Stipulations of the Parties Regarding Home Modifications of Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

Sean T. O'Neil, Ashton, Maryland, and David R. Kunz, Ardmore, Pennsylvania, for claimant.

Alan G. Brackett, Patrick J. Babin and Daniel P. Sullivan (Mouledoux, Bland, LeGrand & Brackett, L.L.C.), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Approving Interim Stipulations of the Parties Regarding Home Modifications (2016-LDA-00269) of Administrative Law Judge

Peter B. Silvain, Jr., rendered on a claim filed pursuant to 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).[1] 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).

Claimant suffered a stroke during the course of his work in Afghanistan in 2009 as a result of an IED explosion. He is permanently totally disabled and wheelchair dependent, and requires full-time home care. Employer accepted liability and has paid disability compensation but disputed some of the medical claims. In 2013, Administrative Law Judge Levin held employer liable for certain medical expenses, including reimbursement for the costs of some home modifications. The parties agreed future home modifications were necessary but, because claimant's needs were still being assessed, Judge Levin determined that any future home modifications were "beyond the purview" of the record before him and it would be premature to make a decision on them. Consequently, he stated that any future medical claims must commence with the district director. *Driver v. L-3 Communications-MPRI*, 2012-LDA-00400 (Mar. 8, 2013), slip op. at 19.

In 2014, claimant received a report from Seating Solutions regarding its recommended home modifications. It is unclear if the report was considered by the district director, but a hearing was held in 2017 before Administrative Law Judge Silvain, which was interrupted before its conclusion. Judge Silvain referred the parties to a settlement judge, Administrative Law Judge Rosen, but they were unable to resolve their differences. Thereafter, claimant retained his current attorneys, and the parties continued negotiating, including having claimant's building contractor meet with employer's housing expert.

According to claimant: "[b]y November 2018, [the parties] arrived at a conceptual agreement on what the home modifications might resemble." Cl. Br. at 7. This agreement was titled "Plan E," and was encompassed in an interim stipulation which the parties signed. The parties submitted the document to Judge Silvain and, on January 11, 2019, he accepted the interim stipulations on the home modifications, finding them to be "fair, adequate, and reasonable." He approved them in a decision and order which, he stated,

[1] The administrative law judge issued a Decision and Order Approving First Interim Stipulations, also on January 11, 2019. That decision, which addresses reimbursement for miscellaneous medical expenses, pool modifications, and attendant care costs, has not been appealed.

fully incorporated the parties' interim stipulations and attachments thereto.[2] Decision and Order at 1.[3]

Claimant contends there was a mutual mistake of fact in the underlying stipulations and/or in the meaning of the stipulations. He also contends in the alternative that the administrative law judge's order lacks finality and is unenforceable. Claimant specifically challenges the parties' Stipulation 12 as problematic, and, as the administrative law judge accepted the stipulations, he asserts the problems permeate the administrative law judge's decision. *See* Decision and Order at 2-3.

The parties' interim Stipulations 11, 12, and 13 state:

> 11. By the end of September 2018, the housing experts jointly developed Plan E to modify the Claimant's home, which both experts felt reasonably met the Claimant's disability needs.
>
> 12. The Employer/Carrier and the Claimant agree that the Plan E modification developed by the respective party experts, attached hereto, is reasonable, medically necessary and appropriate to effectuate Claimant's disability needs.
>
> 13. The parties agree that Mr. DeWitt [claimant's contractor] will be the contractor building Plan E if he provides a cost estimation that is reasonable and within the community standard. The Employer/Carrier agrees to pay Mr. DeWitt for all reasonable costs necessary to construct the Plan E modification. Mr. Riley [employer's expert] will provide oversight to Mr. DeWitt's preparations, work, costs, expenses, design, etc. during the five phases of design, if necessary: 1) schematic design, 2) design development, 3) construction documents, 4) bidding, and 5) construction administration[,] and will confirm the reasonableness of the construction costs.

---

[2] Attached to the five-page home modifications interim stipulation document is a one-page drawing labelled "Driver Residence Plan 'E'." Cl. Br. at exh. A.

[3] In April 2019, following the Board's acknowledgement of this appeal, Judge Silvain issued a "Decision and Order Staying Claim and Transferring Record to the Benefits Review Board for Interlocutory Appeal of the Order Approving the Parties Stipulations." Therein, he stated that all requirements covered in the January 2019 home modifications order were stayed, pending the appeal.

Cl. Br. at exh. A; *see* Decision and Order at 2-3 (numbered paragraphs 10-12). Claimant contends the parties intended Plan E to be a starting point, not the end result, of the home modifications, and he is entitled to give further input into the plans. Claimant supports his assertion by quoting and providing copies of post-decision email communications between the parties' contractors and the parties' attorneys. He appears to seek modification of the administrative law judge's order based on a mistake in fact: he cites Section 22 of the Act, 33 U.S.C. §922, yet admits he is "aware of the unique and perhaps awkward posture of the present Appeal being used to seek modification under Section 922." Cl. Br. at 20. He asserts that Plan E cannot be the parties' final agreement because, for example, it does not include a wheelchair-accessible kitchen, as required by his doctor. In the alternative, claimant asks the Board to render the administrative law judge's decision void because it deprives him of medical care to which he is entitled or to find the decision is not "final" and, therefore, is unenforceable because it is impossible to implement.

Employer responds, urging the Board to dismiss claimant's appeal because he has submitted new evidence which the Board cannot address or because the appeal is interlocutory. Nevertheless, employer alternatively asserts the administrative law judge's Decision and Order is final and is supported by the "substantial evidence" of the modification plan and the stipulations the administrative law judge accepted, which are binding. Claimant filed a reply brief. We dismiss claimant's appeal, and we remand this case to the administrative law judge with instructions.

Section 7(a) of the Act states that "[t]he employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. §907(a). In order for a medical expense to be assessed against the employer, it must be reasonable and necessary for treatment of the work injury. *Ramsey Scarlett & Co. v. Director, OWCP [Fabre]*, 806 F.3d 327, 49 BRBS 87(CRT) (5th Cir. 2015); *Teer v. Huntington Ingalls, Inc., Pascagoula Operations*, 53 BRBS 5 (2019); *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996) 20 C.F.R. §702.401(a). Reasonable and necessary medical expenses may include home modifications. *Teer*, 53 BRBS 5; *Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989).

Medical issues which involve factual disputes, such as whether home modifications are reasonable and necessary for the claimant's work injury, are within the domain of the administrative law judge. *Teer*, 53 BRBS 5; *Weikert v. Universal Maritime Service Corp.*, 36 BRBS 38 (2002). On the other hand, purely discretionary questions, such as the character and sufficiency of necessary home modifications, are within the statutory purview of the district director. *Teer*, 53 BRBS 5; *McCurley v. Kiewest Co.*, 22 BRBS 115 (1989); *see also Jackson v. Universal Maritime Service Corp.*, 31 BRBS 103 (1997) (Brown, J., concurring). Section 7(b) of the Act states in pertinent part: "The Secretary

shall actively supervise the medical care rendered to injured employees . . . , shall have authority to determine the necessity, character, and sufficiency of any medical aid furnished or to be furnished . . . ." 33 U.S.C. §907(b). Section 702.407 of the regulations provides:

> The Director, OWCP, through the district directors and their designees, shall actively supervise the medical care of an injured employee covered by the Act. Such supervision shall include:
>
> ***
>
> (b) The determination of the necessity, character and sufficiency of any medical care furnished or to be furnished the employee, including whether the charges made by any medical care provider exceed those permitted under the Act.

20 C.F.R. §702.407(b).

In this case, both Judge Levin and Judge Silvain found that modifications to claimant's home are reasonable and necessary for his work-related condition. Claimant, however, challenges the implementation of the agreed-upon and approved stipulations that involve the home modification plan. He has submitted non-record evidence in support of his arguments to the Board, which the Board may not consider. 20 C.F.R. §802.301; *see also Teer*, 53 BRBS at 6 n.2. Moreover, because the validity of the stipulation approved by the administrative law judge is properly resolved by him in the first instance, *see, e.g.*, *Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 35 BRBS 7(CRT) (5th Cir. 2001), and the specifics of the home modification plan are within the purview of the district director, *Teer*, 53 BRBS 5, we decline to address claimant's contentions.[4]

Accordingly, claimant's appeal is dismissed and the case is remanded to the administrative law judge.[5] On remand, the administrative law judge should address

[4] Assuming, arguendo, claimant is seeking modification of the administrative law judge's decision, the Board must dismiss the appeal. 20 C.F.R. §802.301(c). Stipulated compensation orders are subject to modification. 33 U.S.C. §922; *see, e.g.*, *Ramos v. Global Terminal & Container Services, Inc.*, 34 BRBS 83 (1999).

[5] To the extent the administrative law judge's order is interlocutory, it does not satisfy the criteria for the Board's review. *See Newton v. P & O Ports Louisiana, Inc.*, 38

claimant's contentions regarding the validity and/or interpretation of the stipulations in question, as well as any other "interim" issues that require finality. Once accomplished, he must remand the case to the district director for administration and supervision of the home modification plan. *Teer*, 53 BRBS at 8.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

BRBS 23 (2004); *Tignor v. Newport News Shipbuilding & Dry Dock Co.*, 29 BRBS 135 (1995).