U.S. Department of Labor

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

BRB Nos. 19-0272
and 19-0272A

ARTHUR LEWIS	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
FLUOR FEDERAL GLOBAL PROJECTS, INCORPORATED	)	
	)	
	)	DATE ISSUED: 10/08/2019
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
Employer/Carrier-Respondents Cross-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order on Second Modification of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Arthur Lewis, Spring, Texas.

Kelly F. Walsh (Brown Sims), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant, appearing without counsel, appeals and employer cross-appeals the Decision and Order on Second Modification (2018-LDA-00227) of Administrative Law Judge Larry W. Price 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). In an appeal by a claimant without legal representation, we will review the administrative law judge's findings of fact and conclusions of law to determine if they are rational, supported by substantial evidence, and in accordance with law. If they are, they must be affirmed. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). This case has been before the Board previously.

On June 26, 2011, claimant was working as a material control specialist for employer in Afghanistan, when he was required to move 55-gallon drums of oil. Afterwards, he experienced neck and shoulder pain and went to the Army medic, who gave him pain medicine and a heating pad which claimant used until he went on vacation to the Philippines in July 2011. After returning to Afghanistan, he resigned his job and returned to the United States.

Claimant was diagnosed with multiple levels of cervical spine stenosis. On November 23, 2011, Dr. Tomaszek, a neurosurgeon, performed a laminectomy on claimant's cervical spine. Claimant later developed lower back pain and an MRI revealed spinal canal stenosis and borderline neural foraminal stenosis.

In his first Decision and Order, the administrative law judge found claimant suffered a work-related cervical spine injury and an aggravation of his pre-existing polyneuropathy. The administrative law judge determined claimant's lumbar spine injury is not work-related. He concluded claimant was restricted to sedentary or light-duty positions and could not return to his usual work. He found employer established suitable alternate employment in the Houston, Texas area, but that claimant did not conduct a diligent employment search. The administrative law judge therefore awarded claimant temporary total disability benefits from August 1, 2011 to March 7, 2013, and ongoing temporary partial disability benefits from March 8, 2013.

Claimant sought modification of the administrative law judge's Decision and Order based on a worsened physical condition, seeking permanent total disability benefits. 33 U.S.C. §922. The administrative law judge found claimant did not establish a worsening

of his condition and remained able to perform the suitable alternate employment previously identified. The administrative law judge affirmed his conclusion that claimant did not diligently seek employment. As claimant's condition had reached maximum medical improvement, the administrative law judge modified the award to one for permanent partial disability as of February 3, 2014.[1]

Claimant appealed the administrative law judge's decision on modification. The Board affirmed the administrative law judge's finding that claimant did not establish a mistake of fact concerning the compensability of his lumbar spine condition. *Lewis v. Fluor Daniel Corp.*, BRB No. 15-0434 (July 21, 2016) (unpub.), slip op. at 5. The Board also affirmed the administrative law judge's finding that there was no mistake of fact as to claimant's ability to perform alternate employment. *Id.* at 6-7. However, the Board remanded the case for the administrative law judge to reconsider the extent of claimant's disability and his request for medical benefits. *Id.* at 8-9.

On remand, the administrative law judge noted that claimant's condition appeared to have improved since the initial hearing and that medical records do not show a worsening of claimant's condition. He reaffirmed his finding that claimant could perform the identified suitable alternate employment and did not diligently seek work. The administrative law judge denied the claim for medical benefits, except for certain requests for mileage reimbursement. This decision was not appealed.

Claimant again filed for modification, raising "Carrier compliance with ALJ/BRB orders. New injuries aggravation of back condition in physical therapy, depression, stress, anxiety, carpal tunnel, Section 31(c), hips, butt." JX 1. The administrative law judge found claimant did not present any evidence that employer disobeyed orders of either the administrative law judge or the Board. Decision and Order on Second Modification at 2. He also dismissed claimant's allegations of a violation of Section 31(c), 33 U.S.C. §931(c), finding claimant offered no evidence to support the contention that employer knowingly made a false statement. *Id.* at 3. The administrative law judge further found claimant established a change in his physical condition because he suffers from depression, stress, and anxiety that are connected to his chronic cervical pain. *Id.* at 4. He also concluded that claimant did not establish that his carpal tunnel syndrome and hip and buttocks pain are compensable or that he suffered an aggravation of his back condition in physical therapy for his work injury. *Id.* at 5. He determined employer did not establish suitable alternate employment, considering claimant's physical limitations and psychological

[1] The administrative law judge also granted employer's request for relief under Section 8(f), 33 U.S.C. §908(f). Decision and Order on Modification at 11.

conditions. He therefore awarded claimant permanent total disability benefits from May 16, 2018 and ongoing.

Claimant, without the assistance of counsel, appeals the administrative law judge's Decision and Order on Second Modification. Employer filed a response brief and it cross-appeals the administrative law judge's decision, averring the administrative law judge erred in finding a change in claimant's economic condition.

Claimant's Appeal

Claimant first contends employer has not complied with Orders of the administrative law judge and the Board. Claimant averred before the administrative law judge that "[t]he only body part Employer/Carrier have given approval for treatment on since 2013-2018 is my cervical spine and neck nothing else." The administrative law judge properly noted that prior to his current decision, claimant's only compensable injury was to his cervical spine and found that claimant did not present any evidence that employer has not complied with any orders of the administrative law judge and the Board. Decision and Order on Second Modification at 2. The administrative law judge noted that employer authorized reasonable treatment for claimant's cervical spine injury and his psychological conditions. If claimant has ongoing concerns about medical treatment for his work-related injuries, claimant may raise them with the district director who is responsible for supervising medical care under the Act, including the necessity, character, and sufficiency of that care. 20 C.F.R. §702.407.

Claimant further argues to the Board that "the court . . . err[ed] on every Decision/order mainly because the Court have gotten claimant's work injury wrong when making his decisions," which appears to be a challenge to the administrative law judge's finding that his lumbar spine injury is not work-related. Cl. Br. at 8. The Board previously affirmed the administrative law judge's conclusion that claimant's lumbar spine injury is not work-related. *Lewis*, BRB No. 15-0434 (July 21, 2016), slip op. at 5. Moreover, the administrative law judge properly found claimant did not submit any evidence to support modification based on a mistake of fact as to the compensability of his lumbar spine injury. Decision and Order on Second Modification at 4. Therefore, we reject this contention.

We next address claimant's assertion that employer and its witnesses committed perjury and fraud in violation of Section 31(c) of the Act. Section 31(c) states that any person who knowingly or willfully makes a false statement to reduce or deny benefits to an injured employee will be punished by a fine or imprisonment. 33 U.S.C. §931(c). The administrative law judge found that claimant did not provide any evidence to support his allegations. Decision and Order on Second Modification at 3. Claimant asserts that Drs. Vanderweide, Park, and Orth lied, but he did not identify any statements from them which

are allegedly untrue or submit any evidence to establish any false statements. We affirm the administrative law judge's finding that claimant did not establish a violation of Section 31(c).

Claimant also challenges the administrative law judge's finding that he did not establish a mistake of fact with regard to his ability to perform suitable alternate employment.[2] Claimant offered the records of Dr. Nigam in support of his claim. Dr. Nigam's reports state "I am not offering opinion of his work capabilities as that has happened in his past and I do not have access to his current level of functionality from the records." CX 15. Thus, we affirm the administrative law judge's finding that this evidence is insufficient to establish a mistake in fact as to claimant's ability to perform suitable alternate employment in the past.

Claimant further argues his carpal tunnel syndrome and hip and buttocks pain are compensable, as they are related to his work-related cervical injuries. The administrative law judge found that no evidence connects claimant's carpal tunnel syndrome or his hip and buttocks pain to his cervical injuries. Dr. Mehta diagnosed claimant with carpal tunnel syndrome in 2017. JX 2 at 80.[3] When asked directly about a possible connection between claimant's cervical injuries and his carpal tunnel syndrome, he stated only that it was a possibility. *Id.* at 22. He also stated "it is possible" that a by-product of claimant's neck injury was a change in his gait which could cause pain to the hip and buttocks area. JX 3 at 27. Dr. Mehta did not affirmatively connect claimant's carpal tunnel syndrome or his hip and buttocks pain to his work-related cervical injuries and there is no other evidence in the record to support such a connection. The administrative law judge correctly found that in a case arising within the jurisdiction of the United States Court of Appeals for the Fifth Circuit, such as this one, a claimant bears the burden of showing that a secondary condition is the natural and unavoidable result of the first work-related injury without the benefit of the Section 20(a) presumption, 33 U.S.C. §920(a). 33 U.S.C. §902(2); *see Ins. Co. of the State of Pennsylvania v. Director, OWCP [Vickers]*, 713 F.3d 779, 47 BRBS 19(CRT) (5th

[2] We reject employer's contention that claimant's second motion for modification was untimely filed. Section 22 of the Act provides, inter alia, that a motion for modification may be filed "at any time prior to one year after the date of the last payment of compensation." 33 U.S.C. §922. As claimant has been receiving ongoing compensation, his motion for modification is timely. *See Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 36 BRBS 35(CRT) (7th Cir. 2002) (successive motions for modification are permitted).

[3] Dr. Mehta stated that an EMG from 2008 showed claimant possibly had carpal tunnel syndrome at that time, prior to his work injury. JX 3 at 16.

Cir. 2013); *Amerada Hess Corp. v. Director, OWCP*, 543 F.3d 755, 42 BRBS 41(CRT) (5th Cir. 2008); *see also Metro. Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997); *Vasquez v. Cont'l Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990) (claimant bears the burden of showing a change in condition under Section 22). We affirm the administrative law judge's conclusion that claimant did not establish that his carpal tunnel syndrome and his hip and buttocks pain are the natural and unavoidable result of his compensable cervical injuries as it is supported by substantial evidence and in accordance with law.

Claimant also asserts that he suffered an aggravation of his back condition as a result of the physical therapy he was undergoing for his work-related cervical condition. Claimant testified he felt a "pop" in his back while undergoing physical therapy. Dr. Mehta's medical record from August 2, 2017 stated "Patient reports that participating in physical therapy he reinjured his back." JX 2 at 88. The administrative law judge found claimant's report of the "pop" in his back to be credible but determined there is no evidence that this "pop" increased or aggravated his pre-existing lumbar condition. The administrative law judge's finding is supported by substantial evidence. As the administrative law judge found, Dr. Mehta's June and July 2017 records after the "pop" reference increased pain after physical therapy but "do not reflect any mention of lumbar issues." Decision and Order on Second Modification at 5. An MRI taken of claimant's lumbar spine in January 2012 showed central spinal canal stenosis and neural foraminal stenosis. CX 1 at 37-38. An MRI taken later on October 2, 2017, indicated "multilevel lumbar spinal stenosis with combined central canal and bilateral foraminal components; in association with disc bulging, ligamentous hypertrophy, and facet arthropathy." JX 5 at 5. While claimant's 2017 MRI results again reveal "lumbar spinal stenosis" with "foraminal" components, they do not provide any specific apparent indication of an increase or aggravation in claimant's lumbar condition, consistent with the administrative law judge's determination that claimant's physical therapy did not result in an aggravation of his pre-existing lumbar condition. The administrative law judge's finding that claimant did not establish a compensable aggravation of his lumbar condition is therefore affirmed. *Vickers*, 713 F.3d 779, 47 BRBS 19(CRT); *Amerada Hess*, 543 F.3d 755, 42 BRBS 41(CRT).

Employer's Cross-Appeal

In its cross-appeal, employer challenges the administrative law judge's finding that claimant established a change in his economic condition because his psychological conditions make him unable to work.[4] The administrative law judge found employer did

[4] Employer concedes that claimant's depression, stress and anxiety are related to his compensable cervical injuries. Emp. Br. at 18.

not present evidence to show that the job positions previously identified as suitable for claimant to perform remain suitable and noted that Dr. Bricken recommended cognitive/behavioral therapy in order for claimant to return to gainful employment. Decision and Order on Second Modification at 7. He thus concluded that employer did not establish suitable alternate employment.

Employer first asserts the administrative law judge erred in placing the burden on employer to show that the previously-approved job positions for claimant remain suitable for him. Employer contends the burden should have been on claimant, as the party seeking modification, to establish a change in his economic condition. We reject employer's contention.

While it is true that the burden is on the party seeking modification to establish a change in condition, once a party submits evidence of a change in condition, the standards for determining the extent of disability are the same as in the initial proceeding. *See Metro. Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). In other words, once a claimant has shown that he cannot return to his usual employment because of his work injury, the burden shifts to employer to establish suitable alternate employment. *See Vasquez*, 23 BRBS at 430-31; *see also Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1997). Here, the administrative law judge found claimant established a prima facie case of total disability based on his original finding that claimant cannot return to his usual employment due to his physical restrictions as well as Dr. Bricken's opinion that claimant needs cognitive/behavioral therapy in order to return to gainful employment. Decision and Order on Second Modification at 6-7 (citing JX 4 at 4). Because claimant established a prima facie case of total disability, the administrative law judge properly placed the burden of establishing the availability of suitable alternate employment on employer. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1991).

Employer also contends that Dr. Bricken's statement does not constitute substantial evidence to support the administrative law judge's finding that claimant is unable to work because of his psychological conditions. Employer argues Dr. Bricken's letter is based on erroneous information that claimant's spinal cord stimulator trial was denied and that Dr. Bricken never specifically opined that claimant cannot work. We reject employer's contentions. Employer has not explained how Dr. Bricken's mistaken belief regarding claimant's spinal cord stimulator trial is relevant to his diagnosis of claimant's psychological conditions. Dr. Bricken stated, "With brief cognitive behavioral intervention and reinforcement of his prior coping strategies, Mr. Lewis is likely to make additional recovery, reduce his situational depression and anxiety, return to a higher level of function, and return to some type of gainful employment." JX 4 at 4. The administrative law judge was well within his discretion to infer from Dr. Bricken's statement that claimant

is currently unable to perform gainful employment without having undergone cognitive behavioral therapy. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). His inference was reasonable and the Board does not have the authority to substitute its inferences for those of the administrative law judge. *Id.*, 948 F.2d at 945, 25 BRBS at 81(CRT); *see also James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000). The administrative law judge's finding that claimant established a change in his economic condition is supported by substantial evidence and is therefore affirmed. Employer does not challenge the administrative law judge's finding that it did not submit evidence that the previously-identified suitable alternate employment job positions remain suitable for claimant. We thus affirm the administrative law judge's conclusion that claimant is entitled to ongoing permanent total disability benefits from May 16, 2018.

Accordingly, the administrative law judge's Decision and Order on Second Modification is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge