U.S. Department of Labor

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

BRB No. 19-0288

GAIL S. COBB	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 10/07/2019
CERES MARINE TERMINALS, INCORPORATED	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Order Granting Employer's Motion to Declare Requests for Admissions Admitted and the Decision and Order Granting Employer's Motion for Summary Decision as Facts Deemed Admitted of Dana Rosen, Administrative Law Judge, United States Department of Labor.

Gail S. Cobb, Jacksonville, Florida.

Lawrence P. Postol (Postol Law Firm, P.C.), McLean, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant, appearing without representation, appeals the Order Granting Employer's Motion to Declare Requests for Admissions Admitted and the Decision and Order Granting Employer's Motion for Summary Decision as Facts Deemed Admitted (2018-LHC-01491) of Administrative Law Judge Dana Rosen rendered on a claim filed pursuant to 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 legal representation, the Board reviews 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).

Claimant injured her left thumb working for employer on April 10, 2017. Employer voluntarily paid claimant temporary total disability benefits from April 14 through 18, 2017. Claimant sought additional benefits and the case was forwarded to the Office of Administrative Appeals Judges (OALJ) on June 16, 2017. Employer's discovery requests to claimant were not answered, prompting employer to file a motion to compel claimant to respond. Administrative Law Judge Monica Markley granted employer's motion by Order dated October 24, 2017, and directed claimant to respond to employer's discovery requests within 14 days. A telephone conference was held with Judge Markley on November 30, 2017, at which time claimant was again directed to participate in discovery.

Employer, as a result of claimant's continued failure to respond to its discovery requests, filed a Motion to Dismiss the claim, resulting in Judge Markley's issuance of a Show Cause order on January 9, 2018. Finding claimant's statement that she had recently secured the assistance of a lawyer satisfactory, Judge Markley ordered claimant on April 6, 2018, to promptly participate in discovery, to file proof that she mailed her discovery responses to employer, and to have her attorney file a Notice of Appearance. Claimant's attorney at that time, Ronald Webster, entered his appearance on April 20, 2018, and upon his motion,[1] Judge Markley remanded the case to the district director. At some point while the case was pending before the district director, claimant's attorney either withdrew or claimant discharged him, prompting claimant to continue without legal representation.

This case was returned to the OALJ for further proceedings in October 2018 and assigned to Administrative Law Judge Dana Rosen (the administrative law judge) on December 14, 2018. Meanwhile, employer sent another Request for Admissions to claimant on October 18, 2018, and produced receipts confirming delivery to claimant's address on October 19, 2018 (via Federal Express) and October 22, 2018 (via United States Postal Service). Claimant, however, did not respond to employer's requests. Employer

[1]Claimant, through Mr. Webster, filed simultaneous remand requests in this case and another involving an injury to the same body part sustained while claimant was working for a different employer, *Cobb v. SSA Cooper*, Case No. 2017-LHC-01233, seeking to consolidate the two claims. Judge Markley granted the remand request in the other case as well through a separate order dated May 9, 2018. Claimant's claim against SSA Cooper was referred back to the OALJ on March 12, 2019, albeit with a new Case No. 2019-LHC-00647. It is presently pending, with a formal hearing scheduled for November 19, 2019, before Judge Markley.

then filed motions with the administrative law judge to admit its request for admissions as true and to compel claimant to respond to discovery. The administrative law judge issued two orders dated December 27, 2018, one in which she admitted, as true, employer's Requests for Admissions and a second in which she ordered claimant to file the required responses by January 18, 2019. Meanwhile, on January 2, 2019, employer submitted a Motion for Summary Decision. Claimant did not file any discovery responses, nor did she reply to any of employer's motions.

On January 23, 2019, the administrative law judge issued her Decision and Order Granting Employer's Motion for Summary Decision as Facts Deemed Admitted. She found that as claimant never responded to employer's discovery requests, either within the 30 days allotted for such action pursuant to 29 C.F.R. §18.20(b), or at any time prior to the issuance of her January 23, 2019 decision, the undisputed facts are those listed in employer's Request for Admissions. Finding the absence of any genuine issue of material fact,[2] the administrative law judge granted employer's motion for summary decision and dismissed the case.

Claimant, in a hand-written statement in support of her appeal, alleges she answered employer's discovery requests and that the OALJ has not been fair to her.[3] She also states she would still like a hearing before the administrative law judge. Employer responds, urging affirmance of the administrative law judge's decision. Because claimant is acting without the assistance of counsel, the Board will address all findings adverse to claimant: the administrative law judge's findings that the facts are admitted and that there is no genuine issue of material fact, and resulting order granting employer's motion for summary decision in its favor.

In her December 27, 2018 Order addressing employer's motion to declare requests for admissions admitted, the administrative law judge found: claimant received employer's request for admissions on October 18, 2018; claimant had 30 days from that date to respond or file objections; claimant did not respond to employer nor did she file any objections to employer's requests with the OALJ; and claimant did not file a response to employer's

[2]Employer's admissions establish that claimant had fully recovered from her April 10, 2017 work-related left thumb injury and that she had received all benefits to which she was entitled for that injury.

[3]Claimant allegedly submitted three exhibits in support of her appeal. The first two, she states, establish she answered employer's requests for admissions. They were not attached to her pleading. The third exhibit consists of a picture of claimant's left thumb. The Board is not permitted to accept new evidence. 20 C.F.R. §802.301.

motion to declare its request for admissions admitted. The administrative law judge addressed 29 C.F.R. §18.20 of the OALJ Rules of Practice and Procedure,[4] granted

[4]29 C.F.R. §18.20 stated, in pertinent part:

> (a) A party may serve upon any other party a written request . . . for the admission of the truth of any specified relevant matter of fact.
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> (b) Each matter of which an admission is requested is admitted unless, within thirty (30) days after service of the request or such shorter or longer time as the administrative law judge may allow, the party to whom the request is directed serves on the requesting party: (1) A written statement denying specifically the relevant matters of which an admission is requested; (2) A written statement setting forth in detail the reasons why he or she can neither truthfully admit nor deny them; or (3) Written objections on the ground that some or all of the matters involved are privileged or irrelevant or that the request is otherwise improper in whole or in part.
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> (e) Any matter admitted under this section is conclusively established unless the administrative law judge on motion permits withdrawal or amendment of the admission.

In June 2015, new Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, 29 C.F.R. Part 18, went into effect, with "Requests for admission" now contained in 29 C.F.R. §18.63. This section states in pertinent part:

> (a)(3) *Time to respond; effect of not responding.* A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. A shorter or longer time for responding may be stipulated to under § 18.54 or be ordered by the judge.
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> (b) *Effect of an admission; withdrawing or amending it*. A matter admitted under this section is conclusively established unless the judge, on motion, permits the admission to be withdrawn or amended. The judge may permit withdrawal or amendment if it would promote the presentation of the merits of the action and if the judge is not persuaded that it would prejudice the requesting party in maintaining

employer's motion and "held that the Request for Admissions were deemed admitted as true." Decision and Order at 2.

Employer, in October 2018, requested claimant "admit the truth" to its request for admissions, which are summarized here:

1. The only injury claimed in this proceeding is for an April 10, 2017 left thumb injury, OWCP No: 06-316831;

2. Claimant reached maximum medical improvement for her left thumb injury, without any impairment rating, on April 17, 2017;

3. Employer paid claimant temporary total disability compensation from April 14 through April 18, 2017 based on claimant's average weekly wage at the time of the April 10, 2017 injury of $811.93;

4. Claimant was able to return to full-duty work as a longshoreman on April 19, 2017, and continuing.

The record supports the administrative law judge's finding that claimant received employer's requests for admissions in October 2018. There are tracking receipts from both Federal Express and the United States Postal Service verifying delivery of employer's documents respectively on October 19 and 22, 2018. The record is also devoid of any response and/or objections claimant submitted to employer's request for admissions, its motions to declare requests for admissions admitted, to compel claimant to respond to discovery, and for summary decision, as well as to the administrative law judge's December 27, 2018 Orders.[5] In light of this, we affirm the administrative law judge's acceptance of employer's request for admissions into the record "as true," as it is in accordance with 29 C.F.R. §18.63. *See* n. 2, *supra*.

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or defending the action on the merits. An admission under this section is not an admission for any other purpose and cannot be used against the party in any other proceeding.

The substance of the old and new regulation regarding the failure to respond to a request for admission and the effect of a matter admitted are the same. Consequently, any error in the administrative law judge's reference to the prior regulation is harmless.

[5]While claimant alleges she responded to employer's requests for admission, there is no evidence she actually took such action, let alone did so in a timely fashion.

In addressing employer's motion for summary decision, the administrative law judge reviewed the summary decision provision at 29 C.F.R. §18.72,[6] as well as relevant case law pertaining to reviewing motions for summary decision. As a result of her Order declaring facts admitted, the administrative law judge found there are no issues left to resolve in this claim. Accordingly, she granted employer's motion for summary decision and dismissed claimant's claim for benefits.

In determining whether to grant a motion for summary decision, the fact-finder must determine, after reviewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the moving party is entitled to summary decision as a matter of law. *Morgan v. Cascade General, Inc.*, 40 BRBS 9 (2006); 29 C.F.R. §18.72. If the fact-finder could find for the non-moving party, or if it is necessary to weigh evidence or make credibility determinations on the issue presented, summary decision is inappropriate. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Walker v. Todd Pacific Shipyards*, 47 BRBS 11 (2013), *vacating in pert. part on recon.*, 46 BRBS 57 (2012). Given the admitted facts that claimant's thumb injury reached maximum medical improvement without any disability or impairment, the administrative law judge correctly found "no genuine issues of material fact regarding Claimant's injury and the extent of disability" and that employer is entitled to a decision in its favor as a matter of law.[7] Decision and Order at 4-5. We therefore affirm the administrative law judge's dismissal of claimant's claim.

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[6]Section 18.72(a) states:

> A party may move for summary decision, identifying each claim or defense - or the part of each claim or defense - on which summary decision is sought. The judge shall grant summary decision if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law. The judge should state on the record the reasons for granting or denying the motion.

29 C.F.R. §18.72(a). The regulation thereafter discusses the time for filing, the required procedures, and the ensuing actions for the administrative law judge to take. *See* 29 C.F.R. §18.72(b) – (h).

[7]Moreover, claimant's due process rights were not abridged as she was given repeated notice of, and numerous opportunities to be heard at a reasonable time and in a reasonable manner with regard to, employer's discovery requests and its ensuing motions. 29 C.F.R. §§18.63(a)(3), 18.72(c)(1); *see also Goldberg v. Kelly*, 397 U.S. 254 (1970).

Accordingly, the administrative law judge's Order Granting Employer's Motion to Declare Requests for Admissions Admitted and the Decision and Order Granting Employer's Motion for Summary Decision as Facts Deemed Admitted are affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge