U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 16-0147

EDWARD R. McDONALD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ARMORGROUP INTERNATIONAL LIMITED	)	DATE ISSUED: Sept. 28, 2016
	)	
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
	)	
Employer/Carrier-Petitioners	)	
	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Paul R. Almanza, Administrative Law Judge, United States Department of Labor, and the Amended Order for Calculations of Richard V. Robilotti, District Director, United States Department of Labor.

David Bayly and Andrew Ponnambalam (Bradley Bayly Legal), Perth, Western Australia, for claimant.

John R. Walker (Schouest, Bamdas, Soshea & BenMaier), Houston, Texas, for employer/carrier.

Before: BOGGS, GILLIGAN and ROLFE, Administrative Appeals Judges.

GILLIGAN, Administrative Appeals Judge:

Employer appeals the Decision and Order Awarding Benefits (2010-LDA-00430) of Administrative Law Judge Paul R. Almanza and the Amended Order for Calculations (Case No. 02-160661) of District Director Richard V. Robilotti 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), as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the DBA). We must affirm the findings of fact and conclusions

of law of the administrative law judge 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). The determinations of the district director must be affirmed unless they are shown to be arbitrary, capricious, based on an abuse of discretion, or not in accordance with law. *See Sans v. Todd Shipyards Corp.*, 19 BRBS 24 (1986).

On January 17, 2007, claimant sustained severe work-related injuries while employed by employer as a security officer in Iraq. In April 2007, employer commenced the payment of disability compensation and medical benefits to claimant, who resides in Western Australia. A dispute subsequently arose regarding the necessity and cost of attendant care services, which were being provided to claimant by his wife. Following several informal conferences, employer agreed, on June 12, 2012, to pay claimant a lump sum of $253,458 AUD for past due attendant care, and $4,000 AUD per week thereafter, commencing July 1, 2012, for ongoing attendant care services. *See* Cl. Resp. Br. at 4 and Attachment 1.

Thereafter, another dispute arose regarding the necessity of ongoing attendant care. On February 27, 2014, the Office of Workers' Compensation Programs transferred the case to the Office of Administrative Law Judges for a formal hearing. As both claimant and employer requested a briefing schedule from the administrative law judge, the administrative law judge, by Order dated October 27, 2014, interpreted the parties' requests as motions for a hearing on submission. Accordingly, the administrative law judge issued an Order cancelling the scheduled hearing and granting the motions for hearing on submission. *See* 20 C.F.R. §702.346.

In a letter to the administrative law judge dated July 23, 2015, claimant's counsel informed the administrative law judge that: 1) on or about June 10, 2015, employer filed a LS-207 Notice of Controversion Form informing claimant that it was reducing its weekly payment of attendant care benefits from $4,000 AUD to $267.95 US, and that, 2) claimant's wife was no longer providing attendant care services.

On October 2, 2015, the administrative law judge issued an Order in which he clarified the issue presented for adjudication as being only the necessity of past, present and future 24-hour home attendant care for claimant. The administrative law judge stated that the remaining issues raised by the parties, including employer's responsibility for the payment of claimant's outstanding medical expenses, the reasonable value of attendant care, who is the "proper recipient" of benefits for the attendant care (i.e., claimant or the provider), and who is entitled to choose claimant's attendant care provider, were not properly before him and would not be addressed.

In his Decision and Order Awarding Benefits dated October 23, 2015, the administrative law judge found that claimant's work-related injuries require 24-hour attendant care. Therefore, he awarded claimant past, present and future 24-hour attendant care, payable by employer/carrier pursuant to Section 7(a) of the Act, 33 U.S.C. §907(a). The administrative law judge remanded the case "to the district director to determine the value of 24-hour home attendant care pursuant to 20 C.F.R. § 702.413" and for the district director to "perform all calculations necessary to effect" the award of medical benefits to claimant. Decision and Order at 9-10.

On November 12, 2015, the district director served the administrative law judge's Decision and Order on the parties and, in an accompanying Amended Order for Calculations, directed employer/carrier to immediately resume direct payments to claimant of $4,000 per week for attendant care.[1] The district director further stated that employer was to pay claimant the amount due in $16,000 installments every four weeks, in advance of the period in which the benefits were due, and that claimant was to pay the attendant care provider from these funds.

On appeal, employer challenges the administrative law judge's decision to remand the case to the district director for the calculations necessary to effectuate the administrative law judge's award of attendant care services.[2] In the alternative, employer argues that the district director's Order that it is to pay claimant $4,000 per week is not supported by any findings and must be set aside. In response, claimant urges the Board to reject employer's appeal and affirm the orders of the administrative law judge and district director.[3] For the reasons that follow, we reject the contention that the administrative law judge should have addressed the issue of the cost of claimant's attendant care. We agree with employer's contention that the district director erred in summarily finding employer liable for weekly attendant care benefits of $4,000, and

[1] The district director's Order does not specify the currency in which the $4,000 is to be paid.

[2] As employer does not challenge the administrative law judge's award of 24-hour attendant care services to claimant, that award is affirmed. *See Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007); *see also M. Cutter Co., Inc. v. Carroll*, 458 F.3d 991, 40 BRBS 53(CRT) (9th Cir. 2006).

[3] Employer has filed a Motion to Strike Claimant's Brief, asserting that claimant's response brief, filed on July 21, 2016, was not timely filed pursuant to Section 802.212, 20 C.F.R. §802.212. We note employer's objection, but we accept claimant's response to employer's petition for review. 20 C.F.R. §802.217.

accordingly we remand the case to the district director for further determinations as set forth, *infra*.[4]

Section 7(b) of the Act, 33 U.S.C. §907(b), and its implementing regulation, 20 C.F.R. §702.407, address the authority of the Secretary of Labor to actively supervise an injured employee's medical care.[5] *See generally Lynch v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 29 (2005); *Jackson v. Universal Mar. Serv. Corp.*, 31 BRBS 103 (1997) (Brown, J., concurring); *Roulst v. Marco Constr. Co.*, 15 BRBS 443 (1983). Section 7(g) of the Act, 33 U.S.C. §907(g), states that "All fees and other charges for medical examinations, treatment, or service shall be limited to such charges as prevail in the community for such treatment. . . ." Section 702.413, 20 C.F.R. §702.413, of the regulations implements Section 7(g).[6] *See Newport News Shipbuilding & Dry Dock Co.*

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[4] We reject claimant's contention that the cost of his attendant care was not an issue raised by the parties below. In his brief to the administrative law judge dated December 15, 2014, claimant addressed at length the costs associated with his attendant care and employer responded to claimant's arguments. *See* Cl. Opening Br. at 11-19; Emp. Reb. Br. at 2-7.

[5] Section 7(b) of the Act states that the "Secretary shall actively supervise the medical care rendered to injured employees." Section 702.407 of the regulations states that "[t]he Director, OWCP, through the district directors and their designees, shall actively supervise the medical care of an injured employee covered by the Act."

[6] Section 702.413, 20 C.F.R. §702.413, states:

> All fees charged by medical care providers for persons covered by this Act shall be limited to such charges for the same or similar care (including supplies) as prevails in the community in which the medical care provider is located and shall not exceed the customary charges of the medical care provider for the same or similar services. Where a dispute arises concerning the amount of a medical bill, the Director shall determine the prevailing community rate using the OWCP Medical Fee Schedule (as described in 20 CFR 10.805 through 10.810) to the extent appropriate, and where not appropriate, may use other state or federal fee schedules. The opinion of the Director that a charge by a medical care provider disputed under the provisions of section 702.414 exceeds the charge which prevails in the community in which said medical care provider is located shall constitute sufficient evidence to warrant further proceedings pursuant to section 702.414 and to permit the Director to direct the claimant to select another medical provider for care to the claimant.

v. Loxley, 934 F.2d 511, 24 BRBS 175(CRT) (4th Cir. 1991), *cert. denied*, 504 U.S. 910 (1992). The regulations address procedures for resolving disputes, such as that in this case, regarding a fee for medical treatment or services due claimant. Section 702.414(a), 20 C.F.R. §702.414(a), requires that the district director, upon his own initiative or the written complaint of a party, investigate any fee that appears to exceed prevailing medical charges.[7] In accordance with Section 702.413, the district director must determine the prevailing community rate for the disputed service. The district director then must make specific findings as to whether the fee in dispute exceeds the prevailing community charges. 20 C.F.R. §702.414(c). After the district director issues his specific findings, any affected party may seek, pursuant to Section 702.415, 20 C.F.R. §702.415, a hearing before Office of Administrative Law Judges, on the issue.[8] *See Loxley*, 934 F.2d 511, 24 BRBS 175(CRT).

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[7] Section 702.414, 20 C.F.R. §702.414, states in relevant part:

> (a) The Director may, upon written complaint of an interested party, or upon the Director's own initiative, investigate any medical care provider or any fee for medical treatment, services, or supplies that appears to exceed prevailing community charges for similar treatment, services or supplies or the provider's customary charges. The OWCP medical fee schedule (see section 702.413) shall be used by the Director, where appropriate, to determine the prevailing community charges for a medical procedure by a physician or hospital (to the extent such procedure is covered by the OWCP fee schedule). The Director's investigation may initially be conducted informally through contact of the medical care provider by the district director. If this informal investigation is unsuccessful further proceedings may be undertaken. These proceedings may include, but not be limited to: an informal conference involving all interested parties; agency interrogatories to the pertinent medical care provider; and issuance of subpoenas duces tecum for documents having a bearing on the dispute.
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> (c) After any proceeding under this section the Director shall make specific findings on whether the fee exceeded the prevailing community charges (as established by the OWCP fee schedule, where appropriate) or the provider's customary charges and provide notice of these findings to the affected parties.

[8] Section 702.415, 20 C.F.R. §702.415, states:

As the Act and regulations give the authority to the district director, as the designee of the Secretary of Labor, to address prevailing community charges for medical services in the first instance, we reject employer's contention that the administrative law judge erred in remanding this case to the district director for findings pursuant to 20 C.F.R. §702.413. *See generally McCurley v. Kiewest Co.*, 22 BRBS 115 (1989) (administrative law judge erred in directing specific future treatment); *cf. Weikert v. Universal Mar. Serv. Corp.*, 36 BRBS 38 (2002) (administrative law judge erred in remanding case to the district director where findings of fact on necessity of treatment were needed). Therefore, we affirm the administrative law judge's Decision and Order Awarding Benefits in its entirety. *See* n.2, *supra*.

We cannot, however, affirm, the district director's Amended Order for Calculations. Although the administrative law judge specifically remanded the case to the district director for a determination of the prevailing rate for the awarded 24-hour attendant care, the district director did not undertake the required analysis. Rather, the district director merely ordered employer to pay claimant at the rate of $4,000 per week, based on employer's prior voluntary payment of this amount, and stated that claimant was to pay his provider from these funds.

The district director's Amended Order states:

> Calculations: The employer/carrier will immediately pay $4,000.00 per week directly to the claimant for all past due, present and continuing 24 hour home attendant care. The $4,000.00 per week, had been paid by agreement of all the parties and then stopped by the carrier and reduced to $1,000.00 per month. The $4,000.00 per week is now *enforced* by this amended order. . . . The $4,000.00 per week is to continue, payable every four weeks, at the beginning of each four week period. This benefit will be paid directly to the claimant . . . .

Amended Order for Calculations at 1 (emphasis added).

> After issuance of specific findings of fact and proposed action by the Director as provided in §702.414 any affected provider[,] employer or other interested party has the right to seek a hearing pursuant to section 556 of title 5, United States Code. Upon written request for such a hearing, the matter shall be referred by the District Director to the OALJ for formal hearing in accordance with the procedures in subpart C of this part. If no such request for a hearing is filed with the district director within thirty (30) days the findings issued pursuant to §702.414 shall be final.

Contrary to the district director's implication, there was no prior order for employer to pay claimant $4,000 per week, and, thus, nothing for the district director to "enforce." *See* Cl. Resp. Br. at 4 and Attachment 1. Employer's voluntary agreement to pay this amount after a prior informal conference does not constrain employer from alleging that the amount exceeds the prevailing rate for attendant care services in claimant's community. *Foster v. Davison Sand & Gravel Co.*, 31 BRBS 191 (1997); 20 C.F.R. §702.414. As the district director did not undertake an analysis of the issue on which the administrative law judge remanded the case, we remand the case to the district director for him to do so. The district director must allow the parties to present evidence regarding the prevailing rate for the attendant care services awarded to claimant and make findings with respect to this issue. 20 C.F.R. §702.414(c). If any party is dissatisfied with the district director's findings, he is entitled to a hearing before an administrative law judge.[9] 20 C.F.R. §702.415; *See Loxley*, 934 F.2d 511, 24 BRBS 175(CRT); *see also Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996).

[9] We note that employer has raised on appeal additional issues regarding claimant's awarded attendant care services which were not addressed by the administrative law judge, pursuant to his October 2, 2015, Order. Specifically, employer asserts on appeal that claimant does not have an unqualified right to select his attendant care provider, that any payments for such care should be made to the actual provider and not to claimant personally, and that any payments should be made after, and not before, the services are rendered. Alternatively, employer avers that it may be absolved of further liability for claimant's attendant care expenses since claimant has not complied with the requirements of Section 7(d) of the Act, 33 U.S.C. §907(d). As these issues are within the purview of the district director pursuant to 33 U.S.C. §907(b) and 20 C.F.R. §702.407, employer may raise them before the district director on remand. *See generally Potter, et al. v. Electric Boat Corp.*, 41 BRBS 69 (2007); *Jackson v. Universal Mar. Serv. Corp*., 31 BRBS 103 (1997) (Brown, J., concurring); *Toyer v. Bethlehem Steel Corp*., 28 BRBS 347 (1994) (McGranery, J., dissenting).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed. We remand this case to the district director for prompt consideration in accordance with this opinion. The district director's Amended Order for Calculations is to temporarily remain in effect until modified in order to effectuate the administrative law judge's findings that claimant's work-related injuries require 24-hour attendant care and that employer is liable therefor.[10]

SO ORDERED.

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RYAN GILLIGAN
Administrative Appeals Judge

I concur:

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JONATHAN ROLFE
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring:

I concur with my colleagues in affirming the administrative law judge's Decision and Order Awarding Benefits. Because the district director's Amended Order for Calculations was improper, I would vacate that order and remand the case to the district director for proceedings and determinations consistent with this Board's opinion.

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JUDITH S. BOGGS
Administrative Appeals Judge

[10] If the district director determines that employer has overpaid claimant for attendant care services, employer is entitled to a credit against benefits due for future attendant care services. *See generally R.H. [Harvey] v. Baton Rouge Marine Contractors, Inc.*, 43 BRBS 63, 67 (2009), *aff'd sub nom. Louisiana Ins. Guar. Ass'n v. Director, OWCP*, 614 F.3d 179, 44 BRBS 53(CRT) (5th Cir. 2010) ("Neither claimant, the health care provider, nor a private insurer can recover doubly under the Act."); *Lazarus v. Chevron U.S.A., Inc.*, 958 F.2d 1297, 25 BRBS 145(CRT) (5th Cir. 1992) (medical benefits paid to claimant as reimbursement for medical costs is "compensation"); *see also Aurelio v. Louisiana Stevedores, Inc*., 22 BRBS 418 (1989), *aff'd mem*., 924 F.2d 1055 (5th Cir. 1991) (table) (overpayment of disability benefits may not be credited against medical benefits due).