U.S. Department of Labor

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

BRB No. 17-0017

EVERETT WATSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
FLUOR DANIEL CORPORATION	)	
	)	DATE ISSUED: Sept. 28, 2017
and	)	
	)	
THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Order Dismissing Claimant's Third Request for Modification of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Everett Watson, Dallas, Texas.

Limor Ben-Maier and Victor J. Burnette (Schouest, Bamdas, Soshea and Ben-Maier, P.L.L.C.), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Order Dismissing Claimant's Third Request for Modification (2016-LDA-00727) of Administrative Law Judge Clement J. Kennington rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, 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 representation by counsel, the Board 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. To reiterate, claimant had been diagnosed with multiple heart-related conditions prior to commencing employment with KBR as an electrician in August 2009.[1] Claimant was first assigned to Baghdad, Iraq, where he worked as an electrician at several bases. From Baghdad, claimant was assigned to work in Afghanistan. On January 23, 2010, Fluor Daniel Corporation (employer) assumed the contract previously held by KBR. In April 2010, employer required that claimant undergo a physical examination prior to his leaving on scheduled rest and relaxation leave. The examination revealed that claimant had elevated blood pressure, an abnormal EKG, and an abnormal chest x-ray. Employer therefore returned claimant to the United States for further medical evaluation and to obtain clearance to return to work. On June 13, 2010, claimant underwent a cardiac ablation and, on July 9, 2011, he had a pacemaker implanted. He has not returned to work for employer. Claimant filed a claim under the Act, alleging that his cardiac conditions were worsened by his employment in Afghanistan.

In his Decision and Order dated May 21, 2013, the administrative law judge determined that claimant's diagnosed medical conditions were the same before and after his employment and that claimant's testimony regarding his working conditions was not credible;[2] therefore, he found that claimant failed to establish a prima facie case relating his heart condition to his employment. Alternatively, assuming claimant had established a prima facie case, the administrative law judge found that employer rebutted the Section 20(a), 33 U.S.C. §920(a), presumption and that, based on the record as a whole, claimant did not establish that his cardiac condition is causally related to his employment with

[1] In the 1970s, claimant was diagnosed with an asymptomatic atrial flutter. In 2004, he was diagnosed with, inter alia, high systolic hypertension, mild atrial flutter, dilated left atrium, and a thickening of the mitral value. *See* EX 4. In 2008, claimant was diagnosed with an atrial flutter and acute myocardial infarction. *See* EX 26.

[2] Specifically, the administrative law judge did not believe claimant's statements that he: experienced mortar attacks during his overseas employment; slept within 20 feet of a cannon that was used by Afghan allies without notice; and had to work 24 hours, seven days a week. The administrative law judge found no support in the record for these statements, and claimant testified that he saw acts of violence only on film. Tr. at 41-42 (Oct. 18, 2012). The administrative law judge additionally found claimant to be evasive in answering questions, and he initially denied past cardiac problems and relevant aspects of his medical history. *Watson v. Fluor Daniel Corp.*, Case No. 2012-LDA-00290, slip op. at 6 (May 21, 2013).

employer. Accordingly, the administrative law judge denied benefits. *Watson v. Fluor Daniel Corp.*, Case No. 2012-LDA-00290 (May 21, 2013).

Claimant appealed the administrative law judge's decision, but subsequently advised the Board that he wished to seek modification of the denial of his claim. The Board dismissed claimant's appeal and remanded the case for modification proceedings. *Watson v. Fluor Daniel Corp.*, BRB No. 13-0374 (Nov. 14, 2013). In his order denying claimant's motion for modification, the administrative law judge addressed each of claimant's contentions and found that his assertions of error and new evidence did not establish a mistake in fact in his initial evaluation of the evidence of record.[3] *Watson v. Fluor Daniel Corp.*, Case No. 2013-LDA-00614 (Feb. 12, 2014).

Claimant, without the assistance of counsel, appealed the administrative law judge's denial of modification and sought reinstatement of his prior appeal. On the reinstated appeal, the Board concluded that the credited reports of Drs. Meissner and Fyfe, both of whom opined that claimant's cardiac conditions are unrelated to his employment with employer, constituted evidence of the absence of a causal link between claimant's cardiac conditions and his employment with employer. Thus, the Board affirmed the administrative law judge's finding that employer rebutted the Section 20(a) presumption. On the record as a whole, the Board affirmed the administrative law judge's crediting of the opinions of Drs. Meissner and Fyfe over that of claimant's doctor, Dr. Chen, based on their extensive credentials and familiarity with claimant's medical history. *Watson v. Fluor Daniel Corp.*, BRB Nos. 13-0374, 14-0183 (Feb. 25, 2015).

With respect to claimant's appeal of the denial of his motion for modification, the Board rejected claimant's assertion that the administrative law judge did not adequately address his motion, as the administrative law judge addressed at length the eight contentions raised by claimant. The Board held that the administrative law judge rationally found that claimant did not present any evidence or argument to overturn his credibility determination because claimant was selectively interpreting his medical history and ignoring the existence of his pre-existing cardiac conditions. Accordingly, the Board affirmed the administrative law judge's finding that claimant did not establish a mistake in the determination of a fact concerning the lack of a causal relationship

[3] In so finding, the administrative law judge clarified that claimant did not work 24 hours per day, seven days per week; rather, he worked 12 hours per day, seven days per week and "around the clock if needed." However, the administrative law judge stated that this clarification did not render his credibility determination inaccurate as his denial was based on claimant's many inconsistent actions and statements. *Watson v. Fluor Daniel Corp.*, Case No. 2013-LDA-00614, slip op. at 8 (Feb. 12, 2014); n.1, *supra*.

between his cardiac conditions and his employment. *Watson*, BRB Nos. 13-0374, 14-0183, slip op. at 6-7. Thus, the Board affirmed the denial of claimant's claim.

Four months later, on June 15, 2015, claimant filed a second request for modification with the administrative law judge. Claimant alleged that the new opinion of Dr. Levin established that his heart condition was exacerbated by difficult working conditions and extreme temperatures while working for employer. CX 5 (2015-LDA-00768). Claimant also set forth ten alleged mistakes of fact, asserting that his heart conditions were caused or aggravated by the stress of being under the constant threat of attack by hostile forces, long work hours, and constant exposure to extreme temperatures of 119-degree heat and 32-degree cold. The administrative law judge found that Dr. Levin's opinion, *id.,* was not well-reasoned and he rejected each of claimant's alleged factual mistakes. Because of claimant's selective interpretation of his medical history, mischaracterization of the record, and misleading description of his overseas working conditions, the administrative law judge denied claimant's second request for modification.[4] He reiterated his finding that the opinions of employer's experts were entitled to greater weight than those of claimant's experts, who relied on claimant's misrepresentation of his medical history. *Watson v. Fluor Daniel Corp.*, Case No. 2015-LDA-00768, slip op. at 3-6 (Feb. 24, 2016).

On February 29, 2016, claimant requested reconsideration, contending that the medical opinion of Dr. Joglar, dated September 3, 2015, which claimant attached to his motion, establishes that claimant's stressful working conditions possibly aggravated his underlying heart condition. On March 23, 2016, employer filed a Motion to Declare Claimant a Vexatious Litigant because employer believed claimant was wasting judicial resources by relitigating the same meritless claims. On April 5, 2016, the administrative law judge issued an Order Dismissing Claimant's Petition for Reconsideration, Granting Employer/Carrier's Motion to Declare Claimant a Vexatious Litigant (hereinafter "April 2016 Order"). *Watson v. Fluor Daniel Corp.*, Case No. 2015-LDA-00768 (Apr. 5, 2016). In so doing, the administrative law judge rejected Dr. Joglar's opinion because he did not consider relevant aspects of claimant's medical history. The administrative law judge agreed with employer that claimant was abusing the judicial system and imposing unnecessary costs on the court and employer by attempting to relitigate the same issues previously decided. As a result, the administrative law judge ordered claimant to satisfy pre-filing requirements before the Office of Administrative Law Judges (OALJ) would

[4] The administrative law judge specifically found there was no credible evidence to show that claimant worked in 119-degree heat or freezing temperatures for 12 hours a day or seven days a week. *Watson v. Fluor Daniel Corp.*, Case No. 2015-LDA-00768, slip op. at 4 (Feb. 24, 2016).

address the merits of any future request for modification with respect to his claim against employer.[5] April 2016 Order, slip op. at 5-6.

On April 28, 2016, claimant appealed the administrative law judge's April 2016 Order to the Board, but subsequently withdrew his appeal so that he could pursue another motion for modification. On May 27, 2016, the Board dismissed claimant's appeal without prejudice, and remanded the case to the district director for modification proceedings. On July 25, 2016, the administrative law judge received claimant's third petition for modification with accompanying exhibits and a Motion to Proceed Without an Attorney. The administrative law judge issued an Order to Show Cause on August 11, 2016, because claimant did not explain how he was in compliance with the pre-filing requirements of the April 2016 Order. Claimant responded, indicating that he contacted two attorneys, but they declined to take his case. Claimant also stated that he does not have any other complaint or appeal pending before OALJ or BRB and has no injunctions against him. Further, he could not provide a sworn affidavit stating that he was not relitigating the same issues because he believed his modification request presented issues previously decided on incomplete evidence, i.e., claimant's disability status, whether his cardiac condition was pre-existing, and the weight assigned to the medical opinion evidence of record. The administrative law judge found claimant failed to show cause and to comply with the pre-filing requirements; however, he nonetheless addressed the merits of claimant's modification request. *Watson v. Fluor Daniel Corp.*, Case No. 2016-LDA-00727, slip op. at 5 (Sep. 28, 2016) (hereinafter "Order on Third Modification").

Claimant's motion for modification alleged eight mistakes of fact, asserting that his description of his working conditions is credible, his entire heart muscle was injured during his employment with employer, he did not have a pre-existing progressive heart disease, the opinions of Drs. Black and Joglar establish that claimant's overseas employment could be the cause of his injuries, and the 2012 medical records of Dr. Zevfallos establish that his heart condition is totally disabling. CXs 111, 113, 115. The administrative law judge found claimant did not establish a mistake in fact as to the cause of his heart condition. Specifically, he found that claimant again relied on his own interpretation of selected medical records to fabricate the non-existence of all but one heart condition prior to his overseas employment in 2009, despite the fact that multiple

[5] The administrative law judge required claimant to be represented by counsel and to include in any motion for modification the following: 1) a list of all complaints and appeals filed with OALJ and the Benefits Review Board (BRB) as well as the current status or disposition of those cases; 2) a list of any outstanding injunctions or orders limiting his access to the OALJ for any reason; and 3) a sworn affirmation by claimant sufficiently explaining how the petition and complaint are not relitigating the matter. April 2016 Order, slip op. at 5-6.

cardiac conditions were diagnosed as early as 2004. Order on Third Modification at 7. The administrative law judge further found the opinions of Drs. Black and Joglar do not establish a mistake in fact. Those reports stated only that working conditions "could have resulted" in claimant's medical condition, omitted relevant aspects of claimant's medical history, and relied upon claimant's statements regarding the physical demands of his overseas employment.[6] *Id.* at 7-8. Accordingly, the administrative law judge denied claimant's third motion for modification and did not reach the argument regarding total disability. *Id*. at 8.

Claimant, without the benefit of counsel, appeals the administrative law judge's Order on Third Modification. Employer responds, urging affirmance on the ground that claimant failed to comply with the pre-filing requirements of the April 2016 Order. In the alternative, employer urges the Board to affirm the administrative law judge's decision on the merits. Employer also asks the Board to declare claimant to be a vexatious litigant and to impose pre-filing requirements on claimant with respect to appeals before the Board.

Section 22 of the Act provides the only means for changing otherwise final decisions. Modification pursuant to Section 22 is permitted if the petitioning party demonstrates a mistake in a determination of fact, *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459 (1968), or a change in the claimant's physical or economic condition, *Metropolitan Stevedore Co. v. Rambo* [*Rambo I*], 515 U.S. 291, 30 BRBS 1(CRT) (1995). The party requesting modification bears the burden of showing that the claim comes within the scope of Section 22. *See, e.g., Metropolitan Stevedore Co. v. Rambo* [*Rambo II*], 521 U.S. 121, 31 BRBS 54(CRT) (1997); *Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990). Under Section 22, the administrative law judge has broad discretion to correct mistakes of fact "whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *see also Banks*, 390 U.S. 459.

We affirm the administrative law judge's finding that claimant did not establish a mistake in the determination of a fact concerning the lack of a causal relationship

[6] Dr. Joglar opined that claimant's sick sinus syndrome and cardiomyopathy preexisted his overseas employment. CX 113 at 4-6. Dr. Joglar also opined, however, that it is "entirely possible" that claimant's working "100-hour weeks, 7 days a week for 1 year in 120-degree weather" could have triggered symptoms of shortness of breath or heart failure. *Id*. Dr. Black stated that claimant "performed physically demanding work activity under adverse conditions which he found taxing" and that difficult physical demands under such conditions could have resulted in cardiac impairment. CX 111.

between his cardiac conditions and his employment with employer. *See* Order on Third Modification at 7-8. Substantial evidence supports the administrative law judge's conclusion that claimant's assertions of factual mistakes are based on his own selective and inaccurate interpretations of the medical records. For example, claimant again alleges the non-existence of various cardiac conditions which were diagnosed as early as 2004 and thus asserts that the opinions of employer's experts, Drs. Meissner and Fyfe, attributing his condition to his longstanding cardiac conditions, cannot be credited.[7] EXs 5, 38, 43. In similar fashion, claimant mischaracterizes the opinions of Drs. Meissner and Fyfe as failing to address whether his overseas employment contributed to his cardiac condition, despite the Board's previously affirming, as supported by substantial evidence, the administrative law judge's finding that their opinions rebut the Section 20(a) presumption because they state that claimant's employment did not cause or aggravate claimant's heart condition. *Id*. Moreover, the opinions of Drs. Black and Joglar do not affirmatively attribute claimant's cardiac condition to his employment with employer but, rather, state that it was a "possible" contributing factor. CXs 111, 113. While this may be sufficient to invoke the Section 20(a) presumption of causation, *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998), it is not necessarily sufficient to prove the matter by a preponderance of the evidence. *See Ceres Gulf, Inc. v. Director, OWCP* [*Plaisance*], 683 F.3d 225, 229, 46 BRBS 25, 29(CRT) (5th Cir. 2012); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). As a result, the administrative law judge rationally concluded that claimant did not establish a mistake in fact in his prior decisions concerning the lack of a causal relationship between claimant's heart condition and his employment. Therefore, the administrative law judge did not err in denying claimant's third motion for modification and this decision is affirmed.

Although the administrative law judge addressed claimant's third motion for modification on the merits, and his ordering of pre-filing requirements thus is moot in the present case, we nonetheless address claimant's contention that the administrative law judge erred in imposing pre-hearing requirements in the April 2016 Order. The administrative law judge did not abuse his discretion in granting employer's motion for the imposition of pre-filing requirements based on claimant's repeatedly filing for modification based on the same evidence previously rejected. The administrative law judge is entitled to "to protect and preserve the sound administration of justice," *In Re Martin-Trigona*, 737 F.2d 1254, 1262 (2d Cir. 1984), and thus may fashion "a remedy to

[7] Indeed, the record reflects that claimant's own expert, Dr. Joglar, opined that claimant's cardiomyopathy and sick sinus syndrome predate his overseas employment. CX 113.

stem the flow of frivolous action." *Urban v. United Nations*, 768 F.2d 1497, 1500 (D.C. Cir. 1985).

We are troubled, however, by the administrative law judge's lack of an explicit rationale for the requirement that claimant obtain counsel AND meet pre-filing requirements. *See* April 2016 Order at 5-6. In addressing meritless, frivolous, fanciful, repetitive, vexatious or malicious filings by self-represented persons, the courts most frequently require the self-represented litigant to obtain counsel OR to meet pre-filing requirements in order to preserve access to the courts.[8] *See, e.g., In Re Martin-Trigona*, 9 F.3d 226 (2d Cir. 1993); *Kenney v. SSA ODAR Hearing*, 640 F. App'x 803 (10th Cir. 2016); *Jenkins v. MTGLQ Investors*, 218 F. App'x 719 (10th Cir. 2007). However, where a litigant has filed repetitive frivolous modification requests, the administrative law judge may deny modification if he determines that granting modification will not render justice under the Act. *Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 547, 36 BRBS 35, 45(CRT) (7th Cir. 2002) ("the number of times that the party has sought reopening, and the quality of the new evidence which the party wishes to submit" are relevant to whether a modification request should be denied for failing to render justice under the Act). Nevertheless, as the administrative law judge addressed the merits of claimant's modification request despite his representing himself, any error the administrative law judge made in requiring claimant to obtain counsel is harmless.

[8] As in this case, pre-filing requirements often include seeking and obtaining permission of the court to file an action by certifying, inter alia, that the claim is new and not frivolous. *See, e.g., Matter of Davis*, 878 F.2d 211, 212 (7th Cir. 1989); *Urban v. United Nations*, 768 F.2d 1497, 1500 (D.C. Cir. 1985). Requiring a claimant to obtain representation by counsel for all future modification filings (without any alternative pre-filing requirement) is an extreme measure which requires commensurate justification. Consequently, this sanction should rarely, if ever, be imposed.

Accordingly, the administrative law judge's Order Dismissing Claimant's Third Request for Modification is affirmed.[9]

SO ORDERED.

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JUDITH S. BOGGS
Administrative Appeals Judge

_____
GREG J. BUZZARD
Administrative Appeals Judge

_____
RYAN GILLIGAN
Administrative Appeals Judge

[9] We decline employer's request to impose pre-filing requirements on claimant.