U.S. Department of Labor

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

BRB No. 23-0188

MARIE A. HILL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
VIRGINIA INTERNATIONAL TERMINALS, LLC	)	
	)	
	)	DATE ISSUED: 08/28/2024
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Dana Rosen, Administrative Law Judge, United States Department of Labor.

Krista N. DeSmyter (Chasen Boscolo Injury Lawyers), Greenbelt, Maryland, for Claimant.

Megan B. Caramore (Woods Rogers Vandeventer Black PLC), Norfolk, Virginia, for Employer/Carrier.

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

BUZZARD and JONES, Administrative Appeals Judges:

Claimant appeals Administrative Law Judge (ALJ) Dana Rosen's Decision and Order (2022-LHC-00261) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (Act). We must affirm

the ALJ's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law.[1] 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant sustained a back injury on August 5, 2020, when the translifter she was operating was struck on the passenger side by another translifter. Hearing Transcript (HT) at 24; Employer's Exhibit (EX) 5 at 11. Following Claimant's injury, Employer voluntarily paid temporary partial disability (TPD) benefits from August 6 to August 9, 2020, as well as temporary total disability (TTD) benefits from August 12, 2020, to March 1, 2021. EX 6. Employer controverted payments after March 1, 2021, based on the medical report of its expert orthopedic surgeon, Dr. Bryan Fox, who concluded Claimant's back condition had reached maximum medical improvement (MMI), and her ongoing back pain was not work-related. EX 7; EX 12 at 4-6.

The ALJ conducted a formal hearing on April 20, 2022. HT at 1. At the hearing, Claimant requested that the ALJ keep the record open "for a short time" for submission of Claimant's Exhibit (CX) 6, a supplemental opinion from her treating physician, Dr. Arthur Wardell,[2] responding to the report of Employer's expert neurosurgeon, Dr. Donald Hope. HT at 8. Claimant stated Employer did not produce Dr. Hope's medical opinion "until submitting the exhibits pre-dating this hearing;"[3] she believed a responsive narrative report from Dr. Wardell was necessary, but she was unable to secure the report before the hearing.

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[1] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant sustained her injury in Norfolk, Virginia. 33 U.S.C. §921(c); *see Roberts v. Custom Ship Interiors*, 35 BRBS 65, 67 n.2 (2001), *aff'd*, 300 F.3d 510 (4th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003); 20 C.F.R. §702.201(a); Employer's Exhibit (EX) 6.

[2] Dr. Arthur Wardell is an orthopedic surgeon at Wardell Orthopedics. Claimant's Exhibit (CX) 1.

[3] In her Petition for Review, Claimant indicates she did not receive Dr. Hope's report from Employer until fourteen days before the hearing "when exhibits were due." Claimant's Brief (CB) at 7. However, the Notice of Hearing and Scheduling Order required the parties to exchange exhibits thirty days prior to the hearing and did not require submission of exhibits to the ALJ until five days prior to the hearing. *See* Notice of Hearing and Scheduling Order at 2, 4-5. Employer states the exhibit was timely submitted. Employer's Brief in Response to Claimant's Petition for Review (ER Br.) at 10 (unpaginated). Therefore, although it is unclear from the record before us the exact date Claimant received Dr. Hope's report, there appears to be agreement it was timely produced in accordance with the Notice of Hearing and Scheduling Order.

Id. Employer voiced no objection. *Id.* Nevertheless, the ALJ denied Claimant's request and excluded CX 6, finding it untimely under the Notice of Hearing and Scheduling Order, pursuant to which discovery concluded forty days prior to the hearing and exhibits were exchanged thirty days prior to the hearing.[4] *Id.* at 9 (citing Notice of Hearing and Scheduling Order at 4-5).

The parties submitted post-hearing briefs on June 22, 2022, pursuant to the ALJ's request.[5] HT at 40. On June 23, 2022, Employer filed a Motion to Reopen & for Leave to Submit Post-Hearing Medical Information Received from Treating Physician (ER's M/Reopen). Specifically, Employer proffered EX 19, a report from Dr. Wardell dated April 21, 2022, purportedly following his review of a surveillance video of Claimant, which Employer argued showed "no ongoing disability which would preclude the Claimant from working her pre-injury position." ER's M/Reopen at 2. Claimant did not independently respond in writing to the ALJ,[6] but Employer noted Claimant objected to the motion. *Id.*

The ALJ granted Employer's motion on July 8, 2022, finding good cause to reopen the record because Dr. Wardell's April 21, 2022 report regarding Claimant's capacity to work constituted new and material evidence. Order Granting Employer's M/Reopen (Order I) at 2. She reopened the record for fourteen days, until July 21, 2022,[7] for Employer to submit EX 19 and for Claimant to file any rebuttal evidence.[8] *Id.*

On July 22, 2022, Claimant filed a Motion for Reconsideration (Cl's M/Recon) urging the ALJ to deny Employer's M/Reopen, arguing "equitable application" of the Notice of Hearing and Scheduling Order required the ALJ to exclude Employer's post-hearing report from Dr. Wardell for the same reasons she excluded Claimant's similar request at the hearing to submit a post-hearing report from Dr. Wardell. Cl's M/Recon at

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[4] Forty days prior to the formal hearing would have been March 11, 2022; thirty days prior to the formal hearing would have been March 21, 2022.

[5] Claimant did not raise the ALJ's exclusion of CX 6 as an issue in her post-hearing brief.

[6] Pursuant to 20 C.F.R. §18.33(d), Claimant had fourteen days, or until July 7, 2022, to respond to Employer's M/Reopen. She did not submit a written response.

[7] Fourteen days from July 8, 2022, is July 22, 2022, not July 21, 2022, as the ALJ indicated.

[8] Employer submitted EX 19 on July 14, 2022.

1-2. Claimant indicated she had objected to Employer's M/Reopen "and expected the Court to adhere to its prior ruling." *Id.* at 1. She further argued it was "obvious" EX 19 was available to Employer prior to the hearing, as it consisted of Dr. Wardell's statement "about surveillance that he reviewed at the employer's request," and that the report should be excluded as "double hearsay." *Id.* at 2.

On July 25, 2022, the ALJ issued an Order Denying Claimant's M/Recon (Order II), finding Claimant was given fourteen days to file "any rebuttal" to EX 19. Order II at 2. However, she found Claimant "did not file a rebuttal, response, [or] motion by 7/21/2022." *Id.* Nonetheless, she indicated she considered Claimant's arguments but found no good cause to vacate the prior order. *Id.*

The ALJ issued a Decision and Order (D&O) on February 9, 2023. Having acknowledged the parties' stipulation as to the compensability of Claimant's "initial" back injury, the ALJ evaluated the compensability of Claimant's "ongoing back and current leg conditions" within the framework of Section 20(a) of the Act, 33 U.S.C. §920(a). D&O at 29. The ALJ found Claimant invoked the Section 20(a) presumption with respect to her ongoing back and current leg conditions but found Employer successfully rebutted the presumption with the opinions of Drs. Fox and Hope. *Id.* at 29-31. Weighing the evidence as a whole, she found Claimant failed to prove by a preponderance of the evidence that her "ongoing back, thoracic, and leg complaints and current condition arose out of employment" and therefore denied benefits. *Id.* at 32, 46, 56-57.

The ALJ then addressed whether Claimant is entitled to additional compensation and medical benefits beyond Employer's termination of benefits on March 1, 2021, for the stipulated "initial" work injury to her back. D&O at 46. After comparing Claimant's physical restrictions to the physical requirements of her pre-injury position as a translifter driver and weighing the medical opinions of Dr. Fox, Dr. Hope, and Dr. Wardell, she found Claimant failed to prove she was unable to return to her regular pre-injury employment beginning March 2, 2021. *Id.* at 47-54.

The ALJ gave no weight to Dr. Wardell's "earlier"[9] assignment of partial work restrictions, as she found them based primarily on Claimant's subjective reporting and unsupported by objective diagnostic testing and physical therapy records. *Id.* at 50; *see* CX 1. Conversely, she gave great weight to Drs. Hope and Fox, finding their full duty releases consistent and supported by other medical evidence of record. *Id.* at 51-53. She also gave "significant" weight to Dr. Wardell's April 21, 2022 report (submitted post-

[9] The ALJ explained her reference to Dr. Wardell's "earlier" opinion meant the opinion regarding work restrictions he issued before April 21, 2022. D&O at 50.

hearing as EX 19), finding his change of opinion regarding Claimant's ability to work, based on his review of surveillance video,[10] was "well-reasoned, well-documented, [] persuasive" and consistent with the opinions of Drs. Fox and Hope. *Id.* at 51. She likewise found, based primarily on the opinions of Drs. Fox and Hope, that Claimant's work-related back injury fully resolved and required no additional medical treatment. *Id.* at 56. Consequently, she denied additional benefits for Claimant's "initial" work-related injury. *Id.* at 57.

On appeal, Claimant contends the ALJ deprived her of due process by excluding her post-hearing proffered exhibit (CX 6) but admitting Employer's EX 19. Additionally, she argues the ALJ improperly relied on Drs. Fox's and Hope's opinions to find her testimony about her pain not credible and erroneously found Dr. Wardell returned her to full-duty work. Employer responds, urging the Board to affirm the ALJ's findings.

Section 702.338 provides that the ALJ has a duty to inquire fully into matters at issue and receive into evidence all relevant and material testimony and documents. 20 C.F.R. §702.338; *see also Williams v. Marine Terminals Corp.*, 14 BRBS 728, 732 (1981); *Bachich v. Seatrain Terminals of California*, 9 BRBS 184 (1978). The evidence the ALJ considers must be part of the record, either through direct testimony or reference to an attached exhibit. 20 C.F.R. §702.334. The record closes upon the conclusion of the hearing, at which point no additional evidence may be admitted. 29 C.F.R. §§18.90(a), (b)(1).

Nevertheless, during the time between the record's closing and issuance of the compensation order, the ALJ may reopen the record for receipt of relevant and material evidence. 20 C.F.R. §702.338. A party requesting that the record be reopened must do so "promptly after the additional evidence is discovered" and must show the evidence in question is "new," "material," and "could not have been discovered with reasonable diligence before the record closed." 29 C.F.R. §18.90(b)(1); *Sam v. Loffland Bros. Co.*, 19 BRBS 228, 230 (1987) ("party seeking to admit evidence must exercise due diligence in developing" claim); *see also Smith v. Ingalls Shipbuilding Div., Litton Sys., Inc.*, 22 BRBS 46 (1989). The ALJ has significant discretion concerning the admission or exclusion of evidence, but such decisions may be overturned if the challenging party shows they are arbitrary, capricious, or an abuse of discretion. *Everson v. Stevedoring Services of Am.*, 33 BRBS 149, 152 (1999); *Ramirez v. Southern Stevedores*, 25 BRBS 260, 264 (1992); *McCurley v. Kiewest Co.*, 22 BRBS 115, 118 (1989).

[10] It appears no party submitted the surveillance video into evidence.

In this case, both parties sought leave to submit a post-hearing report from Dr. Wardell. Procedurally, the only difference between the parties' motions relates to when they submitted their requests to the ALJ.[11] Claimant's counsel chose to make a preemptive oral request at the hearing, alerting the ALJ she was waiting for Dr. Wardell's report and asking that the record be kept open for a short time for its submission once she received it. Employer chose to wait until it received Dr. Wardell's report, after the hearing was over, to submit a written request to reopen the record.

Despite the similarities between the parties' requests to reopen the record and that Claimant's request appears to have been filed more expeditiously, the ALJ treated them differently. She summarily rejected Claimant's request, citing a need to consistently apply her discovery and evidentiary deadlines. HT at 9. She did not evaluate whether Claimant's request to reopen the record was prompt or whether the proffered evidence was new, material, and could not have been discovered before the record closed in accordance with 29 C.F.R. §18.90(b)(1). This rejection, in and of itself, may not constitute reversible error, as the ALJ has the discretion to exclude evidence for failure to comply with the terms of her pre-hearing order. *Burley v. Tidewater Temps, Inc.*, 35 BRBS 185, 187 (2002); *Durham v. Embassy Dairy*, 19 BRBS 105, 108 (1986); *Williams*, 14 BRBS at 733. However, the ALJ did not hold Employer to the same standard, instead granting Employer's request after evaluating the materiality and relevance of the proffered evidence in accordance with 29 C.F.R. §18.90(b)(1). She did not explain why Employer's request did not violate the evidentiary and discovery deadlines in her Notice of Hearing and Scheduling Order, or otherwise clarify why Employer's request was evaluated on its merits when Claimant's was not.

We therefore agree with Claimant's argument that the ALJ's excluding CX 6 but admitting EX 19 violated her due process rights. An ALJ's rulings on discovery matters must protect the parties' due process rights.[12] *See, e.g., Ion v. Duluth, Missabe & Iron*

[11] It is reasonable to assume both parties requested Dr. Wardell's opinion prior to the hearing but had not yet received his response when the hearing commenced. Claimant's counsel acknowledged as much when she made her request. HT at 8. Further, the fact that Dr. Wardell's Employer-procured report at EX 19 is dated April 21, 2022, only one day after the hearing, suggests Employer sought it from Dr. Wardell prior to the hearing.

[12] The regulations governing formal hearings state that the ALJ "shall inquire fully into the matters at issue and shall receive in evidence the testimony of witnesses and any documents which are relevant and material to such matters," 20 C.F.R. §702.338, and that the ALJ must conduct the hearing "in such a manner as to best ascertain the rights of the parties," 20 C.F.R. §702.229.

Range Ry. Co., 31 BRBS 75, 79 (1997) (ALJ erred in failing to allow employer to cross-examine claimant or respond to his post-hearing affidavit concerning his diligent job search); *Cornell v. Lockheed Aircraft Int'l*, 23 BRBS 253, 259 (1990) (ALJ's failure to compel production of highly relevant evidence was so prejudicial as to result in a denial of due process). The right to procedural due process in an administrative proceeding encompasses a party's "meaningful opportunity to present [its] case" including presenting evidence cross-examining witnesses. *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976); *see also Goldberg v. Kelly*, 397 U.S. 254 (1970); *see generally Richardson v. Perales*, 402 U.S. 389, 401-402 (1971). "The overriding concern is whether the procedure demonstrates integrity and fundamental fairness." *Feezor v. Paducah Marine Ways*, 13 BRBS 509, 511 (1981) (citing *Richardson*, 402 U.S. at 410).

Here, the ALJ abused her discretion and deprived Claimant of procedural due process by treating her request to reopen the record differently from Employer's similar but perhaps less timely request, resulting in the exclusion of her evidence but the admission of Employer's.[13] This constitutes an abrogation of "fundamental fairness." *Feezor*, 13 BRBS at 509; *see also Mathews*, 424 U.S. at 349; *Richardson*, 402 U.S. at 401-402. Therefore, we vacate both the ALJ's exclusion of CX 6 and the admission of EX 19 and remand for re-evaluation of both parties' requests to reopen the record.

On remand, the ALJ must properly address and explain her findings with respect to Claimant's M/Recon and the arguments therein. She must also decide whether to strictly enforce the terms of her Notice of Hearing and Scheduling Order as to both requests, or to evaluate whether both requests were prompt and offered evidence that was new, material, and could not have been discovered before the record closed in accordance with 29 C.F.R. §18.90(b)(1). We note the ALJ's evaluation of Employer's M/Reopen was flawed in that she addressed only whether the proffered evidence was new and material but made no findings as to whether the request was prompt and whether counsel exercised due diligence. 29 C.F.R. §18.90(b)(1); *see Ezell v. Direct Labor, Inc.*, 33 BRBS 19, 29 (1999). Therefore, on remand, should the ALJ decline to strictly enforce her scheduling order as to both

[13] We reject Employer's argument that Claimant was afforded adequate due process because she was given multiple opportunities to respond to or rebut Employer's M/Reopen but failed to do so timely. ER Br. at 11-12 (unpaginated). While Claimant did not submit a written response to Employer's M/Reopen, her timely objection was noted in Employer's motion. ER's M/Reopen at 2 (unpaginated). Additionally, Claimant's M/Recon was also apparently submitted timely, considering the ALJ's misleading and incongruous instructions to file a rebuttal both within fourteen days and by July 21, 2022 – the thirteenth day. Order I at 2. Fourteen days from her July 8, 2022 Order would have been July 22, 2022, the day Claimant filed her M/Recon.

requests, she must evaluate whether both parties' requests were prompt and whether they demonstrated due diligence in developing the record prior to the hearing, in addition to whether the proffered evidence is new and material. 29 C.F.R. §18.90(b)(1); *Collins v. Elec. Boat Corp.*, 45 BRBS 79, 81-82 (2011); *Ezell*, 33 BRBS at 29.

Because the ALJ's evidentiary determination on remand could impact her analysis as to Claimant's entitlement to disability and medical benefits under the Act,[14] we likewise vacate the denial of benefits. Consequently, we need not address Claimant's remaining arguments regarding the weighing of the evidence.

[14] The ALJ improperly applied the Section 20(a) analysis to determine whether Claimant's "ongoing and current" back and leg symptoms arose out of employment, despite a stipulation as to the compensability of the "initial" workplace injury. *Mitri v. Linguist Solutions*, 48 BRBS 41, 43 (2014) ("stipulations are binding upon those who enter into them"). Claimant is not alleging a secondary injury or a post-injury aggravation; rather, she is seeking continued disability compensation and medical benefits directly resulting from the stipulated compensable work injury. CB at 4. As such, on remand, the ALJ's analysis should be limited to the nature and extent of Claimant's disability and the relatedness, reasonableness, and necessity of continued medical treatment as a result of the stipulated compensable injury, not whether a Claimant sustained a compensable work-related injury.

Accordingly, we vacate the ALJ's Decision and Order denying benefits and remand the case for further consideration consistent with this opinion.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

BOGGS, Administrative Appeals Judges, concurring:

I concur in the result.

JUDITH S. BOGGS
Administrative Appeals Judge