U.S. Department of Labor

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

BRB No. 23-0255

MARCUS SCHULMEISTER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BLACKWATER USA	)	DATE ISSUED: 09/25/2024
	)	
and	)	
	)	
CONTINENTAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Granting Summary Decision and Denying Claim of Paul C. Johnson, Jr., District Chief Administrative Law Judge, United States Department of Labor.

John D. Hafemann (Hafemann, Magee, Thomas, LLC), Pooler, Georgia, for Claimant.

George L. Gutierrez (Thomas Quinn, LLP), San Francisco, California, for Employer/Carrier.

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

PER CURIAM:

Claimant appeals District Chief Administrative Law Judge (ALJ) Paul C. Johnson, Jr.'s Decision and Order Granting Summary Decision and Denying Claim (2022-LDA-04222; 2022-LDA-04223) rendered on consolidated claims filed pursuant to the Longshore

and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (Act), as extended by the Defense Base Act, 42 U.S.C. §§1651-1655 (DBA). The Benefits Review Board must affirm the ALJ's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law.[1] 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 361-62 (1965).

On November 12, 2008, Claimant sustained a left pectoralis major muscle injury while moving cases of ammunition in an aircraft hangar. Claimant's Exhibit (CX) 1. Employer accepted liability and paid temporary total disability (TTD) and medical benefits from December 5, 2008, to January 30, 2009. CXs 2, 3. On June 16, 2012, Claimant sustained a left knee injury as a result of slipping on loose gravel when dismounting an all-terrain vehicle (ATV) following a patrol. CX 6. Employer again accepted liability and paid TTD and medical benefits from January 11 to July 11, 2013. CX 7. Claimant was released to work with no restrictions on August 22, 2013, but he did not return to work. CX 9; Exhibit to Employer's Motion for Summary Decision (EX) 17 at 3.

In 2019, Claimant filed a claim for psychological injuries he allegedly sustained while working overseas for Employer. EX 17 at 3. On October 12, 2020, Claimant and Employer entered into a settlement agreement under Section 8(i) ("2020 Agreement"), 33 U.S.C. §908(i), in which they agreed to settle "all of the symptoms, illnesses, or injuries which Claimant has brought to the attention of Employer/Carrier." *Id.* at 5-6. Notably, the 2020 Agreement included a description of Claimant's prior employment-related physical injuries:

> [Claimant] suffered two physical injury claims while in the employ of Employer. On 11/12/08, he suffered a left pectoral muscle injury. He underwent surgery and received a full duty release to return to work on 1/31/09. He suffered a left knee injury on 6/6/12[2] where he was released to [return to work] full duty on 8/22/13.

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[1] This case arises within the jurisdiction of the United States Court of Appeals for the Second Circuit because the district director who filed the ALJ's decision is in New York. 33 U.S.C. §921(c); *McDonald v. Aecom Tech. Corp.*, 45 BRBS 45, 47-48 (2011). We note Employer incorrectly identified the United States Court of Appeals for the Fifth Circuit as the controlling circuit. Employer's Brief at 10. The mistake is of no consequence.

[2] As the ALJ noted, this date is a typographical error; all the evidence refers to an injury date of June 16, 2012, and there is no evidence of an injury occurring on June 6,

Id. at 3. The district director approved the 2020 Agreement on October 29, 2020. EX 18.

Subsequently, on February 15, 2022, Claimant filed a claim for compensation for alleged employment-related injuries to his left shoulder and left knee. CX 4. Employer filed a motion for summary decision on December 16, 2022, arguing Claimant's claim is precluded by the 2020 Agreement or, in the alternative, the claim was untimely filed. Employer's Motion for Summary Decision (M/Summ. Decision) at 7-14.

In response to Employer's motion, Claimant asserted the 2020 Agreement only covered his psychological injury claim, and therefore a genuine issue of material fact existed as to whether a claim for his left shoulder and left knee injuries was precluded by that settlement. Claimant's Response to Employer's M/Summ. Decision at 294-296 (unpaginated). He further asserted there was a genuine issue of fact as to when he became aware of his employment-related left shoulder injury, which he argued was different than the 2008 left pectoral muscle injury referenced in the 2020 Agreement, and its impact on his ability to earn wages. He therefore asserted summary decision was inappropriate on the issue of the timeliness of his claim. *Id.* at 296-298. Attached as an exhibit to Claimant's response was his own declaration attesting that his 2008 pectoralis injury prevented him from noticing his separate and distinct left shoulder injury, and he did not "realize the extent" of either the shoulder or knee injuries and their effect on his "future employment prospects" until "late 2021." Claimant's Decl. at 1.

The ALJ found Claimant's arguments unpersuasive, determining his alleged left shoulder and left knee injuries were the same as the physical injuries identified in the 2020 Agreement. Decision and Order Granting Summary Decision and Denying Claim (D&O) at 4-5. He found it undisputed that the 2020 Agreement specifically referred to the 2008 and 2012 physical injuries, both injuries were "in existence" at the time of the 2020 Agreement, and the 2020 Agreement contained language indicating that any claim for both injuries was included in the terms of Employer's release. *See* 33 U.S.C. §908(i)(3); 20 C.F.R. §702.241(g); D&O at 3, 6-7. Therefore, the ALJ granted Employer's motion for summary decision, finding no genuine issue of material fact existed that any claim for Claimant's left shoulder and left knee injuries was resolved as part of the 2020 Agreement.[3] D&O at 7.

2012. Decision and Order Granting Summary Decision and Denying Claim (D&O) at 3 n.2 (footnote in original).

[3] Having found the claim for both injuries precluded by the 2020 Agreement, the ALJ found it unnecessary to address the issue of the timeliness of the claim. D&O at 2 n.1.

On appeal, Claimant contends the ALJ erred in granting Employer's motion for summary decision because a genuine issue of material fact exists regarding whether his alleged left shoulder injury is the same as his left pectoral muscle injury identified in the 2020 Agreement. Employer responds, urging the Board to affirm the ALJ's findings.[4]

Summary Decision

The Board reviews summary judgment orders *de novo*. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 465 n.10 (1992); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1304 (2d Cir. 1995). In determining whether to grant a party's motion for summary decision, the ALJ must determine, after viewing the evidence in the light most favorable to the non-moving party, whether any genuine issues of material fact exist and whether the moving party is entitled to summary decision as matter of law. 29 C.F.R. §18.72; *O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55, 61 (2d Cir. 2002); *R.V.* [*Villaverde*] *v. J. D'Annunzio & Sons*, 42 BRBS 63, 64 (2008), *aff'd sub nom. Villaverde v. Director, OWCP*, 335 F. App'x 79 (2d Cir. 2009). In making this determination, all inferences drawn from the facts must be viewed in the light most favorable to the non-moving party. *United States v. Diebold*, 369 U.S. 654, 655 (1962).

Moreover, the party seeking summary judgment bears the initial burden of demonstrating there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Only then does the burden shift to the non-moving party to survive the motion by demonstrating specific, material facts that give rise to a genuine issue. *Id*. In that regard, to defeat a motion for summary decision, the non-moving party must present "specific facts" showing there exists "a genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd., v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). If the ALJ 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, 247-248 (1986) ("By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.").

[4] Claimant does not challenge the ALJ's conclusion that the 2020 Agreement identified and covered the 2008 and 2012 physical injuries in addition to his psychological injuries, nor does he challenge the ALJ's finding it undisputed that the alleged left knee injury identified in his 2022 claim for compensation is the same left knee injury mentioned in the 2020 Agreement. Therefore, we affirm these findings. *See Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57, 58 (2007); D&O at 3, 5.

Because Employer is the moving party, it bears the initial burden of demonstrating no genuine issue of material fact that Claimant's current "left shoulder injury" claim is covered by the parties' previous settlement for his "left pectoral muscle injury." *Celotex*, 477 U.S. at 323. In support of its argument, Employer submitted multiple exhibits, one of which was a copy of the parties' 2020 Agreement. *See* EX 17. As mentioned above, this agreement was negotiated as part of a separate claim that Claimant filed in 2019 for psychological injuries related to wartime exposures during his work for Employer between 2006 and 2012. EX 17 at 2-3.

In setting forth the facts giving rise to Claimant's warzone "psychological injury claim in 2019," the 2020 Agreement describes Claimant's traumatic experiences, bodily injuries, and having witnessed coworkers' and others' bodily injuries. It includes one reference to Claimant's upper body injury (the injury at issue in this appeal):

> On 11/12/08, [Claimant] suffered a *left pectoral muscle injury*. He underwent surgery and received a full duty release to return to work on 1/31/09.

EX 17 at 3 (emphasis added). The 2020 Agreement later states that it "describes all of the conditions symptoms, illnesses, or injuries which Claimant has brought to the attention of Employer/Carrier." *Id.* at 4. Thus, the parties agreed to release Employer from liability only with respect to those "conditions, symptoms, injuries and illnesses . . . that are mentioned in the agreement[.]" *Id.*

Based on this language, Employer contends that the parties, in 2019 as part of Claimant's psychological injury claim, also settled the claim for his November 12, 2008 "left pectoral muscle injury," even though Employer's liability for that injury had apparently been satisfied more than a decade earlier. CX 3 (Employer's February 12, 2009 Notice of Final Payment for a November 12, 2008 "upper arm" injury). It then contends that the 2020 Agreement to settle the pectoral muscle injury covers his newly-alleged left shoulder injury because they are the same injury. The ALJ agreed, finding that the 2020 Agreement's reference to a "left pectoral muscle injury" constitutes a settlement for Claimant's more recent "left shoulder injury" claim as a matter of law because they are "the same type of injury, incurred on the same date." D&O 5.

To reach that finding, the ALJ very generally summarized and cited: 1) Employer's November 12, 2008 Notice of Injury Report, which states Claimant felt "pain in his left shoulder while moving ammunition" and was "diagnosed with a partial torn left pectoral muscle;" 2) Employer's February 12, 2009 Notice of Final Payment for a November 12, 2008 "upper arm" injury; 3) a medical record indicating Claimant was treated on "11/26/08" for a "left pectoralis major repair;" and 4) additional medical records from 2008

discussing Claimant's treatment for his "left pectoralis major tear" but which also, at times, reference his shoulder. D&O at 9 (citing EXs 1, 2, 4, 6, 8-10). The ALJ predominantly relied, however, on Claimant's November 2022 deposition testimony from this current claim, which the ALJ construed as equating his shoulder injury with his previously resolved claim for his left pectoral muscle injury. D&O at 4-5. He also discredited Claimant's post-deposition written declaration which stated that because of the injury he suffered to his left pectoralis in November 2008, he "did not notice the injury also to [his] left shoulder" which "still" gives him "problems." *Id*. at 5 (citing Claimant's Decl. at 1). The ALJ's weighing of this evidence is contrary to the law for two reasons.

First, settlements under the Longshore Act are contracts that bind the parties who agree to them. Once approved, the effect of a settlement is to discharge the employer's liability for injuries that are the subject of the agreement. 33 U.S.C. §908(i)(3); 20 C.F.R. §702.243(b); *see, e.g.*, *Diggles v. Bethlehem Steel Corp.*, 32 BRBS 79, 81 (1998). Further, settlements are final and may not be collaterally attacked by the parties in a subsequent proceeding. *Vilanova v. United States*, 851 F.2d 1, 6 (1st Cir. 1988), *cert. denied*, 488 U.S. 1016 (1989). Because they are contracts, interpretation of settlements under the Act (as with any civil settlement) must give full effect to the parties' agreement. *Powell v. Omnicom*, 497 F.3d 124, 128 (2d Cir. 2007). Thus, if the language of the agreement is clear and unambiguous, "its meaning must be determined from the four corners of the instrument without resort to extrinsic evidence of any nature." *McReynolds v. Richards–Cantave*, 588 F.3d 790, 803 (2d Cir. 2009) (quoting *Goldman v. C.I.R.*, 39 F.3d 402, 405–406 (2d Cir. 1994)).

Here, the ALJ resorted almost entirely to the extrinsic evidence Employer submitted in support of its motion for summary decision to interpret the parties' 2020 agreement: previously submitted Department of Labor claim forms, medical records, and, most significantly, Claimant's 2022 deposition testimony regarding his understanding of the relationship between his pectoralis and shoulder injuries. The ALJ neither found that the agreement was ambiguous (a prerequisite to considering extrinsic evidence) nor attempted to discern its scope based on the language of the agreement itself. Yet, as the evidence reflects, the settlement agreement squarely references only one upper body injury – Claimant's "left pectoralis muscle injury" occurring on November 12, 2008. It sets forth no language specifically encompassing a "left shoulder injury" and the parties further confirmed that the settlement covers only injuries "mentioned in the agreement." The agreement on its face does not meet Employer's initial burden to demonstrate that there is "no genuine issue" that the parties settled Claimant's shoulder injury claim, or that the pectoralis and shoulder injuries are the same.

Second, even if it were permissible for the ALJ to have considered the extrinsic evidence to interpret the settlement, he erred by not viewing that evidence "in the light

most favorable" to Claimant as the non-moving party. *Diebold*, 369 U.S. at 655. For example, although there is evidence suggesting that the injury now alleged and the settled injury may have arisen from the same accident on November 12, 2008, that fact alone does not support the conclusion that the injuries are necessarily the "same" or that benefits are precluded as a matter of law simply because of the settlement's reference to a pectoral injury.

Moreover, one of the documents cited by the ALJ, Employer's November 12, 2008 Notice of Injury Report, states that an accident at work caused Claimant "pain in his left shoulder," but that he was ultimately diagnosed with a "partial torn left pectoral muscle." *See* CX 1. This evidence might arguably provide support for a finding that Claimant's shoulder injury is the same as his pectoralis injury. However, when viewed in the light most favorable to Claimant, it could also arguably be credited as suggesting – consistent with parties' subsequent reference to only the pectoralis injury in their 2020 Agreement with no mention of shoulder pain – that they were aware of two injuries but settled only the former injury and not the latter. *See* 20 C.F.R. §702.241(g) (settlements may encompass any claims "then in existence").

The ALJ similarly erred in weighing Claimant's testimony regarding his understanding of the relationship between his shoulder condition and his pectoralis injury. While the ALJ found Claimant's testimony "unequivocally" shows that the two injuries are "the same," Claimant's statements were made in the context of how he "generally refer[s]" to his injuries and were limited to his own layperson's understanding of the connection between his shoulder injury and pectoralis injury. At one point, Claimant described his testimony on this issue as a "guess" and further offered testimony that arguably could be credited to show that his November 2008 work accident caused injuries to both body parts, with only the pectoral claim having been settled.[5] CX 23 at 10 (Depo. Tr. at 37-40). Thus, the ALJ made inferences that run counter to the requirement that evidence be considered in the light most favorable to the non-moving party. By dismissing the claim prematurely, the ALJ prevented the parties from developing medical evidence in the normal course of litigating this claim that may have facilitated its resolution.

The broader point of these examples is not that the ALJ rendered impermissible factual findings with respect to the extrinsic evidence, or that those findings could not ultimately support a decision to deny this claim, on the merits or as untimely filed, but that he did not act within the constraints imposed by the standard for granting summary decision. *Anderson*, 477 U.S. at 247-248; *Diebold*, 369 U.S. at 655; *see also Sedar v.*

[5] *See, e.g.*, CX 23 at 10 (Depo. Tr. at 37) (testifying that his pectoral muscles ripped *and* separated from his shoulder).

Reston Town Ctr. Prop., LLC, 988 F.3d 756, 761 (4th Cir. 2021) ("[s]ummary judgment cannot be granted merely because the court believes that the movant will prevail if the action is tried on the merits") (citations omitted).

Accordingly, we reverse the ALJ's Decision and Order Granting Summary Decision and Denying Claim as to the 2022 left shoulder injury claim and remand for further proceedings in accordance with this Order.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge