U.S. Department of Labor

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

BRB Nos. 17-0368
and 17-0368A

KERMAN CARROLL	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
VIRGINIA INTERNATIONAL TERMINALS	)	
	)	DATE ISSUED: Jan. 8, 2018
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits of Monica Markley, Administrative Law Judge, United States Department of Labor.

Charlene A. Morring (Montagna Klein Camden, L.L.P.), Norfolk, Virginia, for claimant.

R. John Barrett and Megan B. Caramore (Vandeventer Black, L.L.P.), Norfolk, Virginia, for employer/carrier.

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

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order Awarding Benefits (2016-LHC-00476) of Administrative Law Judge Monica Markley 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). We must affirm the

administrative law judge's findings of fact and conclusions of law 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).

Claimant injured his left knee on November 16, 2014, during the course of his employment and underwent surgery on January 9, 2015. Employer paid claimant temporary total disability and medical benefits from the date of injury until September 3, 2015, ceasing because claimant refused to attend a functional capacity evaluation (FCE). Employer also asserted that claimant's treatment with Dr. Wardell, commencing in September 2015, was unauthorized.

Following a hearing on the matter, the administrative law judge found that claimant's original treating physician, Dr. Aboka, became unavailable, claimant requested authorization to treat with Dr. Wardell, employer did not act upon that request (and, thus, "refused" the request), and claimant was no longer required to seek authorization for treatment with Dr. Wardell. Therefore, the administrative law judge found that Dr. Wardell became claimant's treating physician. Decision and Order at 20. As Dr. Wardell was claimant's treating physician, it was reasonable for claimant to refuse to attend an FCE ordered by Dr. Aboka's former partner, Dr. Luciano-Perez. *Id.* at 22. The administrative law judge awarded claimant temporary total disability and medical benefits from September 4 through November 4, 2015. However, as of November 4, 2015, when Dr. Aboka opined that claimant had reached maximum medical improvement, needed no further treatment, and could return to his usual work without restrictions, the administrative law judge denied disability benefits and specific medical treatment prescribed by Dr. Wardell after November 4, 2015. *Id.* at 26. Claimant appeals, BRB No. 17-0368, and employer cross-appeals, BRB No. 17-0368A, the administrative law judge's Decision and Order. Each responds to the other, urging affirmance on the respective issues.

Employer, on cross-appeal, contends the administrative law judge erred in finding Dr. Wardell to be claimant's treating physician because Dr. Aboka, claimant's first choice of physician, referred claimant to Dr. Luciano-Perez upon Dr. Aboka's departure from the practice, making Dr. Luciano-Perez claimant's treating physician. Ergo, it avers, claimant's refusal to attend the FCE ordered by Dr. Luciano-Perez was unreasonable, and the administrative law judge should have suspended compensation benefits after September 3, 2015. *See* 33 U.S.C. §907(d)(4). Employer also asserts claimant's subsequent treatment with Dr. Wardell was unauthorized. Claimant responds, asserting that the administrative law judge applied the correct law to conclude that Dr. Wardell is his choice of physician and that his refusal to attend the FCE was not unreasonable.

An employer's liability for medical treatment is governed by Section 7 of the Act, 33 U.S.C. §907. The Act provides that an injured employee is permitted his initial free choice of physician to treat the work injury, 33 U.S.C. §907(b), but that he:

> may not change physicians after his initial choice unless the employer, carrier, or [district director] has given prior consent for such change. Such consent shall be given in cases where an employee's initial choice was not of a specialist whose services are necessary for and appropriate to the proper care and treatment of the compensable injury or disease. In all other cases, consent may be given upon a showing of good cause for change.

33 U.S.C. §907(c)(2); 20 C.F.R. §702.406. Thus, if a claimant wishes to change physicians after his initial choice, he must obtain prior written approval from the employer, carrier, or the district director. 33 U.S.C. §907(b), (c); *Jackson v. Universal Maritime Services Corp.*, 31 BRBS 103 (1997) (Brown, J., concurring); *Hunt v. Newport News Shipbuilding & Dry Dock Co.*, 28 BRBS 364, *aff'd mem.*, 61 F.3d 900 (4th Cir. 1995); 20 C.F.R. §702.406. However, where a claimant's chosen physician becomes unavailable, the claimant is not required to obtain approval from the employer, the carrier, or the district director before treating with a new physician of his choosing. Good cause for the change is established under these facts, pursuant to Section 7(b) of the Act and 20 C.F.R. §702.406(a). *Lynch v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 29 (2005); *Maguire v. Todd Pacific Shipyards Corp.*, 25 BRBS 299 (1992); *see* n.4, *infra*.

In this case, there is no dispute that Dr. Aboka was claimant's choice of treating physician for his November 2014 knee injury – he performed the initial examinations, the surgery, and the follow-up. CX 8; EX 1. In a letter dated August 6, 2015, two weeks after claimant was last seen in his office, Dr. Aboka informed claimant that he was "leaving the practice" as of August 31 and transferring claimant's case to his partner, Dr. Luciano-Perez.[1] EX 1 at 46. In a letter dated August 18, 2015, claimant notified employer that Dr. Aboka "has retired or left the practice" and that he would like authorization to transfer to Dr. Wardell. CX 1. On August 31, 2015, claimant informed the district director that he had attempted to obtain authorization from employer because Dr. Aboka had left his practice, and he wanted to choose Dr. Wardell as his treating physician.[2] CX 2. Because claimant last saw Dr. Aboka on July 24, 2015, prior to his

[1] The administrative law judge credited claimant's testimony that he had not spoken with Dr. Aboka about his leaving the practice and did not know that Dr. Aboka was opening another practice. Decision and Order at 19; Tr. at 25, 33.

[2] Claimant testified that employer's representative stated he would get back to him regarding the change of physicians, but he never did. Tr. at 25-26.

departure from the practice, and the notes from that date are silent as to any discussion regarding Dr. Aboka's leaving his practice, EX 1 at 43-44, the administrative law judge found that Dr. Aboka did not refer claimant to anyone at that time and claimant, contrary to Dr. Aboka's deposition testimony, did not express any desire to stay with the practice or encourage the referral, *see* EX 2 at 15-16. Decision and Order at 19. Therefore, the administrative law judge found that claimant did not choose to stay with Dr. Luciano-Perez. *Id.*

Employer also contends that Dr. Aboka's referral requires Dr. Luciano-Perez to become claimant's treating physician. Employer relies on the Board's decision in *Maguire*, 25 BRBS 299, as support. Therein, the Board stated:

> Claimant's initial physician, Dr. Gray, had retired from practice and was no longer available to see claimant, and he had made arrangements for his patients to pass to Dr. Linder through referral. Under these circumstances, we agree with the administrative law judge that claimant was not required to obtain employer's consent to this change of physician. Given that claimant was referred by his authorized physician, Dr. Gray, to Dr. Linder upon the cessation of Dr. Gray's medical practice, the reasonable conclusion is that claimant's initial physician provided the care of another physician whose services were necessary for the proper care and treatment of claimant's compensable injury[.] . . . We conclude that where the authorized physician has retired and referred his patients to a new doctor, *that doctor must be considered to be the physician authorized to provide medical treatment*.

Maguire, 25 BRBS at 301-302 (internal citations omitted) (emphasis added). The administrative law judge rejected employer's interpretation of this language, finding it too broad. Decision and Order at 17.

In *Maguire*, the claimant's treating physician retired and referred his patients to another doctor. Without obtaining the employer's authorization, the claimant treated with that physician. The employer refused to pay medical expenses because the claimant did not obtain its authorization. The Board held that such authorization was not needed, as the claimant was permitted to treat with that new, referred, physician once his treating physician became unavailable. *Maguire*, 25 BRBS at 301-302. The administrative law judge, here, rationally found that employer's reading of *Maguire* took its holding out of context, i.e., that the claimant is *required* to treat with the referred physician whether the claimant wishes to treat with him or not. Decision and Order at 17; *see Lynch*, 39 BRBS 29.

In *Lynch*, the claimant treated with an orthopedist who closed his private practice. The claimant then chose his family physician as his treating physician, but the employer

stated that he should see an orthopedic specialist. At that point, the claimant chose an orthopedist he had seen previously for a different injury, but the employer objected, stating he should choose a spine specialist. The Board held that, because the claimant was not seeking to change his treating physician, but, rather, to select a new one because his doctor became unavailable, the claimant was not required to obtain either employer's or the district director's consent before seeing a new doctor.[3] *Lynch*, 39 BRBS at 32 (citing *Maguire*, 25 BRBS 299).[4]

In accordance with *Lynch* and *Maguire*, the administrative law judge found that Dr. Aboka became unavailable to treat claimant; therefore, claimant required, and was entitled to select, a new physician. She found that claimant could have treated with Dr. Luciano-Perez, pursuant to *Maguire*, but he was not required to do so merely because of Dr. Aboka's referral. Alternatively, and as he did, claimant could select a new doctor, pursuant to *Lynch*. Decision and Order at 18. This finding accords with law. 33 U.S.C. §907; *Lynch*, 39 BRBS 29; *Maguire*, 25 BRBS 299; 20 C.F.R. §§702.403, 702.406, 702.421.

The administrative law judge also rationally rejected employer's alternative argument that claimant had accepted the referral to Dr. Luciano-Perez but then later changed his mind and sought treatment with Dr. Wardell without obtaining consent. Although the administrative law judge found Dr. Aboka's testimony on the matter confusing and contradictory,[5] Decision and Order at 18; EX 2 at 15-16, substantial

[3] The Board stated, however, that the district director retained the authority under 20 C.F.R. §§702.406, 702.407(b), (c), to address employer's objections to the chosen physician and to order a change in physician if warranted. *Lynch*, 39 BRBS at 32.

[4] As here, the requirement that the claimant first request authorization for treatment was not at issue. *Lynch*, 39 BRBS at 32 n.3. We note, however, that substantial evidence supports the administrative law judge's finding that claimant requested authorization, and employer refused treatment by failing to respond to the request. CXs 1-2; Tr. at 25-26. This refusal, the administrative law judge permissibly reasoned, eliminated any need for claimant to seek additional authorization before treating with Dr. Wardell. Decision and Order at 20; *see Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996) (unreasonable delay in responding constitutes constructive refusal); *Shahady v. Atlas Tile & Marble Co.*, 13 BRBS 1007 (1981) (Miller, dissenting), *rev'd on other grounds*, 682 F.2d 968 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1146 (1983) (an employee's right to initial free choice of physician does not negate the requirement to request authorization). Employer does not challenge this finding.

[5] Dr. Aboka testified that he did not refer claimant to anyone at the time of his last appointment. He also testified that he gave claimant the option of staying at the current

evidence supports the administrative law judge's finding that claimant did not accept the referral. The July 2015 appointment notes, EX 1 at 43-44, made no mention of a discussion about Dr. Aboka's leaving his practice or a referral to Dr. Luciano-Perez.[6] Dr. Aboka's referral letter, dated August 6, 2015, EX 1 at 46, did not indicate that Dr. Aboka and claimant had discussed referral to Dr. Luciano-Perez. Thus, the administrative law judge permissibly found that claimant could not have expressed any desire to treat with Dr. Luciano-Perez. Further, the administrative law judge found that, after claimant received the referral letter, he requested authorization from employer and the district director to treat with Dr. Wardell. Decision and Order at 19; CXs 1-2; *see* n.4, *supra*. Consequently, the administrative law judge concluded that claimant chose to treat with Dr. Wardell upon learning that Dr. Aboka was unavailable. Decision and Order at 19-20. This finding is rational and supported by substantial evidence. Therefore, we affirm the finding that claimant selected Dr. Wardell as his treating physician. *Lynch*, 39 BRBS 29.

Employer contends the administrative law judge erred in finding that claimant did not unreasonably refuse to attend the FCE ordered by Dr. Luciano-Perez. Section 7(d)(4) of the Act, 33 U.S.C. §907(d)(4), provides that compensation payments may be suspended "if at any time the employee unreasonably refuses to submit to medical or surgical treatment, or to an examination by a physician selected by the employer. . . ." The burden of proof is on the employer to show that the refusal was unreasonable; if shown, the burden shifts to the claimant to justify the refusal. The reasonableness of the refusal is an objective inquiry, and the justification is a subjective inquiry. *Dodd v. Crown Central Petroleum Corp.*, 36 BRBS 85 (2002); *Hrycyk v. Bath Iron Works Corp.*, 11 BRBS 238, 241-242 (1979).

The administrative law judge found that claimant's refusal to attend the FCE on September 3, 2015, was reasonable. She stated that, after requesting Dr. Wardell as his physician and receiving no response from employer, and then learning that an FCE was scheduled with Dr. Luciano-Perez, it was reasonable for someone in claimant's situation to refuse to attend the FCE – especially because his original treating physician had not

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practice or coming with him to his new practice and that he believed claimant expressed a desire to stay. EX 2 at 15-16. Claimant testified that, from the August 2015 letter, he knew only that Dr. Aboka was leaving his practice. EX 1 at 46; Tr. at 25.

[6] Dr. Aboka's notes from July 24, 2015, recommended only that claimant be set up for work conditioning and, afterwards, return to normal activities without restrictions. EX 1 at 43-44.

ordered such a test before leaving the practice.[7] Decision and Order at 22; *see generally Pittsburgh & Conneaut Dock Co. v. Director, OWCP*, 473 F.3d 253, 40 BRBS 73(CRT) (6th Cir. 2007).

Employer's contention that claimant's refusal was unreasonable rests solely on its position that Dr. Luciano-Perez became claimant's treating physician, and it was unreasonable for claimant to refuse an order from his "treating physician." As we have affirmed the finding that Dr. Wardell, and not Dr. Luciano-Perez, became claimant's treating physician upon Dr. Aboka's becoming unavailable, it was reasonable for the administrative law judge to find that claimant need not attend an FCE ordered by Dr. Luciano-Perez. We reject employer's contentions on cross-appeal and affirm the administrative law judge's findings regarding the treating physician, the FCE, and the award of temporary total disability and medical benefits between September 4 and November 4, 2015.

In his appeal, claimant contends the administrative law judge erred in denying disability and specific medical benefits after November 4, 2015. Claimant contends the administrative law judge erred in relying on the November 2015 opinion of Dr. Aboka to conclude that claimant's medical treatment after that date was unnecessary and that he could return to work without restrictions at that time.

Claimant treated with Dr. Wardell four times before seeing Dr. Aboka at his new practice on November 4, 2015, at employer's request. EX 1 at 49-52. At those four appointments, claimant underwent examination, x-ray, review of MRI, and three visco-supplementation injections. CX 12. On November 4, 2015, Dr. Aboka examined claimant and opined he could return to work with no restrictions. Dr. Aboka noted that claimant's recovery took longer than usual and that claimant was in the midst of a 5-injection regimen of visco-supplementation with Dr. Wardell.[8] According to Dr. Aboka's report, claimant told him that the injections and the physical therapy had not helped much, and Dr. Aboka stated that examination findings did not explain claimant's complaints of consistent pain. He believed claimant's left knee was normal, advised claimant to return to work and to use over-the-counter pain medicine if necessary, and concluded claimant needed no further physical therapy or injections. EX 1 at 49-52. At

[7] Claimant's counsel informed employer that claimant would not attend an FCE before being cleared by his new treating physician. CX 3.

[8] Dr. Aboka reported (EX 1 at 52):

> Although [claimant] had significant delay in improvement of his knee condition, I think over the past several months he has actually come around to regaining normalized state of his left knee from an objective standpoint.

his deposition, Dr. Aboka testified that claimant's condition had reached maximum medical improvement and his conclusion that there was no need for more treatment was based on claimant's progressing and returning to normal function. EX 2 at 18, 26.

The administrative law judge found Dr. Aboka's opinion entitled to great weight. She first acknowledged that, although Dr. Aboka was not claimant's treating physician on November 4, 2015, this was not a typical one-time examination by an employer's expert, as Dr. Aboka had treated claimant, performed surgery, and was familiar with his condition. Further, despite the inconsistency in his testimony regarding the referral of claimant's care, the administrative law judge found that Dr. Aboka's opinion regarding claimant's injury and treatment was credible and thorough. Although Dr. Aboka did not review Dr. Wardell's notes, he was aware of the injection treatment. The administrative law judge found Dr. Wardell's opinion entitled to less weight because she considered his treatment notes to be cursory and lacking in explanation of his examinations and findings. She also noted Dr. Wardell's acknowledgment that claimant's October 2015 MRI showed no ongoing structural damage and that claimant had good range of motion.[9] Decision and Order at 25-26. Based on Dr. Aboka's opinion, the administrative law judge found that claimant had recovered from his work injury and is not entitled to disability benefits after November 4, 2015, or to medical benefits for the injections and physical therapy prescribed by Dr. Wardell because they were not necessary for his work injury after November 4, 2015. *Id.* at 26.

A claimant bears the burden of establishing that treatment is reasonable and necessary for his work-related condition and that he has met the other requirements under Section 7 for his employer to pay medical benefits.[10] *Schoen v. U.S. Chamber of*

[9] Dr. Wardell testified that, because of claimant's complaints of pain in the surgical area, he ordered the MRI to make sure claimant's surgery was thorough. CX 14 at 13.

[10] Contrary to claimant's argument, he is not entitled to a Section 20(a), 33 U.S.C. §920(a), "presumption of reasonable treatment." Although Section 20(a) applies to the determination of whether an injury is work-related, such that an employer may be held liable for medical treatment, *Maryland Shipbuilding & Drydock Co. v. Jenkins*, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979); *Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989), Section 20(a) does not apply to establish the requirements for liability under Section 7. 33 U.S.C. §907; *Jenkins*, 594 F.2d 404, 10 BRBS 1; *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 694, 18 BRBS 79, 87(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986); *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112, 114-115 (1996); *Shahady v. Atlas Tile & Marble Co.*, 13 BRBS 1007 (1981) (Miller, dissenting), *rev'd on other grounds*, 682 F.2d 968 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1146 (1983).

Commerce, 30 BRBS 112 (1996). It is well established that an administrative law judge is entitled to evaluate the credibility of all witnesses, has discretion in evaluating and weighing the evidence of record, and is not bound to accept the opinion or theory of any particular medical examiner. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). In reviewing findings of fact, the Board may not reweigh the evidence but may only inquire into the existence of substantial evidence to support the findings. *South Chicago Coal & Dock Co. v. Bassett*, 104 F.2d 522 (7th Cir. 1939), *aff'd*, 309 U.S. 251 (1940); *Miffleton v. Briggs Ice Cream Co.*, 12 BRBS 445 (1980), *aff'd*, 659 F.2d 252 (D.C. Cir. 1981) (table).

In this case, the administrative law judge rationally gave greater weight to Dr. Aboka's opinion because he was familiar with claimant's condition, his opinion was detailed and thorough, and nothing in the October 2015 MRI accounted for claimant's continued complaints. Decision and Order at 25-26; EXs 1-2. Contrary to claimant's assertion, the administrative law judge is not required to give determinative weight to Dr. Wardell as the treating physician when claimant's prior treating physician stated that additional treatment was unnecessary. *Cf. Amos v. Director, OWCP*, 153 F.3d 1051 (1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir.), *cert. denied*, 528 U.S. 809 (1999);[11] *see generally Consolidation Coal Co. v. Held*, 314 F.3d 184 (4th Cir. 2002). Therefore, as it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant is not entitled to disability benefits after November 4, 2015, as well as her conclusion that claimant has not established the necessity of Dr. Wardell's prescribed visco-supplementation injections and physical therapy subsequent to November 4, 2015.[12] *See Hunt*, 28 BRBS 364; *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988).

[11] In *Amos*, the claimant's treating physician recommended surgery. Two other physicians who examined the claimant opined that there may be no improvement with surgery and recommended against it; however, they did not explicitly state that it was an unreasonable or unnecessary option.

[12] The administrative law judge did not deny the compensability of other treatment such as the knee brace or medications. Decision and Order at 27.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge