U.S. Department of Labor

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

BRB No. 17-0675

JOHN W. BEALE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: July 10, 2018
HUNTINGTON INGALLS INDUSTRIES, INCORPORATED	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

John H. Klein (Montagna Klein Camden, LLP), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (2017-LHC-00623) of Administrative Law Judge Alan L. Bergstrom 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).

The facts in this case are undisputed. *See* Decision and Order at 2-3. Claimant worked for employer as a welder and, in the course of his duties, suffered an injury to his

right knee on July 25, 1991. Claimant filed a claim for benefits for the right knee injury and the district director issued compensation orders on April 26, 2007 and March 31, 2008, pursuant to which employer paid temporary total disability benefits from December 20, 1991 to February 2, 1992 and on May 3, 2007; and permanent partial disability benefits for a 20 percent impairment of the right lower extremity.[1] On April 9, 2009, claimant's counsel wrote to the district director requesting additional temporary total disability benefits from April 1 to April 5, 2009, for his right knee injury. CX 5. The parties entered into stipulations, and the district director issued a Supplemental Compensation Order on June 11, 2009, ordering employer to pay additional temporary total disability benefits from April 16 to April 20, 2008. CX 6. The Order did not address the benefits claimed for April 1 to April 5, 2009. The Supplemental Compensation Order stated that after employer paid the additional temporary total disability benefits, claimant's file would be "CLOSED, subject to the limitations of the Act or until further order of the District Director." CX 6 (emphasis in original). Employer made the last compensation payment for claimant's right knee injury on April 22, 2008.[2] *See* CX 3.

On August 15, 2016, claimant filed a petition for modification pursuant to Section 22, 33 U.S.C. §922, on the right knee claim, seeking additional temporary total disability benefits for various periods commencing April 1, 2009,[3] and also to increase the permanent impairment rating for his right knee to 25 percent.

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[1] These 2007 and 2008 Orders are not in the record but are incorporated by reference in the district director's June 11, 2009 Supplemental Compensation Order. *See* CX 6.

[2] Claimant suffered a work-related injury to his left knee on July 17, 2000. Claimant filed a timely claim and the district director filed a Compensation Order on April 3, 2006, pursuant to which employer paid temporary total disability benefits from October 17, 2000 to February 4, 2001 and from October 22, 2004 to October 24, 2004, and permanent partial disability benefits for a 20 percent impairment of the left lower extremity. CX 7. The district director also issued a Supplemental Compensation Order on July 30, 2009, ordering employer to pay additional temporary total disability benefits on September 25, 2006; from October 31 to November 4, 2007; from October 1 to October 5, 2008; and from April 1 to April 5, 2009. *Id.* Employer also paid temporary total disability benefits for periods from October 2009 to August 2013. Employer made the last compensation payment for the left knee injury on August 25, 2013. CX 8.

[3] These periods are: April 1-5, 2009; October 7-11, 2009; April 28-May 10, 2010; October 6-10, 2010; August 24-29, 2011; February 1-5, 2012; August 29-September 2, 2012; February 27-March 3, 2013; and August 21-25, 2013. Tr. at 9-10.

The administrative law judge found that claimant's Section 22 modification claim was untimely as claimant's right knee injury claim was closed on June 11, 2009 by the district director's Supplemental Compensation Order, and claimant did not file the petition for modification until August 15, 2016, well beyond the one-year statute of limitations in Section 22. Decision and Order at 11. The administrative law judge further stated that, even if the modification claim was not time-barred, claimant is not entitled to additional temporary total disability benefits for his right knee injury because he already received temporary total disability for his left knee injury for the same periods. Decision and Order at 8-9. Finally, the administrative law judge found that claimant did not meet his burden to establish a change in condition, i.e., an increase in the impairment to his right knee. Decision and Order at 13. The administrative law judge concluded that employer is not entitled to Section 8(f) relief, 33 U.S.C. §908(f), because claimant is not entitled to permanent disability benefits. *Id.*

Claimant appeals the administrative law judge's decision, contending the administrative law judge erred in concluding that his petition for modification is time-barred. He further contends the administrative law judge erred in concluding that he is not entitled to benefits for a 25 percent impairment to his right knee. Employer filed a response brief, urging affirmance of the administrative law judge's decision.

Section 22 of the Act provides the only means for modifying otherwise final decisions based upon a mistake of fact in the initial decision or a change in claimant's physical or economic condition. 33 U.S.C. §922; *Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 30 BRBS 1(CRT) (1995); *Westmoreland Coal Co., Inc. v. Sharpe*, 692 F.3d 317 (4th Cir. 2012), *cert. denied,* 133 S.Ct. 2852 (2013); *Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000). A Section 22 petition for modification must be filed within one year of the date of the last payment of compensation or, if a claim is denied, within one year of the date the decision becomes final. *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 43 BRBS 179 (2010), *aff'd*, 637 F.3d 280, 45 BRBS 9(CRT) (4th Cir.), *cert. denied*, 565 U.S. 1058 (2011). The Supreme Court has held that the one-year limitation of Section 22 applies to previously entered orders; it does not apply to claims that were timely filed but were not adjudicated. *Intercounty Constr. Corp. v. Walter*, 422 U.S. 1, 2 BRBS 3 (1975); *Seguro v. Universal Maritime Service Corp.*, 36 BRBS 28 (2002).

In this case, the administrative law judge found that the Supplemental Compensation Order issued by the district director on June 11, 2009, awarding temporary total disability benefits from April 16 to April 20, 2008, constituted a formal adjudication of the April 9, 2009 modification claim for the right knee injury. He acknowledged that the period of benefits requested in the modification claim was not included in the stipulations of fact, or awarded in the Order, but concluded that it was immaterial as "the essential claim is one for work-related right knee injury." Decision and Order at 11.

Therefore, he found that the Section 22 statute of limitations bars claimant's 2016 request for modification because the 2016 claim was made more than one year after June 11, 2009.

We agree with claimant that the administrative law judge's determination that the district director's June 2009 Supplemental Compensation Order closed claimant's April 9, 2009 claim for temporary total disability benefits for his right knee injury cannot be affirmed. The district director's authority is limited to issuing compensation orders only if the parties agree. 20 C.F.R. §702.316. On its face, the June 11, 2009 Order addresses only benefits for April 16 to April 20, 2008. The parties' actual stipulations are not in the record and it is not clear that claimant agreed not to pursue his claim for additional benefits for April 1 to April 5, 2009. If the parties disagreed as to his entitlement, the district director could not resolve that specific claim; she could neither award benefits nor deny the claim. *Durham v. Embassy Dairy*, 40 BRBS 15 (2006). Without a clear resolution, either awarding or denying claimant's claim to the additional temporary total disability benefits from April 1 to April 5, 2009, that modification claim remains open until it is adjudicated and the claim can be amended to include subsequent periods of alleged disability, as claimant did in this case. *See Gillus v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 93 (2003), *aff'd*, 84 F. App'x 333, 37 BRBS 120(CRT) (4th Cir. 2003); *Gilliam v. Newport News Shipbuilding & Dry Dock Co.*, 35 BRBS 69 (2001) (holding that claimant can amend a pending modification request). The administrative law judge's finding that the district director's June 2009 Supplemental Compensation Order closed the claim for benefits from April 1 to April 5, 2009 is not supported by the record or in accordance with law, and therefore, it cannot be affirmed. We conclude, however, that the administrative law judge's error in this regard is harmless as to the benefits claimed, as we affirm the denial of claimant's petition for modification on the merits.

The administrative law judge addressed in the alternative both the 2009 and 2016 petitions for modification on the merits. The administrative law judge determined that claimant would not be entitled to the additional temporary total disability benefits claimed for his right knee injury, *see* n.3, *supra*, as the parties agreed that he was already compensated at a greater compensation rate during that same period for temporary total disability due to his left knee injury. *See* Tr. at 10. We affirm the administrative law judge's decision. Where claimant suffers from more than one disability, concurrent awards cannot exceed the statutory limit for total disability because a claimant may not be more than totally disabled. *See Fenske v. Service Employees Int'l, Inc.,* 835 F.3d 978, 50 BRBS 71(CRT) (9th Cir. 2016); *ITO Corp. of Baltimore v. Green*, 185 F.3d 239, 33 BRBS 139(CRT) (4th Cir. 1999); *see also Thornton v. Northrop Grumman Shipbuilding, Inc.*, 44 BRBS 111 (2010). Because claimant was already receiving temporary total disability

benefits for his left knee injury during the relevant time periods, he could not be entitled to any additional benefits for his right knee injury.[4]

We next turn to claimant's contention that the administrative law judge erred in finding he would not be entitled to an increased impairment rating for his right knee. The administrative law judge concluded that claimant did not show a change in condition that would justify an increase in the impairment rating for his right knee. The administrative law judge noted that Dr. Adelaar had assigned the 20 percent rating in January 2006, stating that claimant will eventually need total knee arthroplasty. Decision and Order at 12; *see* CX 1. In April 2016, Dr. Adelaar opined that claimant has a 25 percent right knee impairment because claimant will eventually need an arthroplasty. EX 3. The administrative law judge determined that Dr. Adelaar's statement regarding the 25 percent impairment rating "lacks sufficient rationale to distinguish it from his earlier 20 [percent] permanent impairment rating and is not given controlling weight." Decision and Order at 13.

We reject claimant's assignment of error. It is well established that an administrative law judge is not required to accept the opinion or theory of any medical expert but is entitled to determine the weight to be accorded to the evidence. The Board may not reweigh the evidence or substitute its own judgment for that of the administrative law judge. *See Ceres Marine Terminals, Inc. v. Director, OWCP [Jackson]*, 848 F.3d 115, 50 BRBS 91(CRT) (4th Cir. 2016); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Brickhouse]*, 315 F.3d 286, 36 BRBS 85(CRT) (4th Cir. 2002). In this case, the administrative law judge gave a rational explanation for rejecting Dr. Adelaar's increased impairment rating. As his conclusion is supported by substantial evidence, we affirm on the merits the finding that claimant did not establish a change in his condition.

[4] Claimant acknowledges this, and agrees he is not entitled to actual compensation for the periods in question. Cl. Br. at 13-14. Claimant avers, nonetheless, that he is entitled to the entry of an "award" for purposes of keeping his claim open for the 2016 petition for modification. Given our holding herein, this contention is moot, because, as we have stated, the timely April 9, 2009 modification claim remained open until it was adjudicated and denied by the administrative law judge in the decision currently before us. Claimant will have one year from the date of this decision in which to file an additional motion for modification. 33 U.S.C. §922; *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491 (4th Cir. 1994).

Accordingly, we reverse the administrative law judge's conclusion that claimant's modification petition was time-barred, but we affirm the administrative law judge's Decision and Order – Denying Benefits on the merits.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge