U.S. Department of Labor

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

BRB No. 15-0492

TANVEER KHAN	)	
	)	
Claimant	)	
	)	
v.	)	DATE ISSUED: June 20, 2016
	)	
MISSION ESSENTIAL PERSONNEL, LLC	)	
	)	
and	)	
	)	
ACE AMERICAN INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
and	)	
	)	
ZURICH AMERICAN INSURANCE COMPANY	)	
	)	
Carrier-Respondent	)	
	)	
TORRES ADVANCED ENTERPRISE SOLUTIONS, LLC	)	
	)	
and	)	
	)	
THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and the Order Granting Motion for Reconsideration and Amending Decision and Order of

Christopher Larsen, Administrative Law Judge, United States Department of Labor.
Keith L. Flicker, Robert N. Dengler and Daniel J. Louis (Flicker, Garelick & Associates, LLP), New York, New York, for Mission Essential Personnel, LLC and ACE American Insurance Company.

Bradley T. Soshea and Craig D. Stocker (Schouest, Bamdas, Soshea & BenMaier PLLC), Houston, Texas, for Mission Essential Personnel, LLC and Zurich American Insurance Company.

Michael T. Quinn and Nora Devine (Thomas, Quinn & Krieger, LLP), San Francisco, California, for Torres Advanced Enterprise Solutions, LLC and the Insurance Company of the State of Pennsylvania.

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

PER CURIAM:

Mission Essential Personnel, LLC (MEP) and its carrier, ACE American Insurance Company (ACE), appeal the Decision and Order Awarding Benefits and the Order Granting Motion for Reconsideration and Amending Decision and Order (2014-LDA-00436, 2014-LDA-00447) of Administrative Law Judge Christopher Larsen 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). 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 sustained a back injury as a result of a July 1, 2010 improvised explosive device (IED) attack which occurred in the course of his work as a linguist in Afghanistan for Torres Advanced Enterprise Solutions (Torres). Torres sent claimant stateside for treatment. Dr. Lazar diagnosed a herniated disk at L5-S1, which he attributed to the July 1, 2010 work accident; he recommended that claimant have surgery. Claimant opted for a minimally invasive left L5-S1 surgical procedure on September 20, 2010, and, after three months, received a clearance to return to work. Claimant returned to work as a translator for Torres on December 24, 2010,[1] who assigned him to a regional contracting

[1] Torres paid claimant temporary total disability benefits from September 10 through December 24, 2010, and medical benefits. 33 U.S.C. §§907(a), 908(b).

company (RCC) at Camp Dwyer in Afghanistan. Torres, through the RCC, provided claimant with "a very comfortable chair in their office," and a "good" work station. HT at 39, 61, 82. Claimant continued to work for Torres until November 18, 2012. On that date, MEP took over the contract under which claimant worked.

The RCC left Camp Dwyer in either late November or early December 2012, and took with it all of its furniture, including claimant's comfortable chair, work station and high quality mattress. In its place, MEP provided claimant a hard folding chair, which claimant stated made him feel so uncomfortable that he was forced to work while sitting on his bed for almost a month, HT at 79; AX 5, and a lower quality mattress, through which claimant could feel "all the springs. . . touching" his back. AX 5. Claimant stated that his back symptoms worsened from December 2012 to January 2013, which he attributed to the change in furniture. HT at 44, 78, 83.

Claimant informed MEP, via email dated January 25, 2013, that he needed to quit his job because his lower back was "falling apart," as evidenced by his being able to "hardly walk" due to "sharp knife pain" in his lower back. CX 8. Once back in the United States, claimant experienced some immediate improvement in his condition during the first few months, but as 2013 progressed, his lower back condition further deteriorated. In November 2013, Dr. Lazar diagnosed claimant with a recurrent disk protrusion at L5-S1, and in May 2014, recommended that claimant undergo a repeat surgery.

Claimant filed claims under the Act against Torres and MEP, seeking temporary total disability benefits from January 26 through June 20, 2013, and temporary partial disability benefits thereafter, as well as medical benefits, for the work-related deterioration of his lower back condition. Torres, and its carrier, Insurance Company of the State of Pennsylvania (ICSP), controverted liability for any benefits after December 25, 2010, the date claimant returned to work. MEP, through its carriers ACE and Zurich America Insurance Company (Zurich),[2] controverted the claim on the ground that claimant's present condition is the result of the natural progression of his July 1, 2010 work-related back injury.

[2] Zurich American Insurance Company (Zurich) was the insurance carrier on the risk at the time claimant began working for MEP on November 19, 2012. On January 1, 2013, ACE American Insurance Company (ACE) became MEP's insurance carrier. Claimant's claim was initially filed against MEP and ACE. Prior to the hearing, ACE joined Zurich as a party to the claim because claimant's back symptoms reoccurred prior to ACE's coverage period and during Zurich's coverage period.

In his decision, the administrative law judge found that claimant sustained a work-related injury on July 1, 2010, with Torres, and that he sustained an aggravation of this injury from November 19, 2012 to January 25, 2013, while working for MEP. As MEP changed carriers effective January 1, 2013, the administrative law judge assigned liability for claimant's benefits to its more recent carrier, ACE. Decision and Order at 10-17. The administrative law judge found that claimant's back condition had not reached maximum medical improvement, that claimant is unable to perform his usual work as a linguist in Afghanistan, and that MEP/ACE established the availability of suitable alternate employment as of January 26, 2013. *Id.* at 18-23. The administrative law judge thus awarded claimant continuing temporary partial disability benefits from January 26, 2013, and medical benefits, payable by MEP and ACE.[3] 33 U.S.C. §§908(c)(21), (e), 907.

On appeal, ACE challenges the administrative law judge's determination that it is the party responsible for the payment of claimant's disability and medical benefits commencing January 26, 2013. Torres/ICSP and MEP/Zurich each respond urging affirmance of the administrative law judge's decision. ACE has filed a reply brief in support of its appeal.

ACE contends the administrative law judge erred in finding it liable for claimant's benefits. Specifically, ACE contends the record establishes that the deterioration of claimant's condition is a result of the natural progression of the work-related back injury he sustained on July 1, 2010, and the resulting September 20, 2010 spinal surgery.[4] ACE avers that the administrative law judge erroneously credited the vague opinion of Dr. Bays, that "something" happened to claimant's back while he worked for MEP, over the detailed opinions offered by Drs. McCollum and Curcin, that claimant's loss of "creature comforts" would not have caused or contributed to claimant's recurrent disk herniation. ACE thus contends that Torres is the liable employer.

[3] The administrative law judge, in his Order Granting Motion for Reconsideration and Amending Decision and Order, corrected a typographical error and a calculation error as to claimant's compensation rate.

[4] ACE maintains that, at most, its liability should be limited to a period of temporary aggravation for medical treatment and temporary partial disability benefits from January 22 through March 2013, and that Torres/ISCP, as claimant's employer/carrier at the time he sustained his July 1, 2010 back injury and experienced renewed back symptoms in 2011, should be liable for any additional surgery and the ultimate disability caused after March 2013, because claimant's condition, from that time, is a direct result of the July 1, 2010 IED attack and September 20, 2010 surgery. *See* discussion, *infra*.

In cases involving multiple traumatic injuries, the determination of the responsible employer and/or carrier turns on whether the claimant's disabling condition is the result of the natural progression or the aggravation of a prior injury. If the claimant's disability results from the natural progression of a prior injury and would have occurred notwithstanding the subsequent injury, then the prior injury is compensable, and the claimant's employer at that time is responsible for claimant's disability. If, however, the subsequent injury aggravates, accelerates or combines with the earlier injury to result in the claimant's disability, then the subsequent injury is the compensable injury and the subsequent employer is fully responsible for the resultant disability. *See, e.g., Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse Co. [Price],* 339 F.3d 1102, 37 BRBS 89(CRT) (9th Cir. 2003), *cert. denied,* 543 U.S. 940 (2004); *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991); *Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986). The aggravation rule applies even if the claimant sustained the greater part of his injury with a prior employer or carrier. *Foundation Constructors*, 950 F.2d 621, 25 BRBS 71(CRT). The administrative law judge must weigh the relevant evidence as a whole to determine the responsible employer and/or carrier; each employer and/or carrier bears the burden of persuading the administrative law judge that it is not the liable entity. *Buchanan v. Int'l Transp. Services*, 33 BRBS 32 (1999), *aff'd mem. sub nom. Int'l Transp. Services v. Kaiser Permanente Hosp., Inc.*, 7 F.App'x 547 (9th Cir. 2001).

In this case, the administrative law judge fully addressed the evidence presented by the parties and concluded that claimant's work in Afghanistan for MEP from November 19, 2012 through January 25, 2013, aggravated his back condition, resulting in disability. In reaching this conclusion, the administrative law judge properly focused on whether claimant sustained an aggravating back injury while working with MEP, and more specifically, while ACE provided coverage. *Price*, 339 F.3d 1102, 37 BRBS 89(CRT);[5] *see also Foundation Constructors*, 950 F.2d at 624, 25 BRBS at 75(CRT); *Kelaita*, 799 F.2d 1308. The administrative law judge found the opinions of Drs. Curcin and McCollum, that claimant's present condition is the natural progression of the July 1, 2010 work-related injury, are either poorly reasoned and/or based on insufficient facts. Decision and Order at 15. Specifically, the administrative law judge found Dr. Curcin's opinion flawed because he did not read claimant's deposition transcripts, he did not

[5] The administrative law judge correctly stated that, in *Price*, the Ninth Circuit affirmed an administrative law judge's determination that the claimant's last employer before his undergoing knee replacement surgery was liable, notwithstanding the fact that his employment that day did not affect the need for the already-scheduled knee replacement surgery, because that administrative law judge credited evidence that the claimant sustained some minor, but permanent, increase in his knee disability as a result of his employment that day. *Price*, 339 F.3d at 1107, 37 BRBS at 91(CRT).

review any MRI films, he did not, despite diagnosing a herniated disk and recommending surgery, impose any restrictions on claimant, and he was unaware of claimant's job duties as a linguist in Afghanistan. *Id.* The administrative accorded diminished weight to Dr. McCollum's natural progression opinion because, while it "relied heavily on Dr. Lazar's finding that there is a 20% recurrence rate of lumbar disk herniation,"[6] it "does not offer any convincing evidence to indicate that [claimant] falls within this 20%." *Id.*

The administrative law judge found that claimant "consistently recounted" that his low back symptoms worsened at the same time his working conditions changed after the RCC left Camp Dwyer.[7] Decision and Order at 16. The administrative law judge credited the opinions of Drs. Lazar and Bays, who attributed claimant's recurrent disk herniation, in part, to his work activities in Afghanistan in December 2012 through January 2013. *Id.*; *see* CXs 10; 11; 12 at 31, 32, 39; ZX 16. Crediting claimant's testimony in conjunction with the opinions of Drs. Lazar and Bays, the administrative law judge concluded that claimant's lower back symptoms sharply increased after the RCC removed the supportive furniture, and that the daily aggravation of his pre-existing back condition continued until his last day of work with MEP on January 25, 2013. He thus concluded that MEP and ACE are the liable parties.

It is well established that, in arriving at his decision, the administrative law judge is entitled to evaluate the credibility of all witnesses, to weigh conflicting evidence, and to draw his own inferences and conclusions from the evidence. *See Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999). The Board is not empowered to reweigh the evidence, but must accept the rational inferences and findings of fact of the administrative law judge which are supported by the record. *Id.* The administrative law judge addressed the credibility of claimant's testimony and found his recitation of the deterioration of his condition while working for MEP to have been consistent and therefore creditable. Decision and Order at 16; *Cordero v. Triple A*

[6] The administrative law judge further stated that if there is a 20 percent recurrence rate, then there is an 80 percent chance that the herniation is not due to a recurrence, a fact, which, in and of itself, "meets the preponderance of the evidence standard." Decision and Order at 15.

[7] When the RCC left Camp Dwyer claimant's high-quality chair, mattress and work station "all vanished" and were replaced by a hard folding chair and poor quality mattress. HT at 61-62, 71, 78-79. The administrative law judge found, based on claimant's credible statements, that the worsening of claimant's lower back symptoms coincided with the removal of the "creature comforts" provided to him by the RCC. Decision and Order at 16.

Machine Shop, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Moreover, the administrative law judge rationally gave greater weight to the opinions of Drs. Lazar and Bay than to those of Drs. Curcin and McCollum. *Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT).

ACE contends the administrative law judge did not specifically address its temporary aggravation argument, i.e., that claimant's condition was only temporarily aggravated through the end of his employment with MEP and that, thereafter, claimant's condition returned to baseline and degenerated due to the 2010 injury. *See generally Delaware River Stevedores, Inc. v. Director, OWCP*, 279 F.3d 233, 35 BRBS 154(CRT) (3d Cir. 2002). The administrative law judge acknowledged this contention, but stated it did not account for the progression of claimant's condition to the point that a second surgery was needed. *See* Decision and Order at 16. Although this statement begs the question of whether the need for surgery is due to the natural progression of the 2010 injury or to an aggravation caused by claimant's employment with MEP, any error is harmless. The administrative law judge rationally credited Dr. Bays's opinion, *id.* at 15, and Dr. Bays stated that claimant's "current [October 2014] complaints are the result of the aggravation, acceleration, exacerbation, or worsening due to job-related activities, circumstances or environment that occurred in December of 2012 through January of 2013 . . . ." ZX 16 at 17. Thus, we reject ACE's contention of error.

In sum, the administrative law judge's finding, that claimant's condition is due to a work-related aggravation of his low back symptoms he suffered through January 25, 2013, while in MEP's employ, is supported by substantial evidence of record. Therefore we affirm the administrative law judge's finding that MEP is the responsible employer, and that ACE is the responsible carrier, liable for the disability and medical benefits due claimant. *Price*, 339 F.3d 1102, 37 BRBS 89(CRT); *Lopez v. Stevedoring Services of America*, 39 BRBS 85 (2005), *aff'd mem.,* 377 F.App'x 640 (9th Cir. 2010); *Buchanan*, 33 BRBS 32.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Order Granting Motion for Reconsideration and Amending Decision and Order are affirmed.

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