U.S. Department of Labor

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

BRB No. 17-0536

ROGELIO HERNANDEZ-GARCIA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ICE FLOE, LLC, dba NICHOLS BROTHERS	)	DATE ISSUED: May 18, 2018
	)	
and	)	
	)	
AMERICAN LONGSHORE MUTUAL ASSOCIATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order After Remand of Christopher Larsen, Administrative Law Judge, United States Department of Labor.

Matthew S. Sweeting, Tacoma, Washington, for claimant.

Nina M. Mitchell (Nicoll Black & Feig, PLLC), Seattle, Washington, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order After Remand (2014-LHC-01160) 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*. (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. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

This case is before the Board for the second time. To briefly reiterate the facts, claimant filed a claim under the Act seeking ongoing disability and medical benefits for bilateral knee injuries he allegedly sustained while working for employer. Claimant underwent arthroscopic left knee surgery on April 30, 2012. In his initial Decision and Order, the administrative law judge awarded claimant temporary total disability and medical benefits from December 21, 2011 to November 29, 2012, but denied claimant's specific request that employer be held liable for the cost of a second arthroscopic inspection of his left knee.

On appeal, the Board vacated the administrative law judge's denial of additional disability benefits and remanded the case for him to determine if claimant made his prima facie case of total disability for any period after November 29, 2012. The Board also instructed the administrative law judge to re-address whether claimant established the necessity of, and employer's liability for, a second arthroscopic procedure for the treatment of claimant's work-related left knee injury. *Hernandez-Garcia v. Ice Floe, LLC*, BRB No. 16-0044 (Aug. 30, 2016) (unpub.). Employer filed a timely motion for reconsideration which was denied by the Board in an Order issued on December 9, 2016.

On remand, the administrative law judge found that claimant failed to establish either the medical necessity of a second left knee arthroscopic procedure or his inability to return to his usual work after November 29, 2012. Consequently, the administrative law judge denied additional benefits.

On appeal, claimant generally challenges the denial of his claim for additional disability and medical benefits. Employer responds, urging affirmance of the administrative law judge's decision on remand in its entirety.

In the "Issues" and "Summary of Position" sections of his Petition for Review and brief, claimant summarily states that the administrative law judge erred in denying his claim for a second arthroscopic inspection of his left knee. *See* Cl. Br. at 3-4. However, claimant does not make any specific arguments with regard to this issue.[1] A party challenging an administrative law judge's finding must demonstrate why, in terms of law and evidence, he believes the finding is not supported by substantial evidence or in accordance with law. *Montoya v. Navy Exch. Serv. Command*, 49 BRBS 51 (2015). Mere allegation of error is not sufficient to invoke Board review. *Collins v. Oceanic Butler, Inc.*,

[1] Claimant states only that he "believes the medical evidence supports an additional medical procedure." Cl. Br. at 3.

23 BRBS 227 (1990); 20 C.F.R. §802.211(b). We, therefore, decline to address claimant's challenge to the administrative law judge's finding that a second procedure is not necessary, as the issue has not been adequately briefed. *See Plappert v. Marine Corps Exch.*, 31 BRBS 109 (1997), *aff'g on recon. en banc* 31 BRBS 13 (1997); *Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 214 (1988). The administrative law judge's finding is affirmed.

Claimant challenges the administrative law judge's denial of additional disability benefits subsequent to November 29, 2012, alleging the finding is not supported by substantial evidence. We disagree.

It is well-established that claimant bears the burden of establishing that he is disabled as a result of a work-related injury. *See Anderson v. Todd Shipyards, Inc.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1980). Thus, in order to establish a prima facie case of total disability, claimant must prove that he is unable to return to his usual work due to the work injury. *See Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988); *see generally Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *Newport News Shipbuilding & Dry Dock Co. v. Riley*, 262 F.3d 227, 35 BRBS 87(CRT) (4th Cir. 2001).

The administrative law judge credited the opinions of Dr. Leavitt, Dr. Becker, and employer's vocational expert, Neil Bennett, in concluding that claimant did not meet his burden of establishing he was incapable of returning to his usual work as of the date he reached maximum medical improvement, November 29, 2012. *See* Decision and Order After Remand at 5-9. *Id.* at 8.[2] He found that Dr. Leavitt, who performed claimant's surgery, opined on November 12, 2012, that claimant's left knee exhibited a zero percent impairment with full range of motion, no muscular deficits, and no quadriceps atrophy. CX 3 at 87. Dr. Leavitt reiterated this opinion on April 18, 2013. CX 5 at 103. Dr. Becker,

[2] Mr. Bennett testified at his deposition as to the duties of a marine painter, based on claimant's description to him of the job and his own observations. Mr. Bennett stated that claimant's duties included: surface preparation with grinders and sandblasters; painting tanks, complex piping systems, side shells, hulls, decks, interior and exterior structures; mixing paint; operating airless and conventional sprayers; applying paint with brush and rollers; and spreading protective tarps and plastics. EX 18.563 to 18.564. The administrative law judge found that while claimant's usual employment duties as a marine painter required him to perform a variety of paint-related tasks, claimant did not establish the actual physical requirements of his usual employment in terms of how often he had to bend, walk, climb ladders, stand or sit. *See* Decision and Order After Remand at 8-9.

Ph.D., conducted a physical capacity evaluation of claimant on September 10, 2014, and concluded claimant could perform full-time medium-duty work without restrictions. CX 24 at 9. The administrative law judge found that Mr. Bennett opined, after visiting employer's facility, that claimant could return to work as a marine painter, given Dr. Becker's evaluation. EX 18.566. The administrative law judge thus concluded that claimant failed to meet his burden of proving that he could not return to his usual employment duties as of November 29, 2012. *See* n. 2, *supra*.

With respect to the remaining evidence, the administrative law judge found claimant's testimony regarding his pain and limitations unreliable, and, based on that finding, declined to credit medical opinions that relied on those complaints, such as Dr. Kinahan's March 7, 2013 report,[3] and Dr. Johnson's April 9, 2014 report.[4] The administrative law judge also declined to credit "form reports" which merely checked boxes as to claimant's disability status, finding them to be conclusory and lacking in any reasoning.[5] Decision and Order After Remand at 5-6, 8. He also found that Dr. Billington's

[3] On March 7, 2013, Dr. Kinahan prohibited, for one month, claimant from squatting, kneeling, and crawling and limited him to occasional ladder climbing, based on claimant's gait and subjective complaints. CX 4 at 95. The administrative law judge noted that observations of claimant's gait were not consistent over the course of several examinations by various medical providers. Decision and Order after Remand at 5. On April 2, 2013 and September 11, 2013, Dr. Kinahan continued the March 7 restrictions, but only on "Washington Insurer Activity Prescription" forms, which the administrative law judge found conclusory. CXs 4 at 100; 6 at 108; *see* discussion, *infra*.

[4] Dr. Johnson approved only sedentary work, based on claimant's subjective complaints and need for a crutch. *See* CX 8 at 125. The administrative law judge found, based on a video of claimant obtained by employer and the reports of other physicians, that claimant was capable "of at least some walking without a crutch." *See* Decision and Order After Remand at 6. The administrative law judge also found that Dr. Johnson's opinion took into consideration claimant's non-work-related conditions.

[5] On September 27, 2013, on a "Washington Insurer Activity Prescription" form, Dr. Skalley placed restrictions on claimant such that he could perform only modified duty through October 31, 2013; the restrictions included "seldom" climbing ladders and crawling, and "occasional" standing, walking, twisting, bending, and squatting. CX 7 at 109. Dr. Leavitt filled out two such forms, one on November 29, 2012, the date he stated claimant has a zero percent impairment rating, which checked a box stating claimant's prognosis for returning to work is poor, and prohibiting claimant from twisting, bending, stooping, squatting, kneeling and crawling, with "seldom" ladder climbing and occasional walking and standing permitted. CX 3 at 89. The second form, dated April 18, 2013, authorizes "modified duty" from April 18 to May 19, 2013, with occasional twisting,

opinion, that claimant has permanent knee restrictions, insufficient to establish claimant's prima facie case because he did not attribute them to the work injury. *Id*. at 7.

Claimant does not challenge the administrative law judge's finding that his credibility is suspect and that his subjective complaints are not credible. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); Decision and Order After Remand at 5, 11; *see also* Decision and Order at 14-15 (Sept. 15, 2015). Rather, claimant's allegation of error is limited to his contention that there are objective physical findings that support his claim of ongoing knee pain. Thus, claimant contends the medical evidence establishes he is totally disabled. Cl. Br. at 5. Claimant's allegation is insufficient to establish that the administrative law judge's conclusion is not supported by substantial evidence.

The administrative law judge is entitled to weigh the medical evidence and draw his own inferences and conclusions therefrom. The Board is not empowered to reweigh the evidence on the basis that other conclusions could be drawn from it, but must affirm the administrative law judge's findings if they are rational and supported by substantial evidence of record. *See generally Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT); *see also Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988). The administrative law judge permissibly credited the physical findings and zero percent impairment rating of Dr. Leavitt on November 29, 2012 and April 18, 2013, and the ultimate opinions of Dr. Becker and Mr. Bennett, to conclude that claimant did not meet his burden of establishing his inability to return to his usual work. The administrative law judge's rejection of contrary medical opinions predicated on claimant's unreliable subjective complaints and of the unexplained restrictions indicated on the form reports is well within his discretion. *See generally Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 25 BRBS 85(CRT) (9th Cir. 1991). Based on the evidence rationally credited, the administrative law judge's determination that claimant did not meet his burden of establishing that his work injury renders him unable to return to his usual work after November 29, 2012 is supported by substantial evidence. Therefore, we affirm the denial of benefits after this date.

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bending, stooping, squatting, kneeling, and crawling, and frequent standing, walking and climbing permitted. CX 5 at 105.

Accordingly, the administrative law judge's Decision and Order After Remand is affirmed.

SO ORDERED.

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JUDITH S. BOGGS
Administrative Appeals Judge

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GREG J. BUZZARD
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge