U.S. Department of Labor

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

BRB No. 19-0189

ROBERT NOVAK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NAVY EXCHANGE SERVICE COMMAND	)	
	)	
	)	DATE ISSUED: 10/07/2019
and	)	
	)	
ABERCROMBIE SIMMONS AND GILLETTE	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Jeffrey M. Winter and Kim Ellis, San Diego, California, for claimant.

James P. Aleccia and Marcy K. Mitani (Aleccia & Mitani), Long Beach, California, for employer/carrier.

Before: BUZZARD, ROLFE and GRESH, Administrative Appeals Judges

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2017-LHC-01111) of Administrative Law Judge Jennifer Gee rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *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 worked for employer at the Navy Postgraduate School as an auto technician performing vehicle service and repairs. On April 28, 2016, he was changing the tires on an armored vehicle, lifting each 65 to 70-pound tire up and onto the vehicle. When squatting and dead-lifting the fourth tire, he lost his balance and the tire started to fall on him. He made a corrective move and hurt his back. Claimant's supervisor filled out an accident report describing the injury as "groin and back are sore from changing 4 truck tires." EX 17. Claimant finished working that day.

The next day, claimant went to the Watsonville Hospital for treatment. A physician's assistant noted he complained of lower back pain and "tenderness in lumbar area." CX 7. Claimant was taken off work until May 3, 2016, when he was permitted to return with a restriction on lifting. On May 6, 2016, he began treatment at Action Urgent Care clinic. He returned to work on May 17, 2016, but after two days he stopped working again because he said he was in too much pain. CX 35 at 45. From May 23 to July 30, 2016, claimant worked part-time on light duty as a service writer and received temporary partial disability benefits. Tr. 2 at 9. On August 1, 2016, Action Urgent Care released him to full duty, against his wishes, CX 5 at 15; however, he returned to modified duty on August 1, 2016, took the next two days off work, and returned to full-duty work on August 4, 2016. Tr. 1 at 47-48. After experiencing difficulty picking up tools, claimant stopped working and has not returned. *Id.*

On June 5, 2017, claimant underwent bilateral lumbar diagnostic facet blocks at L3-L4, L4-L5, and L5-S1 performed by Dr. Parikh, who diagnosed claimant with lumbar spondylosis and lumbar disc displacement. CX 17 at 87, 93. Claimant next consulted with Dr. Khavkin on a referral from Dr. Parikh. Dr. Khavkin recommended transforaminal lumbar interbody fusion surgery from L2 to S1. EX 11 at 90. Claimant underwent that surgery on February 5, 2018.[1] *Id.* at 110. Dr. Khavkin stated claimant could not return to his usual work because of the surgery and estimated he could return to work between September and November of 2018. CX 38.

Drs. Rosen and Kucera also evaluated claimant. Dr. Rosen initially examined claimant on January 8, 2018, before claimant's surgery. He also reviewed surveillance

[1] Claimant's private insurance company initially denied coverage for the back surgery as they felt it was not medically necessary. Claimant successfully appealed and claimant's insurance ultimately paid for the surgery. Tr. 1 at 60-61.

videos of claimant. Dr. Rosen diagnosed claimant with chronic low back sprain, chronic degenerative disk disease and facet syndrome, but concluded the videos and other medical records belied his complaints and that claimant can perform sedentary work. *See* EX 8 at 26, 33. Regarding the lumbar fusion surgery, Dr. Rosen expressed doubt that it was related to claimant's work injury or would be successful. *See id.*

Dr. Kucera examined claimant on April 27, 2018, after the surgery, and reviewed claimant's medical records. He diagnosed claimant with low back strain, lumbar facet joint syndrome, lumbar disc herniation, L2-S1 posterior lumbar fusion, and low back pain from his April 2016 work injury. CX 43 at 577. He noted that claimant underwent lumbar fusion surgery as a neurosurgeon recommended due to a failure of conservative care and that this was necessary as a direct result of his injury. *See id.* He stated his review of the medical records did not show any marked discrepancy between claimant's claims of disability and any objective findings and that claimant's complaints to his physicians have been consistent. *See id.* at 578.

Claimant filed a claim for additional benefits under the Act.[2] The parties stipulated claimant suffered a work-related low back injury on April 28, 2016. Decision and Order at 2. They disputed the extent of claimant's injury as of July 31, 2016, whether claimant's condition had reached maximum medical improvement, and whether claimant's surgery on February 5, 2018, was reasonable and necessary for his injury.

The administrative law judge found claimant was not a credible witness, noting inconsistencies between his testimony and his medical records. Decision and Order at 37-39. She gave less weight to the opinion of Dr. Kucera because he relied on claimant's recitation of his medical history and additional weight to the opinion of Dr. Rosen, who was skeptical of claimant's statements. *See id.* at 40-41. She noted, however, that Dr. Kucera is more familiar with back and spinal pain issues than Dr. Rosen and thus afforded him "slightly more credibility" for that reason. *See id.* at 41.

The administrative law judge found claimant was able to return to his usual work after July 31, 2016, in view of his ability to perform sedentary work as a service writer for more than a month prior to that date and because the nurse practitioners at Action Urgent Care released him to full-duty work. Decision and Order at 44. She also relied on the

[2] Employer paid claimant temporary total disability benefits from April 29 to May 17, 2016 and temporary partial disability benefits from May 22 to July 30, 2016.

nurses' opinions that claimant misused his medication and refused to comply with their instructions.[3] *See id*.

The administrative law judge found claimant's February 5, 2018 surgery was not reasonable and necessary treatment for his April 2016 lower back injury. Decision and Order at 47. She noted Dr. Rosen opined that claimant's April 2016 back strain was not responsible for the fusion surgery or the pain he was experiencing. *See id*. She discounted Dr. Kucera's opinion that the surgery was related to the work injury because it was based on claimant's non-credible reports to him. *See id*. Because she found the surgery was not reasonable and necessary, she did not address whether claimant was required to seek authorization from employer or the district director prior to the surgery. She therefore denied additional disability and medical benefits.

On appeal, claimant asserts the administrative law judge erred in finding he was able to return to work and that his surgery was not reasonable and necessary treatment for his work injury. Employer filed a response brief, urging affirmance. Claimant filed a reply brief.

We agree with claimant that the administrative law judge erred in finding he was able to return to his usual work as of July 31, 2016. The administrative law judge found claimant had no legitimate work restrictions as of July 31, 2016, because the nurse practitioners at Action Urgent Care released him to full-duty work at that time. She did not give any weight to an opinion from Dr. Gjeltema, who was claimant's primary care physician at the time and stated that claimant could not work as of August 5, 2016, because Dr. Gjeltema did not give a reason for this recommendation. Decision and Order at 45-46. She also noted that claimant underwent an MRI on July 26, 2016, which Dr. Braslau, to whom the nurses at Action Urgent Care referred claimant, interpreted as being normal. *See id.* at 46.

A disability is classified as total if a claimant demonstrates that his work-related injury prevents him from performing his usual employment. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). A claimant's usual employment is the job he was performing at the time of his injury. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). In determining whether a claimant can return to his usual work, the administrative law judge must compare claimant's medical restrictions

[3] The nurse practitioner stated claimant was not using Naproxen as his primary pain reliever as prescribed, but was instead inappropriately using the prescribed Hydrocodone as his primary pain reliever. *See, e.g.*, EX 16 at 406, 411-414.

with the requirements of his usual employment. *See Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011).

While we acknowledge that the administrative law judge cited evidence supportive of her finding that claimant could return to his usual work on July 31, 2016, she erred in premising her finding on claimant's "ability to perform stationary work for over a month." Decision and Order at 45; *see Elliott v. C & P Telephone Co.*, 16 BRBS 89 (1984). The inquiry concerning "total disability" is whether a claimant is able to perform the job he performed at the time of his injury. *See Manigault*, 22 BRBS at 333. In this case, claimant's usual work as an auto technician required frequently lifting up to 20 pounds and occasionally lifting up to 60 pounds. CX 13 at 71-72. Claimant's ability to perform sedentary work does not support a finding that he was able to return to his usual employment.

Moreover, the administrative law judge did not discuss all the relevant medical evidence regarding the extent of claimant's disability. Although, Dr. Braslau read claimant's July 2016 MRI as normal, Dr. Wong, an orthopedic surgeon who reviewed the same MRI, concluded claimant had "L5-S1 disc herniation and annular tear." CX 10 at 61. Dr. Kucera later testified that someone with an annular tear should be limited to sedentary work. Tr. 1 at 134. In addition, the administrative law judge noted Dr. Gjeltema's August 29, 2016 disability opinion, but she did not discuss the opinions of the other doctors who continued to certify that claimant was unable to work after July 31, 2016.[4] Dr. Rosen, whose opinion the administrative law judge found credible, also stated claimant was not able to return to his usual work and should not "lift, push, pull, and carry more than 20 pounds." EX 8 at 33. These restrictions, if credited, would preclude claimant from performing his usual employment. Therefore, as the administrative law judge did not discuss all the relevant medical evidence on this issue, we vacate her finding that claimant was able to return to his usual work after July 31, 2016.[5]

[4] Dr. Bezard stated that claimant was unable to perform even sedentary work as of December 31, 2016, and stated that he was unable to work as of July 13, 2017. CX 8 at 25; CX 12. Dr. McKenna stated that claimant was unable to work as of March 12, 2017. CX 23.

[5] We reject claimant's assertion that the administrative law judge suspended his benefits pursuant to Section 7(d)(4) of the Act, 33 U.S.C. §907(d)(4), on the ground that failing to follow his medication protocol amounted to an "unreasonable refusal to undergo treatment." The administrative law judge did not actually apply this section to suspend benefits, nor did she purport to apply the legal analysis for application of this section. Decision and Order at 45, 47-48; *see Pittsburgh & Conneaut Dock Co. v. Director, OWCP*,

On remand, the administrative law judge must reconsider, in light of all the relevant evidence, whether claimant established an inability to perform his usual work due to his work-related injury. *See Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 49 (2005). If so, she must address whether employer established the availability of suitable alternate employment. *See Rhine v. Stevedoring Services of America*, 596 F.3d 1161, 44 BRBS 9(CRT) (9th Cir. 2010); *Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994).

We also agree with claimant that the administrative law judge erred in finding the February 5, 2018 lumbar fusion surgery that Dr. Khavkin recommended and performed not reasonable and necessary. The administrative law judge relied on Dr. Rosen's opinion that the surgery was not related to claimant's April 2016 lower back strain and on the absence of surgery recommendations from claimant's other doctors. Decision and Order at 47. She also stated that Dr. Kucera's opinion is entitled to less weight because he relied on claimant's subjective reports, which the administrative law judge found were not credible. *See id.*

Section 7 of the Act provides that an employer is responsible for "medical, surgical, and other attendance or treatment … for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. §907(a). In order for an employer to be responsible, the treatment must be reasonable and necessary and related to a claimant's work injury. 20 C.F.R. §702.402; *R.C. [Carter] v. Caleb Brett, LLC*, 43 BRBS 75 (2009). The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has held that an opinion of a treating physician is entitled to greater weight. *Amos v. Director, OWCP*, 153 F.3d 1051, 1054, 32 BRBS 144, 147(CRT) (9th Cir. 1998), *amended*, 164 F.3d 480 (9th Cir.), *cert. denied*, 528 U.S. 809 (1999).

In *Amos*, claimant's treating physician recommended surgery while two other doctors disagreed, recommending more conservative treatment. *Id.*, 153 F.3d at 1054, 32 BRBS at 147(CRT). The administrative law judge found the opinion of the claimant's treating physician to be less persuasive and therefore denied the surgery. The Ninth Circuit disagreed, holding that "[a]lthough the employer is not required to pay for unreasonable and inappropriate treatment, when the patient is faced with two or more valid medical alternatives, it is the patient, in consultation with his own doctor, who has the right to chart his own destiny." *Id.*, 153 F.3d at 1054, 32 BRBS at 147(CRT); *see Monta v. Navy Exch. Serv. Command*, 39 BRBS 104 (2005). The court concluded that because the treating physician's "recommendation was entitled to special deference, and since that opinion was

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473 F.3d 253, 40 BRBS 73(CRT) (6th Cir. 2007); *B.C. [Casbon] v. Int'l Marine Terminals*, 41 BRBS 101 (2007).

not shown by the testimony of the other doctors to be unreasonable, the ALJ's choice of one reasonable option over the other was not hers to make." *Amos*, 153 F.3d at 1054, 32 BRBS at 147(CRT).

We vacate the administrative law judge's denial of benefits for claimant's lumbar fusion surgery because she did not discuss all the relevant medical evidence or discuss *Amos* when considering the compensability of the surgery.[6] The administrative law judge discussed only the opinions of Drs. Rosen and Kucera as to whether the lumbar fusion surgery was reasonable and necessary. Claimant discussed surgery and other alternative treatments with Dr. Parikh.[7] CX 17 at 119. Dr. Parikh referred claimant to Dr. Khavkin, who recommended lumbar fusion surgery from L2 to S1 for claimant's injury, which he underwent in February 2018. EX 11 at 91. An administrative law judge's failure to discuss relevant evidence requires remand, pursuant to the Administrative Procedure Act, 5 U.S.C. §557. *See Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990). On remand, the administrative law judge must reconsider the compensability of claimant's lumbar fusion surgery in light of *Amos*, and all relevant medical opinions regarding the necessity and reasonableness of lumbar fusion surgery to treat claimant's work injury. If necessary, the administrative law judge should address any other unresolved issues concerning claimant's entitlement to medical benefits.

[6] Earlier in her decision, the administrative law judge cited *Amos* for the proposition that status as a treating physician "is one factor to consider when resolving conflicts in medical opinion evidence." Decision and Order at 36.

[7] Dr. McKenna recommended claimant undergo injection therapy before considering surgery, which claimant did in April 2017. CX 31. In June 2017, Dr. Parikh administered facet blocks and an epidural injection, which ultimately did not relieve claimant's pain. CXs 17 at 125C; 34. Subsequently, Dr. Parikh recommended radiofrequency denervation, which was postponed after Dr. Khavkin recommended surgery. CX 17 at 99, 104, 111. On November 3, 2017, claimant asked Dr. Parikh for a referral for a second opinion regarding surgery. *Id.* at 119. Claimant reported to Dr. Parikh that the "second opinion regarding spine advised radiofrequency ablation. Patient is hoping to proceed with surgery so that he does not have to have repeat radiofrequency ablation every 6 months to year." *Id.* at 125B.

Accordingly, we vacate the administrative law judge's Decision and Order Denying Benefits and remand the case for further proceedings consistent with this opinion.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge