

U.S. Department of Labor

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



BRB No. 21-0511

NATHAN FRAKER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TRIPLE CANOPY	)	
	)	
and	)	
	)	
STARR INDEMNITY & LIABILITY	)	DATE ISSUED: 12/22/2022
COMPANY	)	
	)	
Employer/Carrier-	)	
Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Order Granting Employer’s Motion for Remand and Order Denying Claimant’s Motion for Reconsideration of Heather Leslie, Administrative Law Judge, United States Department of Labor.

Scott L. Thaler (Grossman Attorneys at Law), Boca Raton, Florida, for Claimant.

Lisa Torron-Bautista (Schouest, Bamdas, Soshea & BenMaier P.L.L.C.), Boca Raton, Florida, for Employer/Carrier.

Matthew W. Boyle (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: ROLFE, GRESH, and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Heather Leslie's Order Granting Employer's Motion for Remand and Order Denying Claimant's Motion for Reconsideration (2020-LDA-01145) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (Act or LHWCA), as extended by the Defense Base Act, 42 U.S.C. 1651 *et seq.* (DBA). We must affirm the ALJ'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).

On April 25, 2019, while working for Employer in Kabul, Afghanistan, Claimant fell off a treadmill resulting in alleged injuries to his lumbar spine, right knee, right hip, right groin, and cervical spine.<sup>1</sup> Claimant's Proposed Trial Exhibit (CX) 1.<sup>2</sup> Two days later, on April 27, 2019, Claimant allegedly injured his left shoulder after falling in the shower when his right knee gave out. *Id.* Claimant subsequently amended his claim to include his left shoulder injury. *Id.*

Employer initiated temporary total disability (TTD) benefits on June 3, 2019, retroactive to May 1, 2019. CX 4. A dispute arose regarding the authorization of medical

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<sup>1</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Second Circuit because Claimant filed his claim in the Region II District Office of the Office of Workers' Compensation Programs (OWCP), which is in New York. 33 U.S.C. §921(c); *McDonald v. Aecom Tech. Corp.*, 45 BRBS 45 (2011).

<sup>2</sup> The ALJ remanded this claim to the district director before holding a hearing, therefore Claimant's proposed hearing exhibits, submitted with his Pre-Hearing Statement, were never formally admitted into evidence. Employer had not yet submitted any proposed hearing exhibits at the time the ALJ issued her Order Granting Remand. We note Employer attached exhibits to its Response Briefs; however, each of these exhibits are duplicates of those previously submitted to the ALJ as attachments to Employer's various motions and therefore are already in the record before us.

treatment, leading the parties to participate in an Informal Conference. Exhibits (Exh.) 3 and 4 of Employer's Renewed Motion for Remand (Emp. Renewed Remand Motion). After the conference, a claims examiner issued a memorandum recommending Employer authorize Claimant to have knee and shoulder surgeries. Exh. 4 of Emp. Renewed Remand Motion. Employer thereafter agreed to authorize Claimant's knee surgery but refused to authorize his shoulder surgery. Emp. Renewed Remand Motion at 3.

Claimant subsequently submitted a Form LS-18, Pre-Hearing Statement, requesting the claim be referred to the Office of Administrative Law Judges (OALJ). CX 5. Notably, in addition to authorization for shoulder surgery, he also listed his ongoing entitlement to disability compensation as a disputed issue. *Id.*

A formal hearing was scheduled for June 17, 2021. Claimant's Brief in Support of Petition for Review (Cl. Br.) at 2. Meanwhile, Employer continued to pay regular, uninterrupted TTD benefits. Exh. 2 of Emp. Renewed Remand Motion. On June 2, 2021, before the scheduled hearing, Employer sought remand to the district director, stating it would withdraw its controversion of the Claimant's entitlement to shoulder surgery. But while it agreed to have the district director issue a compensation order on that issue, it objected to any order awarding TTD compensation because it had not controverted Claimant's right to that compensation. Emp. Renewed Remand Motion at 7.

On June 15, 2021, the ALJ granted Employer's request for remand. She relied on 20 C.F.R. § 702.351, which provides that "whenever a party withdraws his controversion of the issues set for a formal hearing, the administrative law judge shall halt the proceedings . . . and forthwith notify the district director who shall then proceed to dispose of the case as provided for in § 702.315." Order Granting Employer's Motion for Remand (Order Granting Remand) at 2. The ALJ recognized that "the medical issues are not the only issue Claimant has raised . . . ; Claimant has also requested disability compensation." *Id.* But because the Employer was paying TTD compensation voluntarily, she found that issue was not contested and therefore not ripe for adjudication. *Id.* at 2-4. The ALJ stated "[a] remand would prevent premature adjudication, entanglement in abstract disagreements, and promote judicial efficiency." *Id.* at 4. Claimant sought reconsideration, which the ALJ denied.

Claimant appeals both orders. He contends the ALJ erred in remanding the case to the district director under 20 C.F.R. §702.351 when the issue of his entitlement to disability benefits remains in dispute, relying on the Benefits Review Board's decision in *Hoodye v. Empire/United Stevedores*, 23 BRBS 341 (1990). Cl. Br. at 4. The Director, Office of Workers' Compensation Programs (Director), responds arguing the ALJ erred in not issuing an order resolving Claimant's right to continuing TTD compensation, also relying on *Hoodye*. Director's Response Brief (Dir. Br.) at 5-7. Employer responds to both

Claimant and the Director, attempting to distinguish *Hoodye* and urging affirmance of the Order Granting Remand. Employer's Response to the Claimant's Notice of Appeal/Petition for Review (Emp. Resp. to Cl. Br.) at 10; Employer's Reply to Director's Response Brief (Emp. Resp. to Dir. Br.) at 4.

We agree with Claimant that the ALJ erred in granting remand under 20 C.F.R. §702.351, as the language of that regulation unequivocally requires agreement between the parties on all issues prior to remand. Because Employer and Claimant disagree regarding Claimant's continued entitlement to compensation, remand is prohibited.<sup>3</sup>

Section 702.351 instructs ALJs to halt proceedings and remand claims to the district director upon receipt of a signed statement withdrawing controversion of all issues scheduled for a hearing. 20 C.F.R. §702.351. Here, Employer submitted a signed statement withdrawing its controversion of one limited issue: whether to authorize Claimant's request for shoulder surgery. The scheduled hearing before the ALJ, however, was not limited to that issue but was also to address the issue of Claimant's entitlement to continuing TTD benefits, as raised in his Pre-Hearing Statement. As Employer's withdrawal of controversion did not cover "all issues" scheduled for a hearing, remand was improper. 20 C.F.R. §702.351.

A straightforward reading of the regulations compels this result. The latter half of Section 702.351 instructs the district director, on remand, to "dispose of the case as provided for in § 702.315." 20 C.F.R. §702.351. Section 702.315, in turn, is titled "agreement on all matters with respect to the claim" and instructs the district director to enter a compensation order *only* when "agreement is reached *on all issues*[" 20 C.F.R. §702.315 (emphasis added). By contrast, 20 C.F.R. §702.316 instructs the district director to draft a non-binding recommendation and/or referral of the claim to the OALJ for adjudication when the parties do not agree "on all issues." 20 C.F.R. §702.316.

The Board has explicitly held Section 702.351 can only apply when no unresolved issues remain. *Hoodye v. Empire/United Stevedores*, 23 BRBS 341 (1990). In *Hoodye*, the only controverted issue was the claimant's entitlement to TTD benefits for a short

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<sup>3</sup> 20 C.F.R. §702.351 states:

Whenever a party withdraws his controversion of the issues set for a formal hearing, the administrative law judge shall halt the proceedings upon receipt from said party of a signed statement to that effect and forthwith notify the district director who shall then proceed to dispose of the case as provided for in §702.315.

period of time. At the hearing, the employer withdrew its controversion of the issue and requested remand, which the ALJ granted, with instructions to the district director to calculate the exact amount of past-due TTD the employer owed for the suspension period. The ALJ declined to address the issue of the claimant's ongoing entitlement to TTD, which had been identified as an unresolved issue on pre-hearing filings, as the claimant's condition had not yet reached maximum medical improvement (MMI). *Id.* at 342-43. The Board reversed, holding the ALJ erred in finding no dispute between the parties because the issue of the nature and extent of the claimant's disability at the time of the formal hearing was clearly and properly before him, by virtue of both parties' pre-hearing statements. *Id.* at 343.

So too here. Employer attempts to distinguish *Hoodye*, arguing the suspension of benefits there created a real dispute absent in this case. Emp. Resp. to Cl. Br. at 10. But that alleged distinction makes no difference. The remaining issue for the ALJ in *Hoodye* to consider, as the parties identified on their pre-hearing filings, was Claimant's continued entitlement to benefits that the employer was voluntarily paying. Similarly, in this case, once Employer withdrew its controversion of Claimant's entitlement to shoulder surgery, the only remaining issue was Claimant's continued entitlement to TTD benefits, as identified in his Pre-Hearing Statement. Consequently, *Hoodye* is directly on point on these material facts.

As disagreement between the parties exists, the district director lacks the power to "dispose of the claim" pursuant to 20 C.F.R. §702.315, and the ALJ erred in remanding the claim pursuant to 20 C.F.R. §702.351. Consequently, we reverse the Order Granting Employer's Motion for Remand. 20 C.F.R. §§702.351, 702.315; *see Hoodye*, 23 BRBS 341.<sup>4</sup>

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<sup>4</sup> The ALJ erred in her application of the ripeness doctrine to this claim. The parties clearly do not agree remand is in order, which in and of itself renders remand pursuant to 20 C.F.R. §702.351 improper and necessitates reversal of the ALJ's Order Granting Remand, as outlined above; therefore, we address ripeness only for clarity. Employer's voluntary compensation payments under the Act do not constitute a stipulation as to compensability, *Foster v. Davison Sand & Gravel Co.*, 31 BRBS 191 (1997); therefore, absent an order, Employer can unilaterally, and at any time, dispute the compensability of an injury, suspend, or terminate benefits, and/or withhold medical authorization, a potentially significant hardship on Claimant. The fact that Claimant has not yet reached MMI is immaterial, *Hoodye*, 23 BRBS at 343-344, and Employer has provided no other reason why the requested relief should be postponed. As a result, because the interest in postponing relief is outweighed by the potential hardship on Claimant, his continued entitlement to disability benefits is an issue ripe for adjudication. *Chavez v. Director, OWCP*, 961 F.2d 1409, 25 BRBS 134(CRT) (9th Cir. 1992).

Accordingly, we reverse the ALJ's Order Granting Employer's Motion for Remand and Order Denying Claimant's Motion for Reconsideration. The ALJ should issue an order addressing Claimant's continued entitlement to TTD disability benefits under the Act, either after adjudication or upon the parties' stipulation.<sup>5</sup>

SO ORDERED.

JONATHAN ROLFE  
Administrative Appeals Judge

DANIEL T. GRESH  
Administrative Appeals Judge

MELISSA LIN JONES  
Administrative Appeals Judge

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<sup>5</sup> The administrative record before us indicates Claimant's condition has not yet reached MMI; therefore, he is not entitled to permanent disability benefits. *See Pietrunti v. Director OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997); *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991). If the facts have changed in the interim, the ALJ should take Claimant's claim for post-MMI benefits into consideration.