BRB No. 93-2124

EWART V. ROCHESTER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GEORGE WASHINGTON UNIVERSITY	)	DATE ISSUED:
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Order of Remand and Decision and Order - Rejection of Claim of Aaron Silverman, Administrative Law Judge, United States Department of Labor.

Clement Theodore Cooper, Washington, D.C., for claimant.

Kelly D. Vanstrom (Anderson & Quinn), Rockville, Maryland, for employer/ carrier.

Before: HALL, Chief Administrative Appeals Judge, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order of Remand and Decision and Order -- Rejection of Claim (92-DCW-8) of Administrative Law Judge Aaron Silverman denying benefits 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*. (1982), as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§501, 502 (1973)(the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which 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).

Claimant was employed by the George Washington University as a service worker. On March 12, 1979, claimant suffered a low back injury as he was handling a heavy barrel which contained debris. He returned to work on his own without apparent permanent impairment. After this event, claimant missed work intermittently, and received temporary total disability benefits. He left the employ of the University in 1981, and received retirement benefits from employer beginning in 1983.

Subsequent to the accident, however, claimant began to suffer from a condition labelled "dystonia" which in this case was characterized by involuntary jerking and twisting motions of his upper right extremity and torso to the right. By October 30, 1981, Dr. Koulouris indicated that claimant's "[work-related] lumbosacral spine symptoms gradually improved [after the March 12, 1979 accident]" but that seven months after the accident "claimant developed an uncontrollable jerking movement of his upper trunk and head to the right ... ." Dr. Koulouris opined that this condition was unrelated to the work injury. Cl. Ex. III-C.

Claimant sought benefits under the Act. In July 1983, claimant, through counsel, entered into a Section 8(i) settlement, 33 U.S.C. §908(i) (1982), pursuant to which claimant received a lump sum payment in the amount of $10,000, of which $2,000 was to go to counsel as a fee, and the right to receive reasonable medical expenses that might be incurred as a result of the March 12, 1979, injury. On November 19, 1991, claimant, now represented by new counsel, petitioned to vacate the settlement, and also claimed medical benefits for his dystonia on the grounds that this condition was related to the 1979 injury. After an informal conference was held before a claims examiner, that official found that claimant's dystonia was not work-related, and determined that the district director lacked the jurisdiction to set aside the compensation order which approved the settlement agreement. Cl. Ex. XXXIII-C. The case was referred to the Office of Administrative Law Judges on November 21, 1991.

The administrative law judge likewise declined to set aside the district director's refusal to reopen the settlement, stating in an Order of Remand dated February 22, 1992, that he did not have the authority to vacate or set aside the settlement agreement. In this interlocutory Order, the administrative law judge, citing claimant's entitlement to possible medical benefits pursuant to the settlement, remanded the claim to the district director for a determination of whether "any of claimant's medical conditions" are related to his employment injury. Order of Remand (Feb. 26, 1992).

In a Decision and Order dated June 10, 1993, which was confined to the question of whether claimant was entitled to medical benefits, the administrative law judge found that claimant's dystonia is not related to his March 1979 injury. The administrative law judge implicitly invoked the presumption of causation accorded by Section 20(a), 33 U.S.C. §920(a), but found that the "weight of the reliable probative and substantial evidence severs the relationship between the Claimant's dystonia and his employment." Decision and Order at 5. Medical benefits were thus denied for this condition, and claimant has appealed.

Claimant first contends that the administrative law judge has the authority to set aside a settlement agreement "where there has been a mistake of medical fact" or a "medical controversy regarding the cause-effect relationship" between physical trauma and his dystonia, and that he erred in ruling otherwise. Claimant maintains that his dystonia was aggravated by his industrial injury. Finally, stating that "where law ends, equity begins," claimant asserts that the Board is a "court" pursuant to 5 U.S.C. §551(1)(b), and can thus invoke equity powers to set aside the settlement agreement. Claimant avers that the Board can thus "sidestep" the ruling in *Downs v. Director, OWCP*, 803 F.2d 193, 19 BRBS 36 (CRT) (5th Cir. 1986), in which the Fifth Circuit, held, *inter alia*, that a settlement agreement cannot be reopened pursuant to the modification provisions of Section 22 of the Act, 33 U.S.C. §922.

Claimant also argues that medical evidence in the form of treatises which were favorable to him were not considered or were concealed. Claimant avers that had he known of medical authorities who theorized in general that dystonia can be caused or aggravated by trauma, he would have rejected the settlement petition but for these "faulty medical assumptions." Cl. Br. at 25-26. Claimant concludes his argument by asserting that the administrative law judge also possesses the equitable power to set aside the settlement agreement.[1] Claimant does not explicitly challenge the administrative law judge's causation findings in his latest Decision and Order, other than to reiterate his general theories that dystonia can be related to, or aggravated by, work-related trauma.

Employer responds to claimant's appeal, urging affirmance in all respects. Employer initially avers that claimant's arguments relating to the administrative law judge's and the Board's authority to set aside the settlement agreement, and the equitable reasons therefor, are not before the Board on appeal. Employer asserts that the sole issue is whether the Decision and Order of the administrative law judge denying medical benefits should be affirmed, and reminds the Board that claimant failed to appeal the administrative law judge's February 26, 1992, Order of Remand refusing to set aside the settlement agreement and remanding to the district director.

At the outset, we hold that employer's challenge to the scope of claimant's appeal is without merit. The administrative law judge's Order declining to set aside the settlement agreement and remanding the case to the district director for a determination of claimant's entitlement to medical benefits is interlocutory and not subject to direct appeal. *See generally Arjona v. Interport*

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[1]In this regard, claimant also states that the claims examiner, who recommended on remand that the settlement agreement not be reopened, lacked the authority to do so. In a letter to the administrative law judge, dated June 30, 1992, the claims examiner objected to claimant's apparent attack on his character and integrity. As a result, claimant sought to reopen the record for an inquiry into possible conflicts of interest and improprieties on the part of the claims examiner. The administrative law judge rejected this request, reminding the parties that the sole issue remaining in this case was whether claimant's dystonia was work-related. Ruling Denying Motion to Reopen Record (July 13, 1992). This discretionary ruling is not at issue in this appeal. Moreover, given the administrative law judge's finding that he too lacked the authority to reopen the agreement, claimant's assertions regarding the claims examiner are moot.

Maintenance, 24 BRBS 222, 223 (1991). As a final decision has issued on the claim, and claimant has timely appealed, the administrative law judge's interlocutory Order is now subject to review. *Burns v. Director, OWCP*, 41 F.3d 1555, 1561-1562, 29 BRBS 28, 36-37 (CRT)(D.C. Cir. 1994); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 944, 25 BRBS 78, 80 (CRT) (5th Cir. 1991); *Sun Shipbuilding & Dry Dock Co. v. Benefits Review Board*, 535 F.2d 758, 761 n.10, 4 BRBS 32, 34 n.10 (3d Cir. 1976); *see* 5 U.S.C. §704. Accordingly, the issue of the correctness *vel non* of the administrative law judge's decision not to reopen the compensation order approving the settlement agreement is properly before us.

We now turn to the issues raised by claimant and find them to be without merit. Claimant's contentions that the Board (and the administrative law judge) is a court, and may equitably set aside the now 15-year old accord are rejected. The Administrative Procedure Act (APA) defines the term "agency" in subsection (1) as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include ... (b) the courts of the United States." 5 U.S.C. §551(1). The provision relied upon by claimant is the "courts" exemption to the "agency" definition of the APA, and does not affirmatively dictate what a "court" is under that statute. It has, however, been established that the Board is not a "court." *Kalaris v. Donovan*, 697 F.2d 376, 381 (D.C. Cir.), *cert. denied*, 462 U.S. 1119 (1983); *see also Metropolitan Stevedore Co. v. Brickner*, 11 F.3d 887, 27 BRBS 132 (CRT) (9th Cir. 1993). The "subject matter jurisdiction of the [administrative law judge] and the Benefits Review Board is confined to a right created by Congress" and the Board does not "possess all ordinary powers of the district court." *Schmit v. ITT Federal Electric Int'l*, 986 F.2d 1103, 1109, 26 BRBS 166, 173 (CRT) (7th Cir. 1993); *see generally Washington Legal Foundation v. U.S. Sentencing Commission*, 17 F.3d 1446, 1448-1449 (D.C. Cir. 1994). Thus, the Board does not have the "equitable" power to overturn the settlement agreement of the parties or the compensation order approving same, as the Board's authority is statutory.

In this regard, it is well-established that Section 8(i) settlement agreements are final under the Act and may not be reopened pursuant to Section 22, even in its pre-1984 Amendments incarnation.[2] *Bonilla v. Director, OWCP*, 859 F.2d 1484, 1486, 21 BRBS 185, 188 (CRT) (D.C. Cir. 1988), *amended*, 866 F.2d 451 (D.C. Cir. 1989); *Downs*, 803 F.2d at 201, 19 BRBS at 45 (CRT). *Bonilla* is factually similar to this case. The employee in that case suffered a back injury in 1978 during the course of her employment with the Georgetown University Hospital. She settled her claim three years later under an agreement which was approved by the district director. In the same year, the claimant sought to set aside the settlement, asserting a change in condition and mistake in determination of fact. She also averred, belatedly, that the agreement was not in her "best interest" when entered. The claimant's attempt to reopen the settlement was denied by every tribunal

[2]The 1984 Amendment to Section 22 codified pre-amendment law that settlements entered pursuant to Section 8(i) are not subject to modification. 33 U.S.C. §922 (1988). The 1984 Amendments do not apply to cases arising under the 1928 D.C. Act. *Keener v. Washington Metropolitan Area Transit Authority*, 800 F.2d 1173, 1175 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 918 (1987).

that considered her application. The United States Court of Appeals for the District of Columbia Circuit upheld the Board's ruling that Section 22 does not authorize the modification of a settlement that has been approved. Turning to the employee's challenge to the settlement findings as not being in her "best interest," the court of appeals noted that while the district director's order did not recite all of the findings required by the regulations which implement Section 8(i), *see* 20 C.F.R. §702.241(c) (1984), the "joint petition" referred the district director to specific medical evidence which the employee acknowledged would have made it difficult "to establish that [she] has suffered any significant residual disability from this injury[,]" and recited that the settlement would be in the employee's "best interest." *Bonilla*, 859 F.2d at 1486, 21 BRBS at 188 (CRT). The court concluded that the district director was entitled to rely on the parties' statements based on their evaluation, at the time of the settlement, of the prospects of the claimant's claim. *Id.*

In this instance, while claimant may now possess new medical literature which may have bolstered the theory of his case in 1983, he is simply precluded at this late date from setting aside an accord on the grounds specified in Section 22. Claimant has no argument sufficient to attack the properly approved settlement under Section 22.[3] Equitable concerns do not come into play.

Finally, to the extent that claimant's argument now before the Board can be construed as a collateral attack on the district director's finding that the settlement was in his best interests, it is also rejected. Claimant was represented throughout by counsel. The Joint Petition, while not citing specific exhibits, does state that "[i]n view of the anticipated medical testimony, the claimant may have difficulty in establishing his claim for additional disability benefits and loss of wage earning capacity." Cl. Ex. XXV-C (Joint Petition) ¶ 8. While the district director's compensation order approving the settlement is sparse, it does recite, as did the Form LS-465 Order in *Bonilla*, that the settlement was approved "[p]ursuant to agreement and stipulation ... ." The order further recites that the settlement is in the "best interests" of the employee and that it discharges employer's liability. OWCP No. 40-146937 (Aug. 15, 1983); Cl. Ex. XXVII-C. Given the facts that claimant was represented by counsel and that no evidence was cited at that time or introduced by claimant to support his theory that his dystonia arose out of or was aggravated by his industrial accident, the district director reasonably found that the settlement was in claimant's best interest. *See Bonilla*, 859 F.2d at 1486, 21 BRBS at 188 (CRT). We therefore conclude, as did the court in *Bonilla*, that the district director's compensation order approving the agreement was correctly entered. Accordingly, we reject claimant's assertion that the Section 8(i) settlement may be reopened, and we affirm the administrative law judge's refusal to review the settlement accord reached in this case.

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[3]The claimant in *Downs v. Director, OWCP*, 803 F.2d 193, 19 BRBS 36 (CRT)(5th Cir. 1986), averred that the settlement should be reopened in part because of "undue influence approaching fraud" on the part of his former attorney. 803 F.2d at 197, 19 BRBS at 41 (CRT). The Fifth Circuit did not even reach that argument because the Section 8(i) accord was simply beyond the reach of Section 22. In this case, claimant appears to imply that he was misled by former counsel, and that the original attorney acted improperly in obtaining claimant's consent to the settlement. As were articulated in *Downs*, there are no allegations of fraud or undue influence in this case.

The issue of medical treatment resulting from the injury was left open by the settlement and thus was properly before the administrative law judge. Claimant does not directly contest the administrative law judge's findings that, based on the medical evidence pertinent to this case, claimant's dystonia is not related to his March 1979 industrial injury. Specifically, claimant fails to articulate any challenge to the administrative law judge's evaluation of the medical reports of record, or the invocation and rebuttal of the Section 20(a) presumption. Nevertheless, upon a review of those findings and the record as a whole, we conclude that the administrative law judge's determinations that the medical evidence is sufficient to rebut the Section 20(a) presumption and that claimant is not entitled to medical benefits for his dystonia are supported by substantial evidence.

Although claimant introduced medical literature regarding the possibility that dystonia may devolve from trauma, employer introduced "specific and comprehensive evidence" that this condition in this instance was not related to claimant's March 1979 injury. Dr. Koulouris, on October 30, 1981, diagnosed an "athetoid syndrome which associated with the right sided Babinski and the minimal weakness involving his right upper extremity ... [which] of course is unrelated to his injury." Cl. Ex. III-C. Dr. Reich, an Assistant Professor at the Johns Hopkins University, concluded in a September 9, 1991, consultation report that

> Although in Mr. Rochester's case, there clearly is a temporal relationship between the lumbar injury and the subsequent appearance of the dystonia, I am unable to establish a cause and effect relationship and furthermore, the appearance of multiple strokes involving regions of the brain associated with dystonia provide an alternate explanation. Clearly, the cerebrovascular disease cannot be attributed to the lumbar injury.

Cl. Ex. XXXI-C (emphasis in original). In rendering this opinion, Dr. Reich was aware of literature that discussed relationships between trauma and dystonia in general. *See* Cl. Ex. XXXII-C. Dr. Jenkins examined claimant in January, 1982. In his January 7, 1982 report, Dr. Jenkins opined, *inter alia*, that claimant's dystonic condition "is not related to his accident nor to his work." Emp. Ex. 2. Over ten years later, the same physician reviewed all of claimant's medical reports, as well as the medical authorities cited by claimant's counsel. Dr. Jenkins concluded that "in my opinion, and in the opinion of others, there is no causal connection between [claimant's] dystonia and the event of 03-12-79." Emp. Ex. 3.

The administrative law judge properly found that this medical evidence is sufficient to rebut the Section 20(a) presumption, *see generally Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94, 95-96 (1988), and to establish the lack of a causal connection between claimant's work accident and his dystonia based on the record as a whole. Inasmuch as the administrative law judge's causation finding is supported by substantial evidence based on the record as a whole, and accords with applicable law, we affirm the Decision and Order denying medical benefits.[4]

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[4]The opinion of Dr. Anderson, who in 1981 noted his impression that "[claimant has a h]istory of low back pain and right lower extremity pain, as well as a dystonic syndrome, which apparently came on following a job-related injury[,]" Cl. Ex. XII, was cited by Dr. Jenkins in his review of the

medical records, and only points out the temporal relationship between the injury and the exhibition of claimant's dystonia. Claimant also introduced a disability award by an administrative law judge of the Social Security Administration. Cl. Ex. X-C. That administrative law judge, in a general recitation of evidence, noted that "claimant has alleged disability due to degenerative arthritis of the spine and Parkinsonism. The claimant's disability is traceable to an industrial accident in 1979." *Id.* at 61. That judge did not make a formal finding of a causal relationship between claimant's dystonia and the work accident, and his disability finding concerns all of claimant's medical conditions.

Accordingly, we affirm the Decision and Order, as well as the Order of Remand, of the administrative law judge.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge