BRB No. 97-911

NORMAN HARGROVE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
STRACHAN SHIPPING COMPANY	)	DATE ISSUED: Sept. 23, 1998
	)	
and	)	
	)	
GEORGIA INSURERS INSOLVENCY POOL	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER on RECONSIDERATION

Appeal of the Decision and Order of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Ralph R. Lorberbaum (Zipperer & Lorberbaum, P.C.), Savannah, Georgia, for claimant.

Edward T. Brennan (Brennan, Harris & Rominger), Savannah, Georgia, for employer/carrier.

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

PER CURIAM:

Employer has filed a timely Motion for Reconsideration of the Board's Decision and Order in the captioned case, *Hargrove v. Strachan Shipping* Co., 32 BRBS 11 (1998). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407(a). In addition, claimant has filed a petition for an attorney's fee for work performed before the Board. For the reasons that follow, we grant the motion for reconsideration, but deny the relief requested.

To recapitulate the facts and proceedings below, claimant injured his back in a work-related accident on February 2, 1971. As a result of the injury, employer paid temporary total disability benefits for 19 weeks. Thereafter a dispute arose and an informal conference was held on June 28, 1972, at which claimant contended that he was totally disabled and employer contended that there was no employment-related disability after June 23, 1971. As a result of the informal conference, it was determined that the parties would discuss the possibility of a settlement and that if a settlement should not be achieved, a formal hearing would be held to adjudicate the claim. On April 2, 1973, claimant and his attorney wrote to the district director[1] asking that the claim be withdrawn; this request was confirmed by a follow-up letter after claimant was advised by the district director of the possible hazards of withdrawal. Cl. Ex. 1 at 22-26. James Todd, vice-president for insurance for employer testified that claimant was paid $12,591.61 in compensation benefits, of which $1,267.67 represented temporary total disability compensation, and the balance, a "settlement" to conclude the case. Emp. Ex. 1; Tr. at 36. On April 17, 1973, the district director wrote to claimant advising that he was closing the file. Cl. Ex. 1 at 21. On March 13, 1996, claimant's counsel requested an informal conference in this case, maintaining that claimant was and still is disabled. Cl. Ex. 1 at 7. Claimant also requested that employer provide medical treatment. Cl. Ex. 1 at 8.

In his Decision and Order, the administrative law judge found that the "settlement" was never approved under Section 8(i) of the Act, 33 U.S.C. §908(i). Moreover, he found that claimant never stated in writing to the district director his reasons for requesting withdrawal of his claim as required by regulation and that there is no reliable evidence that the district director approved claimant's request for withdrawal of his claim as being for a proper purpose or in claimant's best interest. *See* 20 C.F.R. §702.216 (1973) (renumbered as 702.225 in 1985). Thus, the administrative law judge concluded that claimant's original claim should still be viable and open for adjudication. However, the administrative law judge found that the Board's decision in *Rodriguez v. California Stevedore & Ballast Co.*, 16 BRBS 371 (1984), is controlling in this case. In *Rodriguez*, the Board held that a 1967 claim, in which an attempted settlement had not been approved, could not be "reopened" in 1984 "as a matter of policy." The administrative law judge found the facts in the instant case virtually the same as those in *Rodriguez* and therefore stated that claimant's 1971 claim could not be "reopened" 25 years later. The administrative law judge also denied claimant medical benefits finding that "claimant had failed to establish a causal nexus between the subject work injury and psychiatric impairment and treatment...." Decision and Order at 8.

[1]The title "district director" has been substituted for the title "deputy commissioner" used in the statute. 20 C.F.R. §702.105.

Claimant appealed this decision to the Board, contending that the administrative law judge erred in applying *Rodriguez* in light of the Supreme Court's decision in *Intercountry Construction Corp. v. Walter*, 422 U.S. 1, 2 BRBS 3 (1975), and Board case law post-dating *Rodriguez*. Claimant also contended that the administrative law judge erred in his analysis in denying medical benefits by failing to apply the Section 20(a) presumption to this issue. 33 U.S.C. §920(a). The Board held oral argument in this case in Jacksonville, Florida on November 13, 1997. 20 C.F.R. §802.305.

In its decision, the Board initially affirmed the administrative law judge's findings that the claim was neither settled pursuant to Section 8(i) nor withdrawn pursuant to 20 C.F.R. §702.216. In addition, the Board held that the administrative law judge erred in finding that the decision in *Rodriguez* is controlling in the instant case, and held that the administrative law judge erred in finding that he could not "reopen" the claim, and thus remanded the case to the administrative law judge to address the merits of the instant claim as it was timely filed and never adjudicated. *Hargrove*, 32 BRBS at 13-15. Lastly, the Board held that the administrative law judge erred in placing the burden on claimant to prove that his psychological condition is work-related and held, based on the evidence of record, that Section 20(a) is invoked as a matter of law. Thus, on remand, the administrative law judge was instructed to make a determination as to whether the presumption is rebutted and, if so, as to whether a causal relation is established based on the record as a whole. *Id.* at 15.

Initially, on reconsideration, employer contends that the Board erred in holding that the regulation at Section 702.216 is applicable in the instant case, rather than its predecessor at Section 31.7, as it contends that the regulation in effect at the date of injury is to be applied. Moreover, employer alleges that the amended regulation did not become effective until September 13, 1973, after the withdrawal attempt. The Board stated that the administrative law judge properly applied Section 702.216, rather than 20 C.F.R. §31.7 (1971),[2] as the "withdrawal" attempt was made in 1973, after the regulation was amended.

[2]Section 31.7 states:

Hargrove, 32 BRBS at 12 n.2.

We reject employer's contention that the Board erred in affirming the administrative law judge's application of Section 702.216. Procedural regulations in force at the time the administrative proceedings take place govern, not those in effect at the date of injury. *See Chilcott v. Orr*, 747 F.2d 29, 34 (1st Cir. 1984); *accord Alberica v. United States*, 783 F.2d 1024, 1028 (Fed. Cir. 1986). Thus, the regulation in effect in April 1973 applies, as that is when the parties attempted to resolve the claim in some manner. Contrary to employer's contention, Section 702.216 became effective on January 26, 1973. *See* 38 Fed. Reg. 2,650 (1973). In promulgating the new regulations in January 1973, it was noted that the regulations were to take effect prior to the receipt of comments on the rulemaking. *Id.* After comments were received, some of the new regulations were amended, and these amendments were implemented on September 26, 1973. 38 Fed. Reg 26,860 (1973). Section 702.216, however, was not affected by these revisions, and thus, in April 1973, claimant was required to state in writing the reasons for the withdrawal request, which the administrative law judge found he did not do. Thus, the administrative law judge properly found on this basis that a proper withdrawal was not accomplished.

> Any claimant not desiring to proceed with a claim filed in case of injury or death pursuant to said act and the regulations in this subchapter, may apply for withdrawal of the claim to the deputy commissioner with whom filed, stating the reasons for such withdrawal. The deputy commissioner whose jurisdiction has been invoked for the filing of such claim shall in consideration of such application determine whether such withdrawal is for a proper purpose and for the claimant's best interest prior to authorizing such withdrawal. . . .

20 C.F.R. §31.7 (1971). This section does not explicitly require that claimant state in writing the reasons for the withdrawal request.

Moreover, even if Section 31.7 were applicable, the administrative law judge also found that there was no evidence that the case was closed by the district director after consideration of whether it was for a proper purpose and for claimant's best interest. Specifically, the administrative law judge found that "Mr. Bergeron's testimony that he doesn't recall any such approval, but assumes he '...thought that way or...wouldn't have approved the withdrawal' (Tr. 13, 14), does not constitute probative or reliable evidence on this score." Decision and Order at 5 and n.3. As the administrative law judge's credibility determination is rational, we reaffirm the administrative law judge's finding that there was no effective withdrawal of this case in 1973, as a proper exercise of his discretion. *See generally John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Thus, as the Board held in its decision, there was neither an effective withdrawal nor a proper settlement, and the case therefore must be remanded for consideration on the merits, as it was timely filed and never adjudicated.[3] *See Intercounty Construction Corp. v. Walter*, 422 U.S. 1, 2 BRBS 3 (1975); *Norton v. National Steel & Shipbuilding* Co., 25 BRBS 79 (1991), *aff'd on recon. en banc*, 27 BRBS 33 (1993)(Brown, J., dissenting); *O'Berry v. Jacksonville Shipyards, Inc.*, 21 BRBS 355 (1988), *aff'd in relevant part on recon.*, 22 BRBS 430 (1989).

[3]We reject employer's contention regarding the "absurd rule that if claimant receives money or anything of value in exchange for withdrawal, it is invalid," Emp. Brief at 4, as Section 15(b) of the Act, 33 U.S.C. §915(b), explicitly provides that "an agreement by an employee to waive his right to compensation" is invalid.

Employer also contends on appeal that the Board erred in instructing the administrative law judge on remand to reconsider whether there is sufficient evidence to rebut the presumption under Section 20(a) of the Act, 33 U.S.C. §920(a), that claimant's psychiatric condition and treatment is causally related to the work accident, and if so whether a causal relationship is established based on the record as a whole. Employer contends that ultimately it is claimant who must prove his case, which he failed to do in the opinion of the administrative law judge, and thus the denial of medical benefits should be affirmed.

The Board noted that the record contains the reports of Drs. Pellicano and Tillinger, both of whom opine that claimant's work-related injuries contributed to his psychoses and depression. Thus, as there i s evidence of record that claimant suffers from a psychiatric condition that could have been caused, at least in part, by the work injury, the Board held that the administrative law judge erred in placing the burden of proving a causal relationship on claimant, and invoked the Section 20(a) presumption as a matter of law. *Hargrove*, 32 BRBS at 15; *see Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 24 BRBS 75 (CRT)(D.C. Cir. 1990). As claimant met his burden of establishing his *prima facie* case, the burden now shifts to employer to rebut the presumption with substantial countervailing evidence that claimant's injury was not caused, aggravated or contributed to by the work accident. *See generally* Brown v. Jacksonville Shipyards, Inc., 893 F.2d 294, 23 BRBS 22 (CRT) (11th Cir. 1990). We thus reject employer's contention that the Board applied an improper burden of proof, and affirm our holding that the administrative law judge must consider on remand whether the presumption is rebutted and, if so, whether a causal relationship is established based on the record as a whole.

Claimant's counsel has filed a petition for an attorney's fee for work performed before the Board in the amount of $8,587.50, representing 28.625 hours of legal services at the hourly rate of $300. Employer responds, objecting to the award of an attorney's fee as claimant has yet to be awarded compensation or other benefits. In addition, employer objects to the amount of time and rate of payment sought by claimant's attorney, but makes no specific arguments. Employer contends it cannot fully respond to the amount of the fee requested until it knows the full degree of claimant's success on remand.

As this case involved an unusual question which required oral argument, the number of hours spent preparing the case are reasonable and necessary. Therefore, we grant claimant's fee petition for 28.625 hours of legal services, contingent upon his obtaining an award of benefits on remand. *See generally Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990)(Lawrence, J., dissenting). However, the hourly rate requested, $300, is excessive and not commensurate with the rate the Board has previously awarded in the geographic region in similarly complex cases. Therefore, we reduce the hourly rate to $200, and thus award a fee in the amount of $5,725, representing 28.625 hours of legal services at the hourly rate of $200, payable directly to counsel by employer, contingent upon claimant's obtaining an award of benefits on remand. 33 U.S.C. §928; 20 C.F.R. §802.203.

Accordingly, employer's Motion for Reconsideration is granted, but the relief requested is denied. 20 C.F.R. §802.409. Claimant's counsel is awarded an attorney's fee of $5,725 for work performed before the Board, contingent upon claimant's obtaining an award on remand.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge