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Office of Administrative Law Judges
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Issue Date: 14 January 2015

CASE NOs.: 2014-LDA-00355
2014-LDA-00356

OWCP NOs.: 02-301252
02-224794

In the Matter of:

BRIAN S. STRUM,
Claimant,

vs.

DYNCORP TECHNICAL SERVICES,
Employer,

and

CONTINENTAL INSURANCE COMPANY,
Carrier.

APPEARANCES:

Gary Pitts, Esq.,
For the Claimant

Gregory P. Sujack, Esq.,
For the Employer/Carrier

BEFORE: Christopher Larsen
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore Harbor Workers' Compensation Act, 33 U.S.C. §§ 901, *et seq.* ("the Act" or "LHWCA"), as extended by the Defense Base Act, 42 U.S.C. §§ 1651 *et seq.* The hearing in this matter took place before me in Phoenix, Arizona, on October 22, 2014.

The claimant, Brian S. Strum, born December 29, 1971, worked from October, 2011, until the summer of 2013 training local police forces in Afghanistan. He reports injuring himself on January 4, 2012, when, wearing combat gear, he lost his footing while walking over a tree limb laid as a makeshift bridge across a canal ditch, and jumped, landing forcefully on the far bank, to avoid falling in the water (TR pp. 21-22). This incident reportedly caused pain in his low back (TR, p. 22, lines 23-25). Employer contends Mr. Strum suffered no injury of any consequence in the manner he describes, noting that he continued to work at the same job in Afghanistan for more than a year thereafter. Mr. Strum contends his condition worsened through June 25, 2013. He terminated his employment after learning he would be laid off.

I. STIPULATIONS

The parties stipulate, and I find:

1. Mr. Strum is covered under the Act for injury, if any, resulting from the events of January 4, 2012, as he describes them.
2. The alleged injury occurred on January 4, 2012.
3. Mr. Strum was an employee of Employer Dyncorp Technical Services on January 4, 2012, and remained employed continuously through June 25, 2013.
4. Mr. Strum provided timely notice of his injury to the Employer.
5. The Employer filed timely Notice of Controversion.
6. The parties attended an informal conference on January 30, 2014.
7. Mr. Strum's average weekly wage at the time of his alleged injury was \$2,667.78.
8. The Employer has paid no benefits to Mr. Strum, whether medical or disability benefits.

II. ISSUES FOR DECISION

1. Whether Mr. Strum was injured in the manner he describes on January 4, 2012, and whether his condition worsened through June 25, 2013.
2. The extent of Mr. Strum's retained earning capacity.
3. Whether Employer is liable for disability or for Section 7 medical benefits.
4. The extent, if any, to which Mr. Strum's counsel may recover attorney fees and costs.

Issue #1: Mr. Strum Was Injured in Afghanistan

There is no evidence to suggest Mr. Strum's testimony about jumping a canal ditch on January 4, 2012, is inaccurate (TR, p. 12, lines 4-7), and an October 1, 2013, MRI shows a

herniated disc at L5-S1, with possible displacement of the right S1 nerve root (RX 3, p. 4; *see also* CX 12, p. 8).

Although Mr. Strum did not seek medical treatment in the United States at any time between January 4, 2012, until August, 15, 2013, he testified at the hearing that while in Afghanistan after his injury, he experienced “flare-ups” of back pain “[r]oughly every month or two.” On those occasions, about ten in all, a medical corpsman would give him injections and pain medication, and put him on bed rest (TR, p. 27 line 21 – p. 28, line 8). In a written statement received in evidence, medical corpsman Brett Davis states

I had the pleasure of serving with Brian Strum from March 2013 to June 2013. During that time I treated Mr. Strum several times for lower back pain as the medical provider for FOB Bolan, Afghanistan. Mr. Strum stated that he started to have lower back pain after an incident in January 2012 while serving with another unit. His symptoms were severe enough for me to place Mr. Strum on bed rest and treat with Nonsteroidal anti-inflammatory drugs and heat/cold packs on several occasions. Mr. Strum had told me on several occasions that the pain was constant and progressively getting worse with continued wear of his flak jacket and Kevlar helmet, and that he intended to see an orthopedic specialist once he had made it back to his home (CX5, p. 1).

In another written statement, medical corpsman David Okdie avers

During the month of January 2012, I witnessed Brian Strum sustain an injury to his back after attempting to jump a canal during a patrol where he was acting as a Law Enforcement Professional for the Afghanistan Border Police. I treated him for his back injury and brought him to the Chief Tung which was the Independent Duty Corpsman at the KP for proper medical attention. Brian remained on anti-inflammatory medication until I departed Afghanistan in May 2012 (CX5, p. 2).

Staff Sergeant William J. Motes likewise indicates he saw Mr. Strum injure his back while jumping a canal in January, 2012, and indicates Mr. Strum “complained of back pain during the patrol and got treatment from our corpsman once he returned from the patrol. Our corpsman prescribed medication and put him on best rest. I also witnessed Brian Strum periodically receive treatment, medication, and bed rest from our corpsman from January until May 2012 at COP Taghaz” (CX5, p. 3).

There is no direct evidence to contradict Mr. Strum’s testimony on this point, or the statements of the staff sergeant and the two corpsmen.

Yet, although Corpsman Davis indicates Mr. Strum stated an intention to see an orthopedic specialist “once he had made it back to his home” (CX5, p. 1), Mr. Strum did not do so until on or about August 15, 2013, either on any of his three vacations to the United States, or after leaving Afghanistan permanently in June, although he traveled from Phoenix to Minnesota and Wisconsin in the meantime (TR p. 46, line 8 – p. 47, line 7), and from Phoenix to Minnesota

and back during his vacations (TR p. 41, lines 6-9). He continued to work in Afghanistan, at the same job, until June, 2013, when he learned he was about to be laid off (TR p. 49, lines 2-8). What is more, before leaving Afghanistan for the last time, Mr. Strum applied for a job as a U.S. Border Patrol agent, a job he had held before (TR p. 47, line 20 – p. 48, line 20). He anticipated the job with the Border Patrol would be as demanding physically as the work he had been doing in Afghanistan, if not more so (TR p. 54, line 14 – p. 55, line 6). In a later conversation with insurance adjuster Jason Gerstein, Mr. Strum said he had taken a month-long vacation in June and July, 2013, during which he “felt fine” (RX1, p. 5). After that vacation, and before seeking medical attention in the United States, Mr. Strum began working for U.S. Palm assembling and packing ammunition magazines for firearms (TR, p. 31, line 22 – p. 32, line 9). After a “few weeks” of working at U.S. Palm, he awoke one morning with back pain so severe he could not get out of bed – something that had never happened to him before (TR p. 53, line 18 – p. 54, line 3). These facts are consistent with a hypothesis that whatever his symptoms, Mr. Strum remained able to work as a police trainer in Afghanistan, and believed himself capable of performing a different job that was at least as demanding physically, until he worked at U.S. Palm roughly a year-and-a-half after his original injury. Employer/Carrier concludes it was not Mr. Strum’s adventures in Afghanistan, but his employment at U.S. Palm, that herniated his disc (TR p. 12, lines 20-24; Employer/Carrier’s Post-Hearing Brief, p. 10).

Employer/Carrier contends Mr. Strum is not credible because he has given “two completely different versions” of his condition after returning from Afghanistan (Employer/Carrier’s Post-Hearing Brief, p. 8). In one version, his statement to Mr. Gerstein, taken after he filed a claim for benefits, Mr. Strum admitted he “felt fine” during his one-month vacation in June and July, 2013, experiencing “soreness” but not “massive severe pain” (RX1, p. 5). At the hearing, in Employer/Carrier’s view, Mr. Strum testified he had been experiencing pain since the January 4, 2012, incident, contradicting his statement to Mr. Gerstein.

The evidence shows that Mr. Strum, although he did not seek treatment in the United States, sought treatment in Afghanistan, as the corpsmen and staff sergeant attest. What is more, his symptoms were episodic (TR, pp. 27-28), and

. . . I seemed to manage the pain through physical work-outs and the treatments that the coremen [*sic*] were giving me. I stayed overseas, because I was nervous that – well, I didn’t think I had a very bad injury, because I could do push-ups and crunches and I could take these anti-inflammatories and I could manage the pain. Everybody was injured. I don’t think anybody that I worked, that I patrolled with over there didn’t have some sort of an injury (TR, pp. 24-25).

As for feeling “fine” during his month-long vacation in June and July of 2013, Mr. Strum testified “I don’t think I was lying to Mr. Gerstein. I think I had a good vacation and – but I did have pain, but I was taking it very easy” (TR p. 52, lines 23-25). “I was with family and friends and I was drinking beer and enjoying myself and, yeah, I wasn’t doing anything that would be considered any type of work load at all. I was – I was relaxing and I was enjoying bourbon and friends and family” (TR, p. 52, lines 11-15). When he worked at U.S. Palm,

. . . I finally had come to the conclusion that, you know, there was something really wrong with my back and that I needed to go to the doctor. Whether it was going to, you know, risk my future career or not, it wasn't going to go away with sit-ups and crunches. It wasn't going to go away with taking aspirin or anti-inflammatory pills (TR, p. 32, lines 12-18).

Dr. Komar took Mr. Strum off work on August 21 (CX1, p. 5). When the Border Patrol offered Mr. Strum an interview a month or two after he stopped working at U.S. Palm, he declined (TR p. 32, line 19 – p. 33, line 5).

Even defense medical examiner John L. Beghin, M.D., in his report of November 13, 2013, concludes “the claimant probably did injure the disc on January 4, 2012 and . . . suffered a spontaneous herniation or enlargement of a preexistent herniation on or about August 14, 2013” (RX 3, p. 5).¹ I find Mr. Strum’s testimony persuasive. It seems reasonable to me that a person experiencing episodic pain might go months, even years, sustained by the hope it might eventually get better (*see* TR, p. 60, lines 9-12). It also seems reasonable to me that he would experience more severe pain when working in full combat gear than he would sitting on a couch drinking beer with relatives and friends. What is more, Mr. Strum’s testimony is supported by the statements of the witnesses who were with him in Afghanistan. It is also supported by the opinion of Dr. Komar, who wrote that Mr. Strum’s symptoms in October, 2013, were “casually related to his injury sustained in January, 2012” (CX1, p.10); by the opinion of Dr. Theodore that “Mr. Strum’s spinal problems began in January 2012” (CX12, p. 1), and by the opinion of Dr. Beghin. There is no direct evidence of any kind to suggest any intervening or superseding cause in August, 2013.

I conclude Mr. Strum injured his back in Afghanistan on January 4, 2012, as he has testified, in the course and scope of his employment, and that his condition worsened thereafter.

Issue #2: Mr. Strum’s Post-Injury Earning Capacity

At the same time, there is no dispute that despite his January 4, 2012, injury, Mr. Strum continued to work in Afghanistan, doing the same job (with occasional sick days and treatment), earning the same pay, until essentially volunteering for layoff in June, 2013. There is nothing to suggest Employer was in any way unhappy with Mr. Strum’s work after January 4, 2012, or consciously offered him any kind of an accommodation to keep him on the job. On the contrary, Mr. Strum testified he was no worse off physically than many of his co-workers – in his own words, “[e]verybody was injured” (TR, p. 25, lines 1-2). This strongly suggests that Mr. Strum’s job performance, despite his injury, was as good as many, perhaps most, and possibly even substantially all of his colleagues’. There is absolutely nothing in the record before me to suggest otherwise.

In order for a claimant to receive a disability award, he must have not only a physical or psychological impairment, but also an economic loss. *Sproull v. Stevedoring Servs. Of America*,

¹ Dr. Beghin goes on to opine “the compensability of this claim would most appropriately date to the January 4, 2012, incident as opposed to August 14, 2013,” but since compensability is more a legal issue than a medical one, I discount that comment accordingly.

25 BRBS 100, 110 (1991). From January 4, 2012, at least until he left Afghanistan, Mr. Strum had no economic loss. After he left Afghanistan, he traveled extensively and sought physically-demanding employment with the Border Patrol. By his own account, it was not until he was working at U.S. Palm that he concluded “there was something really wrong with [his] back and that [he] needed to go do the doctor” (TR, p. 32, lines 12-14).

The precise moment of that epiphany is not clear from the record. Dr. Beghin suggests a sudden worsening of Mr. Strum’s condition “on or about August 14, 2013” (RX3, p. 5). This date is generally consistent with Mr. Strum’s testimony about a day on which he couldn’t get out of bed one morning after he began working at U.S. Palm (TR, p. 53, lines 18-24). Mr. Strum went to Urgent Care on August 15, 2013 (CX1, pp. 1-4), and Dr. Komar took him off work on August 21, 2013 (CX1, p. 5). I conclude Mr. Strum suffered an economic loss, in that he became unable to work, on August 14, 2013. He underwent back surgery on August 6, 2014 (CX12, pp. 13-15), and at the hearing testified his doctors had told him it might take him a year to recover thereafter (TR, p. 35, lines 1-15). He further testified that Drs. Komar, Theodore, and Beghin had all told him “that I needed to consider myself retired from law enforcement or any type of dangerous duty or heavy duty work” (TR, p. 36, lines 3-8).

Employer urges me to conclude Mr. Strum’s epiphany, and perhaps his sudden inability to get out of bed one day in August, were caused by another injury while he was employed by U.S. Palm. There is no evidence of such an injury in the record before me. At best, I can infer from the fact that something happened in August, 2013, that there must have been a work-related injury in August, 2013, to cause it. Not even Dr. Beghin goes that far. The doctor concludes Mr. Strum “suffered a spontaneous herniation or enlargement of a preexistent herniation on or about August 15, 2013” (RX3, p. 5). Dr. Beghin links this development with no specific occurrence at that time.

I conclude Mr. Strum became temporarily totally disabled on August 14, 2013.

Issue #3: Employer/Carrier Is Liable for Disability and Medical Benefits

Since Mr. Strum was injured in the course of his employment, Employer/Carrier is liable for disability benefits under 33 U.S.C. §908(b) and medical benefits under 33 U.S.C. §907(a).

Issue #4: Recovery of Fees and Costs

Claimant’s counsel may recover attorney fees and costs by petition under 20 C.F.R. §702.132.

ORDER

Based on the foregoing, and on the entire record, I issue this compensation order. The District Director will compute the specific dollar amounts of the award.

1. Employer/Carrier must pay Mr. Strum compensation for temporary total disability beginning on August 14, 2013, based upon an average weekly wage of \$2,667.78, such payments to continue until Mr. Strum reaches maximum medical improvement.

2. Under Section 7 of the Act, Employer/Carrier must furnish such reasonable, appropriate, and necessary medical care and treatment as Mr. Strum's work-related injury referenced herein may require. Additionally, Employer/Carrier must reimburse Mr. Strum for the costs of such care and treatment previously incurred.

3. Employer/Carrier must pay interest on all past due payments. The District Director will determine the amount of interest due, applying the appropriate rate as of the filing date of this Decision and Order with the District Director.

4. All computations of benefits and other calculations provided for in this Order are subject to verification and adjustment by the District Director.

SO ORDERED.

CHRISTOPHER LARSEN
Administrative Law Judge