IN THE SUPREME COURT OF THE STATE OF NEVADA

JESUS A. VILLEGAS,
Appellant,
vs.
BMHC/SELECT BUILD, A NEVADA CORPORATION; ESIS, A NEVADA SELF-INSURANCE AGENCY; AND GALLAGHER BASSETT SERVICES, INC., A NEVADA SELF-INSURANCE AGENCY,
Respondents.

No. 61471

FILED

JAN 21 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from a district court order denying a petition for judicial review in a workers' compensation matter. Eighth Judicial District Court, Clark County; Linda Marie Bell, Judge.

Appellant challenges an appeals officer's order affirming numerous decisions by respondent Gallagher Bassett Services, Inc., the insurer for appellant's employer, respondent BMHC/Select Build, regarding the scope of his claim, temporary total disability (TTD) benefits, vocational rehabilitation benefits, his average monthly wage calculation, and his permanent partial disability (PPD) award.

This court reviews an appeals officer's decision in a workers' compensation matter for clear error or abuse of discretion. NRS 233B.135(3); *Vredenburg v. Sedgwick CMS*, 124 Nev. 553, 557, 188 P.3d 1084, 1087 (2008). Judicial review is confined to the record before the appeals officer, and on issues of fact and fact-based conclusions of law, the appeals officer's decision will not be disturbed if it is supported by substantial evidence. *Vredenburg*, 124 Nev. at 557, 188 P.3d at 1087-88; *Grover C. Dils Med. Ctr. v. Menditto*, 121 Nev. 278, 283, 112 P.3d 1093,

1097 (2005). An appeals officer's determinations on pure issues of law, however, are reviewed de novo. *Roberts v. State Indus. Ins. Sys.*, 114 Nev. 364, 367, 956 P.2d 790, 792 (1998).

We first address appellant's argument that the scope of his claim should be expanded to include abdomen and chest injuries based on initial hospital reports. The appeals officer's September 24, 2009, decision and order affirmed the insurer's denial of the abdomen as part of appellant's claim. Appellant did not seek judicial review of this order and therefore the abdomen is excluded from the scope of the claim as a matter of law. *See Washoe Cnty. v. Otto*, 128 Nev. ___, ___, 282 P.3d 719, 725 (2012) (explaining that a party must seek judicial review of a final agency decision within 30 days in order to invoke the district court's jurisdiction to consider the matter). Furthermore, though appellant's chest was examined for injuries, Dr. Michael Elkanich opined that appellant had not suffered a thoracic injury, and thus, substantial evidence supports the appeals officer's determination that the abdomen and chest should be excluded from appellant's claim. *See Wright v. State, Dep't of Motor Vehicles*, 121 Nev. 122, 125, 110 P.3d 1066, 1068 (2005) (recognizing that substantial evidence may be inferred from the lack of certain evidence); *see also* NRS 616C.150(1) (requiring an injured employee prove by a preponderance of the evidence that his injury was industrial before receiving compensation).

Appellant also asserts that the appeals officer's finding that the insurer properly denied his request for TTD benefits from August 21, 2009, through January 2010 was in error. TTD benefits must cease when a physician determines that the employee may return to work and the employer offers employment that is modified to fit any restrictions

imposed by the physician. NRS 616C.475(5). Here, the record shows that Dr. Eugene P. Libby released appellant to light-duty work on August 21, 2009, and that the employer had made a light-duty work offer on August 18, 2009. Thus, substantial evidence supports the appeals officer's finding that the insurer had properly terminated appellant's TTD benefits.

Appellant further argues that the appeals officer erred in affirming the insurer's lump sum payment offer for his vocational rehabilitation benefits. Vocational rehabilitation benefits are generally not provided to an injured employee residing outside the state, *see* NRS 616C.580(1), and the appeals officer determined that appellant was residing in California. Substantial evidence in the record supports the appeals officer's finding that appellant currently resides in California, and we find no error of law in the appeals officer's determination that the lump sum payment offer was therefore appropriate. *See* NRS 616C.580(3) (explaining that an injured employee who resides outside of Nevada and is eligible for vocational rehabilitation benefits may receive a lump sum payment of benefits in lieu of the services the employee would otherwise receive if within the state). We further note that the appeals officer correctly determined that if appellant rejected the lump sum payment and moved back to Nevada, he would be entitled to his benefits. *See* NRS 616C.597(1) (noting that an employee may reject a lump sum offer and continue to work with his or her vocational rehabilitation counselor).

Appellant next claims that the appeals officer erred by finding that the insurer had properly calculated his average monthly wage. The appeals officer determined that appellant was hired as a pieceworker, and this finding is supported by his job offer card and the signed piecework agreement in the administrative record. When "earnings are based on

piecework and a history of earnings is unavailable for a period of at least 4 weeks, the wage must be determined as being equal to the average earnings of other employees doing the same work." NAC 616C.435(6). Instead of calculating the average earnings of all other carpenters employed by respondent BMHC/Select Build, the insurer took the average wage of three randomly selected carpenters who held the same position as appellant. Because this court will generally defer to the agency's interpretation of an administrative regulation that the agency is charged with enforcing or administering if that interpretation does not conflict with the statute, *see Pub. Agency Comp. Trust v. Blake*, 127 Nev. ___, ___, 265 P.3d 694, 697 (2011), we find no abuse of discretion or error of law in the appeals officer's determination that the insurer's average monthly wage calculation was proper.

Finally, appellant asserts that the appeals officer improperly dismissed his appeal from the insurer's PPD award offer as untimely and that the PPD award was erroneously calculated. The insurer made its PPD offer on February 3, 2010, and the appeals officer determined that appellant appealed from this determination on May 6, 2010. Therefore, the appeal was untimely made, *see* NRS 616C.315(3)(b) (requiring that a request for a hearing on an insurer's decision be filed within 70 days after the date on which notice of the insurer's determination was mailed), and we find no error in the appeals officer's decision.[1]

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[1]We also note that the administrative record contains no evidence that the PPD award was improperly calculated and that if appellant disagreed with the PPD rating he received the workers' compensation statutes provide for methods to challenge the rating. *See* NRS 616C.100(1) (explaining that an injured employee who disagrees with a disability rating may obtain a second rating).

Though appellant asserts that he should be able to further develop and prove facts relevant to his case, the time to do so was when this matter was before the appeals officer. As stated above, both this court and the district court are confined to the administrative record on judicial review from an administrative decision. *See* NRS 233B.135(1). Because we conclude that substantial evidence supports the appeals officer's decision and there were no errors of law, *see Vredenburg*, 124 Nev. at 557, 188 P.3d at 1087-88, we affirm the district court's order denying appellant's petition for judicial review.

It is so ORDERED.

_____, J.
Hardesty

_____, J.
Douglas

_____, J.
Cherry

cc: Hon. Linda Marie Bell, District Judge
Jesus A. Villegas
Lewis Brisbois Bisgaard & Smith, LLP/Las Vegas
Eighth District Court Clerk