U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 252 May 2013

Stephen L. Purcell
Chief Judge

Paul C. Johnson, Jr.
Associate Chief Judge for Longshore

Yelena Zaslavskaya
Senior Attorney

William S. Colwell
Associate Chief Judge for Black Lung

Seena Foster
Senior Attorney

I. Longshore and Related Acts

A. U.S. Circuit Courts of Appeals[1]

***Marine Repair Services, Inc. v. Fifer*, __F.3d __, 2013 WL 1832103 (4th Cir. 2013).**

Vacating the ALJ/BRB's award of benefits, the Fourth Circuit held that the ALJ erred in concluding that employer failed to demonstrate suitable alternate employment ("SAE"). Specifically, the court concluded that (1) the ALJ made findings of fact as to claimant's physical limitations which were unsupported by substantial evidence in the record, and (2) the ALJ faulted employer for failing to address these limitations, imposing a heavier burden than this court's precedent requires.

First, the court concluded that in rejecting employer's labor market survey, the ALJ relied on physical limitations unsupported by substantial evidence in the record, namely claimant's inability to stand for long periods of time, need for frequent rest breaks, and regimen of medications. Claimant did not testify that he had trouble standing; instead, he indicated that he needed to take breaks during work-hardening targeted towards "hard" work parameters, and that he chose to return to his family's restaurant because he knew he could take breaks there without reprimand. He also testified that, on one occasion, he had to "lay down" (sic) to rest his back; and his brother testified that sometimes claimant "needs to sit down right away." While the ALJ credited claimant's testimony, she also credited

[1] Citations are generally omitted with the exception of particularly noteworthy or recent decisions. Short form case citations (*id.* at *__) pertain to the cases being summarized and refer to the Westlaw identifier.

the testimony of Dr. Franchetti, who never mentioned standing or rest break restrictions, and opined that claimant was not barred from restaurant work. Further, the most recent functional capacity evaluation indicated that claimant could stand frequently and walk constantly. Further, the ALJ found that the security guard positions identified by employer would likely require drug tests which claimant would fail due to his medication regimen. However, there was no evidence that security guards routinely undergo drug testing, that prescription painkillers cause applicants to fail drug tests, or that claimant's regimen would bar him from employment.

Second, the court concluded that the ALJ also erred in that "the ALJ's emphasis on [claimant's] standing, rest break, and medication-related restrictions led her to fault Marine for overlooking them in its labor market studies. The ALJ thus penalized Marine for failing to address restrictions of which it was unaware, imposing too heavy a responsibility under the LHWCA's burden-shifting scheme." *Id.* at *6 (citations omitted). Employer properly relied on the physical restrictions of which it was aware to present a range of suitable positions. The court stated that

> "Marine cannot be faulted for failing to account for restrictions which were unannounced prior to the hearing, a conclusion underscored by the ALJ's unfounded findings with respect to Fifer's medication-related restrictions. While the record corroborated the fact that Fifer took medication to manage his pain, neither his nor his treating physician's testimony supports the conclusion that Fifer's medication interfered with his ability to obtain employment. Indeed, as discussed above, nothing in the record indicated that security guards must undergo drug tests to qualify for employment. Faulting Marine for failing to address unfounded restrictions turns the employer's showing of [SAE] into a moving target."

Id. at *7. Moreover, the ALJ erred in rejecting employer's third labor market study based on failure to describe the specific duties of the positions. Employer's third labor study described with requisite specificity the responsibilities of a restaurant manager or assistant manager using the DOT's standard occupational descriptions. Because Dr. Franchetti's lifting and sitting restrictions were the only restrictions of which employer was aware prior to the hearing, and because employer presented several suitable positions which the ALJ found comported with those restrictions, the court concluded that employer met its burden of showing SAE. Therefore, the burden should have shifted to claimant to prove that he could not obtain

such employment despite his diligent effort. Accordingly, the case was remanded for further proceedings.

[Topic 8.2.4.2 Suitable alternate employment: Employer must show nature, terms, and availability; Topic 8.2.4.5 Suitable alternate employment: vocational evidence]

[Ed. Note: the following unpublished decision is included for informational purposes only**]**

***Ceres Gulf v. Director, OWCP*, No. 12-60927 (5th Cir. May 24, 2013)(unpub.).[2]**

The Fifth Circuit upheld the ALJ/BRB's award of benefits for permanent hearing loss, rejecting employer's contentions that the ALJ erred because claimant was not at maximum medical improvement ("MMI") as surgery could improve his hearing, that the ALJ erred in averaging the results of two audiograms, and that the ALJ failed to properly address all evidence presented at trial.

The ALJ did not err in concluding that claimant's hearing loss was permanent based on the opinion of Dr. Mark, an otolaryngologist appointed by the DOL as an independent medical examiner. While Dr. Mark testified that the conductive portion of claimant's hearing loss could theoretically be improved through medication or surgery, he stated that an exploratory surgery would be needed to evaluate if further surgery could be useful. On this basis, Dr. Mark concluded that hearing aids were the best form of treatment. The court stated that a condition may be considered permanent if surgery is not anticipated or if the prognosis after surgery is uncertain. Further, if recovery after surgery is uncertain or unknown, a disability may still be found permanent. Thus, even where experts disagree over the benefit of surgery or where an expert acknowledges a surgery may be beneficial, a finding of MMI is not precluded.

Nor did the ALJ err in relying on the average of Dr. Mark's two audiograms – which showed hearing impairment of 56% and 39.6%, respectively – to find that the extent of claimant's hearing loss was 47.8%. Employer asserted that the results of Dr. Marks' two tests were not within the acceptable test/retest variance of each other. The court observed, however, that the Guide for Conservation of Hearing and Noise produced by the American Academy of Otolaryngology provides that if two "audiograms agree within 10 [decibels] at four or more of the audiometric frequencies (.5,1,2,3,4,6, and 8 kHz), they may be considered consistent." As Dr. Marks' two audiograms yielded results that were within 5 decibels at a

[2] As of 6/12/13, this decision was not available on Westlaw.

majority of the given frequencies and more than four of these seven frequencies yielded results that were within the 10 decibel threshold, the results met this standard of consistency. The court observed that, although the Guides suggests that the audiogram that yields the smallest number should be accepted as representing an individual's hearing, the ALJ, finding both of Dr. Marks' audiograms reliable, instead chose to average the results. Further, contrary to employer's contention, *Ceres Marine Terminals, Inc. v. Green*, 656 F.3d 235 (4th Cir. 2011), is distinguishable and does not support employer's contention that the ALJ could not properly average the results of the audiograms in this case.

Finally, the court rejected employer's assertion that the ALJ's decision did not comport with the Administrative Procedure Act because the ALJ did not discuss all the evidence before him and failed to explain his rejection of evidence. While the ALJ is required to address each issue with substantial evidence, the ALJ is not required to address each conflicting fact. Here, the ALJ supported his findings and addressed each expert's opinion.

[Topic 8.13.1 HEARING LOSS – Introduction to General Concepts – Determining the Extent of Loss]

B. Benefits Review Board

***Newton-Sealey v. ArmorGroup (Jersey) Services, Ltd.*, __ BRBS __ (2013).**

The Board vacated the ALJ's decision denying benefits and dismissing claimant's claim pursuant to Section 33(g) based on claimant's failure to obtain the DBA carrier's prior written approval of a third-party settlement.

Claimant, a resident of the United Kingdom ("UK"), worked in Iraq pursuant to an employment contract with AG Jersey. Following his injury, he was paid benefits under the Defense Base Act ("DBA") by the carrier. Additionally, he filed a negligence and breach of contract lawsuits in the UK against three defendants, all of which claimant considered his "employer:" AG Jersey, AG UK, and AG PLC. AG PLC is the holding/parent company and sole shareholder of the AG Jersey and AG UK subsidiaries. The UK court dismissed AG UK and AG PLC from claimant's breach of contract claim, as it found that claimant did not have an employment contract with these entities. With respect to the negligence claim, the court found that there was potentially a special relationship between claimant, AG UK, and AG PLC such that AG UK and AG PLC could have foreseen the dangers and had a special responsibility to him. Thereafter, claimant and the three defendants entered into a confidential settlement agreement. Prior to the settlement, claimant did not inform, or obtain prior written approval from, the DBA carrier.

The sole issue before the ALJ was whether any of the AG entities involved in the settlement was a "third party" within the meaning of the Act; if so, § 33(g)(1) would apply to bar claimant's claim. The ALJ found that AG Jersey was claimant's employer by virtue of the actual employment contract; that AG UK was a borrowing employer by virtue of claimant's having been recruited, hired and assigned by AG UK to perform duties required under its contract with Bechtel; and that AG PLC was a distinct entity and, therefore, a third party by virtue of its inability to qualify under the borrowing employer test and the decision rendered by the UK court. Accordingly, the ALJ found that AG Jersey carried its burden of proof to establish the applicability of § 33(g), and dismissed the claim.

The Board initially vacated the ALJ's finding that AG UK was claimant's borrowing employer, as it found the ALJ's analysis in this regard to be vague and, therefore, unreviewable. The Board and the courts have used several different tests to address borrowed employee relationship, and the Board has held that an ALJ must evaluate the evidence and apply whichever test he determines is best suited to the facts of a particular case. Slip op. at 8 (collecting cases). The Board remanded the case for the ALJ to reconsider the issue in light of this case law, with the AG Jersey/carrier bearing the burden of establishing that AG UK is not an employer of claimant. If the ALJ finds that AG UK is not an employer, then § 33(g) may potentially apply.

The Board next rejected the ALJ's analysis of the status of AG PLC. The ALJ concluded that AG PLC was not an employer under the borrowed servant analysis. Rather, the ALJ reasoned that the AG PLC's status depended on whether its holding company relationship with the two subsidiaries made it one legal entity under the UK law. The ALJ stated that this issue was addressed by the UK court, and he concluded that AG PLC was a separate legal entity because the court found there was no contract between claimant and AG UK or AG PLC. On appeal to the Board, claimant and the OWCP Director argued that the ALJ should have applied the law under the Act/DBA to determine whether AG PLC is an employer; and claimant additionally argued that this issue may be resolved by piercing the corporate veil to determine whether the three corporate entities are one.

The Board initially agreed with the Director's contention that the ALJ erred in applying a "collateral estoppel" or "res judicata"-type analysis to the findings made in the UK court decision to determine that AG PLC is a third party under the Act. The UK court decision was an interim decision and did not decide the merits of claimant's tort claims. Further, while the court did make a final decision as to the existence of a contract between claimant and AG PLC, the absence of a contract with claimant does not preclude a finding that an entity is claimant's "borrowing employer." Moreover, the duty of care claims were not dismissed and were not litigated by the UK court; there was no specific finding as to whether either entity was an "employer" under

the UK law; and no party raised the issue of whether AG UK or AG PLC was an "employer" under the Act. The Board further concluded that the ALJ did not sufficiently explain his conclusion that AG PLC was not a borrowing employer. The BRB instructed the ALJ to determine on remand which employment relationship test best applies to the facts of this case and apply the test to determine whether AG PLC and claimant had an employment-employee relationship.

The Board further instructed that, if the ALJ determines that AG PLC is not an employer under one of the tests, he should then consider claimant's alternative argument that the three ArmorGroup entities acted as one. Thus, on remand, the ALJ should address whether the AG corporate structure should be disregarded so as to consider all three entities as one single entity, making them all claimant's employers. Slip op. at 12-13 (collecting cases). If the ALJ finds that AG PLC is a borrowing employer or acted as a single entity with its subsidiaries such that the corporate structure should be disregarded, then it is a statutory "employer" and claimant's unapproved settlement with it does not invoke § 33(g) because it is not a third party. If he finds that AG PLC is not an employer, it is a third party and § 33(g) applies to preclude further benefits.

Finally, the Board instructed the ALJ to address on remand AG Jersey's argument that, if all three AG entities are found to be claimant's employers, claimant would obtain double recovery, as he would have the settlement funds as well as being entitled to benefits under the Act. In this regard, AG Jersey raised two alternate defenses: 1) it is entitled to a credit; and 2) claimant elected to pursue a remedy against his employers in tort, as permitted by the UK law, and, having selected this remedy, he is precluded from also claiming benefits under the Act. With respect to the former argument, the BRB rejected AG Jersey's assertion that its situation is analogous to that of a vessel owner, enabling application of § 33(f); and it noted that none of the Act's other credit provisions appears to be applicable. The Board summarized the relevant law on both points, and further instructed the ALJ to consider the Director's contentions: first, that employer has the burden to prove the existence of a third-party settlement, and, in this case, the terms and conditions of the settlement have not been disclosed; and, second, that, in certain circumstances, the DBA may not necessarily be an employee's exclusive remedy.

[Topic 33.7 COMPENSATION FOR INJURIES WHERE THIRD PERSONS ARE LIABLE – Section 33(g) ENSURING EMPLOYER'S RIGHTS -- WRITTEN APPROVAL OF SETTLEMENT; Topic 4.1.1 Compensation Liability—Employer Liability—Borrowed Employee Doctrine; Topic 5.1.1 Exclusive remedy; Topic 33.6 EMPLOYER CREDIT FOR NET RECOVERY BY "PERSON ENTITLED TO COMPENSATION;" Topic 85

***Res Judicata*, Collateral Estoppel, Full Faith & Credit, Election of Remedies]**

***Gelinas v. Electric Boat Corp.*, __ BRBS __ (2013).**

The Board affirmed the ALJ's finding that claimant's employment duties as a security guard/emergency medical technician ("EMT") did not constitute maritime employment for purposes of Section 2(3), and consequently affirmed the ALJ's denial of the claim.

In his original decision in this case, the ALJ found that claimant did not meet the status requirement under § 2(3). The Board vacated this finding as the ALJ did not fully discuss the evidence in light of case precedent, and remanded the case for the ALJ to determine if claimant's duties were integral to employer's shipbuilding process.[3] On remand, the ALJ discussed the case law and found that claimant was not engaged in maritime employment as he was not employed on navigable waters, did not protect cargo, and the non-performance of claimant's duties would not have impeded employer's shipbuilding activities. The ALJ thus concluded that claimant's duties were not integral to employer's shipbuilding process and thus claimant did not meet the status requirement. Claimant appealed, arguing that the requirement that he respond to injuries sustained by employer's employees constituted an integral part of employer's shipbuilding process.

The Board discussed the relevant case law, including a prior holding that the duties of a messman/cook were not covered. It concluded that the ALJ properly distinguished decisions that found duties of various guards to be covered under the Act, as claimant acknowledged that "his employment duties did not involve the protection or checking of cargo, or working on a pier." Slip op. at 4. The Board further rejected claimant's contention that because his employment duties involved responding to accidents and injuries, and the investigation of an accident could result in the stoppage of work, those duties constituted an integral part of employer's shipbuilding process. The BRB upheld the ALJ's conclusion that these duties were not integral to employer's shipbuilding process. It reasoned that

> "[t]he [ALJ] found that claimant did not have the unilateral authority to order a work stoppage in the event of an accident but, rather, such a decision rests with employer's production supervisors who make that determination prior to claimant's arrival at the scene of an accident or injury. The [ALJ] determined that no evidence was presented to support a finding that claimant's failure to respond to work incidents would disrupt employer's shipbuilding process and he consequently concluded

[3] *See Gelinas v. Electric Boat Corp.*, 45 BRBS 69 (2011).

> that, like the claimants in *Gelinas, Ellis*, and *Gonzalez,* claimant's work is not covered by the Act. As "Congress did not seek to cover all those who breathe salt air[,]" *Herb's Welding, Inc. v. Gray,* 470 U.S. 414, 423, 17 BRBS 78, 82(CRT) (1985), employees who are on a shipyard site but do not perform duties essential to the shipbuilding process are not covered by the Act."

Slip op. at 4-5 (additional citations and footnotes omitted).

[Topic 1.7.1 STATUS -- "Maritime Worker" ("Maritime Employment")]

II. Black Lung Benefits Act

There are no published decisions to report for this month.