U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 17-0556

RAHEEL KHAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
VERITISS, LLC	)	
	)	DATE ISSUED: Apr. 26, 2018
and	)	
	)	
ACE AMERICAN INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Allen J. Lowe (Ashcraft & Gerel), Washington, D.C., for claimant.

Patrick J. Babin and Alan G. Brackett (Mouledoux, Bland, LeGrand & Brackett), New Orleans, Louisiana, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and GILLIGAN, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order Awarding Benefits (2015-LDA-00315) of Administrative Law Judge Jennifer Gee rendered 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law. 33

U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant was born in Pakistan and lived there until 1999, when he moved to the United States, living in northern Virginia and working in restaurants. Tr. at 29-30; EX 10 at 4-5. In June 2011, claimant was hired by employer as a "cultural advisor," which included working as a linguist. EX 10 at 7-8. He deployed to Afghanistan in early August 2011 where he was moved to a patrol base. *Id.* at 7. On November 15, 2011, he was on a nighttime patrol mission and needed to cross a deep, dry canal. *Id.* at 9. Claimant fell approximately 10 feet into the canal, landing on his back on rocks. *Id.* Claimant alleged that he hurt his left wrist and back, and experienced pain and numbness in his legs. *Id.* He was not treated in Afghanistan but was told that he would have to return to the United States to get treatment, which he did on December 25, 2011.

Claimant was initially treated in Virginia. Claimant then moved to Toronto, Canada, where his family had relocated while he was in Afghanistan. EX 10 at 11. In Toronto, claimant underwent a lumbar spine MRI that showed bilateral spondylosis and a small central disc herniation. He had been on a 90-day medical leave from work but was unable to return due to his back pain. EX 7 at 3-4. Claimant then left Canada because his medical treatment there was too expensive; he returned to Virginia for a time before moving to Buffalo, New York. EX 10 at 11-12; Tr. at 32. He explained that he moved to Buffalo to be closer to his family and because living expenses were lower. Tr. at 33. While in Buffalo, on September 16, 2013, claimant underwent surgery on his back. Tr. at 37-38; CX 13 at 1-2; EX 2 at 120-121. Following his back surgery, claimant was treated with physical therapy and prescription drugs but he continued to report extreme pain and a poor surgical outcome. EX 8 at 10-12.

In September 2014, claimant moved from Buffalo to Spokane, Washington, at the recommendation of a friend who lived there. Tr. at 18, 35. Claimant explained that he decided to move there because he had a dispute in his family,[1] he "had nobody else" in Buffalo, and his friend in Spokane "would take [him] to the hospital, to the doctors, to the emergency." *Id.* at 18, 28. After claimant moved, his friend took him to the doctor, ordered and paid for food for him, and took him to restaurants. *Id.* at 41. They also spoke on the phone between two and four times per week. *Id.* About five months after claimant moved

[1] Regarding the dispute in his family, claimant explained that he had health and financial problems following his surgery, he was unable to take care of his family, he did not think his wife was being supportive, and she stopped talking to him. Tr. at 28. Claimant and his wife have since divorced and she and his children moved back to Pakistan. *Id.* at 31, 33.

to Spokane, however, his friend moved away. *Id.* at 34-35. Claimant continued to reside in Spokane at the time of the February 2016 formal hearing. *Id.* at 18.

Employer paid claimant temporary total disability benefits from March 2, 2012 until February 24, 2015 and temporary partial disability benefits from February 25, 2015 until July 29, 2015. EX 1 at 4. From July 30, 2015 onward, employer paid claimant permanent partial disability benefits at differing rates. *Id.*

Claimant filed a claim seeking benefits for a back injury, a left wrist injury, gastrointestinal issues, and depression.[2] Tr. at 11-12. The administrative law judge noted that employer did not dispute that claimant's back injury is work-related. Decision and Order at 35. The administrative law judge concluded that, in addition to the back injury, the evidence establishes that claimant's psychological condition, diagnosed as an Adjustment Disorder with Anxiety, is work-related because employer failed to produce substantial evidence to rebut the Section 20(a) presumption with respect to this condition. *Id.* at 39.

The administrative law judge noted that claimant conceded he has reached maximum medical improvement "from an orthopedic standpoint" and that the evidence indicates this occurred on December 30, 2014, after he underwent an MRI and a doctor noted that further surgery would not be necessary. Decision and Order at 40. The administrative law judge concluded that claimant has not reached maximum medical improvement for his psychological condition, noting that claimant had not yet undergone treatment for this condition. *Id.* at 41. Thus, she found that claimant's disability remains temporary. *Id.* at 42.

In determining whether employer established suitable alternate employment, the administrative law judge considered several jobs employer identified throughout the United States and overseas. Citing case precedent for the proposition that "the relevant local community is presumptively the community in which the [c]laimant currently resides," the administrative law judge determined that employer failed to justify its use of a "geographically unbounded labor market." Decision and Order at 44. The administrative law judge therefore found that Spokane, claimant's residence at the time of the hearing, is the relevant labor market in which to establish suitable alternate employment and that a number of jobs employer identified in its two labor market surveys were not suitable for claimant, including positions in California, Virginia, Louisiana, Kansas, Rhode Island, and Hawaii. *Id.* The administrative law judge also found that overseas work is not appropriate because claimant took only one position overseas and was abroad for only four months,

[2] Claimant also sought to amend his claim to include a heart condition but the administrative law judge denied the request. Decision and Order at 4.

and his expressed willingness to return to overseas work is not credible and is contradicted by other statements he made. *Id.* at 45. Accordingly, the administrative law judge found that the international labor market is not appropriate, eliminating a number of the jobs identified in employer's second labor market survey. *Id.*

In addressing the jobs employer identified in Spokane, the administrative law judge found several of them to be unsuited to claimant's background, but concluded that employer established suitable alternate employment based on six positions identified in employer's two labor market surveys, five of which claimant also agreed are suitable. Decision and Order at 46. The administrative law judge noted that claimant did not produce evidence that he engaged in a diligent search for work. *Id.* Accordingly, she found that he was temporarily totally disabled from March 2, 2012 through February 24, 2015, and that he has been temporarily partially disabled since February 25, 2015, when employer established suitable alternate employment. *Id.*

In calculating claimant's wage-earning capacity, the administrative law judge excluded salary ranges for three of the suitable jobs because employer did not provide specific wage information but provided only salary ranges based on national means for the position type. Decision and Order at 48. In addition, the administrative law judge noted that one of the positions, Communications Officer for Spokane County, was repeated in both of employer's labor market surveys so she factored in the wages only once. *Id.* She then took the average of the lower end wage of the two remaining suitable positions in the first labor market survey, dated February 25, 2015, and divided that by 52 to determine that claimant had a weekly post-injury wage-earning capacity of $684.97 per week. *Id.* The administrative law judge then adjusted claimant's wage-earning capacity to correct for inflation to reflect his earning capacity at the time of injury.[3]

Employer appeals the administrative law judge's decision, contending she erred in excluding northern Virginia as a relevant labor market for suitable alternate employment,

[3] The administrative law judge calculated the conversion factor based on the National Average Weekly Wages (NAWW) as of November 15, 2011 and February 25, 2015, and multiplied that by claimant's earning capacity to determine that claimant's earning capacity, in date-of-injury dollars, was $644.30 per week from February 25, 2015 through October 7, 2015. Decision and Order at 49. The administrative law judge repeated the process as of October 8, 2015, the date of employer's second labor market survey, calculating a new average of the now three suitable jobs to determine that claimant's weekly earning capacity was $842.26 per week. The administrative law judge calculated that claimant's earning capacity, in time-of-injury dollars, was $774.98 per week from October 8, 2015 and ongoing. *Id.*

and in adjusting claimant's post-injury wage-earning capacity to correct for inflation. Claimant filed a response brief, urging affirmance.

An employer must establish the availability of suitable alternate employment in the "community" where claimant resides. *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988). Where a claimant has relocated after an injury, his chosen community is "presumptively the proper choice for determining earning capacity" and employer bears the burden of showing that the original move, or a refusal to move again, is unjustified. *Wood v. U.S. Dep't of Labor*, 112 F.3d 592, 597, 31 BRBS 43, 46(CRT) (1st Cir. 1997). The Fourth Circuit has identified a variety of factors that should be considered in determining whether there are "legitimate reasons" for claimant's relocation: claimant's residence at the time he filed for benefits, his motivation for relocating, the legitimacy of that motivation, the duration of his stay in the new community, the availability of suitable jobs in that community as opposed to his former residence, and the degree of undue prejudice to employer in having to prove suitable alternate employment in the new community. *See v. Washington Metro Area Transit Auth.*, 36 F.3d 375, 383, 28 BRBS 96, 104(CRT) (4th Cir. 1994); *Holder v. Texas Eastern Products Pipeline, Inc.*, 35 BRBS 23 (2001) (adopting *See* and *Wood* for cases arising in other circuits).

As an initial matter, employer does not contest the administrative law judge's findings that it failed to justify the use of a "geographically unbounded labor market" or her exclusion of jobs in California, Louisiana, Kansas, Rhode Island, and Hawaii, as well as overseas employment. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007). Employer also does not contest the administrative law judge's finding that Spokane is a relevant labor market or her exclusion of certain jobs for which employer did not provide specific wage information. *Id.* Instead, employer contends that northern Virginia, also should be included in the relevant labor market because claimant did not show any legitimate purpose for his relocation to Spokane, and that excluding northern Virginia unfairly prejudices employer because linguist positions are more widely available there.[4] Emp. Br. at 7.

We reject employer's contention that the administrative law judge erred. It is employer's burden to demonstrate that excluding northern Virginia from the relevant labor market resulted in "undue prejudice" to employer. *Wood*, 112 F.3d at 597, 31 BRBS at 47(CRT). In *See*, the Fourth Circuit stated that undue prejudice could arise if claimant moves to a place "so economically depressed that alternative job opportunities are virtually

[4] Although claimant lived in northern Virginia before he took overseas employment and immediately after he returned, he was living in Buffalo at the time of his move to Spokane. Thus, as claimant asserts, Virginia was not claimant's place of residence immediately before the supposed improper move. Cl. Br. at 6 (unpaginated).

unavailable . . . or one so geographically distant that employer is unable, without extreme hardship, to obtain a reliable labor market survey for purposes of demonstrating suitable alternate employment." *See*, 36 F.3d at 382-83, 28 BRBS at 104(CRT). Employer has not met its burden to demonstrate that it has suffered undue prejudice because of claimant's move to Spokane. *Beumer v. Navy Personnel Command/MWR*, 39 BRBS 98 (2005). Employer has not argued that Spokane is "so economically depressed" that job opportunities are virtually unavailable, and any such argument is belied by the fact that employer was able to obtain two labor market surveys that included a number of suitable positions in Spokane.[5]

In addition, employer has failed to persuasively establish that the other relevant factors indicate that claimant's move to Spokane was unjustified such that jobs in other locales should be considered.[6] *See generally Holder*, 35 BRBS at 25. The Board may not second-guess an administrative law judge's factual findings or disregard them merely because other inferences could have been drawn from the evidence. *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999). The administrative law judge's finding that the relevant labor market in this case was Spokane (claimant's residence at the time he filed for benefits and at the time of the hearing) is rational, supported by substantial evidence, and in accordance with law. Therefore, we affirm this finding. We also affirm the administrative law judge's finding that employer

[5] Employer argues that it suffered undue prejudice because the administrative law judge excluded higher-paying jobs in the northern Virginia area. This contention is not borne out by the evidence of record. Employer's labor market survey identified only two jobs near northern Virginia: a linguist position in Fort Meade, Maryland (B4), which employer notes is 38 miles from Alexandria, and a logistics coordinator in Fairfax, Virginia (A8). One of the jobs deemed suitable in Spokane (B9) pays nearly as much as the excluded position in Fort Meade, and employer did not offer specific wage information for the position in Fairfax. Employer also argues that linguist positions "are more widely available in Virginia"; however, the only linguist job identified in the "northern Virginia" area is the Fort Meade position.

[6] Claimant was living in Spokane at the time he filed his claim. Although the administrative law judge stated that claimant's move to Spokane "made little sense" to her, the evidence in the record does not support employer's characterization of claimant's motive as being to "abandon his family," Emp. Br. at 6, nor is there any law to support employer's assertion that claimant's move was illegitimate because there was no medical basis for it. Claimant was estranged from his wife and family; he testified that he moved on the recommendation of a friend who assisted him with tasks of daily living. *See* Tr. at 18, 41. Claimant remained in Spokane even when his friend moved away and was living there at the time of the formal hearing. *Id.*

established suitable alternate employment in Spokane, as it is unchallenged on appeal. *Scalio,* 41 BRBS 57.

Employer next ascribes error to the administrative law judge's calculation of claimant's wage-earning capacity in this case, contending an inflation adjustment is not required because there is no evidence that claimant would have continued his overseas employment after his one-year contract expired and because at least one of the identified suitable alternate positions did not reflect any inflationary increase between the time of the first labor market survey in February 2015 and the second survey in October 2015.

Section 8(h) of the Act states that wage-earning capacity shall be determined by a claimant's actual earnings if the actual earnings fairly and reasonably represent his wage-earning capacity. 33 U.S.C. §908(h). If a claimant has no actual earnings, then an administrative law judge "may, in the interest of justice, fix such wage-earning capacity as shall be reasonable," considering a number of factors. 33 U.S.C. §908(h). In this case, the administrative law judge rationally averaged the low end salaries of the suitable alternative employment. *See Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998). "The Act contemplates that the current dollar amount of post-injury 'wage-earning capacity' be adjusted downward (i.e., backward in time) to account for post-injury inflation and general wage increases. This adjustment allows post-injury 'wage-earning capacity' to be meaningfully compared to pre-injury 'average weekly wages.'" *Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 1161, 36 BRBS 15, 18(CRT) (9th Cir. 2002).

The administrative law judge stated that "To compare claimant's average weekly wage at the time of injury with his earning capacity at a later date, the earning capacity must be adjusted downwards to correct for inflation." Decision and Order at 48. The administrative law judge used the percentage changes in the NAWW between claimant's date of injury and the dates of employer's two labor market surveys to calculate a conversion factor in order to reflect claimant's post-injury wage-earning capacity in time-of-injury dollars. *Id.* at 49.

The administrative law judge accurately stated and applied the law in adjusting claimant's post-injury wage-earning capacity, using the NAWW to account for inflation. The Board has approved the method used by the administrative law judge. *See Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990). Moreover, the fact that claimant's future job prospects with employer were not certain such that he may not have received an increase in his overseas wages is immaterial. The inflation adjustment is done to provide a comparison between claimant's average weekly wage at the time of injury and the wage the suitable post-injury jobs would have paid at the time of injury. *Sestich*, 289 F.3d at 1161, 36 BRBS at 18(CRT). In addition, as the administrative law judge averaged the salaries of the suitable jobs, employer has not established error in the administrative law

judge's second inflation calculation, even though the wages of the Communication Officer did not change between the first and second labor market survey. The administrative law judge's method of calculating claimant's post-injury wage-earning capacity is rational and in accordance with the law and is, therefore, affirmed. *See Hundley v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 254 (1998).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur:

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GREG J. BUZZARD
Administrative Appeals Judge

GILLIGAN, Administrative Appeals Judge, dissenting:

I respectfully dissent from my colleagues' decision to affirm the administrative law judge's conclusion that the relevant labor market is limited to Spokane, Washington. I believe the administrative law judge did not appropriately consider the factors set forth in *Wood v. U.S. Dep't of Labor*, 112 F.3d 592, 31 BRBS 43(CRT) (1st Cir. 1997) and *See v. Washington Metro Area Transit Auth.*, 36 F.3d 375, 28 BRBS 96(CRT) (4th Cir. 1994), in reaching her conclusion. Thus, I would vacate the administrative law judge's finding regarding the relevant labor market and remand the case for her to reconsider the evidence under the relevant factors and to address whether claimant's move to Spokane placed undue hardship on employer.

In her decision, the administrative law judge stated that claimant's move to Spokane "made little sense," but that employer cannot force claimant to move. Decision and Order at 44. But the issue is not necessarily whether claimant can be forced to move, but what the relevant labor market should be in light of the factors set forth in *See*, i.e., claimant's motivation for relocating, the legitimacy of that motivation, the duration of his stay in the new community, the availability of suitable jobs in that community as opposed to his former residence, and the degree of undue prejudice to employer in having to prove suitable

alternate employment in the new community. *See*, 36 F.3d at 383, 28 BRBS at 104-105(CRT). In *Wood*, the court stated that the claimant's chosen community is presumptively the proper location for locating suitable alternate employment, and that the employer bears the burden of showing that the original move was unjustified. *Wood*, 112 F.3d at 597, 31 BRBS at 47(CRT). The court further stated that,

> As to what constitutes justification, we agree that economic judgments ought generally to control. Care for an aged parent is to be commended; but a claimant who turns down a better job elsewhere for personal reasons has a much weaker claim to be subsidized by the employer . . . Even if the employee's reasons are economically sound, . . . in some cases the employer may still suffer undue "prejudice" if the disparity in wages between the new and old locations is extreme.

Id.

In my view, the administrative law judge failed to sufficiently address these factors, *see* Decision and Order at 44, or the undue burden which claimant's move to Spokane may have placed on employer by excluding increased job opportunities for higher-paying suitable linguist positions in the Northern Virginia area. As these findings are necessary under the case precedent, I would remand the case for the administrative law judge to fully address this issue and, if necessary, to determine whether suitable alternate employment was available in locations in addition to Spokane. Moreover, I would instruct the administrative law judge to recalculate claimant's wage-earning capacity in accordance with any additional findings regarding suitable alternate employment. In all other respects, I agree the administrative law judge's Decision and Order may be affirmed.

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RYAN GILLIGAN
Administrative Appeals Judge