U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 16-0216

STEPHEN S. CLARK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DYNCORP INTERNATIONAL	)	
	)	DATE ISSUED: Jan. 11, 2017
and	)	
	)	
CONTINENTAL CASUALTY COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order – Granting Benefits and the Order Denying Motion for Reconsideration of Stephen R. Henley, Administrative Law Judge, United States Department of Labor.

Joel S. Mills and Gary B. Pitts (Pitts & Mills), Houston, Texas, for claimant.

Marcy Singer Ruiz (Law Offices of Edward J. Kozell), Chicago, Illinois, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order – Granting Benefits and the Order Denying Motion for Reconsideration (2014-LDA-00783) of Administrative Law Judge Stephen R. Henley 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 worked intermittently in Iraq from March 2004 through February 2011, providing high-threat protection. Decision and Order at 3. Claimant began working for employer in Iraq in May 2010 as a protection specialist. Tr. at 4, 14. Claimant testified that during the course of his employment in Iraq, but prior to working for employer, he was exposed to weapons fire and a close friend committed suicide. *Id*. at 18-22. While working for employer, claimant observed another friend, whom he had recruited to work in Iraq, threatened with a gun, then beaten and imprisoned by Iraqi military police. *Id*. at 23-26. Claimant returned to the United States in February 2011 upon completion of his employment contract. Tr. at 43. He filed a claim under the Act on March 8, 2011, alleging aggravation of a pre-existing psychological condition due to his employment with employer in Iraq. CX 2.

In his decision, the administrative law judge found that claimant established he has work-related post-traumatic stress disorder (PTSD). Decision and Order at 26-31. The administrative law judge found that claimant is unable to return to work for employer or in any environment with the potential for re-traumatization. *Id*. at 32-33. The administrative law judge found that claimant's post-Iraq employment in the United States constitutes suitable alternate employment. Specifically, claimant was employed by Alutiiq from August 8, 2011 to October 23, 2013 -- first as a firearms instructor and then with its foreign immersion training unit. Tr. at 15, 45. After being terminated by Alutiiq, claimant worked part-time at a cigar shop. *Id*. at 32-33.

The administrative law judge determined claimant's pre-injury average weekly wage under Section 10(c), 33 U.S.C. §910(c), as $3,384.24, based on his earnings for employer during the year prior to the completion of his employment contract in February 2011. *Id*. at 35-38. The administrative law judge found that claimant has a weekly post-injury wage-earning capacity of $827.59, by averaging claimant's combined earnings with Alutiiq and the cigar shop. *Id*. at 39-43. The administrative law judge awarded claimant compensation for temporary total disability, 33 U.S.C. §908(b), from March 28, 2011[1] to August 7, 2011, and for continuing temporary partial disability, 33 U.S.C. §908(e), from August 8, 2011, at a weekly rate of $1,256.84, which is the statutory maximum rate for fiscal year 2011. *See* 33 U.S.C. §906(b).

Employer filed a motion for reconsideration, which the administrative law judge denied. The administrative law judge rejected employer's contentions that claimant was

[1] Claimant sought compensation beginning on this date, rather than his last day of work for employer in February 2011. Cl. Post-Hearing Br. at 28; *see* CX 10.

not disabled by PTSD until September 2013 and that claimant's average weekly wage, therefore, should be based on his earnings with Alutiiq prior to this time.

On appeal, employer contends the administrative law judge erred by commencing claimant's disability award on March 28, 2011 rather than on July 15, 2013, when, employer avers, a physician first imposed restrictions that would preclude claimant's return to work for employer in Iraq. Employer thus contends that claimant's average weekly wage should be determined with reference to his Alutiiq wages rather than his wages with employer. Claimant responds, urging affirmance of the administrative law judge's award.

Employer contends that claimant's disability from PTSD did not commence until July 15, 2013, when Dr. Gustin first restricted claimant from working with guns or around certain noises. *See* CX 1 at 5. In order to establish a prima facie case of total disability, claimant must show that he is unable to perform his usual work due to the work injury. *See, e.g., Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998). In *Rice v. Service Employees Int'l, Inc.*, 44 BRBS 63 (2010), for example, the claimant established a prima facie case of a totally disabling psychological condition where both psychologists of record opined that claimant should not return to work in a war zone because it would cause her work-related condition to become symptomatic. *Id.* at 65.

In his initial decision, the administrative law judge found that claimant cannot return to his usual work, based on claimant's testimony, Dr. Hill's work capacity evaluation, David Cantu's opinion, and Dr. Dunn's treatment notes.[2] Decision and Order at 32-34; CXs 1; 13 at 3; 15 at 5; Tr. at 29-31. The administrative law judge awarded claimant benefits commencing March 28, 2011.

In its motion for reconsideration, employer averred that, based on the credited evidence, claimant's award should not commence until September 26, 2013, as Dr. Hill's evaluation of this date was the first indication of disability in a medical report. The administrative law judge rejected this contention, finding "[e]mployer's argument is based implicitly on the untenable premise that Claimant could not have had a disability

[2] Dr. Hill's April 15, 2014, evaluation was based on his examination of claimant on September 26, 2013. Dr. Hill opined that claimant cannot work in a high stress environment with combat/conflict potential. CX 13 at 3. Mr. Cantu, a counselor and life coach, stated in a March 28, 2011, letter that claimant should not work in hostile environments or combat zones in order to overcome his violent thoughts and to improve his marriage. CX 1 at 1. The administrative law judge found that Dr. Dunn's treatment notes in 2014 and 2015 reflected increased PTSD symptoms during times of stress. CX 15.

until he was diagnosed with PTSD by Dr. Hill." Order Denying Recon. at 3. The administrative law judge stated that the medical records of Drs. Hill and Dunn proved the existence of claimant's PTSD as of the date of their examinations, but "it does not follow that Claimant's condition did not exist prior to Dr. Hill's diagnosis." *Id.* at 4. The administrative law judge found that "the evidence overwhelmingly indicates that Clamant experienced symptoms of his psychological condition at the end of his employment with Dyncorp in February 2011. . . ." *Id.*

We reject employer's contention that the administrative law judge erred in awarding benefits from March 28, 2011. A claimant's disability award need not be premised on a medical opinion explicitly stating that claimant cannot return to his usual work. *Devor v. Dep't of the Army*, 41 BRBS 77 (2007); *Golden v. Eller & Co.*, 8 BRBS 846 (1978), *aff'd*, 620 F.2d 71, 12 BRBS 348 (5th Cir. 1980). Rather, as the administrative law judge correctly observed, lay evidence may provide the foundation for a disability award. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *see also Newport News Shipbuilding & Dry Dock Co. v. Riley*, 262 F.3d 227, 35 BRBS 87(CRT) (4th Cir. 2001). Moreover, the administrative law judge is entitled to draw rational inferences from the evidence of record. *Presley v. Tinsley Maint. Serv.*, 529 F.2d 433, 3 BRBS 398 (5th Cir. 1976).

The administrative law judge found that claimant exhibited symptoms of PTSD at the end of his overseas employment and drew the inference that claimant was unable to return to his overseas work due to his PTSD as of that date as well. The administrative law judge credited the March 28, 2011 statement by Mr. Cantu, with whom claimant treated starting in 2010 for marriage problems, that claimant should not work in hostile environments or combat zones in order to decrease his violent thoughts. Decision and Order at 33; *see* CX 1 at 1;[3] n.2, *supra*. Claimant also testified that he underwent weekly psychological counseling sessions with Dr. Beyer via telephone after she contacted claimant at the direction of employer to conduct an exit interview when he stopped working in February 2011. Tr. at 27-29, 58-59. The administrative law judge found that claimant treated with Dr. Beyer for approximately a year.[4] Decision and Order at 30. Claimant testified that Dr. Beyer told him he was suffering from PTSD. The administrative law judge further found that claimant reported consistent psychological

[3] Mr. Cantu also stated that claimant had anger problems that "significantly affected his marriage." CX 1 at 1.

[4] The administrative law judge drew an adverse inference against employer regarding the duration of this treatment because Dr. Beyer acted under the direction of employer and any treatment records should be under its control. Decision and Order at 30; *see Brown v. Pacific Dry Dock*, 22 BRBS 284 (1989).

symptoms to the psychologists. *Id.* at 25 n.13, 27-28. Dr. Hill stated in April 2014 that claimant should avoid environments with the potential for "re-traumatization," CX 13 at 3, and the administrative law judge recited the conditions of claimant's employment in Iraq that could lead to re-traumatization. Decision and Order at 34.

The administrative law judge's finding that claimant's work-related psychological injury prevented him from returning to work in Iraq at the end of his employment there is supported by substantial evidence of record. It is well-established that the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences and conclusions from the evidence. *See Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963). The Board may not reweigh the evidence, but may assess only whether there is substantial evidence to support the administrative law judge's decision. *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003); *Miffleton v. Briggs Ice Cream Co.*, 12 BRBS 445 (1980), *aff'd*, No. 80-1870 (D.C. Cir. 1981). Although the administrative law judge could have found that claimant was not disabled from performing his usual work in Iraq until a medical professional explicitly expressed such an opinion, the administrative law judge reasonably concluded from the credited evidence that claimant's work-related PTSD prevented him from returning to Iraq as of the date claimant sought benefits. *Rice*, 44 BRBS 63; *Devor*, 41 BRBS 77; *see Presley*, 529 F.2d at 436, 3 BRBS at 400. Therefore, as it is supported by substantial evidence, we affirm the award of disability compensation from March 28, 2011.

We also reject employer's contention that the administrative law judge erred in using claimant's wages with employer as the basis for his average weekly wage. First, employer's premise that average weekly wage is calculated with reference to the onset of disability is mistaken. The United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, has held that average weekly wage is calculated with reference to the wages at the "time of injury" that causes the disability. *LeBlanc v. Cooper/T. Smith Stevedoring, Inc.*, 130 F.3d 157, 31 BRBS 195(CRT) (5th Cir. 1997). Second, the administrative law judge reasonably relied on the parties' stipulation that February 6, 2011, is the "date of injury" and calculated claimant's average weekly wage with reference to claimant's earnings with employer prior to this date. Decision and Order at 2; JX 1; *see, e.g., Richardson v. Director, OWCP*, 94 F.3d 164 (4th Cir. 1996); *Ramos v. Global Terminal & Container Services, Inc.*, 34 BRBS 83 (1999); *Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120, 127-128 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994). Moreover, the administrative law judge's finding that claimant's latest "date of awareness" is March 8, 2011, also is supported by substantial evidence of record, in the form of the claim form filed that day. CX 2; *Ceres Gulf, Inc. v. Director, OWCP [Fagan]*, 111 F.3d 17, 31 BRBS 21(CRT) (5th Cir. 1997); *see generally*

Leathers v. Bath Iron Works Corp., 135 F.3d 78, 32 BRBS 169(CRT) (1st Cir. 1998); *V.M. [Morgan] v. Cascade General, Inc.*, 42 BRBS 48 (2008), *aff'd mem.*, 388 F.App'x 695 (9th Cir. 2010). Thus, this date also supports the administrative law judge's use of claimant's wages with employer as the basis for his average weekly wage.[5] *See generally LeBlanc*, 130 F.3d. 157, 31 BRBS 195(CRT). As employer has not established error in the administrative law judge's average weekly wage calculation, it is affirmed.

Accordingly, the administrative law judge's Decision and Order – Granting Benefits and the Order Denying Motion for Reconsideration are affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

_____
RYAN GILLIGAN
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge

[5] We also note our agreement with the administrative law judge that the categorization of claimant's PTSD as a traumatic injury or as an occupational disease does not affect his finding that March 8, 2011, is the latest possible date of injury/awareness. *See* Decision and Order at 36 n.22; *see generally LeBlanc*, 130 F.3d 157, 31 BRBS 195(CRT).