U.S. Department of Labor

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

BRB No. 15-0300

JOSEPH R. EGLAND	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
P.C. PFEIFFER COMPANY, INCORPORATED	)	DATE ISSUED: May 19, 2016
	)	
Employer-Respondent	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Carrier-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Gene Watkins (Sherman Watkins PLLC), Houston, Texas, for claimant.

James M. Davin (Julian & Seele, P.C.), Houston, Texas, for employer.

Michael D. Murphy (Sheehy, Ware & Pappas, P.C.), Houston, Texas, for carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (2011-LHC-02031) of Administrative Law Judge Lee J. Romero, Jr., 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*. (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 filed a claim under the Act for injuries he sustained to his left shoulder and neck/back while working as a longshoreman on June 20, 2005. In a decision issued on March 26, 2010, the administrative law judge found that claimant cannot return to his usual work because of his shoulder and neck injuries, and he awarded claimant temporary total disability benefits from June 20, 2005 to May 23, 2006, and from August 19, 2006 to July 31, 2008, followed by a continuing award of temporary partial disability benefits.[1] 33 U.S.C. §908(b), (e). Subsequently, claimant filed a claim alleging that employer violated Section 49 of the Act, 33 U.S.C. §948a, because it refused to allow him to work, despite his having provided a full release from his treating physician, Dr. Masson, on April 11, 2011.[2] Claimant alleged that employer's action was in retaliation for his having filed a compensation claim and that he is entitled to reinstatement to his position and back wages.[3] Employer contended before the administrative law judge that, per the administrative law judge's prior decision, claimant is disabled from returning to work by both his shoulder and neck/back injuries and that Dr. Masson's release was not a "full" release as it did not provide sufficient information about claimant's disabling neck/back condition.

[1] The administrative law judge issued two orders on reconsideration. The first reconsideration decision modified the date employer established the availability of suitable alternate employment from July 31, 2008, to March 31, 2007, and modified claimant's post-injury wage-earning capacity for calculating the ensuing temporary partial disability award from $352 per week to $330. The second reconsideration order modified the prior order to provide that employer shall pay compensation from March 31, 2007 to July 31, 2008, based on a post-injury wage-earning capacity of $330, and continuing temporary partial disability compensation from July 31, 2008, based on a post-injury wage-earning capacity of $352.

[2] After the administrative law judge's 2010 decision, claimant continued to treat with Dr. Masson. On April 8, 2011, Dr. Masson released claimant to return to work. Claimant presented the work release to employer and returned to work on April 11, 2011. CX 3 (2012); *see* n.8, *infra*. Five days later, employer informed claimant that he could not work there because the administrative law judge had determined in his March 2010 decision that claimant was unable to return to work. CX 5 at 16-20 (2012). Claimant was escorted from the facility.

[3] Claimant also alleged that employer's action was in retaliation for his union activities. This is not a basis for a violation of Section 49. *Miller v. Prolerized New England Co.*, 14 BRBS 811 (1981) (Miller, J., dissenting), *aff'd on other grounds*, 691 F.2d 45, 15 BRBS 23(CRT) (1st Cir. 1982).

In his decision dated June 14, 2012, the administrative law judge found that claimant continues to be disabled per the 2010 decision, which has not been modified; therefore, pursuant to Section 49, claimant could not establish a discriminatory act by employer nor could he be reinstated to his job. Accordingly, the administrative law judge denied the discrimination claim. Claimant appealed the administrative law judge's decision and asserted that the administrative law judge erred in failing to modify his prior award and in finding that employer did not discriminate against him.

In its decision, the Board remanded the case for further findings. The Board stated that the administrative law judge erred in failing to determine whether the existing temporary partial disability award should be modified, pursuant to Section 22, 33 U.S.C. §922, based on claimant's assertion at the January 2012 hearing that he was capable of returning to work when Dr. Masson provided the work release and on claimant's actually working at employer's facility for several days before employer told him he could no longer work there. *Egland v. P.C. Pfeiffer Co., Inc.*, BRB No. 12-0554, slip op. at 4-6 (May 30, 2013) (unpub.). The Board held that, in finding claimant was not discriminated against, the administrative law judge did not consider all the relevant evidence and circumstances concerning claimant's dismissal under the facts as they existed at the time claimant was not permitted to return to work. *Id*., slip op. at 6. Specifically, Dr. Masson had not then indicated that claimant's work release was for a trial period (as he subsequently testified at his deposition). Moreover, the Board stated that the administrative law judge did not address and weigh the relevant evidence from employer's representatives regarding its practices when injured employees return to work. *Id*.

In his decision on remand, the administrative law judge found that he could not grant modification under Section 22 because any request therefor was not timely.[4] Decision and Order on Remand at 17. The administrative law judge found claimant entitled to a presumption of discrimination under Section 49 but that employer rebutted the presumption. The administrative law judge then found, based on the totality of the evidence, that claimant did not establish that employer committed a discriminatory act against him motivated by his filing a compensation claim. *Id*. at 28. Accordingly, the administrative law judge denied the claim of discrimination under Section 49.

[4] The administrative law judge found that neither claimant's assertion at the January 22, 2012 hearing that he was physically capable of returning to work nor his filing of a formal request for modification in March 2014 are grounds for granting modification since these events occurred more than one year after employer's last payment of temporary partial disability compensation on April 14, 2010. *See* 33 U.S.C. §922; *House v. Southern Stevedoring Co.*, 14 BRBS 979 (1982), *aff'd*, 703 F.2d 87, 15 BRBS 114(CRT) (4th Cir. 1983); EX 8 at 3 (2012).

On appeal, claimant challenges the administrative law judge's denial of the discrimination claim and the finding that he could not modify his prior decision under Section 22. Employer responds that the administrative law judge's decision should be affirmed in all respects. Employer's carrier, Signal Mutual Indemnity Association, responds that the administrative law judge properly refused to consider the merits of claimant's request for Section 22 modification.[5]

Section 49 of the Act prohibits an employer from discharging or discriminating against an employee because the employee has claimed compensation under the Act. If the employee can show he is the victim of such discrimination and if he is qualified to work, he is entitled to reinstatement and back wages. 33 U.S.C. §948a;[6] *G.M.* [*Meeker*] *v. P & O Ports Louisiana, Inc.*, 43 BRBS 68 (2009); 20 C.F.R. §702.271. The essence of discrimination is in treating like individuals differently. *See Mueller Brass Co. v. N.L.R.B.*, 544 F.2d 815 (5th Cir. 1977); *Jaros v. National Steel & Shipbuilding Co.*, 21 BRBS 26 (1988). The Board recently stated the proper standard for analyzing claims under Section 49 of the Act:

> 1. A claimant's initial burden is to make out a prima facie case of discrimination under Section 49. That is, he must "produce enough evidence to permit the trier of fact to infer" that employer committed a discriminatory act motivated by discriminatory animus. If the claimant

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[5] Given our disposition of claimant's appeal of the administrative law judge's denial of the Section 49 claim, we need not address claimant's contentions concerning the administrative law judge's denial of Section 22 modification.

[6] Section 49 provides in part:

> It shall be unlawful for any employer or his duly authorized agent to discharge or in any other manner discriminate against an employee as to his employment because such employee has claimed or attempted to claim compensation from such employer, or because he has testified or is about to testify in a proceeding under this chapter. . . . Any employee so discriminated against shall be restored to his employment and shall be compensated by his employer for any loss of wages arising out of such discrimination: *Provided*, That if such employee shall cease to be qualified to perform the duties of his employment, he shall not be entitled to such restoration and compensation.

33 U.S.C. §948a.

makes out a prima facie case, he is entitled to a rebuttable presumption that his employer violated Section 49 of the Act.

2. An employer's burden on rebuttal is one of production only, that is, it must produce substantial evidence that it acted for non-discriminatory reasons. If the employer produces such substantial evidence, the presumption falls from the case.

3. The claimant, who bears the ultimate burden of persuasion, then must prove by a preponderance of the evidence that his employer committed a discriminatory act against him motivated by his claim for compensation under the Act, i.e., that the action was taken because of the claimant's protected activity.

Babick v. Todd Pacific Shipyards Corp., 49 BRBS 11, 14 (2015). Claimant challenges the administrative law judge's weighing of the evidence, his failure to address the opinion of Dr. Cotler,[7] and his allegedly not following the Board's remand instructions.

The administrative law judge applied the *Babick* standards in addressing this Section 49 claim. Decision and Order on Remand at 22-23. He found claimant entitled to a presumption of discrimination based on claimant's successfully working for employer for several days before being escorted off its premises and Dr. Masson's work release, which the administrative law judge found could arguably be construed as a full work release. Decision and Order at 26-27; *see* CX 3 at 3 (2012).[8] The administrative law judge also credited the testimony of employer's Terminal Superintendent, Joe

[7] Dr. Cotler evaluated, but did not treat, claimant's neck four times from February 2009 to November 2010. He did not impose work restrictions after his last examination of claimant. EX 23 (2009). In his decision on remand, the administrative law judge thoroughly summarized Dr. Cotler's testimony. Decision and Order on Remand at 4-9. Claimant presented no evidence that employer was aware in April 2011 of Dr. Cotler's conclusions. Dr. Cotler's post-hearing deposition in July 2014 is far removed from the circumstances of claimant's dismissal in April 2011, and, moreover, the administrative law judge noted that employer contended that claimant did not present it with a work release from Dr. Cotler. *Id*. at 26. Claimant has not established that the administrative law judge's treatment of Dr. Cotler's reports and opinion is in error.

[8] On a Texas Workers' Compensation Work Status Report Form dated April 8, 2011, Dr. Masson noted that claimant's injury was to his "left shoulder." Dr. Masson checked the box stating claimant could return to work on April 11, 2011 "without restriction." CX 3 at 5 (2012).

Donofry, that prior work releases submitted by other employees had not been questioned, which was supported by the concurring deposition testimony of employer's owner, Thomas Flanagan. CXs 5 at 14-15; 6 at 11 (2012). Moreover, the administrative law judge noted Mr. Flanagan's testimony that there were no written procedures for reviewing medical work releases, and that he never informed claimant of what additional documentation he needed to present in order to return to work. Decision and Order on Remand at 27; CX 5 at 15, 27 (2012). The administrative law judge found this testimony of Mr. Donofry and Mr. Flanagan constitutes evidence that claimant was treated differently than other workers who returned to work after an injury and thus raised the presumption that this disparate treatment was because claimant had filed a compensation claim. Decision and Order on Remand at 27.

The administrative law judge found that employer rebutted the presumption based on other testimony of Mr. Donofry and Mr. Flanagan. The administrative law judge credited the testimony of Mr. Donofry that he understood Dr. Masson's work release as applying only to claimant's shoulder, *see* CX 6 at 21, 23 (2012), which the administrative law judge found negates an inference of animus and demonstrates employer's understanding of what constitutes a "full work release." Decision and Order on Remand at 27. The administrative law judge also credited Mr. Flanagan's testimony that he followed the advice of his attorney[9] to turn claimant away in the absence of a full work release and that this was the first time that a claimant had returned to work after having been adjudicated "permanently disabled." CX 5 at 16-20, 34 (2012).[10] Finally, the administrative law judge noted claimant's testimony at the 2009 hearing to the effect that he had turned away workers who lacked a full work release. Tr. at 116 (2009). The administrative law judge found this testimony constitutes substantial evidence of the absence of animus on the ground that claimant was not treated differently than other employees who lack a full work release. Decision and Order on Remand at 27.

In weighing the evidence as a whole, the administrative law judge found that claimant did not meet his burden of persuasion. The administrative law judge found that, "[B]eyond the evidence analyzed above, the record is devoid of any indication that employer acted with animus in turning claimant away from work." *Id*. at 28. The administrative law judge found that "the weight of the evidence" shows employer had

[9] Mr. Flanagan testified that he called his attorney because he had never encountered a worker returning to work after a decision finding that he was not physically capable of returning to work. CX 5 at 15-20, 34-35 (2012).

[10] In fact, claimant was adjudicated to be temporarily partially disabled, but was found to be unable to return to his usual work due to his work injuries to his shoulder and neck/back.

"genuine doubt" as to the completeness of Dr. Masson's work release, and therefore he denied the Section 49 claim. *Id*.

The administrative law judge is entitled to weigh the evidence and may draw his own inferences and conclusions from it. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Moreover, it is impermissible for the Board to substitute its views for those of the administrative law judge; thus, the administrative law judge's findings may not be disregarded merely on the basis that other inferences could have been drawn from the evidence. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). In this case, the administrative law judge adhered to the Board's remand instruction that he address the relevant evidence and the circumstances at the time of claimant's dismissal in April 2011. *See generally Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157 (1990). Substantial evidence supports the administrative law judge's conclusion that claimant did not establish that employer's action in not allowing claimant to return to work was motivated by claimant's filing a compensation claim. Therefore, we affirm the denial of claimant's Section 49 claim. *See Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998); *Manship v. Norfolk & Western Ry. Co.*, 30 BRBS 175 (1996).

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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GREG J. BUZZARD
Administrative Appeals Judge