U.S. Department of Labor

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

BRB No. 16-0637

LEON LOTT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HANMORE BROTHERS CONSTRUCTION COMPANY	)	
	)	
	)	DATE ISSUED: May 3, 2017
and	)	
	)	
COMMERCE & INDUSTRY INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Tracy A. Daly, Administrative Law Judge, United States Department of Labor.

Leon Lott, Gulfport, Mississippi.

Jeffrey I. Mandel (Juge, Napolitano, Guilbeau, Ruli & Frieman), Metairie, Louisiana, for employer/carrier.

Before: BUZZARD, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant, appearing without counsel, appeals the Decision and Order (2015-LHC-00896) of Administrative Law Judge Tracy A. Daly 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). In an appeal by a claimant without legal representation, we

will review the administrative law judge's findings of fact and conclusions of law to determine if they are rational, supported by substantial evidence, and in accordance

with law. If they are, they must be affirmed. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant started working for employer in 2008, where he held a number of positions as a laborer, construction worker, forklift operator, and truck driver. His duties included building frames, pouring cement, finishing cement, rigging, operating trucks, transporting equipment, operating forklifts, and cleaning up trash from the work site. His job assignments varied depending on the type of employer's current projects and work load. When employer's business was slower than usual, employer gave claimant other tasks to keep him working. He generally worked eight to ten hours per day at an hourly wage of $16.

On August 6, 2014, claimant suffered injuries to his lower back and leg while stripping plywood on a barge under the state dock in Gulfport, Mississippi. Tr. at 36. While attempting to pry plywood with a break bar, the break bar slipped, causing claimant to fall backwards onto the barge's flat surface. Claimant landed directly on his tail bone. Afterwards, he felt tightness in his lower back and leg. Claimant continued to work operating a forklift, but later that day began to experience pain and decided to stop working. He reported the accident to his supervisor, Javid Hanmore, on his way home.

Claimant's primary complaints were of a sharp pain in his hip and numbness in his leg. He has seen a number of doctors for treatment, starting with Dr. Todd Coulter the day after the accident.[1] On August 18, 2014, Dr. Coulter placed claimant on "light duty" work restrictions with no lifting, pushing, or pulling objects greater than ten pounds. CX 6 at 14; Tr. at 46.

After the accident, employer put claimant on light duty operating the forklift, which required minimal physical lifting. Employer also permitted claimant to take as many breaks as necessary. Claimant operated the forklift while another employee

[1] Claimant was seen by Dr. Rand Voorhies, a neurosurgeon, who diagnosed claimant with advanced degenerative changes consistent with spondylosis. EX 8 at 5. A report prepared by Dr. Voorhies' office stated that as long as claimant could take breaks and was not required to stand or walk frequently, then light-duty work would be permissible. *Id.* at 10. Claimant was also seen by Dr. Robert Applebaum, a neurosurgeon, who opined that claimant had "significant degenerative disc disease in the lumbar spine prior to his accident," although he acknowledged that the symptoms were related to claimant's work accident. EX 7 at 3. Dr. Applebaum released claimant to sedentary work with no prolonged bending, stooping, or lifting loads greater than five to ten pounds. *Id.* at 4. Dr. Applebaum did not believe that claimant was capable of returning to work as a construction worker. *Id.*

stacked the materials for the forklift, but several times during an eight hour shift claimant was required to lift four-by-four boards. Claimant characterized this type of lifting as minimal and stated that another laborer was present to help him lift anything heavy. Tr. at 48-49, 98. While operating the forklift, claimant stated he complained of pain to a co-worker. *Id.* at 50.

Employer next reassigned claimant to work at a construction site in Long Beach, Mississippi picking up paper and trash. Tr. at 51-52. There, claimant was required to climb three flights of stairs and be on his feet for more than six hours per day. Claimant estimated the greatest weight he had to lift was an eight-ounce piece of Styrofoam. *Id.* at 99. Claimant was able to perform these tasks and did not inform employer he could not physically perform these duties. *Id.*

Claimant testified that one day while he was on his way to work, Mr. Hanmore called him to inform him that no more light-duty work was available.[2] Tr. at 94. On cross-examination, claimant denied employer's claim that he requested that employer place him on workers' compensation, only to later change his mind that he desired to work light duty. *Id.* at 95-96. Claimant stated he would have continued working modified duty for as long as he was physically able and had available work. *Id.* at 100. Claimant also denied that he refused employer's continued offer to work a modified light-duty position. *Id.* at 100-101. Claimant further testified he can no longer perform a light-duty job, including operating the forklift and picking up trash, due to back pain and difficulties with walking. *Id.* at 61. Claimant admitted, however, that none of his physicians have stated that he is physically unable to work. *Id.* at 103-104.

Mr. Hanmore testified for employer. Mr. Hanmore stated that employer had authorized claimant to be treated by Dr. Coulter but that claimant neither requested nor received authorization to be treated by Dr. Sudderth. Tr. at 120. Mr. Hanmore further confirmed that employer made modified light-duty work available to claimant and that cleaning and picking up trash was "real work" because construction sites must be cleaned daily. *Id.* at 126. Claimant did not report that he was unable to perform his modified light-duty position. *Id.* at 122.

Mr. Hanmore averred that claimant refused to work all hours made available to him. Tr. at 123. According to Mr. Hanmore, on several occasions claimant informed him that he did not wish to work anymore and wanted to receive workers' compensation benefits but claimant then changed his mind before Mr. Hanmore could complete the paperwork. Mr. Hanmore asserted that claimant was terminated on September 20, 2014 after claimant again refused to perform light-duty work. *Id.* at 125, 128-130.

[2] Employer disputed claimant's account of how his employment ended.

Claimant sought disability benefits under the Act and reimbursement for past medical expenses, as well as future medical benefits.[3] In his decision, the administrative law judge concluded that claimant's testimony was only partially credible because it was inconsistent and sometimes unclear. Decision and Order at 17. The administrative law judge further found that claimant's testimony that he is unable to work because of pain is undermined by his conduct in returning to work after the accident and in failing to inform employer that he was unable to perform the new light-duty work. *Id.* The administrative law judge also noted that claimant's testimony about his continuing pain is undermined by the fact that claimant has not requested any additional pain treatment from his physicians. *Id.* at 18.

The administrative law judge found Mr. Hanmore to be a credible witness. The administrative law judge specifically credited Mr. Hanmore's version of events and concluded that claimant was terminated because he refused to perform available light-duty work. Decision and Order at 18. The administrative law judge also found the testimony of Michael Scullin, employer's vocational consultant, to be generally credible and accordingly assigned considerable weight to his conclusions about the nature of work available to claimant based upon the physical functional limitations assigned by claimant's treating physicians. *Id.* at 19.

The administrative law judge found that claimant established that he is unable to return to his regular or usual employment as a laborer due to his work-related injuries. Decision and Order at 22. Accordingly, the administrative law judge found that claimant established a prima facie case of total disability. *Id.* The administrative law judge found that claimant reached maximum medical improvement on November 5, 2015, the date of claimant's last medical appointment in the record. *Id.* at 23. The administrative law judge further concluded that employer offered claimant a modified job that was not "sheltered employment," and qualified as suitable alternate employment because the nature and physical requirements of the job were tailored to claimant's post-injury restrictions. The administrative law judge found claimant's testimony that he could no longer return to full employment in a light-duty position is not credible nor supported by the totality of medical evidence in the record. The administrative law judge found that claimant is not entitled to disability compensation because he is capable of performing suitable alternate employment provided by employer and suffered no loss of wage earning capacity after returning to work following the accident. *Id.* at 25-28.

[3] The parties stipulated, among other things, that the Act applies to the claim and that claimant's injury occurred during the course and scope of his employment. Decision and Order at 2.

The administrative law judge stated that claimant is entitled to all future reasonable, necessary and appropriate medical expenses related to his work-related injury but that this does not include the cost of surgery or the reimbursement of claimant's treatment with Dr. Sudderth because claimant did not seek authorization for the treatment by Dr. Sudderth and claimant did not establish that surgery was necessary for treatment of his work-related injury. Decision and Order at 29.

Claimant appeals the denial of disability benefits.[4] Employer responds, urging affirmance.

As claimant is appealing without the assistance of counsel, we will address all of the administrative law judge's findings which are adverse to claimant. We begin with the administrative law judge's finding that claimant is not disabled by his work injury. To establish a prima facie case of total disability, a claimant must show that he cannot return to his usual work due to his work injury. *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998). Where, as here, claimant has established a prima facie case of total disability, the burden shifts to the employer to show suitable alternate employment. Employer must show the realistic availability of job opportunities within the geographic area where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions is capable of performing. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156(CRT) (5th Cir. 1981). Employer can meet its burden by offering claimant a light-duty job in its facility. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996); *Buckland v. Dep't of the Army/NAF/CPO*, 32 BRBS 99 (1998). Sheltered employment, however, is insufficient to constitute suitable alternate employment. *Ezell v. Direct Labor, Inc.*, 33 BRBS 19, 25 (1999). Sheltered employment is defined as a job that is unnecessary to employer's operations and was created merely to place claimant on the payroll. *Buckland*, 32 BRBS at 100. The mere fact that light-duty work is tailored to claimant's physical limitations is insufficient to establish that a position is sheltered. *See Darby*, 99 F.3d at 689, 30 BRBS at 95(CRT).

We affirm the administrative law judge's finding that employer established suitable alternate employment by virtue of its light-duty position. Substantial evidence supports the finding that the job was suitable for claimant. *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9 (2001), *aff'd mem.,* 32 F. App'x 126 (5th Cir. 2002). The administrative law judge found that Dr. Coulter placed claimant on light-duty work restrictions with no lifting, pushing, or pulling objects greater than ten pounds, while Dr.

[4] Claimant was represented by counsel before the administrative law judge. Claimant's former counsel filed a motion to withdraw with the Board on November 22, 2016.

Applebaum restricted claimant from prolonged bending, stooping, or lifting loads greater than five to ten pounds. The administrative law judge found the job at employer's facility was within these restrictions, as employer established that claimant was permitted to perform the job in a manner that did not require any repetitive lifting of tools or of heavy objects and to take breaks whenever necessary. In addition, the administrative law judge relied on claimant's testimony that he was not required to lift heavy objects and had the assistance of a co-worker when necessary. The administrative law judge found that claimant adequately performed the work and that the evidence does not establish claimant reported to employer that he was physically unable to perform the work. The administrative law judge also noted that claimant conceded that none of his physicians restricted him from working at all. Decision and Order at 13.

We further conclude that the administrative law judge's finding that employer's light-duty position did not constitute sheltered employment is rational and supported by the evidence. *Peele v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 133 (1987). In addition to determining that the light-duty position was not too physically demanding for claimant to perform, the administrative law judge found that employer presented credible evidence that the duties claimant was performing were a necessary part of employer's business. This finding is supported by Mr. Hanmore's testimony that it was "real work" because construction sites must be cleaned daily. Tr. at 126. Claimant's own testimony acknowledged that operating a forklift and picking up trash had been part of his regular duties before his injury, indicating that such duties were, in fact, necessary for employer's business, even if the position was modified to suit claimant's physical limitations. *See Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986).

Moreover, the administrative law judge discredited claimant's testimony that he is no longer able to perform light-duty work. Decision and Order at 27. The administrative law judge credited the testimony of Mr. Hanmore that claimant's employment was terminated after he refused to perform the light-duty position rather than claimant's assertion that he was told that there was no more light-duty work available. The administrative law judge noted that claimant's testimony that he is unable to work due to significant pain is not supported by the medical evidence and the fact that both Drs. Coulter and Applebaum deemed claimant able to perform light-duty work. *Id.* On the basis of the record before us, the administrative law judge rationally declined to credit claimant's testimony concerning his ability to work and credited Mr. Hanmore's testimony over claimant's on the issue of why claimant's employment was terminated. It is well established that an administrative law judge in his role as the fact-finder has the discretion to determine the credibility of witnesses and weigh the evidence accordingly. *See Mendoza v. Marine Personnel Co.*, 46 F.3d 498, 500, 29 BRBS 79, 81-81(CRT) (5th Cir. 1995).

Based on the foregoing, we affirm the administrative law judge's determination that employer established suitable alternate employment for claimant by offering him a light-duty position that was not sheltered employment. Moreover, as substantial evidence supports the finding that claimant was, and remained, capable of performing this work we affirm the administrative law judge's finding that claimant is not entitled to disability compensation as he did not sustain a loss of wage-earning capacity due to his injury.[5] *Arnold*, 35 BRBS at 15-16.

We next address employer's liability for medical expenses associated with back surgery and for reimbursement to claimant for the cost of treatment by Dr. Sudderth. Section 7(a) of the Act, 33 U.S.C. §907(a), states that "[t]he employer shall furnish medical, surgical, and other attendance or treatment for such period as the nature of the injury or the process of recovery may require." The administrative law judge concluded that employer is not currently liable for back surgery, because claimant's physicians have not currently recommended any particular type of surgery as treatment for claimant's work injury. Decision and Order at 29. This finding is supported by substantial evidence. Dr. Voorhies stated that "it may be that lumbar spine surgery will be required," but because claimant has extensive abnormalities, it was difficult for Dr. Voorhies to envision a realistic surgical option. EX 8 at 31. Dr. Applebaum stated that it was "unlikely that any need for further surgical intervention would be related to [claimant's work] accident. . . ." EX 7 at 3-4. Accordingly, we affirm the administrative law judge's finding that employer is not currently liable for back surgery.[6] *See generally Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993).

The administrative law judge also concluded that employer need not reimburse claimant for medical expenses incurred with Dr. Sudderth. Section 7(d) of the Act, 33 U.S.C. §907(d), requires that, in order to be entitled to reimbursement for medical

[5] The administrative law judge found, based on claimant's testimony and employer's wage records, that claimant was paid the same hourly wage before and after his injury. The administrative law judge credited Mr. Hanmore's testimony that claimant could work light-duty on the same schedule as before his injury. Decision and Order at 28.

[6] The administrative law judge ordered that "[e]mployer shall pay all reasonable, appropriate, and necessary medical expenses arising from Claimant's August 6, 2014, work injury, pursuant to the provisions of Section 7 of the Act." Decision and Order at 30. Thus, if claimant requires surgery to treat his work injury, claimant can seek employer's authorization for such treatment, in accordance with Section 7(c), (d) of the Act, 33 U.S.C.§907(c), (d). *See* 20 C.F.R. §§702.406, 702.421.

expenses, a claimant must first request his employer's authorization for the medical services performed by any physician, except in the cases of emergency, neglect, or refusal. *See Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1997); *Ranks v. Bath Iron Works Corp.*, 22 BRBS 302, 307 (1989). The administrative law judge found that it was "undisputed" that claimant did not request authorization to consult Dr. Sudderth and that "[t]here is no evidence to suggest there was an emergency, neglect, or refusal on the part of Employer." Decision and Order at 29. The administrative law judge's finding is rational and supported by the evidence in the record. Claimant testified that he did not receive a medical referral to see Dr. Sudderth but consulted Dr. Sudderth based on his attorney's recommendation and there is no evidence in the record to show that claimant made an attempt to seek employer's prior authorization for the visit to Dr. Sudderth. Therefore, we affirm the administrative law judge's finding that claimant is not entitled to reimbursement for medical expenses for his consultation with Dr. Sudderth. *See Ezell v. Direct Labor, Inc.*, 37 BRBS 11, 19 (2003).

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

SO ORDERED.

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GREG J. BUZZARD
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge