U.S. Department of Labor

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

BRB No. 21-0180

TONY BARHORST	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
COMBAT SUPPORT ASSOCIATES, LTD.	)	
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	DATE ISSUED: 4/27/2022
	)	
Employer/Carrier-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Joel S. Mills, Gary B. Pitts and Hunter B. Ratcliff (Pitts, Mills & Ratcliff), Houston, Texas, for Claimant.

Mark K. Eckels (Boyd & Jenerette, P.A.), Jacksonville, Florida, for Employer/Carrier.

Steven Winkelman (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore),

Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Joseph E. Kane's Decision and Order (2018-LDA-00729)[1] rendered on a claim filed pursuant to 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.* (Act).[2] We must affirm the ALJ's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant, in his third week of work as a carpenter for Employer in Kuwait, sustained injuries in a motor vehicle accident on May 14, 2009. Decision & Order (D&O) at 2-3. He was immediately taken by ambulance to a local hospital, treated for a spinal injury, and discharged on May 21, 2009. *Id.* at 4. He then returned to the United States and began treatment with neurosurgeon Dr. Jamal Taha, who diagnosed a spinal fracture at L1 with an accompanying right foot drop. CX 1 at 1, 3. Dr. Taha recommended physical therapy, prescribed a foot brace, and sent Claimant to Dr. Stephen Duritsch, a physical medicine and rehabilitation specialist. CX 1 at 4. Dr. Duritsch, who first evaluated Claimant on November 24, 2009, concurred with Dr. Taha's treatment recommendations and stated Claimant could not climb, balance, or "return to his previous job as a carpenter." CX 1 at 10. Claimant continued to periodically receive treatment from Drs. Taha and Duritsch, as well as Dr. James Hoover, another physical medicine and rehabilitation specialist in the same practice as Dr. Duritsch, and a podiatrist, Dr. Gary LaBianco.

[1] We note Employer and the Director, Office of Workers' Compensation Programs, incorrectly refer to the case number as 2019-LDA-00729.

[2] The Benefits Review Board's processing of this case was substantially delayed due to the COVID-19 pandemic, which impacted the Board's ability to obtain records from the Office of Administrative Law Judges and the Office of Workers' Compensation Programs. After remanding this case for reconstruction, the Board reinstated the appeal on January 31, 2022.

Claimant has not returned to work. D&O at 3. Employer voluntarily paid him $400.00 per week in temporary total disability benefits from May 15, 2009, until October 10, 2013, and $180.67 per week in ongoing permanent partial disability benefits from October 11, 2013. EX 7. Although the parties agreed Claimant is incapable of returning to his overseas carpentry work with Employer, a controversy arose regarding his ability to perform other light duty work. Drs. Duritsch, LaBianco, and Hoover each opined Claimant is capable of performing sedentary work with restrictions,[3] prompting Employer to submit several labor market surveys which purportedly identified suitable alternate employment. The case was transferred to the Office of Administrative Law Judges, and a hearing was held in Cincinnati, Ohio, on July 1, 2019.

In his decision, the ALJ awarded Claimant temporary total disability benefits from May 14, 2009, to December 2, 2010, and ongoing permanent total disability benefits from December 3, 2010, based on an average weekly wage of $993.32 computed under 33 U.S.C. §910(c).

On appeal, Employer challenges the ALJ's extent of disability and average weekly wage findings. Claimant responds, urging affirmance of the ALJ's decision. The Director, Office of Workers' Compensation Programs (Director), responds, urging the Benefits Review Board to affirm the ALJ's average weekly wage determination.

Section 8 - Extent of Claimant's Disability

Employer contends the ALJ erred in finding it did not establish the availability of suitable alternate employment. It maintains the ALJ applied an inappropriate burden of proof in addressing its evidence by requiring it "to identify and provide the perfect job" for Claimant. Specifically, it contends the testimony of its vocational expert, Susan Rapant, identifying four jobs having duties within Claimant's restrictions, establishes the availability of suitable alternate employment. Employer further contends the ALJ did not address whether Claimant conducted a diligent job search to secure suitable alternate employment. For these reasons, Employer contends the ALJ erroneously concluded Claimant is totally disabled.

[3] The record also contains functional capacity evaluations separately conducted by Margaret Headings and Kelly Bombrys. CXs 1 at 26, 9. Ms. Headings opined Claimant is able to work at the "sedentary-light" physical demand level for four hours per day, while Ms. Bombrys opined Claimant demonstrated the ability to function within the sedentary physical demand category for an eight-hour workday. *Id.*

To establish a prima facie case of total disability, a claimant must show he cannot return to his usual work due to his work injury. *Christie v. Georgia-Pacific* Co., 898 F.3d 952, 52 BRBS 23(CRT) (9th Cir. 2018). Where, as in this case, the claimant has established a prima facie case of total disability, the burden shifts to the employer to demonstrate the availability of suitable alternate employment. *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988); *Bumble Bee Seafoods v. Director,* OWCP, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). To meet this burden, the employer must establish the existence of available job opportunities within the geographic area in which the claimant resides, which he is capable of performing considering his age, education, work experience, and physical restrictions, and which he could realistically secure if he diligently tried. *Edwards v. Director*, OWCP, 999 F.2d 1374, 1375, 27 BRBS 81, 82 (CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *Wilson v. Crowley Maritime*, 30 BRBS 199 (1996). The claimant can rebut the employer's showing of the availability of suitable alternate employment, and retain his eligibility for total disability benefits, if he shows he diligently pursued alternate employment opportunities but was unable to secure a position. *Edwards*, 999 F.2d at 1376 n.2, 27 BRBS at 84 n.2(CRT).

Prior to addressing Employer's evidence of suitable alternate employment, the ALJ discussed the August 2018 work capacity evaluations that Drs. Duritsch, LaBianco, and Hoover conducted, as well as Ms. Headings's and Ms. Bombrys's functional capacity evaluations. D&O at 15-16. Dr. Hoover initially stated Claimant could work four hours per day; later in the report, however, he stated Claimant could not perform even sedentary work. CX 1 at 67. The ALJ found Dr. Hoover's assessment that Claimant cannot perform even sedentary work "most probative" as it is "most consistent with the Claimant's reports of chronic pain, foot drop, tingling, and low back pain." D&O at 16. Thus, the ALJ found the weight of the medical evidence shows Claimant cannot "even perform sedentary work for [four] hours per day." *Id*. Even assuming Claimant could perform sedentary work, the ALJ found he could not perform it more than four hours per day. *Id*. He gave "paramount weight" to Dr. Duritsch's opinion that any sedentary work would have to: be home-based or only require Claimant to drive occasionally during the workday; allow for changes in physical position every thirty minutes, including frequently alternating between sitting and standing; and only minimally increase Claimant's pain level.[4] Thereafter, he examined Employer's evidence of suitable alternate employment within those restrictions.

Employer's arguments focus solely on four positions identified in Ms. Rapant's September 2019 labor market survey; consequently, we need only review the ALJ's

[4] Because the ALJ ultimately determined Claimant was capable of working four hours per day within certain parameters, we need not address Employer's contention that the ALJ erred in finding Claimant cannot even perform sedentary work for four hours.

findings about those positions.[5] Employer first states two part-time customer service jobs with Kirsten & Associates (K&A) constitute suitable alternate employment. The ALJ found the first K&A job helping customers make reservations for Walt Disney World Resorts unsuitable because the record is inconsistent as to whether it is a work-from-home position or a call center position.[6] Regardless, he also found Claimant does not have the skills for the job because he lacks any experience in customer service or support. D&O at 20. He similarly found the second K&A position handling customer support for Franchisees First unsuitable because Claimant does not have customer service experience and the job's work hours were not mentioned in the posting.

While Employer argues the only specific "qualification" identified in these job postings is a high school diploma or GED, that fact does not establish any error in the ALJ's rational inference that the jobs require customer service skills Claimant "does not possess and is not capable of acquiring." D&O at 21-22. And, although Ms. Rapant identified Claimant as having "transferrable skills" commensurate with a job in customer service,[7] the ALJ permissibly found she and the other vocational experts did not persuasively explain how Claimant's employment history "in unskilled heavy manual labor," with no computer or office experience, provided him with the transferrable skills required for the customer service jobs that Employer identified.[8] Moreover, he found it

[5] In light of this, we affirm the ALJ's findings that the jobs identified in the February 2012 and October 2013 labor market surveys do not constitute suitable alternate employment as those findings are unchallenged on appeal. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007). Moreover, contrary to Employer's contention, the ALJ properly identified and appropriately applied the correct standard in evaluating its evidence of suitable alternate employment. D&O at 14, 17-22.

[6] The ALJ noted that while the job listing identifies it as a "work from home" position, the "job duties" section describes the work as being part of "call centers." D&O at 20; EX 1 at 15.

[7] Ms. Rapant stated "[a]ccording to O*Net Online," Claimant acquired transferrable skills from his prior employment which included active learning, active listening, complex problem solving, coordination, critical thinking, judgement, decision making, reading comprehension, and speaking. EX 1 at 12-13.

[8] With respect to Claimant's skills, the ALJ stated he was "more persuaded" by the statements of vocational expert Sarah L. Whitten, who found Claimant's successful completion of a training program was questionable at best, and rehabilitation expert Julia

significant Claimant had no experience in sales or marketing or in the hospitality or travel industries.

In assessing whether a job constitutes suitable alternate employment, an ALJ is required to consider not only a claimant's education and vocational background but also whether he is likely to be hired if he diligently sought the job. *Hairston*, 849 F.2d 1194. The ALJ permissibly concluded Claimant's lack of customer service experience and inability to acquire the skills to perform these customer service jobs made them realistically unavailable to him. *See Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 653, 44 BRBS 47, 51(CRT) (9th Cir. 2010). We therefore affirm the ALJ's finding that they do not constitute suitable alternate employment.

The ALJ rejected the third position working as a Guest Service Agent with Comfort Inn because it lists prior face-to-face customer experience as a preference, involved "light" strength work which he found is outside Claimant's physical limitations, and falls beyond Dr. Duritch's restriction against Claimant driving to work.[9] As the ALJ recognized, Ms. Rapant identified this work as involving "light" as opposed to "sedentary" strength. EX 1 at 13. Dr. Duritch's August 6, 2018, work capacity evaluation that the ALJ credited, however, explicitly states Claimant is limited to sedentary work and is not capable of light-duty work. CX 1 at 65. Although the job posting states "the position physical demands can be accommodated," the ALJ rationally relied on Ms. Rapant's representation that it involves light work, which the ALJ found to be beyond Claimant's sedentary limitation.

Crume, who felt Claimant would most likely need to be retrained but was not a feasible candidate for retraining. D&O at 22.

[9] In December 2010, Dr. Duritch opined Claimant could work in a "sedentary or light" capacity but only for four hours per day, and he would be "very limited to light assembly in a seated position." CX 1 at 28. In January 2012, he opined Claimant could work four hours per day as long as he was able to change positions every thirty minutes. EX 3 at 16. He also stated Claimant could drive "occasionally" during a four-hour workday but elaborated that "[t]his does not mean that he can occasionally drive to work." *Id.* Consistent with his earlier opinions, Dr. Duritch's August 2018 functional capacity evaluation limits Claimant to working only four hours per day in a sedentary job and states Claimant has "limitations" on driving to and from work and is limited to "occasionally" driving during the workday. CX 1 at 65. The ALJ rationally interpreted Dr. Duritch's opinion as indicating "Claimant could work in a sedentary capacity for four hours per day, including occasional driving time, if the Claimant could change positions every thirty minutes and did not have to drive to work." D&O at 16. As such, he reasonably rejected this position because of its regular driving requirement.

EX 1 at 13; D&O at 20. Additionally, the ALJ permissibly rejected this job due to its stated preference for applicants with prior face-to-face customer service experience, which Claimant lacks. We therefore affirm the ALJ's rejection of this position as evidence of suitable alternate employment because his underlying reasoning is supported by substantial evidence.

The ALJ rejected the fourth and final position as a receptionist at Brookdale Senior Living because it is located twenty-seven miles away from Claimant's home and would require approximately one hour of travel. *Id.* at 20. Given Claimant's daily hourly restraints, the ALJ found he could not "work for four hours in addition to commuting" twenty-seven miles each way to work. Since this position's requirements fall beyond Dr. Durtisch's work limitations for Claimant, the ALJ rationally found this job likewise does not constitute suitable alternate employment.

Consequently, we affirm the ALJ's findings that the four identified positions do not constitute suitable alternate employment. We therefore affirm the ALJ's conclusion that Employer has not established the availability of suitable alternate employment[10] and the award of ongoing permanent total disability benefits.

Section 10 - Average Weekly Wage

Employer contends the ALJ's calculation of Claimant's average weekly wage is erroneous because it does not reflect a fair and reasonable approximation of Claimant's wage-earning capacity at the time of his injury. It asserts the ALJ erred by including foreign area living allowance (FALA) payments in Claimant's overseas wages and failing to account for pre- and post-injury events which necessarily impacted the calculation of his average weekly wage. Employer states the ALJ's exclusive use of overseas wages resulted in an inflated average weekly wage calculation. Instead, it asserts Claimant's average weekly wage should have been $748.32, calculated by using Claimant's annual salary of $40,784.54 as outlined in his employment contract. Alternatively, because Claimant did not complete the one-year term of his work contract, Employer suggests the ALJ should have adopted a blended approach for the fifty-two weeks preceding Claimant's injury, using his pre-injury domestic earnings of zero dollars and his three weeks of pre-injury overseas earnings of $3,713.98. Employer's Brief at 31-36 (citing *Service Employees Int'l, Inc. v. Director,* OWCP, No. H-11-01065, 2013 WL 943840 (S.D. Tex. Mar. 11, 2013), *vacating K.S. [Simons] v. Service Employees Int'l, Inc*., 43 BRBS 18, *aff'd on recon. en banc*, 43 BRBS 136 (2009)).

[10] In light of this, we need not address Employer's contention that the ALJ failed to address whether Claimant conducted a diligent job search.

Section 10 of the Act provides for the calculation of a claimant's average weekly wage. Section 10(c) is a catch-all provision when Section 10(a) or (b) cannot reasonably and fairly be applied. 33 U.S.C. §910(c);[11] *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998). Under Section 10(c), an ALJ is afforded broad discretion to arrive at a sum that "shall reasonably represent the annual earning capacity of the injured employee." 33 U.S.C. §910(c); *Rhine v. Stevedoring Services of America*, 596 F.3d 1161, 44 BRBS 9(CRT) (9th Cir. 2010).

The ALJ initially calculated Claimant's earnings by using his overseas hourly wage of $16.34, multiplied by his forty-eight-hour work week. These findings accurately reflect the terms of the employment contract between Claimant and Employer and are consistent with Claimant's wage records. CX 11 at 4. The ALJ therefore concluded Claimant's anticipated annual salary in his position with Employer would have been $40,784.64, which correlated to weekly earnings of $748.32. D&O at 25. Finding Claimant's FALA payments "readily calculable" at a weekly rate of $245, the ALJ included those payments in his calculation. Accordingly, he added the $245 weekly FALA payments to Claimant's weekly earnings of $748.32 to conclude Claimant's average weekly wage is $993.32. D&O at 25.

We reject Employer's average weekly wage arguments. First, the ALJ correctly found Claimant and Employer signed an employment contract that exceeded the three pre-injury weeks Claimant actually worked and, moreover, Claimant was not terminated "for

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[11] Section 10(c) of the Act states:

> If either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C. §910(c). The ALJ's use of Section 10(c) to calculate Claimant's average weekly wage is not challenged in this case.

poor performance or for his intentional failure to violate his work contract[.]" D&O at 25; *Denton v. Northrop Corp.*, 21 BRBS 37 (1988); *see also Wright v. Universal Maritime Service Corp*., 31 BRBS 195 (1997), *aff'd and remanded*, 155 F.3d 311, 33 BRBS 15(CRT) (4th Cir. 1998). In contrast to Employer's assertions, the contract showed the parties intended Claimant to work for one year, from April 22, 2009, to April 21, 2010, with an initial ninety-day probationary period. CX 11. The work-related vehicular accident that caused his injury cut this period short. Based on this, the ALJ rationally concluded Claimant's actual and expected overseas earnings best reflected his earning capacity at the time of his injury and should be used as the sole basis for calculating his average weekly wage under Section 10(c). *Luttrell v. Alutiiq Global Solutions*, 45 BRBS 31 (2011). This conclusion falls within the ALJ's broad discretion under Section 10(c) to determine a wage that reasonably represents the annual earning capacity of the injured claimant, "having regard" for the earnings in the job claimant was performing when injured. *Id*.

The ALJ also rationally included the FALA payments in the calculation. As the Director suggests, the Board has held overseas post allowances, foreign service additives, incentive compensation, completion awards, foreign housing allowances, and cost of living adjustments are properly included in average weekly wage calculations when they comprise readily-calculable direct payments to the employee. *McMennamy v. Young & Co*., 21 BRBS 351 (1988); *Denton*, 21 BRBS 37; *Thompson v. McDonnell Douglas Corp*., 17 BRBS 6 (1984); *see also* Dir. Br. at 4. The record establishes Claimant's FALA payments were a part of his regular pay, CX 11, and we reject Employer's argument that their inclusion improperly inflates Claimant's average weekly wage. Consequently, we affirm the ALJ's calculation of Claimant's average weekly wage at $993.32, as it is rational and supported by substantial evidence.

Accordingly, we affirm the ALJ's Decision and Order.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge