U.S. Department of Labor

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

BRB No. 21-0205

STEVEN T. YOUNG	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 08/27/2021
HUNTINGTON INGALLS INDUSTRIES, INCORPORATED	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Modification of Monica Markley, Administrative Law Judge, United States Department of Labor.

Matthew H. Kraft (Matthew H. Kraft, P.L.C.), Virginia Beach, Virginia, for Claimant.

Christopher R. Hedrick (Mason, Mason, Walker & Hedrick P.C.), Newport News, Virginia, for self-insured Employer.

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

PER CURIAM:

Claimant appeals Administrative Law Judge Monica Markley's Decision and Order Denying Modification (2018-LHC-00691) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (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 applicable law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This is the fourth time Claimant's case has been before the Benefits Review Board. We will briefly reiterate the facts and procedural history of this case. Claimant worked as a welder for Employer from June 1977 until May 1989. In early 1988, he suffered work-related injuries to his hands, wrists, elbows, and neck. He stopped working for Employer in May 1989 and has essentially remained out of work since that time. *See Young v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 04-0842 (June 30, 2005) (unpub.) (Board's third decision). He underwent five surgeries for his various conditions between 1990 and 2000, and Employer paid him periods of temporary total and temporary partial disability benefits. *See id.* at 2, n.1. An administrative law judge originally awarded Claimant permanent partial disability benefits from June 27, 2000, the date Employer established suitable alternate employment; the Board later modified the award to include permanent total disability benefits from January 18, 2000, the date Claimant underwent neck surgery, until July 27, 2000. *See id.* at 2. The United States Court of Appeals for the Fourth Circuit affirmed the ongoing award of permanent partial disability benefits. *Newport News Shipbuilding & Dry Dock Co. v. Young*, 199 F. App'x 274 (4th Cir. 2006).

Claimant's permanent partial disability award was based on physical restrictions of lifting not more than ten pounds, no pushing or pulling, no overhead work, and "no fine manipulation." *See Young v. Newport News Shipbuilding & Dry Dock Co.*, Case Nos. 1999-LHC-3081, 2000-LHC-1692, Decision and Order on Remand (Nov. 14, 2002), at 6. Claimant underwent a second neck surgery in 2008 and continued to be treated by Dr. Partington. Claimant's symptoms worsened and, in 2015, Dr. Partington placed additional permanent restrictions on him, including a five-pound lifting limit and no hand manipulation. *See* CX 24.

Claimant filed a motion for modification based on a change in condition, seeking to have his permanent partial disability benefits modified to permanent total disability benefits. 33 U.S.C. §922. The administrative law judge found Claimant established a change in condition based on Dr. Partington's new restrictions of no hand manipulation and no lifting more than five pounds. *See* Decision and Order Denying Modification at 22-23. As the parties agreed Claimant remains unable to return to his usual work, the administrative law judge addressed whether Employer established suitable alternate employment. The administrative law judge gave greater weight to Ms. Harvey's opinion and labor market surveys than to the opinion of Claimant's vocational consultant, Mr. Broughton, who opined that none of the jobs Ms. Harvey identified are suitable and Claimant is not employable on a sustained basis. *See id.* at 29-30. The administrative law judge agreed with Ms. Harvey's narrower reading of Dr. Partington's restriction on hand manipulation as not referring to normal daily activities, but only specific repetitive movements such as pushing boxes or carts or manipulating objects. *See id.* She also found Mr. Broughton's opinion was based on Claimant's subjective statements, rather than Dr. Partington's restrictions, because Dr. Partington did not include any limitations on standing

or walking despite Claimant's complaints. *See id.* at 29. She concluded some of the jobs identified in Ms. Harvey's 2018 and 2019 labor market surveys satisfied Employer's burden of establishing suitable alternate employment and denied Claimant's motion to modify his award to permanent total disability.[1] *See id.* at 30-31.

Claimant appeals the administrative law judge's finding that Employer established suitable alternate employment.[2] Employer responds in support of the administrative law judge's decision.

Where, as here, it is undisputed that a claimant is unable to perform his usual work due to his injury, he has established a prima facie case of total disability and the burden shifts to his employer to demonstrate the availability of suitable alternate employment that he is capable of performing. *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988). In order to meet its burden, the employer must present evidence that a range of available jobs exists which the disabled employee is realistically able to secure and perform. *Id.*, 852 F.2d at 131, 21 BRBS at 112(CRT); *see also Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988); *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74(CRT) (4th Cir. 1984).

Claimant first asserts error in the administrative law judge's acceptance of Ms. Harvey's interpretation of Dr. Partington's restrictions against hand manipulation as not including normal daily activities. Claimant also challenges the administrative law judge's decision to give greater weight to Ms. Harvey's opinion of Claimant's abilities and employability than to Mr. Broughton's.

The administrative law judge credited, as supported by the medical evidence, Ms. Harvey's understanding that Dr. Partington's limitations applied to specific activities or

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[1] The administrative law judge found seven of the jobs that Ms. Harvey identified exceed Claimant's physical restrictions because they require occasional overhead lifting and/or lifting of ten pounds but found suitable alternate employment established based on the remaining fifteen jobs in Ms. Harvey's two labor market surveys. *See* Decision and Order at 28. She noted Claimant did not demonstrate a diligent search for employment. *See id.* at 31.

[2] Employer does not challenge the administrative law judge's finding that Claimant established a change in his physical condition under Section 22, 33 U.S.C. §922. *See Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291 (1995); *Lombardi v. Universal Maritime Service Corp.*, 32 BRBS 83 (1998).

repetitive hand manipulation.[3] *See* Decision and Order at 29-30. Although she found Ms. Harvey and Mr. Broughton to be equally qualified, she concluded Mr. Broughton's opinion is entitled to less weight because his understanding of Claimant's limitations was based more on Claimant's subjective reports than on the medical evidence, and she found flaws in his methodology. *See id.* at 29. She also rejected Mr. Broughton's objections to the jobs Ms. Harvey identified based on Claimant's lack of experience because many of them are entry-level and do not require previous experience. *See id.*

We reject Claimant's contention that the administrative law judge erred in finding Ms. Harvey more credible than Mr. Broughton because she had a better understanding of Claimant's physical abilities. The administrative law judge has the discretion to weigh the evidence and determine the credibility of the witnesses on each contested issue. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963). In addition, she has the discretion to draw inferences from the evidence; the Board may not overturn her findings simply because other inferences could have been drawn. *See Ceres Marine Terminals, Inc. v. Director, OWCP [Jackson]*, 848 F.3d 115, 50 BRBS 91(CRT) (4th Cir. 2016); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991).

Contrary to Claimant's contention, despite relying on Dr. Partington's opinion to determine he had established a change in condition, the administrative law judge was not required to read Dr. Partington's restrictions on pushing, pulling, and hand manipulation as a complete restriction on Claimant using his hands for any type of work, such as operating a cash register, making change, cleaning, or assisting customers in and out of vehicles. The administrative law judge permissibly found Dr. Partington's records do not support Claimant's interpretation and include observations that Claimant had no obvious weakness or numbness in his upper extremities. *See* Decision and Order at 30; CX 24 at 56, 60. Her finding that Claimant's restrictions do not completely restrict him from using his hands and arms for routine movements is affirmed as it is supported by substantial evidence.

The administrative law judge was also entitled to reject Claimant's subjective reports of his increased pain from standing or walking, accurately noting that Dr. Partington did not place any restrictions on these activities. Her finding that Mr. Broughton's opinion of Claimant's physical restrictions is not consistent with Claimant's medical records is

[3] Ms. Harvey stated there is no category for fine hand manipulation and acknowledged that each of the jobs requires some use of the hands, but only usual everyday activities such as pushing and pulling a car or refrigerator door, some writing, or using a cash register. *See* Tr. at 125-127.

supported by substantial evidence and is affirmed.[4] We therefore affirm the administrative law judge's decision to give greater weight to Ms. Harvey's assessment of Claimant's physical restrictions as it is within her discretion to do so.

Claimant next contends the administrative law judge erred in concluding Employer established suitable alternate employment. We agree. Although the administrative law judge assessed the suitability of the jobs Ms. Harvey identified in light of Claimant's physical capabilities, she did not assess their suitability in view of Claimant's vocational factors, age, and length of absence from the workforce.[5]

In determining whether an employer has established the availability of suitable alternate employment, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has stated an administrative law judge should consider not only a claimant's physical restrictions but also "whether there exists a reasonable likelihood, given the claimant's age, education, and vocational background that he would be hired if he diligently sought the job." *Trans-State Dredging*, 731 F.2d at 201, 16 BRBS at 76(CRT) (quoting *New Orleans (Gulfwide) Stevedores. v. Turner*, 661 F.2d 1031, 1043, 14 BRBS 156, 165(CRT) (5th Cir. 1981)). "Disability under the Act is determined not only on the basis of physical condition, but also on factors such as age, education, employment history, rehabilitative potential, and the availability of work that the claimant can do." *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Brickhouse]*, 315 F.2d 286, 36 BRBS 85(CRT) (4th Cir. 2002). Thus, an administrative law judge must

[4] Mr. Broughton stated Claimant cannot sit or stand for more than fifteen minutes at a time or walk for more than two blocks because of pain. *See* CX 21 at 8. However, no doctor has placed restrictions on Claimant for sitting, standing, or walking. *See* CX 24 (Dr. Partington's 2015 restrictions); CX 29 (Claimant's 2008 functional capacity evaluation).

[5] We do, however, reject Claimant's argument that the administrative law judge's rejection of some jobs as outside his physical restrictions was inconsistent because she did not reject other jobs involving similar tasks. The administrative law judge rejected a number of jobs based on the listed physical requirements of the jobs, not whether they involved some of the same specific tasks, such as operating a cash register or making change. For example, the administrative law judge rejected the Goodwill Retail Associate and the City of Chesapeake Toll Collector positions because both jobs required at least occasional overhead reaching and pushing/pulling; conversely, she found Claimant physically capable of performing the Ameripark Lot Attendant position because the job required no overhead reaching and no pushing/pulling. *See* EX 63 at 8-9, 14.

compare the claimant's physical restrictions and vocational factors with the requirements of the jobs. *See Patterson v. Omniplex World Services*, 36 BRBS 149 (2003).

The administrative law judge largely limited her consideration of the suitability of the jobs to Claimant's physical restrictions and did not consider any other factors, such as his vocational skills, that bear on his ability to obtain a particular job and perform its required duties. *See, e.g., Trans-State Dredging*, 731 F.2d at 201, 16 BRBS at 76(CRT) ("the standard should incorporate the specific capabilities of the claimant, that is, his age, background, employment history and experience, and intellectual and physical capacities."); *Ceres Marine Terminal v. Hinton*, 243 F.3 222, 35 BRBS 7(CRT) (5th Cir. 2001) (affirming the administrative law judge's finding that employer did not establish suitable alternate employment considering the claimant's "lack of mathematical skills, his age, and the fact that his entire employment history is limited to unskilled, heavy manual labor.").

The evidence in the record does not support the administrative law judge's conclusion that Claimant is qualified for some of the jobs she found suitable. For example, the jobs as a Service Greeter at Casey Auto Group, a Service Valet at Checkered Flag, and a Shuttle Driver at Hall Honda list among their qualifications the ability to operate manual transmissions. The record is devoid of evidence that Claimant is able to operate manual transmissions. *See* EX 59; EX 63. Moreover, the administrative law judge did not address whether Claimant's restrictions against "pushing, pulling, hand manipulation" render him incapable of performing this task. CX 24.

The administrative law judge also did not assess the suitability of other jobs requiring a variety of skills in light of Claimant's vocational factors. For example, several of the jobs, including the Transportation Dispatcher position at Virginia Premier Health Plan and the Service Greeter position at Casey Auto Group, list among their requirements "excellent customer service." The administrative law judge did not address whether Claimant's lack of relevant experience would disqualify him from those positions.[6]

Finally, the administrative law judge also did not consider whether Claimant's age and background make him likely to be hired for any particular position. She limited her consideration to Claimant's physical restrictions but did not address whether his age and

[6] Similarly, a number of positions, including the Service Valet position at Checkered Flag and a Security Officer at Dunbar, list among their qualifications strong written and oral communication and interpersonal skills. The Security Officer at Dunbar position also lists among its requirements "Must be able to acquire and maintain a VADCJS Unarmed Security Officer Certification." EX 59 at 13.

long absence from the work force effects his ability to compete for a job.[7] Mr. Broughton stated Claimant's age would not make him a good candidate for retraining, *see* Tr. at 53-54; CX 21 at 12, and Ms. Harvey, whose opinion the administrative law judge generally accepted, also acknowledged a person's age and prolonged absence from the work force could affect that person's ability to obtain a job. *See* Tr. at 135. The administrative law judge did not adequately address whether Claimant is reasonably likely to be hired in any of the identified positions considering his age and work history.

We therefore vacate the administrative law judge's finding that Employer established suitable alternate employment and remand this claim for her to reconsider the issue. On remand, the administrative law judge must independently assess whether the jobs Ms. Harvey identified as suitable are, in fact, suitable given all relevant factors. She should consider whether Claimant's specific background and experience meet the stated requirements and qualifications for each job. *See White v. Peterson Boatbuilding Co.*, 29 BRBS 1 (1995). In addition, she must address the likelihood of Claimant's obtaining a job given his age and length of absence from the workforce.

Accordingly, we affirm the administrative law judge's finding that Claimant established a change in his physical condition. We vacate her finding that Employer

[7] We note Claimant is over 60 years old and essentially has not worked since 1989. He testified that after stopping his work as a welder, he worked briefly for ActMedia, installing and removing coupon machines in grocery stores, but he stopped that work because he could not physically perform it. *See* Tr. at 17-18. He also worked for the Virginia Department of Transportation for one day in 2016 but then told the employer he could no longer work because of the pain in his shoulders and an inability to stand for hours. *See id.* at 27. He has not looked for work since March 2015. *See id.* at 25-26.

established suitable alternate employment and remand the case for further proceedings consistent with this opinion.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge