U.S. Department of Labor

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

BRB No. 21-0632

CHARLIE C. PARKER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JAZ INDUSTRIES OF FLORIDA, LLC	)	
	)	DATE ISSUED: 02/21/2023
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD.	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Permanent Total Disability Benefits and Denying Section 8(f) Relief of Monica Markley, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna Klein Camden, LLP), Norfolk, Virginia for Claimant.

Megan B. Caramore (Vandeventer Black, LLP), Norfolk, Virginia for Employer/Carrier.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Monica Markley's Decision and Order Denying Permanent Total Disability Benefits and Denying Section 8(f) Relief (2019-LHC-00787) 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 ALJ'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).[1]

Claimant worked for Employer as a reefer mechanic, working on generators and refrigeration units in Norfolk, Virginia. While taking his turn monitoring temperature gauges on refrigeration units on January 16, 2018, Claimant "stepped backwards into a hole" and hurt his lower back.[2] Hearing Transcript (TR) at 74. Claimant was seen at the NowCare Medical Center the day of his injury and was initially diagnosed with an acute lumbar sprain. EX 9 at 4. He treated with Dr. Arthur Wardell, first visiting him on January 18, 2018, and also received a lumbosacral spine sprain diagnosis. EX 10 at 3. Employer voluntarily paid temporary total disability benefits from January 17, 2018, until November 28, 2018, in the amount of $1,471.78 per week, totaling $63,764.74. Employer subsequently paid permanent partial disability benefits from November 29, 2018, until December 12, 2018, in the amount of $452.51 per week, totaling $905.02. Thereafter, Employer paid additional temporary total disability benefits from November 29, 2018, until February 20, 2019, in the amount of $452.51 per week, totaling $5,430.12. EX 8; JX 1. Employer also has paid $10,609.50 in medical benefits. JX 1.

On February 1, 2019, the claims examiner conducted an informal conference. On November 4, 2019, the ALJ held a hearing in Newport News, Virginia, and issued her Decision and Order (D&O) on March 23, 2021.

The ALJ denied Claimant's claim for permanent total disability benefits because she found Employer met its burden of establishing the availability of suitable alternate employment by providing a light duty position within Claimant's vocational and physical limitations set by both Dr. Wardell and physical therapist Molly Fostek. D&O at 21. The ALJ also rejected Claimant's argument that the position Employer offered was sheltered employment, as she found it was necessary work and tailored to Claimant's restrictions. *Id.* at 22. Based on an average weekly wage of $2,770.38 and a retained wage-earning

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the injury occurred in Virginia. 33 U.S.C. §921(c); *Hon v. Director, OWCP*, 699 F.2d 441 (8th Cir. 1983).

[2] The reefer monitor position was handled by multiple reefer mechanics on a rotating basis to meet Employer's needs.

capacity of $1,696.88 per week, the ALJ awarded Claimant permanent partial disability benefits commencing November 29, 2018.[3] *Id.* at 23-25.

Claimant appeals the ALJ's decision and argues she erred in denying permanent total disability benefits and in finding the job Employer offered is suitable alternate employment because: 1) he is unable to perform the job as described; and 2) the position is sheltered employment. Employer responds urging affirmance.

Where, as here, the employee has shown he cannot return to his regular or usual employment due to his work-related injury and has established a prima facie case of total disability, the burden shifts to the employer to demonstrate the availability of suitable alternate employment, i.e., the availability of a range of job opportunities within the geographic area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions. *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988); *Gacki v. Sea-Land Serv., Inc.*, 33 BRBS 127 (1998). The employer can meet its burden by offering the employee a suitable job in its facility, *Spencer v. Baker Agric. Co.*, 16 BRBS 205 (1984), including a light-duty job. *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (1980). The ALJ need not examine job opportunities on the open market where the employer offers suitable work which is not sheltered employment. *Conover v. Sun Shipbuilding & Dry Dock Co.*, 11 BRBS 676 (1979). If the employer demonstrates the availability of suitable alternate employment, the burden shifts back to the employee to establish he diligently tried to obtain work but was unable to do so. *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 542 (4th Cir. 1988).

Employer offered Claimant the reefer temperature monitoring position on November 19, 2018. EX 2. This position is within Employer's facility and would require Claimant to visually inspect temperatures on digital displays, record temperatures, and report alarms to the office. EX 2 at 2. Reefer containers may be stacked atop each other, so the job summary also explains Claimant may need to look up, use binoculars to focus on the digital displays, or climb a ladder. *Id.*; EX 4 at 11; TR at 24. He would not be required to make any repairs but would need to call the office if any alarms rang or if maintenance was required. If he was unable to read a gauge, he could call for assistance or return to it later.

Claimant argues this position is not suitable for him because it exceeds his physical limitations because it would require him to carry and climb ladders or kneel. Dr. Wardell

[3] The ALJ denied Employer's request for Section 8(f) relief, 33 U.S.C. §908(f). D&O at 23-25.

conducted a Functional Capacity Evaluation (FCE) on August 7, 2018, and he determined Claimant can perform the following activities on occasion: lift and carry 10 and 20 pounds; push and pull a cart; walk; climb; scoop; bend; crouch; squat; reach; sit; and stand.[4] EX 14. Ms. Fostek conducted an FCE on October 23, 2018, and she determined Claimant can:

> work at shoulder height, overhead, squat, sit, stand and walk. Bending was limited by complaints of back pain and limits in [range of motion] were noted. He was able to tolerate bending on an Occasional basis. Kneeling, crawling and climbing were limited by issues not related to this work injury, specifically left knee pain.

EX 15 at 1.

The ALJ found some of the traditional demands of the reefer temperature monitoring position beyond Claimant's physical abilities; however, he noted Employer's willingness to modify the position to bring the job within Claimant's restrictions. D&O at 21. Specifically, Timothy Zimmerly, President and part-owner of JAZ Industries, testified the position he formally offered Claimant has been modified to fit within Claimant's restrictions: Claimant will not have to carry or climb ladders and will be permitted to call into the office and request assistance if he cannot read the gauge. TR at 24.[5] Mr. Zimmerly testified the numbers on the digital monitors are approximately 2.5 to 3 inches tall and the screens themselves are anywhere from 12 to 14 inches wide. TR at 34-35. Furthermore, Mr. Zimmerly testified "I've gone out there and I can easily see the numbers on the two-high" and clarified the position does not require manipulating or scrolling through the digital monitor; Claimant would only be recording the temperatures.[6] TR at 34.

[4] Occasional is described as not more than one-third of a workday. EX 14 at 3.

[5] Mr. Zimmerly stated Claimant could "just radio into the office" for help; however, Mr. Zimmerly also stated there were other options available to Claimant. For instance, if Claimant could not read a gauge because of the sun or glare, he could mark it on his sheet and go back to it later when the light has changed, or he could climb a ladder, or call and ask someone else to come read it. TR at 25; *see also* EX 4 at 11 (co-worker and reefer mechanic, Ray Macmillian, testified during his deposition that he might use a ladder or wait and double back).

[6] As the temperature read-outs can be situated high or low on the container, Claimant takes issue with the ALJ's statement that "it seems obvious that rather than bending, Claimant could take a small step backward to see the lights." D&O at 21. He states this is

Furthermore, the job description indicates the employee can drive a company vehicle alongside the reefers to complete the monitoring duties. EX 2 at 3.

As Employer submitted only one position to satisfy its burden, Employer must show the job was offered to Claimant and Claimant could perform it. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996); *Stratton v. Weedon Eng'g Co.*, 35 BRBS 1, 6 (2001) (en banc). Employer made the job offer on November 19, 2018, EX2, and the ALJ reviewed both Claimant's vocational limitations as well as the requirements of the light-duty position. He found even if bending is required to see some of the digital screens, Dr. Wardell, based on the FCE, did not prohibit all bending; rather, he said bending is limited to less than one hour per day. D&O at 21; EX 14 at 3. The ALJ found the position, as modified, within Claimant's limitations. *Stratton,* 35 BRBS at 7.

Claimant also contends the reefer monitoring position is a sheltered job, insufficient to establish suitable alternate employment. A sheltered job is either unnecessary or a job for which the employee is paid even if he cannot do the work. *Harrod*, 12 BRBS 10. An ALJ may rationally find a light-duty position is not sheltered employment, if the employer presents credible evidence that the job satisfies a necessary function, which can be shown if the position is currently occupied by another worker. *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999).

The ALJ rejected Claimant's argument and found the reefer monitor position is not sheltered employment because it is a necessary position. D&O at 22. Mr. Zimmerly testified the position was created in 2015, TR at 24, after one of Employer's largest clients, representing 95% of Employer's revenue, complained of containers losing power and causing temperature damage to its shipments. This prompted Employer to begin reefer temperature monitoring, assigning a reefer mechanic to a daily shift and a night shift as well. TR at 21-23. Therefore, to prevent temperature failures and ensure quality control, Employer began the reefer monitoring position. TR at 21-23. Until the job was offered to Claimant and to another employee,[7] Employer required the reefer mechanics to take shifts as monitors. TR at 22-23; D&O at 22. Based on this evidence, the ALJ reasonably determined the reefer monitor job is not sheltered employment. *Ezell,* 33 BRBS at 29. Not only was the position "tailored to his restrictions" and approved by both Dr. Wardell and

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a misperception of the task, and the low gauges would require him to bend down. According to the FCEs, however, Claimant is not precluded from bending. EXs 14-15.

[7] Indeed, Claimant states the position with the exact same requirements was offered to another employee, Alex Fennema. Cl. Pet. at 14.

Ms. Fostek,[8] but it was necessary for Employer's business. Therefore, we affirm the ALJ's finding that Employer established the availability of suitable alternate employment. *Darby*, 99 F.3d at688, 30 BRBS at 94(CRT).

As Employer met its burden, to be entitled to total disability benefits, Claimant must show he diligently tried to secure post-injury employment. *Tann*, 841 F.2d at 542, 21 BRBS at 12(CRT). The ALJ found Claimant presented no such evidence.[9] D&O at 22. Claimant does not challenge the finding of no diligent job search, and, in any event, the absence of evidence in the record supports the ALJ's finding. Claimant is partially disabled. *Tann*, 841 F.2d at 544, 21 BRBS at 17(CRT).

Accordingly, we affirm the ALJ's Decision and Order Denying Permanent Total Disability Benefits and Denying Section 8(f) Relief.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[8] EX 10 at 13-15; EX 15 at 8.

[9] Mr. Zimmerly testified he did not receive any communication from Claimant regarding the position after it was offered. TR at 27.