U.S. Department of Labor

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

BRB No. 23-0408

JACQUELINE McQUIGG	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 01/29/2025
	)	
UNITED STATES MARINE CORPS	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Compensation and Benefits of Steven B. Berlin, Administrative Law Judge, United States Department of Labor

Norman Cole (Brownstein Rask LLP), Portland, Oregon, for Claimant.

William N. Brooks II (Law Offices of William N. Brooks), Long Beach, California, for Employer.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Steven B. Berlin's Decision and Order Awarding Compensation and Benefits (2019-LHC-00347, 2019-LHC-00348, and 2019-LHC-00349) rendered on claims filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (Act), and as extended by

the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §§8171-8173.[1] 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 worked for Employer at Marine Corps Community Services beginning in February 2008, where she provided education and training for new parents and conducted developmental assessments of children up to age six. Joint Exhibit (JX) 21 at 963; Hearing Transcript (TR) at 20, 31. The record reveals that, between October 2011 and April 2018, Claimant reported back pain at various medical appointments and was diagnosed with a history of underlying degenerative disk disease. JXs 1 at 83, 2 at 91, 3 at 625, 635, 640, 4 at 656-657, 16 at 916-917, 19 at 942-944, 954, 26 at 11, 29 at 1116. On June 16, 2014, she injured her lower back at work when she lifted four to six boxes of equipment onto a cart and pushed the loaded cart from a storage area to a classroom as she was preparing to teach a class. Decision and Order (D&O) at 3-4; *see* JX 21 at 41; TR at 41-43. She continued working thereafter for Employer until her last day on April 5, 2018, when she experienced additional lower back pain. JXs 19 at 954-955, 27 at 1087, 29 at 1116. On April 13 and 16, 2018, Claimant underwent lower back surgery, including a discectomy and fusion at L3-4, L4-5, and L5-S1, and facetectomies at L3-4 and L4-5. JX 1 at 44, 47. Claimant did not return to work for Employer after the surgery. TR at 56.

Procedurally, on June 26, 2014, Claimant filed a claim for benefits under the Act for her back injury. JX 6 at 683. On March 19, 2018, she filed an aggravation claim for the cumulative trauma she continued to experience after her June 2014 injury until her last day working for Employer. *Id.* at 677. On May 2, 2018, and November 28, 2018, Employer filed notices of controversion disputing both claims. *Id.* at 667, 671. Unable to reach an agreement, Claimant had the case referred to the Office of Administrative Law Judges (OALJ). The ALJ held a hearing on September 19, 2019.

In his July 18, 2023 Decision and Order (D&O), the ALJ first determined Claimant sustained a work-related injury.[2] D&O at 18-21. He next found Claimant has been unable

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit because Claimant sustained her injuries in California. 33 U.S.C. §921(c); *see Roberts v. Custom Ship Interiors*, 35 BRBS 65, 67 n.2 (2001), *aff'd*, 300 F.3d 510 (4th Cir. 2002); 20 C.F.R. §702.201(a).

[2] The ALJ found Claimant's workplace activities, beginning no later than June 16, 2014, and continuing through April 5, 2018, combined with or otherwise aggravated her underlying degenerative condition, which resulted in cumulative trauma and a progression of that condition either through greater degeneration or increasingly adverse symptoms.

to return to her usual employment since before her surgery on April 6, 2018, and is still unable to do so. *Id.* at 34. In addition, the ALJ accepted the parties' stipulation that Claimant's back condition reached maximum medical improvement (MMI) on April 19, 2019. *Id.* at 2, 28. Consequently, he awarded her temporary total disability (TTD) benefits from April 6, 2018, through April 18, 2019, as Employer did not establish the availability of suitable alternate employment (SAE) for that period. D&O at 41. The ALJ awarded Claimant permanent total disability (PTD) benefits thereafter, converting them to permanent partial disability (PPD) benefits on August 19, 2019, when he found Employer established the availability of SAE. *Id.* at 41-42, 44. He also awarded all past, present, and future reasonable and necessary medical treatment related to Claimant's work-related back injury under Section 7 of the Act, 33 U.S.C. §907(a). D&O at 44-45.

Claimant appeals the ALJ's decision, contending he erred in finding Employer established available SAE from August 19, 2019.[3] Employer responds, urging affirmance, and Claimant filed a reply brief, reiterating her contentions.

Once a claimant establishes an inability to return to her usual work, the burden shifts to the employer to demonstrate the availability of SAE. *Gen. Constr. Co. v. Castro*, 401 F.3d 963, 968-969 (9th Cir. 2005), *cert. denied*, 546 U.S. 1130 (2006). If the employer does so, the claimant's disability is no longer presumed to be total. To be suitable, alternate employment must be available within the geographic area where the employee resides, and it must be work she can perform considering her limitations, age, education, background and restrictions. *Edwards v. Director, OWCP*, 999 F.2d 1374, 1375 (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *see generally Wilson v. Crowley Maritime*, 30 BRBS 199 (1996). It is not sufficient for the employer to point to general work the claimant may be physically able to perform; rather, it must show specific jobs available to the claimant which she can perform. *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 1196 (9th Cir. 1988); *Bumble Bee Seafoods v. Dir., OWCP*, 629 F.2d 1327, 1330 (9th Cir. 1980). The credible testimony of a vocational rehabilitation specialist is sufficient to meet the employer's burden. *Minick v. Levin Metals Corp.*, 14 BRBS 893, 896 (1982).

The ALJ accepted Dr. Payam Moazzaz's opinion that Claimant cannot perform the duties of her usual job or similar work, even with accommodation, without engaging in

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D&O at 28. As no party challenges this finding, it is affirmed. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57, 58 (2007).

[3] We affirm as unchallenged on appeal the ALJ's findings that Claimant established entitlement to TTD benefits from April 6, 2018, to April 18, 2019, and PTD benefits from April 19, 2019, to August 18, 2019. *Scalio*, 41 BRBS at 58.

restricted activity. D&O at 33-34; JX 26 at 1056-1057. He also credited Dr. Larry D. Dodge's opinion that Claimant's physical capabilities are limited to no lifting over twenty pounds and no repetitive bending, stooping, or twisting. D&O at 33-35; JX 20 at 957. Further, based on the opinions of Drs. Melissa Hurd and Christopher J. Rogers, the ALJ concluded that Claimant is limited to lifting no more than ten pounds occasionally and requires "a sit/stand option" every twenty minutes. D&O at 34; JXs 2 at 107, 9 at 702, 704.

Employer's vocational expert, Roy Katzen, who the parties stipulated is a qualified vocational expert, identified twenty-one jobs he considered suitable for Claimant, dividing his list into two categories. Category one included nine jobs working as a telephone solicitor or telemarketer while category two contained twelve jobs working as a light-duty nurse. D&O at 29-36; JX 24 at 1008, 1017. Based on Claimant's retained capacity and considering her age, education, experience, skills, and restrictions,[4] the ALJ found one suitable job from each group: a customer service representative position at Drjays Com, Inc., and a remote triage nurse position with IntellaTriage.[5] D&O at 41; JX 24 at 1014-1015, 1017-1019.

Claimant contends the ALJ erred in finding Employer satisfied its burden to establish the availability of SAE because it established only one job – and not a range of

[4] The ALJ accepted Mr. Katzen's conclusion that Claimant can engage in extensive reading, has high-level reasoning capabilities, and has many skills because she earned a Ph.D. in Nursing, is a registered nurse, and taught at a college-level. D&O at 2, 30; D&O at 2, 30; JX 24 at 999-1000; TR at 18-19, 21, 65, 90-92. He also credited the determination of Alejandro Calderon, Claimant's vocational expert, that Claimant has basic computer skills and any jobs requiring proficiency in Microsoft Excel, PowerPoint, or Access are unsuitable. D&O at 31; JX 26 at 1036; TR at 196, 220. As no parties challenge these findings on appeal, they are affirmed. *Scalio,* 41 BRBS at 58.

[5] The ALJ found the customer service job is suitable because Claimant has the computer skills, other than those the employer will teach her, and the verbal communication skills required for the job to assist customers over the telephone. D&O at 37; *see* JX 24 at 1014-1015. He also found it is within her physical restrictions because there is no lifting, she would sit in a cubicle and can change positions as needed, and the job does not involve using a keyboard all day. *Id.* Further, he determined the nursing job is suitable because Claimant can do the job remotely from her home with no physical demands, and she has the option to sit or stand at will. *Id.* at 40; *see* JX 24 at 1017-1019. As Claimant does not challenge the suitability of these jobs on appeal, we affirm the finding that they are suitable. *Scalio,* 41 BRBS at 58.

jobs – in each category of identified work. Employer disagrees and asserts the ALJ approved two jobs and there is no legal basis for finding two jobs are insufficient to meet its burden. We agree with Employer's position: there is no law supporting Claimant's contention that one available job in telemarketing *and* one available job in light nursing are insufficient to establish the availability of SAE merely because the categories of work are dissimilar.

The United States Court of Appeals for the Fourth Circuit has held an employer must show a range of jobs and, thus, one job is insufficient. *Lentz v. The Cottman Co.*, 852 F.2d 129 (4th Cir. 1988). On the other hand, the United States Court of Appeals for the Fifth Circuit has held an employer may meet its burden by identifying only one job, if it also shows the claimant has a reasonable likelihood of obtaining that job under appropriate circumstances. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 431-432, *reh'g denied,* 935 F.2d 1293 (5th Cir. 1991).[6]

The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has held SAE may be found where the employer has identified one or more possible positions the claimant is able to perform. *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 652 (9th Cir. 2010). It has also held that an employer must demonstrate the specific job opportunities are "realistically and regularly available" in her community. *Edwards*, 999 F.2d at 1374*; Hairston*, 849 F.2d at 1194; *Bumble Bee Seafoods*, 629 F.2d at 1327.

Even though the Ninth Circuit has not specifically ruled on the single-job issue and has not specifically adopted the holding in either *Hayes* or *Lentz*, we need not speculate on the matter. Employer in this case satisfied its burden under all of the aforementioned approaches by identifying not one, but two different suitable alternate jobs. No legal precedent requires an employer to identify a range of jobs in a range of categories. The fact that the two suitable jobs Employer identified have different job titles and are in different job categories does not somehow render that evidence insufficient to meet Employer's burden. *Edwards*, 999 F.2d at 1374*; Hairston*, 849 F.2d at 1194; *Bumble Bee Seafoods*, 629 F.2d at 1327; *see Rhine v. Stevedoring Services of America*, 596 F.3d 1161, 1166 (9th Cir. 2010) (there are two criteria to determine SAE: the claimant's physical abilities and the economic availability of particular jobs in the relevant market). As the

[6] The Fifth Circuit explained: "Such an opportunity could well exist, for example, where the employee is highly skilled, the job found by the employer is specialized, and the number of workers with suitable qualifications in the local community is small." *Hayes*, 930 F.2d at 432.

ALJ permissibly found two of the identified jobs suitable, we affirm his finding that Employer satisfied its burden.

Because the ALJ found two jobs suitable, we also reject Claimant's assertion that, pursuant to *Bumble Bee Seafoods*, Employer must demonstrate other nursing and telemarking jobs were generally available, in addition to the approved positions in each category. In *Berezin v. Cascade General, Inc.*, 34 BRBS 163, 166 (2000), the Board interpreted the Ninth Circuit's decision in *Bumble Bee Seafoods*, 629 F.2d 1327,[7] and explained that an employer may establish the availability of SAE based on the identification of *one* actual position in conjunction with evidence that similar work was generally available. Here, however, the ALJ found that Employer identified two suitable positions, supported in part by Mr. Katzen's conclusion that general nursing and telemarking positions are suitable for Claimant given her age, education, work experience, and physical restrictions. TR at 118-119. Mr. Katzen also opined these types of jobs are realistically available to Claimant in "sufficient numbers" so that she would have a "legitimate shot" at obtaining one if she were to diligently try. *Id.* Thus, we reject Claimant's assertion that Mr. Katzen's opinion does not meet the "generally available" criteria, even if we were to assume such criteria is applicable. *Berezin*, 34 BRBS at 166; *Bumble Bee Seafoods*, 629 F.2d at 1327.

Accordingly, the ALJ's finding that Employer "demonstrated a range of job opportunities open and available" to Claimant near her residence that she can perform consistent with her work restrictions is rational and supported by substantial evidence. D&O at 42; *Ogawa*, 608 F.3d at 648 (Board may not substitute its views for those of the factfinder but must instead accept the ALJ's credibility findings unless they are inherently incredible or patently unreasonable); *Duhagon v. Metropolitan Stevedore Co.*, 19 F.3d 615, 618 (9th Cir. 1999) (it is the ALJ's duty to weigh the evidence and make credibility determinations). As Claimant raises no further challenges to the ALJ's decision, we affirm the ALJ's award of PPD benefits commencing August 19, 2019.

[7] In *Bumble Bee Seafoods*, the Ninth Circuit stated that one specific position, combined with evidence of the general availability of similar suitable work, may satisfy the employer's burden of demonstrating the claimant is not totally disabled. *Bumble Bee Seafoods*, 629 F.2d at 1330. However, a general statement about available sedentary work and insufficient evidence regarding the availability of the sole security guard job identified in that case, as well as the claimant's ability to perform it, was not persuasive or sufficient. The court thus affirmed the award of total disability benefits. *Id.*

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge