U.S. Department of Labor

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

BRB Nos. 20-0263
and 21-0082

RONALD SHAW	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED: 06/25/2021
CERES MARINE TERMINALS, INCORPORATED	)	
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and the Order Awarding Attorney's Fees and Costs of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Lara D. Merrigan (Merrigan Legal), Sausalito, California, and Malcolm M. Crosland, Jr. (The Steinberg Law Firm), Mount Pleasant, South Carolina, for Claimant.

Roy A. Howell, III (Trask & Howell, LLC), Mount Pleasant, South Carolina, for Self-Insured Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge Paul C. Johnson, Jr.'s Decision and Order Awarding Benefits and Order Awarding Attorney's Fees and Costs (2016-LHC-00823) 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).

Claimant worked on the docks at the Port of Charleston, South Carolina. He testified he performed many jobs for Employer but was injured while driving a yard tractor/truck. TR at 152-154, 181-182.[1] On August 2, 2011, when he was 56 years old, he was involved in a work-related motor vehicle accident – another truck "t-boned" his, hitting near the driver's door. CXs 1, 3; TR at 142. He went to the emergency room, complaining of hip, low back, and knee pain. CX 3; EXs 2-3. At a doctor's visit the next week, Claimant complained of neck pain and limited range of motion. CX 5; EX 5. Following a course of physical therapy, Claimant underwent left shoulder arthroscopy on January 10, 2012, for a partial rotator cuff tear repair and debridement. CX 7; EX 10. Follow-up physical therapy reports indicated slow progression, continued pain, and possible self-limiting behavior. EX 11. Claimant testified he has constant left shoulder pain and takes 800 milligrams of ibuprofen to relieve it, but there is not much he can do because any activity increases the pain. He stated his neck pain comes and goes but turning his head side to side bothers him, so he tries to avoid it.[2] He attempted to return to work once, driving a hustler, but he was unable to complete the work day. TR at 159-162, 188. He has not worked since the August 2011 accident. CX 12.

Employer paid Claimant temporary total disability benefits from August 3, 2011, through June 19, 2012. His condition reached maximum medical improvement on June 20, 2012. The issues before the administrative law judge were the extent of permanent disability, medical benefits, and liability for any past due benefits.

The administrative law judge found Claimant cannot return to his usual longshore work, and Employer did not establish the availability of suitable alternate employment – at most it showed only one job that may meet Claimant's capabilities to perform. He concluded Claimant was permanently totally disabled as of June 20, 2012, and Employer is liable for medical benefits for Claimant's work-related left shoulder and neck conditions. Decision and Order at 58-67. Employer appeals the award. Claimant filed a response brief to which Employer replied. BRB No. 20-0263.

Thereafter, Claimant's counsel requested an attorney's fee for work performed before the Office of Administrative Law Judges. He requested $36,918.75, representing

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[1] He testified he is certified to work as a lasher, footman, topman, yard-tractor driver, and forklift operator. TR at 153-154.

[2] Claimant acknowledged he still has a South Carolina driver's license and claimed driving his personal vehicle bothers his shoulder. TR at 162, 205-206.

98.45 hours at $375 per hour, plus $12,467.17 in costs. Employer did not file any objections. The administrative law judge awarded a fee and costs of $48,335.92. Employer appeals the fee award and requests its appeal be consolidated with BRB No. 20-0263. Claimant responds, urging affirmance of the fee award. BRB No. 21-0082. We grant Employer's motion to consolidate the appeals. 20 C.F.R. §802.219.

Employer contends the administrative law judge erred in awarding Claimant permanent total disability benefits. It alleges Claimant failed to establish a prima facie case of total disability because it asserts he can return to his prior employment on the waterfront. It also argues it established the availability of suitable alternate employment with jobs on the waterfront as well as a multitude of non-waterfront jobs Claimant can perform. It further alleges the administrative law judge's mistaken belief that Claimant takes oxycodone is a "material" mistake which "colors the entire decision[.]" Emp. Reply Br. at 5. Finally, Employer contends Claimant did not diligently seek post-injury employment.

To establish a prima facie case of total disability, the employee must show he cannot return to his regular or usual employment due to his work-related injury. If the employee meets this burden, the burden shifts to the employer to demonstrate 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). If it does so, 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).

The administrative law judge summarized Claimant's testimony regarding his duties for Employer and a union official's and Employer's descriptions of the requirements of several jobs on the waterfront. After finding Claimant "mostly drove and lashed" and was injured while driving a yard tractor, the administrative law judge set forth the issue as: "whether Claimant is physically capable of returning to his *previous driving jobs or his job as a lasher*." Decision and Order at 58 (emphasis added). Therefore, the administrative law judge understood Claimant's "usual work" consisted of more than driving a yard tractor. *See Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998).

The administrative law judge credited Claimant's testimony regarding his left shoulder and neck pain,[3] and the restrictions Drs. John Graham, Howard Brilliant, Kerri

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[3] The administrative law judge found Claimant's complaints of left shoulder and neck pain credible, as well as his testimony that his shoulder "never stops hurting" and any

Kolehma (neck only) and Dr. Todd Lansford (shoulder only) outlined. He gave little weight to the opinions of Drs. Jeffrey Buncher and Richard Friedman because they were unexplained and contrary to the parties' stipulations, respectively. Decision and Order at 58-59. He found "Claimant is incapable of climbing, performing overhead activities, reaching above [the] shoulder, lifting more than 25 pounds, or repetitive use of the neck." *Id.* at 58-59.[4] Applying the restrictions to the various jobs' requirements, he found lashers must be able to lift rods weighing nearly 50 pounds and climb, and "driving any vehicle at the port" requires repetitive head-turning to look for hazards. Because these activities are outside Claimant's physical restrictions, the administrative law judge found Claimant cannot perform his usual work.

Both his findings regarding Claimant's restrictions and his inability to perform his usual work are rational. CXs 7, 10; EXs 4, 9, 17, 52. The administrative law judge permissibly credited Claimant's testimony concerning his pain and restrictions, and substantial evidence supports his conclusions that lashers must be able to lift more than 25 pounds and work overhead, and the driving jobs require neck twisting/head turning. CXs 7-10, 17; EX 54. Therefore, we affirm the administrative law judge's finding that Claimant cannot return to his usual work. *Universal Mar. Corp. v. Moore,* 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Padilla v. San Pedro Boat Works*, 34 BRBS 49 (2000); *Williams v. Halter Marine Serv., Inc.*, 19 BRBS 248 (1987).

We further affirm the administrative law judge's finding that the alternate longshore jobs Employer identified are not suitable for Claimant as it is supported by substantial evidence. *Delay*, 31 BRBS at 203; Decision and Order at 60-61. The footman, spotter/flagman/ramp guard, and shuttle driver jobs require neck twisting or looking/working above shoulder level. CXs 7, 17. The topman, hatch tender/paperman, and water boy jobs require lifting greater than 25 pounds, and the gang header, topman, and hatch tender/paperman jobs exceed Claimant's climbing restriction. CX 11; EX 20.

Employer also asserts it established the availability of suitable non-longshore employment. EXs 13, 18, 20, 22, 26, 29. The administrative law judge rejected this evidence and found Employer did not satisfy its burden. Decision and Order at 61-66. Again, substantial evidence supports the administrative law judge's conclusion. The driver and traveling sales associate positions require neck-turning and are unsuitable for the same

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left arm activity increases the shoulder pain. Decision and Order at 58. He also credited Claimant's testimony that turning his neck bothers him. *Id.*

[4] In addition to his physical restrictions, the administrative law judge found Claimant has limited educational skills and experience. Decision and Order at 44, 62.

reasons as the other driving positions. CXs 9, 11. The cashier, security guard/parking enforcement officer, food service, and parking attendant positions require skills with math, writing, communications, computers, or laws, all of which the administrative law judge found are beyond Claimant's capabilities. CX 9; EXs 24, 29. The product handler/feeder-folder position requires lifting and folding textiles and/or placing finished products onto conveyor belts. It was not approved by the doctors and requires lifting and much upper body work. EX 29. We affirm the administrative law judge's rejection of these positions. *See Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993); *Wilson v. Crowley Mar.*, 30 BRBS 199 (1996).

The administrative law judge found one identified job, ticket taker at a movie theater, was physically suitable for Claimant. However, he found the job unsuitable because "Claimant's medications, including oxycodone, render him sleepy and cause inattention and a loss of mental acuity." Decision and Order at 65-66; EX 18 at 91. Contrary to the administrative law judge's statement, Claimant testified he was not taking oxycodone – he was taking only ibuprofen for pain. TR at 160; *see also* Cl. Br. at 19 ("it is admittedly inaccurate that those medications included oxycodone").[5]

The administrative law judge's error is harmless, however, as this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, which has held the identification of only one suitable job is insufficient to satisfy an employer's burden of showing a range of suitable jobs. *Lentz*, 852 F.2d 129, 21 BRBS 109(CRT). Although the administrative law judge rejected the ticket taker job for an erroneous reason, this was the sole job he found suitable and it is legally insufficient to meet Employer's burden under *Lentz*. Therefore, we affirm the administrative law judge's finding that Employer failed to establish the availability of suitable alternate employment. *Id.*; *see Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 35 BRBS 7(CRT) (5th Cir. 2001); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). Consequently, we affirm the award

[5] Dr. Graham prescribed Percocet (oxycodone) following Claimant's surgery in 2012. CX 7 at 52. David Price, Claimant's vocational consultant, considered this factor in his 2014 labor market survey. CX 9. However, it appears doctors prescribed only 800 milligrams of ibuprofen or other non-narcotic muscle relaxants as of 2015. CXs 22-23; EX 24. The ticket taker position was identified in 2017, EX 18 at 91 – well after Claimant had discontinued taking narcotic medication. At the hearing, Mr. Price acknowledged he did not have evidence of Claimant's currently using narcotic medication. TR at 113, 134.

of permanent total disability benefits.[6] *Lentz*, 852 F.2d 129, 21 BRBS 109(CRT); *Mendez v. Nat'l Steel & Shipbuilding Co.*, 21 BRBS 22 (1988).

Employer also contends the administrative law judge erred by issuing a fee award while this case is on appeal to the Board. Because the order on the merits is not final, Employer also asserts it is under no obligation to pay the awarded fee. Employer does not challenge the amount of the fee awarded.

Contrary to Employer's assertion, an administrative law judge may award an attorney's fee before the award of benefits becomes final; however, the fee award is not enforceable until all appeals have been exhausted. *Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011); *see also Thompson v. Potashnick Constr. Co.*, 812 F.2d 574 (9th Cir. 1987); *Wells v. Int'l Great Lakes Shipping Co.*, 693 F.2d 663, 15 BRBS 47(CRT) (7th Cir. 1982); *Story v. Navy Exch. Serv. Ctr.*, 33 BRBS 111 (1999); *Mowl v. Ingalls Shipbuilding, Inc.*, 32 BRBS 51 (1998); *Lewis v. Bethlehem Steel Corp.*, 19 BRBS 90 (1986). Therefore, we reject Employer's argument. As we have affirmed the administrative law judge's award of permanent total disability benefits, we also affirm his fee award. *See Zaradnik v. The Dutra Grp.*, 52 BRBS 23 (2018), *appeal dismissed*, 792 F. App'x 518 (9th Cir. 2020).

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[6] As Employer did not establish the availability of suitable alternate employment, the burden did not shift to Claimant to establish he diligently sought work. *See, e.g., Roger's Terminal & Shipping Corp. v. Director, OWCP,* 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986). Thus, as the administrative law judge permissibly did not reach this issue, it is unnecessary to address Employer's contentions in this regard.

Accordingly, we affirm the administrative law judge's Decision and Order Awarding Benefits and Order Awarding Attorney's Fees and Costs.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge