U.S. Department of Labor

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

BRB No. 19-0431

EUGENE WILLIAMS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PORTS AMERICA, INCORPORATED	)	DATE ISSUED: 03/10/2020
	)	
and	)	
	)	
PORTS INSURANCE COMPANY, INCORPORATED	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order and the Order Denying Employer's Motion for Reconsideration of Morris D. Davis, Administrative Law Judge, United States Department of Labor.

Bruce B. Eisenstein, Baltimore, Maryland, for claimant.

Christopher J. Field (Field Womack & Kawczynski, LLC), South Amboy, New Jersey, for employer/carrier.

Before: BOGGS, Chief Administrative Appeals Judge, ROLFE and JONES, Administrative Appeals Judges.

ROLFE, Administrative Appeals Judge:

Employer appeals the Decision and Order and the Order Denying Employer's Motion for Reconsideration of Administrative Law Judge Morris D. Davis rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act). We must affirm the findings of fact and

conclusions of law of the administrative law judge 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).

Claimant, while working for employer as a lasher at the Seagirt Marine Terminal (the terminal), Port of Baltimore, sustained an injury to his left shoulder/brachial plexus in a motor vehicle accident on July 26, 2016. Employer authorized medical care and voluntarily paid claimant temporary partial disability benefits from July 27, 2016 to January 29, 2017, and temporary total disability benefits from January 30 to July 7, 2017. Claimant sought additional benefits and the case was forwarded to the Office of Administrative Law Judges for a formal hearing. Claimant has not worked since his July 26, 2016 work accident.

Based on the parties' stipulations, the administrative law judge found claimant's left shoulder/brachial plexus condition work-related. He determined claimant is unable to return to his pre-injury employment as a lasher, employer established the availability of suitable alternate employment through its labor market survey dated July 5, 2018, and claimant did not exercise due diligence in seeking alternate work. The administrative law judge, however, found the groundman job at the terminal, which paid higher wages, is not suitable alternate employment. The administrative law judge awarded claimant periods of temporary total and permanent total disability benefits from July 27, 2016 through July 4, 2018, and ongoing permanent partial disability benefits thereafter based on his average weekly wage of $2,188.65 and a post-injury wage-earning capacity of $486.06. The administrative law judge denied employer's motion for reconsideration.

On appeal, employer challenges the administrative law judge's finding that the groundman position it regularly filled from the union hall does not constitute suitable alternate employment, such that claimant has a higher post-injury wage-earning capacity. Claimant responds, urging affirmance of the administrative law judge's decision.

Once, as here, claimant establishes he is unable to perform his usual employment duties due to his work injury, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *See Marine Repair Services, Inc. v. Fifer*, 717 F.3d 327, 47 BRBS 25(CRT) (4th Cir. 2013); *Lentz v. Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988). In order to meet its burden, employer must demonstrate the availability of a range of realistic job opportunities within the geographic area where claimant resides which claimant, by virtue of his age, education, work experience, and physical restrictions is capable of performing if he diligently

tried.[1] *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1999); *Lentz*, 852 F.2d 129, 21 BRBS 109(CRT).

Claimant was able to return to the workforce on July 1, 2017. Employer attempted to show suitable alternate employment as of that date through a groundman position filled by seniority at the terminal. The administrative law judge found claimant physically capable of working as a groundman at that time, and employer showed it hired individuals from the union hiring hall with lesser seniority than claimant to fill groundman jobs on 268 out of 426 days between July 1, 2017 and August 31, 2018. Order on Recon. at 3. The administrative law judge, however, found the continued availability of the groundman position is too speculative as it "varies daily" depending on employer's need and the seniority of other individuals bidding for the position on any given day. The administrative law judge thus concluded the groundman position did not constitute suitable alternate employment because employer did not show that such work "would remain available, regular, and continuous going forward." Decision and Order at 15; *see* Order on Recon. at 1-4.

We affirm the administrative law judge's rejection of the groundman position as suitable alternate employment for the period preceding July 5, 2018, when employer submitted a labor market survey identifying other jobs. Under *Lentz*, 852 F.2d at 131, 21 BRBS at 112-113(CRT), it is legally insufficient to establish suitable alternate employment with a single employment position, unless employer actually offers the job to claimant. *See Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993); *Shiver v.*

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[1]The Fourth Circuit's reasoning behind the requirement that employer must show a "range" of jobs is as follows:

> A single job opening cannot reasonably or realistically satisfy an employer's burden of "demonstrat[ing] the types of jobs that the claimant can perform, that those types of jobs are available in the relevant community, and that there is a reasonable likelihood that the claimant would be hired if he diligently sought the job." *Roger's Terminal* [*& Shipping Corp. v. Director, OWCP*,] 784 F.2d [687,] at 691 [(5th Cir. 1986), *cert. denied*, 479 U.S. 826 (1986)]. If a vocational expert is able to identify and locate only one employment position, it is manifestly unreasonable to conclude that an individual would be able to seek out and, more importantly, secure that specific job.

Lentz, 852 F.2d at 131, 21 BRBS at 112-113(CRT).

United States Marine Corps, Marine Base Exch., 23 BRBS 246 (1990). As it is uncontested employer did not offer claimant the groundman position, we affirm the administrative law judge's finding employer did not establish the availability of suitable alternate employment from July 1, 2017 to July 4, 2018. Consequently, we affirm the administrative law judge's award of total disability benefits from July 27, 2016 to July 4, 2018, as it is rational, supported by substantial evidence, and in accordance with law.

Employer submitted labor market surveys dated July 5 and 13, 2018, identifying driver jobs, a lot attendant job, and greeter jobs as allegedly suitable for claimant. EX 13. The administrative law judge found six positions suitable for claimant and available as of July 5, 2018.[2] Decision and Order at 16-17. He averaged the wages of the six jobs to arrive at claimant's post-injury wage-earning capacity. *Id.* at 20; *see* 33 U.S.C. §908(h).

We agree with employer that as of July 5, 2018, the administrative law judge should have considered anew whether the groundman position was suitable and available to claimant, because as of that date it was within the "range of jobs" potentially suitable for claimant. *See Fifer*, 717 F.3d at 336, 47 BRBS at 29(CRT). Therefore, we vacate the finding that the groundman job is not suitable alternate employment as of that date and remand for further findings.

Contrary to the administrative law judge's reasoning that the groundman job is not suitable because of the lack of evidence of future availability, *see* Decision and Order at 15, the law does not require this specific showing for jobs identified in a labor market survey; thus, employer cannot be held to a higher standard regarding a job it does not directly control. *Lentz* requires the employer to show "the injured employee retains the capacity to earn wages in regular, continuous employment." *Lentz*, 852 F.2d at 131, 21 BRBS at 112(CRT); *cf. Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994) (in retrospect, job claimant held for only 11 weeks post-injury is not suitable alternate employment because the work was not "realistically and regularly available" on the open market). Indeed, part-time jobs can constitute suitable alternate employment; employer does not have to identify full-time work. *Gregory v. Norfolk Shipbuilding & Dry Dock Co.*, 32 BRBS 264 (1998); *Hundley v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 254 (1998); *Royce v. Elrich Constr. Co.*, 17 BRBS 157 (1985). Moreover, the record contains evidence establishing when individuals with less seniority than claimant obtained the groundman job through the date of the formal hearing and the wages they were paid. EX 16. This provides evidence

[2]We affirm as unchallenged on appeal the administrative law judge's findings that these six jobs constitute suitable alternate employment and that claimant did not diligently seek alternate work. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

from which the administrative law judge can determine if claimant could "realistically and likely secure" this job and has the "capacity to earn wages in regular, continuous employment."[3] *Lentz*, 852 F.2d at 131, 21 BRBS at 112(CRT).

The record, however, contains conflicting evidence as to whether claimant was capable of performing the groundman position. Claimant testified at the August 1, 2018 hearing, "I could do the groundman job." HT at 28, 37, 42. However, Dr. Barbera certified on January 9, 2018, that claimant was permanently totally disabled by his shoulder injury. CX 4. In considering the viability of the groundman position, the administrative law judge should discuss the impact, if any, that claimant's disability retirement and removal from the union roll might have on his ability to work.[4] If the administrative law judge finds the groundman job suitable, he must address and recalculate claimant's post-injury wage-earning capacity with reference to that job.[5] *See, e.g., B.H. [Holloway] v. Northrop Grumman Ship Systems, Inc.*, 43 BRBS 129 (2009). Consequently, we remand this case for the administrative law judge to reconsider whether the groundman position should be

[3]As employer posits, if it turns out claimant's wage-earning capacity is lower than that found by the administrative law judge, claimant's remedy is to seek modification under Section 22, 33 U.S.C. §922. *Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 30 BRBS 1(CRT) (1995); *see, e.g., Del Monte Fresh Produce v. Director, OWCP* [*Gates*], 563 F.3d 1216, 43 BRBS 21(CRT) (11th Cir. 2009) (claimant successfully sought modification when his hourly wage and hours were reduced in his post-injury job).

[4]Claimant took a disability pension on February 1, 2018, and testified "no, you can't" work as a longshoreman once you are on a disability pension. HT at 57. For clarity, we note claimant cannot eliminate an otherwise available union job from consideration by voluntarily removing himself from union membership or choosing not to resume union membership. Thus, the pertinent inquiry concerns the underlying rationale for claimant's disability retirement from the union, i.e., did claimant voluntarily withdraw from the union or was he compelled by disability to take such recourse.

[5]If the groundman job is suitable alternate employment, the wages this job paid at the time of injury, either alone or in combination with the wages of the other suitable jobs, should be used to determine the reasonable dollar amount of claimant's wage-earning capacity as of July 5, 2018. 33 U.S.C. §908(h); *see, e.g., Avondale Industries, Inc. v. Pulliam*, 137 F.3d 326, 32 BRBS 65(CRT) (5th Cir. 1998). If, on remand, the administrative law judge finds the groundman position is not suitable alternate employment, he may reinstate his prior wage-earning capacity finding of $486.06. *See* 33 U.S.C. §908(h).

included among those jobs he previously found constituted suitable alternate employment as of July 5, 2018.

Accordingly, we vacate the finding that the groundman position does not constitute suitable alternate employment as of July 5, 2018, and we remand the case for further consideration consistent with this opinion. We affirm the administrative law judge's decision in all other respects.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

I concur:

MELISSA LIN JONES
Administrative Appeals Judge

BOGGS, Chief Administrative Appeals Judge, concurring:

I concur in the results reached by my colleagues. I write separately to emphasize that my decision to affirm the administrative law judge's finding that the groundman position did not constitute suitable alternate employment prior to employer's July 5, 2018 submission of a labor market survey is compelled by *Lentz v. Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988). Under *Lentz*, the employer is required to demonstrate the availability of a range of jobs, unless the employer provides employment. *See, e.g., Shiver v. United States Marine Corps, Marine Base Exch.*, 23 BRBS 246 (1990). Nevertheless, where, as in this case, employer's evidence clearly establishes the groundman position would have been available to claimant based on seniority had he merely shown up to the union hall to seek it, a reasonable likelihood exists that claimant could have obtained this single job. Under these specific circumstances, I believe employer's showing of the groundman job should be sufficient to meet employer's burden to show the availability of suitable alternate employment as of July 1, 2017.

With respect to the period beginning February 2, 2018, when claimant was removed from the union rolls, *see* n.4, *supra*, I emphasize that the reason for his removal is the primary issue. Claimant's taking a disability retirement does not necessarily eliminate from consideration a union job if he voluntarily relinquished or did not reinstate his membership in the union. Consequently, if claimant could have qualified for a job by

retaining or reinstating his union membership, it should be considered in determining the availability of suitable alternate employment.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge