**U.S. Department of Labor**

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

BRB No. 20-0393

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| MOHAMMAD N. SAHEED | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| VALBIN CORPORATION | ) | |
| | ) | DATE ISSUED: 03/30/2021 |
| and | ) | |
| | ) | |
| ACE AMERICAN INSURANCE COMPANY c/o ESIS NEW ORLEANS WC | ) | |
| | ) | |
| Employer/Carrier-Respondents | ) | DECISION and ORDER |

Appeal of the Decision and Order Awarding Benefits of Stephen R. Henley, Chief Administrative Law Judge, United States Department of Labor.

David J. Kapson (ChasenBoscolo Injury Lawyers), Greenbelt, Maryland, for Claimant.

Alan G. Brackett, Patrick J. Babin and Daniel P. Sullivan (Mouledoux, Bland, Legrand & Brackett, LLC), New Orleans, Louisiana, for Employer/Carrier.

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

PER CURIAM:

Claimant appeals Chief Administrative Law Judge Stephen R. Henley's Decision and Order Awarding Benefits (2018-LDA-00305, 2019-LDA-00043) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (Act), as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.*

(DBA). 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 for Employer in the United States before accepting a six month contract to work in Afghanistan as a media screener.[1] Tr. at 26-27. At the January 7, 2019 hearing to address his physical injuries, Claimant testified he was required to wear 45 to 50 pounds of body armor. Tr. at 26. On December 4, 2015, Claimant injured his back, shoulder and wrist removing the body armor. Tr. at 27-28. He returned to the United States within a week or two of the incident with severe pain in the affected body parts. *Id*. at 31. Claimant attempted to redeploy to Afghanistan in April 2016, but was able to work there for only a month because he did not pass Employer's physical examination due to his injuries. *Id*. at 63-64, 84-86. He continued working for Employer in the United States at lower wages than he earned in Afghanistan. *Id*. at 37, 70, 86. Claimant underwent right shoulder surgery in April 2017 and right wrist surgery in June 2017. *Id*. at 33-34, 44-49. Employer paid medical benefits and compensation for Claimant's loss of wage-earning capacity, which were terminated in February 2018 when Claimant attempted to switch treating physicians from Dr. Stephen Saddler to Dr. Jeffrey Lovallo. *Id*. at 37-39, 73, 76. Claimant obtained a job with Fulcrum IT in August 2018, where he is paid an annual salary of $125,000. *Id*. at 44-45, 82. He had a psychiatric examination at Employer's request on December 10, 2018, by Dr. James O'Brien, who diagnosed delayed-onset post-traumatic stress disorder (PTSD). CX 21. Employer stipulated that Claimant sustained work-related physical and psychological injuries.[2] Tr. at 8-9, 108.

The administrative law judge determined Claimant is temporarily disabled by his shoulder and back injuries and by PTSD. Decision and Order at 16. He found Claimant was temporarily disabled by his right wrist injury until six weeks after having surgery on June 30, 2017. *Id*. He determined Claimant's average weekly wage under Section 10(c), 33 U.S.C. §910(c), is $2,749.80 based on his actual earnings for Employer for the year prior to his December 4, 2015 work injury, which included income from both stateside and overseas employment. *Id*. at 21. He found Claimant's post-injury wage-earning capacity

[1] Claimant testified most of his job duties are classified, but he essentially collected information on adversaries to the United States. Tr. at 26-27.

[2] A hearing was conducted on January 7, 2019, to address Claimant's alleged injuries, but Claimant did not have representation for his psychological injury claim; therefore, a second hearing was held on February 14, 2020, for his PTSD claim. Decision and Order at 2.

from July 21, 2016 to April 12, 2017 was $1,271.20 per week and $794.50 per week from February 10 to August 7, 2018. The parties agreed that from August 8, 2018, Claimant's wage-earning capacity derives from his annual $125,000 salary with Fulcrum IT, or $2,403.85 per week. *Id*. at 22-23. Accordingly, the administrative law judge awarded Claimant compensation for temporary partial disability, 33 U.S.C. §908(e), of $985.73 per week from July 21, 2016 to April 12, 2017, $1,303.53 per week from February 10, 2018 to August 6, 2018, and $230.63 per week from August 7, 2018. *Id*. at 24.[3]

On appeal, Claimant challenges the administrative law judge's finding that his average weekly wage is $2,749.80 under Section 10(c). He avers the administrative law judge erred by not relying solely on his overseas earnings to calculate his average weekly wage, which he asserts is at least $4,807.69. Employer responds that the administrative law judge's average weekly wage finding is supported by substantial evidence and should be affirmed.

The object of Section 10(c) is to arrive at a sum which reasonably represents the claimant's annual earning capacity at the time of his injury.[4] *See Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991). An administrative law judge has broad discretion when applying Section 10(c) to calculate a claimant's average weekly wage. *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 32 BRBS 91(CRT) (5th Cir. 1998); *Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1987).

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[3] Claimant did not assert entitlement to compensation from April 13, 2017 to February 9, 2018. Decision and Order at 17

[4] The parties agreed Claimant's average weekly wage should be determined under Section 10(c). Decision and Order at 20. Section 10(c) of the Act states:

> If either [Section 10(a) or (b)] cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C. §910(c).

The administrative law judge determined the evidence demonstrates Claimant earned approximately $5,000 to $6,000 per month from January 2015 to July 2015 and approximately $20,000 per month beginning in August 2015, when he started working in Afghanistan until he was injured on December 4, 2015.[5] Decision and Order at 20; *see* CX 15 at 136-144; EX 16 at 6, 8, 10, 12, 14-24. He found the length of Claimant's overseas contract with Employer was for six months, which Claimant testified he was able to renew if he desired. Decision and Order at 21; *see* Tr. at 53-54. The administrative law judge found, however, Claimant did not testify whether he planned to renew his contract beyond December 2015. He also stated the only record evidence of Claimant's pre-injury earnings was his income of $142,989.54 in the 52 weeks prior to his work injury. *Id*.; *see* EX 16 at 2-25. Based on this record, the administrative law judge utilized Claimant's combined stateside and overseas earnings of $142,989.54 during the year prior to his work injury to find Claimant's average weekly wage is $2,749.80, by dividing his total earnings by 52. We reject Claimant's contention that this is erroneous.

In *Jasmine v. Can-Am Protection Group, Inc.*, 46 BRBS 17 (2012), the Board affirmed the administrative law judge's calculation of the claimant's average weekly wage under Section 10(c), based on a blend of his stateside earnings and his overseas contract rate of pay at the time of his injury. The administrative law judge rationally found the claimant was working overseas pursuant to a six-month contract, and the claimant's history of non-continuous overseas employment indicated the lack of a long-term commitment to such employment. *Id.* at 19. In this case, Claimant has not demonstrated error in the administrative law judge's application of Section 10(c) or in his resulting average weekly wage. There is no dispute Claimant's contract to work in Afghanistan was for six months' duration, and the administrative law judge rationally determined the evidence does not establish Claimant would have renewed his overseas employment on the expiration of his short-term contract. *Id.*

In challenging the administrative law judge's finding that there is no evidence he intended to extend his overseas contract, Claimant provides contradictory arguments. He first states, without citing to the record, that he "indicated that he could have and in fact, would have extended his deployment." Cl. Br. at 10.[6] He then concedes, however, that he

[5] Claimant's pay stubs indicate he started working in Afghanistan in June 2015. EX 16 at 14.

[6] While Claimant cites his testimony that his injury prevented him from completing his six-month contract and that contracts could be extended "if you want to," *see* Tr. at 30, neither statement supports Claimant's contention he "indicated that he . . . in fact, would have extended his deployment." Cl. Br. at 10.

"did not say specifically that he would have renewed his contract," but argues such an intent should be inferred from his testimony that his current stateside job with Fulcrum is less physically demanding than his most recent stateside job with Employer. *Id.*, citing Tr. at 45. But Claimant does not explain how his current stateside job being less physically demanding than his previous stateside job undermines the administrative law judge's finding that there is no evidence Claimant would have extended his overseas contract. Nor does Claimant allege that his subsequent, unsuccessful effort to be deployed for Employer evidences an intent to extend his earlier overseas contract.

The administrative law judge's calculation of Claimant's average weekly wage based on the facts of this case is in accordance with Section 10(c), rational, supported by substantial evidence, and within the broad discretion afforded him under Section 10(c). We therefore affirm his finding that the blended overseas and stateside wages Claimant earned with Employer during the year prior to his injury are the best measure of Claimant's earning capacity at the time of his injury. *See Simonds v. Pittman Mechanical Contractors*, 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994); *see also* *Rhine v. Stevedoring Services of America*, 596 F.3d 1161, 44 BRBS 9(CRT) (9th Cir. 2010); *Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 34 BRBS 44(CRT), *modified on other grounds on reh'g*, 237 F.3d 409, 35 BRBS 26(CRT) (5th Cir. 2000).

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge