



BRB No. 16-0321

STANLEY CHRISTIE)	
)	
Claimant-Respondent)	
)	
v.)	
)	
GEORGIA-PACIFIC COMPANY)	DATE ISSUED: <u>Mar. 7, 2017</u>
)	
and)	
)	
ACE AMERICAN INSURANCE)	
COMPANY/ESIS)	
)	
Employer/Carrier-)	
Petitioners)	DECISION and ORDER

Appeal of the Decision and Order Granting Benefits of William Dorsey, Administrative Law Judge, United States Department of Labor.

Richard A. Mann (Brownstein Rask, LLP), Portland, Oregon, for claimant.

Stephen E. Verotsky (Sather, Byerly & Holloway, LLP), Portland, Oregon, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits (2014-LHC-01430) of Administrative Law Judge William Dorsey rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the 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 law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant injured his back on June 29, 1999, during the course of his employment for employer as a carpenter. Claimant returned to work, but he eventually required back surgery on January 9, 2004. CX 2 at 13-14. Claimant returned to work after his surgery with restrictions against lifting over 30 pounds and sitting or standing for more than two consecutive hours.¹ *Id.* at 17. Due to concerns that his job duties as a carpenter could aggravate his back condition, by 2007 or 2008 claimant had begun to work exclusively as a safety inspector at employer's Portland warehouses. Tr. at 21-22, 149-150.

Claimant was informed in late 2010 that his union planned to eliminate its early retirement option, effective January 1, 2011. Elimination of this option meant that claimant, age 56 at that time, would be ineligible to receive pension income until he was 62. Tr. at 52. Believing that his work-related back condition might prevent his continued employment until he was 62, claimant retired on December 1, 2010, with a reduction in pension benefits due to his early retirement. *Id.* at 52-53. Claimant's back condition deteriorated post-retirement and, in December 2012, claimant's treating physician, Dr. Anderson, imposed additional work restrictions. Claimant sought compensation under the Act for permanent total disability.

The administrative law judge found that claimant was physically capable of working as a safety inspector at the time he retired in December 2010. Decision and Order at 22-24. In this regard, the administrative law judge observed that Dr. Anderson first stated on December 3, 2012 that claimant could not return to work as a safety inspector. CX 5 at 91. The administrative law judge also noted that claimant testified that at the time of his retirement he was capable of working but was unsure for how much longer. Tr. at 53. The administrative law judge found, however, that claimant is not barred by his retirement from receiving compensation for permanent total disability, as his decision to stop working in December 2010 was "involuntary." That is, the administrative law judge found that claimant retired, at least in part, because of concerns that his work injury would prevent him from working until the full retirement age of 62, and that he would, therefore, have no pension income prior to that time. *Id.* at 24-26. Because claimant's retirement was motivated at least in part by his work-related injury, the administrative law judge found that claimant's receipt of post-retirement benefits is not precluded. The administrative law judge found that claimant became permanently totally disabled on December 3, 2012, when Dr. Anderson prescribed increased work

¹ On November 22, 2005, Administrative Law Judge Karst issued an order based on the parties' stipulations in which employer agreed to accept responsibility for claimant's June 29, 1999 injury and to pay claimant \$2,300 in satisfaction of outstanding medical bills and a claim for mileage costs. The parties agreed that all temporary partial disability owed had been paid. Claimant retained the right to medical benefits under Section 7 of the Act, 33 U.S.C. §907.

restrictions.² *Id.* at 26-28. In the absence of suitable alternate employment at that time, the administrative law judge ordered employer to pay claimant compensation for permanent total disability, 33 U.S.C. §908(a), from that date forward. *Id.* at 27-28.

On appeal, employer contends the administrative law judge erred by finding claimant entitled to any disability compensation. Employer avers that because claimant was able to work as a safety inspector with no loss of earning capacity at the time he retired in December 2010, he is precluded from receiving benefits commencing in December 2012. Claimant responds, urging affirmance of the award.

The administrative law judge's award of permanent total disability benefits must be reversed in light of the Board's recent decision in *Moody v. Huntington Ingalls, Inc.*, 50 BRBS 9 (2016), *recon. denied*, BRB No. 15-0314 (May 10, 2016), *appeal pending*, No. 16-1773 (4th Cir.), which was issued the same day the administrative law judge issued his decision in this case. In *Moody*, the claimant was working in suitable alternate employment at the time of his voluntary retirement. Two months later, he underwent surgery for a prior work-related injury. He sought, and was awarded, temporary total disability benefits for the recuperative period following the surgery. On appeal, the Board reversed the administrative law judge's award of benefits. The Board held that as the claimant had continued working in a suitable position until his voluntary retirement, he did not have a loss of wage-earning capacity "because of injury" within the meaning of Section 2(10) of the Act, 33 U.S.C. §902(10). Reasoning that the claimant's retirement had already resulted in his complete loss of wage-earning capacity at the time of his surgery, the Board held that the claimant was not entitled to temporary total disability benefits for the post-retirement period during which he recovered from his work-related shoulder injury. *Moody*, 50 BRBS at 10-11. The Board previously had reached this result in *Burson v. T. Smith & Son, Inc.*, 22 BRBS 124 (1989) and *Hoffman v. Newport News Shipbuilding & Dry Dock Co.*, 35 BRBS 148 (2001).³

² Dr. Anderson imposed work restrictions on December 3, 2012, of no: sitting for more than six hours; operating a motor vehicle at work; walking, kneeling, pushing, pulling or lifting over 20 pounds for more than two hours; and standing, reaching, twisting, bending, squatting or climbing for more than one hour. CX 5 at 91.

³ In *Burson*, the Board affirmed the administrative law judge's finding that the claimant had voluntarily left the workforce as it was supported by substantial evidence. Consequently, the Board affirmed the administrative law judge's denial of temporary total disability benefits because claimant failed to establish he had a loss of wage-earning capacity when his work-related toe injury required surgery after retirement. The Board held, however, that claimant could receive a scheduled award for permanent physical impairment to the toe, because such an award is not predicated on a loss of earning capacity. *Burson*, 22 BRBS at 127.

These cases thus represent controlling authority for the proposition that an employee is not entitled to receive a total disability award after he retires for reasons unrelated to the work injury because there is no loss of wage-earning capacity due to the injury. As explained by the Board in *Moody*, Section 2(10) of the Act provides that: “‘Disability’ means incapacity *because of injury* to earn the wages which the employee was receiving at the time of injury in the same or any other employment[.]” 33 U.S.C. §902(10) (emphasis added); *Moody*, 50 BRBS at 10. Thus, the disability inquiry encompasses both physical and economic considerations. *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 126, 31 BRBS 54, 56(CRT) (1997). In a traumatic injury claim for post-retirement disability compensation for lost earning capacity, the only relevant inquiry is whether claimant’s work injury precluded him from performing his usual work or suitable alternate employment at the time of his retirement such that the loss of earning capacity was “because of injury.” *Moody*, 50 BRBS at 10; *Harmon v. Sea-Land Service, Inc.*, 31 BRBS 45 (1997) (total disability awardable even though claimant retired at normal retirement age because he could not perform his usual work at that time due to his work injury); *Hoffman*, 35 BRBS 148; *Burson*, 22 BRBS 124; *see also Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff’d sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993).

This case is not legally distinguishable from *Moody*. As in *Moody*, claimant’s work-related injury did not preclude his continued work for employer and had not resulted in a loss of any wage-earning capacity at the time he stopped working. The administrative law judge found “most important” claimant’s testimony that he could have kept working and that he had planned to continue working beyond December 2010 until he learned about the change in employer’s pension plan. Decision and Order at 24; *see Tr.* at 53-55. Claimant’s increased restrictions were not imposed until two years after claimant took his early retirement.

In finding *Hoffman* distinguishable and that claimant’s retirement thus was “involuntary,” the administrative law judge relied on claimant’s testimony that his back

In *Hoffman*, the claimant accepted an early retirement package because it was a “good deal.” His work-related knee condition later deteriorated, first resulting in increased impairment ratings and then requiring a total knee replacement. Employer paid the claimant under the schedule, 33 U.S.C. §908(c)(2), for the increased impairment ratings. Claimant’s doctor restricted him from all work following the surgery, and claimant sought permanent total disability benefits. The administrative law judge denied the claim. The Board affirmed, holding that the administrative law judge rationally found the claimant’s retirement had been unrelated to his work injury and that the increased knee impairment following retirement did not increase claimant’s loss of wage-earning capacity. *Hoffman*, 35 BRBS at 149-150.

condition influenced his decision to retire early, given the imminent change in the pension plan, and claimant's "well-placed fear" that he would lose his job if he could not perform his duties. *See* Decision and Order at 25-26.⁴ In contrast, the administrative law judge noted, claimant Hoffman retired due to a "good-deal" early retirement offer. However, these facts are not legally significant in view of the administrative law judge's finding that claimant was capable of performing his work for employer with no loss of wage-earning capacity at the time he retired. *Id.* at 22-24. The only relevant inquiry is whether claimant's work injury caused a loss of earning capacity two years later, when increased restrictions were imposed. As claimant had no earning capacity at that time, due to his decision to take early retirement at a time that he was not disabled within the meaning of Section 2(10) of the Act, the answer to this inquiry must be that the injury did not cause any loss of earning capacity. Thus, for the reasons set forth in *Moody*, we reverse the administrative law judge's award of post-retirement permanent total disability compensation. *Moody*, 50 BRBS 9; *Hoffman*, 35 BRBS 148; *Burson*, 22 BRBS 124.

⁴ The administrative law judge noted claimant's testimony that his former supervisor, Ms. Stein, told him that he would lose his job if he could not perform his duties. Decision and Order at 10-11. The administrative law judge found that, regardless of whether Ms. Stein actually said this to claimant, claimant believed it to be true. *Id.* at 26. We note that if claimant had lost his job due to his inability to perform it due to his work injury, this loss of wage-earning capacity would have been compensable under the Act, assuming all requirements of the Act were satisfied.

Accordingly, the administrative law judge's Decision and Order Granting Benefits is reversed.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge