U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 16-0227

ROMEL KUZA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GLOBAL LINGUIST SOLUTIONS, LLC	)	
	)	DATE ISSUED: Dec. 8, 2016
and	)	
	)	
ZURICH AMERICAN INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C., and Stephen P. Moschetta (The Moschetta Law Firm, P.C.), Washington, Pennsylvania, for claimant.

Jonathan A. Tweedy and Christy L. Johnson (Brown Sims), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2015-LDA-00243) of Administrative Law Judge Larry W. Price 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), as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the 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 law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant learned, several weeks after his job as an interpreter for employer in Iraq ended on June 1, 2013, that he had been exposed to tuberculosis in the course of that overseas work. He was subsequently diagnosed with latent tuberculosis, for which he received nine months of medication treatment, beginning in August or September 2013. Claimant reached maximum medical improvement for this condition on September 18, 2014. Employer voluntarily paid claimant temporary total disability benefits from June 4, 2013 through November 11, 2014, at a weekly rate of $1,325.18, as well as all medical benefits relating to claimant's tuberculosis. Claimant, thereafter, sought benefits under the Act for additional alleged work-related injuries, including a psychiatric injury and rheumatological and neurological conditions, as well as for medical authorization for the continued treatment of his tuberculous. Employer controverted the claim.

In his decision, the administrative law judge found claimant sustained a work-related psychiatric condition, anxiety and depression, relating to his tuberculosis diagnosis, for which claimant was entitled to temporary total disability benefits from June 4, 2013 through June 25, 2015, followed by an ongoing award of temporary partial disability benefits based on a pre-injury average weekly wage of $1,495.63.[1] The administrative law judge determined claimant's average weekly wage under Section 10(c) of the Act, 33 U.S.C. §910(c), by dividing all of claimant's earnings in the 52 weeks preceding his June 2013 injury, $77,772.99, by 52.

On appeal, claimant challenges the administrative law judge's calculation of his average weekly wage as $1,495.63. Employer responds, urging affirmance of the administrative law judge's decision. Claimant has filed a reply brief.

Claimant contends that the administrative law judge erred as a matter of law in applying a perceived precedential holding as requiring "blending" of stateside and overseas earnings in DBA cases. In particular, claimant asserts that the administrative law judge erred by applying, as precedent, the decision of the United States District Court for the Southern District of Texas in *Service Employees Int'l, Inc. v. Director, OWCP*, No. H-11-01065, 2013 WL 943840 (S.D. Tex. Mar. 11, 2013), *vacating K.S.* [*Simons*] *v. Service Employees Int'l, Inc.*, 43 BRBS 18, *aff'd on recon. en banc,* 43 BRBS 136 (2009). Claimant, instead, asserts that the Board's en banc *Simons* decision, holding that the claimant's average weekly wage must be calculated based solely on his overseas earnings in order to account for the plain language of Section 10(c), remains valid law and should be applied to the facts in this case. Claimant thus contends his average

[1]The administrative law judge found, based on the parties' stipulations, that claimant's rheumatological, neurological and orthopedic complaints are unrelated to his work for employer. Decision and Order at 3.

weekly wage is $2,430.41, based solely on his overseas earnings with employer had he worked the entirety of his annual contract.

Section 10(c) of the Act states:

> If either of the foregoing methods [Section 10(a), (b)] of arriving at the average annual earnings of the injured employee 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).[2] Citing *Proffitt v. Serv. Employers Int'l, Inc.*, 40 BRBS 41 (2006),[3] the Board in *Simons* reversed the administrative law judge's use of the claimant's combined overseas and stateside earnings during the year preceding his injury to calculate his average weekly wage under Section 10(c). The Board held that the claimant's average weekly wage must be calculated based solely on his overseas earnings as the claimant had been enticed by higher wages to work in a dangerous environment in Iraq and Kuwait. The claimant's potential to maintain his higher level of earnings afforded by his one-year contract to work overseas was cut short by his injury. Therefore, the Board held that the claimant's earnings under this contract provided the best evidence of his capacity to earn absent the work injury and that a calculation based on the overseas earnings properly had "regard for the previous earnings of the injured

[2]It is uncontested that Sections 10(a) and (b) are not applicable, such that claimant's average weekly wage must be calculated pursuant to Section 10(c). 33 U.S.C. §910(a), (b).

[3]In *Proffitt*, the administrative law judge based the claimant's average weekly wage calculation solely on his overseas earnings because the claimant's stateside employment was not similar to his overseas work, in that claimant had different duties and the job was inherently more dangerous. The Board affirmed the calculation as rational and supported by substantial evidence because use of the overseas earnings reflected claimant's recent wage increase and demonstrated the loss of earnings he sustained as a result of the injury. *Proffitt*, 40 BRBS at 45.

employee in the employment in which he was working at the time of injury." *Simons*, 43 BRBS at 20-21; 43 BRBS at 137.[4]

On appeal, the district court held that the Board erred in engaging in de novo review of the evidence and usurped the wide discretion afforded administrative law judges in calculating average weekly wage under Section 10(c).[5] *Simons*, 2013 WL 943840 at *3-4. The court stated that substantial evidence supported the administrative law judge's finding that a blended approach, using both the claimant's stateside and overseas earnings, better reflected the claimant's true earning capacity pursuant to Section 10(c), taking into account his one-year contract and the conditions of his overseas employment. The court held that the Board did not provide any support for the proposition that the decision in *Proffitt*, 40 BRBS 41, should be applied to all cases with similar facts, as such a conclusion abrogated the wide discretion afforded administrative law judges pursuant to Section 10(c). *Id*. at *3. The court stated that the administrative law judge had reasonably determined that the facts in *Simons* were sufficiently different from those in *Proffitt* to merit a different outcome, and it identified these facts:

> Simons was employed in the same type of work as he was previously employed, was injured in a manner that could have occurred stateside, and his work overseas did not provide him with new skills that might be used to

[4]The Board denied employer's motion for reconsideration of the holding that the claimant's average weekly wage had to be calculated with use of only his overseas wages. The Board stated that the fact that the claimant's injury was not caused by the peculiar dangers of overseas work does not negate the conditions which formed the basis for his remuneration; specifically, employer's agreement to pay the claimant substantially higher wages to work overseas in dangerous settings. The Board added that while the administrative law judge is afforded broad discretion in determining the average weekly wage pursuant to Section 10(c), that discretion is not unfettered as the administrative law judge's finding must be based on applicable law. The Board reiterated that, in *Simons*, the exclusive use of overseas wages provides the legal framework within which the administrative law judge may exercise his discretion in determining the amount of the claimant's average weekly wage. *K.S.* [*Simons*] *v. Service Employees Int'l, Inc.*, 43 BRBS 136 (2009) (*en banc*), *aff'g on recon.* 43 BRBS 18 (2009), *vacated and remanded sub nom. Service Employees Int'l, Inc. v. Director, OWCP,* No. H-11-01065, 2013 WL 943840 (S.D. Tex. Mar. 11, 2013).

[5]The district court based its holding on the administrative law judge's "wide discretion," specifically stating, "[I]t is within the administrative law judge's discretion to determine whether or not the facts of the two cases [*Simons* and *Proffitt*] are similar enough to merit similar outcomes." *Simons*, 2013 WL 943840 at *4.

> increase his salary once he returned home. Dkt. 1, Ex. D at 8. Proffitt was working in a different field than he had worked stateside, he had learned new skills that would increase his salary stateside, and was injured running from a mortar attack, an event that would not have occurred had he been working in the United States. *Id.*

Simons, 2013 WL 943840 at *4 n.4. The district court thus vacated the Board's decision.

Prior to the district court's ruling in *Simons*, the Board referenced its *Simons* decision in two cases. *See Jasmine v. Can-Am Protection Group, Inc.*, 46 BRBS 17 (2012); *Luttrell v. Alutiiq Global Solutions*, 45 BRBS 31 (2011). In *Luttrell*, 45 BRBS 31, a DBA case arising on the Kwajalein Atoll in the South Pacific, the Board affirmed an administrative law judge's finding that the rate of pay the claimant earned in that position realistically reflected his wage-earning potential at the time of injury. In reaching its conclusion, the Board rejected claimant's contention that the post-injury job offer the claimant received to return to higher-paying work in the Middle East should be factored into his average weekly wage under Section 10(c), as the claimant voluntarily chose to leave higher-paying work in the Middle East and to accept the lower-paying job for employer on the Atoll which he held at the time of his injury.[6] *Luttrell*, 45 BRBS at 33. The Board stated that the administrative law judge's average weekly wage determination accounted for the extrinsic circumstances of the claimant's employment on the Kwajalein Atoll and the language of Section 10(c) requiring the administrative law judge to give "regard to the previous earnings of the injured employee in which he was working at the time of the injury." *Id.*

In *Jasmine*, 46 BRBS 17, the Board affirmed an administrative law judge's use of blended stateside and overseas earnings to calculate the claimant's average weekly wage in a DBA case involving employment in Afghanistan. In *Jasmine*, the Board stated:

> *Simons* does not mandate the use of only overseas earnings to calculate a claimant's average weekly wage in all DBA cases. *See Luttrell*, 45 BRBS

[6]Claimant Luttrell had worked exclusively overseas since 1996, including jobs in Bosnia, Saudi Arabia, and under the International Criminal Investigative Training and Assistance Program (ICITAP) in Jordan and Iraq. Tr. at 14-17. Beginning in 2004, the claimant worked under the ICITAP, training Iraqi police officers. *Id*. at 15. He left Iraq for a lesser paying job in the Bahamas for about three months prior to signing a one-year contract to work with employer on the Atoll. The claimant further testified that he intended to return to the Middle East and was offered such employment in Bahrain upon completion of his contract with the employer, but that he declined due to his recuperating from surgery for his work injury with the employer.

> 31. Rather, the Board held that, in cases arising under the DBA, a claimant's overseas earnings must be used exclusively to calculate his average weekly wage under Section 10(c) when he was enticed to work overseas in a dangerous environment in return for higher wages under a long-term contract. *See Simons*, 43 BRBS 18; *see also Proffitt*, 40 BRBS 41.

Jasmine, 46 BRBS at 19. The administrative law judge determined that the Board's decision in *Simons* did not require the exclusive use of the claimant's overseas earnings to calculate his average weekly wage because the claimant's contract of employment with the employer was for a six-month period. The administrative law judge concluded that, in light of the short-term duration of the claimant's employment contract with the employer and the claimant's employment history, which documented his rotation between stateside and overseas employment, a calculation of the claimant's average weekly wage using both his stateside and overseas earnings appropriately reflected his actual earning capacity at the time of his injury. The Board affirmed the administrative law judge's blended approach as rational and supported by substantial evidence. *Id.*

Although the administrative law judge, in this case, stated that the district court's decision in *Simons* "is exactly on point," Decision and Order at 23, he nevertheless adequately addressed the relevant evidence regarding claimant's work history and earnings in resolving the average weekly wage issue pursuant to Section 10(c). In particular, the administrative law judge found that the evidence establishes: 1) that for much of 2012, claimant was voluntarily in the United States and unemployed; 2) while he did work stateside for about three and a half months in 2012 for UPS, he quit of his own volition when he determined the effort was not worth the pay; 3) claimant did not work again until he resumed his overseas work with employer in November 2012;[7] 4) claimant worked overseas for employer for approximately seven months, from November 2012-June 3, 2013, until employer's contract ended; 5) when employer's contract ended, claimant opted to not seek other employment or accept an offer to remain overseas for less pay; and that 6) claimant, instead, appeared satisfied to remain in the United States, unemployed, until he received another contract offer from employer for an overseas position elsewhere. Relying on this evidence, the administrative law judge calculated claimant's average weekly wage at the time of his injury by dividing his stateside and overseas earnings in the year immediately preceding his last day of work for employer by 52. The administrative law judge found, based on the facts of this particular case, that

[7]The record shows that claimant left his job with UPS in April or May 2012 and that he did not work again until November 2012, when he resumed his overseas work with employer as an interpreter. *Id.* at 29-31. Thus, claimant was, by his own volition, unemployed for at least half of calendar year 2012.

this blended approach, "which takes into account the periods of voluntary unemployment," best "reflects how much he actually earned in the year preceding the injury." Decision and Order at 23.

The administrative law judge's findings are rational, supported by substantial evidence, and within the discretion afforded by Section 10(c). The administrative law judge's use of a blended calculation is supported by claimant's history of periods of employment and voluntary unemployment in the United States, and of overseas work, including in the year immediately preceding his last work for employer on June 3, 2013. Moreover, claimant's injury did not cut short his overseas employment, as he declined an offer to remain overseas at lower pay. Claimant was voluntarily unemployed, stateside, at the time of his diagnosis.[8] Consequently, the administrative law judge's calculation of claimant's average weekly wage based on a blending of claimant's stateside and overseas earnings in the year immediately preceding his last day of work with employer on June 3, 2013, is a rational exercise of his discretion pursuant to Section 10(c).[9] *Jasmine*, 46 BRBS at 19; *Proffitt*, 40 BRBS at 44-45. In accordance with the language of Section 10(c), the administrative law judge's calculation, based on the specific facts of this case, has "regard to the previous earnings of the injured employee in the employment in which he was working at the time of his injury" and "reasonably represent[s] the annual earning capacity of the injured employee." 33 U.S.C. §910(c). As the administrative law judge's findings are rational, supported by substantial evidence and in accordance with law, his conclusion that claimant's average weekly wage is $1,495.63 is affirmed. *See generally Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 34 BRBS 44(CRT), *modified in part on reh'g,* 237 F.3d 409, 35 BRBS 26(CRT) (5th Cir. 2000).

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[8]While claimant correctly notes that his annual salary with employer was $147,000, HT at 64, the record establishes that employer's contract ended after approximately seven months of work, and thus, arguably was of short-term duration. Moreover, unlike *Simons* and *Proffitt*, claimant's inability to earn his annual salary as of his last day of work with employer, i.e., June 3, 2013, was not due to his work-related injury but instead was the result of employer's contract coming to an end. Consequently, claimant's potential to maintain his higher level of earnings afforded by his contract to work overseas was, as of his last day of work for employer in June 2013, not cut short by his injury.

[9]For this reason, we need not address claimant's contentions that the district court's decision in *Simons* is not entitled to any precedential value and/or that the Board should instead reinstate and apply its holding in *Simons* in this case. In any event, as previously noted, the Board stated in *Jasmine*, "*Simons* does not mandate the use of only overseas earnings to calculate a claimant's average weekly wage in all DBA cases." *Jasmine*, 46 BRBS at 19.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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JUDITH S. BOGGS
Administrative Appeals Judge

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GREG J. BUZZARD
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge