U.S. Department of Labor

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

BRB Nos. 18-0412
and 18-0412A

ERIC TISER	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	DATE ISSUED: 12/20/2018
	)	
TCB INDUSTRIES, INCORPORATED	)	
	)	
and	)	
	)	
LOUISIANA WORKERS' COMPENSATION CORPORATION	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order on Remand and the Decision and Order Denying Claimant's Motion for Reconsideration of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Allain F. Hardin (Fransen & Hardin, P.L.C.), New Orleans, Louisiana, for claimant.

David K. Johnson (Johnson, Rahman & Thomas), Baton Rouge, Louisiana, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and employer cross-appeals,[1] the Decision and Order on Remand and the Decision and Order Denying Claimant's Motion for Reconsideration (2015-LHC-00852) of Administrative Law Judge Clement J. Kennington 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).

This is the second time this case has been appealed to the Board. Claimant injured his back while working as a rigger for employer on May 21, 1996. Employer voluntarily paid claimant temporary total disability benefits from May 21, 1996 through February 20, 2004, and temporary partial disability benefits from February 21, 2004 through November 3, 2014. Claimant thereafter sought additional disability and medical benefits. Employer controverted the claim.

In his initial decision, the administrative law judge found claimant entitled to the Section 20(a), 33 U.S.C. §920(a), presumption that his current back condition is related to

[1] The Board acknowledges receipt of employer's Notice of Cross-Appeal, mailed on July 24, 2018 and received by the Board on October 22, 2018 (mailed to a closed P.O. Box). *See* 20 C.F.R. §802.204. Employer's cross-appeal is assigned the Board's docket number 18-0412A. All correspondence relating to this appeal must bear this number. 20 C.F.R. §802.210.

Employer's cross-appeal, however, was untimely filed. Section 802.205(b) provides that a Notice of Cross-Appeal must be filed within 14 days of the date on which the first Notice of Appeal was filed or within 30 days from the date on which the Decision and Order was filed in the Office of the District Director. 20 C.F.R. §802.205(b). The district director filed the administrative law judge's Decision and Order Denying Claimant's Motion for Reconsideration on April 27, 2018. Claimant timely filed his Notice of Appeal on May 29, 2018. 20 C.F.R. §§802.205(a), 802.221(a). Although employer alleges it first received notice of claimant's appeal on July 12, 2018, the service sheet confirms that claimant's Notice of Appeal was mailed to counsel for employer/carrier on May 17, 2018 at the correct address. Therefore, as claimant's appeal was properly served on employer, and as employer's notice of appeal post-dates the filing of the administrative law judge's decision by more than 30 days and post-dates claimant's notice of appeal by more than 14 days, we dismiss employer's cross-appeal as untimely. 20 C.F.R. §802.205(b).

the employment incident, which employer did not rebut. He further found claimant incapable of returning to his usual employment with employer and employer did not establish the availability of suitable alternate employment. The administrative law judge calculated claimant's pre-injury average weekly wage under Section 10(c), 33 U.S.C. §910(c), as $639.72, based solely on claimant's January to May 1996 earnings with employer "because the record does not show [claimant's] date of hire in 1995 or any reported earnings in that year." Decision and Order at 18. He awarded claimant compensation for temporary total disability benefits from May 21, 1996 to June 23, 2003, and for continuing permanent total disability from June 24, 2003, as well as medical benefits.

Pursuant to employer's appeal, the Board affirmed the administrative law judge's findings regarding causation, disability, and the use of Section 10(c) to calculate claimant's average weekly wage. The Board, however, vacated the administrative law judge's average weekly wage calculation because he failed to address employer's payroll records showing that claimant worked for employer in 1995 for five consecutive weeks between September 3 and October 1, 1995, and did not work for employer between October 1, 1995, and January 1, 1996. The Board directed the administrative law judge on remand to address all relevant evidence and calculate an average weekly wage that reasonably represents claimant's annual earning capacity at the time of his injury.[2] *Tiser v. TCB Industries, Inc.*, BRB No. 16-0657 (July 25, 2017) (unpub.).

On remand, the administrative law judge determined that claimant earned a total of $3,224 while working for employer between September 3 and October 1, 1995, and earned $12,884 while working for employer between January 1 and May 21, 1996. Thus, the administrative law judge found claimant earned $16,108 over 263 days, or 37.57 weeks, while working for employer between September 3, 1995, and May 21, 1996, which yields an average weekly wage of $428.75. The administrative law judge found this reasonably represents claimant's earning capacity at the time of his injury, given claimant's

[2] The Board additionally affirmed the administrative law judge's finding that employer refused authorization for treatment of claimant's work-related injuries by Drs. Manalae and Adatto. However, as the Board could not discern from the record whether claimant's doctors complied with the provisions of 33 U.S.C. §907(b), (d), the Board vacated the administrative law judge's award of medical benefits, and directed the administrative law judge to thereafter remand the case to the district director for consideration of employer's Section 7(d)(2) contention. *Tiser v. TCB Industries, Inc.*, BRB No. 16-0657, slip op. at 10-11 (July 25, 2017) (unpub.).

intermittent and discontinuous work schedule.[3] He awarded claimant benefits based on a compensation rate of $285.83. *See* 33 U.S.C. §908(a).

Claimant filed a Motion for Reconsideration and to Supplement the Record. In his motion, claimant asserted that the administrative law judge's calculation does not accurately reflect his pre-injury wage-earning capacity under Section 10(c) because it does not include his earnings while self-employed as a fisherman between October 1, 1995 and January 1, 1996. Claimant requested that the administrative law judge accept his affidavit into evidence. Therein, claimant stated: October to January is mullet season; payments for mullets were approximately $2.35 per pound in 1995, which was very high compared to other years; he stopped working for employer during this time so he could fish for mullet; and, he earned more as a fisherman than he would have as a rigger during that period. Claimant additionally requested that the record be reopened and that he be allowed to submit further testimony regarding his earnings as a fisherman. Employer opposed claimant's motion.

The administrative law judge denied claimant's motion, finding it lacked merit because "[c]laimant has presented no evidence of his 1995 earnings as a fisherman" other than his "self-serving" testimony and affidavit. Order Denying Reconsideration at 3. The administrative law judge further explained that no such evidence exists because claimant testified he had not filed any income tax returns in the past 30 years and employer undertook every effort to obtain evidence of claimant's earnings without success.[4] *Id*.

On appeal, claimant challenges the administrative law judge's average weekly wage calculation. He contends the administrative law judge misconstrued the Board's decision as directing the administrative law judge to recalculate his average weekly wage. Claimant argues in the alternative that the average weekly wage calculation is flawed because it fails to account for the value of his 13-weeks of self-employment as a commercial fisherman. Claimant asserts that Section 10(c) obligates the administrative law judge to place a value on his self-employment because his testimony is uncontroverted. Cl. Br. at 11, 15. He asks that the Board direct the administrative law judge to reopen the record pursuant to the Act's modification provisions under Section 22, 33 U.S.C. §922, so that he may provide

[3] Claimant testified that he worked approximately six or seven months out of the year as a rigger and the remainder of the year as a commercial fisherman. Tr. at 43.

[4] The administrative law judge also denied claimant's request to reopen the record as untimely because claimant was afforded ample opportunity to submit evidence of his pre-injury earnings pre-hearing, post-hearing, and again on remand. Order Denying Reconsideration at 3.

testimony regarding his pre-injury earnings as a fisherman. *Id*. at 18. Employer responds, urging affirmance. Claimant filed a reply brief.

Section 10(c) is used to calculate a claimant's average weekly wage when neither Section 10(a) nor Section 10(b) can reasonably or fairly be applied. 33 U.S.C. §910; *see Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 1031, 32 BRBS 91, 95-96(CRT) (5th Cir. 1998); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 823, 25 BRBS 26, 29(CRT) (5th Cir. 1991). Section 10(c) provides:

> If either of the foregoing methods 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). The administrative law judge has broad discretion in determining average weekly wage under Section 10(c). *Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 407, 34 BRBS 44, 46(CRT), *modified on other grounds on reh'g*, 237 F.3d 409, 35 BRBS 26(CRT) (5th Cir. 2000). 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. *See Gatlin*, 936 F.2d at 823, 25 BRBS at 29(CRT). In this context, earning capacity is the amount that a claimant had the potential and opportunity to earn absent injury. *Jackson v. Potomac Temporaries*, 12 BRBS 410, 413 (1980).

Upon consideration of the administrative law judge's findings, the record as a whole, and the contentions raised on appeal, we find no reversible error in the administrative law judge's decision. Contrary to claimant's assertion, the Board vacated the administrative law judge's prior average weekly wage calculation and remanded the case with specific instructions to consider all relevant evidence and "calculate an average weekly wage that reasonably represents claimant's annual earning capacity at the time of injury." *Tiser*, slip op. at 8. Further, the administrative law judge did not err in failing to include "the value" of claimant's alleged fisherman work in the calculation of his average weekly wage.

Claimant correctly states that income from all jobs held concurrently at the time of injury, including self-employment income, is to be included in determining a

claimant's average weekly wage under Section 10(c). *See Lobus v. I.T.O. Corp. of Baltimore, Inc.*, 24 BRBS 137, 139 (1990); *Wise v. Horace Allen Excavating Co.*, 7 BRBS 1052, 1057 (1978). However, as the proponent of the contention that his pre-injury earnings as a self-employed fisherman should be included in the calculation, claimant has the burden of proof on this issue; he must provide evidence of his earnings or the value of his self-employment.[5] *See generally Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 277-278, 28 BRBS 43, 46-47(CRT) (1994); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171, 174 (1996). The administrative law judge correctly found claimant presented no evidence of the amount he earned pre-injury as a fisherman.[6] Order Denying Reconsideration at 3; *see Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). As the record in this case lacks any evidence from which the administrative law judge could gauge the value of claimant's work as a fisherman, we reject his assertion that the administrative law judge failed to include such value in calculating his average weekly wage.[7] *Wise*, 7 BRBS at 1058-1059; *see also McDougall v. E.P. Paup Co.*, 21 BRBS 204, 212 n.5 (1988), *aff'd and modified sub nom. E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT) (9th Cir. 1993); *see also* 5 U.S.C. §557(c)(3)(a). As claimant raises no further challenges to the administrative law judge's average weekly wage finding of $428.75, which is based on substantial evidence of record, we affirm it.[8] *See Staftex Staffing*, 237 F.3d at 407, 34 BRBS at 46(CRT).

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[5] Any error the administrative law judge made in construing the Board's decision as instructing him to exclude claimant's pre-injury earnings as a fisherman is harmless given the absence of such evidence in this case. *See generally Patterson v. Omniplex World Services*, 36 BRBS 149, 156 (2003); Order Denying Reconsideration at 3.

[6] Claimant filed no income tax returns in the past 30 years. Tr. at 81-82. Although claimant testified that he "probably" made over $2,700 per day as a fisherman before his injury, he does not say how often he fished and/or sold his catch. *Id.* at 123. Further, although claimant's affidavit states that he earned $2.35 per pound of mullet in 1995, he does not say how this reflects the "value" of his work, pursuant to Section 10(c).

[7] To the extent claimant asserts the administrative law judge erred in failing to reopen the record on reconsideration, claimant has not shown an abuse of discretion. The administrative law judge has broad discretion with respect to the admission of evidence and his finding that claimant had ample opportunity to support his average weekly wage contention is rational. *See Collins v. Electric Boat Corp.*, 45 BRBS 79, 81 (2011); Tr. at 81-82; Cl. Supp. Br. at 15 (July 22, 2016); *see also* Cl. Br. at 11.

[8] Claimant correctly states that an administrative law judge's average weekly wage calculation is subject to the Act's modification provisions under Section 22, 33 U.S.C.

Accordingly, employer's cross-appeal, BRB No. 18-0412A, is dismissed. The administrative law judge's Decision and Order on Remand and Decision and Order Denying Claimant's Motion for Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

§922, based on a mistake in fact. *Island Operating Co., Inc. v. Director, OWCP [Taylor]*, 738 F.3d 663, 47 BRBS 51(CRT) (5th Cir. 2013); *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 107 (2003); *see generally Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 36 BRBS 35(CRT) (7th Cir. 2002); *Jessee v. Director, OWCP*, 5 F.3d 723 (4th Cir. 1993). A motion for modification must be made by the party seeking modification – this is not a proceeding initiated by the Board.