BRB No. 13-0173

WILLIAM E. JENKINS, III	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
THE WASHINGTON POST	)	DATE ISSUED: Feb. 24, 2014
	)	
and	)	
	)	
GALLAGHER BASSETT SERVICES, INCORPORATED	)	
	)	
	)	ORDER on MOTION
Employer/Carrier-Petitioners	)	for RECONSIDERATION
	)	

Employer has filed a timely motion for reconsideration of the Board's decision in this case, *Jenkins v. The Washington Post*, BRB No. 13-0173 (Nov. 26, 2013).[1] Claimant responds, opposing the motion, to which employer replies. 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. We grant employer's motion and vacate our decision.

To briefly reiterate the pertinent facts, claimant worked for employer as a mail handler, and on March 2, 1982, he sustained a work-related back injury. He underwent multiple surgeries and, in 1984, while wearing a full-body cast as a result of one of the back surgeries, claimant fell and injured both knees, again leading to multiple surgeries. Following his recovery sometime after his last surgery in 1987, claimant returned to his usual work for employer. Claimant worked until October 4, 2008, when there was an alleged disagreement with a foreman, and claimant was sent home. On October 7, 2008, claimant learned he had been terminated by employer for insubordination and harassment. Claimant did not return to any work thereafter. His physical condition deteriorated, rendering him physically unable to return to his work as of late 2009. In 2010, claimant and employer settled the dispute over claimant's termination. Claimant retired from the workforce.

[1] Employer also moved for reconsideration *en banc*; however, *en banc* reconsideration is not available in cases arising under the D.C. Act. 20 C.F.R. §801.301(d).

In determining claimant's entitlement to disability benefits for the work-related deterioration of his physical condition, the administrative law judge considered the central issue to be whether claimant, through either his own misconduct or his retirement, had voluntarily removed himself from the workforce prior to the deterioration of his physical condition. The administrative law judge found there is no evidence in the record of claimant's actual misconduct and, thus, that he was precluded from finding that claimant was terminated for misconduct. Decision and Order at 14. With regard to claimant's retirement, the administrative law judge found that the Board's decision in *Harmon v. Sea-Land Serv., Inc.*, 31 BRBS 45 (1997), is directly on point, as claimant sustained a worsening of his work-related condition in 2009 prior to his retirement in 2010; therefore, the reason for his retirement is irrelevant. Decision and Order at 14. Nevertheless, the administrative law judge found that claimant credibly stated that his worsening condition was a factor in his agreeing to retire. *Id.* at n.10. Because he found that claimant did not remove himself from the work-force voluntarily, the administrative law judge found that claimant established a prima facie case of total disability as of September 1, 2009. As employer did not establish the availability of suitable alternate employment, the administrative law judge awarded claimant temporary total disability benefits commencing September 1, 2009, based on his average weekly wage at the time of his 1982 injury. *Id.* at 15-16. The Board affirmed the administrative law judge's decision.

In its motion for reconsideration, employer contends the Board erred in affirming the administrative law judge's decision because neither the administrative law judge nor the Board addressed whether claimant's termination from work was related to his work injury. In addressing this case previously, both the administrative law judge and, consequently, the Board focused on whether claimant was terminated for "misconduct" or whether his retirement was "voluntary." On both issues, the Board affirmed as supported by substantial evidence the administrative law judge's findings that "misconduct" as to claimant's termination was not established and that claimant's retirement was in part due to his deteriorating condition and, therefore, was work-related and not "voluntary." *Jenkins*, slip op. at 5. However, overlooked was employer's assertion to the administrative law judge and the Board that the termination in 2008, regardless of whether there was "misconduct," was unrelated to claimant's work-related injury and his ability to perform his job. Tr. at 14. Thus, employer contends claimant's disability is not compensable. We agree with employer that the legal test for determining compensability is not whether claimant's usual work became unavailable due to his misconduct or his retirement but whether it was unavailable because of claimant's work injury. *See McBride v. Eastman Kodak Co.*, 844 F.2d 797, 21 BRBS 45(CRT) (D.C. Cir. 1988).

Both parties agreed that claimant was physically capable of performing his usual work at the time he was terminated, and the administrative law judge so found. Decision

and Order at 15; Tr. at 38-39; *see Jenkins*, slip op. at 2 n.1, 5. Section 2(10) of the Act, 33 U.S.C. §902(10) (emphasis added), provides: "'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[.]" Where a claimant is performing his usual work post-injury, and his inability to continue to do so is not due to his work injury, the employer does not have the burden of establishing the availability of suitable alternate employment. *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). Rather, when a claimant leaves or is discharged from his usual work for reasons unrelated to his work-related injury, he does not have a "disability" within the meaning of the Act and is not entitled to disability compensation. *Id.* (terminated for violation of company rule); *Hoffman v. Newport News Shipbuilding & Dry Dock Co.*, 35 BRBS 148 (2001) (voluntarily retired); *Burson v. T. Smith & Son, Inc.*, 22 BRBS 124 (1989) (voluntary retirement); *see also* 33 U.S.C. §902(10);[2] *cf. Harmon*, 31 BRBS 45 (claimant disabled when he was physically unable to perform his usual work due to injury at the time he took longevity retirement).

In this case, after claimant was injured, he was able to return to his usual work and earn his regular wages. Thus, claimant was not disabled at the time of his discharge. *Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 191 (1984). The administrative law judge did not make a specific finding regarding whether claimant's loss of wage-earning capacity following his 2008 termination was "because of injury" pursuant to Section 2(10). Rather, he focused on whether the termination was due to claimant's misconduct. As this is not the proper standard for assessing disability under the Act, we vacate his award of benefits, as well as the Board's affirmance thereof. We remand the case to the administrative law judge for further consideration.

Claimant bears the burden of establishing that his loss of wage-earning capacity in 2008 was related to his work injury. *See, e.g., Crum v. General Adjustment Bureau*, 738 F.2d 474, 16 BRBS 115(CRT) (D.C. Cir. 1984). The administrative law judge must address whether claimant's termination in 2008 was related to his work injury and

[2] A similar rule applies in cases where the claimant ceases working in suitable alternate employment and, because of the claimant's conduct, the employer is relieved of having to re-establish the availability of suitable alternate employment in order to preclude total disability. *Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996) (violating company policy); *Jaros v. Nat'l Steel & Shipbuilding Co.*, 21 BRBS 26 (1988) (falsification of company records); *cf. Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999) (employer has a renewed burden to establish the availability of suitable alternate employment when there has been an economic layoff at its facility).

whether the 2010 settlement with employer vitiated the termination so that claimant was "employed" at the time he retired due in part to his physical restrictions resulting from the work injury. If the administrative law judge finds that claimant's loss of wage-earning capacity as a result of his termination was unrelated to his work injury, and that this status (i.e. being a terminated employee) continued through his 2010 settlement/retirement, claimant is not disabled as a result of his work injury.

Accordingly, the Board's affirmance of the administrative law judge's award of benefits is vacated. The administrative law judge's award of benefits is vacated. The case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge