U.S. Department of Labor

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

BRB No. 17-0398

HERNAN DACARET	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED: Feb. 6, 2018
NATIONAL STEEL AND SHIPBUILDING COMPANY	)	
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order on Remand and the Order Denying Motion for Reconsideration of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Eric A. Dupree and Paul Myers (Dupree Law, APLC), Coronado, California, for claimant.

Renee C. St. Clair and Barry W. Ponticello (England, Ponticello & St. Clair), San Diego, California, for self-insured employer.

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

HALL, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order on Remand and the Order Denying Motion for Reconsideration (2013-LHC-01512) of Administrative Law Judge Paul C. Johnson, Jr., 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 is before the Board. The case arises out of an October 15, 2001 injury that occurred when claimant tripped over a ground cable at work and fell, injuring both his shoulders and his knees. Claimant had multiple surgeries after

his injury, the first on January 11, 2002 and the last on June 16, 2010. He filed a claim for permanent total disability benefits.

The administrative law judge found, inter alia, that claimant's disability became temporary during the periods of recuperation following his two knee replacement surgeries. Decision and Order Awarding Benefits at 49. The administrative law judge further concluded that claimant is totally disabled and awarded him temporary total disability benefits for the periods of recuperation between his surgeries, and permanent total disability benefits from May 3, 2005 through May 26, 2008, December 9, 2008 through June 9, 2009, and February 22, 2011 onwards. *Id.* The administrative law judge calculated claimant's average weekly wage pursuant to Section 10(c) of the Act, as $616.96. *Id.* at 62-63. The administrative law judge also awarded employer Section 8(f) relief, 33 U.S.C. §908(f). *Id.* at 68-69.

Claimant appealed the administrative law judge's decision to the Board, challenging the administrative law judge's award of temporary, rather than permanent, total disability benefits during the periods of recuperation following his knee surgeries and also the calculation of his average weekly wage. The Board modified the administrative law judge's decision to award claimant permanent total disability benefits beginning on May 3, 2005, the date on which claimant's disabling shoulder injuries became permanent. *Dacaret v. National Steel & Shipbuilding Co.*, BRB No. 15-0467 (July 7, 2016) (Buzzard, J., concurring and dissenting).

The Board also concluded that the administrative law judge erred in calculating claimant's average weekly wage under Section 10(c) rather than Section 10(a). *Dacaret*, slip. op. at 7. The Board stated that because claimant is a five or six-day-a-week worker who was employed for at least 75 percent of the workdays in the year prior to his injury, Section 10(a) should have been applied. *Id.* (citing *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 48(CRT) (9th Cir. 1998)). The Board remanded the case for the administrative law judge to recalculate claimant's average weekly wage under Section 10(a) of the Act. Judge Buzzard dissented on the ground that remand was unnecessary as the parties already agreed that $652.20 represented claimant's average weekly wage at the time of his injury, pursuant to Section 10(a). *Dacaret*, slip. op. at 9-10 (citing Cl. Br. at 17; Emp. Resp. Br. at 6; Cl. Reply Br. at 4-5). Accordingly, Judge Buzzard would have modified the administrative law judge's decision to reflect an average weekly wage of $652.20. *Id.*

On remand, the administrative law judge declined to follow the parties' wage calculations because he stated that "it is unclear how they arrived at that number." Decision and Order on Remand at 2. The administrative law judge instead relied on Claimant's Exhibit 5 (CX 5, claimant's statement of gross earnings in the year preceding his injury) to conclude that claimant was a five-day-per-week worker who earned

$30,939.98 during 218 days of work in the year immediately preceding his injury. The administrative law judge divided that total to calculate claimant's average daily wage ($141.92) and then multiplied that daily wage by 260 pursuant to the formula in Section 10(a) ($36,899.20). He then divided that number by 52, pursuant to Section 10(d) to arrive at an average weekly wage of $709.60. *Id.*

Employer filed a motion for reconsideration, asserting the administrative law judge's calculation of claimant's average weekly wage was based on an error of fact and the administrative law judge should have relied on Employer's Exhibit 2 (EX 2, claimant's time card record information). The administrative law judge noted that there was a discrepancy between the total wages reported in CX 5 and EX 2, but he found that CX 5, indicating gross wages of $30,939.98, was more reliable evidence of claimant's earnings than "the incomplete amount presented" in EX 2. Order Denying Motion for Reconsideration at 2. Accordingly, he denied the motion for reconsideration. *Id.*

Employer appeals, challenging the administrative law judge's calculation of claimant's average weekly wage. Claimant filed a response brief, urging affirmance. Employer filed a reply to claimant's brief.

Employer contends the administrative law judge's calculation of claimant's average weekly wage is not supported by substantial evidence and that he ignored the more detailed information provided in its EX 2. Employer also contends that the administrative law judge merely speculated that the gross wage amount in CX 5 was more accurate and may include other IRS valued benefits.

In his decision on remand, the administrative law judge rejected the parties' assertions that claimant earned $28,435,82 prior to the injury, as he stated it was not clear how they arrived at this figure. The administrative law judge used the wages indicated in CX 5, $30,938.98, that claimant earned from October 15, 2000 to October 15, 2001, to calculate claimant's average weekly wage as $709.60 pursuant to the Section 10(a) formula.

In denying employer's motion for reconsideration, the administrative law judge stated that EX 2 was a "one-page exhibit show[ing] work periods, the total days worked in the period, and the wages earned in each period," and is "not more detailed" than CX 5.[1] Order Denying Motion for Reconsideration at 2. The administrative law judge noted

[1] We note that the administrative law judge arguably erred in stating employer could not raise this issue on reconsideration under 29 C.F.R. §§18.10, 18.93 and Fed. R. Civ. P. 59(e) as the Act and its regulations state that administrative law judges are not bound by procedural rules. 33 U.S.C. §923(a); 20 C.F.R. §702.339.

that CX 5 was a record "certified under penalty of perjury" that showed the total hours reported and total gross wages for the year preceding the injury.[2] *Id.* The administrative law judge concluded that the gross wages in CX 5 "may include 'the reasonable value of any advantage which is received from the employer and included for purposes of any withholding of tax under subtitle c of the Internal Revenue Code.'" *Id.* (quoting 33 U.S.C. §902(13)). For these reasons, he concluded that the gross wages indicated in CX 5 are more accurate. *Id.*

We conclude that the administrative law judge's calculation of claimant's average weekly wage cannot be affirmed. Although CX 5 supports the administrative law judge's calculation of claimant's average weekly wage, the administrative law judge did not adequately explain his decision to rely on CX 5 rather than on EX 2. Contrary to the administrative law judge's statement that EX 2 is a "one-page exhibit," EX 2 consists of 11 pages providing claimant's time card information from November 20, 2000 through October 28, 2001, showing the hours and days claimant worked and his hourly rate as well as the total amount he was paid for each week. *See* EX 2. EX 2 shows claimant's total earnings as $28,435.82, resulting in an average weekly wage of $652.20. CX 2 is a two-page wage statement worksheet that lists only claimant's total hours worked and his total wages for the year preceding his injury, arriving at a gross wage of $30,939.98. In his decision on remand, the administrative law judge relied on the information in EX 2 to determine the number of days claimant worked in the year prior to his injury, 218, but then declined to accept the information in EX 2 for claimant's gross wages.[3]

The Administrative Procedure Act requires that an administrative law judge's decision must provide a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law or discretion presented on the record." 5 U.S.C. §557(c)(3)(A); *see also Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996). The administrative law judge's description of EX 2 as a "one-page exhibit" that is less detailed than CX 5 is erroneous. The administrative law judge also did not explain his observation that CX 5 "may include" any other "advantage which is received from the employer," which may constitute wages under the IRS Code.[4] As the administrative law

[2] CX 5 is a wage statement worksheet prepared by employer's workers' compensation assistant who signed it, vouching for its accuracy to the best of her knowledge, under penalty of perjury.

[3] Significantly, claimant did not argue that EX 2 was inaccurate and indeed, in the prior appeal before the Board, agreed that claimant's total earnings were $28,435.82, as stated in EX 2. Cl. Br. at 16-17 (BRB No. 15-0467).

[4] "Wages" include monetary and non-monetary "advantages" subject to tax withholding. *McNutt v. Benefits Review Board*, 140 F.3d 1247, 32 BRBS 71(CRT) (9th

judge did not provide a valid basis for rejecting EX 2, we must vacate the administrative law judge's calculation of claimant's average weekly wage and remand the case for him to fully discuss the relevant evidence and to explain the basis for his decision to rely on particular evidence. *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 384, 28 BRBS 96, 106(CRT) (4th Cir. 1994) (stating that because an administrative law judge cannot reject evidence for no reason or for the wrong reason, "an explanation from the ALJ of the reason why probative evidence has been rejected is required so that a reviewing court can determine whether the reasons for rejection were improper.").

Claimant's counsel has filed a petition for attorney's fees for work performed in the prior appeal, BRB No. 15-0467. Employer filed an objection to the attorney's fee petition. Claimant's counsel is entitled to a fee for successfully appealing to the Board or defending an award against employer's appeal. 20 C.F.R. §802.203(a). Moreover, any fee awarded should take into account the amount of benefits obtained pursuant to 20 C.F.R. §802.203(e). Accordingly, a determination of claimant's attorney's fee cannot be made until the issue of claimant's average weekly wage is resolved by the administrative law judge on remand, thereby determining the amount of benefits claimant is entitled to.[5] *See Perkins v. Marine Terminals Corp.*, 16 BRBS 84 (1984). Therefore, we deny the fee petition at this time. Counsel may refile his fee petition within 60 days of the date the administrative law judge issues his decision on remand. 20 C.F.R. §802.203(c).

Cir. 1998); *Wausau Ins. Companies v. Director, OWCP*, 114 F3d 120, 31 BRBS 41(CRT) (9th Cir. 1997); *see* 33 U.S.C. §902(13).

[5] Claimant did obtain permanent, rather than temporary, total disability benefits by virtue of his initial appeal.

Accordingly, the administrative law judge's Decision and Order on Remand and the Order Denying Motion for Reconsideration are vacated, and the case remanded for further proceedings consistent with this opinion. The fee petition filed by claimant for work performed before the Board in the prior appeal, BRB No. 15-0467, is denied at this time.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur:

_____
JONATHAN ROLFE
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, concurring and dissenting:

I agree with my colleagues that, in calculating claimant's average weekly wage on remand, the administrative law judge gave an invalid reason for relying on the summary statement of claimant's earnings in CX 5, rather than the detailed wage information in EX 2. However, I disagree with their decision to again remand this case for the administrative law judge to reevaluate the evidence and better-explain his decision.

When this matter first came before the Board, I agreed with the majority that the administrative law judge erred in applying Section 10(c), as opposed to Section 10(a), to calculate claimant's average weekly wage. *See Dacaret*, slip op. at 9-10. I determined, however, that remanding the claim was not necessary because both parties, relying on

claimant's earnings of $28,435.82 in EX 2,[6] agreed that $652.20 represented claimant's average weekly wage under the formula set forth in Section 10(a).[7] *Id.*

On remand, the administrative law judge stated that he would not accept the parties' agreed-upon average weekly wage because it was unclear how they determined claimant's earnings. Decision and Order on Remand at 2. A review of EX 2, however, reveals it to be the source. The document sets forth in detail claimant's daily and weekly earnings during the relevant 52-week period prior to his injury on October 15, 2001. EX 2. Moreover, the parties identified EX 2 as the source of claimant's earnings when this matter was first before the administrative law judge. Emp. Post-Hr'g. Br. at 17; Cl. Post-Hr'g. Br. at 25.

In light of the apparent confusion surrounding the source of claimant's earnings, employer filed a motion for reconsideration that detailed the specific income data within EX 2 that the parties had relied upon in making their average weekly wage calculation. Emp. Mot. for Recon. at 4-5. In its motion, employer accurately characterized EX 2 as containing "more detailed, day by day wage information" than that contained in CX 5, and provided the administrative law judge with a table containing the exact data points in EX 2 that the parties used to calculate claimant's earnings. *Id.* Nevertheless, the administrative law judge again rejected the parties' reliance on EX 2, erroneously concluding that the information in EX 2 is "not more detailed" than CX 5, and is only a

[6] The parties cite either $28,435.82 or $28,432.82 as claimant's reported earnings in EX 2. Emp. Post-Hr'g. Br. at 19; Cl. Post-Hr'g. Br. at 25; Cl. Br. at 15 (BRB No. 15-0467); Emp. Mot. for Recon. at 1-6; Emp. Br. at 3 (BRB No. 17-0398). A review of the document, however, reveals that the actual figure is $28,432.82. The error may stem from the fact that employer's summary of EX 2, *see* Emp. Mot. for Recon. at 5, identifies claimant's earnings during the week of August 27, 2001 as $636.76, rather than $633.76 as reported in EX 2. This three dollar difference results in an average weekly wage of $652.13, rather than $652.20 as calculated by the parties ($28,432.82 ÷ 218 × 260 ÷ 52 = $652.13).

[7] Claimant argued that the Board should modify the administrative law judge's decision "to fix [his average weekly wage] as $652.20 under [Section] 10(a) as a matter of law[,]" while employer asserted that if the administrative law judge's use of Section 10(c) was improper, Section 10(a) should be employed "to yield an average weekly wage of no more than $652.19/$652.20." Cl. Br. at 16-17; Emp. Resp. Br. at 6 (both BRB No. 15-0467).

"one-page exhibit" whereas CX 5 "is a two page exhibit[.]"[8] Order Denying Recon. at 2. Thus, employer appealed to the Board.

Having considered the administrative law judge's decisions, and the arguments raised by the parties, I remain of the opinion that the parties should be bound by their previous representations before this Board that EX 2 accurately reflects claimant's earnings for the purpose of calculating his average weekly wage. It is particularly difficult to square claimant's reliance on EX 2 to argue that his average weekly wage is $652.20 "as a matter of law," with his argument in this second appeal that CX 5 represents the "best available record evidence" of his earnings. Cl. Br. at 3.

Accordingly, and for the reasons identified in footnote 6, *supra*, I would hold that claimant's average weekly wage is $652.13. As a result, I would also address counsel's fee petition in BRB No. 15-0467 at this time, as claimant succeeded in increasing his average weekly wage and in obtaining permanent, rather than temporary, total disability benefits for the periods of recuperation.

For these reasons, I respectfully dissent.

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GREG J. BUZZARD
Administrative Appeals Judge

[8] While EX 2 is an 11-page document that contains a detailed day-by-day and weekly breakdown of claimant's wages during the time period for calculating average weekly wage, CX 5 is a two-page document that contains essentially one data point purporting to be claimant's overall earnings during the relevant time period.