U.S. Department of Labor

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

BRB No. 17-0467

TOLETHA ELERYAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: Feb. 20, 2018
	)	
REGIONAL NAF PERSONNEL OFFICE/BUREAU OF NAVAL PERSONNEL c/o CONTRACT CLAIMS SERVICES, INCORPORATED	)	
	)	
Self-Insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Toletha Eleryan, Norfolk, Virginia

Jonathan H. Walker and Aaron M. Wilensky (Mason Mason Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant, who is without legal counsel, appeals the Decision and Order (2015-LHC-00148) of Administrative Law Judge Alan L. Bergstrom 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.* as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *et seq.* (the Act). In an appeal by a claimant

without legal representation, we will review the administrative law judge's findings of fact and conclusions of law to determine if they are rational, supported by substantial evidence, and in accordance with law. If they are, they must be affirmed. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant slipped and fell on July 27, 2011, during the course of her employment for employer as a dining room attendant. The parties stipulated that claimant sustained injuries to her head, back and legs. JX 1. Employer paid claimant temporary total disability compensation, 33 U.S.C. §908(b), from September 15, 2011 to August 31, 2012. *Id*. Claimant has not returned to work. She sought continuing compensation for temporary total disability from August 31, 2012, and reimbursement for medical treatment provided by Dr. Quidgley-Nevares. Employer contended that claimant's work injury resolved within six months and that any disability or medical treatment after that time is not related to the work injury.

In his decision, the administrative law judge found that claimant was not candid with her medical providers and employer's physicians about treatment for her back, legs and head she had received prior to the work injury.[1] Therefore, the administrative law judge found that claimant lacks credibility regarding the subjective extent of her work-related disability. Decision and Order at 37-39. The administrative law judge found the reports of Drs. Skidmore and Erickson to be "well-documented and well-reasoned." *Id*. at 44. They opined that claimant's work injury had resolved within six months. EXs 20, 24. The administrative law judge concluded that claimant failed to establish that her work injury permanently aggravated her pre-existing conditions, and he found that her work injuries had reached maximum medical improvement and completely resolved by March 29, 2012. Decision and Order at 44.

The administrative law judge found that, while claimant is capable of returning to her usual work, employer did not submit any evidence that such work is available or that employer offered her similar work. Decision and Order at 47. Accordingly, the administrative law judge addressed employer's evidence of suitable alternate

[1] The administrative law judge found that claimant had pre-existing complaints of bilateral lower extremity numbness and tingling, and neck and lower back pain. In this regard, claimant underwent a cervical fusion at C3-5 in March 2005 following a car accident. EX 2. X-rays and an MRI taken in 2007 were interpreted as showing lumbar scoliosis with excessive lordosis, facet arthropathy at L5-S1, narrowing of the C5-6 disc space, and spinal stenosis at C3-4, and C6-7. EXs 4, 7, 11, 14. Claimant saw Dr. Mitchell two days prior to her work injury for "electric shock sensations from her neck through her spine to her mouth;" she also complained of weakness and tingling in her feet. CX 1 at 1.

employment. He found: employer established the availability of suitable work after March 29, 2012, as a bank teller, telephone sales worker, call center sales associate, driver, transporter, and customer service representative; these positions paid more than claimant's position with employer; and claimant did not show due diligence in seeking alternative work. *Id*. at 47-49. The administrative law judge concluded, therefore, that claimant is not entitled to disability compensation after August 31, 2012. The administrative law judge found that claimant is entitled to reimbursement for the treatment provided by Dr. Quidgley-Nevares from the date of injury through March 29, 2012. *Id*. at 49-50. Employer's request for Section 8(f) relief, 33 U.S.C. §908(f), and its contention that claimant is not entitled to further disability compensation, pursuant to Section 8(j), 33 U.S.C. §908(j), were denied as moot.[2] *Id*. at 50-51

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Claimant appeals the denial of benefits.[3] Employer responds that the administrative law judge's decision is supported by substantial evidence and should be affirmed.

Claimant bears the burden of establishing that she is unable to perform her usual work due to her work-related injuries. *See Devor v. Dep't of the Army*, 41 BRBS 77 (2007); *Delay v. Jones-Washington Stevedoring Co.*, 31 BRBS 197 (1998). In finding that claimant's work injury did not permanently aggravate her pre-existing conditions or result in disability for more than six months, the administrative law judge credited the opinions of Drs. Skidmore and Erickson. Decision and Order at 44. The administrative law judge found these opinions are based on objective medical data, as opposed to claimant's unreliable subjective complaints.[4] *Id.* Dr. Skidmore stated that claimant's

[2] Claimant and employer moved for reconsideration of the administrative law judge's finding regarding employer's liability for an attorney's fee. The administrative law judge denied the motions. Order Denying Request for Reconsideration at 2.

[3] Claimant also submitted with her appeal some of her current medical records, consideration of which is outside the Board's scope of review. 33 U.S.C. §921(b)(3).

[4] The administrative law judge found that claimant's subjective complaints lack credibility. Decision and Order at 37-39; *see* n.1, *supra*. In reaching this conclusion, the administrative law judge noted that claimant testified to radiating lower back pain, yet she reported upper back pain and tightness to Dr. Tucker two days after the work injury. *Id*. at 37; *see* Tr. at 41; CX 5 at 3. The administrative law judge also noted that, although claimant treated with Dr. Mitchell three weeks after the work injury, she made no mention to him of back pain until September 15, 2011. *Id*. at 37; *see* CX 1. The administrative law judge described the contrast between the surveillance report from June 2012, where claimant was observed performing bodily movements in a fluid and unrestricted manner, and the August 2012 physical therapy visit, where claimant reported

work injury resulted in cervical and lumbar strains which reached maximum medical improvement six months after the incident. He placed no restrictions on her ability to work. Dr. Skidmore opined that there are no objective findings to support claimant's subjective complaints of neck and low back pain and that the work injury did not do any structural damage. EXs 20 at 3; 24 at 3. Dr. Erickson opined that claimant's work-related injuries resolved within six months, that the degenerative changes in claimant's neck and low back were not the result of the temporarily disabling work injury, and that the work injury did not hasten or materially worsen the degenerative changes. EX 24 at 3. In contrast, the administrative law judge gave less weight to the restrictions assigned by Dr. Quidgley-Nevares because he did not explain how these restrictions were different from those due to claimant's pre-existing medical condition and/or whether the restrictions are related to claimant's subjective pain complaints, which the administrative law judge found not credible. Decision and Order at 44.

We affirm the administrative law judge's findings that claimant's work injury resolved by March 29, 2012, and that the work injury did not permanently aggravate her pre-existing conditions as these findings are supported by substantial evidence. The administrative law judge is entitled to determine the weight to be accorded to conflicting evidence and the Board may not reweigh the evidence. *Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994). The administrative law judge permissibly gave determinative weight to the opinions of Drs. Skidmore and Erickson, and they support the conclusion that claimant's work injury resolved by March 29, 2012.[5] *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96(CRT) (4th Cir. 1994).

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high pain levels pain and was assessed as having made minimal progress. *Id*. at 38; EXs 21, 29. The administrative law judge also found claimant's subjective complaints undermined by the examination assessments of Drs. Skidmore and Erickson. *Id*. at 38-39. We affirm the administrative law judge's finding that claimant's subjective complaints are not credible as it is rational and supported by substantial evidence. *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

[5] We also affirm the administrative law judge's finding that claimant is not entitled to reimbursement for medical treatment provided by Dr. Quidgley-Nevares after March 29, 2012. Decision and Order at 50. Although a claimant need not be disabled in order to be entitled to medical benefits, in this case, the administrative law judge credited evidence that claimant's injury had resolved and Dr. Erickson also opined that claimant did not require any additional medical treatment that was related to the work injury. EX 24 at 4; *see Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9 (2001), *aff'd mem*., 32 F. App'x 126 (5th Cir. 2002).

The administrative law judge found that employer bore the burden of establishing suitable alternate employment because there is no evidence that employer made available to claimant her usual employment as a dining room attendant when she was physically capable of returning to work after March 29, 2012. *See generally McBride v. Eastman Kodak Co.*, 844 F.2d 797, 21 BRBS 45(CRT) (D.C. Cir. 1988); *Rice v. Service Employees Int'l, Inc.,* 44 BRBS 63 (2010). Employer may satisfy its burden of establishing suitable alternate employment by demonstrating that a range of jobs is available in claimant's community that she could secure if she diligently tried. *See*, 36 F.3d 375, 28 BRBS 96(CRT); *Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993). A claimant may retain eligibility for total disability benefits, after employer establishes the availability of suitable alternate employment, if claimant demonstrates that she diligently, yet unsuccessfully, sought alternate work of the type shown by employer to be suitable and available. *See Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988); *see also Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991).

The administrative law judge found that, as claimant was capable of returning to work for employer as a dining room attendant, her functional work capabilities are the same as they were pre-injury. Decision and Order at 47. The administrative law judge noted the statement by employer's vocational consultant, Barbara Harvey, that claimant had pre-existing work restrictions against overhead work, work requiring substantial headgear, and frequent stair climbing or lifting over five pounds.[6] *Id*. at 45; *see* EX 28 at 3. He also noted claimant's deposition testimony that she had worked part-time as a tax preparer for two or three years prior to the work injury. *Id*. at 46; *see* EX 30 at 5-10. He found this employment demonstrated claimant's ability to "interact with others in a professional manner and perform the sedentary work activities of a tax preparer," Decision and Order at 46, and that employer's labor market survey identified employment opportunities after March 29, 2012, as a bank teller, telephone sales associate, call center sales associate, and customer service representative, within claimant's work restrictions and abilities *Id*. at 47; *see* EX 28. The administrative law judge found that employer also identified suitable positions as a driver and transporter that were available after March 2012 but before claimant was prescribed pain medication that would interfere with her concentration and driving. *Id*. at 47-48. He determined that

[6] The administrative law judge stated that Ms. Harvey's labor market survey was based on the October 21, 2012, and March 2014 restrictions placed by Dr. Quidgley-Navares and the opinions of Drs. Skidmore and Erickson that claimant has no restrictions due to the July 2011 work injury. Decision and Order at 22. Dr. Quidgley-Navares limited claimant to no overhead activity, no lumbar straining, and no lifting over 15 pounds. EX 22 at 7. According to Ms. Harvey, Dr. Quidgley-Navares amended claimant's limitations in March 2014 to no lifting over 5 pounds. EX 28 at 3.

the wages paid by the suitable jobs establish that claimant did not sustain any loss of wage-earning capacity from her work injury, and that claimant failed to establish that she engaged in a diligent job search after March 29, 2012. *Id*. at 48-49. Accordingly, the administrative law judge denied the claim for disability compensation after August 31, 2012.

We affirm the administrative law judge's finding that the bank teller, telephone sales associate, call center sales associate, and customer service representative jobs are within claimant's physical and vocational abilities, as Dr. Skidmore approved each job.[7] EX 28 at 8-12, 37-38, 47; *see Young v. Newport News Shipbuilding & Dry Dock Co.*, 45 BRBS 35 (2011). Moreover, these positions paid an hourly wage higher than the $8.50 per hour the administrative law judge found that claimant was paid by employer.[8] Decision and Order at 3, 45; *see* EX 30 at 9, 13. The administrative law judge rationally concluded that claimant did not diligently seek suitable employment.[9] *Wilson v. Virginia Int'l Terminals*, 40 BRBS 46 (2006); *Berezin v. Cascade General, Inc.*, 34 BRBS 163 (2000). Thus, we affirm the administrative law judge's findings that employer established the availability of suitable alternate employment, with no loss of wage-earning capacity, and that claimant failed to rebut employer's evidence by diligently seeking suitable work. Therefore, we affirm the administrative law judge's denial of additional disability compensation after August 31, 2012.

[7] Thus, we need not address the administrative law judge's findings that the driver and transporter jobs are suitable for claimant. We note that Dr. Quidgley-Navares continuously prescribed narcotic pain medication to claimant from her initial office visit on January 9, 2012. *See* CX 2.

[8] Employer's labor market survey states that the customer service and bank teller positions paid $13.09 per hour and the call center sales associate and telephone sales associate positions paid $9.34 per hour. EX 28 at 8-12, 37-38.

[9] The evidence of claimant's post-injury job search consists of her testimony that she submitted three or four online job applications and one in-person application. Tr. at 34.

Accordingly, the administrative law judge's Decision and Order – Denying Disability Compensation Benefits After August 31, 2012 and Granting Payment of Reasonable Medical Expenses Through March 29, 2012, and the Order Denying Request for Reconsideration are affirmed.

SO ORDERED.

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JUDITH S. BOGGS
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge