BRB No. 01-0426

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| TERRY W. CAMPBELL | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| NORFOLK SHIPBUILDING AND DRYDOCK CORPORATION | ) | DATE ISSUED: Jan. 28, 2002 |
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| and | ) | |
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| RICHARD FLAGSHIP SERVICES INCORPORATED | ) | |
| | ) | |
| Employer/Carrier-Petitioners | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order on Remand of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Robert J. Macbeth, Jr. (Rutter, Walsh, Mills & Rutter, L.L.P.), Norfolk, Virginia, for claimant.

Gerard E.W. Voyer, Donna White Kearney, and Christopher J. Wiemken (Taylor & Walker, P.C.), Norfolk, Virginia, for employer/carrier.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (94-LHC-822) of Administrative Law Judge Richard K. Malamphy 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 findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

This case is before the Board for the third time. Claimant, a rigger, injured his head, neck, and back at work on May 2, 1987. Employer voluntarily paid claimant various periods of total and partial disability benefits between May 1987 and January 7, 1993. Claimant returned to light duty work for employer in October 1992 but was fired from this job on January 9, 1993, for violating the five day call-in rule. Claimant worked for Savage Builders from September 13 to December 10, 1993. In his initial Decision and Order, the administrative law judge denied claimant's claim for total disability benefits commencing January 9, 1993. Claimant subsequently filed a petition for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, seeking total disability benefits commencing August 5, 1994. The administrative law judge denied benefits, and claimant appealed.

In *Campbell v. Norfolk Shipbuilding & Drydock Corp.*, BRB No. 97-1371 (June 17, 1998)(unpublished), the Board affirmed the administrative law judge's finding that there had been no change in claimant's condition since the initial decision. The Board, however, vacated the denial of benefits on modification and remanded the case to the administrative law judge to reconsider whether a mistake in fact had occurred regarding claimant's entitlement to total or partial disability benefits.

On remand, the administrative law judge awarded claimant total disability benefits commencing January 4, 1993, following claimant's discharge, finding that employer did not establish suitable alternate employment as claimant's light duty job in employer's facility was outside of claimant's restrictions and too physically demanding. Upon the motion for reconsideration of the Director, Office of Workers' Compensation Programs, the administrative law judge awarded claimant total disability benefits as of October 19, 1992, the date he found claimant reached maximum medical improvement.

In *Campbell v. Norfolk Shipbuilding & Drydock Corp.*, BRB No. 99-0704 (April 8, 2000)(unpublished), the Board affirmed the administrative law judge's finding that employer did not establish the availability of suitable alternate employment through claimant's post-injury light duty job at its facility. Consequently, the Board affirmed the administrative law judge's award of total disability benefits for the periods when

claimant was not working. The Board, however, vacated the administrative law judge's award of total disability benefits for the period claimant was actually working, as an award of total disability benefits while working is to be the exception and not the rule. The Board remanded the case to the administrative law judge to determine whether claimant was entitled to total disability benefits for the period when he was working part-time in the light duty job for employer from October 19, 1992, to January 9, 1993, and for Savage Builders from September 13 to December 10, 1993. Such a determination would require the administrative law judge to find that claimant worked through extraordinary effort and in spite of excruciating pain, or for a beneficent employer, for these two periods.

On remand, the administrative law judge found that claimant worked through extraordinary effort and in spite of excruciating pain from October 19, 1992, to January 9, 1993, and consequently awarded claimant total disability benefits for this period. The administrative law judge found that claimant did not work through extraordinary effort and in spite of excruciating pain from September 13 to December 10, 1993, and thus awarded only partial disability benefits for this period. The administrative law judge further found that neither employer nor Savage Builders was a beneficent employer.

On appeal, employer challenges the administrative law judge's award of total and partial disability benefits for these two periods. Employer also raises contentions concerning the Board's first two decisions in this case in order to preserve these issues for appeal.[1] Claimant filed a response brief to which employer replied.

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[1]We decline to address employer's arguments that the Board exceeded its scope of review with regard to the administrative law judge's 1995 and 1997 decisions, and erred in affirming the administrative law judge's granting of claimant's petition for modification in BRB No. 97-1371, and the administrative law judge's finding that the light duty job at employer's facility was not suitable in BRB No. 99-0704, as the Board's prior rulings constitute the law of the case. *See, e.g., Ion v. Duluth, Missabe & Iron Range Ry. Co.,* 32 BRBS 268 (1998).

Employer initially argues that the administrative law judge erred in awarding claimant total disability benefits from October 19, 1992, to January 9, 1993, because the fact that claimant sought and was prescribed medication while he was working is insufficient to establish that he worked through extraordinary effort and in spite of excruciating pain. Claimant may be found to be totally disabled while he is working in post-injury employment if he works through extraordinary effort and in spite of excruciating pain, or is provided a position only through employer's beneficence,[2] *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT)(1st Cir. 1991); *Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51(CRT)(11th Cir. 1988); *Lewis v. Haughton Elevator Co.*, 5 BRBS 62 (1976), *aff'd,* 572 F.2d 447, 7 BRBS 838 (4th Cir. 1978), though such an award is to be the exception, rather than the rule. *See, e.g., Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999).

In the instant case, the administrative law judge noted that the Board had affirmed the finding that claimant's post-injury job with employer was not suitable, and he then summarily concluded that claimant worked through extraordinary effort and in spite of excruciating pain because Dr. Suter prescribed numerous medications for claimant's pain in late 1992 and because claimant sought additional medical help from the shipyard's clinic where other pain medications were prescribed.[3] The administrative law judge also stated, however, that claimant's credibility was "quite questionable."[4]

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[2]The administrative law judge's conclusion that neither employer was a beneficent employer is affirmed as unchallenged on appeal. Decision and Order on Remand at 8.

[3]From October 19, 1992, to January 9, 1993, claimant was prescribed robaxisal, atenolol, cafergot, and fiorinal for his headaches, valium to relieve muscle tension at night, and percodan for pain relief by Dr. Suter, his treating physician. Cl. Exs. 1, 9. Prescription refills were provided for these medications, in addition to tenormin, by Dr. Geib, the shipyard clinic's doctor. Emp. Ex. E.

[4]Claimant testified that he was having problems performing his part-time light duty work with employer, testing drop cords and light bulbs, because he was taking a lot of medications due to the job's requirements of using hand-held equipment, which was outside of his work restrictions, and of bending and carrying. 1994 Tr. at 28-29. In response to what kind of pain caused him to take medication at work, claimant stated, "The motions of, you know, of using the hand-held equipment, stooping and bending if I had to, and just mainly just trying to sit on them hard chairs. Or, you know, if I didn't sit on there, I had to stand on just pure concrete." 1994 Tr. at 30. Claimant took fiorinal, dolobid, cafergot, percodan, and valium prescribed by Dr. Suter and refilled by Dr. Geib to relieve pain in his neck, shoulders, and hip. *Id.*

We cannot affirm the administrative law judge's award of total disability benefits for the period in question. The administrative law judge's apparent reliance only on the fact that claimant took several pain medications while working is not sufficient, standing alone, to support the award of total disability benefits. *See Burch v. Superior Oil Co.*, 15 BRBS 423, 425 (1983). Moreover, the administrative law judge found claimant's testimony "quite questionable" but did not explain which testimony he found questionable, nor did he explain whether he credited or discredited claimant's testimony regarding his difficulties in performing his job in finding that claimant worked through extraordinary effort and in spite of excruciating pain. Thus, we must remand this case for reconsideration. On remand, the administrative law judge must discuss and weigh claimant's relevant testimony and explain his reasons for crediting or discrediting this testimony. The administrative law judge also must determine the sufficiency of Dr. Suter's reports from October 1992 to January 1993, which state that claimant experiences "some" pain while working and that claimant has to take pain medications while working. *See Ezell,* 33 BRBS 19*; Burch*, 15 BRBS at 425*; Williams v. General Dynamics Corp.*, 10 BRBS 915, 919 (1979); Decision and Order on Remand at 5-8; Cl. Exs. 1 at 8, 10, 9 at 34, 36-37; Emp. Ex. 4 at Exhibit 15; Emp. Ex. E.

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The pain medications would make him drowsy and he would sleep on the job. 1994 Tr. at 31. He testified he could not work on days where he had such severe headaches or such lower back pain that he could not move because he was on so much medication. *Id.* Claimant's counsel relied on this testimony to support his argument that claimant worked through extraordinary effort and in spite of excruciating pain. *See* Decision and Order on Remand at 3. The administrative law judge noted claimant's testimony in his decision. Decision and Order on Remand at 7.

The administrative law judge may find, based on the aggregation of factors, that claimant worked only through extraordinary effort and in spite of excruciating pain.[5] *See Shoemaker v. Schiavone & Sons, Inc.*, 11 BRBS 33, 37 (1979); *Steele v. Associated Banning Co.*, 7 BRBS 501, 509 (1978). The administrative law judge, however, must evaluate all relevant evidence to determine whether this standard is met. If the administrative law judge does not find that claimant was working through extraordinary effort and in spite of excruciating pain, he should consider claimant's entitlement to partial disability benefits for this period. In awarding partial disability benefits, the administrative law judge must determine claimant's post-injury wage-earning capacity pursuant to Section 8(h) of the Act, 33 U.S.C. §908(h), taking into account claimant's pain and that his light duty job at employer's facility was outside of his work restrictions. *See Ramirez v. Sea-Land Services, Inc.*, 33 BRBS 41, 45 n. 5; *Ezell*, 33 BRBS at 27.

Employer next contends that the administrative law judge erred in awarding partial disability benefits from September 13 to December 10, 1993, because claimant's discharge in January 1993 from his post-injury light duty job at employer's facility for a non-work-related reason negated any requirement that it

[5]The Fourth Circuit, in an unpublished decision, recently affirmed an award of total disability benefits to a claimant who was working post-injury through extraordinary effort and perseverance and in spite of considerable pain and discomfort based on her testimony which was corroborated by the opinions of Dr. Stiles, her treating physician, and Mr. DeMark, a rehabilitation counselor. *See Newport News Shipbuilding & Dry Dock Co. v. Wiggins*, No. 00-2532, 2001 WL 1598094 (4th Cir. Dec. 14, 2001)(unpublished). In that case, claimant testified that she worked in pain and was forced to stop working to rest at times because of pain and swelling in her knee, and pain in her hands. Dr. Stiles stated that claimant's work caused "a lot" of pain and prescribed a knee brace and medications for the pain. Additionally, Mr. DeMark stated that claimant's work as a part-time newspaper carrier required "extra effort" on her part and was outside of her medical restrictions. He stated she worked because she needed the money as her compensation had been terminated. Although Rule 36(c) of the rules of the Fourth Circuit, 4th Cir. R. 36(c), disfavors the citation of unpublished cases, we believe our discussion of *Wiggins* is consistent with the Rule because *Wiggins* may be instructive to the administrative law judge in determining claimant's entitlement to total disability benefits. There is no other Fourth Circuit precedent discussing application of factors relevant to "extraordinary effort" and "excruciating pain" determinations. The court's decision in *Haughton Elevator Co. v. Lewis,* 572 F.2d 447, 7 BRBS 838 (4th Cir. 1978), merely affirmed a total disability award to a working claimant, as supported by substantial evidence.

establish the availability of suitable alternate employment after that date. A claimant is entitled to disability benefits where he is discharged from a post-injury job at employer's facility which was not suitable for him given his restrictions, and thereafter sustains a loss of wage-earning capacity on the open market. *See generally Newport News Shipbuilding & Dry Dock Co. v. Riley*, 262 F.3d 227, 35 BRBS 87(CRT)(4th Cir. 2001); *Norfolk Shipbuilding & Dry Dock Corp. v. Hord,* 193 F.3d 797, 33 BRBS 170(CRT)(4th Cir. 1999); *compare Brooks v. Newport New 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)(claimant is not entitled to total disability benefits when he is discharged from a *suitable* job at employer's facility due to a violation of a company rule). As the light duty job at employer's facility was outside claimant's restrictions, employer's premise is not consistent with law, and it is rejected.

In the instant case, the administrative law judge awarded partial disability benefits from September 13 to December 10, 1993, on the basis that claimant sustained a loss of wage-earning capacity in his employment with Savage Builders. Employer does not contest this finding. Thus, as claimant sustained a loss in wage-earning capacity following his discharge from the unsuitable job at employer's facility, we affirm the administrative law judge's award of partial disability benefits from September 13 to December 10, 1993.[6] *See generally Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996).

[6]The administrative law judge's conclusion that claimant did not perform his post-injury job with Savage Builders through extraordinary effort and in spite of excruciating pain and his determination of the amount of partial disability benefits awarded based on claimant's post-injury earnings with Savage Builders are affirmed as unchallenged on appeal. Decision and Order on Remand at 8-9.

Accordingly, the administrative law judge's Decision and Order on Remand is vacated with respect to his award of total disability benefits for the period of October 19, 1992, to January 9, 1993, and the case is remanded to the administrative law judge for further consideration consistent with this opinion. In all other respects, the administrative law judge's decision is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge