BRB No. 11-0345

BRIAN S. BARTLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL, INCORPORATED	)	DATE ISSUED: 01/27/2012
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Joel S. Mills and Gary B. Pitts (Pitts & Mills), Houston, Texas, for claimant.

Jerry R. McKenney and Billy J. Frey (Legge, Farrow, Kimmitt, McGrath & Brown, L.L.P.), Houston, Texas, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2010-LDA-00060) of Administrative Law Judge Daniel F. Solomon 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 Defense Base Act, 42 U.S.C. §1651 *et seq*. (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge 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).

Claimant signed a contract to work in Iraq for one year beginning in June 2008. He sustained an injury to his left shoulder on September 24, 2008, while working in a mailroom. Claimant's duties involved sorting and delivering mail such as heavy boxes, seventy-pound foot lockers, and large bags of mail. Tr. at 7. Claimant initially was diagnosed with tendonitis. While on interim leave in the United States, claimant sought treatment for his left shoulder pain. He was examined by Dr. Paul, an orthopedic surgeon, on October 20, 2008. After ordering and reviewing claimant's MRI, Dr. Paul diagnosed a posterior labral tear as well as tendonitis. CX 1 at 29, 31, 34. Claimant never returned to Iraq and received his last paycheck from employer on October 29, 2008. On January 6, 2009, claimant underwent surgery to repair his rotator cuff and the labrum tear in his left shoulder. Employer paid claimant medical benefits and various periods of disability benefits at a rate of $542.31 per week. Claimant filed a claim for additional benefits under the Act.

The administrative law judge found that claimant established a *prima facie* case relating his injury to his work, and he invoked the Section 20(a), 33 U.S.C. §920(a), presumption. He also found that employer did not rebut the presumption and that claimant's condition is work-related as a matter of law. The administrative law judge found that claimant's condition reached maximum medical improvement on August 20, 2009, based on Dr. Saterlee's opinion, and that claimant is unable to return to his usual duties in Iraq as a mail clerk, based on his credible complaints of pain. The administrative law judge found that claimant's post-injury jobs at Target and at a group home constitute suitable alternate employment, although his job at Venetian Tan from April to June 2009 did not. Accordingly, the administrative law judge awarded claimant temporary total disability benefits from October 30, 2008, through August 20, 2009, when his condition became permanent. He found claimant entitled to permanent total disability benefits from August 20, 2009, until October 13, 2009, when claimant began working at Target, and to permanent partial disability benefits thereafter, based on differing wage-earning capacities.[1] All benefits are based on the administrative law judge's finding that claimant's average weekly wage while working for employer was $1,543.51. Decision and Order at 15-18. Employer appeals the award of benefits. Claimant responds, urging affirmance.

Employer contends the administrative law judge erred in finding that claimant established an inability to return to his usual employment as a mail clerk as a result of his work injury. In this regard, employer argues that the administrative law judge erred in crediting claimant's testimony and complaints of pain over the objective medical

[1]Claimant voluntarily left his job at Target on February 26, 2010, to look for work paying greater wages. On April 17, 2010, he secured higher-paying work at the group home. The administrative law judge adjusted claimant's benefits accordingly.

evidence of record. We reject employer's argument. In order to establish a *prima facie* case of total disability, a claimant must demonstrate an inability to return to his usual work as a result of his work injury. *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). The administrative law judge credited claimant's testimony that he is unable to perform his usual employment as a mail clerk with employer because of pain associated with his work-related left shoulder injury and the corresponding surgery, which he stated had worsened the pain. Decision and Order at 10; EX 40 at 40, 50; Tr. 29-30. The administrative law judge relied on claimant's testimony that he thought he could perform the work for one or two hours, but not 12 hours, per day, seven days per week. He also relied on Dr. Saterlee's opinion that, while claimant does not have a functional impairment, his pain may limit his work activity, and he is unable to lift heavy weights on a frequent basis. Decision and Order at 10-11; EX 44 at 26, 37. Contrary to employer's argument that objective medical evidence showing no physical impairment should be given greater weight, the administrative law judge rationally credited claimant's testimony and Dr. Saterlee's opinion; this constitutes substantial evidence that claimant cannot return to his usual work, as it is well established that an administrative law judge is entitled to evaluate the credibility of all witnesses and has considerable discretion in evaluating and weighing the evidence of record. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969); *see also Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982) (credible complaints of pain, alone, may be sufficient to establish a claimant's inability to return to his usual work). Therefore, we affirm the findings that claimant cannot return to his usual work and has established a *prima facie* case of total disability.

Employer also contends the administrative law judge erred in assessing claimant's post-injury wage-earning capacity, as he failed to consider a relevant piece of evidence. Specifically, employer argues that, although claimant obtained post-injury employment, it offered into evidence the labor market survey of Mr. Stanfill, dated December 28, 2009, to establish a higher post-injury wage-earning capacity than that established by claimant's actual post-injury earnings. The administrative law judge identified this report, CX 14; EX 38, in his summary of the evidence; however, he did not fully address it in his analysis, and he relied on claimant's actual wages to set his post-injury wage-earning capacity. Decision and Order at 13.

Section 8(h) of the Act, 33 U.S.C. §908(h), provides that the post-injury wage-earning capacity of a partially disabled employee for whom compensation is determined pursuant to Section 8(c)(21), 33 U.S.C. §908(c)(21), shall be equal to the employee's

actual earnings if they fairly and reasonably represent his wage-earning capacity. The party contending that the employee's actual earnings are not representative of his wage-earning capacity has the burden of establishing an alternative reasonable wage-earning capacity, and the fact that a claimant's post-injury employment is regular and continuous, as the administrative law judge found here, does not preclude an employer from establishing that the claimant can earn higher wages on the open market. *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992); *Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108(CRT) (5th Cir. 1990).

The December 28, 2009, report identified 11 potential jobs "currently" available for claimant; however, the administrative law judge did not analyze whether these jobs were available to and suitable for claimant, or whether the wages paid for those jobs more reasonably represented claimant's post-injury wage-earning capacity than his actual post-injury wages.[2] As some of the jobs identified in the labor market survey paid greater wages than claimant was actually earning and, if found suitable, would decrease employer's liability for benefits after December 28, 2009, the administrative law judge erred in not addressing them. *Id.* Because the administrative law judge did not address all the evidence relevant to claimant's post-injury wage-earning capacity, we must remand the case for him to address Mr. Stanfill's vocational report and to make a specific finding, in light of all relevant evidence, as to claimant's residual wage-earning capacity after December 28, 2009, consistent with Section 8(h).

Lastly, employer contends the administrative law judge erred in basing claimant's pre-injury average weekly wage on his overseas earnings alone. The object of Section 10(c), 33 U.S.C. §910(c), is to arrive at a sum which reasonably represents a claimant's annual earning capacity at the time of his injury. *See Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 32 BRBS 91(CRT) (5th Cir. 1998). The Board has held that where a claimant is injured while working overseas in a dangerous environment, under a long-term contract, his annual earning capacity should be calculated based upon the earnings in that job as they reflect the full amount of the earnings lost due to the injury. *K.S. [Simons] v. Serv. Employees Int'l, Inc.*, 43 BRBS 18, *aff'd on recon. en banc*, 43 BRBS 136 (2009); *Proffitt v. Serv. Employers Int'l, Inc.*, 40 BRBS 41 (2006). In this case where the administrative law judge found the facts are legally indistinguishable from those in *Simons* and *Proffitt*, the administrative law judge divided claimant's 2008 earnings with employer, $31,311.74, by the number of weeks employer paid claimant, June 10 through October 29, 2008, to determine that claimant's pre-injury average

[2]As the administrative law judge found that claimant was working at suitable alternate employment, and that finding has not been challenged, the issue arising from employer's labor market survey concerns only claimant's post-injury wage-earning capacity.

weekly wage is $1,543.51. *See* CXs 8, 9. For the reasons set forth in *Simons* and *Proffitt*, we reject employer's argument that the calculation should have included claimant's pre-overseas wages, and we affirm the administrative law judge's average weekly wage finding.

Accordingly, the case is remanded for further consideration of claimant's post-injury wage-earning capacity as of December 28, 2009, consistent with this decision. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge