U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0182

STEVEN POPOVICH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JONES STEVEDORING COMPANY	)	DATE ISSUED: Jan. 14, 2016
	)	
Self-Insured	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of William Dorsey, Administrative Law Judge, United States Department of Labor.

Theodore P. Heus (Preston Bunnell, LLP), Portland, Oregon, for claimant.

James McCurdy and Jay W. Beattie (Lindsay Hart, LLP), Portland, Oregon, for self-insured employer.

Ann Marie Scarpino (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2012-LHC-00446) of Administrative Law Judge William Dorsey 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).

The basic facts of this case are not in dispute. On May 21, 2010, while working for employer as a walking boss,[1] claimant, who was 68 or 69 years old at the time, boarded a ship via a gangway with rope rails. He slipped and, grabbing on to the stanchion to prevent himself from falling, wrenched his right elbow and shoulder. Tr. at 236-238. He reported the incident immediately, finished his shift, and went to the doctor the next day. He has not worked since this incident. Employer voluntarily paid claimant temporary total disability benefits from May 22 through November 19, 2010, and permanent partial disability benefits from November 20 through December 17, 2010, ceasing benefits upon contending claimant could return to work as of January 17, 2011. EXs 53-54. Employer also paid claimant's medical benefits.

Claimant's elbow injury was diagnosed as a 90 percent rupture of the triceps tendon. Claimant's shoulder injury was diagnosed as a labral tear and a partial tear of the rotator cuff; significant degenerative changes also were noted. EXs 49-50. The elbow injury has fully resolved. Dr. Jacobson, who treated the shoulder injury, determined the shoulder condition reached maximum medical improvement on February 7, 2011, and he gave claimant permanent work restrictions.[2] EXs 55-56, 61.

The administrative law judge found that claimant is incapable of returning to his usual work. He gave greater weight to Dr. Jacobson's opinion than to that of Dr. Yodlowski, employer's expert, regarding the extent of claimant's physical restrictions, which prevent claimant from working at his home port because all the Coos Bay walking boss jobs require climbing gangways. The administrative law judge also credited claimant's evidence that the union dispatch office has not placed claimant back on the active duty list. Decision and Order at 12-13, 20-21. Moreover, the administrative law judge rejected employer's evidence that claimant could perform his usual work with

[1] Claimant's home port is Coos Bay, Oregon, but on the date of the injury, he was working at employer's facility in Portland. A "walking boss" is also called a "foreman."

[2] Dr. Jacobson restricted claimant from: lifting more than 50 pounds up to horizontal and 20 pounds overhead; climbing and descending onboard vertical ladders; climbing anything that requires use of his arms above shoulder height to support his weight; and walking on slippery or moving gangways which requires use of arms for support. EXs 56, 61 at 252-254, 291.

biomechanic modifications.[3] Finally, the administrative law judge found that the evidence submitted by employer does not establish the availability of suitable alternate employment, and he rejected employer's assertion that more of the identified jobs would be available to claimant if he obtained an Americans with Disabilities Act (ADA) accommodation. The administrative law judge concluded that, at ports in Oregon, such accommodations were granted infrequently, if at all, such that claimant's request for one would be futile. Decision and Order at 30-31. As employer did not identify suitable alternate work that is "realistically and regularly available" to claimant, the administrative law judge found that claimant has been permanently totally disabled since February 7, 2011. *Id.* at 31-32. Additionally, the administrative law judge found that, while claimant has pre-existing permanent partial disabilities, the evidence does not establish that the ones which were manifest to employer contributed to claimant's ultimate permanent total disability. Therefore, he denied employer's request for Section 8(f), 33 U.S.C. §908(f), relief. *Id.* at 32-35. Employer appeals the administrative law judge's award of permanent total disability benefits and his denial of Section 8(f) relief. Claimant urges the Board to affirm the award of permanent total disability benefits, and the Director, Office of Workers' Compensation Programs (the Director), urges the Board to affirm the denial of Section 8(f) relief. Employer filed briefs in reply to the two response briefs.

Extent of Disability

Employer first contends the administrative law judge erred in finding claimant is totally disabled. It argues that claimant is able to return to his usual work as a walking boss, asserting the administrative law judge should not have credited testimony that the union cannot place claimant on the call list unless he has been released to return to full-duty work, as claimant had been working with less-than-full-duty capabilities at the time of the 2010 injury. Employer asserts there is no requirement for a full-duty release and, if there were, it would violate the ADA. Alternatively, employer contends claimant is, at most, partially disabled because it established the availability of suitable alternate employment at its various port facilities and claimant did not show diligence in attempting to obtain that work. Specifically, employer asserts its submission of evidence of walking boss dock shifts within its organization from May 25, 2010, through

[3] Dr. Becker, employer's expert in human biomechanics and physical rehabilitation, suggested a modified way of stepping and climbing, and use of a harness, such that full weight would not be placed on claimant's shoulder, and claimant could more securely move around the ships. The administrative law judge found that, while employer was willing to provide the equipment, this solution was not infallible, and it was time-consuming and cumbersome. Decision and Order at 22-26.

September 7, 2012, demonstrates the availability of suitable alternate jobs for claimant.[4] EXs 71, 80.

In order to establish a prima facie case of total disability, a claimant must show that he cannot return to his usual work due to his work injury. *Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994). If the claimant establishes an inability to return to his usual work, the burden shifts to the employer to demonstrate the availability of suitable alternate employment that the claimant is capable of performing and could secure if he diligently tried. *Id.*; *see also Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). If the employer establishes the availability of suitable alternate employment, the employee may nonetheless prevail in obtaining total disability benefits if he demonstrates that he diligently tried but was unable to secure alternate employment. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986); *Fortier v. Electric Boat Corp.*, 38 BRBS 75 (2004).

In this case, the administrative law judge found that claimant's work restrictions preclude him from returning to his usual work.[5] Employer has not appealed this finding. Although the administrative law judge also found that claimant has not been placed on the active-duty call list, and cannot return to work for that reason either, this finding is superfluous because, even if claimant were on the call list, his work restrictions prevent him from performing his usual work. Dr. Jacobson's work restrictions constitute substantial evidence supporting the administrative law judge's finding. *See* n. 2, *supra*. Therefore, we affirm the finding that claimant cannot return to his usual work because of his work injury.[6] *Newport News Shipbuilding & Dry Dock Co. v. Riley*, 262 F.3d 227, 35 BRBS 87(CRT) (4th Cir. 2001); *see generally Caudill v. Sea Tac Alaska Shipbuilding, Inc.*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director,*

[4] A "dock shift," per employer, does not refer to an individual job; rather, it refers to days on which there were dock jobs available, and those jobs could be in one or more of the ports. Emp. Br. at 9 n.6.

[5] The administrative law judge found there are only two types of ships in the Coos Bay port -- log and wood chips -- and they are overseen by one foreman who works both on and off the ships, accessing them by gangways.

[6] Employer does not challenge the administrative law judge's acceptance of Dr. Jacobson's opinion or the rejection of the opinions of its experts, Dr. Becker and Ms. Bloom. *See generally Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999).

OWCP, 8 F.3d 29 (9th Cir. 1993).

As claimant has established an inability to return to his usual work, employer bears the burden of establishing the availability of suitable alternate employment. *Edwards*, 999 F.2d 1374, 27 BRBS 81(CRT). Employer submitted a list of walking boss dock shifts, asserting such jobs are within claimant's restrictions and would not require him to board ships. EXs 71, 80. Employer argues it was improper for the administrative law judge to conclude that it would be futile for claimant to apply for an ADA accommodation, as such accommodation would allow claimant to take jobs at other ports even if there are openings at Coos Bay and, thus, would open up more of the identified jobs to him. In this regard, employer asserts the administrative law judge should have determined whether claimant is entitled to an ADA accommodation before finding that the jobs it identified are not available to him.

Contrary to employer's assertion, it is not the role of the administrative law judge to determine claimant's entitlement to an ADA accommodation. *See generally* 33 U.S.C. §919(c); *Temporary Employment Services v. Trinity Marine Group, Inc.* [*Ricks*], 261 F.3d 456, 35 BRBS 92(CRT) (5th Cir. 2001) (administrative law judge cannot address contractual indemnity provisions between borrowing and lending employers); *Holliman v. Newport News Shipbuilding & Dry Dock Co.*, 852 F.2d 759, 21 BRBS 124(CRT) (4th Cir. 1988) (administrative law judge cannot determine reasonableness of employer rule in a Section 49 claim). Rather, it is the obligation of employer to show the availability of suitable alternate employment.[7] The potential for accommodations under the ADA process does not establish the reality of accommodations being made. Absent an accommodation, claimant would not be given the opportunity to by-pass open jobs at his home port in favor of less strenuous jobs at other ports. *See generally Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996); *Kilsby v. Diamond M Drilling Co.*, 6 BRBS 114 (1977), *aff'd sub nom. Diamond M Drilling Co. v. Marshall*, 577 F.2d 1003, 8 BRBS 658 (5th Cir. 1978).

Moreover, even if claimant had an ADA accommodation in this case, employer has not demonstrated the actual availability of suitable jobs. Despite an accommodation, employees senior to claimant could accept jobs, making them unavailable to claimant. *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002) (seniority system generally prevails over ADA accommodation). It is employer's burden to prove there exists suitable

[7] Employer has not committed itself to providing specific accommodations in accordance with the ADA which would enable claimant to work. Rather, its Director of Contract Administration and Arbitration, Joseph T. Weber, testified that accommodations are possible and a request to reject jobs requiring claimant to board ships would be addressed through the ADA process. Tr. 180, 211.

alternate employment that is regularly and realistically available to claimant, regardless of whether claimant takes some initial action to improve his employability. *See generally Crum v. General Adjustment Bureau*, 16 BRBS 101 (1983), *aff'd in pert. part* 738 F.2d 474, 16 BRBS 115(CRT) (D.C. Cir. 1984) (claimant's willingness to work is not a factor). Thus, as the list of shifts employer submitted does not indicate which jobs are actually available to claimant or which are within his restrictions, but, rather, was an overall list of walking boss jobs (ship and dock) that were filled after claimant's injury, the administrative law judge's finding that employer did not show suitable alternate employment that is regularly and realistically available *to claimant* is rational. *Edwards*, 999 F.2d 1374, 27 BRBS 81(CRT); *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988); *Seals v. Ingalls Shipbuilding, Div. of Litton Systems Inc.*, 8 BRBS 182 (1978). Accordingly, we affirm the administrative law judge's award of permanent total disability benefits. 33 U.S.C. §908(a).

Section 8(f) Relief

Employer also contends the administrative law judge erred in denying it Section 8(f) relief. Specifically, employer asserts that claimant's overall condition is compromised by his pre-existing injuries; therefore, the combination of his pre-existing disabilities and his shoulder injury put him at a greater risk of severely injuring himself were he to climb gangways, and thus contributed to claimant's permanent total disability. The Director responds that there is no evidence establishing claimant's pre-existing conditions contributed to his total disability.

Section 8(f) of the Act shifts liability to pay compensation for permanent disability or death after 104 weeks from an employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §944. An employer may be granted Special Fund relief in a case where a claimant is permanently totally disabled if it establishes that the claimant had a manifest pre-existing permanent partial disability and that his permanent total disability is not due solely to the subsequent work injury. 33 U.S.C. §908(f); *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT) (9th Cir. 1993); *FMC Corp. v. Director, OWCP*, 886 F.2d 1185, 23 BRBS 1(CRT) (9th Cir. 1989); *see also Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1(CRT) (2d Cir. 1992); *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34(CRT) (5th Cir. 1990); *Dominey v. Arco Oil & Gas Co.*, 30 BRBS 134 (1996). To establish the contribution element, an employer must establish that the claimant's current disability is not due solely to the subsequent work injury and is contributed to by the manifest pre-existing permanent partial disability. *E.P. Paup Co.*, 999 F.2d 1341, 27 BRBS 41(CRT); *FMC Corp.*, 886 F.2d 1185, 23 BRBS 1(CRT). The employer may present medical or other evidence to show contribution. *Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997).

In discussing employer's entitlement to Section 8(f) relief, the administrative law judge made the following findings: 1) claimant had a manifest pre-existing permanent partial disability to his left knee (28 percent impairment) which has not been shown to have contributed to his total disability; 2) claimant had a manifest pre-existing permanent partial disability to his right arm (5 percent impairment) which, by common sense, may have contributed to the shoulder injury but the courts have rejected the "common sense test" and employer did not submit evidence of contribution; 3) claimant had degenerative changes in his shoulder that contributed to his total disability but they were not manifest to employer prior to the shoulder injury; and 4) claimant is permanently totally disabled because he cannot return to his usual work due to his not being on the dispatch list and work restrictions for the shoulder. Decision and Order at 33-35. The administrative law judge then stated: "[n]either of the two grounds for finding the Claimant PTD depend upon his earlier disabilities. They are based upon his May 21, 2010 shoulder injury." *Id.* at 35. Thus, the administrative law judge found that, while claimant has pre-existing permanent partial disabilities, the evidence does not establish that the ones which were manifest to employer contributed to claimant's ultimate permanent total disability. Therefore, he denied employer's request for Section 8(f), 33 U.S.C. §908(f), relief. *Id.* at 32-35.

It is employer's burden to show that claimant's permanent total disability is not due solely to the work-related shoulder injury. *Director, OWCP v. Jaffe New York Decorating*, 25 F.3d 1080, 28 BRBS 30(CRT) (D.C. Cir. 1994). Employer contends that the administrative law judge's findings in discussing claimant's disability establish that claimant's pre-existing conditions, by common sense, contribute to his total disability. Decision and Order at 14-15.[8] However, employer points to no evidence establishing that claimant's total disability is not due solely to the work-related shoulder injury. Notwithstanding the administrative law judge's finding that claimant's pre-existing conditions might increase the risk of future injuries, the credited medical evidence establishes that claimant's work restrictions and ensuing inability to return to his usual work are due to his shoulder injury alone.[9] EXs 56; 61 at 53-55; Decision and Order at

[8] The administrative law judge discussed that claimant's age, medical history, and physical condition make claimant's risk of future injury high because those pre-existing conditions increase the probability of his falling and needing to support himself with his injured arm/shoulder. Decision and Order at 14-15.

[9] That is, although claimant's knee condition might cause claimant to fall more readily, his inability to support himself in the event of a fall is due solely to the shoulder condition. Moreover, the administrative law judge found that claimant's disability is total because employer failed to show the *availability* of suitable alternate employment. Thus, we reject employer's contention that claimant's pre-existing disabilities contributed to his inability to obtain more lighter-duty positions.

35. Moreover, although employer asserts it is "common sense" to conclude that claimant's prior injuries contributed to the disability caused by the shoulder injury, a "common sense test" has been rejected; employer must submit evidence to support its claim that claimant's disability is not due solely to the shoulder injury. *Two "R" Drilling Co.*, 894 F.2d 748, 23 BRBS 34(CRT). The administrative law judge properly found that employer did not establish that claimant's permanent total disability is not due solely to his 2010 shoulder injury. *FMC Corp.*, 886 F.2d 1185, 23 BRBS 1(CRT); *see generally E.P. Paup Co.*, 999 F.2d 1341, 27 BRBS 41(CRT). Therefore, we reject employer's contentions and affirm the administrative law judge's denial of Section 8(f) relief.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

_____

JUDITH S. BOGGS
Administrative Appeals Judge

_____

RYAN GILLIGAN
Administrative Appeals Judge

_____

JONATHAN ROLFE
Administrative Appeals Judge