

BRB No. 89-1074

GAYLYNN LOVEJOY)
)
 Claimant-Petitioner)
)
v.)
)
LOCKHEED SHIPBUILDING COMPANY)
)
and)
)
CLAIMS MANAGEMENT SERVICES) DATE ISSUED:
)
Employer/Carrier-)
Respondents) DECISION AND ORDER

Appeal of the Decision and Order - Awarding Benefits of Ellin M. O'Shea, Administrative Law Judge, United States Department of Labor.

Gaylynn Lovejoy, Woodinville, Washington, pro se.

Before: SMITH and BROWN, Administrative Appeals Judges, and LAWRENCE, Administrative Law Judge.*

PER CURIAM:

Claimant, without legal representation, appeals the Decision and Order - Awarding Benefits (87-LHC-2476) of Administrative Law Judge Ellin M. O'Shea 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.. In an appeal by a pro se claimant, the Board will review the administrative law judge's Decision and Order under its statutory standard of review. We must affirm the findings and conclusions 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).

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5) (1988).

Claimant, a pipefitter for employer, injured her back in three industrial accidents occurring on November 24, 1980, December 24, 1980, and May 21, 1981. Although claimant returned to work after each of these incidents, she suffered acute back pain on a family outing on May 31, 1981, and has not worked since.

Employer voluntarily paid claimant total disability compensation from June 1, 1981 through April 11, 1987 and partial disability thereafter. Claimant sought permanent total disability compensation under the Act. The parties stipulated that claimant was injured during the course and scope of her employment on the above dates and that claimant was temporarily totally disabled through at least December 23, 1983.

After evaluating the medical and vocational evidence, the administrative law judge found that although claimant was unable to perform her usual job, employer had established the availability of suitable alternate employment through the testimony of its vocational expert, John Shervey. Accordingly, the administrative law judge awarded claimant temporary total disability benefits from June 1, 1981 until January 24, 1986, and permanent partial disability benefits thereafter. Claimant, representing herself, appeals the administrative law judge's denial of permanent total disability compensation, arguing that she is in constant pain and cannot work.¹

Once claimant establishes that she is unable to do her usual work, she has established a prima facie case of total disability, and the burden shifts to the employer to establish the availability of suitable alternate employment which claimant is capable of performing. Bumble Bee Seafoods v. Director, OWCP, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); Edwards v. Todd Shipyards Corp., 25 BRBS 49 (1991), appeal pending, No. 91-70648 (9th Cir. October 24, 1991). In order to meet this burden, employer must show the availability of specific work within the geographical area where claimant resides, which she could perform based upon her age, education, work experience, and physical restrictions, and which she could secure if she diligently tried. See New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991).

After review of the record, we affirm the administrative law judge's determination that claimant was permanently partially disabled rather than permanently totally disabled subsequent to January 24, 1986 because it is rational, and supported by substantial evidence in the record. See O'Keeffe, supra. In the

¹We reject claimant's contention that her attorney was "covering Lockheed," as there is no evidence in the record which suggests that claimant's counsel's representation was inadequate.

present case, as it was undisputed that claimant is unable to perform her usual work as a pipefitter, the burden shifted to employer to establish the availability of suitable alternate employment. See Newport News Shipbuilding & Dry Dock Co. v. Tann, 841 F.2d 540, 21 BRBS 10 (CRT) (4th Cir. 1988). In finding that employer had met this burden, the administrative law judge credited the opinion of employer's vocational expert, Mr. Shervey, that jobs existed consistent with claimant's age, education, work experience and physical limitations both in 1983 and 1986.² After inter-viewing claimant and reviewing relevant medical reports, Mr. Shervey conducted a labor market survey in April 1986, and determined that claimant was capable of performing light duty work which did not involve lifting over thirty pounds or standing more than two to three hours at a time, such as that of an assembler, machine operator, or clerical worker. Mr. Shervey identified specific available jobs within these categories, including machinist positions with Pacific Electro Dynamics and Sunstrand Data Control, assembler and machine operator positions with Eldec Corporations, Wesmar, and Pacific Circuits, and clerical positions with the City of Seattle.

At the hearing, Mr. Shervey testified that based on information obtained from the Washington Occupational Information Headquarters, starting salaries in 1980 for electronic assemblers ranged from \$3.10 to \$3.50 per hour. He also testified that salaries for production assemblers ranged from \$2.90 to \$6.30 per hour with an average salary in 1980 of \$5.59 per hour. Mr. Shervey indicated that he viewed the \$5.59 average figure as indicative of claimant's earning potential because although claimant had prior mechanical experience and training, she had been out of work for some time and her skills were slightly dated.

Mr. Shervey further noted that the \$5.59 average figure was consistent with the results of his vocational survey and that similar jobs had been identified in the prior vocational surveys conducted in 1983.³ Because the record reflects that Mr. Shervey

²In considering the suitable alternate employment issue, the administrative law judge noted that the medical evidence was uncontradicted that claimant was capable of performing some form of alternate work and that she found the functional capabilities assessment of the six consulting orthopedist-neurologists and two psychiatrists who had evaluated claimant at employer's request between 1983 and 1988 more persuasive than Dr. Backlund's evaluation. The administrative law judge accordingly determined that with the exception of lifting over 30 pounds or standing more than two to three hours at a time, claimant was capable from a physical standpoint of working on a reasonably continuous basis and that claimant has no significant emotional or psychiatric condition which would affect her ability to work.

³An employment survey conducted between March and May of 1983

fully considered and identified specific available employment opportunities consistent with claimant's age, education and physical restrictions, we affirm the administrative law judge's decision to credit his testimony and find suitable alternate employment established. See generally Merrill v. Todd Pacific Shipyards Corp., 25 BRBS at 145-146. We therefore affirm his finding that claimant was only partially disabled subsequent to January 24, 1986. O'Keefe, supra. See generally Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039, 26 BRBS 30 (CRT) (5th Cir. 1992).

We conclude, however, that the administrative law judge incorrectly determined that claimant was entitled to temporary total disability benefits until January 24, 1986. In the present case, although the administrative law judge found that claimant reached maximum medical improvement by December 23, 1983, she awarded claimant temporary total disability compensation through January 24, 1986, and permanent partial disability compensation thereafter. The administrative law judge reasoned that claimant was not psychologically capable until that time of engaging in the alternate employment which she had been functionally capable of performing far earlier. Based on this finding, January 24, 1986, is the date on which suitable alternate employment was established.

Inasmuch as the date of maximum medical improvement separates temporary disability from permanent disability, we hold that the administrative law judge erred in failing to terminate the award of temporary disability compensation as of December 23, 1983. See generally Rinaldi v. General Dynamics Corp., 25 BRBS 128 (1991).

An injured employee who has reached maximum medical improvement but remains unable to return to his usual work, is, however, entitled to permanent total disability compensation from the date that maximum medical improvement is established until the date on which employer demonstrates the availability of suitable alternate employment. See Stevens v. Director, OWCP, 909 F.2d 1256, 23 BRBS 89 (CRT) (9th Cir. 1990), rev'g Stevens v. Lockheed Shipbuilding Co., 22 BRBS 155 (1989), cert. denied, 111 S.Ct. 798 (1991). Accordingly, we vacate the administrative law judge's determination that claimant is entitled to temporary total disability compensation through January 24, 1986, and modify the award to reflect that claimant is entitled to temporary total disability compensation from January 8, 1981 until December 23, 1983, permanent total disability compensation from December 23, 1983 until January 24, 1986, and permanent partial disability compensation thereafter.⁴

identified several electronic assembler jobs paying \$3.75 to \$4.17 per hour as well as several other types of light duty jobs.

⁴In the present case, the administrative law judge determined that claimant had reached maximum medical improvement as of

September 23, 1983 or, at the latest, December 23, 1983, finding it unnecessary to resolve the specific date in light of her determination that Section 8(f) was inapplicable. Because, however, the administrative law judge accepted the parties' stipulation that claimant was temporarily totally disabled through at least December 23, 1983, see Transcript at 9, we conclude that December 23, 1983 must be the applicable permanency date as a matter of law in order for the administrative law judge's Decision and Order to be internally consistent.

Accordingly, the Decision and Order of the administrative law judge awarding benefits is modified to reflect that claimant is entitled to temporary total disability compensation from January 8, 1981 until December 23, 1983, permanent total disability compensation from December 23, 1983 until January 24, 1986, and permanent partial disability compensation thereafter. The Decision and Order of the administrative law judge awarding benefits is in all other respects affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge