U.S. Department of Labor

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

BRB No. 15-0467

HERNAN DACARET Claimant-Petitioner v. NATIONAL STEEL AND SHIPBUILDING COMPANY Self-Insured Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED: July 7, 2016 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and the Order Denying Motion for Reconsideration of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C.; Lara D. Merrigan (Merrigan Legal), Mill Valley, California; Eric A. Dupree and Paul Myers (Dupree Law, APLC), Coronado, California, for claimant.

Renee C. St. Clair and Barry W. Ponticello (England, Ponticello & St. Clair), San Diego, California, for self-insured employer.

Kathleen H. Kim (M. Patricia Smith, Solicitor of Labor; Maia Fisher, Acting 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: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order Awarding Benefits and the Order Denying Motion for Reconsideration (2013-LHC-01512) of Administrative Law Judge Paul C. Johnson, Jr., 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 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 commenced working for employer as a welder in 1974. On October 15, 2001, claimant fell during the course of his employment, injuring both of his shoulders and knees. Claimant returned to modified work following this incident, but apparently last worked for employer on August 25, 2002. Employer voluntarily paid claimant temporary partial, temporary total, permanent partial, and permanent total disability compensation for various periods following his work injury.

Claimant underwent a number of surgical procedures for his work-related bilateral shoulder and knee conditions. Specifically, claimant underwent a left knee arthroscopy on January 11, 2002, a left shoulder arthroscopy on May 10, 2002, a right knee arthroscopy on January 8, 2003, a right shoulder arthroscopy on August 6, 2003, and a second left knee arthroscopy on June 9, 2004. On May 27, 2008, claimant underwent total left knee replacement surgery. On June 11, 2009, he underwent a similar procedure on his right knee; follow-up surgery, the result of continued swelling in claimant's right knee, was performed on June 16, 2010. Claimant sought continuing permanent total disability benefits.

In his Decision and Order, the administrative law judge accepted the parties' stipulation that claimant's injuries reached maximum medical improvement on May 3, 2005. The administrative law judge found, however, that claimant's disability became temporary in nature during the periods of recuperation following his two knee replacement surgeries. Decision and Order at 46-49. The administrative law judge found that claimant is totally disabled, as he is incapable of returning to his usual work as a welder with employer, and that employer did not establish the availability of suitable alternate employment. *Id.* at 49-61. The administrative law judge calculated claimant's average weekly wage pursuant to Section 10(c) of the Act, 33 U.S.C. §910(c), as $616.96. *Id*. at 61-63. The administrative law judge awarded claimant temporary total disability benefits from January 11 through January 20, 2002, January 28 through February 17, 2002, May 9 through August 11, 2002, August 26, 2002 through May 2, 2005, May 27 through December 8, 2008, and June 11, 2009 through February 21, 2011, and permanent total disability benefits from May 3, 2005 through May 26, 2008,

December 9, 2008 through June 10, 2009, and continuing from February 22, 2011. 33 U.S.C. §908(a), (b). The administrative law judge awarded employer relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). Claimant filed a motion for reconsideration, which was denied by the administrative law judge.

On appeal, claimant challenges the administrative law judge's award of temporary, rather than permanent, total disability benefits during the periods of recuperation following his knee replacement surgeries. Claimant additionally asserts that the administrative law judge erred in calculating his average weekly wage, and in failing to specify the periods of compensation subject to Section 10(f), 33 U.S.C. §910(f), adjustments. Employer responds, urging affirmance of the administrative law judge's average weekly wage calculation, but does not oppose claimant's claim to permanent total disability benefits during his recuperative periods. The Director, Office of Workers' Compensation Programs (the Director), has filed a response brief in support of claimant's contentions regarding the nature of his post-surgery disability. Claimant has filed a reply brief.[1]

Claimant challenges the administrative law judge's award of temporary, rather than permanent, total disability benefits during the periods of recuperation from each bilateral knee replacement surgery. The Director agrees that the administrative law judge erred in awarding claimant temporary disability benefits during these periods.[2]

After accepting the parties' stipulation that claimant's medical condition reached maximum medical improvement on May 3, 2005, the administrative law judge cited *Pacific Ship Repair & Fabrication, Inc. v. Director, OWCP* [*Benge*], 687 F.3d 1182, 46 BRBS 35(CRT) (9th Cir. 2012), to find, nonetheless, that claimant's total disability was temporary from May 27 to December 8, 2008, and from June 11, 2009, through February 21, 2011, the periods of recuperation following claimant's knee replacement surgeries. *See* Decision and Order at 46-49. We agree with claimant and the Director that the

[1] Claimant also has filed with the Board a "Notice of Supplemental Authority" wherein he cites a recently issued decision by the United States Court of Appeals for the Ninth Circuit, *SSA Terminals v. Carrion*, 821 F.3d 1168 (9th Cir. May 11, 2016), as support for his contention that the nature of his disability remained permanent following his knee replacement surgeries. We accept this supplemental pleading. 20 C.F.R. §802.215.

[2] The Director notes that acceptance of claimant's position will increase the liability of the Special Fund pursuant to the award of Section 8(f) relief.

administrative law judge's reliance on *Benge* is misplaced in this case and that, consequently, his finding on this issue cannot be affirmed.

In *Benge*, unlike the situation in this case, the claimant was permanently partially disabled prior to her surgery. She was subsequently determined to be temporarily totally disabled during her period of recovery following her surgery. *See Benge*, 687 F.3d at 1187-1188, 46 BRBS at 37-38(CRT). The Ninth Circuit held that a prior finding of "partial permanent disability does not preclude a later finding of temporary disability for the same underlying injury during a period of recovery following surgery." *Id.*, 687 F.3d at 1188-1189, 46 BRBS at 38(CRT).[3] In contrast to *Benge*, claimant in this case was permanently totally disabled at the time he underwent his knee replacement surgeries and, moreover, had also sustained totally disabling shoulder injuries, factual distinctions which makes this case comparable to *Misho v. Global Linguist Solutions*, 48 BRBS 13 (2014). In *Misho*, the claimant sustained work-related physical and psychological injuries, and the parties did not challenge the administrative law judge's finding that the psychological injury alone rendered her incapable of returning to her prior employment. Finding that the claimant's psychological condition had reached maximum medical improvement, even though the physical condition remained temporary in nature, the administrative law judge awarded the claimant ongoing temporary total disability benefits. The Board held that where a claimant has established an inability to perform her usual work due to only one of several work-related conditions, rather than a combination of work-related injuries, the nature of the disabling condition governs the award of benefits. The Board therefore modified the administrative law judge's award to reflect the claimant's entitlement to permanent total disability benefits as of the date her totally disabling psychological injury had reached maximum medical improvement. *See Misho*, 48 BRBS at 15-16.

As in *Misho*, claimant in this case sustained more than one work-related injury. The administrative law judge addressed claimant's medical restrictions and rationally found that claimant "is unable to return to his prior employment because of the bilateral knee and bilateral shoulder injuries he sustained on October 15, 2001."[4] *See* Decision

[3] In reaching this conclusion, the Ninth Circuit relied on the position of the Director, as exemplified by the Board's decision in *Leech v. Serv. Eng'g Co.*, 15 BRBS 18, 22 (1982), that the temporary total award subsumes the underlying permanent partial award. *Benge*, 687 F.3d at 1187, 46 BRBS at 38(CRT).

[4] The administrative law judge found that,

> [T]here is sufficient evidence that the Claimant was required to squat and kneel in his usual employment, and has been restricted from doing so by all three doctors. There is also sufficient evidence to show that Claimant

and Order at 49-51. Thus, prior to his two knee replacement surgeries, claimant was unable to perform his usual work as a welder due to his knee conditions, which result in squatting and kneeling restrictions, and his shoulder conditions, which result in lifting restrictions. Therefore, when claimant was recuperating from his left knee replacement surgery between May 27 and December 8, 2008, he remained totally disabled due to the restrictions resulting from his already permanent bilateral shoulder and right knee conditions. Similarly, between June 11, 2009 and February 21, 2011, when claimant was recuperating from his right knee replacement surgery, the restrictions resulting from the permanent bilateral shoulder conditions prohibited him from returning to work. Pursuant to the Board's holding in *Misho*, the nature of claimant's totally disabling shoulder conditions, which in this case was permanent during the two periods at issue, governs claimant's award of benefits. *See Misho*, 48 BRBS at 16. On the undisputed facts of this case, we therefore modify the administrative law judge's decision to reflect claimant's entitlement to permanent total disability benefits commencing May 3, 2005, the date on which the parties agreed that claimant's totally disabling shoulder injuries became permanent.[5]

Claimant also contends the administrative law judge erred in applying Section 10(c), 33 U.S.C. §910(c), rather than Section 10(a), 33 U.S.C. §910(a), of the Act to calculate his average weekly wage at the time of his injury. Section 10 sets forth three alternative methods for determining claimant's average weekly wage. Section 10(a) of the Act, 33 U.S.C. §910(a), looks to the actual wages of the injured worker who is employed for substantially the whole of the year prior to the injury. Specifically, Section 10(a) of the Act states:

> If the injured employee shall have worked in the employment in which he was working at the time of his injury, whether for the same or another

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> engaged in lifting greater than 20 pounds at his usual employment, and this is also precluded by the medical restrictions.

Decision and Order at 51. Based upon these findings, the administrative law judge concluded that claimant established his prima facie case of total disability, a finding that is unchallenged on appeal. *Id*.

[5] These benefits are the liability of the Special Fund pursuant to the award of Section 8(f) relief. Moreover, pursuant to the express language of Section 10(f) of the Act, 33 U.S.C. §910(f), claimant is entitled to cost-of-living adjustments on his permanent total disability benefits. *Bowen v. Director, OWCP*, 912 F.2d 348, 24 BRBS 9(CRT) (9th Cir. 1990); *see also Wilson v. Serv. Employees Int'l, Inc.*, 44 BRBS 81 (2010), *recon. denied*, 45 BRBS 1 (2011).

> employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

33 U.S.C. §910(a).[6] Section 10(a) thus requires the administrative law judge to determine the average daily wage claimant earned during the preceding twelve months. *Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1988). This average daily wage is multiplied by 260 if claimant was a five-day per week worker, or 300 if claimant was a six-day per week worker. The resulting figure is then divided by 52, pursuant to Section 10(d) of the Act, 33 U.S.C. §910(d), in order to yield claimant's statutory average weekly wage. Section 10(c) of the Act, 33 U.S.C. §910(c), is a catchall provision to be used in instances when neither Section 10(a) nor Section 10(b), 33 U.S.C. §910(b), can be reasonably and fairly applied.[7] *See Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 48(CRT) (9th Cir. 1998); *Newby v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 155 (1988).

In this case, the administrative law judge acknowledged that the record contains sufficient evidence from which he could calculate claimant's average weekly wage under Section 10(a), but he rejected the parties' contentions that Section 10(a) applies.[8] Specifically, citing *Le v. Sioux City & New Orleans Terminal Corp.*, 18 BRBS 175 (1986), the administrative law judge found "the application of §910(c) to be necessary in this case because the Claimant received a raise two weeks before his injury, and calculation under §910(a) would not yield a reasonable representation of the claimant's earning capacity at the time of his injury." *See* Decision and Order at 62.[9] The

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[6] Use of Section 10(a) arrives at a *theoretical* calculation of a claimant's average weekly wage, as if he worked every available work day in the year preceding his injury. *Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004).

[7] No party contends that Section 10(b) should be applied in this instant case.

[8] Utilizing Section 10(a), claimant initially calculated his average weekly wage at the time of his injury as $671.41; on reconsideration, claimant offered a calculation resulting in an average weekly wage of $722.87. In contrast, employer, also utilizing Section 10(a), asserted before the administrative law judge that claimant's average weekly wage was $652.19.

[9] On October 1, 2001, claimant received a wage increase of approximately 3.1 percent, which raised his hourly rate from $15.82 to $16.32. *See* EX 2.

administrative law judge proceeded to calculate, pursuant to Section 10(c), claimant's average weekly wage as $616.96. *Id.* at 63. On reconsideration, the administrative law judge specifically found that "a calculation of Claimant's average weekly wage under Section 10(a) would not be fair or reasonable," that the use of "Section 10(c) is proper when use of Section 10(a) results in excessive compensation or overcompensation," and that his calculation of claimant's average weekly wage pursuant to Section 10(c) resulted in the "most accurate assessment of Claimant's earning capacity." *See* Order Denying Mot. for Recon. at 3-4.

We agree with claimant that the administrative law judge's decision to apply Section 10(c), rather than Section 10(a), to calculate claimant's average weekly wage cannot be affirmed. The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has held that when a claimant is a five or six-day-a-week worker who was employed for at least 75 percent of the workdays of the measuring year, Section 10(a) applies, if the necessary information is in the record. [10] *Matulic*, 154 F.3d at 1058, 32 BRBS 151-152(CRT); *see also General Constr. Co. v. Castro*, 401 F.3d 963, 39 BRBS 12(CRT) (9th Cir. 2005), *cert. denied*, 546 U.S. 1130 (2006). Moreover, the court held that mere overcompensation alone, *i.e.*, that an employee's average weekly wage calculated under Section 10(a) is determined to be higher than his actual earnings, is an insufficient basis to preclude the use of Section 10(a). *Matulic*, 154 F.3d at 1057, 32 BRBS at 151(CRT); *see also* n.6, *supra.* The holding in *Matulic* was subsequently addressed by the Ninth Circuit in *Stevedoring Services of America v. Price*, 366 F.3d 1045, 38 BRBS 51(CRT) (9th Cir. 2004), *cert. denied*, 544 U.S. 960 (2005), in which the court stated that, in calculating an employee's average weekly wage:

> [t]he presumption is that § 910(a) or (b) applies rather than § 910(c). *See Matulic*, 154 F.3d at 1057. However, sections 910(a) and (b) cannot be reasonably and fairly applied when employment in the industry is "casual,

[10] The record contains evidence, and the parties do not dispute, that claimant was a five-day-a-week worker who was employed for substantially the whole of the year, specifically 218 days, in the year preceding his work injury. Claimant was therefore employed for approximately 84 percent of the days available to him; this percentage is comparable with the factual situations in *General Constr. Co. v. Castro*, 401 F.3d 963, 39 BRBS 12(CRT) (9th Cir. 2005), *cert. denied*, 546 U.S. 1130 (2006) (employee worked 77.4 percent of workdays) and *Stevedoring Services of America v. Price*, 366 F.3d 1045, 38 BRBS 51(CRT) (9th Cir. 2004), *cert. denied*, 544 U.S. 960 (2005) (employee worked 75.77 percent of workdays), cases in which the Ninth Circuit affirmed the use of Section 10(a), pursuant to *Matulic*. Additionally, the record contains sufficient evidence regarding claimant's total earnings during the year prior to his injury such that an average daily wage can be ascertained.

> irregular, seasonal, intermittent, and discontinuous," *Marshall v. Andrew F. Mahony Co.*, 56 F.2d 74, 78 (9th Cir. 1932); when applying sections 910(a) and (b) would result in "excessive compensation" in light of the injured worker's actual employment record, *Duncanson-Harrelson Co. v. Director, OWCP*, 686 F.2d 1336, 1342 (9th Cir. 1982), *vacated on other grounds*, 462 U.S. 1101 (1983); or when there is insufficient evidence in the record to enable the ALJ to make an accurate calculation under sections 10(a) and (b), *id.*

Id., 366 F.3d at 1050-1051, 38 BRBS at 53-54(CRT).

In rejecting the parties' Section 10(a) calculations, the administrative law judge applied Section 10(c) because claimant received a wage increase shortly before his injury. The administrative law judge cited the Board's decision in *Le*, 18 BRBS 175, for the proposition that average weekly wage should be calculated pursuant to Section 10(c) under these circumstances. In *Le*, the Board affirmed the administrative law judge's calculation of average weekly wage under Section 10(c), rather than Section 10(a), using the employee's new, higher hourly rate multiplied by the number of hours the employee worked in the year preceding his injury, noting the wide latitude afforded the fact-finder under Section 10(c). *Id.*, 18 BRBS at 177.

Le, however, was decided well before *Matulic*, and, moreover, the purpose of using Section 10(c) in that case was to give the claimant the benefit of the higher earnings lost due to the employee's work-related death. In this case, the use of Section 10(c) resulted in a lower average weekly wage than either party proposed under Section 10(a). *See* n.8, *supra*. While a Section 10(c) calculation might, as the administrative law judge concluded, result in the most accurate assessment of claimant's earning capacity at the time of injury, this consideration is not a basis for departing from *Matulic* in view of the Ninth Circuit's admonitions that Section 10(a) is presumptively applicable if the necessary data is in the record and that mere overcompensation is not a basis for utilizing Section 10(c). *See Castro*, 401 F.3d at 977, 39 BRBS at 23(CRT); *Price*, 366 F.3d at 1050-1051, 38 BRBS at 53-54(CRT). As the administrative law judge did not provide a legally sound basis for using Section 10(c) rather than Section 10(a), we hold that *Matulic* is applicable in this case because claimant worked 84 percent of his available work days. *Castro*, 401 F.3d at 977, 39 BRBS at 23(CRT). The parties agree that claimant was a five-day per week employee who worked substantially the whole of the year preceding his work injury, and the administrative law judge acknowledged that the record contains the wage information necessary to render the appropriate calculation

required by Section 10(a) of the Act. Therefore, we remand the case for recalculation of claimant's average weekly wage pursuant to Section 10(a) of the Act.[11]

Accordingly, the administrative law judge's award of temporary total disability benefits from May 27 through December 8, 2008, and June 11, 2009 through February 21, 2011, is modified to reflect claimant's entitlement to permanent total disability benefits during those periods. Claimant is entitled to cost-of-living adjustments, pursuant to Section 10(f), for all periods during which he receives permanent total disability compensation. The administrative law judge's average weekly wage calculation is vacated, and the case remanded for the administrative law judge to recalculate in accordance with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur:

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JONATHAN ROLFE
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, concurring and dissenting:

[11] In his Order Denying Motion for Reconsideration, the administrative law judge, presuming that "the rule from *Matulic*" applies to a Section 10(c) calculation, alternatively calculated claimant's average weekly wage as $688.79 based upon the assumption that claimant worked 260 days. *See* Order Denying Mot. for Recon. at 5 n.1. As this calculation does not comply with the specific requirements of Section 10(a), it cannot establish claimant's average weekly wage. In this respect, we note that the claimant's average daily wage is computed with reference to the "days so employed," which the parties agree was 218 in this case. *Trachsel v. Rogers Terminal & Shipping Corp.*, 597 F.3d 947, 43 BRBS 73(CRT) (9th Cir. 2009).

I concur with my colleagues' determination that in accordance with *Misho v. Global Linguist Solutions*, 48 BRBS 13 (2014), the administrative law judge's award of temporary total disability compensation during the periods of recovery following claimant's two knee replacement surgeries must be vacated and modified to reflect claimant's entitlement to permanent total disability compensation during these periods.

I additionally agree with my colleagues that, on the facts of this case, the administrative law judge erred in calculating claimant's average weekly wage pursuant to Section 10(c) of the Act, 33 U.S.C. §910(c). As this case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit, that court's decision in *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 48(CRT) (9th Cir. 1998) mandates that Section 10(a) must be used in this case to calculate claimant's average weekly wage. I disagree, however, with my colleagues' decision to remand this case for the administrative law judge to calculate claimant's average weekly wage. The parties in their briefs to the Board have agreed that $652.20 represents claimant's average weekly wage at the time of his injury, pursuant to Section 10(a). *See* Cl. Br. at 17; Emp. Resp. Br. at 6; Cl. Reply Br. at 4-5. Thus, I would modify the administrative law judge's decision to reflect an average weekly wage of $652.20.

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GREG J. BUZZARD
Administrative Appeals Judge