U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 17-0662

JULIA A. ENGBLOM	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GEORGIA-PACIFIC, LLC	)	
	)	DATE ISSUED: July 31, 2018
and	)	
	)	
ACE AMERICAN INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

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

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

Stephen E. Verotsky (Sather, Byerly & Holloway, LLP), Portland, Oregon, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2015-LHC-01864; 2015-LHC-01865; 2015-LHC-01866) of Administrative Law Judge Christopher Larsen 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).

Claimant started working for employer in 2001 as a utility worker. She became a barge loader in 2007, which involved driving a forklift up and down ramps. This work required her to twist her head and back to see behind her. Tr. at 14-16, 33, 36. The forklift did not have a suspension system.

On June 15, 2012, claimant suffered a neck strain when her forklift struck a metal plate, causing her to stop abruptly. Tr. at 43. She missed some time from work as a result of this incident, but could not recall how much. *Id.* at 45.

After claimant returned to work, she reported worsening lower back and lower extremity pain.[1] In May 2013, Dr. Baxter examined claimant and stated she suffered from a persistent cervical and thoracic strain as a result of the work incident on June 15, 2012, but that her lower back strain had resolved. CX 3; EX 8 at 17-18. Claimant also was examined by Dr. Leadbetter on February 19, 2014, who concluded claimant had reached maximum medical improvement and could return to work without restrictions. EX 10 at 9-11. He diagnosed claimant with multilevel spondylosis of the lumbar and cervical spines, which he opined was due to degenerative arthritis and not caused by the June 2012 accident. *Id.* at 30-31.

On September 11, 2014, claimant suffered a second injury at work when she tripped and fell and landed on her left hand, fracturing her left ring finger.[2] Claimant was eventually diagnosed with carpal tunnel syndrome and underwent a left carpal tunnel release. EX 26 at 69. Employer paid claimant temporary total disability benefits from September 12, 2014 to May 14, 2015.[3] EX 15.

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[1] Claimant began suffering from back pain in 2007 and underwent a series of injections from Dr. Sandquist, who noted that claimant would likely need an L4-5 fusion in the future. EXs 2; 4. Her back pain appears to have worsened in July 2012 so that claimant returned to see Dr. Sandquist after more than a year between visits. EX 6.

[2] Claimant also alleged she injured both knees and her left shoulder in this fall, but she did not pursue a claim for these injuries. *See* EX 13.

[3] The administrative law judge's supposition that these benefits were paid for claimant's back injury, *see* Decision and Order at 13-14, is not borne out by the record. Claimant had not yet claimed a back injury at the time employer instituted payments on September 24, 2014. *See* EX 15. It is apparent from the record that these payments were for claimant's hand injury. *See* EXs 11-20, 22-24, 25-28, 32.

Claimant also suffered increased back symptoms after she stopped working on September 11, 2014. She returned to Dr. Baxter on February 16, 2015, for back pain, who referred her to Dr. Adler. Dr. Adler diagnosed claimant with spondylolisthesis with spinal stenosis, compression at L4-5 and sciatica; he recommended surgery. CX 13. Claimant underwent spinal fusion surgery on April 11, 2015. CX 17. Since then, claimant testified that she has suffered pain in her right buttock, numbness in her right foot, and "drag" in her leg. Tr. at 54. On May 16, 2015, Dr. Adler released claimant to modified work, restricting her from lifting more than 15 pounds, operating machinery, pushing or pulling, and from working more than eight hours. CX 18. Claimant testified that she is unable to return to work because of her back pain and that in order to work, she would have to take narcotics, which would make it impossible for her to drive. Tr. at 65. She also stated that her foot drag would negatively affect her ability to drive a forklift. *Id.* at 65-66.

Claimant filed claims for benefits for the 2012 cervical injury and the September 11, 2014, injury to her left hand.[4] On April 23, 2015, claimant filed a separate claim for a cumulative back injury, with a date of injury of September 11, 2014, that being her date of last employment. EX 30. Employer specifically controverted this latter claim. EX 28.

The administrative law judge found claimant established a prima facie case that her cervical and lumbar injuries are work-related. Decision and Order at 9. The administrative law judge found that employer failed to rebut the Section 20(a) presumption with regard to the cervical spine injury. *Id.* at 10. He concluded that employer rebutted the Section 20(a) presumption with respect to claimant's lumbar spine condition, but on weighing the evidence as a whole, claimant established that her lumbar condition is work-related. *Id.* at 12.

The administrative law judge found that claimant reached maximum medical improvement for her cervical spine injury on February 19, 2014, but that she did not establish any economic disability due to this 2012 injury. Decision and Order at 13. With respect to claimant's lumbar injury, the administrative law judge found that claimant made a prima facie case of total disability, first because of her spinal fusion surgery on April 11, 2015 and then because Dr. Adler restricted claimant from operating machinery and working for more than eight hours. Decision and Order at 15; CX 18. In addition, Dr. Baxter restricted claimant from operating heavy machinery, which precludes her from returning to her usual work of operating a forklift. CX 25.

The administrative law judge found that employer failed to establish the availability of suitable alternate employment. Decision and Order at 16. He addressed the labor market

[4] Claimant did not pursue additional benefits for her hand injury. Decision and Order at 9 n.2.

survey submitted by employer, which listed 13 positions, and noted that claimant applied to three of the jobs, was rejected by two of them, and testified that she never heard back from the third one. *Id.* The administrative law judge also rejected a number of other positions as unsuitable for claimant based on her work experience and abilities, leaving only three positions that were allegedly suitable for claimant. The administrative law judge concluded that three positions are not sufficient to establish suitable alternate employment and that therefore claimant is totally disabled. He found that claimant's lumbar condition became permanent on December 28, 2014 and awarded claimant temporary total disability benefits from September 12, 2014 through December 28, 2015 and ongoing permanent total disability benefits from December 29, 2015. *Id.* at 14. He also held employer liable for claimant's back surgery. 33 U.S.C. §907(a).

Employer appeals the administrative law judge's findings that claimant's lumbar condition is work-related and that it failed to establish suitable alternate employment.[5] Claimant filed a response brief, urging affirmance.

Employer asserts the administrative law judge erred in not giving sufficient weight to Dr. Sandquist's opinion that claimant's lower back symptoms stemmed from the natural progression of prior motor vehicle accidents and were aggravated by standing and walking but relieved by sitting down, contrary to claimant's claim that driving aggravated her condition. Employer also contends there is insufficient evidence to establish that claimant's work hastened her need for spinal surgery.

A claimant may invoke the Section 20(a) presumption that an injury is work-related by establishing a prima facie case that: (1) she suffered a harm; and (2) an accident occurred or a workplace condition existed that could have caused, aggravated, or accelerated the harm. *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010). If the claimant establishes a prima facie case, the burden shifts to the employer to rebut the presumption with substantial evidence that is "specific and comprehensive enough to sever the potential connection between the disability and the work environment." *Ramey v. Stevedoring Services of America*, 134 F.3d 954, 959, 31 BRBS 206, 210(CRT) (9th Cir. 1998). If employer rebuts the presumption, it falls out of the case and the administrative law judge must weigh the evidence as a whole to determine if the injury is work-related, with claimant bearing the burden of persuasion. *Ogawa*, 608 F.3d at 651, 44 BRBS at 50(CRT).

The administrative law judge found that claimant invoked the Section 20(a) presumption for her lumbar spine injury based on the opinions of Drs. Baxter and Adler

[5] Employer does not challenge the administrative law judge's finding that claimant's cervical injury is work-related.

that claimant's work as a forklift driver contributed to the worsening of her lower back condition.[6] Decision and Order at 9. He further concluded that employer rebutted the presumption based on claimant's long history of back problems, Dr. Sandquist's 2010 opinion that claimant eventually would require surgery, and the opinions of Drs. Kitchell and Leadbetter that claimant's work did not affect her lumbar spondylosis. *Id.* at 10. These findings are not contested on appeal. On weighing the evidence as a whole, he found that claimant established that her lumbar condition is work-related. *Id.* at 12. He gave greater weight to the opinions of Drs. Baxter and Adler that claimant's work activities contributed to the worsening of her lumbar spine condition, as they are claimant's treating physicians and more familiar with her condition. *Id.* at 11.

The administrative law judge acknowledged claimant's long-standing back problems and noted employer's contention, based on the opinions of Drs. Sandquist, Kitchell and Leadbetter, that claimant's back surgery was necessitated by the natural progression of her degenerative conditions. Decision and Order at 11-12. The administrative law judge also noted that Drs. Kitchell and Leadbetter explicitly stated that claimant's work as a forklift driver did not contribute to her lumbar condition and that her need for surgery was not hastened by her working conditions. CX 19 at 10; EX 43. The administrative law judge chose to rely, however, on the opinions of claimant's treating physicians, Drs. Baxter and Adler, that claimant's work as a forklift driver aggravated her lower back condition, increased her symptomatology, and contributed to the need for surgery. CXs 16, 24. The administrative law judge also noted that Dr. Kitchell acknowledged that driving a forklift and the twisting required for it increased the risk of lower back pain, *see* EX 39 at 121, and Dr. Leadbetter testified that operating a forklift over uneven surfaces can increase pain in the lumbar and cervical spine, *see* CX 31 at 14. The administrative law judge accepted claimant's testimony that the increase in symptoms, which Drs. Kitchell and Leadbetter acknowledged could be caused by her working conditions, led claimant to undergo surgery. Decision and Order at 12. He concluded that although claimant's work may not have accelerated her underlying degenerative conditions, it is sufficient under the Act that her work increased her symptoms and necessitated surgery. *Id.*

We reject employer's contention that the administrative law judge's finding on the record as a whole is not supported by substantial evidence. The administrative law judge

[6] Employer also contends the administrative law judge erred in stating that the 2014 "fall affected [claimant's] back." Decision and Order at 4; Emp. Br. at 12-13. Employer is correct that the basis for claimant's back injury claim was cumulative trauma and not the 2014 fall. *See* EX 30. This error is harmless, as the administrative law judge did not invoke the Section 20(a) presumption on this basis. *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010).

was well within his discretion to give greater weight to the opinions of Drs. Baxter and Adler.[7] *See Rhine v. Stevedoring Services of America*, 596 F.3d 1161, 44 BRBS 9(CRT) (9th Cir. 2010). It is well-established that an administrative law judge is not required to accept the opinion of any particular medical examiner but is entitled to independently weigh the evidence and make reasonable inferences therefrom. *See Ogawa*, 608 F.3d at 650, 44 BRBS at 49(CRT). The Board may not reweigh the evidence. *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 25 BRBS 85(CRT) (9th Cir. 1991). As the administrative law judge's finding that claimant established her lumbar condition for which she required surgery is related to her employment as a forklift driver is supported by substantial evidence, it is affirmed. *Ogawa*, 608 F.3d at 651, 44 BRBS at 50(CRT). As employer does not contest the necessity of the back surgery, we affirm the conclusion that employer is liable for the medical care of claimant's lumbar injury. 33 U.S.C. §907(a).

We next turn to employer's contention that the administrative law judge erred in concluding it did not establish the availability of suitable alternate employment. Where, as here, claimant has demonstrated that she is unable to return to her usual job, the burden shifts to employer to demonstrate that suitable alternate employment is available in claimant's community. *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991). It is employer's burden to show the realistic availability of jobs suitable for claimant given her age, education, and vocational and medical capabilities, and that she could secure if she diligently sought the jobs. *See Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988). If employer satisfies this burden, claimant may rebut it with evidence of a diligent yet unsuccessful job search. *See Kalama Services, Inc. v. Director, OWCP*, 354 F.3d 1085, 37 BRBS 122(CRT) (9th Cir.), *cert. denied*, 543 U.S. 809 (2004).

The administrative law judge concluded that employer did not establish the availability of suitable alternate employment. Decision and Order at 16. He rejected four positions as unsuitable because they involved customer service, in which claimant has no experience, and a number of other positions as unsuitable for claimant's physical abilities and skills.[8] *See id.* He noted that claimant testified she applied to three positions, was not

[7] The administrative law judge acknowledged that Drs. Baxter and Adler's opinions are merely their signatures affixed to statements written by claimant's counsel following his discussions with them. CXs 16, 24. The administrative law judge stated, "This Court has no reason to believe [claimant's] physicians did not read what they signed or that the signed concurrences are not an accurate reflection of their opinions." Decision and Order at 11 n.3.

[8] The administrative law judge found the position at PeaceHealth St. John's Medical Center unsuitable because it required one year of medical office experience and knowledge of medical terminology which claimant does not have. Decision and Order at 16. He

hired for two of them and did not hear back from the third. The administrative law judge concluded that the three remaining jobs are insufficient to meet employer's burden to establish suitable alternate employment and that, therefore, claimant is totally disabled.[9] *See id.* at 17.

Employer challenges the finding that it did not establish suitable alternate employment, arguing that the administrative law judge erred in excluding a number of jobs as unsuitable. Employer also contends that the administrative law judge's determination that it cannot establish suitable alternate employment with only three positions is unsupported by the law.

We reject employer's contention that the administrative law judge erroneously excluded four customer service jobs. The prospective employers preferred customer service experience, EX 44, which claimant does not possess. Tr. at 69; *see also* EX 44. An administrative law judge is required to consider not only claimant's education and vocational background but also whether claimant is likely to be hired if she diligently sought the job. *Hairston*, 849 F.2d 1194, 21 BRBS 122(CRT). The administrative law judge permissibly concluded that claimant's lack of customer service experience made such jobs realistically unavailable to her. *See Ogawa*, 608 F.3d at 653, 44 BRBS at 51(CRT). We therefore affirm the administrative law judge's finding that the customer service jobs are unsuitable for claimant.

We also reject employer's challenge to the finding that the Cascadia job was unavailable. Employer identified an opening for a production scheduler in its April 29,

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rejected the position with G4S Security Associates because it requires a "state unarmed Security Guard license," which claimant does not have and employer did not establish claimant would be able to obtain. *Id.* He rejected the Astoria Animal Hospital position as unsuitable because it required occasional lifting of 25 pounds, whereas Dr. Adler restricted claimant from lifting more than 15 pounds. He also rejected the Tongue Point Job Corps position as it required claimant to pass an Excel and typing test, which it was unclear claimant could pass. *Id.* at 16-17.

[9] *But see* n.3, *supra*. The administrative law judge has not supported his finding that claimant's disability due to her back injury commenced on September 12, 2014, with any evidence other than his mistaken supposition that employer commenced benefits for this injury on that date. Any error is harmless, however, as claimant is not entitled to simultaneous total disability awards for two injuries. *See, e.g., Fenske v. Service Employees Int'l, Inc.*, 835 F.3d 978, 50 BRBS 71(CRT) (9th Cir. 2016); *Rupert v. Todd Shipyards Corp.*, 239 F.2d 273 (9th Cir. 1956).

2016 labor market survey. EX 44 at 208ac. Sometime before the May 18, 2016, formal hearing, claimant applied for the Cascadia job, but was informed the position was filled. Tr. at 68.[10] Given the brief time between the survey and claimant's being informed the job was filled—at most 19 days—the administrative law judge permissibly concluded that this job was not realistically available to claimant. *Ogawa*, 608 F.3d at 653, 44 BRBS at 51(CRT) (administrative law judge entitled to draw reasonable conclusions from the evidence); *cf. Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988) (employer satisfies burden by showing the availability of jobs during period when claimant was able to work).

However, we agree with employer that the administrative law judge's conclusion that the remaining three jobs are insufficient to establish suitable alternate employment cannot be affirmed. The Board has held that an employer may establish suitable alternate employment by identifying one specific job opportunity along with evidence of similar available jobs in the community. *Berezin v. Cascade General, Inc.*, 34 BRBS 163 (2000); *see also P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116(CRT), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991); *but see Lentz v. Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988) (holding that one job is legally insufficient to establish suitable alternate employment). Moreover, in discussing the suitable alternate employment framework, the Ninth Circuit, within whose jurisdiction this case arises, stated, "Once the employer has pointed to one or more possible positions, the ALJ makes a factual finding as to whether the claimant is able to perform those jobs." *Ogawa*, 608 F.3d at 652, 44 BRBS at 51(CRT). Thus, a labor market survey identifying three jobs may be sufficient to establish suitable alternate employment. We therefore vacate the administrative law judge's finding that employer did not establish suitable alternate employment. On remand, we direct the administrative law judge to reconsider the suitability of the three remaining jobs to determine if employer established suitable alternate employment. If the administrative law judge finds that employer established the availability of suitable alternate employment, he must address whether claimant rebutted the showing with evidence of a diligent, yet unsuccessful job search.[11] *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT)

[10] Claimant read the text of the email she received informing her the job was filled. Tr. at 68.

[11] As the administrative law judge found that suitable alternate employment was not established, he did not err in not addressing claimant's diligence in seeking employment, contrary to employer's contention. Claimant's diligence in seeking employment is not relevant unless employer first demonstrates the availability of suitable alternate employment. *Kalama Services, Inc. v. Director, OWCP*, 354 F.3d 1085, 37 BRBS 122(CRT) (9th Cir.), *cert. denied*, 543 U.S. 809 (2004).

(2d Cir. 1991). If claimant is only partially disabled, the administrative law judge must determine claimant's post-injury wage-earning capacity. *See* 33 U.S.C. §908(c)(21), (h).

Accordingly, the administrative law judge's finding that employer did not establish suitable alternate employment is vacated and the case is remanded for further proceedings consistent with this opinion. In all other respects, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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GREG J. BUZZARD
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge