U.S. Department of Labor

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

BRB No. 17-0679

REBECCA IMEL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TRIPLE CANOPY	)	
	)	DATE ISSUED: July 11, 2018
and	)	
	)	
STARR INDEMNITY & LIABILITY COMPANY	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

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

Ronald S. Webster (Webster Law Group, P.A.), Orlando, Florida, for claimant.

Robert N. Popich (Mouledoux, Bland, Legrand & Brackett, LLC), New Orleans, Louisiana, 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-LDA-00836) of Administrative Law Judge Monica Markley 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 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 began working for employer as an administrative and logistics security specialist in Iraq in 2009. Tr. at 36-37. Her position required her to work in a warehouse, use heavy equipment, and move boxes. *Id.* at 43. Claimant testified that she went on leave on November 16, 2011 and would normally have returned to work in January 2012, but because of a delay with Iraq's visa processing, she was not able to return to Iraq until May 2012.

Upon her return to Iraq, claimant worked in "Administrative and Logistics," in which she "took care of all the vehicles" and "issue[d] gear to [Department of State] employees." Tr. at 51. On January 31, 2013, claimant suffered an accident in which she slipped off the hood of a land cruiser and caught her foot on something under the vehicle. *Id.* at 53. She testified that her foot hurt and she told employer about it immediately because she did not want to "be running around anymore." *Id.* Claimant received medical treatment a few days later when the pain did not improve. Claimant testified that the clinic told her that three toes were probably broken and that she could "buddy tape them," or that she could fly to Baghdad to get x-rays taken but claimant chose not to as "it's a really expensive flight." *Id.* at 54.

After the accident, claimant worked primarily at desk jobs but continued to work because she thought her toes would heal on their own. Tr. at 54. A few months later, however, the pain in her foot had not improved. She returned to the U.S. and Dr. Schweger diagnosed fractures of claimant's 2nd and 4th toes and an effusion of her metatarsophalangeal joint. *Id*. at 55-56; EX 6. Dr. Schweger initially recommended a conservative treatment of steroid injections. Claimant's condition did not improve and she underwent surgery in September 2013. Afterward, claimant continued to experience pain and, approximately one year later, underwent a second surgery to remove the screw inserted during the first surgery. Tr. at 57.

Claimant enrolled in college classes at Central Oregon Community College after her first surgery, seeking a degree in Aviation. Tr. at 87-88. After attending college off and on for almost two years, she stopped attending because she was having a hard time with pain management and walking from class to class was too painful. *Id.* at 64.

Claimant worked for a few months for Leading Edge Aviation, where she drove fuel trucks. Tr. at 62, 87, 90. She testified that the job also required walking. *Id.* at 92. She stated that she resigned from this position because of her increasing pain but did not mention the pain in her resignation letter because it was "none of Leading Edge's business." *Id.* at 93, 97; EX 22 at 9.

Claimant has been to a number of different doctors to receive treatment for her foot, including Dr. Hinz, an orthopedic surgeon, who performed a third operation on claimant's right foot in April 2016. CX 29 at 5-6. Claimant also was seen by Dr. Paluck from September 2015 through January 2016; he stated that claimant was limited from walking or standing for any prolonged period. EX 19 at 12. Dr. Paluck noted that as of January 2016, claimant had not reached maximum medical improvement, but could engage in sedentary employment. *Id.* at 34.

Claimant sought benefits under the Act. The administrative law judge found that claimant invoked the Section 20(a) presumption that her foot condition was caused by her accident at work.[1] Decision and Order at 33. The administrative law judge further found that employer did not produce substantial evidence to rebut the presumption. *Id.* at 35. In weighing the evidence as a whole, the administrative law judge concluded that claimant's foot condition is the result of her workplace injury. *Id.*

The administrative law judge found that claimant has not reached maximum medical improvement and that her disability remains temporary. Decision and Order at 41-42. The administrative law judge further concluded that claimant established a prima facie case of total disability because she is unable to return to her usual employment. *Id.* at 42. The administrative law judge credited the opinions of Drs. Schweger, Hinz, and Paluck that claimant cannot return to her usual employment, as well as claimant's credible testimony that the pain in her right foot would not permit her to return to her usual work. *Id.* at 44.

The administrative law judge noted that employer did not present additional evidence of suitable alternate employment but argued only that claimant's job at Leading Edge demonstrated that suitable work was available to claimant and that she resigned due to school and family commitments, not because of her work injury. Decision and Order at

[1] The administrative law judge stated that the "initial determination at the District Director's level was made in Jacksonville, Florida" and concluded that the case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. Decision and Order at 2. Employer argues that the administrative law judge erred in this determination as claimant lives in Oregon, the informal conference was held in Seattle, and the Decision was filed and served by the district director in Seattle. We agree with employer that the administrative law judge erred in this regard. This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit as the Seattle district director filed and served the administrative law judge's decision. 42 U.S.C. §1653(b); *McDonald v. Aecom Technology Corp.*, 34 BRBS 45 (2011). We conclude, however, that the administrative law judge's error is harmless as there is no difference in the applicable law in this case between the Eleventh and Ninth Circuits.

47-48. The administrative law judge rejected employer's argument that the job at Leading Edge established the availability of suitable employment, crediting claimant's testimony that she resigned her Leading Edge job because of her foot pain and her explanation for why she did not mention this in her resignation letter. The administrative law judge accordingly concluded that claimant has been temporarily totally disabled from March 20, 2013, the first day on which claimant stopped receiving pay for her position. *Id.* at 48.

The administrative law judge calculated claimant's average weekly wage under Section 10(c) as Sections 10(a) and (b) do not apply. The administrative law judge concluded that claimant's actual earnings in the 52 weeks prior to her injury do not reasonably represent her wage-earning capacity because she was unable to return to work in Iraq for an extended period due to issues beyond her control. Decision and Order at 51. The administrative law judge accordingly excluded the four-month period in 2012 in which claimant did not earn wages due to the visa processing delay and relied on the amount claimant was paid for the 26 weeks prior to her injury from June 1, 2012 to November 29, 2012. *Id.* at 52. The administrative law judge then doubled that amount to arrive at an average annual earning capacity of $110,399.84, and divided it by 52 to arrive at an average weekly wage of $2,123.07. Because this amount exceeds the maximum compensation rate, the administrative law judge found that claimant is entitled to the maximum compensation rate of $1,325.18 per week. 33 U.S.C. §906(b)(1).

On appeal, employer contends that the administrative law judge erred in finding that claimant is totally disabled and in calculating claimant's average weekly wage. Claimant filed a response brief, urging affirmance.

Where, as here, claimant has established a prima facie case of total disability because she is unable to return to her usual job due to her work injury, the burden shifts to employer to demonstrate that suitable alternate employment is available in the community. *Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994). If employer meets this burden, claimant's disability is, at most, partial. 33 U.S.C. §908(c), (e); *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988).

Employer challenges the administrative law judge's finding that claimant is entitled to temporary total disability benefits from March 20, 2013. Employer specifically contends that the administrative law judge should have found claimant was only partially disabled from December 2014 to March 30, 2015 while she was employed and earning wages at Leading Edge.

We reject this contention. The administrative law judge found that the job at Leading Edge was not suitable for claimant. He credited claimant's testimony that the job caused increased foot pain. Decision and Order at 47; Tr. at 62, 92, 97. The administrative

law judge accepted claimant's explanation for why her resignation letter to Leading Edge did not mention her injury,[2] and found that other evidence supports claimant's testimony that she stopped working for Leading Edge because of her pain and not her school commitments.[3] Decision and Order at 47-48. The administrative law judge was well within her discretion to credit claimant's testimony that she stopped working due to pain. *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that the "brief job" at Leading Edge was not suitable for claimant and did not establish suitable alternate employment. *See Armfield v. Shell Offshore, Inc.*, 30 BRBS 122 (1996); *see also Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994). As employer presented no other evidence of suitable alternate employment, we also affirm the administrative law judge's award of temporary total disability benefits.

We also reject employer's contention that the administrative law judge erred by not basing the calculation of claimant's average weekly wage on her earnings in the 52 weeks preceding her injury, including the four-month period in which claimant was not able to return to work due to the visa delay. Section 10 of the Act provides for the calculation of a claimant's average weekly wage. Section 10(c) is a catch-all provision when Section 10(a) or (b) cannot reasonably and fairly be applied.[4] 33 U.S.C. §910(c); *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998). Under Section 10(c), an administrative law judge is afforded broad discretion to arrive at a sum that "shall reasonably represent the annual earning capacity of the injured employee." 33 U.S.C. §910(c); *Rhine v. Stevedoring Services of America*, 596 F.3d 1161, 44 BRBS 9(CRT) (9th Cir. 2010).

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[2] Claimant's resignation letter to Leading Edge stated that due to the increasing number of hours she was required to work, she was resigning because of school and family commitments. EX 22 at 9. The administrative law judge credited claimant's testimony that she "left out the pain [from the letter] because it was none of Leading Edge's business." Tr. at 97. She testified that her supervisor knew of her painful condition but that the head of the company did not need to know that. *Id.*

[3] The administrative law judge found that the medical evidence supports claimant's testimony that the pain from her injury was exacerbated with walking and standing. Decision and Order at 48; *see* EX 19 at 12-15.

[4] Claimant was neither a five-day nor six-day a week worker so Section 10(a) is not applicable. There is no evidence of the wages of other employees in the same class as claimant, so Section 10(b) is not applicable.

The administrative law judge calculated claimant's average weekly wage under Section 10(c). She found that the wages claimant actually earned in the 52 weeks prior to her injury do not reasonably represent her annual earning capacity because of the four-month period in which claimant was unable to return to work due to the visa delay. Decision and Order at 51. The administrative law judge concluded that if claimant had been able to return to her position in Iraq, her annual earnings for the year preceding her injury would have been higher than her actual earnings. The administrative law judge therefore excluded the four-month period in 2012 in which claimant did not earn wages and relied on the amount claimant was paid for the 26 weeks prior to her injury from June 1, 2012 to November 29, 2012. The administrative law judge then doubled that amount to arrive at an average annual earning capacity of $110,399.84 and an average weekly wage of $2,123.07. *Id.* at 52.

The administrative law judge rationally excluded the four-month period from January through May 2012 in which claimant was unable to return to work. Calculations of a claimant's average weekly wage under Section 10(c) permit an administrative law judge to take into account time lost due to "periods of involuntary non-work." *Hawthorne v. Director, OWCP*, 844 F.2d 318, 320, 21 BRBS 22(CRT) (6th Cir. 1988) (stating that an estimation of annual earning capacity was unfair where an administrative law judge did not consider what claimant would have earned but for a labor strike); *see also Browder v. Dillingham Ship Repair*, 24 BRBS 216, *aff'd on recon*, 25 BRBS 88 (1991) (affirming an administrative law judge's decision to include wages claimant would have earned for seven weeks, but for his mother's death as it was a non-recurring event similar to a strike). The evidence in the record supports the administrative law judge's finding that claimant's actual earnings in the 52 weeks prior to her injury do not reflect her annual earning capacity prior to the injury and that this depression in earnings was due to an event outside of claimant's control. Claimant testified that she would have returned to work and was willing and able to do so during the four-month period except for the visa processing issues that delayed her return to Iraq. Tr. at 46-49. The administrative law judge's decision to exclude the four-month period of involuntary unemployment is rational, supported by the evidence, and in accordance with the law, and therefore, is affirmed. *Hawthorne,* 844 F.2d 318, 21 BRBS 22(CRT).

We also affirm the administrative law judge's calculation of claimant's average weekly wage. The administrative law judge's reliance on the wages claimant earned in the 26-week period from June 1, 2012 to November 29, 2012 in which claimant actually worked is a reasonable basis for arriving at the amount claimant would have earned in the 52 weeks prior to her injury. *See James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000). The administrative law judge noted that claimant was paid for 76 percent of the total days during that period, which is consistent with claimant's testimony concerning her work schedule. Decision and Order at 52; Tr. at

41. Because the administrative law judge's calculation of claimant's average weekly wage reasonably represents her annual earning capacity at the time of injury, it is affirmed. *Rhine*, 596 F.3d at 1162, 44 BRBS at 10(CRT); *Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1987).

Accordingly, 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