U.S. Department of Labor

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

BRB No. 18-0282

JOHN SCARBROUGH Claimant-Petitioner v. SHANNON WAGNER dba SEATTLE MARINE CONSTRUCTION and SEABRIGHT INSURANCE COMPANY Employer/Carrier-Respondents	)	DATE ISSUED: 07/09/2019 ORDER on MOTION for RECONSIDERATION

Claimant has filed a timely Motion for Reconsideration of the Board's decision in *Scarbrough v. Shannon Wagner* [*Scarbrough II*], BRB No. 18-0282 (Mar. 11, 2019) (unpub.). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. Claimant contends the Board erred in affirming the administrative law judge's denial of disability benefits from February 7 through March 1, 2012, and from July 26, 2012 through July 15, 2013. Claimant also asserts he is entitled to interest on the awarded Section 14(e) assessment, 33 U.S.C. §914(e), from the date employer incurred liability for the awarded compensation, rather than, as the Board held, from the date of the administrative law judge's decision. Employer has not responded to claimant's motion.

In its prior decisions, the Board addressed claimant's challenges to the administrative law judge's denial of disability benefits for these periods. In its first decision, the Board "fully addressed the issues of claimant's ability to perform his usual work up until March 1, 2012, why he left his job with Crestline, and whether he is entitled to any disability benefits prior to his May 7, 2012 right knee surgery . . . which constitutes

the law of the case, , ."[1] *Scarbrough II*, slip op. at 4 (citing *Scarbrough v. Shannon Wagner*, BRB No. 15-0199 (Feb. 23, 2016) (unpub.), slip op. at 3-4). Additionally, claimant's contentions regarding the administrative law judge's denial of benefits from July 26, 2012 through July 16, 2013, are identical to those addressed and rejected by the Board in its second decision. *Scarbrough II*, slip op. at 4-5. Claimant has not identified any error in the Board's consideration of this issue.[2] Accordingly, we reject claimant's contentions.

Claimant's contention that the Board erred by not awarding pre-judgment interest on the Section 14(e) assessment awarded in this case is likewise without merit. The Board held, "for the reasons expressed" in *Robirds v. ICTSI Oregon, Inc.*, 52 BRBS 79, 80-84 (2019) (en banc) (Boggs, J., concurring), claimant is entitled to post-judgment interest on the awarded Section 14(e) assessment. *Scarbrough II*, slip op. at 10. In *Robirds*, the Board held that "interest on a Section 14(e) payment is to be awarded on a post-judgment basis, to be calculated from the date the administrative law judge enters the Section 14(e) award," *Robirds*, 52 BRBS at 84. The claimant in *Robirds* moved for reconsideration en banc of the Board's decision, challenging its award of post-judgment, rather than pre-judgment, interest on the Section 14(e) additional compensation. The Board summarily denied reconsideration in *Robirds* on May 29, 2019, after claimant filed his motion for reconsideration in this case. Consequently, we reject claimant's request to modify the Board's decision to reflect his entitlement to pre-judgment interest on the awarded Section 14(e) assessment. *See also Sea-Land Service, Inc. v. Barry*, 41 F.3d 903, 29 BRBS 1(CRT) (3d Cir. 1994) (awarding post-judgment interest on late Section 14(f) payment).

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[1]The Board also stated "claimant's suggestion that the administrative law judge and Board did not discuss relevant evidence regarding his ability to perform his usual work during the period in question is incorrect." *Scarbrough II*, slip op. at 4 n.3. The Board held "substantial evidence supports the administrative law judge's conclusion that claimant stopped working at that time because the project ended, and not because of his physical limitations." *Id.* Moreover, as the goal of an average weekly wage calculation is to assess claimant's annual earning capacity, it is not incongruous, as claimant suggests, to include periods of unemployment in the calculation, yet deny benefits for the same periods. Claimant is entitled to benefits only if his inability to work is work-related.

[2]That claimant applied for and did not obtain work during this period does not, by itself, establish his prima facie case of total disability. Claimant failed to satisfy his burden of establishing that he could not have returned to his regular or usual employment due to his work-related injury during this period. *See Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988); *Gacki v. Sea-Land Service, Inc.*, 33 BRBS 127 (1999).

Accordingly, claimant's motion for reconsideration is denied. 20 C.F.R. §802.409. The Board's prior decision is affirmed, and the case is remanded to the district director to make all necessary calculations including the calculation of the Section 14(e) assessment and for post-judgment interest thereon.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge[3]

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[3]Chief Administrative Appeals Judge Boggs is substituted on the panel of this case due to the retirement of Chief Administrative Appeals Judge Betty Jean Hall. 20 C.F.R. §802.407(a).