U.S. Department of Labor

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

BRB No. 14-0369

ROBERT J. MATSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PACIFIC NORTHERN ENVIRONMENTAL	)	DATE ISSUED: June 8, 2015
	)	
and	)	
	)	
ZURICH AMERICAN INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order on Remand Awarding Benefits and the Order Denying Motion for Reconsideration of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Neil J. Kohlman (Stephens & Grace), Metairie, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand Awarding Benefits and the Order Denying Motion for Reconsideration (2009-LHC-01074) of Administrative Law Judge Jennifer Gee 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).

This case is before the Board for a second time. To recapitulate, in her initial decision, the administrative law judge found that claimant is unable to resume his usual employment due to his work-related right leg injury, that employer established the availability of suitable alternate employment as of the date of its March 22, 2010 labor market survey, and that claimant's participation in a vocational rehabilitation program does not preclude his performance of suitable alternate employment. The administrative law judge awarded claimant temporary total disability benefits, 33 U.S.C. §908(b), from August 21, 2008 through March 4, 2009, permanent total disability benefits, 33 U.S.C. §908(a), from March 5, 2009 through March 21, 2010, and a scheduled award of permanent partial disability benefits based on a 50 percent permanent impairment of his right leg, 33 U.S.C. §908(c)(2), (19).

Claimant appealed, and employer cross-appealed, the administrative law judge's decision. *Matson v. Pac. N. Envtl.*, BRB Nos. 10-0624/A (Jul. 6, 2011) (unpub.). In its decision, the Board vacated the administrative law judge's finding that employer established the availability of suitable alternate employment and remanded the case for reconsideration of this issue. The Board modified the administrative law judge's award under the schedule, stating that if partial disability benefits are awarded on remand, claimant is entitled to receive benefits for the full $66^{2/3}$ percent of his average weekly wage for a period of 144 weeks. In all other respects, the administrative law judge's decision was affirmed. The Board denied employer's motion for reconsideration.

On remand, the administrative law judge found that employer established the availability of suitable alternate employment based on the "At Your Service" agent position at the Portland Marriott Hotel, which was identified in employer's labor market survey. Decision and Order on Remand at 6-7. The administrative law judge awarded claimant compensation for scheduled permanent partial disability for 144 weeks commencing on the date of the labor market survey, March 22, 2010. The administrative law judge again rejected claimant's contention that he was not able to work full-time while attending school 15 hours a week. *Id*. at 8-9. In her Order on Reconsideration, the administrative law judge rejected claimant's contentions that employer must show the availability of more than one specific job in order to establish the availability of suitable alternate employment and that claimant diligently but unsuccessfully sought suitable work. Order at 7. Thus, the administrative law judge denied claimant's motion for reconsideration.

On appeal, claimant challenges the administrative law judge's finding that employer established the availability of suitable alternate employment, contending that it is neither supported by substantial evidence nor in accordance with law. Employer responds, urging affirmance in all respects. Claimant filed a reply brief.

Claimant first contends that employer's showing of only one suitable job does not satisfy its burden of establishing the availability of suitable alternate employment. Once, as here, claimant establishes his inability to perform his usual work due to his work injury, the burden shifts to employer to establish the availability of alternate jobs claimant can perform, which, given claimant's age, education, and background, he could likely secure if he diligently tried. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980)*; see also Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991); *Hairston v. Todd Shipyards Corp*., 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988).

In her decision on remand, the administrative law judge rejected four of the five positions identified in employer's labor market survey, but found the At Your Service position suitable given claimant's physical and vocational abilities. Decision and Order on Remand at 6-8. On reconsideration, the administrative law judge extensively addressed, and rejected, claimant's contention that employer's showing of only a single position cannot establish the availability of suitable alternate employment.[1] Order at 2-7. She also found there likely was more than one At Your Service position available, and that each position could have fallen into one of three job categories,[2] because employer's vocational report mentioned three Marriott locations in the Portland area and provided statistics about the availability of similar jobs in the pertinent community,[3] *i.e.*, the

[1] In addition to discussing *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980), the administrative law judge noted and discussed the following decisions: *Duluth, Missabe & Iron Range Ry. Co. v. Director, OWCP*, 151 F.3d 1120, 32 BRBS 188(CRT) (8th Cir. 1998); *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996); *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988); *Lentz v. Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988); *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74(CRT) (4th Cir. 1984); *New Orleans* (*Gulfwide*) *Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *Diosdado v. John Bludworth Marine, Inc.*, No. 93-5422 (5th Cir. Sept. 19, 1994) (unpub.); *Berezin v. Cascade General, Inc.*, 34 BRBS 163 (2000); *Holland v. Holt Cargo Systems*, 32 BRBS 179 (1998); and *Vonthronsohnhaus v. Ingalls Shipbuilding, Inc.*, 24 BRBS 154 (1990).

[2] The administrative law judge noted that the suitable job could have fallen into the category of switchboard operator, information clerk or hotel/motel desk clerk. Order at 7 n.3; Tr. at 94-96.

[3] Specifically, Ms. Seyler's labor market survey included a table derived from the Washington State Employment Security Department Occupational Employment

Southwest Washington area. EXs 1 at 6; 4. The administrative law judge concluded from this evidence that there are suitable jobs similar to the specific At Your Service position available to claimant and that employer, therefore, established the availability of suitable alternate employment. Order at 7.

We reject claimant's contention that the showing of one specific job coupled with evidence of the availability of similar jobs during the period of employer's labor market survey is legally insufficient to satisfy employer's burden to show suitable alternate employment. In *Berezin v. Cascade General, Inc.*, 34 BRBS 163 (2000), the Board explained that the United States Court of Appeals for the Ninth Circuit's decision in *Bumble Bee*, 629 F.2d 1327, 12 BRBS 660, does not preclude a finding of suitable alternate employment based on the identification of one actual position in conjunction with evidence that similar work was generally available. The facts in *Berezin* are indistinguishable from those in this case. The administrative law judge in *Berezin* found that only one of the actual positions identified by the employer was suitable for the claimant, but that the employer also put forth credible evidence of the general availability of similar jobs during the periods the claimant was able to work. The administrative law judge's decision herein accords with *Berezin*. Therefore, we reject claimant's contention that the administrative law judge's finding of suitable alternate employment does not comport with law.

Claimant next challenges the administrative law judge's finding that the At Your Service position is vocationally suitable for him, alleging he has: no telephone answering skills; a typing speed of six words a minute with misspellings; and no computer or keyboarding skills.[4] Claimant further avers that the administrative law judge failed to discuss the opinion of Maureen Devine, the vocational counselor to whom the Office of Workers' Compensation Program (OWCP) referred claimant.[5] Ms. Devine testified that the jobs identified in employer's labor market survey are vocationally unsuitable for claimant.

Projection. This table listed a combined total of 89 average annual openings from 2007-2012 in these three job categories. EX 1 at 6; Tr. at 98.

[4] Claimant does not challenge the administrative law judge's finding that he could physically perform the job, which involves sitting at a desk except when working at the front desk.

[5] In its prior decision, the Board summarized Ms. Devine's testimony and remanded the case for the administrative law judge to discuss her opinion that claimant is functionally illiterate. *Matson*, slip op. at 4-6. On remand, the administrative law judge held another hearing at which Ms. Devine testified.

The administrative law judge found, based on the testimony and report of Carla Seyler, employer's vocational consultant, that the At Your Service position is vocationally suitable for claimant. Decision and Order on Remand at 7. Ms. Seyler stated that the job involves answering and directing phone calls and occasionally filling in at the front desk, such that the candidate must be able to read and write basic English and preferably have basic keyboard knowledge; however, a high school diploma or GED is not required. EX 1 at 4-5; Tr. at 94-96. Ms. Seyler testified that the job is suitable for claimant, as he had been very successful in his prior work, despite his educational limitations.[6] Tr. at 88-90; 97. The administrative law judge credited Ms. Seyler's opinion, and, in addition, found that claimant had applied for other jobs requiring similar skills through internet sites, demonstrating his belief that he was capable of such work. Decision and Order on Remand at 7; *see* Tr. II at 137; EX 6 at 6-7.

The administrative law judge discussed and quoted from Ms. Devine's testimony at the hearing on remand that claimant is functionally illiterate. Decision on Remand at 4-5; *see* Tr. II at 189. The administrative law judge also discussed Ms. Devine's testimony that claimant was incapable of using a computer for the hotel clerk job. Decision on Remand at 5; Tr. II at 193-194, 211. The administrative law judge explicitly credited Ms. Devine's testimony to find unsuitable four of the five jobs identified in employer's labor market survey. Decision and Order on Remand at 5-6. Although the administrative law judge did not discuss Ms. Devine's specific testimony regarding her opinion as to the suitability of the At Your Service position, it can be inferred from the administrative law judge's decision that she did not find this testimony persuasive. The administrative law judge gave a reasoned explanation, based on Ms. Seyler's opinion, why she found claimant could overcome his literacy and computer difficulties to successfully perform the At Your Service job. Decision and Order on Remand at 7-8. The administrative law judge is entitled to weigh the conflicting evidence of record and to draw her own inferences therefrom. *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999). The administrative law judge rationally relied on Ms. Seyler's opinion concerning claimant's employability, and substantial evidence of record thus supports the administrative law judge's finding that claimant has the vocational skills and abilities necessary for the At Your Service agent position.[7] *Rhine v.*

[6] The administrative law judge found that claimant obtained numerous certifications in order to advance in the environmental cleanup industry and "manage the vigorous and mentally taxing demands of a project manager position." Decision and Order on Remand at 7.

[7] We reject claimant's contention that his unsuccessful efforts to obtain the At Your Service job prove it was unavailable. This contention is not supported by the record as there is no testimony by claimant that he actually applied for the job during the period

Stevedoring Services of America, 596 F.3d 1161, 44 BRBS 9(CRT) (9th Cir. 2010); *see generally Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 36 BRBS 15(CRT) (9th Cir. 2002); *Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT). Therefore, we reject claimant's contentions of error with respect to the At Your Service position.

Claimant lastly challenges the administrative law judge's finding that he was capable of working full-time while attending school 15 hours a week to obtain a GED, a course of study that was approved by the OWCP. In her initial decision, and on remand, the administrative law judge found that claimant's participation in the OWCP-approved GED program did not preclude his working in suitable alternate employment. *See Kee v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 221 (2000); *see generally General Constr. Co. v. Castro*, 401 F.3d 963, 39 BRBS 13(CRT) (9th Cir. 2005), *cert. denied*, 546 U.S. 1130 (2006). The Board affirmed this finding it its initial decision. *Matson*, slip op. at 7. As the Board thoroughly considered this issue in its prior decision, the Board's affirmance of the administrative law judge's finding constitutes the law of the case. *See, e.g., Boone v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 1 (2003); *Weber v. S.C. Loveland Co.*, 35 BRBS 75 (2001), *aff'd on recon.*, 35 BRBS 190 (2002). Claimant has not demonstrated that any exceptions to this doctrine apply in this case. *Schwirse v. Marine Terminals Corp.*, 45 BRBS 53 (2011), *aff'd sub nom. Schwirse v. Director, OWCP*, 736 F.3d 1165, 47 BRBS 31(CRT) (9th Cir. 2013). Therefore, we decline to address claimant's contention.

In sum, claimant's contentions concerning the administrative law judge's finding that employer established the availability of suitable alternate employment are without merit. Substantial evidence of record supports the administrative law judge's finding that employer established suitable alternate employment as of March 22, 2010, and that claimant's disability became partial on that date. *Stevens*, 909 F.2d 1256, 23 BRBS 89(CRT). Therefore, we affirm the award of permanent partial disability benefits commencing March 22, 2010.

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it was identified as available. *See* Tr. II at 126-128, 157,158, 176-178; CX 38; EX 1. Moreover, we find that any contradictory statements between the administrative law judge's decision on remand and her order on reconsideration regarding claimant's "good faith" effort in seeking similar jobs is harmless. *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010). In this regard, we note that claimant does not appeal the administrative law judge's finding that he did not exercise due diligence in seeking suitable work. *See generally Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *Berezin*, 34 BRBS 163.

Accordingly, the administrative law judge's Decision and Order on Remand Awarding Benefits and Order Denying Motion for Reconsideration are affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge