U.S. Department of Labor

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

BRB No. 16-0599

DOLORES MONTOYA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NAVY EXCHANGE SERVICE COMMAND	)	
	)	
	)	DATE ISSUED: June 5, 2017
Self-Insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand/Order Denying Modification Request of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Jeffrey Winter and Kim Ellis (Law Office of Jeffrey Winter), San Diego, California, for claimant.

William N. Brooks II (Law Office of William N. Brooks), Long Beach, California, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand/Order Denying Modification Request (2012-LHC-00396) 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.*, as extended by the

Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *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. Claimant was hired by employer as a sales clerk in October 1999. CX 24 at 4. Her job duties included scanning and displaying merchandise, performing cash register transactions, and unpacking, staging, and moving merchandise on the retail floor and in the warehouse. *Id.* at 4-5. Claimant injured her back on September 22, 2006, when she bent down to pick up some clothes that had fallen to the floor. *Id.* at 6-7. Claimant worked intermittently following her injury but eventually stopped working on November 5, 2006.

Claimant filed a claim for benefits under the Act on November 28, 2006. In his initial decision, the administrative law judge concluded that claimant suffered a work-related injury that aggravated her pre-existing back condition. Decision and Order at 27. The administrative law judge reviewed the labor market survey prepared by employer's vocational expert, David Morgan, and concluded that parking lot attendant/cashier jobs were suitable alternate employment for claimant. The administrative law judge noted that the parking lot attendant jobs allowed claimant to work in a booth, which accommodated her medical restrictions against prolonged standing and walking. *Id.* at 29.

The administrative law judge found that claimant did not establish she engaged in a diligent effort to obtain alternate employment. Decision and Order at 34. The administrative law judge noted that, according to claimant's own testimony, she did not look for employment because "[she] won't be able to function or offer the abilities they ask for." *Id.* at 34 (quoting CX 24 at 17). Claimant also reported that one day at the mall, she approached a mall kiosk and inquired about the requirements of part-time employment there. CX 24 at 17. The woman at the kiosk told claimant she did not "want to chance it, especially if you don't know how long you can stand or sit." *Id.* at 18. The administrative law judge noted that, after that attempt, claimant did not look further for any employment opportunities and concluded that claimant did not make a diligent attempt to secure either the jobs identified as suitable alternate employment or any other kind of employment. Decision and Order at 34. Therefore, the administrative law judge found that claimant was not totally disabled. *Id.*

The administrative law judge awarded claimant temporary total disability benefits from November 5, 2006 until April 22, 2009, permanent total disability benefits from April 23, 2009 until August 9, 2012, and ongoing permanent partial disability benefits from August 10, 2012, the date employer established the availability of suitable alternate employment. Decision and Order at 35. The administrative law judge concluded that

employer is entitled to Section 8(f) relief because claimant's underlying spinal conditions and prior back injuries were a major contributing factor to her present disability, which resulted from the combination of her pre-existing condition and her work-related injury. *Id.* at 42.

Claimant appealed and employer cross-appealed the administrative law judge's decision. The Board affirmed the administrative law judge's conclusion that employer established suitable alternate employment. *Montoya v. Navy Exchange Service Command*, 49 BRBS 51 (2015). The Board also affirmed the administrative law judge's conclusion that claimant did not establish diligence in seeking suitable work and, accordingly, affirmed the administrative law judge's finding that claimant was permanently partially disabled. *Id.* at 53. The Board remanded the case for the administrative law judge to specifically address whether employer established suitable alternate employment earlier than August 10, 2012. *Id.* The Board affirmed the administrative law judge's finding that the applicable minimum compensation rate was the 2007 rate. *Id.* at 54.

While the case was pending before the administrative law judge on remand, claimant filed a motion to submit additional evidence regarding her learning disability and challenging employer's evidence of suitable alternate employment. The administrative law judge granted claimant's motion as a request for modification under Section 22 of the Act, 33 U.S.C. §922, and afforded the parties an opportunity to present additional evidence and argument on the issue of suitable alternate employment.

Claimant submitted a supplemental vocational evaluation report from her vocational expert, Mark Remas. Mr. Remas reported that claimant is "low functioning" and would have difficulty in a comprehensive academic training program due to her low general learning and reasoning ability. CX 33 at 3. Mr. Remas opined that claimant does not have the educational history, aptitudes, or physical capacity to perform competitive employment on the open labor market. *Id.* at 4. Claimant also submitted a vocational testing report from Paulo Da Silva, a qualified rehabilitation representative, who prepared a vocational testing report on January 27, 2016. Mr. Da Silva stated that claimant's test results indicate her abstract reasoning, clerical, and proofreading scores are below average and that claimant reported that she understands and speaks slang Spanish, but cannot read Spanish. CX 35 at 6; *see also* CX 37.

Employer submitted a labor market survey report from a certified rehabilitation counselor, Joyce B. Gill, who opined that claimant was, and remains, capable of working as a cashier/parking lot attendant. CX 41 at 9. Ms. Gill concluded that if claimant was sufficiently motivated to return to work, she would have a realistic opportunity of securing employment. *Id.* at 9.

On remand, the administrative law judge addressed claimant's request for modification and concluded that claimant failed to show a mistake of fact in the original Decision and Order. The administrative law judge therefore denied claimant's request for modification. Decision and Order on Remand at 9. The administrative law judge found that the additional evidence supports that claimant has a learning disability, but also that the parking lot attendant/cashier positions are within claimant's abilities because her work history demonstrates that she has the ability to use a cash register and to engage with customers in a courteous manner. *Id.* Therefore, the administrative law judge denied modification with regard to suitable alternate employment.

The administrative law judge also found that claimant's only attempt to secure employment was the inquiry she made at the mall kiosk, noting that claimant did not know whether any of the parking lot attendant/cashier positions required an electronic application. Decision and Order on Remand at 10. Accordingly, the administrative law judge concluded that there was no mistake in the determination of fact that claimant did not establish a diligent effort to obtain alternate employment. *Id.* at 10-11. The administrative law judge further concluded that employer's labor market survey established that the parking lot attendant/cashier positions were available on January 14, 2012, the date claimant was determined capable of returning to work with restrictions. The administrative law judge therefore found that employer established suitable alternate employment as of January 14, 2012, and amended claimant's permanent partial disability award to start as of that date. *Id.* at 11.

On appeal, claimant challenges the administrative law judge's determination that she did not establish a diligent effort to obtain alternate employment. Claimant argues that a "reasonable person" standard should have been used to consider the diligence of the job search, taking into account claimant's mental capacity, lack of job search skills, and lack of computer literacy. Employer responds, urging affirmance. Claimant filed a reply brief.

Once, as here, claimant establishes she cannot return to her usual work and employer establishes the availability of suitable alternate employment, claimant may demonstrate she remains totally disabled by showing that she diligently tried but was unable to secure employment. *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 claimant merely must establish that [s]he was reasonably diligent in attempting to secure a job within the compass of employment opportunities shown by the employer to be reasonably attainable and available." *Palombo v. Director, OWCP*, 937 F.2d 70, 74, 25 BRBS 1, 8(CRT) (2d Cir. 1991). Claimant bears the burden of establishing a mistake in fact on this issue in order to obtain modification of the prior order, pursuant to Section 22 of the Act. *See generally Del Monte Fresh Produce v. Director, OWCP [Gates]*, 563 F.3d

1216, 43 BRBS 21(CRT) (11th Cir. 2009) (the same standards apply in a modification proceeding as in an initial proceeding).

In his Decision and Order on Remand, the administrative law judge discussed claimant's new evidence concerning her mental and learning disabilities and lack of computer skills. Decision and Order on Remand at 4-5, 9. As it relates to the diligent effort requirement, the administrative law judge again emphasized that claimant made only a single inquiry at the mall kiosk. The administrative law judge further found that claimant did not inquire about the application process at any of the 15 parking lot employers and thus did not know whether any of these jobs required applying by computer. *Id.* at 10. The administrative law judge further found that the record shows that of the 15 parking lot attendant/cashier employers identified in the labor market surveys provided by both claimant's and employer's vocational experts only one of them has an online application. *Id.* The administrative law judge thus concluded that there was not a mistake in fact in the prior decision concerning claimant's lack of diligence in seeking alternate work.

We reject claimant's contention that the administrative law judge erred in finding that claimant's job search was not diligent. The administrative law judge rationally credited claimant's admission at her deposition that after the single inquiry at the mall kiosk, she gave up and did not look further. CX 24 at 18. The administrative law judge also rationally concluded that claimant's lack of knowledge concerning the application process for the parking lot attendant jobs identified by the vocational experts supports a finding that claimant was not diligent in her job search. *See Berezin v. Cascade General, Inc.*, 34 BRBS 163 (2000) ("Claimant may not retain entitlement to total disability benefits merely by alleging that he did not seek work because he was unsure if he would be hired, or because he preferred another type of work to that identified by employer.").

In this respect, we note that claimant appears to believe that the administrative law judge required claimant's job search to include online applications. *See* Claimant's Reply Brief at 4. However, claimant mischaracterizes the administrative law judge's decision. The administrative law judge did not find that claimant's job search was not diligent because she did not fill out online applications but stated only that claimant should have, at the least, inquired about the job application process for the parking lot attendant positions, which claimant did not do. The administrative law judge fully considered the evidence of claimant's learning disability and determined that even someone with claimant's limitations should have made more of an effort to seek employment. Decision and Order on Remand at 10. The administrative law judge's finding is neither irrational nor unsupported by the evidence. *See generally Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010).

We also reject claimant's argument that the administrative law judge should have considered not only the diligence of claimant's job search on its own but also whether

there is a reasonable likelihood that a reasonable person with claimant's learning disability and narrow work experience would likely be hired had she conducted a diligent job search. The administrative law judge correctly noted that employer was not required to ascertain for claimant the application process. Decision and Order on Remand at 10. It is well-established that employer is not required to act as an employment agency for the employee. *See, e.g., Fox v. West State Inc.*, 31 BRBS 118 (1997). If claimant's learning disability would, in fact, render her unable to be a competitive candidate for employment, it was claimant's burden to demonstrate such by diligently seeking employment. *Id.*[1]

The administrative law judge credited Mr. Da Silva's testimony that claimant would be a strong candidate for the parking lot attendant positions because of her experience in handling cash transactions, customer service experience, and Spanish language skills. Decision and Order on Remand at 9-10. The administrative law judge also found that Mr. Remas's contrary opinion that claimant would not be a competitive candidate for the parking lot attendant positions because her skills, traits, and temperament do not transfer from her prior employment are contradicted by his own labor market report and the record as a whole. *Id.* at 9. It is within the administrative law judge's discretion to determine the weight to be given an expert's testimony and to draw rational inferences therefrom. *See Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT). Taking into account claimant's learning disability, the administrative law judge found that claimant possesses sufficient skills and work history to apply for a parking lot attendant position; specifically, claimant's work history demonstrates that claimant has the necessary interpersonal skills to work in customer service and that claimant is able to use a cash register and handle cash transactions. Decision and Order on Remand at 9-10. Therefore, as it is supported by substantial evidence of record, we affirm the administrative law judge's findings that claimant did not establish a mistake in fact in the finding that she did not engage in a diligent job search and is limited to partial disability benefits.

[1] In *Fox*, the claimant sustained a work-related back injury. He contended that his history of cardiac and stroke-related conditions would render alternate employment realistically unavailable to him, despite the lack of restrictions from those conditions. The Board held that employer established suitable alternate employment. In rejecting claimant's contention that employer must establish that he would be hired with his pre-existing conditions the Board stated, "[e]vidence that claimant's prior history makes his obtaining a job unrealistic is relevant to this complementary burden [of demonstrating diligence in seeking work] borne by claimants. If, in fact, employers will not hire applicants with claimant's history of stroke and cardiac problems, it will be apparent when a claimant demonstrates that his diligent job search was unsuccessful." *Fox*, 31 BRBS at 122.

Accordingly, the administrative law judge's Decision and Order on Remand/Order Denying Modification is affirmed.

SO ORDERED.

_____

ETTY JEAN HALL, Chief
Administrative Appeals Judge

_____

JUDITH S. BOGGS
Administrative Appeals Judge

_____

RYAN GILLIGAN
Administrative Appeals Judge