U.S. Department of Labor

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

BRB No. 16-0370

DORRIS F. HENDRICKS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HUNTINGTON INGALLS, INCORPORATED (PASCAGOULA OPERATIONS)	)	DATE ISSUED: Mar. 24, 2017
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Isaac H. Soileau, Jr. (Soileau & Associates, LLC), New Orleans, Louisiana, for claimant.

Donald P. Moore (Franke & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2015-LHC-00731, 00735) of Administrative Law Judge Patrick M. Rosenow 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 worked for employer from August 1971 to April 1976, and returned to work for employer in August 1983. Claimant complained of bilateral elbow and hand pain on July 10, 2006. He was diagnosed with work-related carpal tunnel syndrome, and

he underwent surgery in November 2006 and January 2007. CX 4 at 10-11, 17. Claimant was assigned a ten percent impairment to each upper extremity by his treating physician, Dr. McCloskey, and released to return to his usual work as an outside machinist on May 28, 2007. *Id.* at 27-28, 34, 36. Claimant injured his right knee in the course of his employment on July 22, 2009. JX 1. He was treated conservatively until January 13, 2010, when Dr. Fondren surgically repaired the meniscus. CX 9 at 12. Dr. Fondren assigned a five percent right leg impairment and opined that claimant could return to his usual work on April 18, 2010. *Id*. at 16, 19. Claimant returned to work for employer, but retired on December 17, 2010. EX 16. On April 19, 2011, he filed a claim under the Act asserting that he was forced to retire because of his injuries. CX 8 at 6. Claimant sought compensation for permanent total disability from the date of his retirement, and he challenged the average weekly wage employer utilized to voluntarily pay compensation for the 2006 and 2009 work injuries.[1]

In his decision, the administrative law judge found that claimant is not entitled to compensation for permanent total disability because he was able to perform his usual job at the time he retired. Decision and Order at 12. The administrative law judge found that claimant's average weekly wage at the time of the 2006 injuries was $779.05 and was $873.58 at the time of the 2009 injury. *Id*. at 13-14. The administrative law judge derived these wages by dividing claimant's gross earnings during the year prior to each injury by the number of weeks that claimant worked or received pay. The administrative law judge awarded claimant additional benefits for his 2006 arm injuries consistent with the increased average weekly wage. *See* n.1, *supra*.

On appeal, claimant challenges the denial of permanent total disability compensation and the administrative law judge's average weekly wage calculations. Employer responds, urging affirmance. Claimant filed a reply brief in support of his contentions.

Claimant contends the administrative law judge erred by finding that he could perform his usual work at the time he retired. In a traumatic injury claim for post-retirement total disability compensation, the relevant inquiry is whether claimant's work injury precluded his return to his usual work or suitable alternate employment at the time

[1] For the 2006 injury, employer paid claimant temporary total disability benefits, 33 U.S.C. §908(b), from November 13, 2006 through May 7, 2007, and permanent partial disability benefits for a ten percent impairment to each arm, 33 U.S.C. §908(c)(1), based on an average weekly wage of $768.80. EX 5 at 2. For the 2009 injury, employer paid claimant temporary total disability benefits from January 13 through April 18, 2010, and permanent partial disability benefits for a five percent right leg impairment, 33 U.S.C. §908(c)(2), based on an average weekly wage $873.58. EX 6 at 7.

of his retirement, such that the claimant's loss of earning capacity was "because of injury." 33 U.S.C. §902(10); *Christie v. Georgia-Pacific Co.*, __ BRBS __, No. 16-0321 (Mar. 7, 2017); *Moody v. Huntington Ingalls, Inc.*, 50 BRBS 9, 10 (2016), *recon denied*, BRB No. 15-0314 (May 9, 2016), *appeal pending*, No. 16-1773 (4th Cir.); *Harmon v. Sea-Land Service, Inc.*, 31 BRBS 45, 48 (1997). The Board is not empowered to reweigh the evidence, but must accept the rational inferences and findings of fact of the administrative law judge that are supported by the record. *See James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *see also Newport News Shipbuilding & Dry Dock Co. v. Winn*, 326 F.3d 427, 37 BRBS 29(CRT) (4th Cir. 2003).

In finding that claimant was not disabled by his work injuries at the time he retired, the administrative law judge rationally found that claimant voluntarily quit working, not because of his work injuries, but because "he simply was ready to retire," based on the absence of any work restrictions or medical treatment after April 2009 for the arm injuries or after April 2010 for the right knee injury. Decision and Order at 12; EXs 12 at 10-12; 13 at 10-12 The administrative law judge also rationally found claimant's testimony that he refused work restrictions and that he worked in great pain contradicted by the records of Drs. Fondren and McCloskey and claimant's post-retirement lifestyle.[2] Decision and Order at 12; Tr. at 59, 62-63; EXs 12, 13. Accordingly, as it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant was not precluded by his injuries from performing his usual work at the time he retired and thus affirm the consequent denial of the claim for permanent total disability compensation from December 2010. *Christie*, slip op. at 4-5; *see generally Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 242 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP*, 909 F.2d 1488 (9th Cir. 1990).

Claimant next challenges the administrative law judge's average weekly wage calculation for each injury. Claimant contends the administrative law judge erred by including as "weeks worked," two weeks each in December 2005 and December 2008 when employer's shipyard was closed.

In his decision, the administrative law judge rejected claimant's contention that the two weeks in each year should not be included as weeks worked on the ground that claimant was paid regular wages for those weeks. Decision and Order at 14.

[2] The administrative law judge found that, "the fact that [claimant] bought a motorcycle and made multiple trips to the Philippines after he retired does not necessarily mean that he could have kept working, but at the same time paints a picture of an active individual." Decision and Order at 12.

Specifically, the administrative law judge found that claimant was paid for 94 regular hours for the week preceding the pay periods ending on December 21 and December 28, 2008. *Id*. The administrative law judge found that the additional 54 regular hours paid represented vacation pay for the following two pay periods. The administrative law judge found there are no other payroll entries during the year preceding claimant's July 22, 2009 knee injury where "Claimant worked or was paid for more than 40 *regular* hours worked in a week."[3] *Id*. (italics in original). Accordingly, the administrative law judge concluded that claimant worked or was paid for vacation time for 49 out of the preceding 52 weeks, and therefore divided by 49 claimant's gross earnings of $42,805.19 during the year prior to the 2009 work injury.[4] *Id*. The payroll records similarly show that claimant was paid for 104 regular hours for the pay period ending on December 18, 2005, preceding the two-week holiday shutdown. EX 18 at 1. The administrative law judge thus divided claimant's gross earnings in the year prior to the June 2006 injury by 51 weeks. *See* n.2, *supra*.

Section 10(c), 33 U.S.C. §910(c), is used to calculate a claimant's average weekly wage when neither Section 10(a), 33 U.S.C. §910(a), nor Section 10(b), 33 U.S.C. §910(b), can reasonably or fairly be applied.[5] *See Hall v. Consolidated Employment*

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[3] Specifically, the administrative law judge found that, "the record shows that Claimant worked anywhere from 10 to 40 hours a week." Decision and Order at 14 n. 48.

[4] The administrative law judge noted the parties did not dispute that claimant was not paid for the weeks ending October 12, October 19 and October 26, 2008, and the administrative law judge did not count these weeks as "weeks worked." Decision and Order at 14 n.47. Similarly, the administrative law judge did not count one week in the year prior to the July 10, 2006 injury in which claimant did not receive any wages. *Id.* at 13-14.

[5] Section 10(c) of the Act, 33 U.S.C. §910(c), states that a claimant's average weekly wage shall be determined as follows:

> If either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in

Systems, Inc., 139 F.3d 1025, 32 BRBS 91(CRT) (5th Cir. 1998); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991). The administrative law judge has broad discretion in determining average weekly wage under Section 10(c). *Staftex Staffing v. Director, OWCP* [*Loredo*], 237 F.3d 404, 34 BRBS 44(CRT), *modified on other grounds on reh'g*, 237 F.3d 409, 35 BRBS 26(CRT) (5th Cir. 2000).

In this case, it is not disputed that Section 10(c) is applicable because claimant was a four-day a week worker, thus precluding the use of Section 10(a).[6] *See* EX 15; *see generally Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004). Rather, claimant contends the administrative law judge, in effect, erroneously applied *Wooley v. Ingalls Shipbuilding, Inc.*, 33 BRBS 88 (1999), *aff'd*, 204 F.3d 616, 34 BRBS 12(CRT) (5th Cir. 2000), which, claimant avers, is exclusively pertinent to a Section 10(a) determination, to find that the weeks he did not work in December 2005 and December 2008 should be included in the divisor. In affirming the Board's decision in *Wooley*, the United States Court of Appeals for the Fifth Circuit, in whose jurisdiction this case arises, noted that Section 10(a) aims at a theoretical approximation of what a claimant could ideally have been expected to earn in the year prior to his injury. The court found it "appropriate to charge the [administrative law judge] with making fact findings concerning whether a particular instance of vacation compensation counts as a 'day worked' or whether it was 'sold back' to the employer for additional pay." *Wooley*, 204 F.3d at 618, 34 BRBS at 14(CRT). Thus, the court stated that it is permissible to count as a "day worked" any days when claimant was paid vacation pay but did not report to work. *Id*.; *see also Duncan v. Washington Metropolitan Transit Authority*, 24 BRBS 133 (1990).

Although *Wooley* involved Section 10(a), case law interpreting Section 10(c) recognizes the administrative law judge's broad discretion in determining a claimant's "average annual earnings" pursuant to that subsection. *See*, *e.g.*, *Rhine v. Stevedoring Services of America*, 596 F.3d 1161, 44 BRBS 9(CRT) (9th Cir. 2010); *Hall*, 139 F.3d 1025, 32 BRBS 91(CRT); *Meehan Seaway Service, Inc. v. Director, OWCP* [*Hizinski*], 125 F.3d 1163, 31 BRBS 114(CRT) (8th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998). Contrary to claimant's contention, this discretion extends to the administrative law judge's counting as "weeks worked" the weeks claimant received pay in lieu of working. *See Wooley*, 204 F.3d at 618, 34 BRBS at 14(CRT). Claimant also asserts there is nothing in the record supporting the administrative law judge's finding that the regular hours exceeding 40 for the pay periods ending on December 18, 2005 and December 14,

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self-employment, shall reasonably represent the annual earning capacity of the injured employee.

[6] It is not contended that Section 10(b) is applicable in this case.

2008 represent vacation pay for the following two weeks when the shipyard was closed. Contrary to this assertion, because claimant was paid his regular hourly wage, and not an overtime rate, for hours worked in excess of 40 for each respective pay period, he had not been paid for more than 40 regular hours for any other pay period, and he received no wages for the following two pay periods, the administrative law judge's inference that these wages represent vacation pay is rational and supported by substantial evidence. *See generally Presley v. Tinsley Maint. Serv.*, 529 F.2d 433, 3 BRBS 398 (5th Cir. 1976). We, therefore, reject claimant's contention that the administrative law judge erred by counting as "weeks worked" the two weeks each in December 2005 and December 2008 that claimant received "regular" wages when the shipyard was closed. Moreover, the Fifth Circuit and the Board have affirmed average weekly wage calculations under Section 10(c) derived by dividing a claimant's gross earnings by the number of weeks worked in the year prior to injury. *Loredo*, 237 F.3d 404, 34 BRBS 44(CRT); *Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT); *Fox v. West State, Inc.*, 31 BRBS 118 (1997). Accordingly, as it supported by substantial evidence of record, we affirm the administrative law judge's calculation of claimant's 2009 average weekly wage as $873.58 ($42,805.19 ÷ 49).

Similarly, we affirm the administrative law judge's finding that 51 weeks is the divisor for calculating claimant's average weekly wage prior to the June 2006 injury. Claimant contends, however that the administrative law judge erred in calculating his gross earnings for the year prior to the July 10, 2006 injury. At the hearing, claimant alleged that his gross earnings for the year prior to the July 2006 injury were $42,093.86, while employer contended that claimant's gross earnings were $39,731.72. *Compare* EX 18 *with* EX 20. The administrative law judge found that claimant's calculation incorrectly double-counted $586.22 from the "other" earnings category as part of claimant's gross earnings of $41,507.64, as represented in Employer's Exhibit 18 (EX 18).[7] Decision and Order at 13. The administrative law judge then summarily concluded that he would use the gross earnings of $39,731.72 for the year preceding the work injury as stated in Employer's Exhibit 20 (EX 20). *Id*. Claimant contends that the administrative law judge erred by not providing a rationale for using the gross earnings represented in EX 20 of $39,731.72 and that this figure is factually inaccurate.[8]

[7] On appeal, claimant concedes that he incorrectly double-counted $586.22 from the "other" category and asserts that $41.507.64 represents claimant's actual gross earnings. Cl. Br. at 16.

[8] We reject claimant's argument that EX 20 is, per se, factually inaccurate. Claimant asserts that the administrative law judge erred in crediting EX 20 because it encompasses his wages from July 4, 2005 to July 9, 2006, and not the actual year prior to the injury; i.e., July 10, 2005 to July 9, 2006. Contrary to claimant's contention, even if the wages claimant earned from July 4 to July 9, 2005, are excluded from his wage

The object of Section 10(c) is to arrive at a sum which reasonably represents the claimant's annual earning capacity at the time of his injury. *See New Thoughts Finishing Co. v. Chilton*, 118 F.3d 1028, 31 BRBS 51(CRT) (5th Cir. 1997); *Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT). Although EX 18 and EX 20 purport to represent claimant's actual earnings during the year preceding the July 2006 injury, they are incongruent in every category summarized therein.[9] Given the discrepancies in these exhibits, we agree with claimant's contention that the administrative law judge erred by not providing a rationale for utilizing the lower gross earnings figure in EX 20. Accordingly, there is no basis for the Board to determine whether the administrative law judge's crediting of EX 20 is reasonable. *See generally* 5 U.S.C. §557(c)(3)(A); *H.B. Zachry v. Quinones*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000). Therefore, we vacate the administrative law judge's finding that claimant's average weekly wage for the July 10, 2006 injury is $779.05. We remand this case for the administrative law judge to address the conflicting wage evidence in Employer's Exhibits 18 and 20 and to provide the rationale for his decision to credit particular evidence.

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calculation, EX 20 includes, as does EX 18, claimant's wage data for the relevant period from July 10, 2005 to July 9, 2006. Claimant also erroneously contends that the gross earnings credited by the administrative law judge of $39,731.72 were derived by using the gross earnings listed in EX 20 of $40,301.71 and subtracting the "other" earnings listed in EX 18 of $586.22. The result of claimant's calculation is $39,714.88, which is not the amount, $39,731.72, utilized by the administrative law judge. The administrative law judge's calculation reflects that he subtracted from the gross earnings listed in EX 20 claimant's earnings from July 4 to July 7, 2005, i.e., the time period that is more than a year prior to claimant's injury ($40,301.71 - $569.99 = $39,731.72).

[9] Both EX 18 and EX 20 are payroll figures generated by employer's Payroll Department. In addition to calculating different gross earnings, EX 18 states that claimant worked 1,797.6 regular hours, 189.9 hours of time and a half, 164 vacation hours, and other wages of $586.22. EX 18 at 2. The summary at EX 20, after subtracting the hours claimant worked from July 4 to July 7, 2005, represents that claimant worked 1,687.6 regular hours, 169 hours of time and a half, 204 vacation hours, shift premiums totaling $436.02 and a bonus of $125. EX 20 at 1, 41. The sum of $561.02 from the shift premium and bonus categories in EX 20 appear to correspond to the "other" category in EX 18, which is stated therein as totaling $586.22.

Accordingly, the administrative law judge's average weekly wage calculation for the July 10, 2006 injury is vacated, and the case is remanded for further proceedings in accordance with this opinion. In all other respects, the administrative law judge's Decision and Order is 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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GREG J. BUZZARD
Administrative Appeals Judge