U.S. Department of Labor

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

BRB Nos. 17-0397
and 17-0397A

BILJANA WARNER	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
NAVAL PERSONNEL COMMAND/MWR	)	DATE ISSUED: Mar. 16, 2018
c/o CONTRACT CLAIMANT SERVICES	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order on Remand and Request for Modification of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Andrew J. Hanley (Crossley, McIntosh, Collier, Hanley & Edes, PLLC), Wilmington, North Carolina, for claimant.

James M. Mesnard (Seyfarth Shaw LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order on Remand and Request for Modification (2013-LHC-00310) of Administrative Law Judge Alan L. Bergstrom rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, 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 findings of fact and conclusions of law of the administrative law judge if they

are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

This case is before the Board for the second time. To recapitulate, claimant was employed by employer as a child and youth program assistant at a Camp Lejeune Child Development Center (CDC) when she slipped and fell on a wet hallway floor on March 11, 2011. Claimant sought medical care at employer's clinic and a local urgent care clinic for complaints of neck, back, and hip pain. The next work day, March 14, 2011, claimant returned to work in a light-duty capacity. Sometime after April 14, 2011, when light-duty work at the CDC became unavailable, claimant transferred to a light-duty receptionist position at the Base Education Center (BEC), at her previous CDC wages. In July 2011, claimant sought mental health counseling for psychological symptoms, which she associated with the work accident. In August 2011, claimant commenced physical therapy for her injuries; claimant subsequently asserted that she injured her left knee during physical therapy.

Sometime in 2012, employer sought to return claimant to light-duty work in a modified position as the third program assistant in a CDC pre-school classroom. Claimant declined employer's offer of modified work, believing she was incapable of performing her prior duties as a program assistant due to her work injuries. At claimant's request, employer formally reassigned claimant to the BEC on November 4, 2012, with a corresponding reduction in salary.

Claimant sought permanent partial disability and medical benefits under the Act, alleging she sustained a loss of wage-earning capacity due to her work-related neck, back, hip and knee conditions, as well as her alleged work-related psychological condition. Employer challenged the work-relatedness of claimant's knee and psychological conditions and claimant's contention that she sustained a loss of wage-earning capacity as a result of her March 2011 work injury.[1]

In his first decision, the administrative law judge found that claimant established a causal relationship between her injuries and her work accident. The administrative law judge also found claimant incapable of returning to her regular employment duties with employer as a child and youth program assistant, and that the modified position employer offered to claimant at the CDC is sheltered work and thus is not suitable alternate employment. The administrative law judge found that the receptionist position at the BEC constitutes suitable alternate employment and that claimant is entitled to temporary

[1] Employer stipulated that claimant sustained neck, back and hip injuries as a result of her slip and fall.

partial disability compensation for her resulting loss in wage-earning capacity.[2] 33 U.S.C. §908(e), (h).

Employer appealed the administrative law judge's findings that claimant's left knee and psychological conditions are causally related to her March 11, 2011 work injury. Additionally, employer contended the administrative law judge erred in finding that the modified program assistant position at the CDC was sheltered work and did not constitute suitable alternate employment.

In its decision, the Board affirmed the administrative law judge's causation findings. *Warner v. Naval Personnel Command/MWR*, BRB No. 14-0327 (May 27, 2015) (McGranery, J., concurring in part and dissenting in part). The Board vacated the administrative law judge's finding that the modified CDC position was sheltered employment and did not, consequently, establish the availability of suitable alternate work. *Id*., slip op. at 5-8. The Board stated that, in discussing the "necessity" of the modified position, the administrative law judge erred in focusing only on whether the position existed before claimant's injury or after she declined it. *Id*. at 7. The Board remanded the case for the administrative law judge to re-address this issue. *Id*. at 8.

On remand, employer filed a request for Section 22 modification, 33 U.S.C. §922, contending there was a change in claimant's condition because claimant had obtained a college degree and a higher-paying position and, therefore, no longer had an economic loss due to her work injuries. Claimant responded that modification should commence only from the date employer established the availability of suitable alternate employment given her new qualifications and that, thereafter, she is entitled to a nominal award.

On remand, the administrative law judge re-assessed claimant's work restrictions. He found that restrictions from the work injury prevent her from performing the modified CDC position and thus that this position does not constitute suitable alternate employment. Decision and Order on Remand and Request for Modification (Decision on Remand) at 13-15. In addition, the administrative law judge again found the modified CDC position was sheltered employment. *Id.* at 15. Therefore, the administrative law judge reaffirmed the award of temporary partial disability benefits commencing March 25, 2011.

With respect to employer's motion for modification, the administrative law judge found that a change in claimant's condition was established from January 24, 2016, the

[2] The administrative law judge found that, while claimant's neck, back and hip conditions reached maximum medical improvement on May 22, 2012, the evidence did not establish that claimant's left knee or psychological conditions had become permanent.

date claimant began working as an Administrative Support Assistant at the Base Substance Abuse Counseling Center at an average weekly wage of $619.60, which resulted in no further loss of wage-earning capacity from the work injury. *Id*. at 29-30. The administrative law judge rejected claimant's contention that she is entitled to a nominal award. *Id*. at 30. Thus, the administrative law judge terminated the disability award as of January 24, 2016.

On appeal, claimant challenges the denial of a nominal award. Employer responds that the administrative law judge's finding is supported by the record and should be affirmed. BRB No. 17-0397. Employer appeals the administrative law judge's finding that claimant was not able to perform the modified position at the CDC. For purposes of preserving the issue for further appeal, employer again challenges the administrative law judge's initial finding that claimant established she has a work-related psychological injury. Claimant responds that employer's arguments should be rejected. BRB No. 17-0397A.

We first address employer's appeal of the administrative law judge's findings on remand. Employer contends the administrative law judge erred in finding that claimant has a work-related psychological injury. This issue was addressed by the Board in its first decision. The holding in that decision, affirming the administrative law judge's finding, constitutes the law of the case, as there is no basis for finding that doctrine inapplicable. *Irby v. Blackwater Security Consulting*, 44 BRBS 17 (2010); *Kirkpatrick v. B.B.I., Inc.*, 39 BRBS 69 (2005). Therefore, we decline to further address employer's contention.

Employer also contends that the administrative law judge's finding on remand that claimant was not capable of performing the modified job at CDC is not based on substantial evidence of record. Employer asserts that the administrative law judge impermissibly created restrictions to evaluate claimant's ability to perform the modified position and that there is no medical evidence that claimant has any psychological or emotional reason why she could not have performed this light-duty job.

In his decision on remand, the administrative law judge summarized, in pertinent part, the requirements of the modified CDC position:

> The modified position presented by the Employer required the Claimant to return to the classroom for 24 preschool children age 3 to 5 in the presence of two other adult care givers . . . to mainly of (sic) write reports, child development/behavior observations, inventory reports, requests for material and supplies, and teaching plans . . . listen to voices and sounds of children in the classroom and observe up to 24 preschool children for safety of activity and actions of individual children and call for the other two adult

> care givers present to respond to children in need or in an unsafe position or activity . . . occasionally interact verbally with children ages 3 to 5 years old such as teaching, leading and singing a song or reading a story while seated at a low table . . . contribute to the "nurturing environment" required of CDC care givers . . . .

Decision on Remand at 14; *see also id*. at 9. The administrative law judge specifically noted the testimony of a CDC director, Deborah Beale, that the modified position at the CDC would require claimant to provide additional support and nurturing to the preschoolers and to interact with the children while seated.[3] *Id*. at 13; Tr. at 45.[4] The administrative law judge also noted the deposition testimony of Marla Talley, the branch manager of family care programs at employer's facility, including all seven CDCs on the base. EX 40 at 5-6. Ms. Talley testified that employer could not safeguard against the possibility of re-injury because children are unpredictable. Decision on Remand at 14; EX 40 at 71-72, 83.

The administrative law judge then described claimant's physical and psychological restrictions pertinent to the work requirements of the modified CDC position:[5]

> The claimant should avoid . . . trip hazards . . . should avoid work environment exposing her to unpredictable pushing or pulling of her body by others, including small mobile children; unpredictable impact of sudden weights on her body exceeding 20 pounds, including small mobile children;

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[3] The administrative law judge stated, "[T]here is a constant requirement to provide a 'nurturing environment' to the preschool aged children whose parents deploy on a regular basis, by physically and verbally interacting with all CDC children on a group and one-on-one basis to provide then (sic) with a sense of safety, well-being and love." Decision on Remand at 9.

[4] Except where cited, all hearing transcript citations are to the initial hearing held on April 13, 2013.

[5] The administrative law judge determined these restrictions, in part, by making permissible inferences from the evidence. *Newport News Shipbuilding & Dry Dock Co. v. Riley*, 262 F.3d 227, 35 BRBS 87(CRT) (4th Cir. 2001). While the administrative law judge certainly could have more clearly explained the basis for finding these restrictions, his reasoning is apparent from the evidence he cites. *See Magallenes v. Bowen*, 881 F.2d 747, 755 (9th Cir. 1989).

> and positions of responsibility for the well-being and safety of small mobile children.

Decision on Remand at 14-15. The administrative law judge concluded that:

> After deliberations on the credible evidence of record, this presiding judge finds that Claimant has medical-vocational work restrictions that preclude her from performing work which exposes her to the unpredictable pushing, pulling, jumping and running of the preschool children in the CDC classroom to which the Claimant was to be assigned with 3 to 5 year old children as a third adult care giver and work restrictions which would impede her ability to provide the much required "nurturing environment" required of CDC caregivers.

Id. at 15.

Initially, we note that the administrative law judge did not find the modified CDC position unsuitable because of claimant's physical work restrictions.[6] Rather, the administrative law judge's findings result from claimant's work-related psychological condition, which he discussed extensively. Decision on Remand at 9-12. In June 2011, Physician's Assistant Scheaffer referred claimant for psychological counseling, believing claimant might be depressed; claimant was noted to have lost 15 pounds, have decreased appetite, and was tearful when discussing her injury. EX 26 at 2-6. In July 2011,

[6] In his initial decision, the administrative law judge credited work restrictions prescribed by the attending physician at Onslow Urgent Care on March 25, 2011, by Dr. Roger, claimant's treating physician, and by Dr. Getz, who examined claimant at employer's request. Decision at 43-44; CX 3 at 5, 11-13; EXs 22-24. Claimant's initial restrictions were no pushing, pulling, or lifting more than 10 pounds, and limited stooping, bending, twisting, pivoting, squatting, and kneeling. CX 3 at 6. Dr. Getz modified these restrictions to allow for an eight-hour workday with a 20-pound restriction on lifting from waist height, a 5-pound limitation on lifting from the floor, occasional use of the extremities above shoulder height, and avoidance of crawling or kneeling. EX 23 at 8. The administrative law judge found that Dr. Rodgers agreed with the all the above restrictions. Decision at 44; EX 22. In June 2012, Dr. Getz modified claimant's restrictions to sitting for no more than an hour with reasonable opportunities to change positions and to stand and walk for at least a half-hour, occasional lifting up to 20 pounds from waist height, minimal lifting from the floor, limited stair climbing, and no upper extremity limitations. EX 23. The administrative law judge accepted these limitations with the exception of the absence of upper extremity limitations, as this restriction is inconsistent with previously imposed restrictions. Decision at 44.

claimant began treating with a Licensed Clinical Social Worker, Ms. Stanley, who diagnosed adjustment disorder with depressed mood and anxiety. CX 10 at 47, 90, 111. In November 2011, claimant's physical therapist, Angela Rystrom, discharged claimant from physical therapy; she reported that her progress had plateaued and was impeded by psychological issues. CX 11 at 149-151. The administrative law judge found claimant's testimony and demeanor at the hearing consistent with Ms. Stanley's diagnosis "in that she appeared upset and became tearful at times while testifying." Decision on Remand at 12. Ms. Stanley noted that claimant became tearful during therapy, including throughout their session on June 26, 2012, after she was informed she would have to return to work at the CDC. CX 10 at 51, 105, 111. Several days later, on July 2, 2012, Ms. Stanley wrote a letter "To Whom it May Concern," stating claimant was worried about re-injury because of the work environment around young children. Ms. Stanley wrote that claimant's work with young children could be hazardous due to children pulling on her or running around, and that "safety concerns need to be addressed . . . by her employers to insure her risk of injury is low." CX 2; *see* CX 10 at 52, 63. Ms. Stanley stated that claimant's concerns in this regard were "reasonable." *Id.* It appears that Ms. Stanley's note was reviewed by employer's claims administrator. *See* Tr. at 62-63. Claimant had been treating with Ms. Stanley for almost two years as of the time of the formal hearing in April 2013. CX 10.

On March 8, 2013, claimant responded to employer's interrogatories stating that she has chronic back pain, anxiety and a fear of falling. EX 32 at 3. One of claimant's physical therapists, Jessica Deuhring, reported that claimant had "an almost paralyzing" fear of falling and that she "can get very tearful and hyperventilate." CX 19 at 1. Claimant testified that she had episodes of shaking from her fear of falling. Tr. at 83-84. Ms. Stanley regularly noted claimant becoming tearful and that she had "constant" worries about her back, being hypersensitive to fall hazards, anxious when she saw a wet floor or someone mopping a floor, unsure whether she could interact with young children pushing and pulling on her, and that she had very little patience. CX 10 at 47, 52, 63, 74, 90, 95-96 105, 111. Claimant testified she told Ms. Talley she was afraid that her lack of patience, which arose after the work injury, may cause her to injure a child. Tr. at 95-96. The administrative law judge noted claimant's hearing testimony that she felt she could no longer lift children, pick up after them and clean the classroom, she was afraid that she would harm the children because she had no patience anymore, she was afraid that she would fall again, and that her mental health counselor had recommended that she not return to her old job. Decision on Remand at 11-12; Tr. at 23, 95-96. Claimant testified that she told Ms. Talley she did not want to return to the CDC for these reasons. Tr. at 95-97; *see also* EX 38 at 26. Ms. Talley stated that claimant became "extremely upset" when Ms. Talley told her about the modified job at the CDC; Ms. Talley stated that claimant told her she "couldn't possibly work around children because she might harm one of [them]." Decision on Remand at 14; EX 40 at 21-23. As noted, *supra*, Ms. Talley

also testified at her deposition that employer could not safeguard against the possibility of re-injury because children are unpredictable. EX 40 at 71-72, 83.

We affirm the administrative law judge's permissible conclusion from the totality of this evidence that the modified work at the CDC was unsuitable for claimant from a psychological perspective. *See Norfolk Shipbuilding & Drydock Corp. v. Faulk*, 228 F.3d 378, 34 BRBS 71(CRT) (4th Cir. 2000), *cert. denied*, 531 U.S. 1112 (2001). There is substantial evidence that claimant's fears and anxieties resulting from the work injury would preclude her from working around the unpredictable "pushing, pulling, jumping and running" of preschool children and providing the "required nurturing environment." Decision on Remand at 14-15; *see Newport News Shipbuilding & Dry Dock Co. v. Riley*, 262 F.3d 227, 35 BRBS 87(CRT) (4th Cir. 2001). It is well established that the administrative law judge may draw his own inferences from the evidence of record, and it is impermissible for the Board to substitute its own views for those of the administrative law judge on the basis that other inferences also could be drawn from the evidence. *See Newport News Shipbuilding & Dry Dock Co. v. Winn*, 326 F.3d 427, 37 BRBS 29(CRT) (4th Cir. 2003); *Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994). The administrative law judge heard claimant's testimony and observed her demeanor at the formal hearing and found them consistent with the contemporaneous reports of Ms. Stanley and other medical providers. This credibility determination is within his prerogative. *See, e.g., Bartelle v. Mclean Trucking Co.*, 687 F.2d 34, 15 BRBS 1(CRT) (4th Cir. 1982). Based on the totality of this record and the administrative law judge's rational inferences, we hold employer has not demonstrated error in the administrative law judge's permissible finding that claimant could not perform the modified CDC position due to her work-related psychological injury.[7] *See Riley*, 262 F.3d 227, 35 BRBS 87(CRT); *see also Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). Accordingly, we affirm the administrative law judge's finding that employer did not establish suitable alternate employment through the modified CDC position as it is supported by substantial evidence.[8]

[7] In addition, the administrative law judge reiterated his finding that the modified CDC job was sheltered, and thus not suitable alternate employment. Decision and Order on Remand at 15. Employer did not appeal this finding, which also is a basis for affirming the award of benefits. *See Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

[8] We note that this case is distinguishable from *Marine Repair Services, Inc. v. Fifer*, 717 F.3d 327, 47 BRBS 25(CRT) (4th Cir. 2013). In this case, the administrative law judge's finding that the modified CDC position is not suitable is supported by substantial evidence, as we have discussed. *Id.*, 717 F.3d at 335, 47 BRBS at 28-

In her appeal, claimant challenges the administrative law judge's denial of a nominal award. Claimant alleges she has substantial physical and psychological work restrictions and that she has just begun a new career. On remand, the administrative law judge stated, "[T]he Claimant has submitted no evidence to establish a reasonable expectation of a loss of wage-earning capacity will occur in the future." Decision on Remand at 30.

A nominal award under Section 8(h), 33 U.S.C. §908(h), is appropriate when an employee's work-related injury has not diminished her current wage-earning capacity but there is a significant potential that the injury will cause a reduced wage-earning capacity in the future. *Metropolitan Stevedore Co. v. Rambo* [*Rambo II*], 521 U.S. 121, 31 BRBS 54(CRT) (1997); *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 18 BRBS 12(CRT) (4th Cir. 1985). The Supreme Court stated that, in such cases, a nominal award gives full effect to Section 8(h)'s admonition that the future effects of an injury must be considered when assessing an employee's post-injury wage-earning capacity. *Rambo II*, 521 U.S. at 131-132, 136-137, 31 BRBS at 57-58, 60-61(CRT). Thus, there are two relevant components to a nominal award on which claimant bears the burden of proof: present medical impairment or likely deterioration thereof, and the likelihood of future impairment to earning capacity because of the injury. *See*, *e.g.*, *Keenan v. Director for Benefits Review Board*, 392 F.3d 1041, 38 BRBS 90(CRT) (9th Cir. 2004); *Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2001).

In this case, claimant completed college after issuance of the initial decision, and she is taking graduate courses to obtain a Master's degree. March 14, 2016 Tr. at 64-66. She is gainfully employed by employer as an Administrative Support Assistant at a higher average weekly wage than the wage paid to her at the CDC. Substantial evidence supports the administrative law judge's finding that claimant did not offer evidence of a significant potential of future economic harm due to her work injuries. *See Gilliam v. Newport News Shipbuilding & Dry Dock Co.*, 35 BRBS 69 (2001); *see also B.H.* [*Holloway*] *v. Northrop Grumman Ship Systems, Inc.*, 43 BRBS 129 (2009). Accordingly, we affirm the administrative law judge's denial of a nominal award.

29(CRT). Moreover, to the extent dicta in *Fifer* require that employer have knowledge, before the hearing, of a claimant's restrictions, this condition is satisfied here. The compensability of claimant's psychological condition was one of the primary issues at the initial formal hearing. *See* Decision and Order (May 23, 2014) at 4-5. Employer was aware, through claimant's interactions with CDC personnel, that claimant believed she was incapable of returning to work there. Moreover, Ms. Stanley's letter of July 2, 2012 was apparently received by employer prior to the hearing. *See* Tr. at 62-63.

Accordingly, the administrative law judge's Decision and Order on Remand and Request for Modification 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