U.S. Department of Labor

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

BRB No. 17-0500

HOWARD HENNING	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MARINE TERMINALS CORPORATION - EAST	)	DATE ISSUED: Mar. 15, 2018
	)	
and	)	
	)	
PORTS INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Paul R. Almanza, Administrative Law Judge, United States Department of Labor.

Howard Henning, Baltimore, Maryland.

Christopher J. Field (Field & Kawczynski, LLC), South Amboy, New Jersey, for employer/carrier.

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

PER CURIAM:

Claimant, appearing without counsel, appeals the Decision and Order Awarding Benefits (2014-LHC-01661) of Administrative Law Judge Paul R. Almanza 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). In an appeal by a claimant without legal representation, we will review the administrative law judge's findings of fact and conclusions of law to determine if they are rational, supported by

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

Since 2003, claimant has worked at the port of Baltimore as a driver, driving equipment, cars, and tractors onto and off ships. Tr. at 31. On May 9, 2009, claimant was asked to drive a piece of agricultural equipment. He climbed the vehicle to get into the driver's seat, some thirteen or fourteen feet high. *Id.* at 38. As the vehicle descended the ramp, however, claimant could not get the vehicle to stop and so he jumped from the vehicle onto the ramp. *Id.* at 38-39. Afterwards, claimant felt pain in both of his feet, his right knee, his lower back, and his left shoulder. *Id.* at 39.

Claimant initially sought medical treatment from Dr. William J. Launder, who diagnosed claimant with a lumbar strain, chondromalacia of the right knee, plantar fasciitis of the right heel, and a chronic sprain of the left ankle. Claimant was released to full-duty work in August 2009. CX 7.

Claimant returned to work but gradually his left shoulder also began to hurt and show decreased range of motion, becoming his chief source of pain. Claimant was kept off work from November through December 2012, but continued to suffer pain. CX 7. Claimant underwent shoulder surgery on March 21, 2013, having been diagnosed with a degenerative labral tear and rotator cuff tears. CX 4. On November 22, 2013, Dr. Andrew Pollak cleared claimant for work that involves driving, subject to not having to use his left arm for "climbing or steering particularly heavy vehicles." EX 20. Employer paid claimant temporary total disability benefits from May 21, 2009 but terminated them on December 11, 2013, citing Dr. Pollak's release of claimant for work as a driver. Claimant retired on a disability retirement effective January 1, 2014. Tr. at 42.

The parties stipulated, inter alia, that claimant had not returned to his usual job since 2012, that he reached maximum medical improvement on August 1, 2013, and that he was released to medium duty work. Decision and Order at 6. The administrative law judge found that claimant's injury prevents him from performing his usual employment because it required climbing and driving heavy vehicles. *Id.* at 10. The administrative law judge thus concluded that claimant made a prima facie case of total disability. *Id.* at 11.

The administrative law judge further found that employer established suitable alternate employment for claimant because employer offered him work as a driver. Decision and Order at 11. Claimant disputed that he would be permitted to return to work and take only the jobs within his capabilities, but the administrative law judge credited the testimony of employer's general manager, Mr. Curran, that claimant's seniority would give him options to pick and choose among the available jobs for drivers. *Id.* at 13. The administrative law judge determined that claimant could have returned to work as an auto

driver full time because the record showed that auto driving was medium or light duty work, which was within claimant's physical capabilities. *Id.* at 15. In the alternative, the administrative law judge found that employer established suitable alternate employment through its labor market survey. The administrative law judge determined that nine of the ten positions identified in the survey were suitable for claimant given his physical restrictions. *Id.* at 18.

The administrative law judge concluded that claimant's retirement was involuntary because it was based in part on claimant's injury rendering him unable to perform his usual employment. Decision and Order at 20. He calculated claimant's average weekly wage according to Section 10(c), 33 U.S.C. §910(c), using claimant's wage records from May 20, 2009 to November 16, 2012, and averaging the hours claimant worked per year and hourly rates he earned in the different work he performed. *Id.* at 23. He determined claimant's average weekly wage to be $1,385.54.[1] *Id.* at 24. The administrative law judge calculated claimant's post-injury wage-earning capacity based on how much claimant would have made if he were to perform only auto driving for employer and determined that claimant's weekly post-injury wage-earning capacity is $1,347.08.[2] *Id.* at 25. Accordingly, the administrative law judge concluded that claimant is entitled to permanent partial disability compensation beginning on December 12, 2013, based on two-thirds of the difference between $1,385.54 and $1,347.08. 33 U.S.C. §908(c)(21), (h).

Claimant, who is without counsel, appeals the administrative law judge's decision. Employer filed a letter as a response brief, urging affirmance. In an appeal by a claimant without legal representation, we address all findings adverse to claimant.

Suitable Alternate Employment

Where, as here, a claimant has made a prima facie case of total disability because he cannot perform his usual employment, the burden shifts to the employer to demonstrate the availability of suitable alternate employment which claimant is capable of performing. *See Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 797, 800, 33 BRBS 170, 171(CRT) (4th Cir. 1999). The employer may meet its burden by making suitable work

[1] The administrative law judge noted that the parties proposed to stipulate to claimant's average weekly wage as $1,561.55 but claimant rejected the stipulation at the hearing. Tr. at 10.

[2] The administrative law judge mentioned in a footnote that claimant's weekly wage-earning capacity based on the labor market survey would be $438.30 but he did not otherwise rely on this calculation in determining the amount of benefits to which claimant is entitled. Decision and Order at 25, n.21.

available to the employee in its own facilities or it may demonstrate that suitable alternate employment is available in the open labor market. *Id.* In this case, the administrative law judge concluded that employer established suitable alternate employment through an auto driver position at its facility, as that work is within claimant's physical restrictions and available to him.

We affirm the administrative law judge's findings. Claimant testified that his seniority would not allow him to pick only auto driving jobs, an account which was corroborated by Mr. Mackenzie, the president of claimant's longshore union, who explained how jobs were assigned by employer and that with claimant's level of seniority, he would most likely be a fifth wheel or tractor driver. CX 16 at 22. In addition, he stated that someone working as an auto driver when seniority permitted them to work a higher level position would unfairly affect other employees, who would then be assigned to jobs that were lower than what their seniority level allowed. *Id.* at 24. In contrast, employer's general manager, Mr. Curran, stated that someone with high seniority, such as claimant, can use his seniority to choose the jobs he wants and that drivers are able to get accommodations for any physical restrictions. Tr. at 106-108. The administrative law judge determined that Mr. Curran's interpretation was the most accurate because Mr. Curran was in the best position to understand how seniority functions for employer. Decision and Order at 13. He also reasoned that because seniority is a benefit for time worked, it was illogical that it would limit an individual's opportunities rather than increase them. *Id.* It is well established that the Board may not second-guess an administrative law judge's factual findings or overturn a decision merely because other findings or inferences could have been made from the evidence. *See Norfolk Shipbuilding & Drydock Co. v. Faulk*, 228 F.3d 378, 34 BRBS 71(CRT) (4th Cir. 2000), *cert. denied*, 531 U.S. 1112 (2001). The administrative law judge's decision to credit Mr. Curran's testimony and his reasoning as to why seniority should give claimant greater opportunities to choose work as an auto driver are rational and supported by the evidence. Therefore, we affirm the finding that auto driving work is available to claimant. *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9 (2001), *aff'd*, 32 F. App'x 126 (5th Cir. 2002).

Further, the administrative law judge's conclusion that claimant is physically capable of working as an auto driver is supported by the record evidence. Dr. Pollak opined that claimant could drive cars and fifth wheels, but not heavy vehicles like forklifts. EXs 20; 25 at 13-14. Claimant and Mr. Curran agreed that auto driving is the lightest duty driving work available. Tr. at 82, 103. Claimant testified that no doctor has restricted him from driving. *Id.* at 74. Drs. Kitsukie and Pollak stated that claimant should avoid overhead use of his left arm, such as in climbing ladders or into tall vehicles, but placed no restrictions on claimant's ability to climb stairs or on "walking" or "climbing/steps," which would permit claimant to climb ramps or go up and down stairs in order to get in and out of the autos. EX 6. Additionally, neither Dr. Pollak nor the other physicians who examined claimant stated that his use of prescription pain medication would make it unsafe for him

to drive. *See Marine Repair Services, Inc. v. Fifer*, 717 F.3d 327, 47 BRBS 25(CRT) (4th Cir. 2013) (reversing an administrative law judge's finding that a claimant's medications would interfere with his ability to find work where there was no evidence to support the finding). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that work as an auto driver is suitable for claimant.[3] *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996).

Diligence in Seeking Work

The administrative law judge also found that claimant did not demonstrate diligence in seeking suitable work. Decision and Order at 19. If an employer has established the availability of suitable alternate employment, a claimant may counter this by demonstrating a diligent but unsuccessful search for employment in order to establish that he remains totally disabled. *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96(CRT) (4th Cir. 1994). The administrative law judge concluded that claimant did not show reasonable diligence with regard to the auto driving position offered by employer because claimant did not accept the position. Decision and Order at 18. The administrative law judge did not accept claimant's only explanation for not accepting this position, *see* Tr. at 41-43, noting that the evidence he credited did not support claimant's assertion that the job was beyond his physical requirements. *Id.*; *see* discussion, *supra.* We affirm the administrative law judge's conclusion as it is supported by substantial evidence in the record.[4] *See Berezin v. Cascade General, Inc.*, 34 BRBS 163 (2000). Accordingly, we affirm the administrative law judge's finding that claimant is entitled to permanent partial disability benefits. *Id.*

Average Weekly Wage

Claimant ascribes error to the administrative law judge's calculation of his average weekly wage, arguing that it does not accurately reflect what he earned in 2008, the year

[3] Because we affirm the administrative law judge's finding that working as an auto driver is suitable alternate employment for claimant, it is not necessary to address the administrative law judge's finding in the alternative that employer established suitable alternate employment through its labor market survey. We note, however, that the administrative law judge made the requisite comparison of the physical requirements of the jobs identified in the labor market survey with claimant's restrictions in concluding that nine out of the ten jobs are suitable for claimant. The administrative law judge's finding is supported by substantial evidence in the record. Decision and Order at 16-18.

[4] In addition, we also affirm the administrative law judge's finding that claimant did not show reasonable diligence in seeking suitable work through the labor market survey as the finding is supported by the evidence in the record. Decision and Order at 18-19.

prior to his injury. Section 10(c) is used, as here, when neither Section 10(a) nor (b) can be reasonably and fairly applied to calculate claimant's average weekly wage or where there is insufficient information to apply those subsections.[5] *See Rhine v. Stevedoring Services of America*, 596 F.3d 1161, 44 BRBS 9(CRT) (9th Cir. 2010). "[T]he prime objective of section 10(c) is to arrive at a sum that reasonably represents a claimant's annual earning capacity at the time of the injury." *SGS Control Services v. Director, OWCP*, 86 F.3d 428, 441, 30 BRBS 57, 59(CRT) (5th Cir. 1996). An administrative law judge has broad discretion in determining a claimant's average weekly wage under Section 10(c). *Rhine,* 596 F.3d 1161, 44 BRBS 9(CRT).

The administrative law judge appropriately calculated claimant's average weekly wage under Section 10(c), relying on claimant's hourly rates.[6] The administrative law judge noted that claimant's wage rates depended on the type of work he performed, as he received a higher wage when he performed "RO-RO work" or top loader work, and also on whether the hours were classified as standard, overtime, "RT," or "MT."[7] *Id.* at 23. The administrative law judge averaged the hours that claimant worked per year from May 20, 2009 to November 16, 2012, and divided that total by the number of hours claimant worked in each job. *Id.* at 23. The administrative law judge then multiplied claimant's hourly rate for each of the different job types (taking into account whether the work was paid as standard, overtime, RT, or MT) by the number of hours he worked in each job in a year to determine that claimant's average weekly wage is $1,385.53. *Id.* Claimant's challenge to the administrative law judge's calculation of his average weekly wage is unavailing because it appears to be based on his tax records, which were not submitted into evidence, nor was any other evidence of pre-injury earnings.[8] Based on the evidence submitted, the

[5] Section 10(a) is not applicable in this case because there is no evidence from which the administrative law judge could calculate claimant's average daily wage at the time of injury. Decision and Order at 21; *see Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999). Section 10(b) is not applicable because there is no evidence of the wages of similarly situated workers. *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988).

[6] The administrative law judge relied on the only evidence in the record as to claimant's wages, EX 9, which is a record of claimant's hours and wages from May 20, 2009 to November 16, 2012, all after the injury.

[7] The administrative law judge found that neither party offered evidence explaining what "RT" and "MT" meant, beyond their payment scales. Decision and Order at 22.

[8] Claimant may seek modification of the administrative law judge's compensation order under Section 22 of the Act on the grounds of a change in conditions or a mistake in a determination of fact and submit additional evidence, if available, at that time. 33 U.S.C.

administrative law judge's method of calculating claimant's average weekly wage "reasonably represent[s] the annual earning capacity of the injured employee" at the time of injury and therefore it is affirmed. 33 U.S.C. §910(c); *see generally Staftex Staffing v. Director, OWCP*, 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).

Wage-Earning Capacity

Finally, claimant challenges the administrative law judge's determination of his post-injury wage-earning capacity, stating that it is unlikely that if he worked only as an auto driver for employer he could work 20 days per month at eight-hour days. Wage-earning capacity is determined under Section 8(h), 33 U.S.C. §908(h), which provides that a claimant's wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his wage-earning capacity.[9] If claimant has no actual earnings or if his earnings are not representative of his wage-earning capacity, then the administrative law judge must evaluate all relevant evidence and calculate a dollar amount which reasonably represents a claimant's wage-earning capacity. *See Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997); *Newport News Shipbuilding & Dry Dock Co. v. Stallings*, 250 F.3d 868, 35 BRBS 51(CRT) (4th Cir. 2001); *see also Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995).

The administrative law judge properly concluded that claimant's wage-earning capacity should be based on his earning capacity in the suitable alternate employment employer identified at its facility. Decision and Order at 20; *see generally Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998). The administrative law judge determined that claimant's wage-earning capacity is equivalent to claimant's prior work with employer limited only to auto

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§922; *see also Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997).

[9] Section 8(h) states that "The wage-earning capacity of an injured employee … shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity." 33 U.S.C. §908(h). If not, an administrative law judge "may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition…" *Id.*

driving.[10] *Id.* at 25. The administrative law judge concluded that claimant's post-injury average annual earnings would be $71,451.97, which equates to a weekly wage-earning capacity of $1,374.08. *Id.*

We conclude that the administrative law judge's calculation of claimant's wage-earning capacity cannot be affirmed because he did not explain the method he used in determining claimant's post-injury average annual earnings. The administrative law judge merely stated that claimant could earn $71,451.97 annually, or $1,374.08 weekly, working only as an auto driver. Therefore, his conclusion is not reviewable. *See generally Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). Because the administrative law judge did not adequately explain the method by which he determined claimant's post-injury wage-earning capacity, his determination must be vacated and the case remanded. On remand, the administrative law judge must explain the basis for his conclusion as to how many hours per week claimant would be able to work as an auto driver, taking the Section 8(h) factors into account. *See* 33 U.S.C. §908(h); *Devillier v. National Steel & Shipbuilding Co*., 10 BRBS 649 (1979).

[10] In a footnote, the administrative law judge also averaged the salaries of the nine suitable jobs from employer's labor market survey to note claimant's wage-earning capacity on the open market, but did not rely on that figure in determining claimant's benefits. Decision and Order at 25, n.21. As we affirm the administrative law judge's conclusion that the auto driver job is suitable for claimant, the issue of claimant's wage-earning capacity on the open labor market is moot.

Accordingly, the administrative law judge's calculation of claimant's post-injury wage-earning capacity is vacated and the case is remanded for further proceedings consistent with this opinion. The award of permanent partial disability is to remain in effect until the administrative law judge issues a decision on remand. In all other respects, the administrative law judge's Decision and Order Awarding Benefits 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