BRB No. 99-836

JAMES B. PLOURDE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BATH IRON WORKS CORPORATION	)	DATE ISSUED: May 9, 2000
	)	
and	)	
	)	
BIRMINGHAM FIRE INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of John M. Vittone, Chief Administrative Law Judge, United States Department of Labor.

Marcia J. Cleveland, Brunswick, Maine, for claimant.

Nelson J. Larkins (Preti, Flaherty, Beliveau, Pachios & Haley), Portland, Maine, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (98-LHC-1638, 1639) of Chief Administrative Law Judge John M. Vittone 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 supported by substantial evidence, are rational, and are 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 sustained an injury to his left wrist and elbow on May 20, 1988, while

working for employer. He subsequently developed problems with both upper extremities, and his upper back and neck. Claimant stopped working in March 1990. Employer paid claimant total disability benefits under the Maine Workers' Compensation Act, 39 ME. REV. STAT. ANN. §1 *et seq.* (1989) (amended 1993),[1] from March 1990 until November 15, 1996, except for a period in 1994-1995, when claimant worked temporarily for employer. Following a hearing upon consolidation of petitions from both parties before the State of Maine Workers' Compensation Board (the State Board), the hearing officer reduced claimant's benefits to 75 percent of his average weekly wage, based on his finding that claimant has some residual work capacity.[2] Cl. Exs. 4. at 12, 5 at 14; Emp. Exs. 6 at 15, 7 at 17. Claimant filed a claim under the Longshore Act on February 18, 1997, seeking permanent total disability and medical benefits from November 16, 1996, the date the State Board decision reduced his disability rating. Cl. Exs. 5, 6.

The administrative law judge in the Longshore Act proceeding found that collateral estoppel precludes claimant from relitigating the issue of disability under the Longshore Act, and he therefore did not make any findings on the merits of the claim. On appeal, claimant contends that the administrative law judge erroneously determined that collateral estoppel is applicable to the instant case, and maintains that he is entitled to total disability benefits under the Longshore Act. Employer responds, urging affirmance. Clamant has filed a reply brief.

Under the principle of collateral estoppel, a party is barred from relitigating an issue decided in prior litigation if: (1) the issues at stake are identical in both cases; (2) the issue was actually litigated in the prior litigation; and (3) the determination of the issue in the prior litigation was a critical and necessary part of the judgment in the earlier action. *Figueroa v.*

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[1]At the time of claimant's injury in this case, May 1988, 39 ME. REV. STAT. ANN. was in effect, since replaced by Title 39-A, codified as 39-A ME. REV. STAT. ANN. (effective January 1, 1993).

[2]The Maine scheme refers to total disability as "maximum level of partial incapacity," or "100 percent partial incapacity." *See Bureau v. Staffing Network, Inc.*, 678 A.2d 583 (Me. 1996); *Tripp v. Philips Elmet Corp.*, 676 A.2d 927 (Me. 1996).

Campbell Industries, 45 F.3d 311, 315 (9th Cir. 1995); *see generally Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971); *Lawlor v. National Screen Service Corp.*, 349 U.S. 322 (1955); *Ortiz v. Todd Shipyards Corp.*, 25 BRBS 228 (1991). In order for collateral estoppel effect to be given to a court's finding by an administrative law judge deciding a claim under the Longshore Act, the same legal standards must be applicable in both forums. *See, e.g., Casey v. Georgetown University Medical Center*, 31 BRBS 147, 151 (1997). Collateral estoppel effect may be denied because of differences in the burden of proof. *Bath Iron Works Corp. v. Director, OWCP [Acord]*, 125 F.3d 18, 21, 31 BRBS 109, 111 (CRT) (1st Cir. 1997). The point of collateral estoppel is that the first determination is binding not because it is right but because it is first, and was reached after a full and fair opportunity between the parties to litigate the issue. *Acord*, 125 F.3d at 22, 31 BRBS at 112 (CRT).

Claimant first argues that the administrative law judge selectively decided to give collateral estoppel effect to findings in the state proceeding which were adverse to him, while not accepting the favorable findings of fact. Initially, the favorable findings to which claimant appears to be referring are that he suffered a work-related injury, that the injury rendered him totally disabled from 1990 until 1994, and from August 1995 until November 1996, and that he remained 75 percent disabled after November 1996. Cl. Br. at 7. Claimant's arguments are without merit, as the administrative law judge never rejected the findings to which claimant refers. In addition, no party disputes that such findings of fact from one forum must be accepted in another forum. *See Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 12 BRBS 828 (1980). The extent of the claimant's disability, however, is a mixed question of law and fact, *Barlow v. Western Asbestos Co.*, 20 BRBS 179, and these factual findings are not relevant to the disability issue raised before us, *i.e.*, whether there are differing burdens of proof under the two schemes for determining the extent of disability.

Claimant next argues that a consent decree dismissing the state proceeding does not bar the Longshore claim. Emp. Ex. 15. The parties signed a Consent Decree on February 4, 1999, under which claimant would no longer receive state benefits and would pursue a claim under the Longshore Act.[3] Claimant asserts that the administrative law judge "refers" to the consent decree and alleges that the decree "may have improperly" affected his decision. This argument is also without merit. The administrative law judge does refer to the decree, agreeing to admit it as employer's post-hearing exhibit, for the purpose of providing "some indication of the procedures used in Maine's workers' compensation scheme, along with information regarding the original State Board decision."

[3]Claimant explains that as there was related litigation before the state agency after the Longshore claim was filed, in order to avoid duplicative litigation the parties agreed to dismiss the state proceeding with prejudice.

Decision and Order at 2. The administrative law judge, however, nowhere refers to this document in his "Finding of Facts and Conclusions of Law," and does not rely on it in reaching his ultimate finding. Decision and Order at 8-9. Therefore, claimant's arguments relating to this issue are rejected, as there is no evidence that this decree was a factor in the administrative law judge's decision.

Claimant's primary argument is that he is not collaterally estopped by the state decision from seeking total disability benefits under the Longshore Act, because he had a greater burden of proof in the state proceeding. Relitigation of an issue is not precluded by the doctrine of collateral estoppel where the party against whom the doctrine is invoked had a heavier burden of persuasion on that issue in the first action than he does in the second, or where his adversary has a heavier burden in the second action than he did in the first. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Jenkins]*, 583 F.2d 1273, 8 BRBS 723, 732 (4th Cir.), *cert. denied* 440 U.S. 915 (1978), *citing* RESTATEMENT (SECOND) OF JUDGMENTS, §68.1(D), COMMENT F AT 38-39. The administrative law judge concluded that the position claimant advocates was rejected in *Acord*, 125 F.3d at 21, 31 BRBS at 111 (CRT). He determined that while the state and federal statutory schemes differ in some respects, the main thrust is the same, as once employer has shown the claimant's ability to return to work, claimant must show that work is unavailable in order to claim total disability. The administrative law judge reasoned that the State Board found that employer established that claimant had a residual work capacity and that claimant showed a lack of diligence in pursuing other jobs, Cl. Ex. 4 at 4 (Nov. 15, 1996 state decision). He therefore concluded that the two schemes are not different, and found that claimant was precluded from pursuing the Longshore claim.

We reverse the administrative law judge's application of the doctrine of collateral estoppel in this case. While the general definition of "disability" appears to be similar under the state and federal schemes,[4] the allocations of the burdens of production and proof differ

[4]Under Maine law, earning capacity is based on a combination of the employee's physical capacity and the availability of work within the employee's physical limitations. *Dumond v. Aroostook Van Lines*, 670 A.2d 939, 941 (Me. 1996); *Tripp v. Philips Elmet Corp.*, 676 A.2d 927, 928 (Me. 1996). As under the Longshore Act, "'incapacity for work' means not merely physical incapacity, but also the lack of employment resulting from the injury," *id.* at 929, thus defining "disability" in terms of an economic loss, as under the Longshore Act, where disability is defined as the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or other employment." 33 U.S.C. §902(10). The inquiry under state law is the degree to which the "persisting effects of [a] work-related injury are preventing [the employee] from engaging in remunerative work." *Id.* at 929.

materially under the two schemes. Under the Maine scheme, either the employer or the worker may petition for a review of incapacity (*i.e.*, total disability) previously determined by decree or agreement, on the ground that the claimant's incapacity has subsequently been increased, diminished or eliminated. *Ibbitson v. Sheridan Corp.*, 422 A.2d 1005 (Me. 1980). Employer-movant must establish through medical evidence that the employee has regained the physical capacity to perform some work. 39 ME. REV. STAT. ANN. §100(2)(B)(1989) (repealed). The initial showing by employer of an improvement in the worker's physical ability to work places on the worker the burden to come forward with evidence bearing on whether his work-related injury is causing remunerative work in the marketplace to be unavailable to him. *Poitras v. R.E. Glidden Body Shop, Inc.*, 430 A.2d 1113 (Me. 1981). The employee essentially has to show a lack of a stable job market, or that if there is such a current job market in his community, it is unavailable to him due to his injury.[5] *See Warren v. Vinalhaven Light & Power Co.*, 424 A.2d 711 (Me. 1981). Once the worker meets his burden of production, employer has the "never-shifting" ultimate burden of proof that it is more probable than not that the persisting effects of the worker's work-related injury lacked causative relation to the worker's opportunities for remunerative work in the work market of his community. *Ibbitson, supra.*

The state law requires the employer to show initially only that the claimant is no longer physically totally disabled and has acquired an earning capacity based, in most cases, solely on medical evidence. *See, e.g., Warren*, 424 A.2d at 712. Similarly, the administrative law judge found the state and Longshore Acts substantially the same because the employer first must show the claimant's ability to return to work. This burden under state law, however, is not comparable to employer's burden under the Longshore Act. Once the claimant has shown his inability to return to his usual work under the Longshore Act, the burden shifts to the employer to establish the availability of suitable alternate employment. It is manifestly insufficient under the Longshore Act for the employer to show merely that the claimant has some capacity to work or that the claimant can perform certain tasks. *See, e.g.*, *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84, 89(CRT) (2d Cir. 1997). The employer must show the realistic availability of actual jobs that the claimant can perform in order to meet its burden of establishing the availability of suitable alternate employment under the Longshore Act. The United States Court of Appeals for the First Circuit has referred to this burden as requiring the "precise nature, terms, and availability of the job[s]." *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 434, 24 BRBS 202, 208 (CRT) (1st Cir. 1991). The employer's initial burden under the state Act, that of coming forward with nothing more than

[5]The so-called work-search rule was a judicially-created doctrine designed to allocate the burdens of production and of proof in cases when a partially incapacitated employee claims total incapacity benefits. *Tripp v. Philips Elmet Corp.*, 676 A.2d 927, 929 (1996).

medical evidence evincing an ability to work, therefore is significantly lighter than that required under the Longshore Act; rather, to meet its burden of establishing suitable alternate employment, employer must provide evidence of actual positions, either at its facility or on the open market, that claimant can perform, given his age, education, vocational background and physical restrictions. *See id.*

In addition, the state burden on the claimant is greater than that required under the Longshore Act. Under the Maine law, once employer establishes claimant's physical capacity to work, claimant must show that work is unavailable to him within his restrictions in order to retain total disability benefits or to obtain a larger partial disability award. Although a claimant under the Longshore Act bears a complementary burden of establishing reasonable diligence in attempting to secure alternate employment, *see Legrow*, 935 F.2d 430, 24 BRBS 202(CRT); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT)(5th Cir. 1986), *cert denied*, 479 U.S. 826 (1986), this burden does not arise until employer's burden of establishing suitable alternate employment is satisfied. *Id.* The State Board found that claimant herein did not meet his burden of production on the work search issue. Under the Longshore Act, however, this burden would not arise in the absence of credited evidence of suitable alternate employment. *Id.* As employer's burden of establishing suitable alternate employment under the Longshore Act is greater than its burden of establishing claimant's ability to work under the state act, and as claimant bore a higher burden of establishing his inability to perform any work under state law than that required under the Longshore Act, we reverse the administrative law judge's finding that collateral estoppel effect must be given to the state determination.[6] *Acord*, 125 F.3d at 18, 31 BRBS at 109 (CRT).

The administrative law judge's finding that the First Circuit's decision in *Acord*, 125 F.3d 18, 31 BRBS 109(CRT), requires application of collateral estoppel in this case is mistaken, as the facts of the two cases are materially different. In *Acord*, the claimant was awarded benefits for a 25 percent partial disability under the Maine Act for work-related knee injuries sustained in 1983. Claimant sustained several traumas to his injured knee thereafter, the last being in June 1987. Claimant subsequently had additional surgery, resulting in a reduced work schedule. Claimant was discharged in November 1988 when employer had no suitable work for him.

The state agency found that the June 1987 incident did not permanently contribute to

[6]Employer's argument that claimant would get "two bites at the apple" is unpersuasive, as it gets a credit under Section 3(e), 33 U.S.C. §903(e), for all disability payments claimant received for the same injury under the state law.

claimant's condition, but it increased claimant's award to 50 percent due to the worsening of the 1983 condition. Different carriers were on the risk in 1983 and 1987. Claimant filed a claim under the Longshore Act for total disability, on the ground that employer did not identify suitable alternate employment. The administrative law judge found collateral estoppel inapplicable, and that the 1987 injury permanently aggravated claimant's condition, such that the latter carrier is liable.

The First Circuit held that collateral estoppel effect must be given to the state finding that there was no permanent aggravation in 1987. It held that the burdens of proof are the same, namely, that the carrier must establish by a preponderance of the evidence that the June 1987 incident had no permanent effect on claimant's condition. The court stated, in fact, that the carrier's burden was heavier under the state act, because, under Section 20(a) of the Longshore Act, 33 U.S.C. §920(a), employer's rebuttal burden is one of producing substantial evidence to the contrary, with the ultimate burden of proof thereafter returning to claimant. The court also noted that the state and federal acts may have different standards for identifying the liable carrier, but that this cannot affect the factual determination of whether, in fact, the 1987 incident permanently aggravated claimant's knee condition. The court further stated that the state act might be less willing to compensate an aggravating injury, but found no evidence that this influenced the state agency in this case, as the finding was based solely on medical evidence. Finally, the court noted that the administrative law judge credited newer and different evidence than that presented to the state agency, but held that even if the state decision was in some way "wrong" it must be given collateral estoppel effect.

The decision in *Acord* clearly states that if the burdens of proof are different in the two forums, collateral estoppel *may* not apply. Only if application of the differing burdens affects the result is the doctrine inapplicable. 125 F.3d at 21, 31 BRBS at 111(CRT). In this case, the differing burdens clearly affect the result, as the parties are required to produce different types and quantum of evidence at different steps in the proceedings. Thus, collateral estoppel does not apply. *Id.* We, therefore, reverse the administrative law judge's conclusion that collateral estoppel operates to bar claimant's claim in this case. Because the administrative law judge did not address the merits of claimant's claim, the case must be remanded for him to do so.

Accordingly, the administrative law judge's finding that collateral estoppel bars claimant from litigating his claim is reversed. His Decision and Order Denying Benefits is vacated, and the case is remanded for consideration of the claim on the merits.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge