U.S. Department of Labor

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

BRB No. 14-0327

BILJANA WARNER	)	
	)	
Claimant-Respondent	)	
	)	DATE ISSUED: May 27, 2015
v.	)	
	)	
NAVAL PERSONNEL COMMAND/MWR	)	
	)	
and	)	
	)	
CONTRACT CLAIMS SERVICES	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of Decision and Order–Awarding Benefits of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Andrew Hanley and Jarrett McGowan (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, McGRANERY and BOGGS, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order–Awarding Benefits (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 which 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).

Claimant was employed by employer as a child and youth program assistant at the Camp Lejeune Child Development Center (CDC) when, on March 11, 2011, she slipped and fell on a wet hallway floor.[1] Claimant sought medical care at employer's medical 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 her work accident. In August 2011, claimant commenced physical therapy for her physical injuries; claimant subsequently asserted that she injured left knee during her 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 pre-school classroom at the CDC. Claimant declined employer's offer of modified work at the CDC, believing herself incapable of performing her prior duties as a program assistant. At claimant's request, employer formally reassigned claimant on November 4, 2012 to the BEC, with a corresponding reduction in salary.

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

In his Decision and Order, the administrative law judge invoked the Section 20(a) presumption with regard to claimant's left knee and psychological conditions,[2] found that employer did not rebut the Section 20(a) presumption and, after discussing the record evidence as a whole, concluded that claimant established a causal relationship between her injuries and her work accident. The administrative law judge also found that claimant is incapable of returning to her regular employment duties with employer as a child and youth program assistant. The administrative law judge concluded that the modified position offered to claimant in employer's CDC is sheltered employment, and thus is not

[1] Employer's CDC provides child care to the children of Marine Corps personnel. Claimant's primary employment duties as a program assistant involved physically interacting with 24 children between the ages of 3 and 5.

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

suitable alternate employment. The administrative law judge found that the receptionist position at employer's BEC constitutes suitable alternate employment and that claimant is entitled to medical benefits and temporary partial disability benefits for her resulting loss in wage-earning capacity.[3] 33 U.S.C. §§907, 908(e), (h).

On appeal, employer challenges 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 contends that the administrative law judge erred in finding that the modified program assistant position at its CDC does not constitute suitable alternate employment. Claimant responds, urging affirmance of the administrative law judge's award of benefits. Employer has filed a reply brief.

We first address employer's contention that claimant's left knee and psychological conditions are not work-related. Claimant bears the burden of proving the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused the harm, in order to establish her prima facie case. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *see U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). If these elements are established, the Section 20(a), 33 U.S.C. §920(a), presumption applies to link claimant's injury or harm with her working conditions. *See Moore*, 126 F.3d 256, 31 BRBS 119(CRT). Employer does not challenge the administrative law judge's finding that Section 20(a) applies in this case, as it concedes that claimant sustained a work accident on March 11, 2011 and subsequently experienced left knee and psychological symptoms that could be related to the work accident. Upon invocation of the Section 20(a) presumption, the burden shifts to employer to produce substantial evidence that claimant's conditions were not caused or aggravated by her employment.[4] *See Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009). If the administrative law judge finds the Section 20(a) presumption rebutted,

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

[4] Under the aggravation rule, where a claimant's employment aggravates, exacerbates or combines with a prior condition, the entire resulting disability is compensable. *Newport News Shipbuilding & Dry Dock Co. v. Fishel*, 694 F.2d 327, 15 BRBS 52(CRT) (4th Cir. 1982); *see Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008); *Strachan Shipping v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986)(*en banc*).

it no longer controls, and the issue of causation must be resolved on the evidence of record as a whole, with claimant bearing the burden of persuasion. *Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *see Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

Employer contends the administrative law judge erred in finding that claimant's left knee condition is causally related to her March 11, 2011, work incident. We reject this contention. An employer is liable for additional injuries a claimant sustains in the course of medical treatment for a work-related injury. *White v. Peterson Boatbuilding Co*., 29 BRBS 1 (1995); *Wheeler v. Interocean Stevedoring, Inc*., 21 BRBS 33 (1988); *Weber v. Seattle Crescent Container Corp.*, 19 BRBS 146 (1986). Contrary to employer's contention, it is not significant, at this stage of the analysis, that claimant's treating physicians did not affirmatively opine that claimant's left knee symptoms are causally related to her March 2011 work injury or subsequent physical therapy. Rather, it is employer's burden to produce substantial evidence of the absence of a causal relationship between claimant's knee symptoms and the work accident. *See Moore*, 126 F.3d 256, 31 BRBS 119(CRT). In this regard, employer asserts that the opinion of Dr. Getz establishes that no relationship exists between claimant's left knee condition and her work injury and subsequent medical care. *See* EXs 23, 39. The administrative law judge found that Dr. Getz did not specifically address any relationship between claimant's knee symptoms and her work-related physical therapy. *See* Decision and Order at 31-32. Indeed, Dr. Getz opined that there is no causal relationship between claimant's left knee symptoms and her March 11, 2011 fall at work, but he did not address whether there is such a relationship between the physical therapy for her work-related injuries and her subsequent knee symptoms. *See* EXs 23, 39. Consequently, we reject employer's contention that the administrative law judge erred in his consideration of Dr. Getz's opinion. Accordingly, in the absence of substantial evidence that claimant's left knee symptoms were not caused by her work-related physical therapy, we affirm the administrative law judge's implied finding that the Section 20(a) presumption was not rebutted and his consequent finding of a causal relationship between claimant's work accident and her left knee condition. *See Holiday*, 591 F.3d 219, 43 BRBS 67(CRT).

Employer next contends the administrative law judge erred in finding that claimant's psychological symptoms are causally related to her employment accident. Specifically, employer asserts that the testimony of its medical witness, Dr. Schmickley, rebuts the Section 20(a) presumption and establishes, on the record as a whole, that claimant's work accident neither caused her present psychological condition nor aggravated a pre-existing condition. We need not address employer's contention that Dr. Schmickley's testimony is sufficient to rebut the Section 20(a) presumption, because, based on the record as a whole, the administrative law judge rationally found Dr. Schmickley's opinion deficient and that claimant established a relationship between her work accident and her psychological symptoms. Dr. Schmickley believed claimant's

psychological condition was a depressive disorder likely due to her divorce, and her life experiences in Croatia and in immigrating to the United States. *See* EX 41 at 124-129, 139, 148-150. The administrative law judge found that Dr. Schmickley did not explain the basis for his opinion that claimant's work injury would not have further contributed to or aggravated this underlying emotional condition. Decision and Order at 38. In contrast, the administrative law judge found credible claimant's testimony regarding the effects her work injury has had on her emotional health,[5] noting that claimant's medical records establish that she repeatedly reported consistent psychological symptoms to her health care providers post-injury. *Id.* at 37; *see* CX 10; EXs 26, 29. The administrative law judge found that claimant's clinical social worker, Ms. Stanley, diagnosed claimant with an adjustment disorder with depressed mood which she opined was precipitated by her work injury. *See* CX 10 at 66-68, 90-92. The administrative law judge thus concluded that claimant established by a preponderance of the evidence that her adjustment/depressive disorder is causally related to her March 11, 2011, work injury. *See* Decision and Order at 34-39.

It is well-established that an administrative law judge is entitled to evaluate the credibility of all witnesses and to weigh the medical evidence and draw his own inferences therefrom. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). The administrative law judge's weighing of the evidence is rational, and his conclusion that claimant established by a preponderance of the evidence that her psychological condition is causally related to her March 11, 2011, work injury is supported by substantial evidence of record. *Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994). Therefore, we affirm the administrative law judge's finding. *See generally Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997).

Employer contends the administrative law judge erred in finding that the modified position it offered to claimant in its CDC is sheltered employment and does not, consequently, establish the availability of suitable alternate employment. Once, as here, claimant establishes that she is unable to perform her usual employment duties due to her work injury, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *See Marine Repair Services, Inc. v. Fifer*, 717 F.3d 327, 47 BRBS 25(CRT) (4th Cir. 2013); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d

[5] Claimant testified that she was unable to enjoy her previous lifestyle due to her chronic pain. She stated she had developed a fear of falling. Claimant was concerned that she would not be able to work with children due to possible irritability from pain, and that her work performance would suffer if she had to ask co-workers for help. *See* Tr. at 83-84, 95-97; *see also* EX 38 at 37-42.

540, 21 BRBS 10(CRT) (4th Cir. 1988). Employer can meet its burden by offering a claimant a job in its facility, including a light duty job. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986). An employer may tailor a job to the claimant's specific restrictions so long as the work is necessary. *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); *Larson v. Golten Marine Co.*, 19 BRBS 54 (1986). Sheltered employment, or work provided solely through the beneficence of the employer, on the other hand, is a job for which claimant is paid even if she cannot do the work, or which is unnecessary; such employment is insufficient to constitute suitable alternate employment as it does not establish that the claimant has a wage-earning capacity in her injured condition. *Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51(CRT) (11th Cir. 1988).

In this case, employer offered claimant a modified program assistant position in its CDC; claimant declined this position based upon her belief that she was incapable of resuming work with pre-school age children. In support of its position that this modified job established the availability of suitable alternate employment, employer presented the testimony of Deborah Beale, Cathie Marshall, and Marla Talley. Ms. Beale, the Director of the CDC, testified that while a typical CDC classroom was staffed by two program assistants who performed the work necessary for the classroom, the position offered to claimant would be that of a third classroom program assistant and would entail only those duties that were within her capabilities; in her opinion, claimant's employment as a third assistant would serve as additional support for the nurturing required for the children under the CDC's care.[6] Tr. at 45. Ms. Marshall, employer's employee relations manager, testified that the modified position as the third program assistant would require claimant to perform the classroom's administrative duties but not the physical duties associated with caring for the children. *Id.* at 69-70. Ms. Talley, employer's branch manager for family care programs, testified on deposition that the addition of a third program assistant to a classroom would allow time for the other assistants to spend time with the children who need additional attention. *See* EX 40 at 41-43. Ms. Talley further testified that, as a result of the CDC's mission, employer recognized the need for additional staff members to be present in the classrooms, that such work was available, and that claimant's presence would have been justified. *Id.* at 11-12, 17-18, 41-43, 74. Ms. Talley also stated that the daycare program was expanding at the time claimant was offered the position. *Id.* at 11, 17, 54-57, 73.

In determining that the modified position as a third program assistant in a pre-school classroom did not establish the availability of suitable alternate employment, the

[6] For example, Ms. Beale stated that claimant could sing with the children or play with them at table level. *See* Tr. at 45.

administrative law judge found that the position did not entail necessary work and appeared to be created out of employer's beneficence. Specifically, in arriving at this determination, the administrative law judge found that the record did not support a finding that such "overstaffing," that is assigning three rather than two program assistants to a CDC classroom, occurred either before or after the date of claimant's March 11, 2011, work injury, that if such "overstaffing" occurred it was only for the purpose of training new workers and was therefore a temporary measure, and that employer did not hire anyone to work as a third program assistant when claimant declined employer's offer of this position. *See* Decision and Order at 46–52. The administrative law judge thus concluded that the modified program assistant job does not constitute suitable alternate employment, and that claimant's post-injury wage-earning capacity is to be set with reference to claimant's BEC job, which is suitable alternate employment. *Id.* at 52-56.

We agree with employer that the administrative law judge's finding that the modified program assistant job was created out of employer's beneficence cannot be affirmed. 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 the position. This emphasis is misplaced, because an employer may create a position especially for its injured employee. *See Darby,* 99 F.3d at 685, 30 BRBS at 93(CRT). Specifically, in this regard, the Board has stated that, "Any time light duty work is offered to an employee because he is physically or medically incapable of performing his usual work, the light duty employment will necessarily be tailored somewhat to the employee's physical limitations." *Darden*, 18 BRBS at 226; *see also Peele v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 133 (1987). The "necessity" inquiry is not limited to whether the job existed before the claimant's injury, or at other times, *see, e.g., Ezell,* 33 BRBS 19, but also focuses on whether claimant's work would be "profitable" to an employer, *i.e.,* does the employer gain a benefit from the employee's work or is the employee being paid for "doing nothing." *Compare CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991) (claimant worked part-time on an as-needed basis and had a mattress in the office where he could rest) and *Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989) (claimant returned to part-time office work without wages for a company he owned) *with Buckland v. Dep't of the Army/NAF/CPO,* 32 BRBS 99 (1997) (light duty laundry work was necessary even if the position would not be filled if claimant left); *see also Harrod v. Newport News Shipbuilding & Dry Dock Co.,* 12 BRBS 10 (1980).[7]

[7] In *Harrod*, the Board stated that "[s]heltered employment may be said to occur. . . where the job is unnecessary to employer's operations and merely created to place claimant on the payroll." 12 BRBS at 13-14.

In this case, the mission of employer's CDC is to provide daycare for the children of the Marine Corps base. The classrooms for preschoolers consist of 3-to-5 year old children, and employer has presented testimony that while two program assistants assigned to a CDC classroom will fulfill its mission, the presence of a third program assistant would be beneficial to accomplishing that mission. *See* EX 40 (deposition of Ms. Talley); Tr. at 45-46 (testimony of Ms. Beale). Consequently, we vacate the finding that employer's offer to claimant of a modified program assistant position at its CDC did not establish the availability of suitable alternate employment, and we remand the case for reconsideration of this issue. On remand, the administrative law judge must initially determine if claimant is capable of performing the duties of this modified position given her physical and psychological restrictions. *See generally Fifer*, 717 F.3d 327, 47 BRBS 25(CRT); *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 107 (2003). If she is so capable, the administrative law judge must then address whether the position entailed actual duties that are "necessary" to employer's operations or whether claimant would be paid for "doing nothing." *Harrod*, 12 BRBS at 13-14. If the administrative law judge determines that the modified CDC job is suitable alternate employment, he must determine the extent, if any, of claimant's loss in wage-earning capacity. 33 U.S.C. §908(h).

Accordingly, we vacate the administrative law judge's finding that employer did not establish the availability of suitable alternate employment through its offer of a modified position in its CDC, and the case is remanded for reconsideration consistent 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

I concur:

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JUDITH S. BOGGS
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, concurring and dissenting:

I concur with my colleagues' decision to affirm the administrative law judge's findings that claimant's left knee and psychological conditions are causally related to her slip and fall accident on March 11, 2011. However, I respectfully dissent from their decision to vacate the administrative law judge's determination that the modified position in employer's Child Development Center (CDC) constituted "sheltered employment." I would affirm the administrative law judge's decision on this issue as it is supported by substantial evidence, rational, and in accordance with the law. *See generally See v. Washington Metropolitan Area Transit Authority,* 36 F.3d 375, 28 BRBS 96(CRT) (4th Cir. 1994).

The administrative law judge found that claimant is unable to return to her usual work as a program assistant in the CDC due to restrictions resulting from her work injuries. Employer offered claimant a modified position in its CDC sometime in mid-2012, which claimant declined because she believed she would be unable to work safely with 3-to-5 year old children. Reasonably, she found Director Beale's assurance that they would be able to prevent children from jumping on claimant "maybe 85 percent of the time . . ." did not guaranty her safety from another devastating fall. In November 2012, at her request, claimant was permanently assigned to employer's BEC at a salary lower than she had received while working at employer's CDC.

The administrative law judge addressed at length the evidence on which employer relied in support of its position that the modified position work in the CDC established the availability of suitable alternate employment that claimant was capable of performing. He concluded that "the modified preschool classroom duty offered by Employer was not necessary work and appears created out of beneficence." *See* Decision and Order at 52.[8] Thus, the administrative law judge concluded that employer's "proffered 'modified' preschool classroom position is not suitable employment" under the Act. *Id.* I believe that this conclusion is supported by substantial evidence of record; I would therefore affirm the administrative law judge's finding on this issue and his consequent decision to award claimant temporary partial disability benefits based on her post-injury wage-earning capacity as a receptionist at employer's BEC.

[8] The administrative law judge's statement that the CDC position "appears created out of beneficence," was, I believe, "tongue-in-cheek" because his last words on the subject reflect his suspicion that the offer of the allegedly suitable modified CDC position "was an attempt to force the claimant to request transfer to the receptionist position at a greatly reduced rate in pay . . . ." Decision and Order at 52.

Sheltered employment has been described as work for which claimant is paid even if she cannot do the work and which is unnecessary; such employment, therefore, is insufficient to constitute suitable alternate employment because it does not establish that claimant has a wage-earning capacity on the open market. *Patterson v. Savannah Shipyard & Machine*, 15 BRBS 38 (1982) (Ramsey, C.J., dissenting), *aff'd sub nom. Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51(CRT) (11th Cir. 1988); *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (1980). In assessing the nature of the modified program assistant position, the administrative law judge set forth at length the testimony of Ms. Beale, Ms. Marshall, and Ms. Talley. Decision and Order at 12-17, 51-52. The administrative law judge credited evidence that, except for the training of new personnel, only two adults staff each classroom. The administrative law judge found there is no evidence that employer had ever hired a third person to work in any classroom, nor did it do so when claimant rejected its job offer. The administrative law judge further discussed the modified duties claimant would have been able to perform. He stated that the modified position,

> strip[s] out all outdoor activity with children, all indoor activity with children not seated at a desk or in activity groups, all activity related to arranging and maintain[ing] the activity areas, and all activity related to meal[s] and snacks for the children. Other than interacting with children in a very limited capacity indoors, the Branch Manager's [Ms. Talley] response to the Claimant's permanent work restrictions limit the Claimant to clerical duties, similar to those [she had] when she was taken out of the classroom in March 2011.

Decision and Order at 52. It is apparent from the administrative law judge's analysis that there was no "real" work for claimant to do in this modified position. The administrative law judge therefore concluded that claimant would not be performing "necessary" work and that the modified position does not constitute suitable alternate employment. *Id.*

This finding is well within the administrative law judge's discretion to make. The administrative law judge fully addressed the applicable law and the relevant evidence, and he, alone, is entitled to make findings of fact and to draw reasonable inferences from that evidence. *See*, 36 F.3d at 380, 28 BRBS at 103(CRT). That the administrative law judge could have reached the opposite conclusion does not demonstrate error in his determination; the Board may not substitute its finding for those of the administrative law judge. *Id.* Substantial evidence supports the administrative law judge's conclusion that claimant, in her injured condition, would have no real duties to perform in the preschool classroom and that the job, thus, was not necessary. *Patterson*, 15 BRBS 38. Therefore, I would affirm the administrative law judge's conclusion that employer did not establish the availability of suitable alternate employment with its offer of a modified program

assistant position. I would affirm the award of partial disability benefits based on claimant's wages in the BEC.

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REGINA C. McGRANERY
Administrative Appeals Judge