U.S. Department of Labor

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

BRB No. 16-0687

RONALD J. PITTS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SPECTRE GROUP INTERNATIONAL, LLC	)	
	)	
	)	
and	)	
	)	
ALLIED WORLD NATIONAL ASSURANCE COMPANY	)	DATE ISSUED: May 10, 2017
	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Respondent	)	DECISION and ORDER

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

Howard S. Grossman and Scott L. Thaler (Grossman Attorneys at Law), Boca Raton, Florida, for claimant.

Keith L. Flicker and Timothy Pedergnana (Flicker, Garelick & Associates, LLP), New York, New York, for employer/carrier.

Matthew W. Boyle (Nicholas C. Geale, Acting Solicitor of Labor; Maia Fisher, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order on Modification (2015-LDA-00841) of Administrative Law Judge Patrick M. Rosenow rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq*. (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant began working for employer in November 2010 as a mentor to the Director General of the Afghan Counter Narcotics Police in Afghanistan. Tr. at 36. On May 20, 2011, while travelling to Camp Phoenix, a United States military base in Kabul, Afghanistan, claimant injured his left knee and back when he fell off a drop step in a newly constructed area. *Id.* at 71. Claimant took two days off work immediately following the incident but finished working the four-month period, before returning to the United States in September 2011. EX 8 at 44-45; Tr. at 72. He sought treatment for his injuries on September 12 and was placed on a no-work status by his physician on September 22, 2011. CX 9; JX 1. Claimant did not return to work after this date. Employer paid claimant temporary total disability benefits based on the maximum compensation rate in effect at the time of injury, but it did not pay benefits for the periods during which claimant would have been in non-pay status.[1] JX 1. Claimant filed a claim for benefits, and the only issue before the administrative law judge was claimant's entitlement to disability benefits and interest during his periods of non-pay status.

On January 23, 2013, the administrative law judge issued a Decision and Order awarding claimant disability benefits for the periods he was in non-pay status. The administrative law judge rejected employer's argument that claimant drifted in and out of total disability status, depending on what his work schedule would have been in the absence of his injury. The administrative law judge explained that the maximum compensation rate, which the parties stipulated that claimant is entitled to, reflects the fact that claimant had every other four months off. Thus, the administrative law judge found that, until such time as employer establishes suitable alternate employment, claimant is entitled to total disability benefits. Decision and Order at 3 (Jan. 23, 2013).

[1] Claimant's annual salary was $229,500; however, his work schedule alternated four months on with four months off, and he was in non-pay status during his four months off. Decision and Order at 2 (Jan. 23, 2013); JX 1.

Employer subsequently filed for Section 22 modification, 33 U.S.C. §922, contending that claimant's back condition reached permanency as of March 18, 2014, and that it established suitable alternate employment with its labor market survey, dated April 1, 2015. Thus, employer contended that claimant's compensation benefits should be reduced from temporary total to permanent partial as of April 1, 2015.[2]

In his decision on modification, issued on August 16, 2016, the administrative law judge found that claimant's back condition became permanent on March 18, 2014, based on the parties' stipulation. Further, based on the opinion of Dr. Sitzman, claimant's treating pain-management physician, the administrative law judge found that claimant cannot return to his former employment, cannot work in a full-time position, and is capable of working only on a part-time basis with significant accommodations for his limitations. In so finding, the administrative law judge credited Dr. Sitzman's opinion regarding claimant's work capacity and restrictions over that of employer's medical expert, Dr. Bomboy, as Dr. Bomboy evaluated claimant only once and did not specifically address the length of the working day or week he believed claimant could tolerate.[3] As employer's labor market survey did not identify available part-time employment,[4] the administrative law judge found that employer did not establish the availability of suitable alternate employment. Accordingly, the administrative law judge found claimant entitled to permanent total disability benefits as of March 18, 2014. The administrative law judge left it to the district director to calculate claimant's compensation rate, and the district director calculated that claimant is entitled to the maximum compensation rates in effect for each fiscal year beginning with the 2014 rate in effect when claimant's disability became permanent and total. Thus, the district

[2] Employer conceded claimant's left knee condition reached permanency as of April 21, 2014, and that claimant is entitled to an award under the schedule for a three percent permanent impairment to his left knee based on the opinion of Dr. Bomboy. Emp. Post-Hearing Br. at 16, 48-49.

[3] Dr. Bomboy evaluated claimant on April 21, 2014, and opined that claimant has a 19 percent permanent impairment to his back. EX 5. On June 16, 2014, Dr. Bomboy issued an addendum to his report, opining that claimant has the following restrictions: no lifting greater than 20 pounds; no bending, twisting, or prolonged standing; and, no frequently prolonged sitting without the ability to change positions. *Id*.

[4] In support of its assertion that claimant was no longer totally disabled, employer submitted the vocational report of Susan Rampant, which identified 14 full-time light/sedentary jobs available as of April 1, 2015. EX 7. Ms. Rampant identified these jobs based upon her telephonic interview with claimant on February 3, 2015, and the work restrictions issued by Dr. Bomboy. *Id*.; EX 5.

director calculated permanent total disability compensation rates of $1,346.68 from March 18 to September 30, 2014; $1,377.02 from October 1, 2014 to September 30, 2015; and, $1,406 from October 1, 2015 to September 30, 2016.

On appeal, employer challenges the administrative law judge's finding that it did not establish the availability of suitable alternate employment because claimant is not capable of full-time work and its labor market survey does not identify any part-time jobs. Alternatively, employer challenges the district director's calculations of claimant's compensation rates. Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs, filed a limited response, urging the Board to affirm the district director's calculations of permanent total disability benefits if it affirms the permanent total disability award. Employer filed a reply brief.

Section 22 of the Act provides the only means for re-opening a claim that has been finally adjudicated, as it allows the modification of a prior decision on the grounds of a change of conditions or a mistake in a determination of fact. 33 U.S.C. §922; *see Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995); *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459, *reh'g denied*, 391 U.S. 929 (1968). The party moving for modification, here the employer, has the burden of establishing the change in condition or mistake in fact. *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997). The standard for determining the extent of a claimant's disability in a modification proceeding is the same as in the original proceeding. *See Del Monte Fresh Produce v. Director, OWCP [Gates]*, 563 F.3d 1216, 43 BRBS 21(CRT) (11th Cir. 2009); *Vasquez v. Continental Mar. of San Francisco, Inc.*, 23 BRBS 428 (1990). Thus, where a claimant is unable to return to his usual employment, the employer bears the burden of establishing that he is only partially disabled by demonstrating the availability of suitable alternate employment. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). In order to meet this burden, the employer must establish that job opportunities are available within the geographic area in which the claimant resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could realistically secure if he diligently tried. *See Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 35 BRBS 7(CRT) (5th Cir. 2001); *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998); *Turner*, 661 F.2d 1031, 14 BRBS 156.

We reject employer's assertion that the administrative law judge erred in relying on Dr. Sitzman's opinion to find that claimant cannot work full time. The administrative law judge accurately summarized Dr. Sitzman's opinion that, in an eight-hour day, claimant could probably sit for three to four hours, but would need to take breaks every thirty minutes, and that claimant was capable of walking only short distances and standing for 20-30 minutes before needing to sit. Decision on Modification at 19; CX 13

at 10. Dr. Sitzman clarified that his opinion regarding claimant's limitations were general in nature, as claimant did not undergo a physical capacity evaluation,[5] but he further stated on direct examination:

> Q: But from an overall position as both a pain management physician and a physician who has treated hundreds, if not thousands of patients, do you believe that [claimant] is capable of working on an uninterrupted basis during an 8-hour day such that he would be capable of returning each day in a 5-day week?
>
> A: No, I do not.

CX 13 at 11. On cross-examination, Dr. Sitzman responded:

> Q: As you testified earlier that [claimant] in your medical opinion would be unable to work in an uninterrupted position or a work position for eight hours, correct?
>
> A: Correct.
>
> Q: If accommodations were made for [claimant] relating to his pain complaints and whatever sitting and standing requirements that he may have, would [he] be capable of working an 8-hour day?
>
> A: With significant tolerance of his needs, yes.
>
> Q: Would he be capable of working a 4-hour day?
>
> A: I would say yes, with significant limitations to his capacity. And with an employer that would be willing to accommodate. Certainly not what he had been doing before.

Id. at 15.

Considering this testimony as a whole, the administrative law judge rationally interpreted Dr. Sitzman's opinion as not establishing that claimant was capable of consistently working an eight-hour day (i.e., five days a week) and therefore was not capable of returning to full-time work. *See generally Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *see also Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642,

[5] Dr. Sitzman also opined that claimant would have difficulty lifting, and that he could not climb, kneel or squat on a routine basis. CX 13 at 10.

44 BRBS 47(CRT) (9th Cir. 2010) (administrative law judge may draw inferences regarding a claimant's work restrictions that are based on a physician's recommendations); *cf. Marine Repair Services, Inc. v. Fifer*, 717 F.3d 327, 47 BRBS 25(CRT) (4th Cir. 2013) (an employer's evidence of suitable alternate employment cannot be discounted for failing to account for restrictions which were unannounced prior to the hearing as this imposes too heavy a responsibility under the Act's burden-shifting scheme). Although employer's alternative interpretation of Dr. Sitzman's testimony, that claimant is capable of regularly working an eight-hour day with accommodations for his limitations, may also be reasonable, it is well established that the administrative law judge, as the finder of fact, is entitled to weigh the evidence and select from among competing inferences. *See generally Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 32 BRBS 91(CRT) (5th Cir. 1998). Moreover, because Dr. Sitzman treated claimant over a period of several years, the administrative law judge rationally found his opinion regarding claimant's work capacity more probative than that of employer's expert, Dr. Bomboy, because Dr. Bomboy saw claimant only once and did not address the length of the working day or week he believed claimant could tolerate. Decision on Modification at 28-29; *see Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *Compton v. Avondale Industries, Inc.*, 33 BRBS 174 (1999). It is employer's burden to establish that claimant is capable of performing the alternate employment it identified. As it is rational and supported by substantial evidence, we affirm the administrative law judge's finding that claimant is not capable of working full time. *Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT). Further, as employer's labor market survey did not identify part-time employment, we affirm the administrative law judge's findings that employer did not establish the availability of suitable alternate employment, and claimant is, therefore, entitled to permanent total disability benefits commencing March 18, 2014. *See Marathon Ashland Petroleum v. Williams*, 733 F.3d 182, 47 BRBS 45(CRT) (6th Cir. 2013).

In light of our affirmance of the award of permanent total disability benefits, we next address employer's assertion that the district director erred in calculating claimant's permanent total disability benefits at the maximum rate in effect for each fiscal year beginning with that in effect the year claimant became permanently totally disabled, 2014.[6] Employer contends that the Board's decisions in *Lake v. L-3 Communications*, 47

[6] The rates were not set forth in an order but were communicated in a chart the district director attached to the administrative law judge decision. Subsequently, the district director revised his calculations to reflect claimant's entitlement to the maximum rate in effect in each fiscal year, and he communicated the revisions to the parties via email. The district director may make any calculations required to effectuate a compensation order, as this task is ministerial. *See Keen v. Exxon Corp.*, 35 F.3d 226, 28 BRBS 110(CRT) (5th Cir. 1994).

BRBS 45 (2013), and *Marko v. Morris Boney Co.*, 23 BRBS 353 (1990), concerning the applicable maximum rate of Section 6(c), conflict with the Fifth Circuit's decision in *Phillips v. Marine Concrete Structures, Inc.*, 895 F.2d 1033, 23 BRBS 36(CRT) (5th Cir. 1990) (*en banc*), concerning the benefits to which Section 10(f) adjustments apply.[7] 33 U.S.C. §§906(b), (c), 910(f).

The Board's decision in *Lake* addressed at length and rejected the same contention made by employer herein.[8] *Lake*, 47 BRBS at 48-50; *see also Boroski v. Dyncorp Int'l [Boroski II]*, 700 F.3d 446, 46 BRBS 79(CRT) (11th Cir. 2012); *Roberts v. Director, OWCP*, 625 F.3d 1204, 1208-09, 44 BRBS 73, 76(CRT) (9th Cir. 2010), *aff'd on other grounds sub nom. Roberts v. Sea-Land Services, Inc.*, 132 S.Ct. 1350, 46 BRBS 15(CRT) (2012); *Marko*, 23 BRBS at 361-362. We decline to reconsider this issue. The district director properly calculated claimant's benefits in accordance with law and thus we reject employer's contention of error.

[7] In *Phillips*, the Fifth Circuit overturned its prior precedent, and held that Section 10(f) cost-of-living adjustments apply only to benefits awarded for permanent total disability and that a claimant cannot receive the benefit of intervening adjustments during prior periods of temporary total disability. *Accord Bowen v. Director, OWCP*, 912 F.2d 348, 24 BRBS 9(CRT) (9th Cir. 1990); *Lozada v. Director, OWCP*, 903 F.2d 168, 23 BRBS 78(CRT) (2d Cir. 1990); *cf. Director, OWCP v. Hamilton*, 890 F.2d 1143 (11th Cir. 1989) (Eleventh Circuit continues to follow pre-*Phillips* Fifth Circuit case of *Holliday v. Todd Shipyards Corp.*, 654 F.2d 415, 13 BRBS 741 (5th Cir. 1981)).

[8] The employer in *Lake* was represented by the same attorney as the employer is in this case. In *Lake*, the employer supported its contention with reference to the Ninth Circuit's decision in *Bowen v. Director, OWCP*, 912 F.2d 348, 24 BRBS 9(CRT) (9th Cir. 1990). *See* n.7, *supra*.

Accordingly, the administrative law judge's Decision and Order on 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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JONATHAN ROLFE
Administrative Appeals Judge