BRB No. 13-0173

WILLIAM E. JENKINS, III	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
THE WASHINGTON POST	)	DATE ISSUED: 11/26/2013
	)	
and	)	
	)	
GALLAGHER BASSETT SERVICES, INCORPORATED	)	
	)	
	)	
Employer/Carrier-Petitioners	)	

DECISION and ORDER

Appeal of the Decision and Order - Award of Temporary Total Disability Compensation of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

David Schloss (Koonz, McKenney, Johnson, DePaolis & Lightfoot), Washington, D.C., for claimant.

William H. Schladt (Godwin, Erlandson, MacLaughlin, Vernon & Daney, LLC), Ellicott City, Maryland, for employer/carrier.

Before: McGRANERY, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Award of Temporary Total Disability Compensation (2012-DCW-1) of Administrative Law Judge Richard T. Stansell-Gamm 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.* (1982), as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §501 *et seq.* (1973) (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 worked for employer as a mail handler. On March 2, 1982, he sustained a work-related back injury, which necessitated multiple surgeries, including spinal fusions. In 1984, while wearing a full-body cast as a result of one of the back surgeries, claimant fell and injured both knees, again leading to multiple surgeries. Following his recovery after his last surgery in 1987, claimant returned to his usual work for employer. Claimant worked until October 4, 2008, when there was an alleged disagreement with a foreman, and claimant was sent home. On October 7, 2008, claimant learned he had been terminated by employer for insubordination and harassment. He filed a grievance to contest his termination. He remained unemployed.[1] Meanwhile, claimant's back and knee pain worsened and, in July 2009, he underwent a functional capacity evaluation (FCE) which he was unable to complete. He underwent a second FCE, and, on September 1, 2009, the physical therapist determined that claimant could not return to his usual work as the duties were too physically demanding.

In January 2010, claimant's treating physician, Dr. Whitehair, concluded that claimant was not able to return to any work because of the pain in his knees and back associated with his 1982 injury, and claimant filed for and obtained Social Security disability benefits. On August 16, 2010, claimant and employer reached a settlement to resolve his grievance. Employer agreed to pay claimant $40,000 and to contribute $2,500 to his retirement fund. In return, claimant agreed to drop his grievance and his demand for arbitration and to release all claims against employer except his workers' compensation claims. He also agreed he would not seek re-employment with employer. Thereafter, claimant was given a "regular" retirement from employer with a reduction in benefits for retiring early. Decision and Order at 8-10; Cl. Exs. 4, 7-9; Emp. Exs. 1, 4; Tr. at 26-28, 42-43.

Some time in 2010, claimant filed a claim under the Act for temporary total disability benefits commencing September 1, 2009. Tr. at 46. Employer disputed the claim for compensation, arguing that claimant had retired for reasons other than his work injury and, thus, had no compensable loss of wage-earning capacity. The administrative law judge considered the central issue to be whether claimant, through either misconduct

[1]Claimant testified that he searched for work beginning in November 2008 but he was unable to secure any employment. Tr. at 30. He said he had intended to continue working until he reached age 65. *Id.* at 37. Claimant obtained unemployment compensation under Virginia law. Cl. Ex. 8.

or retirement,[2] voluntarily removed himself from the workforce prior to the onset of his disability. Decision and Order at 12. Regarding claimant's alleged misconduct, the administrative law judge found that the record contains only claimant's credible denial of any misconduct, a settlement agreement that does not discuss the reasons for claimant's termination or contain an admission of wrong-doing, and the Virginia unemployment commission's finding that employer did not establish claimant was dismissed for misconduct. Therefore, absent any evidence contradicting claimant's testimony which the administrative law judge found credible, the administrative law judge determined that he was precluded from finding that claimant was terminated for misconduct. Decision and Order at 14. With regard to claimant's retirement, the administrative law judge found the Board's decision in *Harmon v. Sea-Land Serv., Inc.*, 31 BRBS 45 (1997), to be directly on point, as claimant sustained a worsening of his work-related traumatic condition in 2009 resulting in disability prior to his retirement in 2010; therefore, his acceptance of retirement benefits in 2010 is irrelevant to his entitlement to benefits under the Act. Decision and Order at 14. Moreover, the administrative law judge found that claimant credibly stated that his worsening condition was a factor in his decision to retire. *Id.* at n.10. The administrative law judge found that claimant established a prima facie case of total disability as of September 1, 2009, based on the FCE of that date, and that employer did not establish the availability of suitable alternate employment. Thus, the administrative law judge awarded claimant temporary total disability benefits based on his average weekly wage at the time of his 1982 injury. *Id.* at 15-16.

On appeal, employer contends the administrative law judge erred in awarding claimant continuing temporary total disability benefits beginning September 1, 2009, because claimant's employment was terminated for misconduct and he retired for reasons unrelated to his 1982 work injury. Claimant has filed a response brief, urging affirmance, to which employer replies.

In this case, there is no dispute that claimant sustained a traumatic back injury at work in 1982, that his knee condition is the result of the back injury, and that he was unable to return to his usual work after September 1, 2009, due to the natural progression of his work-related back and knee conditions. There also is no dispute that employer did not present evidence of the availability of suitable alternate employment following either the physical therapist's opinion in September 2009 that claimant could not return to his usual work or the doctor's opinion in January 2010 that claimant was unable to return to any work due to his back and knee conditions. *Scalio* v. *Ceres Marine Terminals, Inc.*,

[2]If claimant loses a suitable post-injury job because of his misconduct, employer need not re-establish the availability of suitable alternate employment; such a claimant is limited to whatever benefits he was entitled before the termination for cause. *Harrod v. Newport News Shipbuilding & Dry Dock Co.,* 12 BRBS 10 (1980); *Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996); *Jaros v. Nat'l Steel & Shipbuilding Co.*, 21 BRBS 26 (1988).

41 BRBS 57 (2007). At issue is the relevance of claimant's retirement and his alleged misconduct vis-à-vis his entitlement to disability benefits.

Employer contends the administrative law judge improperly construed "voluntary," and therefor erred in finding that claimant's retirement was not voluntary.[3] Employer asserts that, if a claimant leaves the workforce for reasons other than his work injury, he is a "voluntary" retiree. *See R.H. [Harvey] v. Baton Rouge Marine Contractors, Inc.*, 43 BRBS 63 (2009), *aff'd sub nom., Louisiana Ins. Guar. Ass'n v. Director, OWCP [Harvey]*, 614 F.3d 179, 44 BRBS 53(CRT) (5th Cir. 2010); *Harmon*, 31 BRBS 45; *Morin v. Bath Iron Works Corp.*, 28 BRBS 205 (1994); *Johnson v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 22 BRBS 160 (1989); *Smith v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 22 BRBS 46 (1989); *MacDonald v. Bethlehem Steel Corp.*, 18 BRBS 181 (1986); 20 C.F.R. §702.601(c). Employer contends claimant was terminated for misconduct in October 2008, which, it asserts, constitutes a "voluntary retirement," that claimant was not working at the time his condition worsened in 2009, and that claimant later retired "voluntarily" pursuant to the settlement of his grievance. Thus, employer contends claimant's totally-disabling condition did not cause his loss wage-earning capacity, which pre-existed the onset of physical disability.

The Board has previously discussed the effect of a claimant's "retirement" on his entitlement to benefits in a traumatic injury case. In *Harmon*, 31 BRBS 45, the Board held that a claimant who suffered a work-related traumatic injury and became unable to perform his usual work prior to his retirement remained disabled following his retirement, regardless of the type of retirement he took. That is, because the claimant's work injury precluded his return to his usual work prior to or at the time of retirement, it was immaterial that claimant retired due to eligibility based on his longevity. *Harmon*, 31 BRBS at 47-48. In contrast is *Hoffman v. Newport News Shipbuilding & Dry Dock Co.*, 35 BRBS 148 (2001). In that case, a claimant suffered a traumatic knee injury, returned to light-duty work with his employer which was deemed suitable, and retired three years later by accepting the employer's early retirement package. After his retirement, his knee condition worsened and his physician increased his impairment rating and later performed both arthroscopy and total knee-replacement surgeries, rendering the claimant totally disabled. The Board affirmed the administrative law

[3]Employer asserts that the administrative law judge disregarded the legal definition of "voluntary," 20 C.F.R. §702.601(c), and used a lay definition similar to "not claimant's fault or choice." Employer is mistaken. The definition in the regulation applies only to cases involving occupational diseases, and, moreover, was promulgated pursuant to the 1984 Amendments to the Act. As this case arises under the D.C. Workmen's Compensation Act, any amendments to the Longshore Act after 1982 do not apply. *Keener v. Washington Metro. Area Transit Auth.*, 800 F.2d 1173 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 918 (1987); *Kulick v. Continental Baking Corp.*, 19 BRBS 115 (1986).

judge's finding that the claimant's retirement was not due to his injury. Thus, his loss of wage-earning capacity was not caused by his injury, and, although he was entitled to increased benefits under the schedule, 33 U.S.C. §908(c)(2), he was not entitled to permanent total disability benefits, 33 U.S.C. §908(a). *Hoffman*, 35 BRBS at 149-150; *see also Burson v. T. Smith & Son, Inc.*, 22 BRBS 124 (1989).

We reject employer's assertion that claimant's departure from the workforce in 2008 was due to his misconduct, thus relieving it of liability for disability benefits related to the work injury. Although employer contends claimant's termination occurred because of behavior under claimant's control, the record supports the administrative law judge's finding that employer did not demonstrate that the termination was because of misconduct. The administrative law judge relied on the Virginia commission's finding that employer failed to establish misconduct as the reason for claimant's termination, and its subsequent award of unemployment benefits. He also credited claimant's denial of any misconduct and stated that the 2010 settlement agreement does not address the reasons for claimant's termination. Decision and Order at 14; Cl. Ex. 7; Emp. Ex. 4; Tr. at 26-28. Moreover, the administrative law judge relied on claimant's testimony, which the administrative law judge found credible, Tr. at 38-39, that he was physically capable of performing his work in October 2008, and on employer's concession that, but for his termination in 2008, claimant would have continued in his job. *See* Decision and Order at 15 n.11. Claimant testified that following his termination he commenced looking for work in November 2008. Tr. at 30.[4] As "retirement" involves an expectation that a person will not return to the workforce, we reject employer's contention that claimant's departure from the workforce in 2008 constitutes a "retirement."[5] Thus, we affirm the administrative law judge's findings, as they are rational and supported by substantial evidence. *See generally Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994).

Consequently, we reject employer's contention that claimant's loss of wage-earning capacity is not compensable. Unlike *Hoffman* and *Burson*, claimant's condition deteriorated before his retirement. Although claimant left the workforce in 2008, we have affirmed the administrative law judge's rational findings that he neither retired at that time nor left the workforce due to misconduct. Substantial evidence supports the administrative law judge's finding that claimant's work-related condition worsened in 2009 to the point he was unable to perform his work for employer, and he accepted an early retirement in 2010. Consequently, as the administrative law judge properly found,

[4]This is corroborated by the award of unemployment compensation.

[5]The administrative law judge noted, and the record supports, that the settlement of claimant's grievance did not require him to retire. The settlement only stated claimant would not seek reemployment by employer. Cl. Ex. 7 at 3.

this case is akin to *Harmon*, because the traumatically-injured claimant could not perform his usual work prior to the time of his retirement.[6] *Harmon*, 31 BRBS 45.

In this case, the administrative law judge properly applied the law to determine claimant's entitlement to benefits. To establish a prima facie case of total disability, a claimant must show that he cannot perform his usual work because of his work-related injury. To limit the extent of a claimant's disability, an employer must then present evidence of the availability of alternate employment the claimant can perform given his physical condition and other factors. *Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69(CRT) (D.C. Cir. 1990); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). The administrative law judge's findings that claimant established a prima facie case of total disability and that employer did not establish the availability of suitable alternate employment are not challenged on appeal. Therefore, we affirm the administrative law judge's award of total disability benefits. *Crum v. General Adjustment Bureau*, 738 F.2d 474, 16 BRBS 115(CRT) (D.C. Cir. 1984); *Clophus v. Amoco Prod. Co.*, 21 BRBS 261 (1988).

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

[6]Moreover, as noted, the administrative law judge relied on claimant's testimony that his injury was one of the reasons he accepted the early retirement in 2010.