U.S. Department of Labor

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

BRB No. 15-0227

TROY A. HINES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SEWARD SHIP'S DRYDOCK, INCORPORATED	)	DATE ISSUED: Nov. 23, 2015
	)	
	)	
and	)	
	)	
CHARTIS INSURANCE	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Claimant's Motion for Modification and Granting Respondents' Motion for Modification of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Norman Cole (Sather, Byerly & Holloway, LLP), Portland, Oregon, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Claimant's Motion for Modification and Granting Respondents' Motion for Modification (2012-LHC-01270) of Administrative Law Judge Jennifer Gee 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 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 Alaska as a welder and pipefitter in January 2008. Prior to his injury on April 26, 2008, claimant had requested an eight-week leave of absence beginning the last week of May 2008 so that he could obtain a captain's license to allow him to start a charter fishing business.[1] On April 26, 2008, claimant injured his back and neck at work. He finished his work that day, had the weekend off, and, on Monday, reported to his supervisor that he was unwell; he was taken to the hospital. Using conservative pain relief methods, claimant returned to work and continued working until May 21, 2008, when he could no longer tolerate the pain. Decision and Order at 5-6. Due to his back pain, claimant did not attend the eight-week licensing class, and he did not return to work for employer because he did not have a doctor's release.

In her initial decision, the administrative law judge found that claimant's April 2008 thoracic and cervical work injury caused his pre-existing degenerative disc disease to become symptomatic and that claimant cannot return to his usual work because of this injury. Decision and Order at 21, 23. The administrative law judge also found that claimant's work-related condition had not reached maximum medical improvement. *Id.* at 27-29. The administrative law judge also found, and the parties agreed, that claimant's average weekly wage must be calculated under Section 10(c) of the Act, 33 U.S.C. §910(c).[2] Decision and Order at 29-30. The administrative law judge found that claimant's average weekly wage should be calculated as of May 21, 2008, when claimant stopped working as a result of his injury, and, using a combination of claimant's actual earnings for employer as well as a projection of what he could have earned had he continued to work for employer, she concluded that claimant's average weekly wage is $731.06.[3] Decision and Order at 31-34. The administrative law judge awarded claimant

[1] Claimant was hoping this would supplement his income during slow periods at employer's facility. Tr. at 59-62.

[2] Section 10(c) applies if either Section 10(a) or Section 10(b), 33 U.S.C. §910(a), (b), "cannot reasonably and fairly be applied." 33 U.S.C. §910(c). In this case, the parties agreed that neither Section 10(a) nor Section 10(b) applied, as claimant did not work substantially the whole of the year in the same or similar employment, and the record lacks evidence of the wages of similarly-situated employees during the year preceding the work injury.

[3] The administrative law judge divided claimant's gross earnings of $17,828.13 by his 18.29 weeks of work, resulting in an average wage of $974.75 per week. She multiplied that number by 39 weeks, having determined that claimant would not have worked a full 52 weeks, to arrive at an annual earning capacity of $38,015.25. She then

temporary total disability benefits beginning May 22, 2008, except she awarded him temporary partial disability benefits for those periods after that date when claimant found alternative work.

Claimant appealed the administrative law judge's average weekly wage finding. *Hines v. Seward Ship's Drydock, Inc.*, BRB No. 11-0725 (May 22, 2012) (unpub.). The Board rejected claimant's contention that the record did not support the administrative law judge's finding that claimant would not have worked for employer for 13 weeks of the year-long period that she utilized to calculate claimant's average weekly wage. *Hines*, slip op. at 4-5. The Board stated that, in light of employer's traditional summer slowdown and claimant's pre-injury request for an eight-week leave of absence during the summer of 2008, it was reasonable for the administrative law judge to find that claimant would not have worked for employer for 13 weeks. The administrative law judge's finding that claimant's average weekly wage is $731.06 was thus affirmed, as it was supported by substantial evidence and in accordance with law. *Id*., slip op. at 5.

Subsequently, employer and claimant each requested Section 22 modification, 33 U.S.C. §922, of the administrative law judge's decision. Finding merit in employer's request, the administrative law judge, relying on the opinions of Drs. Beghin, Schmidt and Bald, determined that claimant reached maximum medical improvement, and was capable of returning to his usual work for employer as a welder as of January 13, 2009.[4] Decision and Order on Modification at 46; *see also* RX 116, pp. 214-15; RX 235, p. 991; RX 253, pp. 1240-42; RX 268, pp. 1904-05. Accordingly, the administrative law judge modified her decision to reflect that claimant's entitlement to temporary total disability benefits ceased as of January 13, 2009. Decision and Order on Modification at 48.

Rejecting claimant's request for modification, the administrative law judge concluded that claimant did not establish a mistake in the determination that claimant's average weekly wage should be based on the wages claimant would have earned in 39 weeks in 2008. Specifically, the administrative law judge found that the record does not support a finding that claimant would have worked year-round for employer in the absence of his injury. The administrative law judge rejected claimant's reliance on the testimony of another welder, Bob Hall, that he had never been laid off in the summer and that claimant was an exceptional welder. Tr. at 189-190. The administrative law judge declined to infer that claimant would not have been laid off absent his injury, observing

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divided that figure by 52 to reach an average weekly wage of $731.06. Decision and Order at 35; 33 U.S.C. §910(c), (d).

[4] The administrative law judge rejected claimant's contention that his condition did not reach maximum medical improvement until April 1, 2010. Decision and Order on Modification at 42.

that Mr. Hall was not in charge of welding assignments. The administrative law judge also rejected claimant's contention that his work schedule was comparable to, and thus, his average weekly wage should be comparable to, that of welder Scott Dries, as the record establishes that claimant and Mr. Dries "never worked together during the summer months, which tend to be slower and often require that welders be reassigned to paint jobs or working on boats." Decision and Order on Modification at 41. The administrative law judge found that, "[T]he record does not support a finding that claimant would have worked year-round in the absence of injury." *Id.* The administrative law judge found that only Mr. Hall worked the entire year in 2008, whereas the other six welders worked only part of the year.[5] Decision and Order on Modification at 40-41; *see* Tr. at 444-450. Consequently, the administrative law judge reiterated, based on her prior findings that claimant planned to take off eight weeks to obtain a captain's license and two weeks to go hunting, as well as credible evidence that employer has a seasonal slowdown in work, that claimant's average weekly wage is $731.06 based on a 39-week work year. *See* n. 3, *infra*.

On appeal, claimant asserts error in the administrative law judge's denial of his motion for modification on the average weekly wage issue. Claimant contends the administrative law judge erred in again finding that, absent his work injury, claimant would have worked only 39 weeks in 2008. Employer filed a response brief in support of the administrative law judge's decision. Claimant filed a reply brief.

Section 22 of the Act provides the only means for changing otherwise final decisions. Modification pursuant to Section 22 is permitted if the petitioning party demonstrates a change in the claimant's physical or economic condition, *Metropolitan Stevedore Co. v. Rambo* [*Rambo I*], 515 U.S. 291, 30 BRBS 1(CRT) (1995), or a mistake in a determination of fact. *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459 (1968). It is well established that the party requesting modification bears the burden of showing that the claim comes within the scope of Section 22. *See, e.g., Metropolitan Stevedore Co. v. Rambo* [*Rambo II*], 521 U.S. 121, 31 BRBS 54(CRT) (1997); *Jensen v. Weeks Marine, Inc.*, 346 F.3d 273, 37 BRBS 99(CRT) (2d Cir. 2003); *Vasquez v. Continental Mar. of San Francisco, Inc.*, 23 BRBS 428 (1990). The administrative law judge has "broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971). Pursuant to Section 10(c) of the Act, the administrative law judge has broad discretion to

[5] The administrative law judge also noted that the welders did not all work full-time during the months they were employed. She observed that Mr. Hall, despite working all 12 months, worked 135.25 hours in January and 89.25 hours in December. Decision and Order on Modification at 10; Tr. at 444.

arrive at a fair approximation of a claimant's annual earning capacity at the time of his injury. *Rhine v. Stevedoring Services of America*, 596 F.3d 1161, 44 BRBS 9(CRT) (9th Cir. 2010); *J.T.* [*Tracy*] *v. Global Int'l Offshore, Ltd.*, 43 BRBS 92 (2009), *aff'd sub nom. Keller Found./Case Found. v. Tracy*, 696 F.3d 835, 46 BRBS 69(CRT) (9th Cir. 2012), *cert. denied*, 133 S.Ct. 2825 (2013).

In this case, the administrative law judge acted within the discretion afforded by Section 10(c) and Section 22 in finding unpersuasive claimant's average weekly wage arguments based on the testimony of Mr. Hall and the work schedule of Mr. Dries. *Rhine*, 596 F.3d at 1165, 44 BRBS at 11(CRT); *Healy Tibbitts Builders, Inc. v. Director, OWCP*, 444 F.3d 1095, 1103, 40 BRBS 13, 18-19(CRT) (9th Cir. 2006). The administrative law judge rationally relied on the record evidence concerning the actual work performed by employer's welders in 2008. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Moreover, as discussed in the Board's prior decision, substantial evidence supports the administrative law judge's finding that claimant did not demonstrate that he would have worked a full year for employer. *Hines*, slip op. at 4-5. Claimant has not established that the administrative law judge abused her discretion in finding that claimant did not demonstrate a mistake of fact in the prior average weekly wage determination. *See O'Keeffe*, 404 U.S. at 256. Therefore, the administrative law judge's denial of claimant's motion for modification is affirmed. *See generally Manente v. Sea-Land Service, Inc.*, 39 BRBS 1 (2004).

Accordingly, the administrative law judge's Decision and Order Denying Claimant's Motion for Modification and Granting Respondents' Motion for 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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GREG J. BUZZARD
Administrative Appeals Judge