U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 18-0222

XAVIER HERNANDEZ	)	
	)	
Claimant-Petitioner	)	
	)	DATE ISSUED: 10/03/2018
v.	)	
	)	
NATIONAL STEEL AND SHIPBUILDING COMPANY	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and the Order Denying Motions for Reconsideration of Christopher Larsen, Administrative Law Judge, United States Department of Labor.

Jeffrey M. Winter, San Diego, California, for claimant.

Roy D. Axelrod (Law Office of Roy Axelrod), San Diego, California, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits and the Order Denying Motions for Reconsideration (2016-LHC-00465, 2016-LHC-00466) of Administrative Law Judge Christopher Larsen rendered on claims 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, during the course of his work as a welder for employer from 1974 through December 1, 2011, sustained work-related injuries to his left knee in 2002 and 2008,[1] as well as some minor back injuries.[2] Claimant filed claims for his 2002 and 2008 left knee injuries, which the parties resolved via stipulations approved by the district director in Orders issued in 2004 and 2010. Employer paid claimant compensation for his 2002 and 2008 left knee injuries pursuant to those orders. CX 41; EX 4. Claimant's left knee continued to bother him, prompting further treatment in 2011, which culminated with his undergoing a total left knee replacement by Dr. Behr on October 22, 2012. Dr. Behr opined that claimant could return to semi-sedentary work on February 28, 2013, and that claimant's left knee had reached maximum medical improvement on June 10, 2013, with a permanent impairment of the left lower extremity.

Claimant last worked for employer on December 1, 2011, when he was laid off due to the lack of work. Employer voluntarily paid claimant temporary total disability benefits for his knee injury starting on October 25, 2012, making its last payment on August 4, 2014. Meanwhile, claimant stated that, in early 2013, prolonged standing began causing back pain. Pursuant to Section 22 of the Act, 33 U.S.C. §922, claimant filed a petition for modification of the district director's April 27, 2010 Compensation Order, alleging a worsening of his left knee injury and a mistake in fact as to the calculation of the stipulated average weekly wage for the 2008 knee injury. Claimant also filed a claim in 2014 alleging he sustained a back/hip injury as a result of cumulative trauma in his work for employer through December 1, 2011, and a leg length discrepancy resulting from his October 22, 2012, left knee surgery. Employer controverted the claims.

Relative to this appeal, the administrative law judge found claimant sustained a work-related injury to his hip and back from the cumulative trauma of his work for employer and his altered leg length secondary to his left knee arthroplasty. The administrative law judge found claimant established that his left knee injury, but not his

[1]Claimant injured his left knee while working for employer on January 16, 2002, and reinjured it at work on November 5, 2008. Claimant had an arthroscopic procedure on his left knee in August 2002, and received injections and a custom knee brace for the left knee after the 2008 re-injury. Following each course of treatment, claimant returned to his usual work for employer. Dr. Behr opined that claimant's left knee condition was permanent and stationary on July 30, 2009.

[2]Claimant was examined in employer's medical clinic for low back pain in November and December 1977, and in January and December 1978. He also strained his back in either 1997 or 1998, requiring three weeks of physical therapy. Despite these incidents, claimant continued performing his usual work for employer.

low back and hip injury, precluded him from performing his usual work as of October 22, 2012, that employer demonstrated the availability of suitable alternate employment on June 10, 2013, and that claimant did not engage in a reasonable and diligent job search. Accordingly, the administrative law judge awarded claimant compensation for temporary total disability from October 22, 2012 through June 9, 2013, 33 U.S.C. §908(b), and for a 25 percent permanent impairment of the left lower extremity, commencing June 10, 2013, and running for 72 weeks. 33 U.S.C. §908(c)(2), (19). The administrative law judge denied both parties' motions for reconsiderations.

On appeal, claimant challenges the administrative law judge's conclusion that he is not entitled to disability benefits for his hip/back condition. Employer responds, urging affirmance of the administrative law judge's decision. Claimant has filed a reply brief.

Claimant first contends the administrative law judge's finding that his hip/back condition is not disabling is irrational because the administrative law judge did not sufficiently address Dr. Raiszadeh's work restrictions. We disagree.

In order to make a prima facie case of total disability, claimant must establish that he is unable to perform his usual work due to the work injury. *See Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988). In this case, it is claimant's burden to establish that he has restrictions due to his back and hip condition that render him unable to perform his usual work. *Id.*; *see generally Lamon v. A-Z Corp.*, 46 BRBS 27 (2012), *vacating on recon.* 45 BRBS 73 (2011).

The administrative law judge addressed Dr. Raiszadeh's opinion at length, and rejected it as unpersuasive on the issue of whether claimant's low back and hip injury, separate from his knee injury, prevents him from returning to his usual employment. Order on Recon. at 2-4. The administrative law judge found that although Dr. Raiszadeh imposed permanent work restrictions, he did not expressly state that he placed the restrictions due to the low back and hip pain or explain how claimant's low back and hip pain limits his ability to work. The administrative law judge noted that Dr. Raiszadeh's restrictions are "identical" to those imposed by Drs. Behr, Santore and Amory solely for claimant's left knee.[3] Order on Recon. at 3. Moreover, the administrative law judge declined to infer that

[3]On October 31, 2016, Dr. Raiszadeh imposed permanent restrictions of no lifting more than 10 pounds, no prolonged sitting or standing more than 50 minutes per hour, and no prolonged climbing, bending or stooping at the waist level. CX 46. The prohibitions on prolonged sitting, bending and stooping are not identified in the restrictions for

Dr. Raiszadeh's status as a spinal surgeon indicates that the restrictions he imposed were for claimant's hip and back pain,[4] noting that Dr. Raiszadeh did not "commit to a unique set of restrictions and expressly state their link to [claimant's] back and hip injury." *Id.* at 4. The administrative law judge thus concluded that because Dr. Raiszadeh did not explicitly state that claimant's hip/back condition requires restrictions, claimant did not meet his burden of establishing that his low back and hip injury prevents him from returning to his usual employment.

It is well-established that an administrative law judge is entitled to weigh the evidence and to draw his own inferences therefrom; he is not bound to accept the opinion or theory of any particular medical examiner. *See Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999). The administrative law judge permissibly determined that Dr. Raiszadeh's opinion is too ambiguous to permit him to conclude that claimant has restrictions due to his hip and back condition. Dr. Raiszadeh's reports address claimant's persistent and worsening left knee pain, noting that both claimant's "current knee complaints and back complaints are secondary to the [work-related left knee] injury dated November 5, 2008." CX 46. The administrative law judge thus could infer from Dr. Raiszadeh's reports that he did not delineate restrictions for claimant's work-related back and hip condition. *See generally Duhagon*, 169 F.3d at 618, 33 BRBS at 3(CRT). The Board may not second-guess an administrative law judge's factual findings or disregard them merely because other inferences could have been drawn from the evidence. *Id.*; *see generally Bis Salamis, Inc. v. Director, OWCP* [*Meeks*], 819 F.3d 116, 130, 50 BRBS 29, 37(CRT) (5th Cir. 2016); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). As the administrative law judge's inferences and conclusions are rational and supported by substantial evidence, we affirm the finding that claimant did not make a prima facie case of total disability due to his hip and back condition.[5] *Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT); *Hairston*, 849 F.2d 1194, 21 BRBS 122(CRT).

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claimant's knee. Nevertheless, the administrative law judge explicitly acknowledged these additional restrictions. Order on Recon. at 3.

[4]Thus, contrary to claimant's contention, the administrative law judge recognized "Dr. Raiszadeh's status as a spinal surgeon." Order on Recon. at 4.

[5]We note that restrictions due to claimant's back and hip need not be different than the restrictions for claimant's left knee injury but they must be imposed for those conditions in order to be separately compensable. In *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994), the Board held that "where harm to a part of the body not covered under the schedule results from the natural progression of an injury to a scheduled member, the claimant is not limited to one award for the combined effect of his conditions, but may receive a separate award under Section 8(c)(21) for the consequential injury, in addition to

Thus, we also reject claimant's contention that the administrative law judge erred by not considering Dr. Raiszadeh's purported back/hip restrictions in finding that employer established suitable alternate employment. Additionally, contrary to claimant's contention, Ms. Hendrickson and Ms. Gill, in their respective labor market surveys, accounted for claimant's age, education, work experience, training, and transferable skills in identifying suitable positions. *See* CX 18 at 1; EX 40 at 1. Accordingly, we reject claimant's contention that the labor market surveys are deficient, as the administrative law judge may rely on the consultants' opinions that the jobs are suitable given claimant's vocational factors. *Hogan v. Schiavone Terminal, Inc.*, 23 BRBS 290 (1990). Moreover, the administrative law judge thoroughly addressed the suitability of the positions identified.[6] *Montoya v. Navy Exch. Serv. Command*, 49 BRBS 51 (2015). As claimant raises no other contentions regarding the administrative law judge's finding that employer established the availability of suitable alternate employment, and as the conclusion is supported by substantial evidence, we affirm it. *See Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991). The administrative law judge's award of permanent partial disability benefits for claimant's left knee injury and denial of disability benefits for his back and hip condition are affirmed.

Lastly, claimant contends the administrative law judge erred in not addressing his entitlement to a nominal award for his work-related back and hip injury.[7] A claim for total disability includes a claim for a lesser award. *Rambo v. Director, OWCP*, 81 F.3d 840, 843, 30 BRBS 27, 30(CRT) (9th Cir. 1996), *aff'd and remanded sub nom. Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 31 BRBS 54(CRT) (1997); *Buckland v. Dep't of the Army/NAF/CPO*, 32 BRBS 99 (1997). A nominal award under Section 8(h), 33 U.S.C. §908(h), is appropriate when an employee's work-related injury has not diminished his current wage-earning capacity but there is a significant potential that the injury will cause a reduced wage-earning capacity in the future. *Rambo*, 521 U.S. 121, 31 BRBS

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an award under the schedule for the initial injury." *Bass*, 28 BRBS at 18. This case is distinguishable from *Bass* because the administrative law judge explicitly determined that claimant did not establish an inability to return to his usual work due to his consequent work-related back injury.

[6]The administrative law judge found claimant can perform two of the six identified jobs as a messenger, courier or deliverer; twelve jobs as an assembler; and three jobs as a merchant patroller. Decision and Order at 24-25.

[7]The administrative law judge declined to consider claimant's entitlement to a nominal award, stating claimant inappropriately raised the issue for the first time in his motion for reconsideration. Order on Recon. at 2.

54(CRT). The Supreme Court stated that, in such cases, a nominal award gives full effect to Section 8(h)'s admonition that the future effects of an injury must be considered when assessing an employee's post-injury wage-earning capacity. *Rambo*, 521 U.S. at 131-132, 136-137, 31 BRBS at 57-58, 60-61(CRT). Thus, there are two relevant components to a nominal award on which claimant bears the burden of proof: present medical impairment or likely deterioration thereof and the likelihood of future impairment to earning capacity because of the injury. *See, e.g., Keenan v. Director for the Benefits Review Board*, 392 F.3d 1041, 38 BRBS 90(CRT) (9th Cir. 2004).

In light of the administrative law judge's finding that claimant did not prove he has any restrictions due to his work-related back and hip injuries, and as claimant has not presented any evidence establishing the likelihood of a future worsening of, or the significant possibility of a deterioration in his wage-earning capacity from, those conditions, we hold claimant cannot establish entitlement to a nominal award on the present record. Accordingly, we reject claimant's contention that the administrative law judge erred in failing to address his entitlement to a nominal award. *B.H.* [*Holloway*] *v. Northrop Grumman Ship Systems, Inc.*, 43 BRBS 129 (2009); *Buckland*, 32 BRBS 99.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Order Denying Motions for Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge