U.S. Department of Labor

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

BRB No. 17-0077

MINA OSMAN Claimant-Respondent v. MISSION ESSENTIAL PERSONNEL, LLC and ZURICH AMERICAN INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED: Sept. 14, 2017 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Paul R. Almanza, Administrative Law Judge, United States Department of Labor.

Jonathan A. Tweedy (Brown Sims), New Orleans, Louisiana, for employer/carrier.

Sarah M. Hurley (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, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2015-LDA-00385) of Administrative Law Judge Paul R. Almanza 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), as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the DBA). We must affirm the findings of fact and conclusions of law of the administrative law judge 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 sustained a back injury while working for employer as a translator in Afghanistan on August 3, 2009. Claimant was diagnosed with degenerative joint/disc disease of the lumbar spine, including a 4-5 mm disc extrusion at L4-5 and narrowing of the spine at L3-4 and L4-5, for which she underwent surgery by Dr. Lauerman on December 2, 2010. CX 1; EX 4. Claimant has not worked since her injury. Employer voluntarily paid claimant total disability and medical benefits. Additional issues arose and the case was brought before the administrative law judge for a formal hearing, where claimant appeared without the assistance of counsel.

The administrative law judge found that claimant's back and leg pain are work-related and that claimant, as a result of that pain, is incapable of returning to her usual work as a translator. The administrative law judge found that employer established the availability of suitable alternate employment, which claimant, despite her diligent efforts, has not been able to secure. The administrative law judge applied Section 10(c) of the Act, 33 U.S.C. §910(c), to calculate claimant's average weekly wage as $2,770.01, by dividing claimant's overseas earnings, $110,800.71, by the 40 weeks she worked in Afghanistan for employer. Accordingly, the administrative law judge awarded claimant compensation for temporary total disability from August 3, 2009 through December 1, 2011, and ongoing compensation for permanent total disability from December 2, 2011.

On appeal, employer challenges the administrative law judge's award of ongoing permanent total disability benefits, as well as his calculation of claimant's average weekly wage. The Director, Office of Workers' Compensation Programs (the Director), responds only with regard to the average weekly wage issue, urging affirmance of the administrative law judge's finding based solely on claimant's overseas earnings. Claimant has not responded to this appeal.

Employer first contends that the administrative law judge's finding that claimant is permanently restricted to four-hour workdays due to back and leg pain is not supported by substantial evidence, in light of the opinions of Drs. Levitt, Pateder and Childs that claimant is capable of returning to full-time employment in a light-duty capacity. Employer avers that its labor market surveys identified suitable alternate employment, which Drs. Levitt and Childs found claimant capable of performing.

Once, as here, claimant establishes that she is unable to perform her usual employment duties due to her work injury,[1] 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); *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988). In order to meet its burden of establishing suitable alternate employment on the open market, employer must demonstrate the availability of a range of realistic job opportunities within the geographic area where claimant resides and which claimant, by virtue of her age, education, work experience, and physical restrictions, is capable of performing if she diligently tried. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1999); *Lentz*, 852 F.2d 129, 21 BRBS 109(CRT).

In adjudicating a claim, it is well established that the administrative law judge is entitled to weigh the evidence and may draw his own inferences therefrom. *Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994). It is impermissible for the Board to substitute its own views for those of the administrative law judge. *See Newport News Shipbuilding & Dry Dock Co. v. Winn*, 326 F.3d 427, 37 BRBS 29(CRT) (4th Cir. 2003). Furthermore, the administrative law judge's findings may not be disregarded merely because other inferences and conclusions also could have been drawn from the evidence. *Newport News Shipbuilding & Dry Dock Co. v. Ward*, 326 F.3d 434, 37 BRBS 17(CRT) (4th Cir. 2003); *Tann*, 841 F.2d 540, 21 BRBS 10(CRT).

In this case, the administrative law judge acted within his discretion to credit claimant's testimony regarding her limitations,[2] as well as the opinions of Drs. Childs and Lauerman that claimant is not capable of working a light-duty job more than four hours per day, CX 1 at 53, 59-60, over the opinions of Drs. Pateder and Levitt that claimant can work a light-duty job eight hours per day, EXs 1, 2, 4. *Pittman Mechanical Contractors, Inc.*, 35 F.3d 122, 28 BRBS 89(CRT). The administrative law judge rationally credited Dr. Childs's reports limiting claimant to four-hour workdays, because, as claimant's treating physician, he is "most familiar with her condition." Decision and Order at 12.

[1]The administrative law judge's finding that claimant established a prima facie case of total disability is affirmed as it is unchallenged on appeal. *See Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

[2]Claimant testified at the hearing that she can walk for about one hour and stand for probably one-half hour at a time, and "sit maybe for three hours" before having to change positions by stretching or getting up. HT at 95; *see also* EX 20, Dep. at 41-42.

The administrative law judge found that Dr. Childs's deposition testimony, that he does not have an "objective reason" to state that claimant could not work a modified job eight hours a day, does not detract from his written opinions limiting her to four hours because he acknowledged that his testimony did not account for claimant's credible, subjective complaints of restrictive pain.[3] *Id.*, citing EX 8 at 4.

The administrative law judge also accorded diminished weight to the opinions of Drs. Pateder and Levitt. The administrative law judge found that Dr. Pateder did not explain why he changed his opinion that claimant's pain was work-related between his August 2013 and December 2013 reports, *see* CX 1 at 117-118, 122-124, and that Dr. Levitt did not adequately explain why he thought claimant could return to full-time work if she subjectively "perceived" herself to be suffering from significant back and leg pain, which Dr. Levitt acknowledged physical bases for. *See* EX 5 at 5. We therefore affirm the administrative law judge's finding that claimant is permanently restricted to four-hour workdays as it is rational and supported by substantial evidence.[4] *See generally Devor v. Dep't of the Army*, 41 BRBS 77 (2007); *Monta v. Navy Exchange Service Command*, 39 BRBS 104 (2005).

Employer next contends the administrative law judge's finding that claimant demonstrated diligence in her search for suitable alternate employment is not supported by substantial evidence. Employer maintains that claimant's "passive act" of putting her resume online is inconsistent with a "diligent" effort to seek work. Employer thus asserts that the administrative law judge's total disability award should be reversed.

Where, as in this case, employer establishes the availability of suitable alternate employment, claimant may demonstrate she remains totally disabled by showing that she diligently tried but was unable to secure employment. *See Tann*, 841 F.2d 540, 21 BRBS 10(CRT); *Fox v. West State, Inc.*, 31 BRBS 118 (1997). "The claimant merely must establish that [s]he was reasonably diligent in attempting to secure a job within the compass of employment opportunities shown by the employer to be reasonably attainable and available." *Palombo v. Director, OWCP*, 937 F.2d 70, 74, 25 BRBS 1, 8(CRT) (2d Cir. 1991). The inquiry into the claimant's diligence in seeking post-injury employment

[3]The administrative law judge found that claimant's self-reported symptoms are consistent with the reports of Drs. Childs, Jamshidi and Lauerman and that Drs. Pateder and Levitt each opined that claimant's pain is "real." Decision and Order at 13.

[4]Thus, we reject employer's contention that the administrative law judge erred by limiting his consideration of its evidence of suitable alternate employment to only part-time positions.

is not limited to her diligence in seeking the jobs identified by employer. *Livingston v. Jacksonville Shipyards, Inc.*, 32 BRBS 123 (1998).

The administrative law judge found that employer established the availability of suitable alternate employment by identifying six part-time jobs with sedentary and light-duty responsibilities.[5] Decision and Order at 16. The administrative law judge found, however, that claimant's testimony and job search log establishes she has not been able to secure such employment despite her diligent efforts. *Id.* The administrative law judge thus found claimant entitled to ongoing total disability benefits.

Claimant testified she applied for many jobs, including "every single" part-time job she had identified, HT at 106-107, and that she spends "maybe an hour" each day looking for work. *Id.* at 113. Claimant also described her job search process. EX 20, Dep. at 25-28, 40-41. Specifically, claimant stated she posted her resume "on almost five website[s]" which regularly send updates regarding job possibilities.[6] *Id.*, Dep. at 26-27. She then reviews the updates to "see if something [is] available that I can apply for" and "then I do send my resume online and I print the confirmation." *Id.* Despite applying for "a lot" of customer service and data entry type positions, claimant testified that she has not received any call-backs or interviews. *Id.*, Dep. at 27, 40-41. Claimant also submitted a job search log documenting her online pursuit of part-time employment. CX 1 at 179 – 330. Claimant's records detail her online submission of employment applications and/or her resume, including confirmations, to numerous employers in an effort to secure part-time employment. *Id.* These records also include several part-time jobs identified in the labor market surveys submitted by employer, *id.* at 212-215. As claimant's testimony and job search log, HT at 106-107, 113; EX 20, Dep. at 25-28, 40-41; CX 1 at 179-330, support the administrative law judge's finding that claimant diligently pursued part-time, alternate work without success, we affirm the administrative law judge's finding that claimant rebutted employer's showing of suitable alternate employment. *Fortier v. Electric Boat Corp.*, 38 BRBS 75 (2004). Accordingly, we affirm the administrative law judge's conclusion that claimant is entitled to total disability benefits.

[5]The administrative law judge found employer identified two suitable part-time jobs in its October 22, 2013 labor market survey and four such positions in its January 29, 2014 labor market survey. Decision and Order at 16.

[6]Claimant testified that her resume is currently posted on "DCJobs.com, Monster, Career Builder" and that she also "signed up for ITT, [and] Gold[s] Gym, if they had some type of office job." EX 20, Dep. at 80.

Employer next contends that the underlying precedent for the administrative law judge's exclusive use of claimant's overseas earnings to calculate her average weekly wage is invalid as that decision was overturned by the United States District Court for the Southern District of Texas in *Service Employees Int'l, Inc. v. Director, OWCP,* No. H-11-01065, 2013 WL 943840 (S.D. Tex. Mar. 11, 2013), *vacating K.S.* [*Simons*] *v. Service Employees Int'l, Inc.*, 43 BRBS 18, *aff'd on recon. en banc,* 43 BRBS 136 (2009). Employer avers that it is unreasonable to calculate claimant's average weekly wage solely on her overseas earnings due to the fact that she did not complete the entirety of her overseas contract. Employer also maintains that the Board's decision in *Kuza v. Global Linguist Solutions*, BRB No. 16-0227 (Dec. 8, 2016) (unpub.), *appeal pending*, No. 4:17-cv-00363 (S.D. Tex.), in which the Board affirmed the administrative law judge's use of a blended average weekly wage calculation, is analogous to this case and therefore establishes that a blended approach using both stateside and overseas earnings would result in a fair approximation of claimant's earning potential at the time of her injury. In response, the Director contends that employer's argument is without merit as the administrative law judge applied the correct legal standard for determining claimant's average weekly wage under Section 10(c), and rationally exercised his discretion in calculating claimant's average weekly wage in this case based solely on her overseas earnings.

Section 10(c) of the Act states:

> If either of the foregoing methods [Section 10(a), (b)] of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C. §910(c).[7] The goal of Section 10(c) is to arrive at a sum that reasonably represents the claimant's annual earning capacity at the time of injury. *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991). The Board has addressed the average weekly wage issue in the context of overseas wages in several

[7]It is uncontested that Sections 10(a) and (b) are not applicable, such that claimant's average weekly wage must be calculated pursuant to Section 10(c). 33 U.S.C. §910(a), (b).

DBA cases subsequent to its *Simons* decision,[8] including *Kuza*, which employer cites as requiring the administrative law judge to use a blended approach in this case. *See Jasmine v. Can-Am Protection Group, Inc.*, 46 BRBS 17 (2012) (affirming the administrative law judge's calculation of claimant's average weekly wage under Section 10(c), based on a blend of his stateside earnings and his contract rate of pay with employer at the time of his injury); *Luttrell v. Alutiiq Global Solutions*, 45 BRBS 31 (2011) (affirming the administrative law judge's finding that the claimant's rate of pay in the overseas position in which he was working at the time of injury realistically reflected his wage-earning potential as it accounted for the extrinsic circumstances of that overseas employment and conformed with the language of Section 10(c)); *Hamidzada v. Mission Essential Personnel*, BRB No. 13-0312 (Mar. 21, 2014) (unpub.), *aff'd on recon.* (June 26, 2014) (unpub.) (vacating the administrative law judge's average weekly wage calculation which was based solely on the claimant's overseas earnings, because the administrative law judge "believed he was compelled to apply *Simons*").[9]

In *Kuza*, the administrative law judge, having found that the district court's decision in *Simons* was on point, calculated the claimant's average weekly wage at the time of his injury by dividing his stateside and overseas earnings in the year immediately preceding his last day of work for employer by 52. The Board held that the administrative law judge's use of a blended calculation was supported by the claimant's work history, which included periods of employment and voluntary unemployment in the

[8]In *Simons*, the Board reversed the administrative law judge's use of the claimant's combined overseas and stateside earnings during the year preceding his work injury to calculate claimant's average weekly wage under Section 10(c). The Board held that the claimant's average weekly wage must be calculated based solely on his overseas earnings because the claimant had been enticed by higher wages to work in a dangerous environment in Iraq and Kuwait. *K.S.* [*Simons*] *v. Service Employees Int'l, Inc.*, 43 BRBS 18, *aff'd on recon. en banc,* 43 BRBS 136 (2009), *vacated and remanded sub nom. Service Employees Int'l, Inc. v. Director, OWCP,* No. H-11-01065, 2013 WL 943840 (S.D. Tex. Mar. 11, 2013) (citing *Proffitt v. Serv. Employers Int'l, Inc.*, 40 BRBS 41 (2006)). The district court held that the Board engaged in de novo review of the evidence and usurped the wide discretion afforded administrative law judges in calculating an average weekly wage under Section 10(c). *Simons*, 2013 WL 943840 at *3-4. The district court thus vacated the Board's reversal of the administrative law judge's average weekly wage calculation and remanded the case for further proceedings. *Id.*

[9]In *Hamidzada*, the administrative law judge referred to *Simons* as "controlling law" such that the claimant's average weekly wage "must be" based on overseas earnings exclusively.

United States, and overseas work, all of which also occurred in the year immediately preceding the claimant's injury on June 3, 2013. The Board affirmed the administrative law judge's finding as it was supported by substantial evidence, and had "regard to the previous earnings of the injured employee in the employment in which he was working at the time of his injury" and "reasonably represent[ed] the annual earning capacity of the injured employee." *Kuza*, slip op. at 7.

In this case, the administrative law judge found that claimant's "wages earned as a translator in Afghanistan most accurately reflect claimant's earning capacity at the time of injury." Decision and Order at 14. We reject employer's contention that this finding must be overturned; indeed, such a result would usurp the administrative law judge's discretion, which is what the district court in *Simons* found objectionable. *Simons*, 2013 WL 943840 at *3-4. The administrative law judge found that claimant's ability to complete her contract term and potential to maintain her higher level of earnings was cut short by her work-related injury.[10] The administrative law judge found that claimant had received positive performance reviews and that employer had invited her to reapply for an overseas translator position in 2012. CX 1 at 24-26. The administrative law judge thus concluded that claimant's overseas earnings best reflected her earning capacity at the time of injury and should be used as the sole basis for claimant's average weekly wage under Section 10(c). *Id*. It is an established principle that the administrative law judge has broad discretion under Section 10(c) to determine an average weekly wage that reasonably represents the annual earning capacity of the injured claimant, "having regard" for the earnings in the job in which claimant was injured. *See, e.g., Jasmine*, 46 BRBS 17; *Luttrell*, 45 BRBS 31. As the administrative law judge's calculation based on the specific facts of this case is in accordance with the language of Section 10(c), is rational, supported by substantial evidence, and within the broad discretion afforded him under Section 10(c), we affirm the finding that claimant's average weekly wage is $2,770.01.[11] *See generally Rhine v. Stevedoring Services of America*, 596 F.3d 1161, 44

[10]This distinguishes this case from *Kuza*, wherein the "claimant's injury did not cut short his overseas employment, as he declined an offer to remain overseas at lower pay." *Kuza*, slip op. at 7. Thus, contrary to employer's contention *Kuza* is not directly analogous to this case.

[11]Although, as employer asserts, the administrative law judge's citation to the Board's decision in *Simons* is somewhat clouded by his failure to also cite the district court's decision, his approach in this case is nevertheless in accordance with Section 10(c) and consistent with the broad discretion afforded him in determining average weekly wage pursuant to that provision.

BRBS 9(CRT) (9th Cir. 2010); *Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 34 BRBS 44(CRT), *modified on other grounds on reh'g*, 237 F.3d 409, 35 BRBS 26(CRT) (5th Cir. 2000).

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

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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GREG J. BUZZARD
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge