U.S. Department of Labor

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

BRB No. 15-0279

LASSTEVIE BURTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: Mar. 23, 2016
	)	
MANTECH INTERNATIONAL	)	
	)	
and	)	
	)	
ZURICH AMERICAN INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Ronald S. Webster (Webster Law Group), Orlando, Florida, for claimant.

Jeffrey I. Mandel (Juge, Napolitano, Guilbeau, Ruli & Frieman), Metairie, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2013-LDA-00279, 2013-LDA-00516) of Administrative Law Judge Paul C. Johnson, Jr., rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, 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 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 injuries to his right knee and left shoulder while working for employer in Iraq. Specifically, claimant injured his right knee on July 20, 2011, while disembarking from a helicopter and his left shoulder on September 8, 2011, when a 300-pound tool box he was pulling slipped from his grasp. Upon his return to the United States, claimant received treatment for his injuries from Drs. Wise and Ray, culminating in surgical procedures, performed by Dr. Ray, on claimant's right knee on January 19 and August 24, 2012, and left shoulder on November 9, 2012.

Dr. Ray released claimant to return "to full duty" with regard to his right knee injury on February 21, 2012. Following a Functional Capacity Evaluation (FCE), Dr. Ray, on February 19, 2013, assigned claimant a four percent permanent impairment of his left shoulder and opined that claimant "is allowed to return to full duty with no limitations, other than common sense in use of his left arm." CX 25; EX 9. Based on Dr. Ray's report, the parties stipulated that claimant's injuries reached maximum medical improvement as of February 19, 2013. Employer, who voluntarily paid claimant temporary total disability benefits from November 20, 2011 through March 22, 2013, offered to rehire claimant to his former job. Claimant declined the job offer because he believed he was incapable of fulfilling the duties of the position without assistance. Employer terminated claimant's employment, effective April 5, 2013, because he had not worked in over a year and had not filed an application to be rehired. Claimant subsequently found a job in logistics at the Anderson Army Depot in January 2014. He filed a claim seeking additional benefits under the Act.

The administrative law judge found, based on the parties' stipulations, that claimant sustained work-related injuries to his right knee and left shoulder, and that claimant reached maximum medical improvement on February 19, 2013. Addressing the extent of claimant's disability, the administrative law judge found that claimant established a prima facie case of total disability by proving that he is incapable of returning to his usual employment, based on the restrictions resulting from his work-related left shoulder injury. The administrative law judge further found that employer did not establish the availability of suitable alternate employment. Noting that claimant, through his own efforts, obtained work on January 27, 2014, the administrative law judge found claimant entitled to permanent total disability benefits from March 23, 2013 through January 26, 2014, and thereafter to a continuing award of permanent partial disability benefits pursuant to Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21).

On appeal, employer challenges the administrative law judge's finding that claimant is incapable of returning to his usual work and the resulting award of disability benefits. Claimant responds, urging affirmance of the administrative law judge's decision. Employer has filed a reply brief.

Employer contends the administrative law judge's finding that claimant cannot return to his usual work is not supported by substantial evidence and, thus, cannot be affirmed. In this regard, employer contends the administrative law judge erred by according "little weight" to the opinion of claimant's treating orthopedist, Dr. Ray, that, as of February 19, 2013, claimant was fit for "full duty with no restrictions," given the administrative law judge's finding that Dr. Ray's records were "thorough" and that claimant testified that Dr. Ray was aware of the requirements of his usual work for employer. Employer further contends the administrative law judge erred in finding that it did not establish the availability of suitable alternate employment because it offered claimant his prior job, following Dr. Ray's February 19, 2013 full-duty work release.

In order to establish a prima facie case of total disability, a claimant must demonstrate an inability to return to his usual work as a result of his work injury. *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998); *SGS Control Services v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). In determining whether the claimant established his prima facie case, the administrative law judge must compare claimant's medical restrictions resulting from his injury with the requirements of his usual job. *See Carroll* v. *Hanover Bridge Marina*, 17 BRBS 176 (1985). If the claimant establishes a prima facie case of total disability, employer may establish that the claimant is at most partially disabled by identifying the availability of alternate jobs that are suitable for the claimant, considering his age, education, vocational history, and physical capabilities. *Turner*, 661 F.2d 1031, 14 BRBS 156; *see also Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 35 BRBS 7(CRT) (5th Cir. 2001); *Ledet*, 163 F.2d 901, 32 BRBS 212(CRT). The employer can meet its burden by offering the claimant a suitable job. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986).

After addressing the relevant medical evidence, i.e., the February 12, 2013 FCE and the February 19, 2013 report of Dr. Ray, and claimant's testimony regarding his job duties, the administrative law judge concluded that claimant is not capable of returning to his prior job with employer because of limitations resulting from his work-related left shoulder injury. Contrary to employer's assertions, the administrative law judge's credibility determinations and findings of fact are rational and supported by substantial evidence.

The administrative law judge rationally found that claimant testified credibly as to his job requirements.[1] *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS

[1]Claimant testified that each time he travelled for work in Iraq, he was required to wear a helmet and a flak jacket, which weighed about 20 pounds, and to carry a 40-pound

78(CRT) (5th Cir. 1991); Decision and Order at 20. On February 19, 2013, Dr. Ray stated that claimant "is allowed to return to full duty with no limitations, other than common sense in use of the left arm." EX 9 at 18. Dr. Ray also stated that claimant "continues to have significant soreness in the left shoulder and [a] difficult time using the arm above his head." *Id.* The administrative law judge noted that there is no evidence that Dr. Ray was aware of the actual physical requirements of claimant's job duties, and he found that Dr. Ray's opinion that claimant could return to full-duty work is not supported by the results of the FCE.[2] *See* EXs 9, 12. The administrative law judge provided a rational basis for according "little weight" to Dr. Ray's opinion regarding claimant's ability to return to full-duty work, and we therefore reject employer's contention that the administrative law judge erred in this regard.[3] *See generally Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46(CRT) (5th Cir. 1990).

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tool bag, as well as generator parts which might weigh 10 or 20 pounds each, and "five days of clothing." HT at 31. Claimant testified that, on the date of his shoulder injury, the tool box he was moving weighed about "300 pounds," which, he added, was usually "a four-man carry" but on occasion would be "a two-man carry." *Id.* at 32. Claimant also stated that his job required overhead work, including occasionally assisting in lifting 90-pound cameras and holding them "over your shoulder." *Id.* at 34.

[2]The administrative law judge found that the FCE evaluator, Douglas Cole, MPT, issued lifting limitations which included: no occasional lifting (waist to shoulders) in excess of 35 pounds; no frequent lifting (waist to shoulders) in excess of 18 pounds; no constant lifting (waist to shoulders) in excess of 7 pounds; no occasional upper extremity lifting with the left arm (waist to shoulder) beyond 7 pounds; no frequent unilateral lifting with the left arm (waist to shoulder) in excess of 4 pounds; and no constant upper extremity lifting with the left arm (waist to shoulder) in excess of 1 pound. EX 12 at 4. The administrative law judge recognized that Mr. Cole stated that claimant was unable to complete tasks relating to both waist to shoulder and upper extremity lifts and was able to complete, but with difficulty, tasks relating to the unilateral carry and overhead reaching tasks. EX 12 at 5. Mr. Cole evaluated claimant's effort on the tests and found the results "should be accepted as accurate." *Id.*

[3]Employer's contention that Dr. Ray's opinion should be accorded greatest weight based solely on his status as claimant's treating physician is misplaced. In weighing a treating physician's opinion, the administrative law judge must consider its underlying rationale as well as the other medical evidence of record. *See Brown v. National Steel & Shipbuilding Co.*, 34 BRBS 195 (2001); *see also Monta v. Navy Exchange Service Command*, 39 BRBS 104 (2005).

The administrative law judge rationally relied on the results of the FCE to determine claimant's post-injury physical limitations, *see, e.g., Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011), and properly compared these restrictions to the physical requirements of claimant's usual work to discern whether claimant is capable of returning to that work. *Carroll*, 17 BRBS 176. The administrative law judge's finding that claimant is not capable of returning to his prior job with employer because of limitations resulting from his work-related left shoulder injury is rational and supported by substantial evidence. *See, e.g., Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004). Therefore, we affirm the administrative law judge's finding that claimant established a prima facie case of total disability. *See, e.g., Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998).

The administrative law judge next found that employer did not demonstrate the availability of suitable alternate employment. The administrative law judge found that the only evidence regarding this issue is claimant's testimony that employer offered him his former job in March 2013 and that claimant refused the offer. HT at 71-73. The administrative law judge found that claimant credibly testified that he sent the FCE report to employer and told employer that he would like to return to work but would need help carrying tools. *Id.* at 80-81. Claimant stated that he received the termination letter three weeks later. *Id.* at 82. The administrative law judge stated that employer cannot meet its burden to show suitable alternate employment "by offering the claimant the very job he cannot perform." Decision and Order at 21. We agree, as there is no evidence that employer offered to modify the job to accommodate claimant's restrictions. *Mason v. Bender Welding & Machine Co.*, 16 BRBS 307 (1984). Consequently, as employer did not present evidence of suitable alternate employment, we affirm the administrative law judge's award of permanent total disability benefits from March 23, 2013 through January 26, 2014. *Hinton*, 243 F.3d 222, 35 BRBS 7(CRT); *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989). As claimant obtained work on January 27, 2014, we affirm as of that date the award of permanent partial disability benefits based on claimant's loss of wage-earning capacity. 33 U.S.C. §908(c)(21), (h); *see, e.g., Del Monte Fresh Produce v. Director, OWCP*, 563 F.3d 1216, 43 BRBS 21(CRT) (11th Cir. 2009).

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