U.S. Department of Labor

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

BRB No. 20-0086

CHRISTOPHER FRANCIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 07/16/2020
JONES STEVEDORING COMPANY	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Order Denying Request to Reopen the Record and the Decision and Order Following Remand of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz (Law Office of Charles Robinowitz), Portland, Oregon, for Claimant.

James McCurdy and Elana L. Charles (Lindsay Hart, LLP), Portland, Oregon, for Self-Insured Employer.

Before: BOGGS, Chief Administrative Appeals Judge, ROLFE and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals Administrative Law Judge Richard M. Clark's Order Denying Request to Reopen the Record and the Decision and Order Following Remand (2014-LHC-00813) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (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 applicable law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). This case is before the Benefits Review Board for the second time.

Claimant, a casual longshore worker, sustained an ACL injury to his right knee while working as a lasher for Employer on February 28, 2011. He continued to seek and obtain casual longshore work until June 10, 2011, when he underwent surgery on his right knee. He experienced ongoing knee complaints and subsequently underwent additional knee surgeries on May 16, 2012, December 31, 2013, and October 19, 2015. He has not returned to longshore work since his initial knee surgery. In September 2012, Claimant allegedly injured both shoulders while performing wall squats which, he testified, had been prescribed by his physical therapist for treatment of his work-related knee condition. He underwent distal clavicle excisions on his left shoulder on April 8, 2013, and his right shoulder on July 24, 2013.

In his initial Decision and Order, the administrative law judge found Employer did not dispute the compensability of Claimant's February 28, 2011, knee injury. 2017 Decision and Order at 33-36. He determined Claimant did not present substantial evidence his shoulder injuries were the natural or unavoidable result of, or related to, his work-related knee injury and treatment and thus found Employer was not liable for medical benefits for the shoulder conditions. *Id.* at 36-38. Based on his calculation of Claimant's average weekly wage as $94.84, *id.* at 38-41, the administrative law judge awarded Claimant: temporary total disability benefits from June 11, 2011 through January 29, 2013; permanent total disability benefits from January 30, 2013 through January 6, 2015; permanent partial disability benefits for an eight percent impairment to his right lower extremity as of January 7, 2015; temporary total disability benefits from October 19, 2015 through February 22, 2016; and the resumption of any unpaid scheduled permanent partial disability benefits from February 23, 2016, based on Claimant's prior impairment rating. *Id.* at 51; *see* 33 U.S.C. §908(a), (b), (c)(2).

Claimant appealed, challenging the administrative law judge's findings that his shoulder conditions are not related to the work injury, the calculation of his average weekly wage, the degree of his right knee impairment, and the disability benefits awarded.

The Board vacated the administrative law judge's calculation of Claimant's average weekly wage because he did not address all of the relevant evidence regarding Claimant's alleged pre-injury earnings. *Francis v. Jones Stevedoring Co.*, BRB No. 17-0465 (June 21, 2018) (unpub.). The Board stated the administrative law judge did not address the accuracy or credibility of Claimant's belatedly-filed federal and state tax returns in calculating average weekly wage. *Id.*, slip op. at 7. Claimant paid the tax owed and the penalties for late filing. He averred this shows he had additional earnings in the pre-injury period.[1] The

[1]The calculation of a claimant's average weekly wage is not limited to his earnings in the job in which he was injured, but may also include any other jobs that are affected by the work-related injury. *See Liberty Mutual Ins. Co. v. Britton*, 233 F.2d 699 (D.C. Cir.

Board therefore remanded the case for the administrative law judge to address this evidence and recalculate Claimant's average weekly wage if necessary. *Id.* The Board addressed the other issues raised and affirmed the administrative law judge's decision in "all other respects." *Id.* at 11.

On remand, the administrative law judge issued an Order on April 5, 2019, allowing the parties to brief the "narrow issue" on remand, to include reply briefs. After each party had filed its brief, and Employer had filed its reply brief, Claimant moved to reopen the record to admit day planner evidence from his wife in support of his claim to an increased average weekly wage.[2] Employer opposed this motion.

In his Order Denying Request to Reopen the Record (Order) dated July 8, 2019, the administrative law judge denied Claimant's motion finding, inter alia, that the Board remanded the case only for the narrow purpose of addressing Claimant's tax returns and "not to consider all potentially relevant evidence related to Claimant's average weekly wage or alleged non-longshore pre-injury earnings." 2019 Order at 3. He noted Claimant's counsel was not in possession of the day planner, and thus found the proffer was "speculative and unverified." *Id.* Because additional testimony might need to be adduced to verify the planner, the administrative law judge stated the best method of having the planner evidence considered is through a modification petition under Section 22 of the Act, 33 U.S.C. §922. *Id.* In his decision on remand, the administrative law judge, "[a]fter reviewing the information in the record, and specifically reviewing the tax exhibits, hearing testimony, and other information cited by the parties," again calculated Claimant's average weekly wage at the time of his 2011 work-related right knee injury as $94.84. Decision and Order Following Remand at 3.

On appeal, Claimant contends the administrative law judge erred in denying his motion to reopen the record, in calculating his average weekly wage, in finding his bilateral shoulder condition is not work-related, and in not awarding temporary partial disability benefits for his work-related right knee injury from February 29 through June 10, 2011. Employer responds, urging affirmance of the administrative law judge's denial of

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1956); *Wayland v. Moore Dry Dock*, 25 BRBS 53 (1991); *Harper v. Office Movers/E.E. Kane, Inc.*, 19 BRBS 128 (1986); *see also SGS Control Services v. Director, OWCP*, 86 F.3d 438, 30 BRBS(CRT) (5th Cir. 1996).

[2]This evidence was offered to show Claimant worked in other employment on specified days. Cl. Motion to Reopen at 1.

Claimant's motion to reopen and his consideration of the average weekly wage evidence on remand. Claimant filed a reply brief.

Claimant contends the administrative law judge abused his discretion by denying the motion to reopen the record for submission of his wife's day planner. He maintains the submission of the planner is relevant as it supports the additional hours he claims to have worked in pre-injury employment. Employer counters that Claimant did not timely appeal the administrative law judge's Order Denying Request to Reopen Record. Alternatively, Employer maintains, if the administrative law judge's order is reviewable, his decision to deny Claimant's motion to reopen the record should be affirmed.

We will first address Employer's contention that Claimant's argument regarding the day planner cannot be considered because Claimant's appeal of the administrative law judge's Order is untimely. We reject Employer's contention Claimant had to immediately appeal the Order to preserve his right to challenge it because it was an interlocutory order. The Board may consider an appeal of an interlocutory order upon a timely appeal after the administrative law judge's issuance of a final decision and order in the case. *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*, 570 U.S. 904 (2013); *see also Rhine v. Stevedoring Services of America*, 596 F.3d 1161, 44 BRBS 9(CRT) (9th Cir. 2010).

We now move to the merits of Claimant's contention the administrative law judge erred in not considering the day planner evidence. We reject Claimant's contention of error and affirm the denial of the motion to reopen the record as Claimant has not established the administrative law judge abused his discretion in this regard. *See, e.g., Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999) (Board reviews admission of evidence issues under abuse of discretion standard); *see also Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997) (no error in excluding late-identified evidence that was not accompanied by proffer). The administrative law judge permissibly interpreted the Board's remand instruction as limiting his inquiry to the credibility of Claimant's tax returns. *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 1354, 27 BRBS 41, 57(CRT) (9th Cir. 1993) ("The ALJ properly restricted the scope of the remand proceedings to the terms of the Board's remand order. *See* 20 C.F.R. §802.405."); *see Francis*, slip op. at 7. Moreover, as receipt of the planner might require additional testimony, the administrative law judge permissibly noted modification as an available tool for having this evidence considered. *See generally Island Operating Co., Inc. v. Director, OWCP [Taylor]*, 738 F.3d 663, 47 BRBS 51(CRT) (5th Cir. 2013).

Claimant next contends the administrative law judge did not follow the Board's remand instructions to discuss the accuracy or credibility of the tax returns as sworn

documents. He maintains that if a claimant declares income, and has proof of the work and the income in the form of filed tax returns, the administrative law judge is obligated to credit such evidence in calculating average weekly wage.

On remand, the administrative law judge reviewed the information contained in Claimant's tax returns from 2009-2011 pertaining to his personal business earnings from yard work and car detailing.[3] The administrative law judge determined the "tax documents are not accurate or credible because they rely upon the same information I found not credible and not reliable related to Claimant's yardwork and car detailing." Decision and Order Following Remand at 4. He assessed "the character and quality" of the underlying evidence in support of the tax filings, finding "the nature of the testimony explaining the evidence was inconsistent and not credible."[4] Decision and Order Following Remand at 4. He further stated this evidence "does not become more credible because it is presented in a separate format, namely as income tax returns." *Id.* As the administrative law judge found the underlying basis for the income tax information was neither credible nor reliable, as discussed in his first decision, he rejected using it to calculate Claimant's average weekly wage. Consequently, he reinstated his finding that Claimant's average weekly wage is $94.84. *Id.* at 8.

There is nothing in the Act, its regulations, case law, or the Board's remand instructions mandating the acceptance of income reported on tax filings in calculating Claimant's average weekly wage, and there is no dispute regarding the administrative law judge's use of 33 U.S.C. §910(c) to calculate Claimant's average weekly wage in this case.

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[3]The administrative law judge focused on the income Claimant declared on Schedule C-EZ (Net Profit from Business) attached to the Federal 1040 forms, noting Claimant listed his "principal business" as "Yard Work." Decision and Order Following Remand at 3, 4. In this regard, the administrative law judge found Claimant declared: $7,335 in business income in 2009; $7,335 in business income in 2010; and $625 in business income in 2011. *Id.* He also considered the testimony of Claimant, his wife and his aunt, as well as receipts, which he noted were drawn up after the work in question was performed, that purportedly showed the payments Claimant received for such work. *Id.* at 4-8.

[4]The administrative law judge reasonably inferred from Claimant's deposition statement that he performed yard and car detailing work "just whenever they needed it," and this work was sporadic in nature. He also permissibly credited Claimant's representation that his non-longshore work was sporadic because it "was closer in time to the events," over the testimony provided by his wife and aunt at the hearing, who both stated he worked consistently and was paid regularly.

See generally Matulic v. Director, OWCP, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998). Under Section 10(c), an administrative law judge is afforded broad discretion to arrive at a sum that "shall reasonably represent the annual earning capacity of the injured employee." 33 U.S.C. §910(c); *Rhine*, 596 F.3d 1161, 44 BRBS 9(CRT). Thus, it was within the administrative law judge's discretion to discern whether the underlying basis of the income declared on Claimant's tax filings was accurate and credible. *Id.*

The administrative law judge's finding that Claimant's tax filings will not be used to calculate his average weekly wage is supported by substantial evidence. He permissibly rejected as not accurate or credible the testimony and evidence regarding Claimant's employment that formed the basis for the tax returns. *See Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 650, 44 BRBS 47, 49(CRT) (9th Cir. 2010); *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988). The Board is not entitled to reach a different conclusion regarding this evidence. *Rhine*, 596 F.3d 1161, 44 BRBS 9(CRT). We thus affirm the administrative law judge's rejection of Claimant's 2009-2011 tax returns to calculate his average weekly wage and to reinstate his finding that Claimant's average weekly wage at the time of his work injury is $94.84. *Id.*

Claimant next, in essence, seeks reconsideration of the Board's affirmance of the administrative law judge's denial of temporary partial disability benefits for his knee injury from February 29 through June 10, 2011, and for benefits relating to his alleged work-related bilateral shoulder condition. Claimant raised both issues in his prior appeal and the Board affirmed the administrative law judge's findings. *Francis*, slip op. at 5, 7-10. The Board explicitly recognized Claimant's challenge to "the administrative law judge's denial of temporary partial disability benefits from February 29 through June 10, 2011." *Id*. at 5. Noting "Claimant has not alleged any specific error committed by the administrative law judge in addressing his claim for compensation during this period nor cited any specific evidence that his actual post-injury earnings were not representative of his actual post-injury wage-earning capacity," the Board affirmed the administrative law judge's denial of disability compensation from February 29 through June 10, 2011. *Id.*

As for Claimant's bilateral shoulder condition, the Board held the administrative law judge "fully discussed the medical evidence regarding the cause of [C]laimant's shoulder conditions and provided a rational basis for crediting the opinion of Dr. Yodlowski" that the condition is not work-related. *Id.* at 10. The Board therefore affirmed the administrative law judge's finding that Claimant did not meet his burden of establishing his shoulder conditions are related to the treatment for his work-related knee injury which resulted in the denial of medical benefits for those conditions.

These issues were, therefore, fully considered and resolved by the Board in the prior appeal of this case. *Francis*, slip op. at 4-5, 10. As none of the exceptions to the law of the case doctrine is applicable,[5] we hold the Board's decision on these issues constitutes the law of the case, and we decline to address Claimant's contentions.[6] *See Schwirse v. Marine Terminals Corp.*, 45 BRBS 53 (2011), *aff'd sub nom. Schwirse v. Director, OWCP*, 736 F.3d 1165, 47 BRBS 31(CRT) (9th Cir. 2013) (fully-addressed issue is law of the case); *Irby v. Blackwater Security Consulting*, 44 BRBS 17 (2010); *Kirkpatrick v. B.B.I., Inc.*, 39 BRBS 69 (2005); *Ravalli v. Pasha Maritime Services*, 36 BRBS 91 (2002), *denying recon. in* 36 BRBS 47 (2002).

Accordingly, we affirm the administrative law judge's Order Denying Request to Reopen the Record and the Decision and Order Following Remand.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

[5]No exception to the law of the case doctrine applies in this case, as there has not been a change in the underlying factual situation, there has been no intervening controlling case authority, nor has Claimant demonstrated the Board's first decision was clearly erroneous. *See generally Kirkpatrick v. B.B.I., Inc.*, 39 BRBS 69, 70 n.4 (2005).

[6]Here also we note the availability of Section 22 modification.