U.S. Department of Labor

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

BRB Nos. 20-0313
and 20-0313A

CAROLE L. LEWIS	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED: 07/30/2021
CERES GULF, INCORPORATED	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Dennis L. Brown (Dennis L. Brown, P.C.), Bellaire, Texas, for Claimant.

Lawrence P. Postal (Postal Law Firm, P.C.), McLean, Virginia, for Self-Insured Employer.

Before: BUZZARD, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and Employer cross-appeals Administrative Law Judge Patrick M. Rosenow's Decision and Order (2019-LHC-00453) 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).

Claimant injured her left shoulder on September 15, 2017, during the course of her employment for Employer when she fell onto concrete exiting a truck. She was able to continue working until September 27, 2017. An October 12, 2017 MRI showed a rotator cuff tear, and Claimant underwent arthroscopic surgery by Dr. Andrew Lee on December 19, 2017. She received physical therapy with limited effect. A second MRI in October 2018 showed a recurrent rotator cuff tear, which also was treated with physical therapy. Employer accepted liability for medical benefits until March 2019, and paid Claimant compensation for various periods of temporary total and temporary partial disability until May 2019.[1] 33 U.S.C. §908(b), (e). Claimant returned to work driving trucks on August 3, 2019. She sought compensation for temporary total disability from October 23 to December 18, 2017, and from September 25, 2018 to August 3, 2019. Employer controverted the claim, contending Claimant was capable of alternate longshore work at its facility by October 23, 2017.

In his decision, the administrative law judge found Claimant totally disabled from October 23 to December 18, 2017, but that Employer established the availability of suitable alternate employment from September 25, 2018 to May 9, 2019, after which Claimant could perform her usual employment. Decision and Order at 22. He thus awarded Claimant compensation for temporary total disability from October 23, 2017 to December 18, 2019, and temporary partial disability from September 25, 2018 to May 8, 2019.[2] *Id.* at 23.

On appeal, Claimant challenges the administrative law judge's finding that Employer established the availability of suitable alternate employment from September 25, 2018 to May 9, 2019. BRB No. 20-0313. Employer responds, urging affirmance. Employer cross-appeals the award of temporary total disability compensation from October 23 to December 18, 2017, contending it showed suitable alternate employment at its facility during this period. BRB No. 20-0313A. Claimant filed a response brief urging affirmance of the administrative law judge's finding. Employer filed a reply brief.

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[1] The parties stipulated that Employer paid Claimant temporary total disability benefits, 33 U.S.C. §908(b), from September 30 to October 22, 2017, temporary partial disability benefits, 33 U.S.C. §908(e), from October 23 to December 18, 2017, temporary total disability benefits from December 19, 2017 to September 24, 2018, and temporary partial disability benefits from September 25, 2018 to May 9, 2019. Decision and Order at 2; Tr. at 15-17.

[2] The parties stipulated to an average weekly wage of $989.83, and the administrative law judge found Claimant had a post-injury wage-earning capacity of $400. Decision and Order at 2, 22-23.

CLAIMANT'S APPEAL

Suitable Alternate Employment as of September 25, 2018

To establish a prima facie case of total disability, a claimant must show she cannot return to her usual work due to her work injury. *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998). Where, as here, it was uncontested Claimant could not return to her usual employment until May 9, 2019, she established a prima facie case of total disability and the burden shifted to Employer to show suitable alternate employment. *See* Decision and Order at 21. Employer must produce evidence of realistic, available job opportunities within the geographic area where Claimant resides, which Claimant, by virtue of her age, education, work experience, and physical restrictions, is capable of performing. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156(CRT) (5th Cir. 1981). Employer can meet its burden by offering claimant a suitable light-duty job in its facility. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996); *Buckland v. Dep't of the Army/NAF/CPO*, 32 BRBS 99 (1998).

Claimant avers the administrative law judge improperly found the equipment cleaner job employer offered her suitable as of September 25, 2018.[3] She contends he erred by not giving weight to the opinion of her treating physician, Dr. Jeffery DeBender, and instead relying on the testimony of Employer's general manager, Bertrand Maylin, that Claimant could perform the job, and Claimant's testimony that she chose not to look for work in September 2018.

The administrative law judge summarized Mr. Maylin's testimony that Employer had various light-duty jobs Claimant could physically perform, his description of the equipment cleaner position, and a letter sent to Claimant's counsel on September 21, 2018, offering Claimant the job commencing on September 25, 2018. Decision and Order at 21; *see* Tr. at 130-136. The administrative law judge rejected Dr. DeBender's opinion that Claimant should remain off work in September 2018 because it was based on his incorrect belief that returning to work would put her in an environment where she could slip and fall and reinjure herself. Decision and Order at 21-22; *see* Tr. at 59-60; CX 10 at 14-15. He found Claimant's testimony that she could not work in September 2018 due to shoulder pain was not credible because she also testified "she did not look for other work because she was receiving compensation and was therefore not allowed to work anywhere else." Decision and Order at 22; *see* Tr. at 64. The administrative law judge also determined her "demeanor and appearance conveyed the impression" that she was interested in returning

[3] Employer voluntarily paid temporary total disability compensation from December 19, 2017 to September 24, 2018. *See* n. 1, *supra*.

to work only as a truck driver, which he found consistent with her testimony regarding not looking for work and her ultimately returning to work as a truck driver. Decision and Order at 22. The administrative law judge gave weight to Dr. Larry Likeover's September 6, 2018 report approving Claimant's return to work as an equipment cleaner and Mr. Maylin's testimony that the position could be performed with one hand.[4] Decision and Order at 22; *see* Tr. at 131; EX 23 at 2-5.

We reject Claimant's contentions of error. Although an administrative law judge may give special weight to a treating physician's opinion, *see generally Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir.), *cert. denied*, 528 U.S. 809 (1999), he is not required to do so when there is contrary evidence. Rather, the administrative law judge is entitled to evaluate the sufficiency of a medical opinion in view of other evidence of record. *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000); *see also Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48(CRT) (4th Cir. 1998). Moreover, the administrative law judge is entitled to draw his own inferences from the evidence, and his selection among competing inferences must be affirmed if supported by substantial evidence and in accordance with law. *See James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 430, 34 BRBS 35, 37(CRT) (5th Cir. 2000); *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995). As the administrative law judge's assessment of the medical opinions of Drs. Likeover and DeBender, the credibility of Claimant and Mr. Maylin, and his inferences drawn from the evidence are rational, they are affirmed. *Id.* The administrative law judge's finding that Claimant was capable of performing the equipment cleaner position from September 25, 2018 to May 9, 2019, is supported by substantial evidence, is consistent with the applicable legal principles, and therefore is affirmed.[5] *Bourgeois v. Director, OWCP*, 946 F.3d 263, 53 BRBS 91(CRT) (5th Cir. 2020).

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[4] The administrative law judge also determined Claimant could perform the safety observer position at Employer's facility, which Dr. Likeover also approved. Decision and Order at 22; *see* EX 23 at 19-20. But there is no evidence this position was actually available and offered to Claimant at this time. *See generally Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231 (1984), *rev'd on other grounds sub nom. Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69(CRT) (D.C. Cir. 1990).

[5] Claimant's diligence in seeking work did not relieve Employer of its burden to show available jobs Claimant could perform. *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986); *Crum v. General Adjustment Bureau*, 16 BRBS 101 (1983), *aff'd in pert. part*, 738 F.2d 474, 16 BRBS 115(CRT) (D.C. Cir. 1984). Rather, the administrative law judge permissibly determined Claimant's testimony was not credible regarding her physical

EMPLOYER'S CROSS-APPEAL

Temporary total disability award from September 23 to December 18, 2017

Employer avers the administrative law judge erred by finding it did not meet its burden to show suitable alternate employment during this period, as Dr. Likeover approved light-duty jobs at its facility that Claimant could perform, there is no contrary evidence, and the administrative law judge did not sufficiently explain his conclusion that Claimant was unable to perform these positions.[6]

It was uncontested that Employer had the burden to show suitable alternate employment from October 23, 2017 when Claimant stopped working for Employer to the day before she underwent surgery to repair her left rotator cuff tear on December 18, 2017. Decision and Order at 18. The administrative law judge discussed the deposition testimony of Claimant's co-worker and then-boyfriend, Floyd Holmes, that he observed her in a lot of pain after her injury; Dr. Likeover's approval of specific jobs at Employer's facility on October 9, 2017, an opinion he rendered prior to Claimant's MRI results; and Dr. DeBender's opinion, after reviewing the October 12, 2017 MRI showing a large tear of the supraspinatus tendon, that Claimant should remain off work. *Id*.; *see* CXs 10 at 2; 17 at 1-2; 29 at 5-10. Based on this evidence, the administrative law judge concluded Claimant could not have physically performed the proposed jobs at Employer's facility during this pre-surgery period. *Id*. at 19.

In her response brief, Claimant avers the positions at Employer's facility do not establish the availability of suitable alternate employment for the period of October 23 to December 18, 2017, because Employer did not establish the positions were actually available to her. We agree.

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ability to work in the job Employer offered her, based on his finding that she was not willing to accept alternative work in September 2018. *Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22(CRT) (5th Cir. 1994); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962).

[6] Employer voluntarily paid temporary total disability from September 30 to October 22, 2017, and temporary partial disability from October 23 to December 18, 2017. *See* n.1, *supra*. Claimant underwent shoulder surgery on December 19, 2017, when Employer again commenced paying temporary total disability benefits. *Id*.; CX 18.

In order to establish the availability of suitable alternate employment, the employer must show the identified jobs are actually available; mere allegations of available jobs are insufficient proof of suitable alternate employment. *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992); *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986). Employer sent the job descriptions for Safety Observation Worker and Debris Collection Worker to Dr. Likeover when it referred Claimant for a defense medical examination. EX 15. Dr. Likeover approved the jobs as suitable. *Id.* Mr. Maylin testified that Employer's procedure for offering an injured employee an alternate position at its facility is to send written notification to report for work. Tr. at 132. In 2018, Employer submitted such evidence of suitable alternate employment for the equipment cleaner position, which specified where, when and to whom Claimant was to report to work on September 25, 2018. EX 36; *see* discussion *supra* at p. 3. Similar evidence is lacking with respect to the jobs allegedly available and suitable from October 23 through December 18, 2017.

Although the record indicates Dr. Likeover discussed modified duty with Claimant at her October 9, 2017 office visit and Claimant thereafter discussed returning to work with Dr. DeBender, there is no record evidence that the positions within Employer's exclusive control were actually offered to Claimant in accordance with Employer's own procedures. *See* Tr. at 54-56, 67, 71-73; EX 37 at 15. Accordingly, on these facts, Employer did not establish the availability of suitable alternate employment. *See Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (2001) (en banc); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988); *see also Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231 (1984), *rev'd on other grounds sub nom. Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69(CRT) (D.C. Cir. 1990); *cf. Royce v. Elrich Constr. Co.*, 17 BRBS 157 (1985) (employer is not required to find another job for claimant, but must present evidence of actual, rather than theoretical, opportunities). In addition, as the administrative law judge noted, Dr. Likeover approved the jobs before Claimant underwent an MRI revealing a rotator cuff tear. Decision and Order at 18. Therefore, we affirm the administrative law judge's award of temporary total disability compensation from October 23 to December 18, 2017.[7] *Misho v. Global Linguist Solutions*, 48 BRBS 13 (2014); *Reed v. Bath Iron Works Corp.*, 38 BRBS 1 (2004).

[7] Moreover, the administrative law judge's reliance on the testimony of Mr. Holmes, the October 12, 2017 MRI and Dr. DeBender's October 23, 2017 opinion, to conclude that Claimant is entitled to temporary total disability compensation from October 23, 2017 to December 18, 2017, constitutes substantial evidence to support the award and the administrative law judge's reasoning is sufficiently clear for the Board to ascertain the logic of his conclusion. *Bourgeois v. Director, OWCP*, 946 F.3d 263, 53 BRBS 91(CRT)

Accordingly, we affirm the administrative law judge's Decision and Order.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

(5th Cir. 2020); *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000); *Alabama Power Co. v. FPC*, 511 F 2d 383 (D.C. Cir. 1974).