U.S. Department of Labor

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

BRB No. 24-0024

KEVIN BRADY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TEXAS TERMINALS, LP	)	
	)	DATE ISSUED: 09/30/2024
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD.	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Tracy A. Daly, Administrative Law Judge, United States Department of Labor.

Kevin Brady, Houston, Texas.

C. Douglas Wheat and Amanda N. Farley (Kennedys CMK LLP), Houston, Texas, for Employer/Carrier.

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

PER CURIAM:

Claimant, without representation, appeals Administrative Law Judge (ALJ) Tracy A. Daly's Decision and Order on Remand (2019-LHC-00624) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (Act). On appeal, Claimant generally challenges the ALJ's denial of benefits; therefore, the Benefits Review Board will review the rulings adverse to him and address

whether substantial evidence supports the Decision and Order on Remand (D&O on Remand). *See Pierce v. Elec. Boat Corp.*, 54 BRBS 27 (2020). The law requires we must affirm the ALJ's decision and order if it is rational, supported by substantial evidence, and in accordance with applicable law.[1] 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 Board for the second time.

Claimant began working for Employer on March 6, 2017. A pre-employment x-ray of his lumbar spine revealed a history of pre-existing multilevel degenerative disc disease at the thoracolumbar junction and multilevel facet arthropathy, which was most severe in his lower spine. EX 6. Claimant sustained a work-related back injury with Employer on May 15, 2017. He returned to a modified full-time job as an escort with Employer on July 18, 2017, though he only sporadically reported for work. On November 15, 2017, Employer terminated Claimant for failure to work his assigned shifts. EX 31, Dep. at 30-31.

The ALJ found Claimant sustained a work-related thoracic back injury which precluded him from performing his usual employment from May 15, 2017, until May 1, 2018. He next found Employer met its burden of establishing the availability of suitable alternate employment through evidence that it had full-time modified escort work available to Claimant, within his post-accident restrictions, from the date of his injury. As the ALJ found Claimant took on the escort job on a full-time basis at his pre-injury hourly rate of $12, he determined Claimant's average weekly wage (AWW) was not at issue. Comparing Claimant's AWW with his post-injury wages, the ALJ concluded Claimant suffered no loss of wage-earning capacity from his work-related accident and denied disability benefits. However, the ALJ awarded Claimant medical benefits from May 15, 2017, until May 1, 2018, when his work-related condition reached maximum medical improvement (MMI) with no residual impairment or restrictions.

On appeal, the Board affirmed the ALJ's findings that: 1) Claimant sustained a work-related thoracic contusion; 2) Claimant's work-related condition reached MMI as of May 1, 2018; 3) Employer made suitable alternate employment available to Claimant on a full-time basis as an escort at his pre-injury hourly rate of $12 for a total of $480 weekly; 4) Claimant is not entitled to disability benefits; and 5) Claimant is entitled to a finite period of medical benefits but not to recovery of any expenses beyond his treatment with Dr. Badu. *Brady v. Texas Terminal, LP*, BRB No. 21-0397 (June 28, 2022) (unpub.).

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit because Claimant sustained his injury in Texas. 33 U.S.C. 921(c); *see Roberts v. Custom Ship Interiors*, 35 BRBS 65, 67 n.2 (2001), *aff'd*, 300 F.3d 510 (4th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003); 20 C.F.R. §702.201(a).

However, the Board vacated the ALJ's finding that AWW was not at issue and therefore vacated his denial of disability benefits. *Id.*, slip op. at 8, 12. It remanded the case to the ALJ for further consideration of that issue. *Id.* It instructed the ALJ to calculate Claimant's pre-injury AWW and to sufficiently determine whether he sustained a loss in his wage-earning capacity due to lost overtime wages in the suitable alternate employment that Employer provided from May 16, 2017, until his November 15, 2017 termination. *Id.*

Pursuant to the Board's instructions, in his D&O on Remand, the ALJ calculated Claimant's AWW under Section 10(c) of the Act, 33 U.S.C. §910(c). D&O on Remand at 5. He found that in the ten-week period before his work-related injury on May 15, 2017, Claimant earned $5,869.50 in gross wages, including overtime compensation in six of those ten weeks. *Id.* at 4, 6; *see* EX 46. Based on this evidence, he concluded Claimant established overtime was a regular and normal part of his pre-injury work with Employer. However, the ALJ found Claimant's gross earnings in that ten-week period do not reasonably reflect his average annual earning capacity prior to his injury. *Id.* at 6*; see* EX 4. Instead, he determined it would be better to blend Claimant's earnings from multiple employers, including Employer, during the fifty-two-week period prior to his injury, as this method most reasonably represents his annual earning capacity at the time of his injury. *Id.* at 3-4, 6; *see* EX 27 at 16, 22-23, 27. Accounting for wages from Claimant's multiple jobs, including those with Employer, from April 1, 2016, to May 14, 2017, the ALJ found Claimant's gross earnings totaled $20,754.64 and his AWW is $398.50. *Id.* Because Claimant's post-injury wage-earning capacity of $480 weekly is greater than his AWW of $398.50, the ALJ concluded Claimant did not suffer a loss of wage-earning capacity and is not entitled to disability compensation. *Id.* at 6-7. Claimant, without representation, appeals the ALJ's decision. Employer responds, urging the Board to affirm the ALJ's decision.

In several letters to the Board, Claimant argues he is entitled to total disability benefits and reimbursement of unpaid medical expenses. These issues were resolved in the Board's prior decision. *Brady*, slip op. at 4-7, 9-12. Therefore, those holdings are the law of the case and there is no clear error shown. *Schwirse v. Marine Terminals Corp.*, 45 BRBS 53 (2011), *aff'd sub nom. Schwirse v. Dir., OWCP*, 736 F.3d 1165 (9th Cir. 2013) (fully addressed issue is law of the case); *Irby v. Blackwater Sec. 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). Further, we decline to address Claimant's request for backpay, as he did not allege before the ALJ that Employer wrongfully terminated him or treated him in a discriminatory manner in violation of Section 48a of the Act. 33 U.S.C. §948(a) (2018).

Because the ALJ permissibly exercised his discretion in refusing to admit additional exhibits on remand as they were duplicative and unrelated to the issues on remand, Order

on Remand at 2 n.4, we will not disturb his exclusion of these exhibits; the ALJ's evidentiary finding is not arbitrary, capricious, an abuse of discretion or contrary to law. *See Collins v. Electric Boat Corp.*, 45 BRBS 79 (2011); *Patterson v. Omniplex World Services*, 36 BRBS 149 (2003); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999). Moreover, by law, the Board is prohibited from considering new evidence submitted on appeal that was not submitted to the ALJ. *Wynn v. Clevenger Corp.*, 21 BRBS 290 (1988); 20 C.F.R. §802.301(b).

Claimant further contends he is entitled to a higher AWW and to partial disability benefits. The law does not support his contention.

Section 10 of the Act provides for the calculation of a claimant's AWW. Section 10(c) of the Act is a catch-all provision used to calculate a claimant's AWW when neither Section 10(a) nor Section 10(b) can be reasonably and fairly applied. 33 U.S.C. §910(a)-(c);[2] *see Matulic v. Director, OWCP*, 154 F.3d 1052, 1056-1057 (9th Cir. 1998); *Story v. Navy Exch. Serv. Ctr.*, 33 BRBS 111 (1999). The object of Section 10(c) is to calculate a sum which reasonably represents the claimant's annual earning capacity at the time of his injury. *See Empire United Stevedores v. Gatlin*, 936 F.2d 819, 821-822 (5th Cir. 1991); *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982). An ALJ has broad discretion when applying Section 10(c). *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 433 (5th Cir. 2000); *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 1030 (5th Cir. 1998); *Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1987). In computing a claimant's AWW under Section 10(c), overtime should be included if it is a regular and normal part of the claimant's employment. *Brown v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 110 (1989); *Bury v. Joseph Smith & Sons*, 13 BRBS 694, 698 (1981).

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[2] Section 10(c) of the Act states:

> If either of the foregoing methods 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).

In this case, the ALJ properly found Section 10(c) applicable because the record contains no evidence to reasonably and fairly apply Section 10(a) or 10(b). D&O on Remand at 6; *see* 33 U.S.C. §910(a)-(c); *see Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601, 606 (5th Cir. 2004); *Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 297-298 (5th Cir. 2000); *Gallagher*, 219 F.3d at 433; *Hall*, 139 F.3d at 1030. He also correctly determined Claimant worked for Employer only for ten weeks, and he reasonably concluded Claimant's wage records for that period establish overtime was a regular part of Claimant's pre-injury pay, as Claimant earned overtime wages six out of the ten weeks. EX 4; *see Brown*, 23 BRBS 110; *Bury*, 13 BRBS at 698.

In looking at the $5,869.50 in wages Claimant earned during that ten-week period and comparing them to Claimant's work history, the ALJ concluded they do not reasonably represent Claimant's average annual earning capacity prior to his injury because: 1) Claimant's sporadic intermittent work history included periods of unemployment; 2) there is no evidence that Claimant had been consistently employed prior to his work with Employer or that his employment situation had changed such that his future employment with Employer would have been more consistent than in years past; 3) Claimant's testimony regarding his earnings is unreliable and not credible; and 4) Claimant's testimony regarding his 2016 earnings is uncorroborated by his tax records, wage statements, or other evidence of record. D&O on Remand at 3-4, 6; see EXs 4 at 6-15, 12 at 5, 15 at 6-7, 16 at 18, 56, 60-62; Hearing Tr. 2 at 134-40, 155-57, 160-61. As the main objective of Section 10(c) is to arrive at a sum which reasonably represents the claimant's annual earning capacity at the time of his injury, and the ALJ has broad discretion when using Section 10(c), we affirm his finding that Claimant's gross earnings with Employer during that ten-week period do not reasonably represent Claimant's average annual earning capacity prior to his injury. *See Bunol*, 211 F.3d at 297-298; *P & M Crane Co. v. Hayes*, 930 F.2d 424, 432 n.2 (5th Cir. 1991)*; Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 650 (9th Cir. 2010); *Hicks v. Pac. Marine & Supply Co., Ltd.*, 14 BRBS 549 (1981).

Finally, we conclude the ALJ reasonably found that blended earnings from Claimant's work with multiple employers, including Employer, during the 52-week period prior to his injury reasonably represent his annual earning capacity at the time of his injury. D&O on Remand at 3-4, 6; EX 27. He accurately noted the Texas Workforce Commission (TWC) reported Claimant's wages quarterly and, consequently, his reported earnings encompass more than 52 weeks prior to his injury. *Id.* at 6 n.8; *see* EX 27. Because the wages reported by the TWC do not reflect exactly the 52-week period prior to his injury, the ALJ presumed the wages were attributable to this 52-week period and divided them by 52. *Id*. The determination to use the TWC data is reasonable and within the ALJ's discretion and dividing the TWC data by 52 is not challenged by Claimant (and if anything is favorable to Claimant). *See Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 407, *modified on other grounds on reh'g*, 237 F.3d 409 (5th Cir. 2000); *Rhine v. Stevedoring*

Services of America, 596 F.3d 1161, 1164-1165 (9th Cir. 2010); *see generally Jasmine v. Can-Am Protection Group, Inc.*, 46 BRBS 17 (2012) (affirming the ALJ's AWW calculation under Section 10(c) based on a blend of his stateside earnings and his overseas contract rate of pay at the time of his injury). However, the ALJ's calculation of Claimant's gross earnings contains an error. Along with the evidence from the TWC reports, the ALJ used Employer's records to determine Claimant's gross earnings from April 1, 2016, to May 14, 2017, which total $20,913.64, not $20,745.64.[3] EX 27 at 16, 22-23, 27; *see Staftex Staffing*, 237 F.3d at 407; *Rhine*, 596 F.3d at 1164-1165; D&O on Remand at 3-4, 6. Dividing Claimant's gross annual earnings by fifty-two, per Section 10(d) of the Act, results in an AWW of $402.19, not $398.95 as the ALJ found. Therefore, based on the math, we correct Claimant's AWW to be $402.19.[4] Still, the ALJ's error is harmless, as a comparison of Claimant's pre-injury AWW ($402.19) with his post-injury weekly wages in suitable alternate employment ($480) reveals Claimant still earned greater wages as an escort. D&O on Remand at 6-7; *see Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011); *Patterson; cf. Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 648 (9th Cir. 2010) ("we may overturn the administrative law judge's decision only if ... it reasonably can be concluded that absent such error there would have been a contrary result."); *see also Brady*, slip op. at 6-7. Because Claimant's post-injury wage-earning capacity is greater than his AWW, the ALJ correctly concluded Claimant suffered no loss of wage-earning capacity, and therefore he is not entitled to disability compensation. *Id.* The ALJ's calculation of Claimant's AWW, based on the facts of this case, is in accordance with Sections 10(c) and 10(d), rational, supported by substantial evidence, and within the broad discretion afforded

[3] As the ALJ could not adjust the TWC wages encompassing more than 52 weeks prior to his injury, he assumed they were attributable to the 52-week period prior to his injury. *See Staftex Staffing*, 237 F.3d at 407; *Rhine*, 596 F.3d at 1164-1165; D&O on Remand at 6 n.8; EX 27. However, based on this finding, the ALJ incorrectly calculated Claimant's gross earnings using four quarters that entail earnings only from April 1, 2016, to March 31, 2017, and omitted the 2017 second quarter earnings, which contain Claimant's wages from April 1, 2017, to May 14, 2017. Order on Remand at 3-4, 6; *see* EX 27. Claimant's corrected gross earnings from April 1, 2016, to May 14, 2017 ($20,913.64) = 2016 second quarter earnings ($570) + 2016 third quarter earnings ($7,320) + 2016 fourth quarter earnings ($5,399.14) + 2017 first quarter earnings ($2,688.50) + 2017 second quarter earnings ($4,935). EX 27 at 16, 22-23, 27. The six employers for whom Claimant worked are Employer, Walsh Alliance, Ltd., Facilities Mechanical Inc., Peoplelink Staffing, Peopleready, Inc., and Gulf Copper & Manufacturing. *Id.*

[4] Claimant's modified AWW ($402.19) equals his corrected gross earnings ($20,913.64) divided by 52 weeks.

him under Section 10(c). *Gallagher*, 219 F.3d at 433; *Staftex Staffing*, 237 F.3d at 407; *Hall*, 139 F.3d at 1030; *Rhine*, 596 F.3d at 1164-1165.

Accordingly, we modify the ALJ's AWW mathematical calculation in accordance with this opinion. In all other respects, we affirm the Decision and Order on Remand.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge