BRB No. 90-1178

LUTHER DARDEN)
)
Claimant-Petitioner)
)
v.)
)
NEWPORT NEWS SHIPBUILDING)
and DRY DOCK COMPANY)
) DATE ISSUED:
Employer-Respondent)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

John H. Klein (Rutter and Montagna), Norfolk, Virginia, for petitioner.

Jonathan H. Walker (Seyfarth, Shaw, Fairweather and Geraldson), Washington, D.C., for respondent.

Before: STAGE, Chief Administrative Appeals Judge, McGRANERY, Administrative Law Judge, and LIPSON, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (89-LHC-1574) of Administrative Law Judge Daniel L. Leland, on a claim filed pursuant to the provisions of the Longshore and Harbor Worker's Compensation Act, as amended, 33 U.S.C. §901 et seq. (the Act). After reviewing the evidence of record the administrative law judge found that the evidence failed to prove that claimant is totally disabled due to his work related knee injury and that his claim must be denied. In making this finding, the administrative law judge concluded that the employer had met its burden, through the testimony of a vocational rehabilitation counselor, of showing that suitable alternative employment was available to claimant. The administrative law judge concluded further that claimant was not diligent in his search for appropriate employment. See Decision and

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act, as amended in 1984, 33 U.S.C. §921(b)(5)(Supp. V 1987).

Order at 6. On appeal, claimant contends that the administrative law judge erred in finding that claimant was not totally disabled and requests that the administrative law judge's decision be reversed and an award of continuing total disability be granted. Employer responds, arguing that the findings of the administrative law judge are supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director) has chosen not to respond in this case.

The Board's scope of review is defined by statute. The administrative law judge's findings of fact and conclusions of law must be affirmed if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

Claimant, born on January 2, 1937, testified that he has a fifth or sixth grade education. See Hearing Transcript 14. He stated also that he reads and writes very little. Id. On April 17, 1978, while working at the Newport News Shipbuilding and Dry Dock Company as a rigger, claimant suffered an injury to his knee. See Hearing Transcript 16, Employer's Exhibits 2, 15 at 41. After repeated treatment for his injury and intermittent periods of work in light duty positions, see Employer's Exhibit 15 at 18, 34, claimant was declared on October 15, 1979 to have a permanent disability of the right knee which prevents him from working as a rigger. Id. at 34. On September 11, 1984 claimant's doctor determined that he has a fifty percent impairment of his right lower extremity. See Employer's Exhibit 15 at 14.

On January 8, 1985 claimant and employer entered into a consent agreement in which the employer agreed to pay claimant permanent partial disability benefits under the schedule in Section 8(c)(2) of the Act, 33 U.S.C. §908(c)(2), for 144 weeks, as well as temporary total disability benefits for various periods of time. See Employer's Exhibits 3, 9. In total claimant received $56,470.89 in benefits. See Employer's Exhibit 9. On December 18, 1986 claimant filed a second claim for compensation. See Employer's Exhibit 4.

After being placed on medical restrictions by his doctors, see Employer's Exhibit 12, claimant was assigned temporary light duty work at the shipyard for employees with light duty work restrictions. Claimant was passed out of work on May 10, 1988, due to the unavailability of suitable permanent employment at the shipyard. See Employer's Exhibits 10, 12.

On August 15, 1988 claimant was referred by the employer to a vocational rehabilitation counselor, Susan Bohache. Hearing Transcript 83, Employer's Exhibit 20. Ms. Bohache met with claimant and administered a Wide Range Achievement Test (WRAT), the results of which indicated that claimant's reading ability was equivalent to the beginning of the fifth grade, arithmetic ability was equivalent to the fifth grade and spelling ability was below the third grade level. See Hearing Transcript 54. Ms. Bohache began to contact employers on claimant's behalf, see Hearing Transcript 56, which was in addition to the job search that claimant was conducting on his own. See Hearing Transcript 25, Employer's Exhibit 21, Claimant's Exhibits 5, 6. Although claimant contacted many employers he was unable to secure employment. See Hearing Transcript 27. Ms. Bohache's search resulted in her finding several jobs that she says were available to claimant during the period of his search. See Hearing Transcript 56-83. Claimant remained unemployed at the time of the hearing before the administrative law judge on October 5, 1989.

At the hearing, the administrative law judge heard the testimony of Ms. Bohache and claimant. After reviewing the evidence submitted, the administrative law judge determined that there was suitable alternative employment available for which claimant could realistically compete. He concluded that the evidence did not prove that claimant is totally disabled due to his knee injury and that his claim must be denied. See Decision and Order at 6.

Claimant appeals the administrative law judge's Decision and Order on the grounds that the administrative law judge's decision was not supported by substantial evidence, that the administrative law judge improperly relied on the opinion of Ms. Bohache in determining the availability of suitable alternative employment, and that the administrative law judge improperly determined that claimant was not diligent in his job search. In response, employer argues that the administrative law judge's decision was proper and supported by substantial evidence.

In Newport News Shipbuilding and Dry Dock Company v. Tann, 841 F.2d 540, 21 BRBS 10 (CRT) (4th Cir. 1988), the United States Court of Appeals for the Fourth Circuit held that the standard for determining total disability is as follows:

1) The employee bears the burden of showing that he is unable to return to his former employment,
2) The employer bears the burden of showing the existence

of suitable alternate employment that would be available to the claimant if he diligently sought it and

3) If the employer has met its burden, the claimant may still establish disability by showing that he has diligently sought appropriate employment but has been unable to secure it.

See Tann supra 21 BRBS at 13 (CRT).

In order to establish suitable alternative employment, employer must demonstrate the availability of realistic job opportunities which the claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing. New Orleans (Gulfwide) Stevedores, Inc. v. Turner, 661 F.2d 1031, 1042-1043, 14 BRBS 156, 164-165 (5th Cir. 1981), rev'g in pert. part 5 BRBS 418 (1977). Claimant contends that the jobs identified by employer's vocational rehabilitation counselor are beyond his physical and mental capabilities.

The administrative law judge considered the testimony of employer's vocational rehabilitation counselor and concluded that claimant could realistically compete for a number of the jobs identified by the vocational rehabilitation counselor. In making this finding, the administrative law judge stated that he did not believe that the employers would have refused to hire claimant if they had been aware of claimant's low test results. See Decision and Order at 6. The administrative law judge also noted his skepticism concerning the validity of claimant's WRAT results. Specifically, the administrative law judge stated that claimant misspelled such simple words as "arm" and "train" on the test, but correctly spelled "representative", "engineering", "security", "recommended", and "executive" in his job search records. The administrative law judge added that he did not find any misspellings in claimant's handwritten notes, although the handwriting is occasionally difficult to decipher.[1] The administrative law judge then concluded that claimant did not make a good faith effort in taking the WRAT and is fully capable of performing the work of a telephone solicitor and dispatcher. See Id.

Claimant argues that the administrative law judge erred in determining that he was not diligent in his efforts to obtain suitable alternative employment. In making his determination as to claimant's diligence, the administrative law judge noted that claimant had confined his job search to the Suffolk, Virginia area, that claimant frequently sought jobs that were beyond his physical capacity, and that claimant was considerably less than diligent in following up on job leads identified by the vocational counselor.

Regarding the area of his job search, claimant argues that he met his burden because he was only required to search for jobs within the geographical area in which he resides. In Dixon v. John J. McMullen & Assoc., Inc., 19 BRBS 243, 247 (1986), however, the Benefits Review Board held that it was the employer's burden to prove the availability of suitable alternate employment in the vicinity where the employee was injured, and not where he resides. Claimant's argument on this issue is therefore without merit, as claimant's injury occurred in the course of his employment Newport News, Virginia.

[1] Upon examining claimant's handwritten notes several misspelled words were found, in contrast to the statement made by the administrative law judge. See Claimant's Exhibit 5.

Regarding the jobs identified by the vocational counselor, Ms. Bohache testified at the hearing that claimant was generally uninterested in the jobs that she located for him. The vocational counselor testified that all of the jobs that she identified were within claimant's restrictions, that claimant was offered jobs that he could do that he turned down, and that she was informed by prospective employers that claimant exhibited a negative attitude towards the identified jobs in his interviews and in his written applications. Hearing Transcript at 58-60, 62-63, 65-66. The vocational counselor also testified that claimant rejected an opportunity to perform light work at his home because he did not want to be responsible for the materials that the job required. Hearing Transcript at 67-69. The vocational counselor also identified a number of other positions that were available and that claimant was capable of performing that he was not interested in.[2] Hearing Transcript at 73-83. Claimant also testified at the hearing that he contacted all but one of these possible employers by telephone. Hearing Transcript at 24-25. Claimant further testified that the jobs identified by the vocational counselor were outside of his physical restrictions or his mental capabilities, and that he did not believe that he could perform the identified jobs. Hearing Transcript at 44-46, 59-62, 66-68. Ms. Bohache testified, however, that all of these jobs were within claimant's capabilities and that many of them had no minimum educational level requirements. See Hearing Transcript at 72, 76, 77, 79, 83.

Claimant also gave testimony at the hearing regarding the job search that he was conducting on his own. In this regard, claimant stated that he contacted a number of employers in his area to see if they had jobs available. In many cases, claimant was unaware of the type of work done by the employers, and many of the positions for which he applied appear to be outside of the scope of his physical restrictions.[3] See Hearing Transcript at 31-35, 37-38. Claimant was unable to secure a position at any of the places where he applied. Ms. Bohache testified that she felt that the positions identified by claimant in his job search were clearly outside of claimant's physical restrictions. See Hearing Transcript at 55.

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[2] The jobs identified by Ms. Bohache included a position delivering flyers with Commonwealth Printing, a telephone soliciting job with Jobs for the Handicapped, a job working at home as a crab pot builder, a position as a security guard with Murray Guards, a self service cashier job with Shell Service Station, a position as a dispatcher with Tidewater Towing, a phone order representative job at QBC, telephone order clerk positions at Pizza Hut and Domino's restaurants, a toll collector job with the Virginia Department of Transportation, and a job as an identification checker at a naval base. See Hearing Transcript at 56-79. Claimant rejected the job at Commonwealth Printing because it required him to work in inclement weather. See Hearing Transcript at 59. He rejected the Jobs for the Handicapped job because he felt that the pay was not worth his travelling to Norfolk. See Hearing Transcript at 62. The crab pot building job did not suit claimant because he did not want to store the materials at home. See Hearing Transcript at 68. He was denied the Murray Guards job due to the medical conditions and restrictions that he had listed on his application. See Hearing Transcript at 66. He did not submit an application at the remaining jobs because he felt that his low reading, writing, and arithmetic skills would prevent him from performing those jobs. See Claimant's Brief at 15-16.

[3]Some of the positions applied for by claimant include jobs with companies involved in general construction and building farm equipment, as well as jobs in auto repair. Hearing Transcript at 31-35.

In Jones v. Genco, Inc., 21 BRBS 12, 14 (1988), it was held that the "testimony of a vocational rehabilitation specialist is substantial evidence in support of the administrative law judge's finding that employer met its burden of proving the availability of suitable alternative employment." As it is within the discretion of the administrative law judge to accord greater weight to the findings of employer's vocational rehabilitation counselor, see Cordero v. Triple A Machine Shop, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), aff'g 4 BRBS 284 (1976), cert. denied, 440 U.S. 911 (1979), and in light of the fact that, as trier of fact, the administrative law judge may accept or reject all or part of any testimony, Perini Corp. v. Heyde, 306 F. Supp. 1321 (D.R.I. 1969), the Board must respect his evaluation of the evidence of record. Calbeck v. Strachan Shipping Co., 306 F.2d 693, (5th Cir. 1962), cert. denied, 372 U.S. 954 (1963). Consequently, as claimant has failed to provide the Board with a sufficient basis to overturn the credibility determinations of the administrative law judge, see Cordero, supra, the findings of the administrative law judge regarding claimant's diligence, and his findings regarding the availability of suitable alternative employment are supported by substantial evidence of record and are affirmed by the Board.

Therefore, the administrative law judge's denial of benefits is affirmed as it is supported by substantial evidence of record.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

SHELDON R. LIPSON
Administrative Law Judge