U.S. Department of Labor

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

BRB No. 16-0691

STEVEN HERFI	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GLOBAL LINGUIST SOLUTIONS, LLC	)	
	)	DATE ISSUED: July 19, 2017
and	)	
	)	
ZURICH AMERICAN INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Granting Benefits and the Order Denying Reconsideration of William Dorsey, Administrative Law Judge, United States Department of Labor.

Brian E. Wiklendt (Garfinkel Schwartz, P.A.), Maitland, Florida, for claimant.

Jonathan A Tweedy and Mark T. Tufts (Brown Sims), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order and the Order Denying Reconsideration (2013-LDA-00120) of Administrative Law Judge William Dorsey rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 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 administrative law judge's findings of fact and conclusions of law 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 came to the United States from Iraq when he was 17 years old. Tr. at 5. He began working as a cultural advisor and translator in 2007, first in Kuwait and then in Iraq. CX 2 at 31-32. He started working for employer in 2008 as a cultural advisor and translator for the U.S. military. CX 2 at 32.

On April 7, 2010, claimant was with a military unit in Iraq, which had just completed a short mission and was returning to its home base, when an improvised explosive device (IED) exploded near his vehicle. Tr. at 7. The explosion lifted the vehicle up and onto its left side and knocked claimant unconscious. The explosion killed two members of claimant's unit, to whom claimant had become close after living with them since November 2009.

Due to the explosion, claimant suffered serious injuries to his left hand, left leg and ankle, and a coccyx fracture. Claimant was first flown to Mosul, Iraq, where surgery was performed on his left hand. Tr. at 12. Subsequently, claimant underwent an open reduction internal fixation surgery on his left ankle in Germany. *Id.* at 11. Claimant then returned to the U.S. *Id.* at 12.

In the U.S., claimant was first treated by Dr. Lester Mohler, an orthopedic surgeon, who diagnosed claimant with left ankle fractures and syndesmotic injury, left hand blast injuries with open wounds, and a coccyx fracture. EX 4 at 187. Claimant was treated by Dr. Mohler through May 3, 2011, although claimant continued to report significant pain. Dr. Mohler stated that, as of May 3, 2011, however, claimant had reached orthopedic maximum medical improvement and there was "no medical basis for activity restriction." *Id.* at 211. Dr. Mohler stated claimant had no impairment for his hand injury, an eight percent whole body impairment for his ankle injury, and a five percent whole body impairment for his coccyx fracture. *Id.* at 212, 214.

Dr. Mohler recommended a psychiatric consultation and claimant saw a psychologist, Dr. Deena Staab, on July 23, 2010. Tr. at 12. Dr. Staab diagnosed claimant with severe, chronic, delayed onset post-traumatic stress disorder (PTSD) and moderate major depression. CX 12 at 7. She opined that claimant's PTSD and depression were likely exacerbating his perception of physical pain. *Id.* Dr. Staab stated on January 19, 2011 that claimant would not be able to return to the work in Iraq because of his severe PTSD. *Id.* at 17. She last saw claimant on March 15, 2011, when she and claimant agreed he should seek treatment from someone else because of a lack of progress in his recovery. *Id.* at 20. Dr. Staab stated in her deposition that she came to believe that claimant was either consciously or subconsciously sabotaging his recovery. CX 6 at 22.

Since then, claimant has seen a number of physicians and psychologists for continuing pain management and psychological symptoms, including Dr. San Hsieh, claimant's family doctor, and Dr. Kelly Loomis, a board-certified psychiatrist. Dr. Loomis first saw claimant on August 23, 2012 and diagnosed PTSD; major depressive disorder, moderate in severity; and pain disorder associated with psychological factors. CX 11 at 8. Dr. Loomis concluded that claimant had reached maximum medical improvement for his psychological conditions on September 17, 2012 and was incapable of returning to work in a combat scenario. *Id.* at 10. Dr. Loomis did not believe that claimant was either malingering or exaggerating his symptoms. CX 7 at 25-26. Dr. Loomis stated he would not approve overseas work for claimant, specifically expressing concerns about claimant's returning to work in a combat zone. *Id.* at 43-44.

Claimant filed a claim for benefits under the Act. The administrative law judge found claimant entitled to the Section 20(a) presumption for the orthopedic injuries to his left hand, left ankle, and coccyx, as well as for his PTSD and depression. The administrative law judge also applied the Section 20(a) presumption to claimant's alleged lumbar condition.[1] Decision and Order at 41-42. The administrative law judge found that employer rebutted the Section 20(a) presumption only with regard to the lumbar injury and that the evidence as a whole establishes that the lumbar condition is not work-related. Based on the absence of rebuttal evidence, the administrative law found as a matter of law that claimant sustained work-related hand, ankle, coccyx and psychological injuries.

The administrative law judge found that claimant reached maximum medical improvement for his orthopedic injuries on May 3, 2011 and for his psychological injuries on September 17, 2012. The administrative law judge found that claimant's testimony is not credible with regard to his ongoing symptoms and work restrictions due to "his evasive and histrionic behavior during psychological evaluations [and] manipulative performance during psychological testing." Decision and Order at 47. The administrative law judge concluded, however, that claimant's psychiatric condition prevents his working in a combat zone. *Id.* at 48.

The administrative law judge reviewed reports submitted by employer's vocational rehabilitation specialist, Shaun Aulita. The administrative law judge

[1] The administrative law judge stated that he assumed claimant's statements about back pain were for a lumbar injury but noted that the only evidence of a lumbar injury separate from the coccyx injury is a diagnosis of degenerative disc disease. For purposes of establishing the Section 20(a) presumption, the administrative law judge noted that the explosion could have accelerated the degenerative process or aggravated symptoms in claimant's lumbar region. Decision and Order at 41-42.

concluded that overseas work is outside claimant's relevant labor market, Decision and Order at 57, but that all the domestic jobs identified by Ms. Aulita are suitable for claimant. *Id.* The administrative law judge accordingly found that claimant was totally disabled from April 7, 2010 until February 4, 2014, the day before Ms. Aulita's first labor market survey, and that he has been only partially disabled since February 5, 2014. *Id.* at 57-58. The administrative law judge concluded that claimant is entitled to permanent partial disability under Section 8(c)(4), 33 U.S.C. §908(c)(4), for a 28 percent impairment of his left foot, and to unscheduled permanent partial disability benefits under Section 8(c)(21) for his other injuries. *Id.* at 60; 33 U.S.C. §908(c)(21), (h). The administrative law judge denied employer's motion for reconsideration of the scheduled permanent partial disability award.

Employer appeals the administrative law judge's decisions, challenging the award of permanent total disability benefits, the exclusion of all overseas work from the relevant post-injury labor market, and the award of scheduled permanent partial disability benefits pursuant to Section 8(c)(4). Claimant filed a response brief. Employer filed a reply brief to claimant's response.

As a preliminary matter, we reject claimant's argument that employer's appeal of the administrative law judge's Decision and Order was untimely filed and that employer may appeal only the issue addressed in the administrative law judge's denial of employer's motion for reconsideration. Section 802.206(a) of the Board's regulations, 20 C.F.R. §802.206(a), states that a timely motion for reconsideration will toll the time for appeal. If the motion is denied, as it was here, the full time for filing an appeal of both the original decision and the decision on reconsideration commences on the date the subsequent order on reconsideration is filed. *See* 20 C.F.R. §802.206(e). There was no contention below that employer's motion for reconsideration was untimely filed, and the administrative law judge addressed the merits of employer's motion. Employer was entitled to appeal the administrative law judge's initial decision and the order denying reconsideration within 30 days of the filing of the later order, which it did in timely manner.

Total Disability for Claimant's Psychological Condition

Employer challenges the administrative law judge's award of permanent total disability benefits for claimant's psychological condition, contending that substantial evidence does not support the finding that claimant is unable to return to his usual work because of his psychological condition.

The administrative law judge found that claimant's testimony concerning his symptoms and limitations is not credible, based on evidence that claimant exaggerated

symptoms. Decision and Order at 47.[2] The administrative law judge further concluded that claimant's lack of credibility tainted the opinions of his doctors, who relied on claimant's self-reported symptoms in forming their opinions as to the extent of his disability. *Id.* Nonetheless, the administrative law judge credited medical evidence that, whatever the precise severity of claimant's psychological conditions, claimant should avoid work in a combat zone because of those conditions. Accordingly, the administrative law judge found that claimant cannot return to his prior employment due to his psychological injury and established a prima facie case of total disability. *Id.* at 49.

We reject employer's contention that the administrative law judge erred in reaching this conclusion. Claimant establishes a prima facie case of total disability by showing that he cannot return to his former employment due to his work injury. *See Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *see also Pietrunti v. Director, OWCP*, 119 F.3d 1035, 1041, 31 BRBS 84, 88(CRT) (2d Cir. 1997) ("Because disability under the Act is an economic concept, the extent of disability cannot be measured by medical condition alone."). The administrative law judge's finding that claimant is restricted from returning to work in a war zone because of his psychological condition is neither irrational nor unsupported by the evidence in the record. Drs. Staab, Loomis, and Delis each stated that claimant should avoid work in a combat zone.[3] Decision and Order at 48. The administrative law judge reasoned that:

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[2] Drs. Staab, Delis and Meisner observed "histrionic" behavior in claimant that is not typical of PTSD. To some degree, they believed this was a cultural factor. Dr. Staab stated that claimant was to some extent seeking secondary gain – both financial and a desire to be cared for. CX 6 at 13, 33, 39. However, she also stated it was more likely than not that claimant suffers from PTSD. *Id.* at 47. Dr. Delis administered psychological tests to claimant. Dr. Delis stated that claimant did not put forth adequate effort on these tests and that the tests exhibited symptom magnification, either consciously or subconsciously, likely motivated by secondary gain for financial reasons or as a "sick role presentation." CX 3 at 23, 27-29, 38. Similarly, Dr. Meisner stated that claimant failed to make a genuine effort on tests and that claimant's answers exhibited "gross exaggeration" of symptoms. CX 14 at 35; EX 10 at 21.

[3] On January 19, 2011, Dr. Staab opined that claimant would not be able to return to work in Iraq due to his PTSD. CX 12 at 17. At her deposition, more than two years after she stopped treating claimant, Dr. Staab opined that claimant may improve if he returned to Iraq because it would force him to stop perpetuating the "sick role" he had assumed. CX 6 at 39. The administrative law judge acknowledged Dr. Staab's later opinion, *see* Decision and Order at 46, 48, but rationally relied on her earlier opinion. *See, e.g., Perini Corp. v. Heyde,* 306 F.Supp. 1321 (D.R.I. 1969). Dr. Delis stated in his

> [r]estricting a person who has suffered from PTSD at one time (or some other mental disorder triggered by the IED attack) in the past—and may still suffer from some degree of lingering psychological symptoms today—from working in a combat zone seems a common sense precaution. Even if [claimant] is currently asymptomatic, exposure to a combat setting could cause a relapse.

Id. The administrative law judge's conclusion that work in a combat zone is inadvisable cannot be said to be irrational. It is well-settled that an administrative law judge may draw reasonable inferences from the record. *See Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *General Ship Service v. Director, OWCP [Barnes]*, 938 F.2d 960, 25 BRBS 22(CRT) (9th Cir. 1991). Substantial evidence supports the conclusion that claimant cannot return to his usual work because of his work-related psychological condition. *Padilla v. San Pedro Boat Works*, 34 BRBS 49 (2000).

We note, moreover, that the administrative law judge also found that claimant's former work is no longer available to him. Decision and Order at 49. The administrative law judge noted that claimant testified that he contacted employer a few months after his injury to see if he could return to work and was told he could not because he would not be able to wear armor or a helmet because of his back pain. Tr. at 25. The administrative law judge further noted that employer had not shown that claimant's former job remains available or that employer had offered to reemploy him. Decision and Order at 49. Because claimant cannot return to his former work due to his injury, he has established a prima facie case of total disability under the Act. *See McBride v. Eastman Kodak Co.*, 844 F.2d 797, 21 BRBS 45(CRT) (D.C. Cir. 1988) (a claimant establishes an inability to return to his usual employment by showing that his former job is no longer available to him due to his injury); *see also Rice v. Service Employees Int'l, Inc.*, 44 BRBS 63 (2010). Accordingly, we affirm the administrative law judge's finding that claimant is entitled to permanent total disability benefits from September 17, 2012 to February 4, 2014, after

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deposition that claimant could return to overseas work in a "noncombat setting." CX 3 at 41-43. The administrative law judge noted that Dr. Delis later stated that claimant may be able to return to work in some combat situations that were different from the one in which he had worked, but the administrative law judge reasonably noted that without further elaboration from Dr. Delis, it was impossible to separate suitable from unsuitable combat zone work and so accepted Dr. Delis's initial recommendation that claimant avoid returning to any combat zone. Decision and Order at 47. Dr. Loomis stated at his July 16, 2013 deposition that, "I wouldn't want [claimant] to be exposed to combat" due to his psychological condition. CX 7 at 44.

which the administrative law judge found that employer established suitable alternative employment.[4]

The Exclusion of Overseas Positions from the Relevant Labor Market

Employer contends the administrative law judge erred in excluding non-war zone overseas positions from the relevant labor market for determining suitable alternate employment and, thus, claimant's post-injury wage-earning capacity.

Once, as here, the claimant establishes that he is unable to perform his usual job, the burden shifts to the employer to demonstrate that suitable alternate employment is available to the claimant in the relevant labor market. *See Kalama Services, Inc. v. Director, OWCP [Ilaszczat]*, 354 F.3d 1085, 37 BRBS 122(CRT) (9th Cir. 2004), *cert. denied*, 543 U.S. 809 (2004). In this case, the administrative law judge concluded that overseas work is outside claimant's relevant labor market. The administrative law judge noted that claimant's only overseas work was with L-3 Communications and employer from 2007 until the injury in 2010. The administrative law judge stated that although claimant contacted employer about returning to his job a few months after the injury, he has not sought any work since, let alone work abroad. Decision and Order at 49, 57; Tr. at 25. The administrative law judge concluded that the relevant labor market includes only jobs within commuting distance from claimant's home in San Diego, where claimant lived before he was deployed and maintained the family residence while he worked overseas.

The administrative law judge based his determination on the Board's decision in *Patterson v. Omniplex World Services*, 36 BRBS 149 (2003), wherein the Board held that, based on the unique facts in the case, the relevant labor market included overseas employment. Decision and Order at 56. In that case, the Board reasoned that "[a]s a Defense Base Act employee, claimant is accustomed to working in locales away from his

[4] Employer also challenges the administrative law judge's award of permanent total disability benefits for claimant's orthopedic injuries. The administrative law judge did not base the award of permanent total disability benefits on claimant's orthopedic injuries. *See* Decision and Order at 49. Although the administrative law judge accepted claimant's orthopedic restrictions against squatting and lifting more than 40 pounds due to claimant's non-work-related degenerative condition, he nevertheless concluded that the non-overseas positions identified by employer "[fell] within [claimant's] work restrictions" and qualified as suitable alternate employment. *See* Decision and Order at 49, 57; *see generally 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,* 133 S.Ct. 2825 (2013).

permanent residence, and excluding evidence of suitable jobs in these locales permits the incongruous result of potentially finding him totally disabled based on a limited local market while he continues to work overseas." *Id.* at 153.[5] Accordingly, the Board concluded that the overseas labor market was relevant for purposes of establishing the availability of suitable alternate employment, as was the area near the claimant's home in Missouri. *Id.* at 153-154.

The administrative law judge also took note of an unpublished Board decision, *Knipp v. Service Employees Int'l, Inc.*, BRB No. 12-0390 (Apr. 17, 2013). In that case, the Board distinguished *Patterson*, 36 BRBS at 153, because Mr. Patterson had extensive overseas employment, whereas in *Knipp*, the claimant had not made a career of overseas employment, although he had two prior overseas stints. *Knipp*, slip op. at 3.[6] Mr. Knipp had not looked for overseas jobs following his injury and the Board held that the administrative law judge rationally declined to consider the suitability of overseas jobs. *Id.* The administrative law judge in this case determined that guidance resulting from both *Patterson* and *Knipp* could be stated as "[t]here is no duty to seek more overseas employment after recovering from an overseas injury. But if a claimant does pursue overseas work after reaching [maximum medical improvement], overseas jobs become relevant alternate employment." Decision and Order at 57.

We affirm the administrative law judge's exclusion of overseas work in defining claimant's relevant labor market. In *Patterson*, the claimant not only had an extensive history of working overseas pre-injury, but he had actually worked overseas after his injury, as the Board emphasized. *Patterson*, 36 BRBS at 153; *see* n.5, *supra*. In addition, the Board limited its holding to the "unique facts" in that case. *Id.* The administrative law judge rationally found the facts here dissimilar from those in *Patterson* and that overseas jobs need not be considered in determining suitable alternate employment for claimant. This finding is consistent with the Board's holding in *Patterson*, 36 BRBS at 153, and accurately reflects that there is no requirement in case law that overseas jobs must be considered in defining the relevant labor market for every Defense Base Act claimant. *See generally Holder v. Texas Eastern Products Pipeline, Inc.*, 35 BRBS 23

[5] Mr. Patterson worked overseas as a security guard in eight different countries, from 1990 until August 1997, when he suffered the back injury that formed the basis of his claim. *Patterson v. Omniplex World Services*, 36 BRBS 149, 150 (2003). After his injury, he worked overseas from February until June 1999, when he suffered a heart attack. *See id.*

[6] In *Knipp*, the claimant had worked overseas for one year in 2004, two months in 2007, and one month in 2008. *Knipp v. Service Employees Int'l, Inc.*, BRB No. 12-0390 (Apr. 17, 2013).

(2001)*; see also Wood v. U.S. Dep't of Labor*, 112 F.3d 592, 31 BRBS 43(CRT) (1st Cir. 1997); *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96(CRT) (4th Cir. 1994). Accordingly, the administrative law judge's decision to exclude overseas jobs identified by employer as potentially suitable alternate employment from his calculation of claimant's post-injury wage-earning capacity is affirmed.[7]

Scheduled Permanent Partial Disability

Employer asserts that the administrative law judge erred in awarding claimant scheduled permanent partial disability benefits for a 28 percent foot impairment, averring the evidence supports only a 13 percent impairment rating. We disagree.

The administrative law judge awarded claimant permanent partial disability benefits under Section 8(c)(4) for a 28 percent impairment of his left foot. Decision and Order at 60. The administrative law judge based this decision on the opinion of Dr. Mohler. On May 3, 2011, when Dr. Mohler reported that claimant had reached maximum medical improvement, he stated that claimant had an 8 percent whole person impairment for the ankle fracture or a combined 13 percent whole person impairment for the coccyx and ankle fractures together. *See* CX 15 at 4. Later, Dr. Mohler converted the 8 percent whole person impairment to a 20 percent lower extremity or 28 percent left foot impairment. *Id.* at 1.

An award under the schedule is based on the degree of impairment to the injured body part. *See Wright v. Superior Boat Works*, 16 BRBS 17 (1983). The Act does not permit an award based on a whole person rating, as the administrative law judge correctly stated in the Order Denying Reconsideration. Dr. Mohler converted the whole person impairment rating to lower extremity and left foot impairment ratings. Relying on Dr. Mohler's opinion, the administrative law judge awarded claimant benefits for a 28 percent impairment rating for his left foot. We affirm the administrative law judge's award of benefits, pursuant to Section 8(c)(4), for a 28 percent impairment of the left foot as it is supported by substantial evidence in the record. *See Young v. Newport News Shipbuilding & Dry Dock Co.*, 45 BRBS 35 (2011).

[7] The administrative law judge's finding that employer established suitable alternate employment with the domestic jobs identified in the labor market survey is not challenged on appeal and is therefore affirmed. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

Accordingly, the administrative law judge's Decision and Order Granting Benefits and Order Denying Reconsideration are 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