U.S. Department of Labor

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

BRB Nos. 18-0098
and 18-0098A

SCOTT R. GOULD	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
GEORGIA PACIFIC CORPORATION	)	DATE ISSUED: July 20, 2018
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-	)	
Petitioners	)	
Cross-Respondents	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Compensation and Benefits of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Theodore P. Heus (Preston Bunnell, LLP), Portland, Oregon, for claimant.

Sidney Degan, III, Foster P. Nash, II, Travis L. Bourgeois, and Jeffrey C. Brennan (Degan, Blanchard & Nash), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals, and claimant cross-appeals, the Decision and Order Awarding Compensation and Benefits (2016-LHC-00641) of Administrative Law Judge Richard M. Clark 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*. (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 sustained a left rotator cuff injury while working in employer's carpentry shop on April 11, 2015. Claimant sought medical treatment for his ongoing complaints of shoulder pain, but continued to work until October 1, 2015. On November 10, 2015, claimant underwent arthroscopic subacromial decompression surgery on his left shoulder.

In his Decision and Order, the administrative law judge found that claimant suffered an acute left shoulder rotator cuff injury while working for employer on April 11, 2015, that claimant cannot return to his usual work, that claimant's condition reached maximum medical improvement on July 7, 2016, and that employer established the availability of suitable alternate employment as of July 25, 2016. The administrative law judge accepted the parties' stipulation that claimant's average weekly wage at the time of his work injury was $1,262.60, and he calculated claimant's post-injury wage-earning capacity as $548.80 as of July 25, 2016, and $580.80 as of September 27, 2016. The administrative law judge thus awarded claimant temporary total disability benefits from October 1, 2015 through July 6, 2016, permanent total disability benefits from July 7 through July 24, 2016, and permanent partial disability benefits from July 25, 2016, and continuing. *See* 33 U.S.C. §908(a), (b), (c)(21), (h).

On appeal, employer challenges the administrative law judge's award of disability benefits subsequent to May 10, 2016; alternatively, employer contends the administrative law judge erred in calculating claimant's post-injury wage-earning capacity as of September 27, 2016. Claimant responds, urging the Board to deny employer's contentions of error. BRB No. 18-0098. In his cross-appeal, claimant challenges the administrative law judge's post-injury wage-earning capacity calculation. Employer filed a response brief, and claimant filed a reply brief. BRB No. 18-0098A.

Employer contends the administrative law judge erred in awarding claimant disability benefits subsequent to May 10, 2016. Specifically, employer avers it presented substantial evidence that it could have accommodated at its facility claimant's post-surgical work restrictions as of that date, with no loss of wage-earning capacity. We reject this contention.

In order to make a prima facie case of total disability, claimant must establish that he is unable to perform his usual work due to the work injury. *See Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988); *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 49 (2005). Claimant's usual employment is that

which he was performing at the time of injury. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). In this case, claimant was employed as a "lead man" in employer's carpentry shop at the time of his injury. Claimant testified that his work involved structural maintenance, including concrete work, welding, roofing, hanging sheetrock, and installing carpet and cabinets.[1] *See* Tr. at 30-32.

In addressing the extent of claimant's work-related disability, the administrative law judge credited claimant's testimony, as well as the opinions of vocational consultants Bennett and Williams, in concluding that claimant is incapable of performing his usual employment duties post-surgery. Decision and Order at 24. Claimant opined that following his surgery his physical restrictions, as well as his use of prescription medication, rendered him unable to resume his usual work in employer's carpentry shop. *See* CX 33; Tr. at 77. Claimant's testimony regarding his inability to return to his usual work was supported by that of Mr. Bennett, employer's vocational expert, and Ms. Williams, claimant's vocational expert, both of whom opined that claimant could not perform the duties of his usual employment. *See* EX 44 at 119; CX 39 at 129. With regard to employer's contention that claimant could return to his usual work with his post-injury restrictions, the administrative law judge found that claimant's department had lost a significant number of personnel since the time of claimant's injury,[2] and that employer's witnesses did not provide details regarding employer's ability to accommodate claimant's physical restrictions.[3] Decision and Order at 24.

---

[1] The physical requirements of claimant's position are set forth in a document entitled "Functional Job Description: Carpenter in Structural Maintenance." EX 2 at 7. Claimant testified that this document understated the weights he was required to lift and carry during the course of his employment. Tr. at 32-36.

[2] The administrative law judge found that employer employs only one employee on a permanent basis in its carpentry department. *See* Decision and Order at 16.

[3] Ms. Lewis, employer's general manager, and Mr. Richards, employer's distribution manager, testified regarding their desire to re-employ claimant following his surgery. However, Ms. Lewis testified that she was not involved in any decision as to whether or not employer could accommodate claimant's post-surgical restrictions. CX 41 at 14-18; Tr. at 123. Mr. Richards testified that he could not offer claimant a modified position since he was unaware of "what's all involved" in order for employer to make claimant an offer of employment within his post-surgical restrictions. Tr. at 150. Consequently, as the testimony of these witnesses does not establish the actual availability of a modified position in employer's carpentry department that was offered to claimant, this evidence cannot establish either that claimant can return to his usual work or meet employer's burden of establishing that suitable alternate employment was available at employer's facility. *See generally Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (2001);

The administrative law judge is entitled to weigh the evidence and to draw his own inferences and conclusions therefrom. The Board is not empowered to reweigh the evidence, but must affirm the administrative law judge's findings that are rational and supported by substantial evidence. *See generally Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT); *Cordero v. Triple a Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). In this case, the administrative law judge extensively reviewed the evidence of record, and his finding that claimant cannot return to his usual employment duties is rational and within his discretion as factfinder. Claimant's testimony, supported by the opinions of Mr. Bennett and Ms. Williams, support the finding that claimant's post-surgical restrictions preclude his returning to his usual work. As it is supported by substantial evidence, we affirm the administrative law judge's conclusion that claimant established his prima facie case of total disability subsequent to his shoulder surgery.

Therefore, the burden shifted to employer to demonstrate the availability of suitable alternate employment. *See Hairston*, 849 F.2d 1194, 21 BRBS 122(CRT); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). The administrative law judge found that employer established the availability of suitable alternate employment on July 25, 2016. This finding is not challenged on appeal. In addressing claimant's post-injury wage-earning capacity based on the identified suitable alternate employment, the administrative law judge initially found claimant's post-injury wage-earning capacity to be $548.80 as of July 25, 2016, based on the first job identified by employer as being suitable and available for claimant. Decision and Order at 30. Because employer identified eleven additional suitable employment opportunities between August 15 and September 27, 2016, the administrative law judge averaged the lowest starting salary of the twelve jobs to conclude that, as of September 27, 2016, claimant's wage-earning capacity is $580.80. *Id*. Adjusting these figures to account for post-injury inflation and general wage increases, *see Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 1161, 36 BRBS 15, 18(CRT) (9th Cir. 2002); *Quan v. Marine Power & Equip., Co.*, 30 BRBS 124 (1996), the administrative law judge calculated claimant's post-injury wage-earning capacity to be $537.04 as of July 25, 2016, and $569.18 as of September 27, 2016. *Id*.

On appeal, employer challenges the administrative law judge's post-injury wage-earning capacity calculation as of September 27, 2016, contending he erred in averaging all of the suitable positions rather than limiting his calculation to specific carpenter positions. Alternatively, employer asserts the administrative law judge erred in utilizing

---

Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); *see also Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996).

the lowest starting salary for each position. In his cross-appeal, claimant contends the administrative law judge erred in recalculating claimant's post-injury wage-earning capacity as of September 27, 2016. Alternatively, claimant avers that, if his ongoing post-injury wage-earning capacity is to be calculated as of September 27, 2016, he should be entitled to permanent total disability benefits until that date.

An award for permanent partial disability in a case not covered by the schedule is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21); *Sestich*, 289 F.3d 1157, 36 BRBS 15(CRT). Wage-earning capacity is determined under Section 8(h), 33 U.S.C. §908(h), which provides that a claimant's wage-earning capacity shall be his actual earnings if these earnings fairly and reasonably represent his wage-earning capacity. If, as in this case, the claimant has no actual earnings, the administrative law judge must evaluate all relevant evidence in accordance with a range of relevant considerations and calculate a dollar amount that reasonably represents claimant's wage-earning capacity. *See Metropolitan Stevedore Co. v. Rambo* [*Rambo II*], 521 U.S. 121, 31 BRBS 54(CRT) (1997); *Metropolitan Stevedore Co. v. Rambo* [*Rambo I*], 515 U.S. 291, 30 BRBS 1(CRT) (1995); *Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996). The objective of the inquiry concerning claimant's wage-earning capacity is to determine the post-injury wage to be paid under normal employment conditions to claimant as injured. *See Petitt v. Sause Bros.*, 730 F.2d 1173, 47 BRBS 35(CRT) (9th Cir. 2013); *Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149(CRT) (9th Cir. 1985); *Cook v. Seattle Stevedore Co.*, 21 BRBS 4 (1988).

We reject both parties' contentions of error. In calculating claimant's post-injury wage-earning capacity as of September 27, 2016, the administrative law judge reasonably averaged the salaries of the twelve suitable and available positions. *See Avondale Industries, Inc. v. Pulliam*, 137 F.3d 326, 32 BRBS 65(CRT) (5th Cir. 1998) (as courts have no way of determining which job the employee may obtain, averaging ensures that the employee's post-injury wage-earning capacity reflects each job that is available); *see also Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998). Contrary to employer's contention, the administrative law judge rationally utilized the minimum hourly rate of each position as he found there was no way to assess where claimant might fall within the pay scale for a particular position. Decision and Order at 27, 30. Moreover, contrary to claimant's contentions, the administrative law judge did not err in recalculating claimant's wage-earning capacity as of September 27, 2016, as this later calculation rationally took into account all suitable and available positions and reasonably reflected the wages claimant could earn on the open market.[4] *See Mangaliman*, 30 BRBS at 41-42; *Cook*, 21 BRBS at

[4] Contrary to claimant's contention, the administrative law judge is not limited to finding only one post-injury wage-earning capacity in an initial adjudication. *See, e.g.*,

6. As the administrative law judge's calculation of claimant's wage-earning capacity is supported by substantial evidence, it is affirmed.

As claimant does not challenge the administrative law judge's finding that employer established the availability of suitable alternate employment as of July 25, 2016, or his calculation of claimant's post-injury wage-earning capacity as of that date, his contention that he is entitled to permanent total disability benefits through September 26, 2016 is without merit.

Accordingly, the administrative law judge's Decision and Order Awarding Compensation and Benefits is affirmed.

SO ORDERED.

_____
BETTY JEAN HALL, Chief
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge

_____
GREG J. BUZZARD
Administrative Appeals Judge

Petitt v. Sause Bros., 730 F.2d 1173, 47 BRBS 35(CRT) (9th Cir. 2013); *Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149(CRT) (9th Cir. 1985). However, once the administrative law judge's decision becomes final, Section 22 of the Act, 33 U.S.C. §922, provides the only means of changing the award of benefits. *See Metropolitan Stevedore Co. v. Rambo* [*Rambo I*], 515 U.S. 291, 30 BRBS 1(CRT) (1995); *Del Monte Fresh Produce v. Director, OWCP* [*Gates*], 563 F.3d 1216, 43 BRBS 21(CRT) (11th Cir. 2009).