U.S. Department of Labor

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

BRB No. 16-0631

BRADLEY DILLON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BLACKWATER SECURITY CONSULTING	)	
	)	
	)	DATE ISSUED: June 8, 2017
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

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

Howard S. Grossman and Scott L. Thaler (Grossman Attorneys at Law), Boca Raton, Florida, for claimant.

Jeffrey M. Glotzer (Schouest, Bamdas, Soshea & Ben Maier, PLLC), Boca Raton, Florida, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Compensation and Benefits and the Order Striking Motions (2014-LDA-00254) 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.*, 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 worked for employer from 2004-2010, providing security for high-level government officials in Afghanistan and Iraq. The position required that claimant pass a rigorous training program and stay in the best physical condition. Claimant testified that he wore body armor and a "kit" every day, weighing over 80 pounds. Tr. at 84-85. Due to the physical requirements of the position, claimant engaged in an exercise regimen when time allowed. *Id.* at 147, 158-59.

On March 19, 2009, while exercising after work hours at employer's facility in Erbil, Iraq, claimant injured his left arm while using a 45-pound weight. Claimant testified that he heard a "pop," felt a release as of something breaking, and he dropped the weight to the side. Tr. at 89-94. His biceps muscle had detached from the bone. *Id.* at 84. Claimant was treated in Iraq and then medically evacuated the next day and returned home to Florida. *Id.* at 95.

On returning to Florida, claimant was treated by Dr. Robert Baylis, who surgically re-attached the bicep through the backside of claimant's left elbow. Tr. at 96-98. Dr. Baylis referred claimant to Dr. Bruce Zaret, a neurologist, who diagnosed claimant as also having thoracic outlet syndrome and an ulnar nerve condition. *Id.* at 101. Dr. Baylis recommended that claimant see a hand specialist, and claimant went to Dr. David Gilbert, who recommended ulnar nerve decompression surgery, which claimant declined. *Id.* at 104. Dr. Gilbert released claimant for full duty but noted that he had a six percent permanent impairment because of cubital tunnel syndrome. JX 8 at 6-9.

In June 2010, claimant returned to work for employer, deploying to Afghanistan. He continued to have problems with his left arm and was in a lot of pain. Claimant returned to the United States in November 2010 and has not worked since that time.[1] Tr. at 107, 114-116. Claimant again saw Dr. Gilbert and underwent left elbow ulnar nerve decompression cubital tunnel surgery on November 12, 2010. *Id.* at 106-107; JX 8 at 12. Claimant's arm and hand remain painful, with numbness and tingling, which wakes him up at night. *Id.* at 108.

[1] Claimant sought to return to work in Israel in April 2011 because his wife was expecting a child and he wanted to make money before the baby arrived. Tr. at 108-113. This work was to be light-duty; however, he was not medically cleared by employer to work in Israel. *Id.* at 109, 113.

Claimant saw Dr. Ronald Brodkin, a chiropractor, in February 2014, complaining of tingling and numbness in the fourth and fifth digits on his left hand, headaches, and left-sided neck pain. JX 10 at 1. Dr. Brodkin found that claimant has a cervical condition that he believed was caused by the 2009 injury in Iraq. JX 14 at 21. Dr. Brodkin also stated that claimant exhibited signs of thoracic outlet syndrome. *Id.* at 7.

Claimant returned to Dr. Zaret in March 2014. Dr. Zaret did not believe that claimant needed to have a second ulnar surgery. JX 17 at 8. He restricted claimant from working overhead but said claimant can work without restriction at or below shoulder height and forward. *Id*. at 10, 14. At his deposition, Dr. Zaret testified that claimant reached maximum medical improvement for the thoracic outlet syndrome on March 13, 2014, the date he last saw claimant, based on the four-year plateau in claimant's signs and symptoms. JXs 11 at 17; 17 at 10.

The administrative law judge found that claimant suffers from work-related thoracic outlet syndrome and cubital tunnel syndrome. Decision and Order at 38. The administrative law judge found that claimant does not have a work-related cervical condition. The administrative law judge found that claimant reached maximum medical improvement on February 12, 2010 for the biceps injury and on March 13, 2014 for the cubital tunnel syndrome and thoracic outlet syndrome. *Id.* at 42. The administrative law judge further concluded that claimant established a prima facie case of total disability and has ongoing restrictions that affect his ability to work, namely that he is restricted from activities that require lifting his arms over his head.[2] He found that claimant can work without restriction below shoulder height and forward.

The administrative law judge concluded that employer established the availability of suitable alternate employment. The administrative law judge credited the testimony of Ms. Shaun Aulita, a vocational case management specialist and rehabilitation consultant, who was retained by employer to conduct a vocational evaluation and labor market survey.[3] The administrative law judge reviewed the two reports prepared by Ms. Aulita,

[2] The administrative law judge specifically adopted Dr. Zaret's restrictions in making his determination regarding claimant's physical restrictions. Decision and Order at 44. Dr. Zaret stated that claimant could not lift his arms above his head or lift any weights above his head but was not restricted from working below shoulder height. JX 17 at 10, 14.

[3] Ms. Aulita testified that she looked for jobs with no overhead work and no lifting, pushing, or pulling over 80 pounds with the left extremity. Tr. 196-197, 212-213. Ms. Aulita also testified that claimant told her he was computer literate and versed in Microsoft Office Excel, PowerPoint, and Word, participated in social networking, and

one in 2013 and an addendum in 2014, and found that three of the positions Ms. Aulita identified in her first report of November 2013 are suitable for claimant, including a Public Safety Aide for the city of Fort Lauderdale and a Public Safety Dispatcher for the city of Plantation. Decision and Order at 47; EX 3 at 8-12. The administrative law judge concluded that all seven of the positions Ms. Aulita identified in the 2014 addendum are suitable for claimant, including a Security Staff Agent position at Gavin de Becker & Associates in Miami, a position which requires the individual to be physically fit. The administrative law judge averaged the wages for all of the suitable positions and found that claimant's wage-earning capacity as of November 19, 2014 was $37,451.49 annually or $720.22 weekly. The administrative law judge concluded that claimant's ongoing wage-earning capacity, when discounted to reflect the percentage change in the National Average Weekly Wage, is $694.20 from November 22, 2013 to the present. The administrative law judge also found that claimant has not engaged in a diligent job search. Decision and Order at 49.

The administrative law judge found that claimant was temporarily totally disabled from March 20, 2009 through April 8, 2010 due to the biceps injury and the cubital tunnel condition. Decision and Order at 48. The administrative law judge found that claimant was not disabled from April 9 through November 8, 2010 and that claimant was temporarily totally disabled again from November 9, 2010 through November 22, 2013, when employer established suitable alternate employment. The administrative law judge determined that claimant was temporarily partially disabled from November 22, 2013 to March 13, 2014 with a wage-earning capacity of $694.20 per week. The administrative law judge finally concluded that claimant has been permanently partially disabled from March 14, 2014, the date of maximum medical improvement. *Id.*

The administrative law judge found that claimant has a ten percent impairment of the left upper extremity and is entitled to 31.2 weeks of compensation under Section 8(c)(1), 33 U.S.C. §908(c)(1). The administrative law judge also found that claimant is entitled to unscheduled permanent partial disability benefits based on his lost wage-earning capacity from his thoracic outlet injury, to be paid concurrently with the scheduled disability award for the impairment to the left upper extremity.[4] 33 U.S.C. §908(c)(21), (h).

---

had average to slow typing skills, but he did not know how many words per minute he typed. *Id*. at 179, 203, 218.

[4] The scheduled award is to be paid at a reduced weekly rate so that claimant's award for partial disability does not exceed the rate for total disability. *See* Decision and Order at 54.

The administrative law judge found that claimant is entitled to reasonable and necessary future medical benefits arising out of his work-related biceps injury, cubital tunnel syndrome, and thoracic outlet syndrome, but denied approval for claimant to receive a second ulnar nerve surgery as both Dr. Gilbert and Dr. Zaret opined that further surgery was unnecessary. The administrative law judge denied claimant's request for reimbursement for expenses related to past treatment by Dr. Kohn and Dr. Brodkin, and for an MRI ordered by Dr. Brodkin, because claimant had not sought authorization before seeing either Dr. Kohn or Dr. Brodkin and there was no evidence that employer refused or neglected to provide treatment. Decision and Order at 51. The administrative law judge granted claimant's request to change his treating physician to Dr. Kohn. *Id.* at 54.

Claimant filed with the administrative law judge a timely Motion for Reconsideration. The motion was not signed by claimant's counsel. *See* 29 C.F.R. §18.35(b). The administrative law judge provided claimant's counsel an opportunity to correct the lack of a signature. Claimant's counsel submitted an Amended Motion for Reconsideration with the notation /s/ and the printed name of claimant's counsel. The administrative law judge found that this was insufficient under 29 C.F.R. §18.35(b) and issued an Order Striking both Motions for Reconsideration.

On appeal, claimant challenges the administrative law judge's findings regarding suitable alternate employment, the calculation of claimant's wage-earning capacity, and the administrative law judge's denial of claimant's request for reimbursement of medical expenses incurred with Dr. Brodkin. Claimant also contends the administrative law judge erred in striking the motions for reconsideration because they were in substantial compliance with the regulation at 29 C.F.R. §18.35. Employer filed a brief urging affirmance. Claimant filed a reply brief.

Suitable Alternate Employment and Wage-Earning Capacity

Claimant contends the administrative law judge erred in finding that employer established suitable alternate employment with the positions of Public Safety Aide for the City of Fort Lauderdale and Security Staff Agent at Gavin de Becker in Miami. Claimant contends these positions are not suitable for him in view of his physical restrictions. Claimant also contends that the position of Public Safety Dispatcher for the City of Plantation is not suitable because of his lack of proficiency in typing and using Microsoft Office. Finally, claimant assigns error to the administrative law judge's averaging the salaries of the suitable jobs identified by Ms. Aulita because there is no evidence to support the administrative law judge's assertion that claimant would earn more than the starting salary for those positions.

It is well settled that when a claimant has established that he is unable to return to his usual work, the burden shifts to employer to demonstrate the availability of realistic

alternative job opportunities. Employer must demonstrate that "there were jobs reasonably available within [claimant's] capabilities and for which [claimant] was in a position to compete realistically had he diligently tried." *Del Monte Fresh Produce v. Director, OWCP [Gates]*, 563 F.3d 1216, 43 BRBS 21(CRT) (11th Cir. 2009). In addressing the suitability of employment opportunities, the administrative law judge must take into account claimant's age, background, employment history and experience, and intellectual and physical capabilities. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042, 14 BRBS 156, 164(CRT) (5th Cir. 1981).

We agree with claimant that the administrative law judge erred in finding that the three challenged positions constitute suitable alternate employment. With regard to the Public Safety Aide position, the job description states that it requires the ability to lift and carry articles up to 50 pounds, push articles weighing up to 100 pounds, and some reaching. Dr. Zaret restricted claimant from lifting his arms over his head. JX 17 at 10, 14. The administrative law judge specifically accepted Dr. Zaret's assessment of claimant's physical restrictions. Decision and Order at 44; *see* n. 2, *supra*. Employer did not establish that "reaching" is within these restrictions and the credited evidence thus does not support the administrative law judge's conclusion that the Public Safety Aide position is suitable for claimant. *See generally Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 35 BRBS 7(CRT) (5th Cir. 2001). Therefore, we reverse this finding.

We also conclude that the administrative law judge erred in finding that the Security Staff Agent position for Gavin de Becker is suitable for claimant. This position requires that a candidate be physically fit, although the administrative law judge noted that there were no particular lifting, pushing, or pulling requirements.[5] Decision and Order at 28. Ms. Aulita "could not quantify what [the physical fitness requirement] meant for th[e] position." *Id.* We conclude that employer failed to meet its burden to establish that the Security Staff Agent position is suitable for claimant because it did not identify the exertional requirements of the job. *See, e.g., Bunge Corp. v. Carlisle*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000) (stating that an employer must present sufficient evidence for the administrative law judge to determine that the job duties are compatible with claimant's restrictions). Without sufficient information regarding the job's requirements, the administrative law judge is unable to determine whether the job is compatible with claimant's restrictions. *See Hernandez v. National Steel & Shipbuilding Co.*, 32 BRBS 109 (1998) ("The administrative law judge must compare the specific requirements of the jobs identified with claimant's physical restrictions to determine

[5] Claimant's brief attempts to clarify the physical requirements of the Security Staff Agent position, citing exhibits attached to his Motion for Reconsideration. Cl. Br. at 14. That evidence, however, was not accepted by the administrative law judge and cannot be considered by the Board. 20 C.F.R. §802.301(b).

whether they are suitable."). Because the administrative law judge did not have a valid basis for finding that the position was suitable, we reverse the administrative law judge's finding.

We also find merit in claimant's challenge to the administrative law judge's finding that the position of Public Safety Dispatcher for the city of Plantation is suitable. The description of the job requires the ability to "type in a fast paced environment" and the record lacks evidence that claimant is able to do so. The administrative law judge acknowledged that claimant "would have to be proficient with Microsoft applications" and he found claimant to have a working knowledge of Microsoft Office based on the testimony of Ms. Aulita and claimant's extensive work history. Decision and Order at 27, 47, n.23. However, claimant testified that he is a slow typist and Ms. Aulita acknowledged that he had told her he was an "average to slow" typist. Tr. at 179, 219. The administrative law judge did not specifically address claimant's typing abilities, or state what in claimant's work history supports the determination that claimant would be qualified for this position.[6] *See, e.g., Dixon v. McMullen & Assocs. Inc.*, 19 BRBS 243 (1986) (affirming an administrative law judge's determination that employer had not established suitable alternate employment where the claimant's education was insufficient to enable him to find a desk job). Therefore we reverse the administrative law judge's finding that the Public Safety Dispatcher position is suitable for claimant.

Our holding with regard to these three positions does not, however, affect the administrative law judge's conclusion that employer established suitable alternate employment such that claimant is not totally disabled. The administrative law judge determined that Ms. Aulita identified seven other jobs within the relevant job market that are suitable for claimant and claimant does not appeal the finding that employer established suitable alternate employment based on these positions. *See Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007). Therefore, the administrative law judge's conclusions that employer established suitable alternate employment and that claimant is only partially disabled is affirmed. *See Mendoza v. Marine Personnel Co.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995).

Claimant further argues that the administrative law judge erred by averaging the salaries of the suitable jobs. We reject claimant's argument in this regard. In deciding to average the range of pay, the administrative law judge stated that he was taking into

[6] The administrative law judge's finding is contradicted by his acknowledgement that claimant did not have much clerical experience and that there is no evidence that claimant knew how to create databases. Decision and Order at 47, n.23. The evidence in the record does not support a finding that claimant could be deemed to be "proficient with Microsoft applications" as required for the position.

account claimant's extensive work history and abilities.[7] Decision and Order at 47. This decision is not irrational or unsupported by the evidence in the record. The administrative law judge as the fact-finder is entitled to make reasonable inferences from the record in reaching his conclusions. *See Story v. Navy Exchange Service Center*, 33 BRBS 111 (1999); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). An average of the range of salaries of the jobs identified as suitable alternate employment has been held to be a reasonable method for determining a claimant's post-injury wage-earning capacity. *See Avondale Industries, Inc. v. Pulliam*, 137 F.3d 326, 32 BRBS 65(CRT) (5th Cir. 1998). In addition, it was reasonable for the administrative law judge to take into account claimant's past work history to determine claimant's likely salary range in the suitable positions. *See* 33 U.S.C. §908(h) (stating that an assessment of an injured claimant's wage earning capacity may take into account "any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition"); *Devillier v. National Steel and Shipbuilding Co.*, 10 BRBS 649 (1979) (giving a non-exhaustive list of factors to be considered including claimant's age, education, and industrial history). Accordingly, we affirm the administrative law judge's method of calculating claimant's wage-earning capacity.

However, because we have reversed the administrative law judge's finding with regard to the suitability of three of the jobs, we must modify claimant's wage-earning capacity to exclude the three unsuitable positions. Accordingly, we modify claimant's wage-earning capacity as of November 22, 2013, the date of Ms. Aulita's first labor market survey, to $31,798 annually or $611.50 weekly. Taking the average wages for the other jobs found to be suitable alternate employment, we modify claimant's wage-earning capacity as of November 19, 2014 to $33,693.40 annually or $647.95 weekly.

Medical Expenses

Claimant contends the administrative law judge erred in denying his request for reimbursement of medical expenses incurred under Dr. Brodkin and for the cost of the MRI Dr. Brodkin requested.

Generally, an employer is liable for all reasonable and necessary medical expenses that result from the work injury. 33 U.S.C. §907(a). An employer is not liable for past medical expenses unless the claimant first requested authorization prior to obtaining medical treatment, except in the cases of emergency, neglect, or refusal. 33 U.S.C.

[7] The administrative law judge calculated claimant's wage-earning capacity first by taking the average of the salary range for each of the positions found to be suitable alternate employment and then averaging those salaries to determine claimant's wage-earning capacity. Decision and Order 47-48.

§907(d); *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1997). Where an employer has refused to provide treatment, a claimant may obtain reimbursement if he establishes that the treatment was necessary for his injury. *See Atlantic & Gulf Stevedores, Inc. v. Neuman*, 440 F.2d 908 (5th Cir. 1971).

Claimant concedes that he did not make a specific request for authorization to consult with Dr. Brodkin. *See* Cl. Br. at 16-17. Claimant asserts, however, that because employer had refused to authorize the electrodiagnostic testing requested by Dr. Gilbert, claimant was entitled to avail himself of "self help" and obtain the necessary testing without authorization. The administrative law judge found, however, that "there is no evidence that employer refused or neglected to provide treatment." Decision and Order at 51. The administrative law judge also noted that "there was no persuasive evidence that claimant had been denied treatment or otherwise refused services prior to going to Dr. Kohn and Dr. Brodkin." *Id.* The record shows that Dr. Gilbert wanted claimant to undergo a second EMG and be evaluated by Dr. Zaret again in order to confirm a thoracic outlet syndrome diagnosis. JX 8 at 33. There is no evidence in the record, however, that indicates claimant made a request for a second EMG or that employer refused the request. We are satisfied that the administrative law judge's finding that employer did not refuse a request for treatment is consistent with the evidence in the record. *See Parklands, Inc. v. Director, OWCP*, 877 F.2d 1030, 22 BRBS 57(CRT) (D.C. Cir. 1989).

The administrative law judge also concluded that the consultation with Dr. Brodkin was not reasonable and necessary in order to treat or diagnose claimant's work-related injury.[8] In addition, the administrative law judge concluded that the MRI ordered by Dr. Brodkin was unnecessary. The administrative law judge based his decision in part on the opinion of Dr. Gilbert, claimant's treating physician, who found that Dr. Brodkin's reports on claimant's condition were of little value as Dr. Brodkin is not a board-certified neurologist. Dr. Gilbert, on reviewing Dr. Brodkin's report, stated that he was "not impressed" by the study because Dr. Brodkin did not provide a definitive interpretation of the results. The administrative law judge determined that Dr. Gilbert's opinion, as claimant's treating physician, was entitled to significant weight. Decision and Order at 32. It is well-established that an administrative law judge is entitled to evaluate the weight to be accorded to the evidence and may draw his own inferences and conclusions from it. *See generally Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The administrative law judge also noted that claimant went to see Dr. Brodkin on his attorney's recommendation and not that of a medical professional. *See Ezell v. Direct*

[8] We note that chiropractic services are reimbursable only for "manual manipulation of the spine to correct a subluxation shown by X-ray or clinical findings." 20 C.F.R. §702.404.

Labor, Inc., 37 BRBS 11 (2003) (affirming an administrative law judge's conclusion that treatment by a physician was not necessary because claimant was referred by his attorney and not by any treating physician). As the administrative law judge's finding that claimant failed to establish the reasonableness and necessity of Dr. Brodkin's treatment is rational and supported by substantial evidence, we affirm the denial of the claim for reimbursement. *See generally id.*; *Hunt v. Newport News Shipbuilding & Dry Dock Co.*, 28 BRBS 364 (1994), *aff'd mem.*, 61 F.3d 900 (4th Cir. 1995).

Motion for Reconsideration

In his Motion for Reconsideration to the administrative law judge, claimant raised the arguments he makes in this appeal, attaching additional information regarding the requirements for the Public Safety Aide position, the Security Staff Agent position, and the Public Safety Dispatcher position. The administrative law judge struck both the original and amended Motions for Reconsideration because he found they were not properly signed so as to comply with 29 C.F.R. §18.35.[9] Claimant contends that the administrative law judge erred in striking his motion for reconsideration because there was substantial compliance with 29 C.F.R. §18.35, as claimant's counsel's typed name and contact information were attached to the motion. Because the Board has addressed the issues raised in claimant's Motions for Reconsideration on the merits in this appeal, we deem claimant's argument to be moot.[10] Therefore, we decline to address it.

[9] 29 C.F.R. §18.35(a) states: "[e]very written motion or other paper filed with [the Office of Administrative Law Judges] must be dated and signed by at least one representative of record in the representative's name . . . The judge must strike an unsigned paper unless the omission is promptly corrected after being called to the representative's or party's attention."

[10] We are inclined to believe the administrative law judge's decision to strike the Motions for Reconsideration was overly strict, but we do not decide the matter as the arguments claimant raised in his Motion for Reconsideration have been fully addressed by this Board.

Accordingly, the administrative law judge's calculation of claimant's wage-earning capacity is modified as stated herein. In all other respects, the administrative law judge's Decision and Order Awarding Compensation and Benefits is affirmed.

SO ORDERED.

_____
BETTY JEAN HALL, Chief
Administrative Appeals Judge

_____
GREG J. BUZZARD
Administrative Appeals Judge

_____
JONATHAN ROLFE
Administrative Appeals Judge