U.S. Department of Labor

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

BRB No. 18-0006

ANTHONY T. TAFT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 03/14/2019
	)	
LOCKHEED MARTIN CORPORATION	)	
	)	
and	)	
	)	
ACE AMERICAN INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	ORDER on MOTION for RECONSIDERATION

Claimant has filed a timely motion for reconsideration of the Board's Decision and Order in *Taft v. Lockheed Martin Corp.*, BRB No. 18-0006 (Sept. 17, 2018) (unpub.). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. Employer has not responded to claimant's motion.

In his appeal, claimant challenged, inter alia, the administrative law judge's average weekly wage calculation for his post-traumatic stress disorder (PTSD) work injury. The Board affirmed the administrative law judge's decision in all respects. *Taft*, slip op. at 3-8.

In his motion for reconsideration, claimant contends the Board's affirmance of the administrative law judge's average weekly wage finding should be reconsidered in light of the Board's decision in *Robinson v. AC First, LLC*, 52 BRBS 47 (2018). Claimant thus contends that the administrative law judge should have based his average weekly wage calculation on his overseas earnings at the time he left Afghanistan.

In *Robinson*, the claimant voluntarily left his overseas work to take a lower paying job in the United States. Subsequently, he was diagnosed with PTSD related to his overseas

work. Following *Moody v. Huntington Ingalls, Inc.*, 879 F.3d 96, 51 BRBS 45(CRT) (4th Cir. 2018), and *Christie v. Georgia-Pacific Co.*, 898 F.3d 952, 52 BRBS 23 (CRT) (9th Cir. 2018),[1] the Board reversed the denial of benefits and remanded the case for a determination of whether the claimant made his prima facie case of total disability focusing on the following questions: Did the work injury preclude the claimant's return to his overseas work? If so, at what point did that occur? And, if the claimant is unable to return to his usual work due to his injury, the Board stated that his average weekly wage is to be based on his overseas earnings and not the wages of the lower-paying job he took in the United States.[2] *Robinson*, 52 BRBS at 48.

We reject claimant's contention that *Robinson* dictates that his average weekly wage must be based on claimant's full wages at the time he left his overseas employment. *Robinson* does not stand for that proposition as it addressed average weekly wage only in the sense that the claimant would be entitled to compensation based on his overseas earnings and not on subsequent lower earnings in the United States. The Board did not mandate that the administrative law judge calculate average weekly wage under Section 10 of the Act, 33 U.S.C. §910, in any particular way.

Claimant also contends it is incongruous that his average weekly wage for his right shoulder injury was calculated as $3,962.23, whereas it is $2,744.84 for the PTSD injury,

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[1] In *Moody* and *Christie*, the courts held that a claimant is entitled to disability benefits following a voluntary withdrawal from the workforce where his work-related traumatic injury caused the *incapacity* to work. *See* 33 U.S.C. §902(10).

[2] In *Robinson,* the Board stated:

> We reject employer's contention that claimant's usual employment is his job at Union Pacific, for whom he worked when his PTSD became manifest, and that claimant, therefore, does not have a loss of wage-earning capacity. Claimant's usual work is his work with employer, who was the last covered employer to expose claimant to the hazardous conditions that caused his PTSD, and any loss of wage-earning capacity due to the PTSD, therefore, is properly based on his earnings with employer. *See generally Raymond v. Blackwater Security Consulting, L.L.C.*, 45 BRBS 5 (2011), *aff'd mem. sub nom. Blackwater Security Consulting, L.L.C. v. Director, OWCP*, 503 F. App'x 498 (9th Cir. 2012), *cert. denied*, 571 U.S. 817 (2013).

Robinson, 52 BRBS at 48 n.5.

as both average weekly wages are based on his earnings with employer.[3] However, this incongruity is due to the application of Section 10(i), 33 U.S.C. §910(i), which the Board extensively discussed in its decision. The Board noted the parties' agreement that claimant's PTSD is an occupational disease and the administrative law judge's rational finding that the onset of claimant's disability due to PTSD was delayed until January 2015. *Taft*, slip op. at 5-6. These facts indicate the use of Section 10(i). *Id.* Claimant has not demonstrated error in the Board's affirmance of the administrative law judge's decision to calculate his average weekly wage as of the date of onset of disability, which preceded claimant's date of awareness. *Id.* at 8. This method ameliorates the harsh effects of Section 10(i). *Id.*; *see, e.g., LaFaille v. Benefits Review Board*, 884 F.2d 54, 22 BRBS 108(CRT) (2d Cir. 1989).

Claimant next avers that, pursuant to the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), the administrative law judge's failure to state that he utilized Section 10(c), 33 U.S.C. §910(c), to determine his average weekly wage requires remand for him to further explain his methodology.

We reject this contention. In its decision, the Board noted that "it is evident" that the administrative law judge utilized Section 10(c) because Section 10(a) and 10(b), 33 U.S.C. §910(a), (b), were inapplicable as claimant was a seven-day a week employee.[4] *Taft*, slip op. at 7 n.10. Moreover, in their post-hearing briefs, claimant and employer asserted that Section 10(c) applied. *Id.* The administrative law judge has considerable discretion to determine claimant's annual earning capacity under Section 10(c) at the time of injury and may use the claimant's earnings in the 52 weeks prior to the time of injury. *See, e.g., Staftex Staffing v. Director, OWCP [Loredo]*, 237 F.3d 404, 34 BRBS 44(CRT), *modified on other grounds on reh'g*, 237 F.3d 409, 35 BRBS 26(CRT) (5th Cir. 2000); *Fox v. West State, Inc.*, 31 BRBS 118 (1997).

Although the administrative law judge stated he was using a "blended approach" to calculate claimant's average weekly wage, *see* Decision and Order at 26 (citing *Serv.*

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[3] The administrative law judge awarded claimant temporary total and temporary partial disability benefits for his right shoulder injury. If claimant remains disabled by his shoulder injury, the average weekly wage for the PTSD is immaterial.

[4] Sections 10(a) and 10(b) can only be applied if claimant is a five or six day per week worker. 33 U.S.C. §910(a), (b); *see generally Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999). Moreover, those subsections require the use of a specific formula, which the administrative law judge did not employ.

Employees Int'l, Inc. v. Director, OWCP [*Simons*], No. 11-01065, 2013 WL 943840 (S.D. Tex. Mar. 11, 2013)), in actuality he used only claimant's overseas earnings, but the divisor included the weeks claimant did not work after his voluntary relocation to the United States, before the onset of his disability. *Id.* at 28. Claimant has not established that the administrative law judge abused his discretion in calculating his annual earning capacity in this manner, as it accounts for claimant's temporary voluntary withdrawal from the work force in the year prior to the onset of his disability in January 2015.

Accordingly, claimant's motion for reconsideration is denied and the Board's decision is affirmed. 20 C.F.R. §802.409.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge