U.S. Department of Labor

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

BRB No. 18-0282

JOHN SCARBROUGH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHANNON WAGNER dba SEATTLE MARINE CONSTRUCTION	)	DATE ISSUED: 03/11/2019
	)	
and	)	
	)	
SEABRIGHT INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Following Remand of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz (Law Offices of Charles Robinowitz), Portland, Oregon, for claimant.

Nina M. Mitchell (Nicoll Black & Feig), Seattle, Washington, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Following Remand (2013-LHC-00937) 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). This case is before the Board for the second time.

On January 18, 2012, claimant slipped and fell while performing tile work aboard the vessel *Ocean Peace* as part of his temporary work assignment with employer.[1] Nevertheless, he worked four hours that day and finished the tile project. Employer thereafter retained claimant's services as a carpenter and painter until February 13, 2012.[2] Claimant testified that, between the date of the work incident, January 18, and the date of his termination, February 13, he sought medical care for back and knee pain. Claimant subsequently worked for Crestline Trucking (Crestline) as a truck broker from March 1 to May 7, 2012, when he underwent surgery on his right knee. Claimant's employment with Crestline ended on May 14, 2012.

On May 18, 2012, claimant filed a claim for benefits under the Act seeking temporary total disability benefits from February 14 to March 1, 2012, temporary partial disability compensation from March 1 to May 14, 2012, and ongoing temporary total disability compensation commencing May 15, 2012.

In his Decision and Order, the administrative law judge found claimant sustained work-related injuries to his low back and right knee while working for employer on January 19, 2012. He awarded claimant permanent partial disability benefits under the schedule for a 12 percent impairment to his right knee, as well as continuing medical benefits for his work-related back condition. 33 U.S.C. §§907, 908(c)(2). However, he denied temporary total disability benefits because claimant did not establish an inability because of his work injury to return to his usual employment duties after employer released him on February 13, 2012. Claimant appealed the administrative law judge's denial of temporary total disability benefits.

The Board affirmed the administrative law judge's findings that claimant did not establish an inability to perform his usual work due to his work injuries from February 14 to March 1, 2012, and from March 1 to his May 7, 2012 surgery. *Scarbrough v. Shannon Wagner*, BRB No. 15-0199 (Feb. 23, 2016) (unpub.). The Board, however, vacated the denial of total disability benefits after claimant's May 7, 2012 knee surgery, because the

[1]At the time of his hiring, it was understood that, as claimant was to be employed only for this specific project, his work with employer would be temporary in nature.

[2]All of employer's work on the *Ocean Peace* was completed on February 19, 2012.

administrative law judge did not discuss evidence as to whether claimant established his prima facie case of total disability from that point forward, and remanded the case. *Id.*, slip op. at 5.

On remand, the administrative law judge found claimant unable to perform his usual employment between May 7 and 13, 2012, but that he could have worked at Crestline from May 14 to July 26, 2012. The administrative law judge thus ordered employer to pay claimant temporary total disability benefits from May 7 to 13, 2012, and temporary partial disability benefits at varying rates from May 15 to July 26, 2012.

From July 26, 2012 to July 15, 2013, the administrative law judge found claimant capable of returning to his usual construction work and thus not entitled to any disability benefits. He found claimant again incapable of his usual work as of July 16, 2013, that employer established suitable alternate employment on October 22, 2013, and that claimant did not engage in a diligent job search. He therefore ordered employer to pay claimant temporary total disability benefits from July 16 to October 21, 2013, and temporary partial disability benefits from October 22, 2013 to January 15, 2014. The administrative law judge found claimant is not entitled to disability benefits as of January 16, 2014, because his wage-earning capacity from that date exceeded his average weekly wage.

On appeal, claimant challenges the Board's prior affirmance of the administrative law judge's denial of disability benefits from his last day with employer through March 1, 2012, the denial of temporary total disability benefits from May 15, 2012 to July 16, 2013 and October 22, 2013 to January 15, 2014, and the finding that claimant could have continued working as a construction worker during the period between January 5 and April 18, 2014, based on a residual wage-earning capacity of $691.42 per week. Claimant also asserts he is entitled to a Section 14(e) assessment, 33 U.S.C. §914(e). Employer responds, urging affirmance of the administrative law judge's decision. Claimant filed a reply brief.

Claimant first contends the Board made an error of law in affirming the administrative law judge's denial of any temporary disability benefits prior to March 1, 2012, and a factual error in finding that claimant quit his job with Crestline on May 14, 2012.

The Board will adhere to its initial decision unless there has been a change in the underlying factual situation, intervening controlling authority demonstrates the initial decision was erroneous, or the first decision was clearly erroneous and to let it stand would produce a manifest injustice. *See, e.g., Kirkpatrick v. B.B.I., Inc.*, 39 BRBS 69 (2005); *Ravalli v. Pasha Maritime Services*, 36 BRBS 91 (2002); *Weber v. S.C. Loveland Co.*, 35 BRBS 75 (2001), *aff'd on recon.,* 35 BRBS 190 (2002); *Gladney v. Ingalls Shipbuilding, Inc.*, 33 BRBS 103 (1999); *Schaubert v. Omega Services Industries*, 32 BRBS 233 (1998).

The Board fully addressed the issues of claimant's ability to perform his usual work up until March 1, 2012, why he left his job with Crestline, and whether he is entitled to any disability benefits prior to his May 7, 2012 right knee surgery in its prior decision, *Scarbrough*, slip op. at 3-4, which constitutes the law of the case. *Kirkpatrick*, 39 BRBS 69; *Ravalli*, 36 BRBS 91; *Weber*, 35 BRBS 75. As none of the exceptions to this doctrine apply,[3] we decline claimant's request to further consider these issues.

Claimant next contends that no basis exists for the administrative law judge to find him capable of construction work as of July 26, 2012, when his knee condition reached maximum medical improvement, to July 16, 2013, because Drs. Page-Echols, Evans and Lin, each of whom the administrative law judge found was credible, recommended that claimant not return to such work. Claimant notes that while the record establishes that he applied for 40 or 50 construction jobs during this period, he did so because he was desperate for work, not because he was physically capable of doing such work.

In order to establish a prima facie case of total disability, claimant must show 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).

Dr. Pennington opined that claimant could not have returned to general or shipyard construction work until July 26, 2012, the date his right knee became medically stationary. *See* CXs 67, 40. Dr. Pennington stated that once claimant became medically stationary, he "would not anticipate physical limits of lifting, bending, squatting, kneeling,

[3]Regardless, claimant's suggestion that the administrative law judge and Board did not discuss relevant evidence regarding his ability to perform his usual work during the period in question is incorrect. The Board noted claimant's testimony "with regard to his last day of employment with employer, that '[t]he job ended' on or about February 13 or 14," and stated that "[i]n support of his appeal, claimant cites his February 14, 2012 diary entry that he was 'let go after boss learned of extent of injury,'" as evidence of his last day of work. *Scarbrough*, slip op. at 3. In fact, when it was pointed out to claimant that employer's records showed his last day of work was February 7, 2012, he responded: "Well, my record is absolutely correct." HT at 133. In any event, regardless of which date claimant stopped working for employer, substantial evidence supports the administrative law judge's conclusion that claimant stopped working at that time because the project ended, and not because of his physical limitations. Thus, claimant's present contentions do not establish a change in the underlying factual situation or that the first decision was clearly erroneous. Nor has claimant presented any intervening controlling authority to demonstrate that the initial decision was clearly erroneous.

or twisting being placed on [claimant] due to his injury." CX 40. Thus, we affirm the administrative law judge's finding that claimant could have returned to his usual work on July 26, 2012, as supported by Dr. Pennington's opinion. For the period from July 26, 2012 until July 16, 2013, when Dr. Evans first treated claimant and observed that claimant did not appear fit for most work,[4] CXs 61, 68, 76, claimant received medical treatment, *see* CXs 31, 34, 44, 47, 51-60; EX 40, but there are no contemporaneous opinions from claimant's treating physicians regarding his ability to work from July 26, 2012 to July 16, 2013. *Id.*

An administrative law judge is entitled to weigh the evidence and draw his own inferences; he is not bound to accept the opinion or theory of any particular medical examiner. *See Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999). The administrative law judge permissibly inferred, based on the opinion of Dr. Pennington and the absence of contrary opinions, that claimant did not meet his burden of showing he was unable to perform his usual employment from July 26, 2012 to July 16, 2013. The administrative law judge's inferences and conclusions are rational and supported by substantial evidence. *See Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT). We thus affirm the administrative law judge's determination that claimant was capable of performing his usual employment from July 26, 2012 to July 16, 2013, and not entitled to total disability benefits for this period.

Claimant next contends substantial evidence does not support the administrative law judge's finding that five of the jobs identified in employer's labor market survey were suitable and reasonably available to him as of October 22, 2013. Claimant asserts the administrative law judge not address the opinion of his vocational expert, Mr. Stipe, that he did not have the requisite customer experience for the Blockbuster position or the computer skills necessary to obtain the bank teller or Garmin positions. Additionally, claimant contends his unsuccessful applications to three of the positions -- Jiffy Lube, Motel 6, and as a bank teller -- establish he undertook a diligent job search.

Where, as here, claimant has established a prima facie case of total disability because he is unable to return to his usual job due to his work injury, the burden shifts to employer to demonstrate suitable alternate employment is available in the community. *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). It is employer's burden to show the realistic

[4]In a letter dated September 16, 2013, Dr. Evans opined that "it would be advised that [claimant] not return to shipyard work or any manually laborious work for that matter" because of his back condition, an opinion he confirmed during his November 5, 2013 deposition. CX 76, Dep. at 12, 13, 25-26.

availability of jobs suitable for claimant given his age, education, vocational and medical capabilities, and that he could secure the jobs if he diligently sought them. *Id.*; *see also Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *Beumer v. Navy Personnel Command/MWR*, 39 BRBS 98 (2005). In addressing this issue, the administrative law judge must compare claimant's physical restrictions with the requirements of the positions identified by employer in order to determine whether employer has met its burden. *See Hernandez v. National Steel & Shipbuilding Co.*, 32 BRBS 109 (1998). If employer meets this burden, claimant's disability is, at most, partial. 33 U.S.C. §908(c), (e); *Hairston*, 849 F.2d 1194, 21 BRBS 122(CRT).

Contrary to claimant's contention, Ms. Broten, employer's vocational consultant, accounted for claimant's age, education, work experience, training, and transferable skills in identifying suitable positions. EX 38. We therefore reject claimant's contention that her labor market survey is deficient,[5] as the administrative law judge may rely on the consultant's opinion that the jobs are suitable given claimant's vocational factors.[6] *Hogan v. Schiavone Terminal, Inc.*, 23 BRBS 290 (1990). Moreover, the administrative law judge found it significant that five of the positions identified by Ms. Broten were approved by Dr. Evans.[7] *Montoya v. Navy Exch. Serv. Command*, 49 BRBS 51 (2015). Accordingly, we affirm the administrative law judge's conclusion that those five positions constitute suitable alternate employment as of October 23, 2013, as supported by substantial evidence. *See Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir.

[5]Ms. Broten stated she reviewed claimant's background information, including claimant's ability to work on-line, and identified suitable alternate employment based on "claimant's educational level, academic skills, work history, and physical limitations." EX 38.

[6]Contrary to claimant's contention, the administrative law judge permissibly accorded diminished weight to Mr. Stipe's report because he gave too much weight to claimant's subjective complaints, appeared to disregard or minimize contrary evidence in the record, and did not adequately explain why the five positions identified by Ms. Broten and approved by Dr. Evans would not be suitable for claimant. Decision and Order on Remand at 21.

[7]Each of the five job listings approved by Dr. Evans contained a summary of the work involved and identified the physical demands of the position, e.g., sitting, standing, walking, positions, lifting and carrying, pushing/pulling, reaching/handling, bending/squatting, twisting, climbing and crawling, as well as environmental factors, and the products, materials and machines/tools/equipment used at each job. EX 43.

1990), *cert. denied*, 498 U.S. 1073 (1991); *see also Rhine v. Stevedoring Services of America*, 596 F.3d 1161, 44 BRBS 9(CRT) (9th Cir. 2010).

Once, as here, claimant establishes he cannot return to his usual work and employer establishes the availability of suitable alternate employment, claimant may demonstrate he remains totally disabled by showing that he diligently tried but was unable to secure employment of the type shown to be suitable and available. *See Kalama Services, Inc. v. Director, OWCP*, 354 F.3d 1085, 37 BRBS 122(CRT) (9th Cir.), *cert. denied*, 543 U.S. 809 (2004); *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991).

After reviewing the relevant evidence, the administrative law judge found claimant did not engage in a diligent job search.[8] In reaching this conclusion, the administrative law judge stated that "[o]ther than contacting the employers found by Ms. Broten about how to apply, and then completing the application process, there was no evidence to suggest that [claimant] was otherwise diligent about finding employment or following up with the prospective positions." Decision and Order at 22. The administrative law judge found claimant's limited actions inconsistent with his work history in that he had not updated his resume since 2009 or 2010, nor had he utilized any of the online options he previously used to procure work.[9] *Id.* Moreover, the administrative law judge found there is no objective evidence that claimant actually followed through with any of the positions to which he had applied.

The administrative law judge, as the fact-finder, is charged with evaluating the sufficiency of a claimant's job search. *See, e.g., Wilson v. Virginia Int'l Terminals*, 40 BRBS 46 (2006); *Fortier v. Electric Boat Co.*, 38 BRBS 75 (2004). Based on this evidence, the administrative law judge permissibly concluded that claimant's search between October 2013 and January 2014 was not diligent. *Wilson*, 40 BRBS 46; *Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139 (1986); *see generally Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT). Therefore, as it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant's disability became partial on October 22, 2013. *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991).

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[8]Claimant stated he applied for "every one of the jobs" identified by Ms. Broten except for the jobs located in Portland, Oregon, because he considered the commute to be impractical. HT at 150-152. He testified he applied for jobs with Wells Fargo, Jiffy Lube, and Motel 6. *Id.* at 151.

[9]The administrative law judge found claimant sent out 40-50 resumes for construction jobs in the summer of 2012, and had found his position with employer by searching Craigslist and submitting a resume to employer. Decision and Order at 22.

Claimant next contends the administrative law judge had no basis to find he could have returned to construction work after January 5, 2014. Claimant maintains the administrative law judge relied only on evidence that he had earnings from the two short-term constructions jobs he obtained from January 5 to February 4, 2014, and from March 12 to April 18, 2014, and did not address the opinions of Drs. Page-Echols, Evans, and Lin, that ruled out this type of work. Claimant asserts that he obtained this work out of financial desperation and performed it only through extreme pain.

In his initial decision, the administrative law judge found, based on post-hearing submissions, that claimant worked for Stride Construction from January 16 to February 4, 2014, and for Paul Davis Restoration from March 12 to April 18, 2014. Decision and Order at 6, citing CXs 77, 78. The administrative law judge's finding regarding claimant's ability to work in construction for periods in January through April 2014 were made in terms of calculating claimant's wage-earning capacity for those periods. Contrary to claimant's contention, the administrative law judge permissibly discounted the medical opinion evidence regarding claimant's inability to perform this construction work, in favor of claimant's actual actions in securing and performing it. Decision and Order on Remand at 24. Based on his "dim view" of claimant's credibility and the fact that claimant voluntarily sought and successfully performed this work, the administrative law judge found that claimant likely had a higher wage-earning capacity than that represented by the suitable jobs identified by Ms. Broten.[10] *Id.* Having determined that there is no evidence that claimant worked in the construction jobs in spite of pain,[11] the administrative law judge calculated claimant's wage-earning capacity by using his actual wages for the periods he worked in those positions.

From January 16 to February 4, 2014, and from March 12 to April 18, 2014, he found the construction wages represented claimant's wage-earning capacity. For the interim period from February 5, 2014 to March 11, 2014, and commencing on April 19, 2014, the administrative law judge averaged the wages of the five suitable positions with the wages claimant earned in the 2014 construction as evidence of the wages claimant

[10]The administrative law judge noted that Dr. Evans reported in October 2013 that claimant had returned to baseline and had only "some level" of disability. CX 74.

[11]The administrative law judge became aware of these jobs through claimant's post-hearing submission of exhibits 77 and 78. Therefore, claimant could have submitted additional evidence at that time as to his reasons for obtaining this work, or to establish that such work did not constitute suitable alternate employment, i.e., he had extreme difficulty in doing those jobs, and only performed them through extreme pain. Claimant, however, did not submit any evidence indicating his ability to perform such work.

could earn on the open market in his injured condition. Decision and Order on Remand at 24. This finding comports with Section 8(h) of the Act.[12] *See Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149(CRT) (9th Cir. 1985).

Claimant did not produce any creditable evidence that he was capable of performing the construction work only through extraordinary effort and in spite of excruciating pain, or to establish an alternative wage-earning capacity.[13] *See generally Ramirez v. Sea-Land Services, Inc.*, 33 BRBS 41 (1999); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999). Therefore, we affirm the administrative law judge's findings that the work claimant performed from January to April 2014, constituted suitable alternate employment. Thus, we affirm the finding that the average wages of all suitable jobs fairly and reasonably represent claimant's wage-earning capacity. 33 U.S.C. §908(h); *see generally 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). Accordingly, we reject claimant's contention that he is entitled to any total disability benefits after employer established suitable alternate employment on October 22, 2013.[14]

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[12]Section 8(h) of the Act, 33 U.S.C. §908(h), provides that claimant's wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his wage-earning capacity. *Id.* In making this determination, relevant considerations include the employee's physical condition, age, education, industrial history, claimant's earning power on the open market, and any other reasonable variable that could form a factual basis for the decision. *See Container Stevedoring Co. v. Director, OWCP* [*Gross*], 935 F.2d 1544, 24 BRBS 213(CRT) (9th Cir. 1991); *Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149(CRT) (9th Cir. 1985); *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979). The objective of the inquiry under Section 8(h) is to determine claimant's wage-earning capacity in his injured state. *Long*, 767 F.2d 1578, 17 BRBS 149(CRT); *see also Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 36 BRBS 15(CRT) (9th Cir. 2002); *Deweert v. Stevedoring Services of America*, 272 F.3d 1241, 36 BRBS 1(CRT) (9th Cir. 2001).

[13]The party that contends claimant's actual wages are not representative of his wage-earning capacity has the burden of establishing an alternative reasonable wage-earning capacity. *Grage v. J.M. Martinac Shipbuilding*, 21 BRBS 66 (1988), *aff'd sub nom. J.M. Martinac Shipbuilding v. Director, OWCP*, 900 F.2d 180, 23 BRBS 127(CRT) (9th Cir. 1990).

[14]Claimant may seek modification of the administrative law judge's compensation order under Section 22 of the Act, so long as he demonstrates either a change in his physical or economic condition or a mistake in a determination of fact. 33 U.S.C. §922; *see also*

Lastly, claimant contends the administrative law judge neglected to include a Section 14(e) assessment on the additional benefits awarded on remand up to September 10, 2012. We agree. The administrative law judge, in his January 30, 2015 decision, ordered employer to pay "claimant Section 14(e) penalties on all compensation installments due from 28 days after Claimant gave notice of his injury" on January 22, 2012 until September 10, 2012. Decision and Order at 45-46; *see* 33 U.S.C. §914(b), (e). Accordingly, claimant is entitled to a Section 14(e) assessment on the disability benefits awarded by the administrative law judge on remand from May 7 through July 26, 2012. Moreover, for the reasons expressed in *Robirds v. ICTSI Oregon, Inc.*, __ BRBS __ , No. 17-0635 (Jan. 28, 2019) (en banc) (Boggs, J., concurring), we agree that claimant is entitled to post-judgment interest on the awarded Section 14(e) assessment.

Accordingly, the administrative law judge's Decision and Order Following Remand is affirmed. We remand the case to the district director to make all necessary calculations including the calculation of the Section 14(e) assessment and for post-judgment interest thereon.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

Metropolitan Stevedore Co. v. Rambo [*Rambo II*], 521 U.S. 121, 31 BRBS 54(CRT) (1997). Claimant may submit additional evidence at that time.