U.S. Department of Labor

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

BRB No. 18-0037

JAMES M. LOPEZ	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 10/12/2018
CALIFORNIA UNITED TERMINALS	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
Employer/Carrier-Respondents	)	
	)	
ILWU-PMA WELFARE PLAN	)	
	)	
Intervenor	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Lara D. Merrigan (Merrigan Legal), San Rafael, California, and Charles Naylor (Law Office of Charles Naylor), Long Beach, California, for claimant.

Arthur A. Leonard (Aleccia & Mitani), Long Beach, California, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits (2013-LHC-01463) of Administrative Law Judge Jennifer Gee 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 was employed as a casual worker with "A" status when, on May 15, 2012, he was involved in a work incident while operating a top handler.[1] Claimant reported the incident to employer, who issued him a medical slip and filed an LS-202, report of injury form. On May 25, 2012, claimant relocated to Prescott Valley, Arizona, (hereinafter Prescott), which he estimated is a six and one-half hour drive from the Long Beach waterfront, with the intent to commute to Long Beach for work, live with a friend, work three consecutive days, and then return to his new residence. *See* CX 21. Claimant's plan to commute to work was never put into operation because, on July 11, 2012, he filed a claim under the Act seeking benefits for acute and cumulative injuries to his neck, shoulders, arms, hands, legs, feet, and psyche. On July 12, 2012, claimant filed a second claim adding his back and legs to the body parts allegedly injured while working for employer on May 15, 2012. In October 2012, claimant commenced medical disability status and terminated his union membership.

In her decision, the administrative law judge found that claimant failed to establish he sustained work-related bilateral carpal tunnel syndrome, fibromyalgia or injuries to his neck, shoulders, feet, and psyche. Claimant's work-related injuries are limited to his right knee and lumbar spine. Decision and Order at 34-63. The administrative law judge found that claimant's lumbar spine and right knee conditions had not yet reached maximum medical improvement and that claimant cannot return to his usual work as a top handler operator or utility tractor driver. *Id.* at 63-66. She found, however, that employer established the availability of suitable alternate employment by identifying the position of part-time longshore tower clerk in Long Beach available as of October 4, 2012, and five full-time and two part-time "non-waterfront" jobs in the Prescott area available as of April 30, 2014. *Id.* at 66-73. The administrative law judge awarded claimant temporary total disability benefits from May 16 through October 3, 2012, and ongoing temporary partial disability benefits from October 4, 2012, based on claimant's post-injury wage-earning

[1] "A" status granted claimant life-time member status in his union and entitled him to greater flexibility in the selection of work assignments. Tr. at 62-63.

capacity of $1,187.76 as a three-day per week tower clerk in Long Beach. *Id.* at 75-79, 88-89.[2] The administrative law judge denied employer's motion for reconsideration.

On appeal, claimant challenges the administrative law judge's finding that employer established the availability of suitable alternate employment in Long Beach. Employer responds, urging affirmance of the administrative law judge's decision in its entirety. On July 25, 2018, claimant filed a "Notice of Supplemental Authorities," which we accept in support of claimant's appeal. 20 C.F.R. §802.215. On August 31, 2018, employer filed a response to claimant's Notice of Supplemental Authorities.

Claimant contends the administrative law judge erred in finding that employer established the availability of suitable alternate employment through the position of part-time tower clerk in Long Beach. Claimant contends that once the administrative law judge found that claimant's move to Prescott was "legitimate," she should not have considered Long Beach to be a relevant labor market. Claimant further contends the administrative law judge did not address his physical ability to commute from Prescott to Long Beach or whether the tower clerk job is available in terms of claimant's pre-injury "commuting plan." Claimant also avers that the recent decision of the United States Court of Appeals in *Colaruotolo v. SSA Terminals, Inc.*, 728 F. App'x 713 (9th Cir. 2018) establishes that the tower clerk position is not available to him. We agree that the case must be remanded for the administrative law judge to address these issues. Thus, we vacate the finding that employer established the availability of suitable alternate employment in Long Beach and the resultant calculation of claimant's post-injury wage-earning capacity.

Where, as in this case, claimant has demonstrated that he is unable to return to his usual employment duties with employer as a result of his work injury, the burden shifts to employer to demonstrate that suitable alternate employment is available to claimant. *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). In order to meet this burden, employer must establish the existence of realistically available job opportunities within the geographic area in which claimant resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could realistically secure if he diligently tried. *Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988); *Wilson v. Crowley Maritime*, 30 BRBS 199 (1996).

[2] The administrative law judge awarded reimbursement to the ILWU-PMA pursuant to Sections 7 and 17, 33 U.S.C. §§907, 917.

Claimant moved to the Prescott area on May 25, 2012, ten days after the occurrence of the work-related incident which gave rise to his claim for benefits. Prior to that move, claimant presented a letter to his mortgage lender setting forth his plan to commute from Prescott to Long Beach, stay at a friend's residence, work three days in longshore employment, and then return to Prescott.[3] CX 21. Claimant testified, however, that his post-injury physical symptoms and restrictions prohibit him from prolonged sitting, and that it is his belief that he can no longer make the commute to Long Beach. *See* Tr. at 166.

In her decision, the administrative law judge determined that the Prescott area is the appropriate market for employer to establish the availability of suitable non-longshore positions, as it would be implausible for claimant to commute to Long Beach for low-paying non-longshore work. Decision and Order at 69 – 70. The administrative law judge also found, "on the particular facts of this case," that Long Beach remains the appropriate area for employer to identify available and suitable longshore jobs that claimant would be able to realistically secure. *Id.* at 70.[4] She stated that continued longshore employment is a genuine option for claimant in light of his plan to commute to Long Beach, which was supported by the letter claimant presented to his mortgage lender. *Id.* The administrative law judge found that employer established the availability of suitable alternate employment in Long Beach by identifying the position of tower clerk. *Id.* at 70-71.

We reject claimant's contention that Long Beach, per se, is not an appropriate labor market. The administrative law judge considered appropriate factors espoused in case precedent and permissibly determined that Long Beach remains a relevant labor market given claimant's pre-injury commuting plan. *See generally Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010) (administrative law judge entitled to determine the weight to be accorded to evidence). The fact that claimant's move to Prescott was "legitimate" does not mandate a finding that Prescott is the only relevant labor market, as a variety of factors are relevant to this determination.[5] *See Wood v. U.S. Dep't*

[3] Claimant's intent to continue his employment in Long Beach was supported by a letter from his friend who acknowledged claimant's intent to stay with him in Long Beach. CX 22.

[4] We do not read claimant's post-hearing brief as conceding that "alternative Longshore work in Long Beach is appropriate to consider." Decision and Order at 70, citing Cl. Post-Hearing Br. at 68-69.

[5] We reject claimant's reliance on the unpublished decision in *Khan v. Veritiss, LLC*, BRB No. 17-0556 (Apr. 26, 2018) (Gilligan, J., dissenting), as the facts therein are

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); *B.H. [Holloway] v. Northrop Grumman Ship Systems, Inc.*, 43 BRBS 129 (2009); *Beumer v. Navy Personnel Command/MWR*, 39 BRBS 98 (2005); *Holder v. Texas Eastern Products Pipeline, Inc.*, 35 BRBS 23 (2001).

However, the administrative law judge did not address claimant's ability to commute between Prescott and Long Beach in view of his alleged restrictions due to his work injuries. She considered only claimant's pre-injury intention to commute to Long Beach to continue his longshore employment. Although the administrative law judge specifically found claimant to be "not very credible," *see* Decision and Order at 31, 69, she did not specifically address the effects of claimant's alleged restrictions and symptoms on his ability to drive from his residence to Long Beach. Consequently, we vacate the administrative law judge's finding on this issue and remand the case for the administrative law judge to address whether claimant is capable of commuting between his residence and Long Beach. *See Holloway*, 43 BRBS 129.

We also agree that the administrative law judge did not adequately address whether the tower clerk position is realistically available to claimant.[6] While the administrative law judge found that claimant could have procured a tower clerk position three times a week, Decision and Order at 73, she did not take into consideration that claimant anticipated that he would work three consecutive days in Long Beach each week which enabled him to commute from Prescott. As claimant had moved his residence to Prescott and would be commuting between Long Beach and Prescott, we remand the case for the administrative law judge to determine whether the tower clerk position is reasonably available to claimant in light of claimant's commuting intentions.

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demonstrably different. The determination of the relevant labor market is to be made on a case-by-case basis.

[6] We reject claimant's contention that the tower clerk position is not suitable pursuant to the Fourth Circuit's decision in *Lentz v. Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988), wherein the court held that the identification of one job is legally insufficient to establish the availability of suitable alternate employment. The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has held that suitable alternate employment may be found to have been established once the employer has pointed to one or more possible positions that claimant is able to perform. *See Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 652, 44 BRBS 47, 51(CRT) (9th Cir. 2010). Moreover, the tower clerk position is not a single job per se but is, rather, a position for which multiple employees are hired on any given day. *See* CX 66 at 92.

Finally, we agree that, in light of an intervening circuit court decision, the administrative law judge should consider anew the availability of the tower clerk position in view of the testimony of employer's vocational expert and claimant's termination of his union membership. *Colaruotolo v. SSA Terminals, Inc.*, 728 F. App'x 713 (9th Cir. 2018).[7]

The administrative law judge's finding that employer established the availability of suitable alternate employment with five full-time and two part-time jobs in the Prescott area is affirmed as it is unchallenged on appeal. *See Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007). Therefore, should the administrative law judge conclude on remand that employer has not established the availability of suitable alternate employment in Long Beach, she must redetermine the date of onset of claimant partial disability and recalculate claimant's post-injury wage-earning capacity using the Prescott jobs. 33 U.S.C. §908(e), (h); *Stevens*, 909 F.2d 1256, 23 BRBS 89(CRT) (partial disability commences on earliest date suitable alternate employment is established); *see also Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 36 BRBS 15(CRT) (9th Cir. 2002).

[7] We note that the decision in *Colaruotolo* is unpublished and therefore not precedential and binding. Since it was issued after the administrative law judge issued her decision, we bring it to her attention for consideration.

Accordingly, the administrative law judge's finding that employer established the availability of suitable alternate employment in Long Beach and the resultant calculation of claimant's post-injury wage-earning capacity are vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge