U.S. Department of Labor

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

BRB No. 16-0245

CALVIN R. MYERS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
QINETIQ NORTH AMERICA - WESTAR AEROSPACE	)	DATE ISSUED: Sept. 28, 2016
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA c/o AIG	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order – Denying Disability Compensation Benefits and Awarding Medical Benefits of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Ralph R. Lorberbaum (Zipperer, Lorberbaum & Beauvais), Savannah, Georgia, for claimant.

John F. Karpousis (Freehill Hogan & Mahar, LLP), New York, New York, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denying Disability Compensation Benefits and Awarding Medical Benefits (2014-LDA-00699) of Administrative Law Judge Alan L. Bergstrom 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 started working for employer in Iraq in May 2008 as a data entry and diagnostic technician. Tr. at 39. Claimant developed an itchy rash on his arms in September 2008, which ultimately spread over most of his body. *Id*. at 46-50. Claimant continued working for employer until he was discharged from his job in April 2009 for losing his security clearance for reasons unrelated to his rash. *Id*. at 54-56, 72; EX 2. Claimant filed a claim under the Act for compensation and medical benefits for a work-related skin condition. CX 2.

At the hearing, the parties stipulated that claimant developed a work-related rash on September 1, 2008, that claimant sustained no economic loss due to this condition for the period from September 1, 2008 to April 18, 2009, and that claimant is entitled to reasonable and necessary medical care. Decision and Order at 2. In his Decision, the administrative law judge denied claimant's claim for disability compensation commencing April 19, 2009. *Id*. at 20. The administrative law judge found that claimant stopped working for employer in April 2009 only because he lost his security clearance, which was not due to his work-related injury. *Id*. The administrative law judge concluded that claimant, therefore, is not entitled to disability compensation because his injury did not cause disability.

On appeal, claimant challenges the denial of compensation. Employer responds that the administrative law judge's decision is supported by substantial evidence and in accordance with law.

The initial inquiry for determining if a work injury is disabling is whether a claimant's usual work is unavailable to him because of or due to his work injury. *See Service Employees Int'l, Inc. v. Director, OWCP* [*Barrios*], 595 F.3d 447, 44 BRBS 1(CRT) (2d Cir. 2010); *McBride v. Eastman Kodak Co.*, 844 F.2d 797, 21 BRBS 45(CRT) (D.C. Cir. 1988). Section 2(10) of the Act, 33 U.S.C. §902(10) (emphasis added), provides: "'Disability' means incapacity *because of injury* to earn the wages which the employee was receiving at the time of injury in the same or any other employment[.]" Thus, disability under the Act is an economic concept based on a medical foundation. *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997); *Bath Iron Works Corp. v. White*, 584 F.2d 569, 8 BRBS 818 (1978) (1st Cir. 1978); *see generally Metropolitan Stevedore Co. v. Rambo* [*Rambo I*], 515 U.S. 291, 30 BRBS 1(CRT) (1995). Where a claimant is performing his usual work, or suitable alternate work, post-injury, and his inability to continue to do so is not due to the work injury, the employer is not liable for the loss of wage-earning capacity caused by the non-work-related event. *See generally Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS

100(CRT) (4th Cir. 1993). Rather, when a claimant leaves or is discharged from his usual work for reasons unrelated to his work-related injury, he does not have a "disability" within the meaning of the Act and is not entitled to total disability compensation. *See Moody v. Huntington Ingalls, Inc.*, 50 BRBS 9 (2016), *recon. denied*, BRB No. 15-0314 (May 10, 2016), appeal pending, No. 16-1773 (4th Cir.) (voluntarily retired); *Hoffman v. Newport News Shipbuilding & Dry Dock Co.*, 35 BRBS 148 (2001) (same); *Brooks*, 26 BRBS 1 (terminated for violation of company rule); *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986) (same).

In this case, claimant was physically able to continue in his usual work without restrictions and to earn his usual wages after he contracted the rash in September 2008. Although claimant obtained medical treatment for the rash in the United States while he was on leave from his job, there is no indication in the medical records that the rash precluded claimant from performing his usual job before he lost his job for reasons unrelated to his injury.[1] *See* CXs 12, 13. Moreover, claimant does not challenge the administrative law judge's findings that he was discharged for losing his security clearance, that he lost his clearance for reasons unrelated to his skin condition, and that a security clearance was necessary for his job in Iraq. Tr. at 54-56, 72, 88. Consequently, as a matter of law, claimant was not "disabled" due to his injury at the time of his discharge. *Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190 (1984) (no loss of wage-earning capacity as claimant performing usual work at same or higher wages); *see also Moody*, 50 BRBS 9; *Hoffman*, 35 BRBS 148. Accordingly, as it is in accordance with law, we affirm the administrative law judge's determination that claimant is not entitled to disability compensation, as claimant had no loss in earning capacity due to his rash at the time he was discharged from his job for reasons unrelated to his work injury. 33 U.S.C. §902(10).

[1] Thus, Dr. Pritzker's March 13, 2015 report stating that claimant should not work in Iraq because of his rash is of no legal significance under the facts of this case. CX 25 at 2-3; *cf. Rice v. Service Employees Int'l, Inc.*, 43 BRBS 63 (2010) (where claimant's injury caused disability, contraindication of return to work overseas relevant to claimant's status).

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

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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GREG J. BUZZARD
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge