U.S. Department of Labor

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

BRB Nos. 14-0379
and 14-0379A

DOLORES MONTOYA	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
NAVY EXCHANGE SERVICE COMMAND	)	
	)	
	)	
Self-Insured	)	DATE ISSUED: July 17, 2015
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order – Awarding Benefits and the Order Granting in Part Employer's Motion for Reconsideration of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Jeffrey Winter and Kim Ellis (Law Office of Jeffrey Winter), San Diego, California, for claimant.

William N. Brooks II (Law Office of William N. Brooks), Long Beach, California, for self-insured employer.

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

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order – Awarding Benefits and the Order Granting in Part Employer's Motion for

Reconsideration (2012-LHC-00396) of Administrative Law Judge Paul C. Johnson, Jr., 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 Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *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 injured her back during the course of her employment as a sales clerk for employer on September 22, 2006. Claimant intermittently missed several days of work due to her injury; she stopped working on November 5, 2006. Claimant filed a claim under the Act on November 28, 2006. CX 2.

In his decision, the administrative law judge found that claimant sustained a work-related back injury and provided employer timely notice of this work injury pursuant to Section 12, 33 U.S.C. §912. The administrative law judge found that claimant is unable to return to her usual employment due to her work injury and that employer established the availability of suitable alternate employment as a parking lot attendant. The administrative law judge awarded claimant compensation for temporary total disability from November 5, 2006 to April 22, 2009, 33 U.S.C. §908(b), permanent total disability from April 23, 2009 to August 9, 2012, 33 U.S.C. §908(a), and ongoing permanent partial disability from August 10, 2012. 33 U.S.C. §908(c)(21). Employer was granted Section 8(f) relief. 33 U.S.C. §908(f). On reconsideration, the administrative law judge agreed with employer that he had miscalculated claimant's loss of wage-earning capacity under Section 8(c)(21), which he adjusted to a weekly loss of $88.22. The administrative law judge rejected employer's contentions that he erred by using the minimum compensation rate of Section 6(b)(2), 33 U.S.C. §906(b)(2), in effect in fiscal year 2007, rather than 2006, to determine claimant's compensation rate for temporary total disability. The administrative law judge also rejected employer's contention that it had established the availability of suitable alternate employment on January 14, 2012, instead of on August 10, 2012.

On appeal, claimant challenges the administrative law judge's findings that employer established the availability of suitable alternate employment and that she did not exercise diligence in seeking suitable work.[1] BRB No. 14-0379. Employer responds,

[1] In her Petition for Review, claimant summarily avers that the administrative law judge's loss of wage-earning capacity calculation "is arbitrary and without support under the law." Petition for Review at 2. We decline to address the administrative law judge's wage-earning capacity calculation, as the issue has not been adequately briefed. *Plappert v. Marine Corps Exch.*, 31 BRBS 109 (1997), *aff'g on recon en banc* 31 BRBS 13 (1997). A party challenging the administrative law judge's finding must demonstrate

urging rejection of claimant's contentions. Claimant filed a reply brief. Employer cross-appeals the administrative law judge's rejection of its contentions that it established the availability of suitable alternate employment on January 14, 2012, and his use of the minimum compensation rate for fiscal year 2007, instead of 2006. BRB No. 14-0379A. Claimant responds, urging rejection of employer's contentions.

We first address the parties' contentions regarding the extent of claimant's disability. Claimant contends the administrative law judge erred in finding that the parking lot positions identified in employer's labor market survey constitute suitable alternate employment. Once, as here, claimant establishes her inability to perform her usual work due to her work injury, the burden shifts to employer to establish the availability of jobs claimant can perform, which, given claimant's age, education, and background, she could likely secure if she diligently tried. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); *see also 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). In addressing the availability of suitable alternate employment, the administrative law judge must compare claimant's restrictions and vocational factors with the requirements of the positions identified by employer in order to determine whether employer has met its burden. *See, e.g., General Constr. Co. v. Castro*, 401 F.3d 963, 39 BRBS 13(CRT) (9th Cir. 2005), *cert. denied*, 546 U.S. 1130 (2006); *see also Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 35 BRBS 7(CRT) (5th Cir. 2001).

In his decision, the administrative law judge found that claimant has work restrictions of: needing to alternate sitting and standing; no bending; and a 10 pound lifting and pulling limitation. Decision and Order at 28. The administrative law judge found that claimant's vocational consultant, Mark Remas, "did not directly challenge" the conclusion of employer's consultant, Tracy Morgan, that the parking lot positions he identified are consistent with claimant's medical restrictions. *Id*. at 29 (citing CX 32 at 569); *see also* Tr. at 129. The administrative law judge found that, contrary to Mr. Remas's deposition testimony, Mr. Morgan testified that the specific parking lot jobs he identified involve working in a booth where claimant can alternate sitting and standing and would not have to lift more than 10 pounds. *Id*.; *see* Tr. at 139-145. The administrative law judge found that Mr. Remas essentially conceded that claimant could physically perform this type of work, and that his labor market survey identified similar

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why, in terms of law and evidence, the finding is not supported by substantial evidence or in accordance with law. *Collins v. Oceanic Butler, Inc.*, 23 BRBS 227 (1990); 20 C.F.R. §802.211(b).

suitable positions.[2] *Id*. Moreover, the administrative law judge found that Mr. Remas acknowledged that claimant's cash handling and customer service experience and her bilingual ability (English and Spanish) would make her a strong candidate for these positions in the San Diego area. *Id*. (citing CX 34 at 32-33). The administrative law judge rejected Mr. Remas's opinion that claimant would not be able to meet the "productivity standards" for the specific positions due to the side effects of her pain medication. The administrative law judge found that the credible medical evidence establishes that claimant can work eight hours a day so long as she can avoid extended standing and sitting, and that none of the credited physicians imposed any work restrictions related to alleged side effects from claimant's pain medication. *Id*. at 31-32.

The administrative law judge is vested with the authority to make findings of fact and to draw rational inferences from the record; the Board may not substitute its views for those of the administrative law judge. *See, e.g., Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 36 BRBS 15(CRT) (9th Cir. 2002); *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999). In this case, the administrative law judge's finding that claimant had the vocational skills and physical ability to work in a booth as a parking lot attendant is rational and supported by substantial evidence.[3] Therefore, we affirm the administrative law judge's conclusion that employer established the availability of suitable alternate employment. *See Seguro v. Universal Maritime Serv. Corp.*, 36 BRBS 28 (2002); *Hernandez v. Nat'l Steel & Shipbuilding Co.*, 32 BRBS 109 (1998).

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[2] The administrative law judge cited Mr. Remas's labor market survey, which identified parking lot booth positions where claimant could alternate sitting and standing. CX 32 at 562-563. Mr. Remas's summary stated that non-booth parking lot attendant positions would not be suitable. CX 32 at 569.

[3] Claimant's specific arguments are without merit. Mr. Morgan testified that the booth positions were for a 40-hour work week and do not exceed claimant's ten-pound lifting restriction, and that he only identified positions that were within the work restrictions imposed by the physicians ultimately found credible by the administrative law judge. Decision and Order at 28; Tr. at 129, 141-142, 144, 147. Mr. Morgan testified that he contacted prospective employers and informed them of claimant's qualifications and restrictions, and his report noted that claimant was considered qualified and that the prospective employers were willing to train her. Tr. at 125-126; EX 11 at 111. Mr. Remas testified at his deposition that claimant's cash handling experience and bilingual ability were positive attributes for working as a parking lot attendant, that four parking lot employers he contacted could accommodate claimant's restrictions if she were assigned to a booth, and that the airport parking lot attendant positions involved working only in a booth. CX 34 at 32-34, 41-43, 51.

Claimant next contends the administrative law judge erred in finding that she did not establish diligence in seeking alternate employment. Claimant contends she showed diligence when she inquired about working at a mall kiosk. If employer establishes the availability of suitable alternate employment, claimant can rebut the showing and retain entitlement to total disability benefits by demonstrating that, despite a diligent effort, she was unable to secure a position. *See Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *Berezin v. Cascade Gen., Inc.*, 34 BRBS 163 (2000). In his decision, the administrative law judge quoted claimant's deposition testimony that she did not look for work as she did not believe she was physically capable of working. Decision and Order at 34 (citing CX 24 at 449). The administrative law judge noted claimant's inquiry for part-time work at a mall kiosk and the attendant's response that she may not be physically capable of the work. *Id*. The administrative law judge concluded from this evidence that claimant was not diligent, because she did not attempt to seek work of the type he found suitable nor did she attempt to obtain any other employment. We reject claimant's contention that the administrative law judge erred in finding this single employment inquiry established her diligence, and we affirm the administrative law judge's rational conclusion that claimant did not establish diligence in seeking suitable work. *See J.T* [*Tracy*] *v. Global Int'l Offshore, Ltd.*, 43 BRBS 92 (2009), *aff'd sub nom. Keller Found./Case Found. v. Tracy*, 696 F.3d 835, 46 BRBS 69(CRT) (9th Cir. 2012), *cert. denied*, 133 S.Ct. 2825 (2013); *Berezin*, 34 BRBS 163. Therefore, we affirm the administrative law judge's finding that claimant's disability became partial upon employer's showing of suitable alternate employment.

Employer, however, challenges the administrative law judge's finding that it established the availability of suitable alternate employment on August 10, 2012, rather than on January 14, 2012. In his order on reconsideration, the administrative law judge stated that employer's motion in this respect "is simply a re-hash of its argument, which I fully addressed in my Decision and Order." Order on Reconsideration at 2. Partial disability does not commence until employer establishes the availability of suitable alternate employment. *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991); *Palombo*, 937 F.2d 70, 25 BRBS 1(CRT); *Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69(CRT) (D.C. Cir. 1990); *Rinaldi v. Gen. Dynamics Corp.*, 25 BRBS 128 (1991). It is well established that employer can meet its burden of showing the availability of suitable alternate employment through credible, retrospective evidence of jobs available at an earlier date. *Stevens*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988). Mr. Morgan stated in his August 9, 2012 labor market survey and in his hearing testimony that the positions he identified were available on January 14, 2012, which is the date Dr. London opined that claimant was capable of working with restrictions. Tr. at 145; EXs 5 at 32, 61; 11 at 112-115. Contrary to the administrative law judge's statement on

reconsideration, his first decision did not address this evidence. Consequently, because the administrative law judge must in the first instance address the contention that employer established suitable alternate employment before August 10, 2012, we remand the case for him to do so. *See generally Gelinas v. Elec. Boat Corp.*, 45 BRBS 69 (2011); *see also Morehead Marine Services, Inc. v. Washnock*, 135 F.3d 366, 32 BRBS 8(CRT) (6th Cir. 1998).

Employer also appeals the administrative law judge's finding that claimant's compensation for temporary total disability should be based on the minimum compensation rate in effect for fiscal year 2007, instead of that in effect for fiscal year 2006. Employer contends that the 2006 rate should apply because claimant was injured on September 22, 2006, and the administrative law judge "found" she missed eight days of work in September 2006 due to her work injury.

The administrative law judge found, pursuant to Section 6(b)(2) of the Act, that claimant is entitled to the statutory minimum compensation rate for temporary total disability and permanent total disability.[4] He awarded temporary total disability benefits

[4] Section 6(b) provides minimum and maximum rates for compensation. Section 6(b) provides in pertinent part:

> (b)(2) Compensation for total disability shall not be less than 50 per centum of the applicable national average weekly wage determined by the Secretary under paragraph (3), except that if the employee's average weekly wages as computed under section 910 of this title are less than 50 per centum of such national average weekly wage, he shall receive his average weekly wages as compensation for total disability.
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> (3) As soon as practicable after June 30 of each year, and in any event prior to October 1 of such year, the secretary shall determine the national average weekly wage of the three consecutive calendar quarters ending June 30. Such determination shall be the applicable national average weekly wage for the period beginning with October 1 of that year and ending September 30 of the next year….

33 U.S.C. §906(b)(2), (3). In this case, claimant is entitled to the minimum compensation rate under the first clause of Section 6(b)(2) because the parties stipulated that her average weekly wage is $361.50, two-thirds of which, $241, is lower than the minimum compensation rate for either fiscal year 2006 or 2007. The 2006 minimum rate is $268.41; the 2007 minimum rate is $278.61.

based on the minimum compensation rate for fiscal year 2007, which was $278.61. On reconsideration, the administrative law judge rejected employer's contention that the applicable rate should be the one in effect for fiscal year 2006. The administrative law judge found that because claimant first became disabled in November 2006, i.e., in fiscal year 2007, the 2007 rate applies in this case. Order on Recon. at 2.

The Supreme Court of the United States has held that an employee is "newly awarded compensation" within the meaning of Section 6(c),[5] 33 U.S.C. §906(c), when she first becomes disabled and thereby becomes statutorily entitled to benefits, no matter whether or when a compensation order is issued. *Roberts v. Sea-Land Services, Inc.*, 132 S.Ct. 1350, 46 BRBS 15(CRT) (2012) (addressing Section 6(c) in the context of the maximum compensation rate of Section 6(b)(1)). Consequently, the applicable minimum compensation rate is the one in effect when the claimant becomes disabled. The Court also noted that if the "time of injury" and the "time of onset of disability" differ, the applicable national average weekly wage is that in effect at the latter date. *Id.*, 132 S.Ct. at 1356 n. 7, 46 BRBS at 17 n.7 (CRT).

In this case, claimant was injured on September 22, 2006. However, she was "newly awarded" compensation on November 5, 2006. Neither party has specifically challenged the administrative law judge's commencing the award of benefits on November 5, 2006, based on that date constituting the onset of disability.[6] Thus,

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[5] Section 6(c) provides:

> Determinations under subsection (b)(3) of this section with respect to a period shall apply to employees or survivors currently receiving compensation for permanent total disability or death benefits during such period, as well as those newly awarded compensation during such period.

33 U.S.C. §906(c).

[6] In his decision, the administrative law judge stated that, although claimant missed some days of work in September 2006 due to her injury, claimant identified the onset of her disability as November 5, 2006, which is when she stopped working for employer. Decision and Order at 35. As employer notes, this statement is in error. *See* Emp. Pet. for Rev. at 5. Claimant identified November 5, 2006, as the date of onset of her *total* disability. Claimant claimed entitlement to temporary partial disability benefits for the period between the September 22, 2006 injury and November 5. *See* Tr. at 12; Cl. Post-hearing Br. at 41, 52. In her Pre-hearing Statement dated August 12, 2007, claimant claimed temporary total disability from the date of injury. (cont.)

pursuant to *Roberts*, the administrative law judge's finding that the applicable minimum compensation rate is the 2007 rate accords with law, and we affirm this finding.

Accordingly, the administrative law judge's finding that employer established the availability of suitable alternate employment on August 10, 2012, is 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 and Order Granting in Part Employer's Motion for Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

However, neither party has alleged on appeal that the administrative law judge's finding that the onset of disability was November 5, 2006, is, itself, in error, and we will not address the issue sua sponte. *Norwood v. Ingalls Shipbuilding, Inc.*, 26 BRBS 66 (1992). That is, claimant has not appealed the administrative law judge's failure to award benefits for any period prior to November 6, 2006; in fact, claimant has urged affirmance of the award from this date. *See* Cl. Resp. Br. at 5, 10. Although employer has appealed the minimum compensation rate, it has not asserted error in the administrative law judge's failure to award claimant benefits from any date before October 1, 2006, which, under *Roberts*, is an element necessary to its success on the issue raised.