U.S. Department of Labor

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

BRB No. 21-0529

MENAL BALO	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WATERFRONT STAFFING, INCORPORATED	)	
	)	
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYVANIA	)	DATE ISSUED: 8/31/2022
	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

Lara D. Merrigan (Merrigan Legal), Sausalito, California, and Stephen B. Wilson (Law Office of Jason B. Barnett, PA), Fort Lauderdale, Florida, for Claimant.

Thomas C. Fitzhugh, III and Michael A. Kinzer (Schouest, Bamdas, Soshea & BenMaier, PLLC), Houston, Texas, for Employer.

Olgamaris Fernandez (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: ROLFE, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Francine L. Applewhite's Decision and Order Awarding Benefits (2019-LHC-00899) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (Act). We must affirm the ALJ'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).

Employer employed Claimant as a day laborer. On November 23, 2016, he injured his left arm and left leg when a large bundle of metal rebar fell on him. JX 1 at 3. He was taken by ambulance to the hospital that same day. On November 28, 2016, Claimant underwent surgery to repair his fractured femur and left subclavian artery occlusion. JX 1 at 3. He was released but later returned to the hospital on April 12, 2017, and was diagnosed with acute occlusive thrombosis of the brachial, radial, and ulnar veins in his left arm. JX 6 at 4. Claimant filed a claim for benefits under the Act.

The ALJ conducted a telephonic hearing on September 30, 2020.[1] The only issue presented, and now appealed to the Board, is whether Claimant is permanently totally disabled or permanently partially disabled. The answer rests on whether Employer satisfied its obligation to present the availability of suitable alternate employment (SAE) to demonstrate Claimant retains a wage-earning capacity.

The ALJ issued her order on May 18, 2021. D&O at 1. She found Claimant presented a prima facia case that he is unable to return to his usual employment because of his injury. *Id.* at 9. In making her findings, she thoroughly discussed Claimant's injuries, the medical reports and assessments, the multiple vocational assessments, and all fourteen of the jobs Employer presented as SAE. She rejected thirteen positions because they required the "use of a computer," "management of a cash drawer," "customer/guest service experience or cashiering" or "would require Claimant to push, pull, squat, bend, reach [or]

[1] Claimant's injury occurred in Florida, bringing this case within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit.

lift up to 25 pounds." *Id.* at 10-11. In particular, she rejected a retail associate position at Goodwill because the vocational specialist, Ms. Shaun Aulita, did not specify how Goodwill planned on accommodating Claimant's condition. *Id.* at 11. Having eliminated all but a greeter position at Walgreens,[2] she turned to whether that job was sufficient for Employer to meet its burden. The ALJ briefly examined two cases, *Lentz v. Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988), and *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991), and found Employer did not meet its burden under the standard used in either case. She therefore awarded Claimant permanent total disability benefits. Employer appeals, and Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs (Director), also responds, urging the Board to remand the case.[3]

Employer contends the ALJ erred because *P & M Crane* is applicable within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit and the ALJ incorrectly interpreted its standard which is whether the claimant "would be hired if he diligently sought the job." Emp. Br. at 6, 7, 11. It also argues the ALJ erred in holding the Goodwill retail associate position did not meet its SAE burden. In any event, Employer further urges the Board to remand the case for a calculation of permanent partial disability because it argues there are two suitable jobs available, which satisfies the standards set forth in both *P & M Crane* and *Lentz*.

Claimant urges affirmance, asserting the ALJ did not conclusively find *Lentz* applies in the Eleventh Circuit but, rather, acknowledged the split between the United States Courts of Appeals for the Fourth and Fifth Circuits and found that under either test, Employer did not meet its burden: "[t]hus, there was no need for her to consider *which* test to adopt—neither was met." Cl. Br. at 6. Claimant further argues that even if the Goodwill position were accepted as suitable, identifying just two positions does not constitute a "range" of jobs and meeting "the bare minimum threshold of being able to submit an application" is not sufficient. Cl. Br. at 13.

[2] She found this position did not require special training, unique experience, or physical requirements beyond what Claimant is capable of with his disability. D&O at 12.

[3] We deny Employer's motion to strike the Director's brief, accept the Director's response brief into the record, and deny as moot the Director's motion to clarify and set a briefing schedule. 20 C.F.R. §802.219.

The Director likewise argues that *P & M Crane* applies,[4] but he adds that the two-part inquiry set forth in *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981), is applicable in this case. He maintains the ALJ did not adequately inquire whether Claimant had a reasonable likelihood of obtaining the Walgreens job as the second part of that test requires. He requests remand of the case "to afford the ALJ an opportunity to provide an adequate explanation as to whether the injured worker has a reasonable likelihood of obtaining the single employment opportunity found to be suitable [at Walgreens], as required by [*Turner*]." Dir. Br. at 5. Then after the ALJ properly analyzes the Walgreens job, she may turn her attention to whether that one job constitutes SAE under the standard set forth in *P & M Crane*.

Once a claimant establishes he is unable to perform his usual work, as in this case, the burden shifts to the employer to demonstrate the availability of realistic job opportunities within the geographic area where the claimant resides, which the claimant, by virtue of his age, education, work experience, and physical restrictions, can perform. In demonstrating the availability of SAE, the employer need not obtain a job for the claimant but must establish the availability of realistic job opportunities which the claimant could secure if he diligently tried. *See Del Monte Fresh Produce v. Director, OWCP*, 563 F.3d 1216, 43 BRBS 21(CRT) (11th Cir. 2009); *Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *P & M Crane*, 930 F.2d 424, 24 BRBS 116(CRT); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988); *Turner*, 661 F.2d 1031, 14 BRBS 156. In order to satisfy its burden, the employer does not have to find an actual job offer for the claimant but "must merely establish the existence of jobs open in the claimant's community that he could compete for and realistically and likely secure." *Palombo v. Director, OWCP*, 937 F.2d 70, 74, 25 BRBS 1, 6(CRT) (2d Cir. 1991). The employer must present some suitable jobs that are available to the claimant. *Del Monte*, 563 F.3d 1216, 43 BRBS 21(CRT).

Finding suitable jobs that exist is a factual determination for the ALJ to make, and the Board must uphold findings "substantially supported by the record." *Del Monte*, 563 F.3d 1216, 43 BRBS 21(CRT). An employer does not meet its SAE burden by presenting future or hypothetical jobs. *Id*. If the ALJ finds, based on medical opinions or other evidence, that the claimant cannot perform any employment, or the employer has not established the claimant's ability to perform alternate employment, then the claimant is totally disabled. *See Johnson v. Director, OWCP*, 911 F.2d 247, 24 BRBS 3(CRT) (9th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *J.R. [Rodriguez] v. Bollinger Shipyard, Inc.*,

[4] The Director did not opine on whether the Goodwill position constitutes SAE.

42 BRBS 95 (2008), *aff'd sub nom. Bollinger Shipyards, Inc. v. Director, OWCP*, 604 F.3d 864, 44 BRBS 19(CRT) (5th Cir. 2010).

We affirm the ALJ's finding that the Goodwill job did not constitute SAE. The Goodwill job posting requires the "ability to stand and walk," "lift and carry items to stock shelves," and "communicate with guests and customers." EX 4 at 4. Employer contends Ms. Aulita testified that a Goodwill vocational specialist told her Goodwill would accommodate Claimant's disability and Claimant was a "viable candidate." HT at 120, 123. The ALJ reasonably found the Goodwill position unsuitable, however, because it requires "the use of two hands" and the ability to "lift and carry items to stock shelves,'" and Goodwill did not clarify how it would modify the position to accommodate Claimant's inability to do so. D&O at 11. The ALJ has the discretion to find, based on the job description, that Claimant would be unable to perform this job. *See Bunge Corp. v. Carlisle*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000).

Eliminating the Goodwill position leaves only the Walgreens position. The ALJ found it constituted SAE because it did "not require any minimum education requirements, specific skills," or the "use of both arms." But the ALJ's finding is flawed because as the Director points out, she addressed only the first part of the two-part *Turner* test.

Under *Turner*:

> Job availability should incorporate the answer to two questions. (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do? (2) Within this category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he could realistically and likely secure? This second question in effect requires a determination of whether there exists a reasonable likelihood, given the claimant's age, education, and vocational background that he would be hired if he diligently sought the job.

Turner, 661 F.2d at 1042-1043, 14 BRBS at 164-165 (footnote omitted). The ALJ did not determine whether Claimant has a "reasonable likelihood" of securing the Walgreens position. The second part of the test must be addressed before a job can be determined to be SAE. Therefore, we vacate the ALJ's award of benefits and her finding that the Walgreens position is suitable and remand the case for further consideration.

Turner is binding in the Eleventh Circuit which adopted the Board's burden-shifting approach and favorably cited *P & M Crane. Del Monte*, 563 F.3d 1216, 43 BRBS

21(CRT); *Bonner v. City of Pritchard,* 661 F.2d 1206 (11th Cir. 1981) (in the absence of an Eleventh Circuit decision on an issue, Fifth Circuit decisions issued prior to October 1, 1981, are binding precedent in the Eleventh Circuit). The application of *Turner* ties into the applicability of *P & M Crane* and whether one job position satisfies Employer's burden of showing the availability of SAE.[5]

In *P & M Crane*, the Fifth Circuit held an employer may meet its burden of establishing the availability of SAE by demonstrating the availability of general job openings within the claimant's physical and mental capacities that he has a reasonable opportunity of securing; however, it disagreed with the Fourth Circuit's holding in *Lentz*, 852 F.2d 129, 21 BRBS 109(CRT), that an employer's demonstration of only one specific job opening is *automatically* insufficient to satisfy its burden of proof and held the existence of SAE under such circumstances is a factual inquiry.[6] *P & M Crane*, 930 F.2d at 431, 24 BRBS at 431 (CRT). The Eleventh Circuit, in turn, subsequently cited *P & M Crane* favorably for its holding that the existence of SAE is a factual determination. *Del Monte*, 563 F.3d at 1221, 43 BRBS at 24 (CRT).

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[5] Although the Eleventh Circuit has not definitively adopted the holding in *P & M Crane* for the proposition that the identification of one job position can potentially satisfy an employer's burden of establishing the availability of SAE, its application in this case is reasonable.

[6] The Fifth Circuit stated:

> We do not believe that *Turner* specifically requires an employer to present a range of jobs that its injured employee can obtain. Although we may have used imprecise language when we described the two-step alternate employment standard in *Turner* (such as "what types of *jobs*," "within this category of *jobs*," and "are there reasonable *jobs* available" (emphasis added)), we do not believe that this wording automatically prevents an employer from satisfying its alternate employment burden with the listing of one available job. Indeed, toward the end of our discussion of this alternate employment standard in *Turner*, we spoke of an employer's use of a single job to satisfy its burden of proof on this issue when we stated "that [the claimant] would be hired if he diligently sought *the job*." 661 F.2d at 1043 (emphasis added).

P & M Crane Co., 930 F.2d at 431, 24 BRBS at 121(CRT).

Under *P & M Crane*, whether a single position constitutes SAE is a flexible inquiry:

> [O]ur decision in *Turner* leaves open the possibility that an employee may have a reasonable likelihood of obtaining such a single employment opportunity under appropriate circumstances. Such an opportunity could well exist, for example, where the employee is highly skilled, the job found by the employer is specialized, and the number of workers with suitable qualifications in the local community is small.

P & M Crane Co., 930 F.2d at 431, 24 BRBS at 121-122 (CRT). The ALJ's finding that the Walgreens job does not require specialized skill, by itself, is insufficient to preclude Employer from satisfying its burden in this case. While the Fifth Circuit noted specialized skill as an example of when circumstances might be ripe for one job to sufficiently meet an employer's burden, the flexibility of the holdings in *Turner* and *P & M Crane* establish it is not the *only* situation that could meet the standard.

Therefore, on remand, the ALJ must complete the two-part *Turner* test and then determine whether the Walgreens job satisfies the *P & M Crane* criteria. If she concludes it does not, she may reinstate her award of permanent total disability benefits. *See Diosdado v. John Bludworth Marine, Inc.*, 37 F.3d 629, 29 BRBS 125(CRT) (5th Cir. 1994) (unpublished).[7] If she concludes it does, then she must determine whether Claimant engaged in a diligent job search. If not, he is, at most, partially disabled. *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*, 570 U.S. 904 (2013).

Accordingly, we vacate the ALJ's award of total disability benefits and remand the case for further consideration of the SAE issue related to the Walgreens job, consistent

[7] Under the rules of the Fifth Circuit, unpublished opinions issued prior to January 1, 1996, constitute binding precedent. U.S. Ct. of App. 5th Circuit Rule 47.5.3.

with our decision. In all other respects, we affirm the ALJ's Decision and Order Awarding Benefits.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge