U.S. Department of Labor

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

BRB Nos. 20-0315
and 20-0315A

MONETTE RANA	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	DATE ISSUED: 01/29/2021
v.	)	
	)	
INTERNEWS NETWORK, INCORPORATED	)	
	)	
	)	
and	)	
	)	
ALLIED WORLD NATIONAL ASSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits of Evan H. Nordby, Administrative Law Judge, United States Department of Labor.

Howard S. Grossman and Callie J. Fixelle (Grossman Attorneys at Law), Boca Raton, Florida, for Claimant.

Brendan E. McKeon (Flicker, Garelick & Associates, LLP), New York, New York, for Employer/Carrier.

Before: BOGGS, Chief Administrative Appeals Judge, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and Employer and its Carrier (Employer) cross-appeal, Administrative Law Judge Evan H. Nordby's Decision and Order Awarding Benefits (2018-LDA-00023) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the Defense Base Act (DBA), 42 U.S.C. §1651 *et seq.* (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 applicable law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked for Employer as an Operations Advisor in Juba, South Sudan.[1] On June 8, 2016, fighting broke out between armed groups loyal to the president and vice president of South Sudan. Claimant and her colleagues were restricted to their housing compound. Tr. at 15. Soldiers broke into the compound on July 11, 2016. *Id*. at 16-18. She was assaulted and terrorized, and forced to turn over her valuables. *Id*. at 18-19. Claimant escaped from the compound by jumping from a balcony and climbing a tree to go over a fence; she landed on her right shoulder in both instances. *Id*. at 21. Claimant returned the next day to the housing compound, where she saw the corpse of a colleague. *Id*. at 24. She was evacuated to Nairobi, Kenya, on a stretcher. *Id*. at 25. Claimant left Nairobi in October 2016 for her residence in Manila, Philippines. *Id*. at 27. Employer retained her on its payroll from the date of injury until her contract term ended in June 2017. *Id*. at 45. Thereafter, Employer paid her salary and provided health insurance through December 31, 2017, and tuition for a master's degree program in humanitarian logistics and management; in exchange, Claimant signed a waiver of all non-DBA causes of action against Employer related to the work incident.[2] *Id*. at 41-52; EX 2 at 24-26. She filed a claim under the DBA for shoulder and psychological injuries related to the housing compound attack. CX 3.

The administrative law judge applied Section 20(a), 33 U.S.C. §920(a), to presume that Claimant's injuries are related to the incident arising out of her employment. He

[1] Claimant's job duties included creating standard operating procedures for internal accounting, fraud prevention, logistics, and human resources, and establishing systems enabling Employer's accountability to donors. Tr. at 68.

[2] On June 28, 2017, Claimant signed a "Release and Waiver of Claims." EX 2 at 24-27. Employer agreed to pay Claimant her salary through December 31, 2017, $30,000 for retraining, allow her to retain her Employer-provided laptop, and submit an insurance claim for her confiscated personal property. *Id*. at 24. Claimant agreed to release all non-DBA claims against Employer and its employees. *Id*. at 24- 25. The "Release and Waiver of Claims" also contained confidentiality and non-disparagement agreements. *Id*. at 26.

determined Employer did not submit any evidence to rebut the presumption with respect to Claimant's right shoulder injury and found its evidence that Claimant's psychological condition is unrelated to the work incident insufficient to rebut.[3] Decision and Order at 12-15. He determined Claimant cannot return to her usual employment in South Sudan due to her work injuries and that she was temporarily totally disabled from July 12 to October 6, 2016, as Employer did not establish suitable alternate employment during this period. *Id*. at 18. The administrative law judge found Employer established suitable alternate employment from October 7, 2016 to June 30, 2017, by allowing Claimant to work remotely from Manila. He determined she is entitled to temporary partial disability compensation, 33 U.S.C. §908(e), from July 12, 2016 to June 30, 2017, while Employer continued to pay her salary, because she was ineligible for danger pay and other financial allowances related to working in South Sudan.[4] *Id*. at 18-21. He determined Claimant is not entitled to compensation as of July 1, 2017, because she voluntarily removed herself from the workforce by moving to Madrid, Spain, to study Spanish and enroll in a master's degree program. *Id*. at 21-22.

Claimant appeals the denial of temporary total disability compensation. BRB No. 20-0315. Employer responds, urging affirmance. Employer cross-appeals the administrative law judge's finding it failed to rebut the Section 20(a) presumption of a work-related psychological injury and that Claimant's work injury prevents her from returning to her usual employment in South Sudan. BRB No. 20-0315A. Claimant did not submit a response brief.

SECTION 20(a) REBUTTAL

We first address Employer's cross-appeal. The administrative law judge invoked the Section 20(a) presumption that Claimant has a work-related psychological injury.[5] *See,*

[3] Employer did not contest that Claimant's shoulder injuries are work-related. Decision and Order at 15-16.

[4] The administrative law judge determined Claimant had an average weekly wage of $1,422.59, pursuant to Section 10(c), 33 U.S.C. §910(c), and a post-injury wage-earning capacity of $1,292.29, which entitled her to temporary partial disability compensation of $86.78 per week. Decision and Order at 23-24; 33 U.S.C. §908(e), (h).

[5] The administrative law judge relied on Claimant's testimony of her symptoms and the medical record to find her entitled to the Section 20(a) presumption of a work-related psychological injury. Decision and Order at 13. Claimant received counseling from Funda Yilmaz, a licensed professional counselor located in Washington, D.C., and Nilusha Doranegama, a clinical psychologist and certified clinical traumatologist, who is employed

e.g., Ramey v. Stevedoring Services of America, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998). Employer avers the administrative law judge erred by finding Dr. Leonard Weiss's opinion insufficient to rebut the Section 20(a) presumption. Dr. Weiss reviewed Claimant's medical records. He opined, "[T]here is a lack of objective, confirmable evidence provided in the medical reviewed to support that (Claimant) is suffering from a psychological condition arising out of the July 11, 2016 incident . . . ." EX 4 at 1.

In his decision, the administrative law judge found Dr. Weiss assessed Claimant's medical records, but "did not state an opinion related to causation" sufficient to rebut the Section 20(a) presumption. Decision and Order at 15. Additionally, the administrative law judge determined Dr. Weiss did not address or rebut Claimant's testimony concerning her psychological symptoms. *Id*.

The administrative law judge erred in finding Dr. Weiss's opinion insufficient to rebut the Section 20(a) presumption. Contrary to the administrative law judge's finding, Dr. Weiss unequivocally opined there is insufficient medical evidence that Claimant has a work-related psychological injury.[6] EX 4 at 1; *Ramey*, 134 F.3d 954, 31 BRBS 206(CRT); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). The Employer's burden on rebuttal is only one of producing substantial evidence of the absence of a work-related injury. The assessment of the weight to be accorded conflicting evidence "has no proper place in determining whether [the employer] met its burden of production." *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 651, 44 BRBS 47, 55(CRT) (9th Cir. 2010). Accordingly, we reverse the administrative law judge's finding that Employer did not rebut the Section 20(a) presumption. We remand the case for him to address the record evidence as a whole, with Claimant bearing the burden of persuasion of establishing the work-relatedness of any psychological condition, taking into account the reasoning, documentation and credibility of the relevant evidence. *Id.*; *Carpenter v. California United Terminals*, 37 BRBS 149 (2003), *vacated on other grounds on recon.*, 38 BRBS 56 (2004).

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by the United Nations Mission in South Sudan. They diagnosed Claimant with post-traumatic stress disorder (PTSD). CXs 20 at 292; 21 at 294.

[6] We, therefore, need not address whether Dr. Weiss's statement that Claimant's treating medical professionals did not document a diagnosis of PTSD under the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM IV) is sufficient to rebut the Section 20(a) presumption. *See generally S.K [Kamal] v. ITT Industries, Inc.*, 43 BRBS 78 (2009), *aff'd in part and rev'd in part mem.*, No. 4:09-MC-348, 2011 WL 798464 (S.D. Tex. Mar. 1, 2011) (Act does not require psychological harm be defined in terms of DSM criteria).

USUAL EMPLOYMENT

Employer contends the administrative law judge erred in finding Claimant's work-related shoulder injury prevents her from returning to her usual employment in South Sudan as an Operations Advisor.[7] We agree the case must be remanded for further consideration of this issue. In order to establish a prima facie case of total disability, Claimant must establish she is unable to perform her usual work due to her work injury. *See Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT); *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988). In this case, the administrative law judge found Claimant's right shoulder tear and ongoing pain prevent her return to work. Claimant testified her right shoulder is painful and has restricted movement. Decision and Order at 18; Tr. at 29. Dr. Antonio Ferrer Loewinsohn examined her in the fall of 2017. A shoulder ultrasound showed a right rotator cuff tear. CX 19 at 4. Dr. Loewinsohn also diagnosed chronic swelling. *Id*. at 9. He restricted Claimant from lifting over 20 pounds and referred Claimant for physical therapy. *Id*. at 9-10. A physical therapist, Jonathan Ahladas, noted in November 2017 that Claimant reported a pain level of 5-8 on a 10-point scale, which was aggravated, inter alia, by working on a computer for over 30 minutes. *Id*. at 1.

The administrative law judge relied on Claimant's testimony of shoulder pain, as supported by her complaints to Mr. Ahladas, to find she could not return to work at her usual employment. *See*, *e.g.*, *Devor v. Dep't of the Army*, 41 BRBS 77 (2007). However, Claimant characterized her work for Employer as a desk job with no physical requirements other than carrying her travel bag when she goes on leave. Moreover, she applied for her former position after its duty station was relocated to Nairobi. Tr. at 39-40, 54, 57; EX 2 at 22. In determining whether Claimant is capable of performing her usual employment, the administrative law judge should compare Claimant's shoulder symptoms, her credible

[7] Should the administrative law judge find on remand that Claimant's psychological condition is work-related, we affirm as supported by substantial evidence his finding that this condition prevents her return to her usual work in South Sudan. *Rice v. Service Employees Int'l, Inc.*, 44 BRBS 63 (2010). The administrative law judge relied on Claimant's subjective complaints and the recommendation of her counselors. Decision and Order at 18. Claimant testified she suffers from anxiety, loss of memory, concentration and confidence, nightmares, insomnia and depression. Tr. at 30-31, 48. Ms. Yilmaz completed an Office of Workers' Compensation Programs Work Capacity Evaluation form on June 26, 2017, in which she opined Claimant should avoid work in a high stress or active conflict environment. CX 20 at 2. Ms. Doranegama recommended that Claimant "work and live in a place she can feel safe and secure." CX 21. The administrative law judge's erroneous finding that Dr. Weiss did not offer an opinion on Claimant's ability to return to work from a psychological perspective is harmless. Decision and Order at 18; EX 2 at 69.

complaints of pain, and physical restrictions to the requirements of her usual work.[8] *See Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011); *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 49 (2005). Accordingly, we vacate the administrative law judge's finding that Claimant's shoulder injury prevents her return to her usual work, and we remand for the administrative law judge to address the relevant evidence under applicable law.[9]

SUITABLE ALTERNATE EMPLOYMENT

Claimant appeals the administrative law judge's finding that Employer established the availability of suitable alternate employment, averring Employer offered only sheltered employment and was required to show the availability of suitable alternate employment after her contract with Employer ended on June 30, 2017. We address Claimant's appeal in the event the administrative law judge determines Claimant establishes a prima facie case of total disability due to her shoulder injury and/or she has a work-related psychological condition. *See* n.7, *supra*.

1. July 12, 2016 to October 6, 2016

The administrative law judge found Claimant was temporarily totally disabled from July 12, 2016 to October 6, 2016. Decision and Order at 18. He determined Employer

[8] Claimant testified her master's degree program was online and involved writing a thesis, and she was having difficulty completing the program due to psychological symptoms. Tr. at 64-65.

[9] Claimant testified Employer wrote her in October 2016 about returning to her former job, which was relocated to Nairobi, invited her to apply for the position, which she did, but she was not hired. Tr. at 39-40. Employer wrote Claimant on February 1, 2017, that "direct work on the South Sudan project ends on 31 March." EX 2 at 22. In *McBride v. Eastman Kodak Co.*, 844 F.2d 797, 21 BRBS 45(CRT) (D.C. Cir. 1988), the United States Court of Appeals for the District of Columbia Circuit cited the proposition that "disability" within the meaning of the Act has an economic as well as a medical component, and that the administrative law judge and Board failed to account for the unavailability of the claimant's usual job due to his injury despite being medically capable of performing it. *McBride*, 844 F.2d at 798, 21 BRBS at 47(CRT). If the administrative law judge finds Claimant's work injuries did not medically prevent her return to work, he should determine whether the evidence shows Employer did not rehire her because of her injuries. *See Service Employees Int'l, Inc. v. Director, OWCP [Barrios]*, 595 F.3d 447, 44 BRBS 1(CRT) (2d Cir. 2010); *Rice*, 44 BRBS 63.

continued to pay Claimant's salary without requiring her to perform work, which rendered this sheltered employment, and it did not otherwise show the availability of suitable alternate employment. Although the administrative law judge found Claimant temporarily totally disabled during this period, he awarded her compensation for temporary partial disability. *Id*. at 18, 26. In the absence of any evidence that Claimant's wages from July 12, 2016 to October 6, 2016, were intended as advance payments of compensation, such payments do not denote a wage-earning capacity as a matter of law. *See Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998); *Patterson v. Savannah Mach. & Shipyard*, 15 BRBS 38 (1982) (Ramsey, C.J., concurring and dissenting), *aff'd in pert. part and rev'd in part sub nom. Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51(CRT) (11th Cir. 1988); *Van Dyke v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 388 (1978). Accordingly, should the administrative law judge find on remand Claimant established a prima facie case of work-related total disability, she is entitled to compensation for temporary total disability during this period. *See* 33 U.S.C. §908(b).

2. October 7, 2016 to June 30, 2017

The administrative law judge awarded Claimant temporary partial disability compensation of $86.78 per week until June 30, 2017, based on a loss of wage-earning capacity.[10] Decision and Order at 26. He determined Employer established suitable alternate employment from October 7, 2016 to June 30, 2017, based on its assigning Claimant remote-based work in Manila. *Id*. at 18; *see* EX 2 at 20. He found the position suitable psychologically because it was not located in a war zone and was also within her shoulder limitations.

The administrative law judge rejected Claimant's contention the job was sheltered employment. Decision and Order at 19-21. He found uncontested Claimant's assertion she did little actual work for Employer. *Id*. at 19. He also found Claimant did not contend she was unable to perform her job duties in Manila. *Id*. at 20. He characterized the position as "white collar remote work" subject to "ebb and flow" based on Employer's needs. *Id*. He relied on Employer's tailoring Claimant's position to avoid returning her to a war zone, maintaining contact with her, assigning her duties which furthered its mission, discussing with her other assignments and continuing to pay her after the South Sudan program ended on March 31, 2017. *Id*. The administrative law judge concluded, therefore, that Claimant's work was not "*solely* through the beneficence of the Employer." *Id*. at 21 (italics in decision).

[10] Claimant was paid more while working in South Sudan due to her receiving danger pay and other allowances. Decision and Order at 23.

Where the claimant establishes a prima facie case of total disability because she is unable to return to her usual job due to her work injury, the burden shifts to the employer to demonstrate suitable alternate employment is available in the community. *Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *Hairston*, 849 F.2d 1194, 21 BRBS 122(CRT). The employer can meet its burden by offering the claimant a job, including a light-duty job. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986). An employer may tailor a job to the claimant's specific restrictions so long as the work is necessary. *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); *Larson v. Golten Marine Co.*, 19 BRBS 54 (1986). Sheltered employment, or work provided solely through the beneficence of the employer, on the other hand, is a job for which the claimant is paid even if she cannot do the work, or which is unnecessary; such employment is insufficient to constitute suitable alternate employment as it does not establish that the claimant has a wage-earning capacity in her injured condition.[11] *Patterson*, 846 F.2d 715, 21 BRBS 51(CRT).

In *Twin Harbor Stevedoring & Tug Co. v. Marshall*, 103 F.2d 513 (9th Cir. 1939), the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, affirmed an award of benefits because the claimant's wage-earning capacity was permanently impaired and the sympathetic employer had no need for someone to perform the duties the claimant was subsequently assigned after he returned to work. *Id.*, 103 F.2d at 515. Similarly, in *Patterson*, 846 F.2d at 722-723, 21 BRBS at 57-59(CRT), the United States Court of Appeals for the Eleventh Circuit held substantial evidence supported the administrative law judge's finding the claimant's actual earnings did not represent his wage-earning capacity. The administrative law judge determined the claimant had been "treated with kid gloves" and if he left the job, the employer would "not necessarily" replace him. *See Patterson*, 15 BRBS at 42. In *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991), the United States Court of Appeals for the First Circuit affirmed the Board's decision that clerical work on a part-time, as needed, basis, averaging approximately 10 hours per week, and where the claimant needed a mattress in his office so that he could lie down during the day, did not constitute suitable alternate employment. *Id.*, 935 F.2d at 434, 24 BRBS at 208(CRT).

In this case, the administrative law judge found Claimant's testimony uncontested that from October 7, 2016 to June 30, 2017, she performed "little actual work" for Employer. Decision and Order at 19. Claimant testified she was assigned work for only

[11] Sheltered employment is defined as a job that is unnecessary to the employer's operations and was created merely to place the claimant on the payroll. *Buckland v. Dep't of the Army/NAF/CPO*, 32 BRBS 99 (1997); *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (1980).

one week arranging hotel accommodations for a meeting. Tr. at 53, 61. There is no evidence to the contrary. We therefore reverse the administrative law judge's finding that Employer established the availability of suitable alternate employment through the job in Manila, as Claimant was paid but did not perform any necessary work. *Marshall*, 103 F.2d 513; *see Patterson*, 846 F.2d at 722-723, 21 BRBS 57-59(CRT); *Legrow*, 935 F.2d 430, 24 BRBS 202(CRT); *see also Shoemaker v. Schiavone & Sons, Inc.*, 11 BRBS 33 (1979) (paying an employee full-time wages for part-time work may be sheltered employment and assumes a loss of wage-earning capacity). Should the administrative law judge find on remand that Claimant is incapable of returning to her usual employment, she is entitled to compensation for temporary total disability compensation from October 7, 2016 to June 30, 2017 because Employer did not establish the availability of suitable alternate employment.[12]

3. July 1, 2017 and continuing

The administrative law judge found that, after Employer established the availability of suitable alternate employment in Manila, Claimant voluntarily removed herself from the workforce after July 1, 2017. Decision and Order at 21. He determined no doctor opined Claimant has an ongoing total disability and, since July 2017, she has lived in Madrid while undertaking a master's degree program. However, the administrative law judge also found Claimant's testimony of continuing PTSD symptoms and shoulder pain credible. *Id*. The administrative law judge determined Claimant chose to accept severance pay and attend school. *Id*. at 22; *see* n.2, *supra*. He concluded Claimant is not entitled to compensation after June 30, 2017.

We disagree. Because Employer's position in Manila did not constitute suitable alternate employment, its burden to establish such did not expire with Claimant's discharge at the conclusion of her employment contract. *B.H. [Holloway] v. Northrop Grumman Ship Sys., Inc.*, 43 BRBS 129 (2009); *Vasquez v. Cont'l Mar. of San Francisco, Inc.*, 23 BRBS 428 (1990). Claimant's not seeking full-time employment after being laid off on June 30, 2017, is immaterial as Employer is the party bearing the burden of showing suitable employment opportunities such that Claimant is not totally disabled. *Norfolk Shipbuilding & Dry Dock Corp. v. Hord*, 193 F.3d 836, 33 BRBS 170(CRT) (4th Cir. 1999); *Mendez v. Nat'l Steel & Shipbuilding Co.*, 21 BRBS 22 (1988). Once Claimant sustained a loss of wage-earning capacity due to her work injury, her subsequent alleged withdrawal from the workforce does not affect her entitlement to compensation for this loss in wage-earning capacity. *Hoopes v. Todd Shipyards Corp.*, 16 BRBS 160 (1984); *see also generally Sam v Loffland Bros. Co.*, 19 BRBS 228 (1987). Accordingly, we vacate

[12] The record does not contain any evidence of other employment opportunities.

the administrative law judge's finding that Claimant is not entitled to continuing temporary total disability compensation after June 30, 2017.[13] Claimant is entitled to continuing compensation for temporary total disability from July 1, 2017, should the administrative law judge find on remand that Claimant is incapable of returning to her usual employment.

Accordingly, we reverse the administrative law judge's finding that Employer did not rebut the Section 20(a) presumption with respect to Claimant's claim of a work-related psychological injury. We remand the case for the administrative law judge to address on the record as a whole whether Claimant established she has a work-related psychological condition. We vacate the administrative law judge's finding that Claimant's shoulder injury prevents her from returning to her usual employment and remand for further findings consistent with this opinion. We vacate the administrative law judge's award of temporary partial disability compensation from July 12, 2016 to June 30, 2017, and the denial of temporary total disability compensation from July 1, 2017. Should the administrative law judge determine on remand that Claimant is unable to return to her usual employment due to her work injury, she is entitled to continuing compensation for temporary total disability from July 12, 2016. In all other respects, we affirm the administrative law judge's Decision and Order Awarding Benefits.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

[13] Accordingly, we need not address Claimant's contention that she is entitled to temporary total disability after June 30, 2017, because she was enrolled in an employer-approved training program. *See generally Abbott v. Louisiana Ins. Guar. Ass'n*, 889 F.2d 626, 23 BRBS 3(CRT) (5th Cir. 1989), *cert. denied*, 494 U.S. 1082 (1990).