U.S. Department of Labor

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

BRB Nos. 20-0249
and 20-0249A

TROY E. OWEN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TEMCO, LLC	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION LIMITED	)	
	)	DATE ISSUED: 11/24/2020
Employer/Carrier-Respondents Cross-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Cross-Respondent	)	DECISION and ORDER

Appeals of the Order Vacating Initial Decision and Order and Issuing Revised Decision and Order of Christopher Larsen, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for Claimant.

Matthew S. Malouf (Bauer Moynihan & Johnson LLP), Seattle, Washington, for Employer/Carrier.

Ann Marie Scarpino (Kate S. O'Scannlain, 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: BUZZARD, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and Employer cross-appeals Administrative Law Judge Christopher Larsen's Order Vacating Initial Decision and Order and Issuing Revised Decision and Order (2018-LHC-00513) 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 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 sustained an injury to his right shoulder while working as a longshoreman on July 29, 2016. He underwent shoulder surgery on January 3, 2017, which was partially successful and reached maximum medical improvement on August 2, 2017. Claimant, who held A-man status in his local longshore union, agreed he could perform some but not all of the longshore jobs he worked prior to his injury. However, Claimant did not return to longshore employment; rather, he formally retired as of November 1, 2018.

In his Order Vacating Initial Decision and Order and Issuing Revised Decision and Order (Decision and Order),[1] the administrative law judge found Claimant's usual employment with A-man status involved a variety of longshore positions[2] and that, taking into consideration Claimant's present medical restrictions, he is not capable of performing all of the jobs. The administrative law judge therefore concluded Claimant established a *prima facie* case of total disability. Decision and Order at 7.

[1] The administrative law judge issued a Decision and Order on February 7, 2020. Employer and the ILWU-PMA Welfare Plan timely sought reconsideration or clarification of that decision. On February 20, 2020, the administrative law judge granted their motions, vacated his February 7, 2020, Decision and Order, and issued the Revised Decision and Order which is presently on appeal to the Board.

[2] The administrative law judge found that in the 16 months prior to his work injury, Claimant worked 13 different identifiable jobs. Decision and Order at 5 – 6.

He further found Claimant's decision to retire from longshore work, however, does not necessarily preclude consideration of whether longshore jobs are suitable alternate employment. Decision and Order at 8 – 10. He found Claimant capable of performing some longshore jobs post-injury, which would yield a post-injury wage-earning capacity of $611.78.[3] *Id.* at 10 – 26. The administrative law judge awarded Claimant temporary total disability benefits at a weekly rate of $1,406 from July 26, 2016 through August 1, 2017, and permanent partial disability benefits at a weekly rate of $1,048.81 from August 2, 2017 and continuing.[4] 33 U.S.C. §908(b), (c) (21), (h). The administrative law judge awarded Claimant ongoing medical benefits and the ILWU-PMA Welfare Plan a lien against Claimant's benefits in the amount of $50,857.14. The administrative law judge denied Employer's claim for relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

On appeal, Claimant challenges the administrative law judge's determination that, following his retirement from the longshore union, longshore jobs may be considered in determining if Employer established the availability of suitable alternate employment. Alternatively, Claimant challenges the administrative law judge's finding regarding the number of hours he could work post-injury as a mechanical hopper opener. Employer responds, urging the Board to affirm the administrative law judge's award of disability benefits. Claimant filed a reply brief. BRB No. 20-0249.

In its cross-appeal, Employer challenges the administrative law judge's denial of its request for Section 8(f) relief. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of that denial. Employer filed a reply brief. BRB No. 20-0249A.

Claimant's Appeal

Where, as in this case, Claimant establishes his *prima facie* case of total disability, the burden shifts to Employer to demonstrate the availability of suitable alternate employment. *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); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). To meet this burden, Employer must establish that suitable work is realistically and regularly available to Claimant in his community. *Edwards v. Director, OWCP*, 999

[3] The administrative law judge found Employer did not establish the availability of suitable non-longshore work.

[4] The parties stipulated Claimant's average weekly wage is $2,185.

F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *Beumer v. Navy Personnel Command/MWR*, 39 BRBS 98 (2005).

The administrative law judge found suitable alternate employment available to Claimant based on the testimony of Stuart Strader, a longshoreman and business agent for Claimant's union, who identified six specific suitable longshore positions, and Claimant's testimony that he was capable of performing them.[5] The administrative law judge rejected Claimant's contention that since he had formally retired from longshore employment as of November 1, 2018, the identified longshore positions could not be used to demonstrate the availability of suitable alternate employment.[6] He determined Claimant's decision to retire for financial reasons does not automatically reduce his earning capacity to zero: "[i]t cannot be a self-fulfilling prophecy whereby an injured worker, who can perform a limited number of jobs, guarantees he receives total disability by removing himself from the workforce." Decision and Order at 10. Because Claimant retained the physical capability of working as a longshoreman, the administrative law judge concluded his retirement status is not dispositive of his disability status and he evaluated Claimant's post-injury earning capacity based on the longshore jobs Claimant conceded he was capable of performing. *Id.* at 8 – 10. He concluded Employer established the availability of 806.81 hours of yearly employment in suitable longshore positions. *Id.* at 14 – 18. The administrative law judge awarded Claimant permanent partial disability benefits of $1,048.81 per week. 33 U.S.C. §908(c)(21), (h).

In challenging the administrative law judge's findings, Claimant concedes he retains the ability to work part-time in longshore employment. Cl. Br. at 10. Claimant further acknowledges "that if a claimant voluntarily retires, the jobs which were available to him before retirement should be included in his residual wage earning capacity." *Id.* at 12. Claimant contends, however, that he was required by economic necessity to retire from the union because his injury would not permit him to obtain sufficient longshore work to keep his health benefits, and his decision to retire therefore falls within the humanitarian

[5] Mr. Strader testified, and Claimant agreed, that Claimant could perform the positions of walking boss, foreman, mechanical hopper operator, gang boss, clerk, and button pusher. *See* Tr. at 62 – 96; EX 13 at 3112.

[6] Claimant opined the suitable longshore positions Mr. Strader identified would result in fewer than 700 hours of work per year, but that a minimum of 800 hours of work is required for him to receive health insurance and other benefits. Taking into account the likely limited hours plus the cost of union dues, Claimant testified it was not financially feasible to continue to seek longshore jobs. He therefore decided to retire from the longshore union, which made him ineligible for longshore work. *See* Tr. at 97 – 98.

purposes of the Act and should not decrease his entitlement to disability benefits.[7] *Id.* at 13 – 16.

We affirm the administrative law judge's findings as his decision comports with law. In *Rhine v. Stevedoring Services of America*, 596 F.3d 1161, 44 BRBS 9(CRT) (9th Cir. 2010), the United States Court of Appeals for the Ninth Circuit, in whose jurisdiction this case arises, addressed the similar question whether non-longshore work constituted suitable alternate employment where the claimant contended it would cause him to lose his longshore registration. The court found it did, holding two criteria determine suitable alternate employment: the claimant's physical abilities and the economic availability of particular jobs in the relevant market.[8] *Rhine*, 596 F.3d at 1166, 44 BRBS at 11(CRT). A claimant's preferences, or the possible employment consequences of taking an available job, are not relevant. In so holding, the court endorsed the Board's reasoning in *Berezin v. Cascade General, Inc*., 34 BRBS 163 (2000), where the Board:

> considered a claimant's similar argument that, because he wished to return to longshore work, he need not diligently seek alternative employment. The BRB rejected that argument, writing that [c]laimant may not retain entitlement to total disability benefits merely by alleging that he did not seek work because he was unsure if he would be hired, or because he preferred another type of work to that identified by the employer. Similarly, Rhine cannot retain total disability benefits here because of an unrelated though unfortunate possible consequence of accepting alternative work.

Rhine, 596 F.3d at 1164, 44 BRBS at 11-12(CRT) (internal citation omitted).

In *Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139 (1986), the administrative law judge found suitable alternate employment available based on the testimony of a vocational rehabilitation specialist, who identified eight available and suitable positions. The administrative law judge found the claimant had imposed an artificial income barrier by refusing to accept a referral to any job paying less than $25,000 per year, frustrating the employer's efforts to establish his wage-earning capacity. The Board affirmed:

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[7] Claimant asserts his retirement resulted in his receiving a pension of $46,800 per year, no-cost health benefits, and savings in union dues. Cl. Br. at 9.

[8] Section 2(10), 33 U.S.C. §902(10), defines "Disability" as "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…."

> We specifically reject claimant's contention that he has a right to refuse any job paying less than his former salary of $25,800. Congress intended that injured workers return to productive enterprises as soon as possible following an injury, even if low paying or part-time, as part of their rehabilitation program. Any proven ability to perform such [work] establishes the absence of total disability, since disability is defined by the Act in terms of inability to earn wages. 33 U.S.C. §§902(10), 908.

18 BRBS at 141 n.1 (internal citation omitted).

So too here. The administrative law judge found Claimant, while admitting he could perform longshore jobs post-injury, "retired because of a belief he could not support himself financially with the amount of longshore work available to him." Decision and Order at 10. Thus, Claimant's work-related injury did not compel him to retire, and he repeatedly acknowledged his ability to perform longshore positions after reaching maximum medical improvement. EX 13; Cl. Post-hearing Br. at 8. Claimant, like the employee in *Dove*, decided not to pursue post-injury employment opportunities because in his opinion he would be economically disadvantaged by taking them. As the court noted in *Rhine*, however, the possible unfortunate consequences of a claimant's accepting alternate work does not indicate that the employer has failed to identify suitable alternate employment. *See Rhine*, 596 F.3d at 1166, 44 BRBS at 11(CRT).

On the facts of this case, Claimant has not established error in the administrative law judge's decision that post-injury longshore positions could constitute suitable alternate employment notwithstanding Claimant's voluntarily relinquishing his union membership by retiring.[9] As Claimant does not contest that he is physically capable of performing the

[9] Employer's burden is to establish Claimant retains a wage-earning capacity in his injured condition by showing the availability of jobs he could obtain if he reasonably tried. *See generally Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149(CRT) (9th Cir. 1985). The result in this case is consistent with the Board's unpublished decision in *Williams v. Ports America, Inc.*, BRB No. 19-0431 (Mar. 10, 2020) (Boggs, C.J., concurring), slip op. at 4 n.4, where the Board stated:

> For clarity, we note claimant cannot eliminate an otherwise available union job from consideration by voluntarily removing himself from union membership or choosing not to resume union membership. Thus, the pertinent inquiry concerns the underlying rationale for claimant's disability retirement from the union, i.e., did claimant voluntarily withdraw from the union or was he compelled by disability to take such recourse.

six types of longshore work Employer identified as suitable, we affirm the administrative law judge's determination that Employer established suitable alternate employment.[10]

Alternatively, Claimant challenges the administrative law judge's determination of the number of work hours available to him on an annual basis as a mechanical hopper opener. Claimant contends that his having worked 292 hours in this position in the 16 months prior to his injury equates to 219 hours in the year before his injury, and that Mr. Strader, on whose testimony the administrative law judge relied to find the job suitable, *see* Decision and Order at 11 – 12, opined Claimant could have performed only half of the available mechanical hopper opener jobs. Consequently, Claimant contends only 109.5 hours of yearly work in this position would be available to him, thus reducing his wage-earning capacity.

We affirm the administrative law judge's finding that Employer established the availability of 806.81 hours in post-injury longshore employment. The administrative law judge first identified the "inherent uncertainty" in calculating the number of hours Claimant could obtain suitable alternate employment due to the "unique selection process" which is both seniority-based and randomized. He rejected, as largely speculative, Claimant's assertion that he could obtain the suitable jobs for only 678.8 hours and concluded Claimant likely has a greater chance of securing these jobs because he would no longer be competing for positions that are now physically unsuitable for him, which previously accounted for 59 percent of his work. Decision and Order at 14 – 19. Instead, he accepted as the best evidence of availability Claimant's own assessment that of the 2,647.75 hours he worked

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Moreover, the administrative law judge reasonably concluded the Ninth Circuit's decision in *Colaruotolo v. SSA Terminals, Inc.*, 728 F. App'x 713 (9th Cir. 2018) does not compel a contrary conclusion. In *Colaruotolo*, the court viewed the claimant's decision to retire from his union was influenced by his physical inability to work, not concerns about the economic feasibility of accepting alternate longshore employment. *Id.* at 715. It noted he retired at a time when it was not clear his injury would ever permit him returning to work and his retiring required him to forego significant financial benefits. *Id.* at 716. In addition, the evidence regarding the availability of suitable longshore work was uncertain and speculative. *Id.* at 715. In this case, the evidence is uncontradicted that Claimant's injury did not preclude his return to some types of longshore work and that some amount of suitable longshore work would be available.

[10] The factual basis for Claimant's argument – that his inability to obtain 800 hours of work per year to maintain his union benefits necessitated his retirement – is also undermined by the administrative law judge's permissible finding, discussed below, that Claimant could obtain 806.81 hours of work per year.

in longshore employment in the 16 months prior to his injury, 1,075.75 hours represented work in the positions found suitable post-injury.[11] The administrative law judge reduced the 1,075.75 hours Claimant worked over the course of 16 months by 25 percent, thus resulting in a calculation that Claimant would have worked 806.81 hours in the identified positions in one year.

In addressing Claimant's contention with regard to Mr. Strader's testimony,[12] the administrative law judge found that since Claimant's employment records do not separate mechanical hopper opener jobs by type, Mr. Strader's testimony regarding the distinction in hours with regard to hopper positions is not based on any data or factual information.[13] *See* Decision and Order at 17 n.10. Consequently, the administrative law judge rejected Mr. Strader's testimony that the number of available mechanical hopper opener jobs should be reduced by half.[14] *Id.* at 17.

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[11] The administrative law judge accepted Claimant's calculations that he worked the following hours during the period January 1, 2015 to July 29, 2016:

Walking boss/Foreman – 369.75 hours
Mechanical Hopper Opener – 292 hours
Gang Boss – 240 hours
Clerk – 126 hours
Button Pusher – 48 hours

[12] Mr. Strader described two types of "hopper" jobs, one involving the pushing of a cart (listed as an M3 position), and the other involving a cart that is mechanically and hydraulically operated (listed as an M297 position). Tr. at 85 – 86. Without elaboration, Mr. Strader opined Claimant would be able to obtain only half the previously worked hopper hours because one type of hopper job, involving soda ash, is not suitable for Claimant. *Id.* at 86.

[13] The Pacific Maritime Association's Hours by Occupation Code form, which documents the number of hours Claimant worked in payroll year 2013, does not differentiate between hopper positions. CX 2.

[14] With regard to the gang boss position, the administrative law judge found Claimant's request for a 10 percent reduction in hours was entirely speculative. Decision and Order at 17 n.11. While Mr. Strader testified Claimant could perform "a majority" of gang boss work, he did not opine as to the number of hours available in this work. Claimant does not contest this finding on appeal. *See* Cl. Reply Br. at 5-6. Nor does Claimant contest

It is well settled that the fact-finder is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular witness. *Bank v. Chicago Grain Trimmers Assn., Inc.*, 390 U.S. 459, 467 (1968); *Duhagon v. Metro. Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999). It is solely within the administrative law judge's discretion to accept or reject all or any part of any testimony, according to his judgment. *Perini Corp. v. Heyde*, 306 F. Supp. 1321, 1327 **(**D.R.I. 1969). Although the administrative law judge generally relied on Mr. Strader's testimony, he was not required to credit it in its entirety regarding the number of hours mechanical hopper opener jobs are available. *See, e.g., Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010). Accordingly, as it is supported by substantial evidence, we affirm the administrative law judge's calculation of the number of hours available to Claimant in suitable alternate employment and the consequent award of permanent partial disability benefits.

Employer's Appeal

Section 8(f) shifts the liability to pay compensation for permanent disability after 104 weeks from an employer to the Special Fund established in Section 44 of the Act. 33 U.S.C. §§908(f), 944. In order to establish entitlement to Section 8(f) relief, Employer must establish: 1) the employee had a pre-existing permanent partial disability before the work-related injury; 2) the pre-existing disability was manifest to the employer; and 3) the current disability is not solely due to the employment injury (the contribution element). *Director, OWCP v. Campbell Industries Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983).

Although the Director conceded the first two elements were satisfied below, the administrative law judge held Employer did not establish contribution. Employer contends the administrative law judge erred. The Director responds in support of the administrative law judge's decision.

In order to establish the contribution element where the work-related injury results in a permanent partial disability, the employer must show that the current disability is not due solely to the subsequent work injury and "is materially and substantially greater than that which would have resulted from the subsequent work injury alone." 33 U.S.C. §908(f)(1); *Marine Power & Equip. v. Dep't of Labor [Quan]*, 203 F.3d 664, 33 BRBS 204(CRT) (9th Cir. 2000); *Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997). The Ninth Circuit has found it unnecessary to precisely

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the administrative law judge's findings with respect to the number of hours he could have worked in the remaining suitable jobs.

define the degree of quantification required to meet the materially and substantially greater standard under Section 8(f), *Quan*, 203 F.3d at 668, 33 BRBS at 207(CRT), but has held that evidence that the current level of disability is the result of a combination of the pre-existing condition and the work injury may be sufficient. *Director, OWCP v. Coos Head Lumber & Plywood Co.*, 194 F.3d 1032, 33 BRBS 131(CRT) (9th Cir. 1998). In this regard, the contribution element may be satisfied with "medical or other evidence" demonstrating the current disability is not due solely to the subsequent injury and is materially and substantially worsened by the pre-existing disability.[15] *Id.*; *FMC Corp. v. Director, OWCP*, 886 F.2d 1185, 23 BRBS 1(CRT) (9th Cir. 1989) (testimony that several conditions combined with back injury to create greater disability failed to establish 8(f) contribution in absence of evidence that the back injury alone did not cause permanent total disability); *see also Sproull*, 86 F.3d at 900, 30 BRBS at 52(CRT). Thus, if the work injury alone was severe enough to cause the current level of an employee's diminished wage-earning capacity, the fact that the employee may be even more physically limited because of a pre-existing condition is irrelevant. *FMC Corp.*, 886 F.2d 1185, 23 BRBS 1(CRT); *see also E.P. Paup v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT) (9th Cir. 1993);

The administrative law judge found that although Employer may have demonstrated that Claimant's preexisting degenerative condition may have combined with his work injury, it did not demonstrate that his work injury alone would be insufficient to cause his diminished wage-earning capacity. Decision and Order at 31. Employer has not established error in this finding. A claimant's disability must be due to both the pre-existing and current injuries. *See Quan*, 203 F.3d 664, 33 BRBS 204(CRT); *Neff v. Foss Mar. Co.*, 41 BRBS 46 (2007). As Employer has not identified any evidence stating Claimant's ultimate partial disability is not due solely to his work injury, the administrative law judge properly found Employer did not establish the contribution element necessary to obtain relief under Section 8(f). *See FMC Corp.*, 886 F.2d 1185, 23 BRBS 1(CRT). Therefore, we affirm the administrative law judge's denial of Section 8(f) relief. *E.P. Paup Co.*, 999 F.2d 1341, 27 BRBS 41(CRT).

[15] The administrative law accurately found Employer "introduced no vocational evidence" to support its position. To the extent the administrative law judge intended to suggest Employer was required to provide vocational evidence to meet the contribution standard, any error in doing so is harmless in this case. *Sproull v. Director, OWCP*, 86 F.3d 895, 900, 30 BRBS 49, 52(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997) (contribution element may be met by medical or other evidence).

Accordingly, we affirm the administrative law judge's Order Vacating Initial Decision and Order and Issuing Revised Decision and Order.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge