U.S. Department of Labor

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

BRB No. 17-0418

GEORGE N. GINDO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 10/10/2018
	)	
AECOM NATIONAL SECURITY PROGRAMS, INCORPORATED f/k/a McNEIL TECHNOLOGIES, INCORPORATED	)	
	)	
and	)	
	)	
CONTINENTAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Steven B. Berlin, Administrative Law Judge, United States Department of Labor.

David C. Barnett (Barnett, Lerner, Karsen & Frankel, P.A.), Ft. Lauderdale, Florida, for claimant.

Michael W. Thomas and Edwin B. Barnes (Thomas Quinn, LLP), San Francisco, California, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2015-LDA-00046) of Administrative Law Judge Steven B. Berlin 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 worked in Iraq for employer as an advisor from August 2010 to September 13, 2011, when employer's contract was terminated. He returned to the United States, unsuccessfully looked for a job, and received unemployment benefits from October 13, 2011 to February 16, 2013. Decision and Order at 5. In March 2014, Dr. Massel noted claimant's complaints of psychological symptoms,[1] and he referred claimant to Dr. Gutzman, a psychiatrist. JXs 8 at 40; 11 at 154-156. Claimant reported to Dr. Massel on June 1, 2014, that his symptoms had worsened; he referred claimant to Dr. Rahim, also a psychiatrist. JX 11 at 170; *see* JX 12 at 173. On July 23, 2014, Dr. Rahim diagnosed totally disabling major depressive disorder and post-traumatic stress disorder (PTSD) related to claimant's employment in Iraq. JXs 9 at 85-87; 12 at 173. Claimant filed a claim under the Act for compensation for temporary total disability benefits commencing July 23, 2014. The parties stipulated that claimant has been temporarily totally disabled by his work-related psychological injury since July 23, 2014, and is entitled to medical benefits under the Act. However, employer challenged claimant's entitlement to disability compensation. Decision and Order at 4; *see also id*. at 2 n.1.

In his decision, the administrative law judge found that claimant's depressive disorder and PTSD are occupational diseases. Decision and Order at 8-10. He determined that claimant voluntarily retired from the workforce as of February 16, 2013, when he last received unemployment compensation. *Id*. at 12-13. The administrative law judge found that claimant's "date of awareness" is July 23, 2014, as this is the date claimant became aware that he has a disabling, work-related injury. *Id*. at 13; *see* 33 U.S.C. §910(i).[2] The

[1] Claimant complained of depression, decreased concentration, excessive worry, insomnia, irritability, malaise, nervous/anxious behavior, and restlessness. JX 11 at 154.

[2] Section 10(i) provides:

> For purposes of this section [average weekly wage] with respect to a claim for compensation for death or disability due to an occupational disease which does not immediately result in death or disability, the time of injury shall be deemed to be the date on which the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability.

administrative law judge determined that, since claimant had been voluntarily retired for more than one year before July 23, 2014, claimant's compensation must be based on the National Average Weekly Wage as of July 23, 2014 pursuant to Section 10(d)(2)(B), 33 U.S.C. §910(d)(2)(B).[3] *Id*. at 14. He concluded that, as claimant's work injuries are not at maximum medical improvement, claimant is not entitled to an award of compensation pursuant to Sections 2(10)[4] and 8(c)(23)[5] because he does not have a permanent impairment. *Id*.

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[3] Section 10(d)(2) provides:

> [W]ith respect to any claim based on a death or disability due to an occupational disease for which the time of injury (as determined under subsection (i) of this section) occurs--
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> (A) within the first year after the employee has retired, the average weekly wages shall be one fifty-second part of his average annual earnings during the 52-week period preceding retirement; or
>
> (B) more than one year after the employee has retired, the average weekly wage shall be deemed to be the national average weekly wage (as determined by the Secretary pursuant to section 906(b) of this title) applicable at the time of the injury.

33 U.S.C. §910(d)(2).

[4] Section 2(10) provides in pertinent part:

> "Disability" . . . shall mean permanent impairment, determined (to the extent covered thereby) under the guides to the evaluation of permanent impairment promulgated and modified from time to time by the American Medical Association, in the case of an individual whose claim is described in section 910(d)(2) of this title.

33 U.S.C. §902(10)

[5] Section 8(c)(23) provides:

> [W]ith respect to a claim for permanent partial disability for which the average weekly wages are determined under section 910(d)(2) of this title, the compensation shall be $66^{2/3}$ per centum of such average weekly wages multiplied by the percentage of permanent impairment, as determined under

On appeal, claimant challenges the administrative law judge's findings that his injury is an "occupational disease" and that his average weekly wage is to be determined under Section 10(d)(2)(B) and Section 10(i). Claimant contends he is entitled to temporary total disability benefits from July 2014 based on his average weekly wage for employer. Employer responds that the administrative law judge's findings are supported by substantial evidence and in accordance with law. Claimant filed a reply brief.[6]

In *Suarez v. Service Employees Int'l, Inc.*, 50 BRBS 33 (2016), the Board summarized the law on defining an "occupational disease":

> "Occupational disease" has been defined as a disease caused by the hazardous conditions of employment, which are peculiar to the employee's employment as opposed to other employment generally. Hazardous activity need not be exclusive to the particular employment, but it must be sufficiently distinct from hazardous conditions associated with other types of employment or with everyday life. *Carlisle v. Bunge Corp.*, 33 BRBS 133 (1999), *aff'd*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000); *LeBlanc v. Cooper/T. Smith Stevedoring, Inc.*, 130 F.3d. 157, 31 BRBS 195(CRT) (5th Cir. 1997); *Gencarelle v. General Dynamics Corp.*, 892 F.2d 173, 23 BRBS 13(CRT) (2d Cir. 1989); 4 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law, §52.00 *et seq.* (2015). Typically, the onset of an occupational disease is gradual, not sudden. 33 U.S.C. §913(b)(2) (time for filing claim when disease *does not immediately result* in disability or death); *but see* Larson's §52.04[3] (as both types of injuries may be work-related, gradual onset is no longer necessary to distinguish "disease" from "accident").

Suarez, 50 BRBS at 37. In *Suarez*, the Board affirmed the finding that the claimant's gastrointestinal condition was not an "occupational disease" because he suffered immediate disabling symptoms. *See also Morgan v. Cascade General, Inc.*, 40 BRBS 9 (2006).

> the guides referred to in section 902(10) of this title, payable during the continuance of such impairment.

33 U.S.C. §908(c)(23).

[6] Claimant also filed as supplemental authority the recent decisions in *Moody v. Huntington, Ingalls Inc.*, 879 F.3d 96 (4th Cir. 2018), *rev'g* 50 BRBS 9 (2016) and *Christie v. Georgia-Pacific Co.*, 898 F.3d 952 (9th Cir. 2018), *rev'g* 51 BRBS 7 (2017).

In this case, the administrative law judge stated the requirements for an occupational disease as: 1) it must be a disease, 2) that is caused by hazardous or harmful conditions of employment, and 3) these employment conditions must be unique or peculiar to the claimant's employment. Decision and Order at 9-10. The administrative law judge found that claimant's major depressive disorder and PTSD are "diseases" because they are listed as "mental disorders" in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (5th ed. 1994) (DSM-V). *Id*. at 9.[7] The administrative law judge cited examples of claimant's wartime experiences in Iraq to find that these disorders were caused by external hazardous conditions which were "peculiar to employment in a war zone." *Id*. at 11.[8] Moreover, the administrative law judge found that the onset of claimant's work-related disability occurred several years after he stopped working in Iraq. Decision and Order at 10. Thus, he concluded claimant suffers from an "occupational disease" such that Section 10(i) determines the "time of injury" for purposes of claimant's average weekly wage.

We affirm the administrative law judge's finding that, in this case, claimant's psychological condition is an "occupational disease," although his interpretation of the DSM-V definition of "mental disorder" as equating to "disease" may be overbroad.[9] Section 2(2) of the Act defines "injury," but does not define "occupational disease."[10] As

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[7] The administrative law judge provided the following definition of "mental disorder" from the DSM-V:

> A mental disorder is a syndrome characterized by clinically significant disturbance in an individual's cognition, emotion regulation, or behavior that reflects dysfunction in the psychological, biological, or developmental processes underlying mental functioning. Mental disorders are usually associated with significant distress or disability in social, occupational, or other important activities.

DSM-V at 20.

[8] The administrative law judge found that claimant was exposed to enemy fire while aboard a helicopter, was exposed to rocket fire, saw dead and injured friendly soldiers, and experienced "other stressful and dangerous situations." Decision and Order at 10.

[9] Under the administrative law judge's interpretation, every "mental disorder" is a "disease." We do not believe it is necessary to reach this issue here.

[10] Section 2(2) of the Act states:

restated recently in *Suarez*, an occupational disease is often characterized by what it is not. For example, in *LeBlanc v. Cooper/T. Smith Stevedoring, Inc.*, 130 F.3d. 157, 31 BRBS 195(CRT) (5th Cir. 1997), the United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, addressed whether a latent disability due to a back injury caused by a fall from a ladder was an occupational disease. The court stated that the back injury was not an occupational disease because the disability did not result from a disease peculiar to the manual labor the claimant performed as a longshoreman. *Id.*, 130 F.3d at 160, 31 BRBS at 196-197(CRT). The court stated that lifting, bending and climbing ladders "are typical of the manual labor" required by many occupations, and that the claimant's injury resulted from a "traumatic physical impact, not from exposure to any external, environmentally hazardous conditions of employment." *Id.*, 130 F.3d at 160, 31 BRBS at 197(CRT). Thus, the claimant's average weekly wage was to be calculated at the time of the fall from the ladder and not at the time of disability several years later. *Cf. Johnson v. Director, OWCP*, 911 F.2d 247, 24 BRBS 3(CRT) (9th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991) (use average weekly wage at time of onset of latent disability due to carpal tunnel syndrome).

Therefore, we find it useful examine the characteristics of this claimant's psychological malady in view of how an "occupational disease" has been defined by the Fifth Circuit. *LeBlanc*, 130 F.3d at 160, 31 BRBS at 196-197(CRT); *see generally New Orleans Stevedores v. Ibos*, 317 F.3d 480, 36 BRBS 93(CRT) (5th Cir. 2003), *cert. denied*, 540 U.S. 1141 (2004). Claimant's condition is not due to a physical accident to his body and results from exposure to external, environmentally hazardous conditions of employment *LeBlanc*, 130 F.3d at 160, 31 BRBS at 197(CRT); *see, e.g., American National Red Cross v. Hagen*, 327 F.2d 559 (7th Cir. 1964) (physical harm not necessary for a psychological injury claim under the Act). The administrative law judge rationally found that claimant's working conditions were "peculiar to" his work in a war zone, i.e., they are not typical of the vast majority of jobs. *LeBlanc*, 130 F.3d at 160, 31 BRBS at 197(CRT).[11] In this respect, we reject claimant's contention that *LeBlanc* limits "occupational diseases" to cases in which hazards of the employment are "unknown." It

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> The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, ...

33 U.S.C. §902(2).

[11] We note that claimant's contract of employment specifically set forth such hazards as the conditions under which he would work. CX 14 at 372-373.

is if and how those hazards manifest themselves in any given employee that is unknown. The administrative law judge also properly determined that claimant was not aware that the stressful conditions to which he was exposed had harmed him until well after he last worked in Iraq, i.e., there was a delayed onset. Decision and Order at 11 n.17;[12] *cf. Ceres Marine Terminals, Inc. v. Director, OWCP [Jackson]*, 848 F.3d 115, 50 BRBS 91(CRT) (4th Cir. 2016) (immediate onset of psychological condition following accident). Thus, in claimant's case, as in, for example, an asbestosis case, the dangers of the employment were not known to be harmful to claimant until he was diagnosed, i.e., both the injury (disabling response to the harm) and the knowledge of it and its work-relatedness, occurred a significant period after the exposure. As the administrative law judge's findings of fact are supported by substantial evidence of record, and as his conclusion that claimant's psychological condition is an "occupational disease" comports with law, we affirm it. *See Bunge Corp. v. Carlisle*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000). Therefore, we affirm his finding that the claim comes within the purview of Section 10(i) of the Act because claimant suffers from an occupational disease which did not immediately result in disability. *See* n.2, *supra*.

Claimant next challenges the administrative law judge's finding that he is a "voluntary retiree" such that his average weekly wage must be determined pursuant to Section 10(d)(2)(B). "Retirement" is defined as a voluntary withdrawal from the workforce with no realistic expectation of return. 20 C.F.R. §702.601(c).[13] When an employee voluntarily retires and his occupational disease becomes manifest subsequent to his retirement, his recovery is limited to an award for permanent partial disability based on the extent of his medical impairment under the American Medical Association (AMA) guidelines and is not based on economic factors. *See* 33 U.S.C. §§902(10), 908(c)(23), 910(d)(2); n.4, 5, *supra*; *Tucker v. Thames Valley Steel*, 41 BRBS 62 (2007), *aff'd mem.*, 303 F. App'x 928 (2d Cir. 2008); *Morin v. Bath Iron Works Corp.*, 28 BRBS 205 (1994). Claimant is a voluntary retiree if he withdraws from the workforce for reasons

[12] The administrative law judge noted that Drs. Rahim and Conroe agreed that claimant's psychological symptoms arose over time after a delayed onset. JXs 8 at 42-44; 9 at 87-88; 10 at 107-112; 11 at 154.

[13] Section 702.601 states:

> [R]etirement shall mean that the claimant . . . has voluntarily withdrawn from the workforce and that there is no realistic expectation that such person will return to the workforce.

other than the condition which is the subject of the claim. *Hansen v. Container Stevedoring Co.*, 31 BRBS 155 (1997); *Morin*, 28 BRBS 205. Where, however, a claimant's retirement is due, at least in part, to his occupational disease, claimant is not a voluntary retiree and the post-retirement injury provisions at Sections 2(10), 8(c)(23) and 10(d)(2) do not apply. *Hansen*, 31 BRBS at 157. In such cases, where claimant establishes that he is unable to perform his prior job due at least in part to his occupational disease, he has established a prima facie case of disability. Under these circumstances, claimant may be entitled to an award based on his loss of wage-earning capacity. *See* 33 U.S.C. §908(a), (c)(21); *see Hansen*, 31 BRBS at 157-158; *Smith v. Ingalls Shipbuilding Div./Litton Systems Inc.*, 22 BRBS 46 (1989).

Claimant contends the administrative law judge erred in finding that he voluntarily retired on the basis that he was unsuccessful in finding work after his employment with employer ended September 2011. Claimant contends he put forth evidence that he became self-employed, he continued to look for work after his unemployment benefits ended, and he would have accepted employment if it had been offered.

In his decision, the administrative law judge found that claimant, who was born in 1957, unsuccessfully looked for work after returning from Iraq until he stopped receiving unemployment compensation on February 16, 2013. Decision and Order at 12. The administrative law judge found that, thereafter, claimant chose to become active in volunteer work in the Assyrian community, in helping at his son's restaurant, and in artistic pursuits, none of which provided any income. *Id*. The administrative law judge found that these activities "appear to be the choices of a person in active retirement" and that claimant did not testify he intended to resume his job search after his unemployment compensation was terminated. *Id*. The administrative law judge essentially concluded that the fact that claimant engages in activities, including assisting at his son's restaurant, does not negate a finding of "retirement." Accordingly, the administrative law judge concluded that claimant voluntarily retired after February 16, 2013. *Id*. at 12-13.

We affirm this finding. The administrative law judge noted there is no evidence of a job search after March 2012, but he inferred that claimant continued to look for work until February 16, 2013. At this point, his unemployment benefits, which were conditioned on a certified job search, ended. The administrative law judge rejected claimant's vague testimony that he continued to look for work thereafter. Decision and Order at 12. Although there is some evidence of record that claimant owned or co-owned some businesses, the administrative law judge noted the vague nature of this evidence and the lack of evidence of claimant's personal work at the businesses or of income from them.[14]

[14] Based on evidence of record, the administrative law judge questioned whether claimant's son was the "true owner" of the restaurant. Decision and Order at 5-6, 6 n.9.

It is well-established that, in arriving at his decision, the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963). The Board may not reweigh the evidence, but may assess only whether there is substantial evidence to support the administrative law judge's decision. *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir. 2003), *cert. denied*, 540 U.S. 1056 (2003); *Miffleton v. Briggs Ice Cream Co.*, 12 BRBS 445 (1980), *aff'd*, No. 80-1870 (D.C. Cir. 1981). Claimant's contention that the administrative law judge should have concluded from the evidence that he did not withdraw from the workforce misperceives the Board's role. Claimant has not established that the administrative law judge's findings and inferences are not rational or are unsupported by the evidence, and the Board may not reweigh the evidence or draw other inferences from the record. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). The administrative law judge must assess the sufficiency of the evidence offered for the proposition that claimant did not withdraw from the workforce. His finding in this case that claimant voluntarily withdrew from the workforce on February 16, 2013, is rational and supported by substantial evidence. *Jones v. U.S. Steel Corp.*, 22 BRBS 229 (1989);[15] *Smith*, 22 BRBS 46.

Claimant also contends he began experiencing psychiatric symptoms within six months of stopping work for employer in September 2011 and that his psychiatric injuries worsened within a month after his unemployment compensation ended in February 2013;

However, claimant testified in his deposition that he did not own any part of the business. JX 8 at 43 (p.70). Claimant started a business called Amnareh Entertainment in May 2013, but the administrative law judge noted there is no evidence that claimant performed any work for this company and claimant testified he has received no income other than unemployment compensation since returning from Iraq. Decision and Order at 7. Claimant is part owner of BTT, LLC, that owns and leases real estate in Arizona, but the business is not profitable and claimant is not involved in its operation. *Id.* at n.12. In any event, income from a business does not necessarily reflect a claimant's wage-earning capacity. *Seidel v. General Dynamics Corp.*, 22 BRBS 403 (1989). The inquiry in this respect concerns the degree to which any income represents salary to a claimant for his personal services. *Id.*

[15] In *Jones*, the Board held that a claimant can have some earnings and still be considered a retiree. In that case, the claimant worked part-time for four months for his son's business after his retirement and earned $1,700. The Board held, on the facts of that case, that the claimant's supplementing his Social Security benefits did not constitute a "return to the workforce" within the meaning of Section 702.601(c).

therefore, his work injuries contributed to his not working and render any "retirement" involuntary.

The administrative law judge rejected claimant's contention that he was disabled from the time he returned from Iraq. The administrative law judge gave weight to claimant's interrogatory answer that he was not suffering from a psychiatric condition or disabling injury when he stopped working. Decision and Order at 13; EX 29 at 185. The administrative law judge also gave weight to claimant's deposition testimony that he did not intend to stop working when the contract ended and would have accepted a job during the period he received unemployment compensation. Decision and Order at 13; JX 8 at 53. The administrative law judge determined from the medical evidence that the onset of claimant's symptoms was delayed. He found that the first mention of any significant psychological symptoms was Dr. Massel's March 2014 note that claimant had been suffering from depression for the past six to twelve months; claimant answered in an interrogatory that he began experiencing depression sometime in late 2013/early 2014.[16] Decision and Order at 13; JX 11 at 154; EX 29 at 186. Based on this evidence, the administrative law judge found that claimant's symptoms initially became manifest no earlier that September 2013.[17] Decision and Order at 13. He found that claimant became unable to work on account of his work injuries on July 23, 2014, when claimant was diagnosed by Dr. Rahim as totally disabled due to his psychiatric conditions. *Id.*; JX 9 at 87. We affirm this finding as it is supported by substantial evidence. *Jones*, 22 BRBS 229; *Smith*, 22 BRBS 46; *Coughlin v. Bethlehem Steel Corp.*, 20 BRBS 193 (1988).

Claimant's work-related disability due to his occupational disease became manifest more than one year after his voluntary retirement. Therefore, we affirm the administrative

[16] Dr. Massel is claimant's internist. JX 11. The administrative law judge noted that claimant complained to Dr. Massel of chronic intermittent anxiety in March 2012 and reported in June 2012 that the anxiety was improving. Decision and Order at 7; JX 11 at 144, 146. In August 2012 and September 2013, claimant "denied depression" to Dr. Massel, and anxiety is not noted. JX 11 at 150, 154. The administrative law judge found there is no evidence that these episodes of intermittent anxiety were related to his employment in Iraq or affected his ability or desire to work. Decision and Order at 13 n.24.

[17] We reject claimant's extrapolation from his March 2014 report of depression to Dr. Massel that he exhibited symptoms in March 2013, shortly after his unemployment compensation was terminated, as the administrative law judge permissibly found from this evidence and claimant's interrogatory answer that his symptoms were first manifest in September 2013, notwithstanding Dr. Massel's notes. *See* n.16, *supra*; *see generally Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22(CRT) (5th Cir. 1994).

law judge's determination that claimant's average weekly wage must be calculated based on the applicable National Average Weekly Wage pursuant to Section 10(d)(2)(B).[18] As claimant has not been diagnosed with a permanent impairment due to his occupational disease pursuant to the AMA *Guides to the Evaluation of Permanent Impairment*, we affirm the administrative law judge's denial of benefits, pursuant to Sections 2(10) and 8(c)(23). *Morin*, 28 BRBS 205. Because claimant is a voluntary retiree with an occupational disease, his entitlement to disability compensation is statutorily limited to an award under Section 8(c)(23). 33 U.S.C. §902(10). Thus, *Moody v. Huntington, Ingalls Inc.*, 879 F.3d 96 (4th Cir. 2018) and *Christie v. Georgia-Pacific Co.*, 898 F.3d 952 (9th Cir. 2018) are not applicable in this case.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

[18] If claimant's date of awareness occurred within one year after his retirement, or if claimant was disabled by his occupational disease before his date of awareness/manifestation, his average weekly wage could be calculated by one of the methods in subsections (a), (b), or (c) of Section 10 of the Act, 33 U.S.C. §910(a)-(c). *See* 33 U.S.C. §910(d)(2)(A); *see generally Roberts v. Sea-Land Services, Inc.*, 566 U.S. 93, 106 n.7, 46 BRBS 15, 19 n.7(CRT) (2012).