U.S. Department of Labor

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

BRB No. 18-0520

CARLOS M. CAJEIRA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 02/19/2019
KINDER MORGAN LIQUID TERMINAL	)	
	)	
and	)	
	)	
ACE AMERICAN INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Jason T. Ellis (Rudolph, Israel & Ellis, P.A.), Jacksonville, Florida, for claimant.

John J. Rabalais and Gabriel E. F. Thompson (Rabalais Unland), Covington, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (2015-LHC-01848) of Administrative Law Judge Daniel F. Solomon 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.* (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).

This case is before the Board for the second time. To briefly reiterate the facts, claimant filed a claim for temporary total disability benefits from September 18, 2014 through April 8, 2016, for a neck injury sustained at work.[1] In his initial Decision and Order, the administrative law judge found claimant established a prima facie case that his neck condition is related to the work accident, 33 U.S.C. §920(a), and that employer did not rebut the presumption. He further found that claimant could not return to his usual work, but that, except for the period claimant suffered from shingles, employer could have accommodated claimant's restrictions with the position of a pumphouse operator at its New Jersey facility with no loss in wage-earning capacity. The administrative law judge awarded claimant temporary partial disability benefits only from August 1 through 10, 2014. 33 U.S.C. §908(e). During the period he found claimant unable to work due to shingles, February 19 through March 26, 2015, the administrative law judge awarded claimant temporary total disability benefits. 33 U.S.C. §908(b).

Both claimant and employer appealed the administrative law judge's Decision and Order. The Board affirmed the administrative law judge's finding that claimant's shingles constituted a compensable harm resulting from the work injury. The Board vacated the administrative law judge's denial of disability benefits from September 18, 2014 through April 8, 2016, and his award of temporary total disability benefits from February 19 through March 26, 2015, and remanded the case for him to resolve conflicts in the relevant

[1] Following a July 17, 2014 work incident in which claimant struck his head on a metal bar, he was diagnosed with a cervical strain and was restricted from "heavy exertion" until August 11, 2014, when he was released to return to full duty without restrictions. EX 22 at 12-14; *see* Tr. at 65. Claimant returned to work in his pre-injury position as an "alcohol lead man" but was soon re-assigned to the position of a "pumphouse operator." Tr. at 35-36, 66. On September 15, 2014, claimant was given work restrictions which were to remain in effect until he had been evaluated by a neurosurgeon. EX 22 at 15, 16. Claimant continued working for employer until September 17, 2014, when he allegedly experienced an exacerbation of his symptoms. In October 2014, claimant relocated from New Jersey to Florida, where he continued to seek medical care. On February 19, 2015, claimant was diagnosed with shingles after he underwent a cervical epidural steroid injection; this condition resolved itself by March 26, 2015. On April 8, 2016, claimant was released for full duty, but he did not return to work at employer's New Jersey facility until May 9, 2016.

evidence regarding the extent of claimant's post-injury disability. *Cajeira v. Kinder Morgan Liquid Terminal,* BRB Nos. 17-0366/A (Jan. 29, 2018) (unpub.), slip op. at 6.

On remand, the administrative law judge found that claimant was not disabled after September 17, 2014, because employer could have accommodated claimant's restrictions with a job at its facility, with no loss of wage-earning capacity. In addition, the administrative law judge found that claimant did not establish his shingles were caused by his work-related injury. *See* Decision and Order on Remand at 9 – 10. Consequently, the administrative law judge denied claimant's claim for additional benefits.

On appeal, claimant challenges the administrative law judge's denial of his claim for additional disability benefits. Employer responds, urging affirmance of the administrative law judge's decision on remand in its entirety.

Once, as here, claimant has established that he is unable to return to his usual work due to the work injury, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *See New Orleans (Gulfwide) Stevedores v. Turner,* 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also Newport News Shipbuilding & Dry Dock Co. v. Tann,* 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988). Employer can meet its burden by offering a claimant a suitable job in its facility. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996); *Buckland, v. Dep't of the Army/NAF/CPO*, 32 BRBS 99 (1997). 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). Moreover, in order to meet its burden by offering claimant a job in its facility, the job must be actually available to claimant. *See Mendez v. Nat'l Steel & Shipbuilding Co.,* 21 BRBS 22 (1988).

We affirm the administrative law judge's finding that employer established the availability of suitable alternate employment at its New Jersey facility from September 18, 2014 through February 26, 2015. Claimant returned to work for employer in August 2014 in a modified position and was soon re-assigned to a position as a pumphouse operator. Claimant continued to work in this new position until he left work on September 17, 2014, after an exacerbation of his neck pain. In addressing claimant's ability to work as a pumphouse operator subsequent to September 17, 2014, the administrative law judge described the duties of pumphouse operator[2] and screener positions. He stated that

[2] On remand, the administrative law judge issued an Order to Comment wherein he, inter alia, entered into the record the United States Department of Labor's *Dictionary of Occupational Titles. See Cajeira*, slip op. at 6. As this publication was entered into evidence and the parties had the opportunity to comment on its admission, we reject claimant's contention that the administrative law judge erred in citing it for the duties of a

claimant had the following conditions: no lifting more than 50 pounds; no pushing or pulling in excess of 50 pounds; no reaching above shoulder level; and should perform ground level work. Decision and Order on Remand at 4. The administrative law judge set forth in detail the testimony of Messrs. Hitchens and Warner, employer's managers, both of whom testified that claimant's pumphouse operator position could have been accommodated to account for claimant's restrictions and that a screener position was available within claimant's restrictions. *Id.* at 3. Moreover, the administrative law judge noted the absence of any medical evidence until February 2015 establishing that claimant's post-September 2014 physical restrictions would have precluded his performing the work described by Mr. Hitchens. *Id.* at 7.

The administrative law judge permissibly credited the testimony of employer's managers that claimant's work restrictions could have been accommodated with available jobs at its facility. *See generally Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995). Thus, substantial evidence supports the finding that employer established the availability of suitable alternate employment from September 17, 2014 through February 26, 2015. *Darby*, 99 F.3d 685, 30 BRBS 93(CRT). We affirm the conclusion that claimant is not entitled to benefits from September 17, 2014 through February 26, 2015. *See Peele v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 133 (1987).

We cannot affirm, however, the administrative law judge's finding regarding the extent of claimant's disability between February 27, 2015 and April 8, 2016.[3] Claimant's physical restrictions were increased on February 26, 2015 to include no lifting from the floor to waist over 20 pounds, no lifting waist to overhead over 10 pounds, and no pushing or pulling greater than 20 pounds. CX 4 at 6–7. While Mr. Hitchens, when informed at his deposition of claimant's increased physical restrictions, testified that employer could have accommodated claimant, *see* EX 6 at 12–15, Ms. Franco, employer's workers' compensation analyst, wrote in a letter dated April 17, 2015 that she had been informed that the February 26, 2015 restrictions placed on claimant "could not be accommodated." CX 4 at 2. As the administrative law judge did not address Ms. Franco's letter, which is in direct contrast to Mr. Hitchens' testimony, we vacate the administrative law judge's finding that employer established the availability of suitable alternate employment in its facility

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pumphouse operator. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997) (administrative law judge may rely on standard occupational descriptions, such as those in the *Dictionary of Occupational Titles*, to fill out the requirements of prospective jobs).

[3] Claimant was released for full-duty work on April 8, 2016.

subsequent to February 26, 2015, and we remand the case for the administrative law judge to address all the relevant evidence on this issue.

Lastly, we will address the administrative law judge's finding on remand that claimant's shingles is not compensable under the Act. On remand, the administrative law judge reversed his previous finding on this issue, which had been affirmed by the Board, and determined that claimant failed to prove that this condition was work-related. *See* Decision and Order on Remand at 10.

Claimant underwent a spinal facet injection on February 9, 2015, which employer agreed was reasonable and necessary treatment for his work-related injury. On February 19, 2015, claimant was diagnosed with shingles, which subsequently resolved on March 26, 2015. In his initial decision, the administrative law judge summarily concluded that claimant was entitled to the Section 20(a), 33 U.S.C. §920(a), presumption with regard to this condition, and that employer did not rebut the presumption. *See* Decision and Order at 18, 19- 21. Employer appealed this finding and the Board affirmed.[4] *See Cajeira,* slip op. at 3–4.

As the Board specifically affirmed the finding that claimant's shingles was a work-related condition, the administrative law judge erred in addressing this issue on remand. *See generally* 20 C.F.R. §802.405(a). We reiterate that Dr. Hurford stated it was "suspicious that [claimant] developed shingles after having that facet injection," and that it was "likely the two are related." EX 3 at 34. As this evidence is sufficient to establish that claimant's medical treatment *could have caused* shingles, the Section 20(a) presumption applies. *See, e.g., C&C Marine Maint. Co. v. Bellows*, 538 F.3d 293, 42 BRBS 37(CRT) (3d Cir. 2008). As employer did not produce any evidence that the shingles was not related to claimant's work-related medical treatment, it did not rebut the Section 20(a) presumption. We therefore reverse the administrative law judge's finding on this issue and modify his decision to reflect the Board's prior determination that claimant's shingles constitutes a compensable harm resulting from the work injury. *See Cajeira,* slip op. at 4. On remand, the administrative law judge should address claimant's disability status from February 19 through March 26, 2015.

[4] Employer also appealed the finding that claimant was totally disabled during the period. The Board vacated this finding and remanded as the administrative law judge had not addressed all of the evidence relevant to this issue. *See Cajeira,* slip op. at 6.

In sum, we reverse the finding that claimant's shingles is not a compensable harm, vacate the denial of disability benefits from February 19, 2015 through April 7, 2016, and remand the case for further consideration consistent with this opinion. In all other respects, the Decision and Order on Remand is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge