U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0403

GRACE BLOCHER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: May 27, 2016
	)	
DEPARTMENT OF THE ARMY (NAF)	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

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

Terri L. Herring-Puz (Welch & Condon), Tacoma, Washington, for claimant.

Raymond H. Warns, Jr., and Dana O'Day-Senior (Holmes, Weddle & Barcott, P.C.), Seattle, Washington, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Granting Summary Decision (2015-LHC-01080) 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 Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *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 began working for employer in 2009 as a laundry machine operator. Claimant alleges she was injured on May 20, 2012, due to work-related cumulative trauma to both shoulders resulting from the repetitive movement of pulling laundry out of the washers and dryers. CXs B, E, F. Claimant underwent surgery on January 22, 2013.

Employer paid claimant temporary total disability compensation without an award from January 22, 2013 through May 12, 2014, but controverted the claim on May 13, 2014, based on a May 8, 2014 labor market survey which employer contended established the availability of suitable alternate employment.[1] CXs B, E. After that date, employer paid claimant unscheduled permanent partial disability benefits based on the wages of the jobs identified in the labor market survey.[2] *Id*.; *see also* 33 U.S.C. §908(c)(21), (h).

On May 20, 2014, claimant's vocational counselor submitted a proposed vocational rehabilitation plan to the Department of Labor's Office of Workers' Compensation Programs (DOL, OWCP). The objective of the program was to secure employment for claimant as an office clerk, jobs which, at the time the plan was approved, paid an average of $14.95 per hour. The program was to run from July 1, 2014 through June 24, 2015, with 90 days of placement services (through September 24, 2015) to follow. CX F. Claimant would study at South Puget Sound Community College, take five credits in summer 2014, 13 credits in fall 2014, 10 credits in winter 2015, and 10 credits in spring 2015. *Id*. The OWCP notified employer of the proposed plan on June 3, 2014. CX G. Employer did not respond, and the OWCP approved the plan on June 17, 2014. *Id*.

On March 26, 2015, claimant requested that this matter be referred to the Office of Administrative Law Judges for resolution of the sole issue of her entitlement to total disability benefits while she was enrolled in the OWCP-approved vocational program. Less than one month later, on April 24, 2015, claimant filed a motion for summary decision. Employer sought a 15-day extension for filing an opposition to the motion,

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[1] Claimant underwent a physical capacity evaluation on April 30, 2014, which established that she is capable of performing work at the medium level of physical demand, but noted restrictions on lifting overhead, work above shoulder level, and on lifting and carrying. CX C. On June 6, 2014, claimant's treating physician, Dr. McKay, concurred with the findings and recommendations of the physical capacity evaluation. *Id*. Dr. McKay placed claimant's condition at maximum medical improvement on February 6, 2014, and restricted claimant from lifting and carrying more than 10 pounds and from lifting above shoulder level. CX F at 4.

[2] Claimant graduated from high school in the Philippines before immigrating to the United States in 2001. Cl. Declaration at 3. English is claimant's second language. *Id*. Prior to working for employer, she worked as a personal caregiver for approximately six years. CX F. Employer's vocational consultant, John Berg, identified seven jobs that paid between $9.32 and $12 per hour. Mr. Berg found claimant employable in the open market and able to earn $480 per week as an at-home companion for senior citizens. CX D.

citing, specifically, the need to obtain updated vocational evidence. The administrative law judge granted employer's motion, and employer submitted a follow-up letter from vocational consultant, John Berg.[3] The administrative law judge granted claimant's motion for summary decision, finding that no issue of material fact existed as to claimant's inability to work during her vocational retraining program. Thus, he awarded claimant permanent total disability benefits from July 1, 2014 through the date claimant completes her DOL-approved program.

Employer appeals the administrative law judge's granting of claimant's motion for summary decision. Claimant responds, urging affirmance. Employer has filed a reply brief. Employer asserts the administrative law judge misapplied the summary decision standard by failing to view the evidence in the light most favorable to it as the non-moving party. We agree.

The purpose of the summary decision procedure is to promptly dispose of actions in which there is no genuine issue as to any material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1, 3-4 (1990); 29 C.F.R. §§18.40, 18.41;[4] *see also O'Hara v. Weeks Marine*, 294 F.3d 55, 61 (2d Cir. 2002); *Buck v. General Dynamics Corp.*, 37 BRBS 53, 54 (2003); *Dunn v. Lockheed Martin Corp.*, 33 BRBS 204 (1999). In determining whether to grant a party's motion for summary decision, the administrative law judge "must view the evidence through the prism of the [parties'] substantive evidentiary burdens." *Anderson*, 477 U.S. at 254; *In re Oracle Corp. Sec. Litig. v. Oracle Corp.*, 627 F.3d 376, 387 (9th Cir. 2010); *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986).[5] To

[3] Mr. Berg opined that claimant could perform the duties of a laundry worker or caregiver, that her 101 credits of schooling with a 3.10 grade-point average qualifies her for office help jobs, and that she could have worked part time since Spring 2014. EX 1. Moreover, Mr. Berg stated that "Receptionist jobs are often available part time at many companies, medical, dental offices. I provided a direct open lead to her [in] 5/2014…." *Id*.

[4] The Rules of Practice and Procedure Before the Office of Administrative Law Judges (OALJ) are applicable to proceedings under the Longshore Act unless they are "inconsistent with a rule of special application as provided by statute, executive order, or regulation." 29 C.F.R. §18.1 (2014). These rules were recently amended, with the final regulations becoming effective on June 18, 2015, after the filing of the documents and the decision giving rise to this appeal.

[5] "[I]f the movant bears the burden of proof on an issue, either because he is the plaintiff or as a defendant he is asserting an affirmative defense, he must establish beyond peradventure *all* of the essential elements of the claim or defense to warrant judgment in

defeat a motion for summary decision, the non-moving party must "come forward with specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd., v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). If the administrative *could* find for the non-moving party, or if it is necessary to weigh evidence or make credibility determinations on the issue presented, summary decision is inappropriate. *Anderson*, 477 U.S. at 248; *Walker v. Todd Pac. Shipyards*, 47 BRBS 11 (2013), *vacating in pert. part on recon.*, 46 BRBS 57 (2012); *Morgan v. Cascade General, Inc.*, 40 BRBS 9, 13 (2006); *see also Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991) (factfinder must draw all reasonable inferences in favor of the party opposing summary decision).

In her motion for summary decision, claimant averred that no genuine issue of material fact existed as to her inability to work while participating in the approved vocational program.[6] As employer previously produced a labor market survey which, for purposes of her summary decision motion, claimant conceded established suitable alternate employment, it was claimant's burden, as the party moving for summary decision on an issue on which she would bear the burden of persuasion at trial, to establish "beyond peradventure" that her participation in the DOL-approved program reasonably precluded her from securing the identified suitable alternate employment.[7]

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his favor." *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986) (emphasis in original).

[6] To be entitled to total disability benefits, a claimant bears the burden of establishing that suitable alternate employment is not available to her due to her participation in a rehabilitation program approved by the DOL. *Castro v. General Constr. Co.*, 401 F.3d 963, 39 BRBS 13(CRT) (9th Cir. 2005), *cert. denied*, 546 U.S. 1130 (2006); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Brickhouse]*, 315 F.3d 286, 36 BRBS 85(CRT) (4th Cir. 2002); *Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994), *aff'g* 27 BRBS 192 (1993); *Kee v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 221 (2000); *Gregory v. Norfolk Shipbuilding & Dry Dock Co.*, 32 BRBS 264 (1998). Claimant alleged entitlement to total disability benefits for the duration of her program because the time demands of the program rendered the jobs contained in employer's labor market survey unsuitable and not realistically available to her. Cl. Mot. for Summ. Dec. at 9-10. In opposing the motion, employer argued that claimant is capable of working "at least on a part-time basis, while successfully completing her OWCP-approved vocational training program" and offered evidence. Emp. Opp. to Summ. Dec. at 8.

[7] Claimant can meet this burden by establishing, *inter alia*, that the time needed for her commuting, classes, and studying effectively precludes her from obtaining

Fontenot, 780 F.2d at 1194; *see Kee v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 221 (2000). Rather than apply this standard, however, the administrative law judge erroneously placed the burden of proof on employer, the non-moving party, to prove the existence of specific jobs that could accommodate claimant's class schedule and weighed evidence in claimant's favor. *Morgan*, 40 BRBS 9; *see* Decision and Order at 4, 7. Specifically, the administrative law judge found, to employer's detriment, that Mr. Berg's opinion that claimant was capable of working "at least part time" while successfully completing her program was not reasoned or persuasive. Decision and Order at 7. Further, despite claimant's concession that, for purposes of her summary decision motion, employer's labor market survey established suitable alternate employment, the administrative law judge found the survey did not establish suitable alternate employment because all the jobs were full-time positions.[8] Decision and Order at 7; *Brockington*, 903 F.2d 1523. Thus, crediting claimant's written declaration that the time demands of her program equate to "full-time work,"[9] and based on the absence of a dispute as to the remaining *Castro* factors,[10] the administrative law judge found claimant entitled to summary decision as a matter of law.

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suitable alternate employment, or by proving that she diligently sought employment while in the program, but was unable to secure it. *See Castro*, 401 F.3d at 972, 39 BRBS at 19-20(CRT); *Kee*, 33 BRBS at 223; *Brown v. Nat'l Steel & Shipbuilding Co.*, 34 BRBS 195 (2001).

[8] Employer asserts: 1) the cashier position at Tacoma Goodwill identified physical requirements for both full-time and part-time positions; and 2) the companion position at Home Instead Senior Care may have offered a flexible schedule as work assignments would be in patients' homes as assigned. CX D at 6, 11.

[9] Specifically, the administrative law judge found, "[t]here is no dispute that the program requires the equivalent of full-time work, when considering the extent of the classes and preparation required as well as the additional time [c]laimant needs for homework and tutoring because English is not her first language." Decision and Order at 7.

[10] The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has stated that a number of factors may be relevant to determining whether an individual may receive benefits while enrolled in a rehabilitation program. "These include . . . whether completion of the program would benefit the claimant by increasing his wage-earning capacity; and whether the claimant showed full diligence in the program." *Castro*, 401 F.3d at 972, 39 BRBS at 19-20(CRT).

We agree with employer that the administrative law judge failed to draw inferences in its favor as required and erroneously weighed evidence in favor of claimant. Thus, the administrative law judge erred in granting claimant's motion for summary decision. *See Walker*, 47 BRBS 11; *Morgan*, 40 BRBS at 13; *Brockington,* 903 F.2d 1523. Summary decision is legally inappropriate on the facts of this case because employer, the non-moving party, offered sufficient evidence to counter claimant's motion for summary decision, in the form of Mr. Berg's statement that claimant could work on a part-time basis and that jobs are available to her given her enrollment in community college. *See* n.3, 8, *supra*; *Walker*, 47 BRBS 11. The administrative law judge was required to draw inferences from this evidence in favor of employer. *Irby v. Blackwater Security Consulting,* 44 BRBS 17 (2010). Doing so leads to the conclusion that employer's evidence raised the existence of a genuine issue of material fact on an issue on which claimant bears the burden of persuasion at trial. *Id.* We, therefore, reverse the administrative law judge's Decision and Order Granting Summary Decision and the consequent award of benefits. The case is remanded to the administrative law judge to hold an evidentiary hearing on the disputed issues. 33 U.S.C. §919(d); *Walker*, 47 BRBS at 12; 20 C.F.R. §§702.331-350u; 29 C.F.R. §§18.50-65 (OALJ discovery rules).

Accordingly, the administrative law judge's Decision and Order Granting Summary Decision is reversed, and the case is remanded for further proceedings.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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GREG J. BUZZARD
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge