U.S. Department of Labor

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

BRB No. 18-0281

DORRIS F. HENDRICKS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 11/07/2018
HUNTINGTON INGALLS, INCORPORATED (PASCAGOULA OPERATIONS)	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision On Remand of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Isaac H. Soileau, Jr. (Soileau & Associates, LLC), New Orleans, Louisiana, for claimant.

Donald P. Moore (Franke & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision on Remand (2015-LHC-00731, 2015-LHC-00735) of Administrative Law Judge Patrick M. Rosenow 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 has been before the Board previously. Claimant was diagnosed with work-related carpal tunnel syndrome, underwent surgery for that condition in November 2006 and January 2007, and was assigned a ten percent impairment rating to each upper extremity. On July 22, 2009, claimant sustained a work-related injury to his right knee for which he underwent surgery on January 13, 2010, and was assigned a five percent right leg impairment. Claimant returned to work for employer, but retired on December 17, 2010. On April 19, 2011, claimant filed a claim under the Act asserting that he was forced to retire because of his injuries.

In his initial Decision and Order, the administrative law judge denied the claim for permanent total disability benefits. He found that claimant's average weekly wage at the time of his 2006 injury was $779.05 and was $873.58 at the time of his 2009 injury. As employer had paid claimant benefits for his 2006 injury based on a lower average weekly wage than that calculated by the administrative law judge, the administrative law judge awarded claimant additional benefits for his 2006 arm injuries. With regard to claimant's 2009 knee injury, employer had paid claimant benefits based on the average weekly wage confirmed by the administrative law judge, $873.58.

On claimant's appeal, the Board affirmed the administrative law judge's denial of the claim for permanent total disability compensation and the calculation of claimant's 2009 average weekly wage. While affirming the administrative law judge's use of 51 weeks as the divisor in determining claimant's 2006 average weekly wage, the Board vacated the calculation of that wage, and remanded the case for the administrative law judge to address the conflicting wage evidence in Employer's Exhibits 18 and 20. *Hendricks v. Huntington Ingalls, Inc. (Pascagoula Operations),* BRB No. 16-0370 (Mar. 24, 2017) (unpub.).

On remand, the administrative law judge reopened the record over claimant's objections, noting that employer had filed a motion for modification pursuant to Section 22 of the Act, 33 U.S.C. §922. Decision on Remand at 2 – 3. After employer submitted additional evidence, the parties agreed that Employer's Exhibit 18, rather than Employer's Exhibit 20, is more reliable and accurate with regard to the wages paid to claimant in the year preceding his 2006 injury, $41,507.64.[1] An issue arose, however, with regard to the divisor to be used to calculate claimant's average weekly wage based on those wages.

[1] Employer's Exhibit 18 is a statement of claimant's earnings in the 52 weeks preceding his 2006 injury, while Employer's Exhibit 20 is a daily accounting of claimant's earnings during that period. The administrative law judge's initial decision relied on the gross earnings reported in Employer's Exhibit 20, while his decision on remand relied on the gross earnings reflected in Employer's Exhibit 18.

Specifically, claimant argued that, as the Board had affirmed the use of a 51-week divisor, that figure should be used to result in an average weekly wage of $813.88. Employer, in contrast, asserted that the implicit scope of the Board's remand to the administrative law judge included all factors involved in calculating claimant's average weekly wage, and that as Employer's Exhibit 18 was to be used rather than Employer's Exhibit 20, the proper divisor was 52 weeks, resulting in an average weekly wage of $798.22.[2]

In his Decision on Remand, the administrative law judge found that although the Board had affirmed his use of 51 weeks as the divisor for calculating claimant's 2006 average weekly wage, the evidence had not been fully developed regarding claimant's pre-injury earnings until the record was reopened on remand. After noting the broad discretion afforded him in determining claimant's average weekly wage under Section 10(c), 33 U.S.C. §910(c), the administrative law judge concluded that the most reasonable estimate of claimant's annual earnings at the time of his 2006 injury is calculated by dividing the wages paid claimant in the year preceding that injury, $41,507.64, by 52, to result in an average weekly wage of $798.22. Decision on Remand at 9.

On appeal, claimant challenges the administrative law judge's decision to use 52 weeks as the divisor in calculating his average weekly wage. Employer responds, urging affirmance. Claimant has filed a reply brief.

Claimant contends that the law of the case doctrine precluded the administrative law judge from reconsidering on remand the divisor to be used in calculating his average weekly wage at the time of his 2006 injury. Claimant argues that the Board's remand instructions directed the administrative law judge to determine only the correct gross earnings figure and that, as the Board specifically affirmed the use of 51 weeks as the divisor, the Board did not direct the administrative law judge to revisit this issue on remand. In its response brief, employer argues that because it filed a motion for modification on

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[2] At issue, therefore, is the sum of $1,415.66, representing the difference between claimant's calculation using a divisor of 51 and the administrative law judge's use of a divisor of 52:

$41,507.64 ÷ 51 = $813.88

$41,507.64 ÷ 52 = $798.22

$813.88 - $798.22 = $15.66

$15.66 x 90.4 weeks = $1,415.66

September 29, 2017, and the administrative law judge subsequently reopened the record for the submission of additional evidence on the issue of claimant's average weekly wage, the administrative law judge correctly considered all relevant evidence in calculating claimant's 2006 average weekly wage.

Contrary to claimant's contentions, the "law of the case" doctrine does not bind the administrative law judge where the underlying facts have changed. *See Manente v. Sea-Land Service, Inc.*, 39 BRBS 1 (2004). Pursuant to Section 22 of the Act, the factfinder may, inter alia, admit new evidence and reconsider an issue of fact. An administrative law judge has broad discretion to correct mistakes of fact "whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *see also Banks v. Chicago Grain Trimmers Ass'n, Inc.,* 390 U.S. 459 (1968). Thus, Section 22 displaces the notions of finality inherent in the law of the case doctrine. *See, e.g., Island Operating Co., Inc. v. Director, OWCP [Taylor]*, 738 F.3d 663, 47 BRBS 51(CRT) (5th Cir. 2013); *Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 36 BRBS 35(CRT) (7th Cir. 2002); *R.V. [Vina] v. Friede Goldman Halter,* 43 BRBS 22 (2009). Moreover, the administrative law judge may modify findings of fact that have been affirmed on appeal. *Hudson v. Southwestern Barge Fleet Services, Inc.*, 16 BRBS 367 (1984).

On remand, the administrative law judge re-opened the record for the submission of additional evidence in order to address the discrepancies between Employer's Exhibit 18 and Employer's Exhibit 20. The parties subsequently agreed that Employer's Exhibit 18 properly documented claimant's earnings in the year prior to his injury. Pursuant to Section 22, the administrative law judge also had the discretion to revisit the divisor, especially in view of the change in the underlying factual basis for the calculation of claimant's 2006 average weekly wage. *See generally Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied,* 394 U.S. 976 (1969); *Hudson*, 16 BRBS 367. Therefore, we reject claimant's contention that the administrative law judge was precluded by the Board's prior decision from addressing the divisor.

We further reject claimant's contention that the administrative law judge's use of a 52-week divisor is not supported by substantial evidence. It is well established that the main objective of Section 10(c), 33 U.S.C. §910(c), is to arrive at a sum which reasonably represents the claimant's annual earning capacity at the time of his injury, *see James J. Flanagan Stevedores, Inc. v. Gallagher,* 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000); *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 32 BRBS 91(CRT) (5th Cir. 1998); *SGS Control Serv. v. Director, OWCP,* 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1991), and that the administrative law judge has broad discretion in determining a claimant's annual earning capacity under Section 10(c). *See Louisiana Ins. Guar. Ass'n v. Bunol,* 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000).

Section 10(d)(1) of the Act, 33 U.S.C. §910(d)(1), states that an employee's average weekly wage "shall be one fifty-second part of his average annual earnings." As claimant acknowledges, Employer's Exhibit 18 documents his earnings "in the 52-week period preceding his 2006 injury." Cl. Br. at 8. The administrative law judge found that this exhibit documents that claimant received his regular pay for two weeks when the shipyard was closed due to Hurricane Katrina. Contrary to claimant's contention, the administrative law judge permissibly concluded that these weeks should be included in the divisor as "weeks worked" as claimant received his regular wages. Decision on Remand at 8; *see generally Ingalls Shipbuilding Inc. v. Wooley*, 204 F.3d 616, 34 BRBS 12(CRT) (5th Cir. 2000). Therefore, claimant has not demonstrated error in the administrative law judge's calculation of his annual earning capacity by dividing his gross earnings in the year prior to his injury by 52. 33 U.S.C. §910(d)(1); *see Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 34 BRBS 44(CRT), *modified on other grounds on reh'g,* 237 F.3d 409, 35 BRBS 26(CRT) (5th Cir. 2000); *Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT); *Hall*, 139 F.3d 1025, 32 BRBS 91(CRT). As it is supported by substantial evidence of record, we affirm the administrative law judge's calculation of claimant's 2006 average weekly wage as $798.22 ($41,507.64 ÷ 52).

Accordingly, the administrative law judge's Decision on Remand is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge