BRB No. 07-0280

H.K. Claimant-Petitioner v. L-3 COMMUNICATIONS-VERTEX AEROSPACE and ACE AMERICAN INSURANCE COMPANY Employer/Carrier-Respondents	)	DATE ISSUED: 09/21/2007 DECISION and ORDER

Appeal of the Decision and Order Awarding Limited Benefits of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Kurt Gronau, Alexandria, Virginia, for claimant.

Keith L. Flicker (Flicker, Garelick & Associates, LLP), New York, New York, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Awarding Limited Benefits (2006-LDA-00107) of Administrative Law Judge Clement J. Kennington rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' 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 findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, a heavy-duty mechanic, injured his back while changing truck wheels in Iraq on October 5, 2005. After initial treatment in Iraq, claimant returned to the United States on November 23, 2005, where he was treated for a cervical and lumbar strain. Claimant was released by Dr. Fowler to full-duty work with no restrictions on December 30, 2005, and January 5, 2006, CX 5 at 20, 22, and he returned to Iraq in January or February of 2006. Claimant alleges that he again injured his back in either March or April after lifting a 20 pound battery and/or an armored door. Claimant returned to the United States on May 1, 2006, and was terminated by employer on June 8, 2006, for failure to return to work.[1] Claimant sought temporary total disability compensation based on an average weekly wage of $2,296.05, as well as medical benefits for pain management.

In his decision, the administrative law judge found that claimant established the existence of only one injury, that occurring on October 5, 2005, which had fully resolved as of December 2005. Thus, as employer paid temporary total disability benefits through December 29, 2005, the administrative law judge denied claimant any additional compensation. In addition, the administrative law judge found that claimant is not in need of pain management. The administrative law judge found that claimant's average weekly wage is $1,445.41.

Claimant appeals, generally contending that the administrative law judge erred in finding he is not entitled to further compensation. Claimant also contends that the administrative law judge erred in denying medical benefits and in calculating his average weekly wage. Employer responds, urging affirmance of the administrative law judge's decision.

The administrative law judge found that claimant failed to establish that any incidents occurred at work other than the one on October 5, 2005. The administrative law judge also found that claimant was not disabled after Dr. Fowler released claimant to return to unrestricted work in December 2005. Claimant has failed to raise any errors in these findings. The administrative law judge rationally found that claimant's testimony concerning the alleged incidents involving a battery or armored door is not credible because claimant gave conflicting versions of the events, and claimant was unable to name any witnesses to the incidents or to give reliable dates on which they occurred. *See*, *e.g.*, HT at 80-85; *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Thus, the Section 20(a) presumption is not applicable with regard to these incidents as claimant failed to establish an essential element of his claim. *See U.S. Industries/Federal Sheet Metal v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982).

[1] Claimant subsequently found work in the United States on July 5, 2006.

Moreover, the administrative law judge's finding, based on Dr. Fowler's opinion, that claimant was not disabled by his October 2005 injury after December 2005 is supported by substantial evidence. On December 16, 2005, Dr. Fowler found claimant had no abnormalities based on his examination and MRI, and he released claimant to full-duty work with no restrictions on December 30, 2005. CX 5 at 19. A lumbar MRI performed in April 2006 was interpreted as normal. CX 5 at 24. On May 1, 2006, Captain Stabelund concluded that claimant's subjective complaints were inconsistent with the objective or physical findings. CX 5 at 29. Dr. Fowler again examined claimant in May 2006 and found only subjective complaints of pain. EX 14. Finally, on May 25, 2006, Dr. Crompton opined that claimant's test results were normal and he released claimant to work without restrictions. EX 11. Dr. Crompton opined that claimant's complaints were out of proportion to his injury. *Id.* As the administrative law judge rationally found that claimant failed to establish he was disabled by his work injury after December 2005, we affirm the denial of additional disability compensation. *Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 242 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP*, 909 F.2d 1488 (9th Cir. 1990).

Claimant next contends that the administrative law judge erred in finding that employer is not liable for pain management therapy recommended by Capt. Stabelund on May 1, 2006, and by Dr. Fowler on May 8, 2006. *See* CX 5 at 29, 30. The administrative law judge found that these recommendations were based solely on claimant's subjective complaints of pain, which the administrative law judge discredited, noting, in addition, that Dr. Crompton stated that claimant does not need pain management therapy. As the administrative law judge's finding that claimant failed to establish the need for pain management therapy is rational and supported by substantial evidence, we affirm the denial of the claimed medical benefits. 33 U.S.C. §907(a); *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9 (2001), *aff'd mem.*, 32 Fed. Appx. 126 (5th Cir. 2002) (table).

Claimant contends the administrative law judge erred in calculating claimant's average weekly wage as $1,445.42. The administrative law judge divided claimant's total earnings as a mechanic in Iraq in the year prior to the injury, $57,195.12, by the 39.57 weeks he was so employed. Claimant argues that his average weekly wage should be $2,296.05, determined by dividing the wages he earned solely from employer, $27,617.74, by 9.28, the number of weeks he worked for employer.

Section 10(c), 33 U.S.C. §910(c), provides a general method for determining annual earning capacity where neither Section 10(a) nor (b) can fairly or reasonably be applied to calculate claimant's average weekly wage at the time of injury.[2] The objective

[2] No party contends that Section 10(a) or (b) is applicable in this case. Section 10(a) cannot be used because claimant was neither a five- nor six-day per week worker,

of Section 10(c) is to arrive at a figure which is a reasonable representation of claimant's annual earning capacity at the time of injury. *See Empire United Stevedores v. Gatlin*, 936 F.3d 819, 25 BRBS 26(CRT) (5th Cir. 1991).

The record reflects that claimant arrived in Iraq to work as a heavy-duty mechanic for Lear Siegler Services (LSI) in late 2004 and was employed by them for approximately five months. HT at 20-24. Following a hiatus of approximately two months, HT at 64, claimant began working for employer performing similar job duties in Iraq, on July 29, 2005. HT at 63. During the time claimant worked for LSI he earned $29,577.28 in 30.29 weeks. CX 6. Claimant earned $27,617.74 for the 9.28 weeks he worked for employer. Because the work claimant performed in Iraq for two employers was essentially the same, the administrative law judge combined the wages claimant earned from the two employers in the year preceding the injury to arrive at claimant's average weekly wage.

We reject claimant's contention that the administrative law judge erred in not relying only on claimant's earnings with employer to calculate his average weekly wage. The administrative law judge rationally found that the jobs for the two employers in Iraq were comparable in duties and performed under similar circumstances. *See generally Proffitt v. Service Employers Int'l, Inc.*, 40 BRBS 41 (2006). As the finding that the combined wages best represent claimant's annual earning capacity is rational and supported by substantial evidence, we affirm the administrative law judge's average weekly wage calculation. *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).

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

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which is necessary for the application of Section 10(a). 33 U.S.C. §910(a); *see generally Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004). Nor is Section 10(b), 33 U.S.C. §910(b), applicable as there is no evidence establishing the earnings of comparable workers.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge