U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 23 January 2013

Case No.: 2012-LDA-350

OWCP No.: 02-217165

In the Matter of:

RONALD J. PITTS,
Claimant

v.

SPECTRE GROUP INTERNATIONAL, INC.,
Employer

ALLIED WORLD NATIONAL ASSURANCE CO.,
c/o Broadspire,
Carrier

APPEARANCES:

HOWARD S. GROSSMAN, ESQ.,
On Behalf of the Claimant

ROBERT N. DENGLER, ESQ.,
On Behalf of the Employer

BEFORE: PATRICK M. ROSENOW
Administrative Law Judge

DECISION AND ORDER

This case arises from a claim for benefits under the Defense Base Act (the Act),[1] brought by Claimant against Employer and Carrier.[2] The matter was referred to the Office of Administrative Law Judges on 23 Mar 12. A hearing was scheduled for 16 Nov 12, but was canceled because the parties agreed there was no factual dispute and they could submit a joint stipulation of facts. They accordingly waived their right to an in-person hearing. My decision is

[1] 42 U.S.C. § 1651 *et seq.* (2011) (the Defense Base Act is an extension of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950).
[2] For simplicity, both Employer and Carrier are collectively referred to herein as "Employer."

based upon the entire record, which consists of the Stipulation of Facts and exhibits appended thereto.

Facts

Claimant was born in 1956 and resides in Mississippi. In November 2010, Employer hired him to provide executive labor services in support of counter-narcotic police operations in Afghanistan. His annual salary was $229,500. However, his work schedule alternated four months on with four months off. He was in a non-pay status during his four months off. On 20 May 11, while at work in Afghanistan, he injured his left knee and low back. He was able to continue working and completed that four month period, returning on 3 Sep 11, at the start of his scheduled four month break. He sought treatment for his injuries on 12 Sep 11 and was placed on a no-work status by his physician on 22 Sep 11. He has not reached maximum medical improvement or returned to work.

Issues and Positions of the Parties

The parties stipulated that Claimant's average weekly wage is in excess of $1,885.26 and that his total disability rate would be the maximum of $1,256.84. Employer has paid Claimant temporary total disability benefits for those periods during which he would have been actively working for it in Afghanistan, but not for those four month periods during which he would have been in a non-pay status. Employer argues that: (1) disability is a function of a claimant's inability to do his original job; (2) during his no-pay periods, Claimant had no duties; (3) at those times he was not unable to do his original job (because there was essentially no job); and therefore (4) for the four month periods during which he had no duties, he was not disabled. Claimant disagrees and seeks an order for that pay, along with associated interest.[3]

Law

Average Weekly Wage

Section 10 of the Act sets forth three alternative methods for calculating a claimant's average annual earnings, which are then divided by 52, pursuant to Section 10(d), to arrive at an average weekly wage.[4] The computation methods are directed towards establishing a claimant's earning power at the time of injury.[5] Section 10(c) is used where a claimant's employment is seasonal, part-time, intermittent, or discontinuous.[6] Under subsection 10(c), the Administrative

[3] At the end of his brief, Claimant also asked for penalties up to the time Employer filed its Form 207 after the informal conference. Since that request was inconsistent with the stipulation to timely controversion, I contacted both counsel to clarify the issue. Employer's Counsel stated that Employer filed a blanket controversion within days of the initial filing of the claim. In light of that representation, Claimant's Counsel stated that he would withdraw that part of his claim seeking penalties.

[4] 33 U.S.C. § 910(a)-(c).

[5] *SGS Control Services v. Dir., OWCP*, 86 F.3d 438, 441 (5th Cir. 1996), *quoting Empire United Stevedores v. Gatlin*, 936 F.2d 819, 823 (5th Cir. 1991).

[6] *Gatlin*, 935 F.2d at 822.

Law Judge must arrive at a figure which approximates an entire year of work (the average annual earnings).[7]

Nature and Extent

Total disability is defined as complete incapacity to earn pre-injury wages in the same work as at the time of injury or in any other employment. To establish a *prima facie* case of total disability, the claimant must show that he cannot return to his regular or usual employment due to his work-related injury.[8] If the claimant makes this showing, the burden shifts to employer to show suitable alternative employment.[9]

Analysis

Employer's argument that Claimant drifted in and out of total disability, depending on what his work schedule would have been in the absence of his injury, misapprehends the fundamental policies that underlie the Act and interpreting case law. The calculation of the average weekly wage accounts for pre-injury work schedules. In this case, the annual wage was $229,500. The record shows that he was only paid for periods that he worked, which was, on average, half of each year. That would have resulted in an effective annual wage of $114,740. That figure, divided by 52, yields an average weekly wage of $2,206.73, which in turn, results in a total compensation rate greater than the maximum of $1,256.84 which was stipulated to by Employer. Thus, the fact that Claimant had every other four months off is reflected in the average weekly wage.

Employer's observation that during the off-duty periods Claimant had no duties that he was required to perform and was therefore not disabled, may be accurate from a very basic logical perspective, but fails to take into account the full legal context. Because of his covered injury, he could no longer do the job for which he was hired. That there were times he had no tasks that he was unable to perform is not significant.[10] There is no indication that during his four months off, he was not free to engage in other employment. Until such time as Employer establishes suitable alternative employment, Claimant remains just as totally disabled during what would have been his off duty periods as he is during the balance of the year.

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[7] *Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991); *Brien v. Precision Valve/Bayley Marine*, 23 BRBS 207, 211 (1990).

[8] *Elliott v. C & P Tel. Co*., 16 BRBS 89 (1984); *Harrison v. Todd Pac. Shipyards Corp*., 21 BRBS 339 (1988).

[9] *Clophus v. Amoco Prod. Co*., 21 BRBS 261 (1988); *Nguyen v. Ebbtide Fabricators*, 19 BRBS 142 (1986).

[10] Taken to its logical conclusion, Employer's position would mean that many shift workers (e.g., 14 on 14 off) would see their compensation cut in half.

ORDER

1. Claimant became temporarily totally disabled on 22 Sep 11 and remains so. Employer shall pay Claimant temporary total disability benefits at the maximum weekly rate of $1,256.84 from that date to the present and continuing.
2. Employer shall provide all reasonable and necessary medical care pursuant to Section 7 of the Act.
3. Employer shall receive credit for any compensation heretofore paid, as and when paid. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961.[11]
4. The district director will perform all computations to determine specific amounts based on and consistent with the findings and order herein.
5. Claimant's Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorneys' fees.[12] A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. In the event Employer elects to file any objections to said application, it must serve a copy on Claimant's counsel, who shall then have fifteen (15) days from service to file an answer thereto.

ORDERED this 23rd day of January 2013 at Covington, Louisiana.

Digitally signed by PATRICK ROSENOW
DN: CN=PATRICK ROSENOW, OU=ADMINISTRATIVE LAW JUDGE, O=Office of Administrative Law Judges, L=Covington, S=LA, C=US
Location: Covington LA

PATRICK M. ROSENOW
Administrative Law Judge

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[11] Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *Grant v. Portland Stevedoring Co., et al*., 16 BRBS 267, 271 (1984).

[12] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. *Revoir v. General Dynamics Corp.*, 12 BRBS 524, 527 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. *Miller v. Prolerized New England Co.*, 14 BRBS 811, 823 (1981), *aff'd*, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after the date this matter was referred from the District Director.