

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-41129
Summary Calendar

LUCIEN STARR, and
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,

Petitioners,

VERSUS

HOPEMAN BROTHERS, INC.,

Respondent.

Petition for Review of an Order
of the Benefits Review Board
(BRB No. 91-849)

August 1, 1995

Before DAVIS, BARKSDALE, and DEMOSS, Circuit Judges.

PER CURIAM:¹

Contending that the he was permanently totally disabled under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901 *et seq.*, Lucien Starr petitions for review of the decision by the Department of Labor's Benefits Review Board (BRB), wherein it affirmed the Administrative Law Judge's (ALJ)

¹ Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

determination that Starr was permanently partially disabled. We **DENY** the petition.

I.

Since 1965, Hopeman Brothers, Inc., had employed Starr at its Avondale Shipyard in Louisiana. On January 15, 1981, Starr hurt his back in a work-related accident.

Starr initiated a claim against Hopeman Brothers and its insurance carrier for benefits under the LHWCA. When the claim could not be resolved administratively, a formal hearing was conducted. An ALJ determined that Starr could not return to his usual work. Finding that there existed suitable alternative employment opportunities for Starr, however, the ALJ rejected Starr's contention that he was permanently totally disabled; instead, the ALJ found Starr to be permanently partially disabled.

Starr appealed the ALJ's decision to the BRB. Because the ALJ failed to relate the requirements of the alternative employment opportunities to Starr's age, education, work experience and medical restriction, the BRB vacated the ALJ's finding and remanded the case.

After considering the factors identified by the BRB, on remand, the ALJ determined that alternative employment opportunities for Starr still existed. Furthermore, the ALJ concluded that Starr had failed to demonstrate that he tried diligently, but unsuccessfully, to secure such employment. As before, the ALJ found Starr's permanent disability to be partial, not total. On appeal, the BRB affirmed the ALJ's decision.

II.

"We review decisions of the BRB for errors of law and adhere to the substantial evidence standard that governs the BRB's review of the ALJ's factual determinations." ***P & M Crane Co. v. Hayes***, 930 F.2d 424, 428 (5th Cir. 1991). "We must affirm the BRB's decision `if it correctly concluded that the ALJ's findings are supported by substantial evidence and are in accordance with the law.'" ***Mendoza v. Marine Personnel Co.***, 46 F.3d 498, 500 (5th Cir. 1995) (quoting ***P & M Crane***, 930 F.2d at 428). Substantial evidence is evidence that "a reasonable mind might accept as adequate to support a conclusion". ***Avondale Indus., Inc. v. Director, Office of Workers' Compensation Programs***, 977 F.2d 186, 189 (5th Cir. 1992) (quoting ***Diamond M. Drilling Co. v. Marshall***, 577 F.2d 1003, 1005 (5th Cir. 1978) (quoting ***NLRB v. Columbian Enameling & Stamping Co.***, 306 U.S. 292, 299-300 (1939))). In our review we typically defer to the ALJ's credibility choices between conflicting witnesses and evidence. See ***Calbeck v. Strachan Shipping Co.***, 306 F.2d 693, 695 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963).

In order to make a *prima facie* case of permanent total disability, a claimant must show that he cannot perform his former job because of a work-related injury. ***New Orleans (Gulfwide) Stevedores v. Turner***, 661 F.2d 1031, 1038 (5th Cir. 1981). "At that point, the burden then shifts to the employer to establish the availability of other jobs that the claimant could perform." ***Id.*** Once the employer establishes the availability of other jobs, the

claimant may still establish total disability by demonstrating that he "diligently tried and [was] unable to secure such employment". *P & M Crane*, 930 F.2d at 430.

A.

Neither party disputes that, because of a work-related injury, Starr is unable to perform his former job. Thus, the burden was on Hopeman Brothers to demonstrate that, based on Starr's age, education, work experience and medical restrictions, other employment opportunities existed. The ALJ noted that Starr, a 61-year old man,² had a fourth grade education, and had held a variety of jobs in addition to his work at Hopeman Brothers, including, e.g., delivering groceries; landscape maintenance; and, pumping gas, washing cars and cashiering at a service station. As for medical restrictions, the evidence before the ALJ indicated that Starr could perform semi-sedentary types of work, wherein he should not perform repetitive stooping activities or lift more than 15-20 pounds.

Based upon, *inter alia*, the testimony of the Hopeman Brothers' vocational rehabilitation expert, the ALJ found that Hopeman Brothers had demonstrated the availability of jobs that Starr could reasonably perform and secure upon diligent attempts to do so. The expert had identified available jobs, such as a cashier at a self-service gas station or at a convenience store. In addition, he testified that such positions were available in Starr's geographic

² Starr was 61 years old at the original hearing before the ALJ in 1986. The second hearing was conducted in 1990.

area, and that he had personally contacted employers regarding these positions. Although Starr's own expert presented a contrary position, the ALJ concluded that that opinion was "rooted in statistics and theory", and not the actual identification and location of specific available jobs. The ALJ gave less weight to Starr's expert, noting that the opinion of the Hopeman Brothers' expert was "more reasoned and experience based" than that of Starr's expert, "who simply reviewed the work of [the former] before criticizing [sic] it". Stated simply, the ALJ made a credibility determination.

Starr claims that because of his limited education, he will be unable to work computerized cash registers. The ALJ addressed specifically Starr's general mathematical knowledge, and, based on the opinion of the Hopeman Brothers' expert, found that Starr would be able to do the math needed for a cashiering job. Additionally, Starr testified that, in the past, he has performed cashier duties and believes that he can perform them now.

In sum, the ALJ's decision that Hopeman Brothers demonstrated the existence of available employment opportunities for Starr is supported by substantial evidence.

B.

Starr contends next that he diligently sought, but was unable to secure, post-injury employment and, therefore, is entitled to permanent total disability benefits. At the time of the first hearing before the ALJ in 1985, Starr had applied for several jobs and attempted unsuccessfully one employment opportunity. In the

five-year interim between the two ALJ hearings, Starr failed to undertake any effort to locate employment. Based on this, the ALJ determined that Starr had failed to pursue diligently employment opportunities.

Starr does not contest directly this determination. Instead, he claims that, in the second hearing, the ALJ exceeded the scope of the BRB's remand order when the ALJ considered his efforts during the interim period. Although, at the second ALJ hearing, Starr objected to consideration of evidence relating to events and conduct occurring after the original hearing, he failed to press this issue before the BRB. Because Starr failed to raise the scope of the remand order before the BRB, he has waived it. See ***Hix v. Director, Office of Workers' Compensation Programs***, 824 F.2d 526, 527 (6th Cir. 1987); ***General Dynamics Corp. v. Sacchetti***, 681 F.2d 37, 40 (1st Cir. 1982).

III.

For the foregoing reasons, the petition is

DENIED.