U.S. Department of Labor

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

BRB Nos. 15-0096
and 19-0447

TORRENCE T. PALMS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SSA MARINE TERMINALS	)	DATE ISSUED: 04/30/2020
	)	
and	)	
	)	
HOMEPORT INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
ILWU-PMA WELFARE PLAN	)	
	)	
Intervenor	)	DECISION and ORDER

Appeals of the Decision and Order and the Decision and Order Denying Modification and Denying Benefits of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Torrence T. Palms, Auburn, Washington.

Before: ROLFE, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant, without representation, appeals the Decision and Order (2012-LHC-00948, 2012-LHC-00949) and the Decision and Order Denying Modification and Denying Benefits (2016-LHC-01825, 2016-LHC-01826, 2017-LHC-01488, 2017-LHC-01489, 2017-LHC-01490, 2017-LHC-01491) of Administrative Law Judge Richard M. Clark rendered on claims filed pursuant to the Longshore and Harbor Workers' Compensation

Act, as amended, 33 U.S.C. §901 *et seq*. (the Act). In an appeal by a claimant without legal representation, we review the administrative law judge's decision to determine if the findings of fact and conclusions of law are rational, supported by substantial evidence, and are in accordance with the law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The procedural history of this case is extensive. On three occasions between February 10, 2007, and February 29, 2008, while working as a longshoreman, claimant's truck was picked up by a crane and dropped causing injuries to his back, neck, shoulder and hip. On October 13, 2008, after allegedly driving a semi-truck over a bumpy road for two hours for employer, claimant experienced pain in his back for which he sought medical attention. He did not return to work on the waterfront until May 20, 2011. In a Decision and Order dated August 22, 2011, Administrative Law Judge Richard K. Malamphy found claimant established work-related aggravations to his preexisting back, neck, left shoulder and left hip conditions, and depression.[1] He awarded claimant temporary total disability benefits from October 14, 2008, to March 11, 2011, based on the opinion of claimant's treating physician, Dr. Hayes, limiting claimant to light-duty work which was not available on the waterfront.[2] Further finding claimant's average weekly wage at the time of injury exceeded $2,000, he awarded compensation at the FY-2009 maximum compensation rate of $1,200.62 per week for this period.[3] No party appealed this decision. *Palms v. Eagle Marine Servs., et al.*, Case Nos. 2009-LHC-01811/01812; 2010-LHC-01704/01705 (Aug. 22, 2011) (2011 Decision and Order).

Following his 2008 injuries, claimant returned to longshore work on May 20, 2011, performing only safety-trucker and trucker duties. On July 27, 2011, while working as a trucker and lifting equipment in excess of Dr. Hayes's restrictions, claimant experienced pain and discomfort in his neck, back, and legs. Tr. at 64-65. While performing this work, employer photographed claimant, which caused him to feel stress and an obligation to complete the work assignment. He reported his increased pain to his supervisors and immediately sought treatment at the emergency room following his shift. The next day, he followed up with Dr. Hayes, who removed him from work indefinitely. On August 21, 2011, claimant filed a claim under the Act alleging July 27, 2011 aggravations to his preexisting neck, back, and shoulder conditions. Claimant further alleged employer's

[1] Judge Malamphy found claimant failed to establish a prima facie case of work-related hypertension. 2011 Decision and Order at 17.

[2] Dr. Martini did not issue psychological restrictions. CX 3 at 41-42.

[3] Judge Malamphy did not address claimant's entitlement to ongoing benefits.

actions in photographing him and taking another injury report from him caused him "mental stress and anxiety," aggravating his psychological condition. EX 9.

At the April 23, 2013 hearing, claimant, represented by counsel, sought benefits for his 2011 injuries and asserted entitlement to ongoing permanent disability benefits for his October 13, 2008 injuries. Claimant alleged his disability persisted following Judge Malamphy's award because Dr. Hayes restricted him to light-duty work that was unavailable on the waterfront.[4] Tr. at 27-28; ALJX 112 at 10-12. Claimant also sought reimbursement for: 1) medical costs associated with his injury claims; 2) medical costs associated with injuries he sustained in a February 28, 2012 car accident; 3) mileage and meal expenses accrued while pursuing his medical treatment; 4) mileage to attend his own deposition and the 2013 depositions of coworker Joey Arnold, Dr. Johnson, and Dr. Hayes; 4) mileage expenses to attend the April 23, 2013 hearing in San Francisco; and, 5) photocopying and mailing expenses.

Administrative Law Judge Richard M. Clark (the administrative law judge) issued a Decision and Order dated November 20, 2014. *Palms v. SSA Marine Terminals, et al.*, Case Nos. 2012-LHC-00948/00949 (Nov. 20, 2014) (2014 Decision and Order). He accepted the parties' stipulation that claimant's 2008 injuries reached maximum medical improvement on January 1, 2011, and found claimant entitled to permanent total disability benefits for the period of January 1, 2011 to March 11, 2011, rather than the temporary total disability benefits Judge Malamphy had awarded. Further finding both awards payable at the maximum compensation rate, he concluded claimant is not entitled to any additional compensation for this period. 2014 Decision and Order at 38 n.11. He also found claimant unable to return to his usual work as a semi-truck driver on March 12, 2011. Employer established the availability of suitable trucker and safety-trucker jobs during the period claimant did not work; however, employer did not establish the wages claimant could have earned in these positions. Thus, he awarded claimant permanent total disability benefits for the period he did not work, March 12 through May 20, 2011, and permanent partial disability benefits when he worked as a trucker and safety-trucker, May 20 to July 27, 2011. Based on the parties' stipulated average weekly wage of $2,100, the administrative law judge found the awards for both periods compensable at the FY-2011 maximum compensation rate of $1,256.84 per week. 2014 Decision and Order at 39-40.

[4] Although claimant worked intermittently between May 20, 2011 and July 27, 2011, as a trucker and safety-trucker, he asserted these positions are not suitable because the trucker job includes duties that exceed Dr. Hayes's lifting restrictions and the safety-trucker job is an "irregular job tied to the cruise season in Seattle." ALJX 112 at 12-13.

With respect to the alleged 2011 aggravation injuries, the administrative law judge found claimant established he suffered work-related aggravation injuries to his preexisting back, shoulder, neck, and psychological conditions on July 27, 2011. 2014 Decision and Order at 27, 29. He further found: the aggravation of claimant's psychological injury did not result in any work impairment; claimant's July 2011 physical injuries were temporary, but totally disabling exacerbations of preexisting conditions; and all of claimant's work-related conditions and disability resolved by November 21, 2011. *Id*. at 36, 40-43. The administrative law judge therefore awarded claimant temporary total disability benefits between July 27, 2011 and November 21, 2011, for his new aggravation injuries, and found claimant not entitled to ongoing disability and medical benefits thereafter. *Id*. at 43.

The administrative law judge awarded claimant reimbursement for medical treatment of his work-related injuries, his mileage traveling to medical appointments, and all his requested photocopying and mailing expenses. He denied claimant's requests for reimbursement for medical costs due to his car accident on February 28, 2012, and denied all non-medical transportation costs, i.e., claimant's reimbursement requests for mileage to attend the 2013 depositions and hearing. 2014 Decision and Order at 43-44.

On December 16, 2014, claimant, now self-represented, appealed the administrative law judge's 2014 Decision and Order to the Board. On January 3, 2015, he filed a request for modification. On March 31, 2015, the Board dismissed claimant's appeal and remanded the case for consideration of his modification request. *Palms v. SSA Marine Terminals, et al.*, BRB No. 15-0096 (Mar. 31, 2015). Subsequently, claimant filed claims for four additional injuries and sought reimbursement for 20 additional itemized medical costs totaling $16,763.57.

At the September 14-15, 2017 hearing (at which claimant had new counsel), the administrative law judge consolidated claimant's new aggravation claims with his modification claim. With respect to his four new injury claims, claimant alleged he suffered both physical and psychological aggravations during a February 14, 2017 physical capacity evaluation with Dr. Becker. He additionally alleged he sustained psychological injuries on March 1, 2017, when he attempted to acquire medical authorization from the carrier's office but the receptionist told him to "leave the premises immediately," CX 66 at 629, and during his May 11, 2017 psychological evaluation with Dr. Robinson in which claimant was not permitted to have a representative with him and allegedly was made to relive the trauma of his work injuries.

With respect to his modification claim, claimant asserted Judge Malamphy erred in failing to find his hypertension work-related, and the district director erred in failing to timely initiate and refer his modification request to the Office of Administrative Law Judges in violation of Section 19(c), 33 U.S.C. §919(c). He asked to withdraw his

stipulation to a 2008 average weekly wage of $2,100, alleged his average weekly wage is $2,365, and asserted the administrative law judge erred in: 1) failing to award continuing disability benefits for his work-related injuries;[5] 2) including claimant's holiday/vacation payments in his post-2008 injury wage-earning capacity; 3) using the IRS medical mileage rates to calculate the mileage reimbursement rates; and 4) denying costs associated with his February 2012 car accident, which he alleged was a secondary work injury.

In a Decision and Order on Modification dated June 7, 2019, the administrative law judge found none of claimant's alleged new injuries occurred because claimant and his subjective complaints are not credible, and there was no change in condition or mistake in fact as to the findings in his prior decision. *Palms v. SSA Marine Terminals, et al.*, Case Nos. 2016-LHC-01825/01826; 2017-LHC-01488 – 01491, slip op. at 50-52, 71-75 (June 7, 2019) (2019 Decision and Order). He found claimant's earnings records established his 2008 average weekly wage was $2,085.38, rather than the $2,100 to which the parties previously stipulated, which does not affect the compensation award. He also found the preponderance of evidence does not establish: 1) the existence of working conditions that could have caused claimant's psychological condition, *id.* at 58-61; 2) a causal connection between his work injuries and psychological condition, *id.* at 62, 66; 3) a causal connection between his hypertension and work, *id.* at 68; nor, 4) any work-related injury or disability as of November 21, 2011, *id.* at 55-57. Further: the administrative law judge denied reimbursement for all of claimant's additional 20 itemized medical costs; affirmed his wage-earning capacity and mileage reimbursement calculations; held his assertion that his February 2012 car accident is a secondary injury not appropriate for adjudication because he did not file a claim for it; held his assertion that the district director violated Section 19(c) is moot because he failed to request a remedy; and addressed his modification claims. *Id.* at 65, 68-69.

Claimant, again self-represented, appeals the 2019 Decision and Order and has reinstated his 2015 appeal of the 2014 Decision and Order. Employer did not file a substantive brief in response.

[5] In support, claimant submitted new opinions from Drs. Hayes, Rich and Calkin, all of whom opined claimant's physical injuries precluded his return to his usual work at the time of his 2008 injury. CX 63-B; CX 69 at 790; CX 71 at 834; MTR at 149. Regarding his psychological condition, claimant submitted the treatment records and opinion of Renoid Watson, MHP, LMHCA, and the forensic evaluation of Dr. Kane, diagnosing PTSD due to claimant's multiple work injuries and hostile work environment, and stating claimant's psychological condition precludes his return to work as a longshoreman. CX 66 at 627-628; CX 74 at 1023-1026; MTR at 304-305.

In addressing claimant's appeal, we consider the administrative law judge's decision and decision on modification simultaneously. We address all dispositive issues adverse to claimant concerning the denial of benefits and amounts of compensation awarded in the following order:[6] 1) claimant's denied injury claims; 2) amount of compensation awarded; 3) denied continuing disability and medical benefits as of November 21, 2011; and 4) denied reimbursement requests.

1. Denied Injury Claims

In determining whether an injury is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after he establishes a prima facie case that: 1) he suffered a harm; and 2) an accident occurred or conditions existed at work which could have caused that harm. *See Ramey v. Stevedoring Services of America,* 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998). The Section 20(a) presumption does not apply to aid a claimant in establishing his prima facie case. *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Rather, the claimant has the burden of proving the existence of an injury or harm and the occurrence of an accident or working conditions that could have caused the harm. *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989). If the claimant establishes the two elements of his prima facie case, Section 20(a) applies to link the harm to the work incident. *Ramey,* 134 F.3d 954, 31 BRBS 206(CRT).

Upon invocation of the Section 20(a) presumption, the burden shifts to the employer to rebut it with substantial evidence that the claimant's condition was not caused or aggravated by his employment. *Hawaii Stevedores, Inc. v. Ogawa,* 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010). If the administrative law judge finds the Section 20(a) presumption rebutted, it no longer applies, and the issue of causation must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *Id.*; *see Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

a. Psychological aggravation due to work injuries and/or working conditions

In his 2014 Decision and Order, the administrative law judge found claimant established a prima facie case of a work-related psychological aggravation based on claimant's continued treatment with Dr. Martini for depression and adjustment disorder, and Dr. Martini's opinion attributing claimant's depression and psychological symptoms to his work-related injuries and stress from his perceived hostile work environment. 2014 Decision and Order at 28-29; CX 3 at 38; EX 42 at 252. Finding employer did not rebut

[6] As the administrative law judge issued a decision on modification, he properly rejected, as moot, claimant's assertion that the district director erred in failing to timely address his modification claim pursuant to Section 19(c), 33 U.S.C. §919(c).

the presumption, the administrative law judge found claimant established a work-related psychological injury as a matter of law.

The administrative law judge found the preponderance of the record evidence and new evidence submitted on modification does not establish a causal relationship between claimant's psychological condition and work. 2019 Decision and Order at 62. The administrative law judge found claimant failed to establish an actual or perceived hostile work environment and failed to establish his work-related physical injuries caused or contributed to his psychological condition. The administrative law judge explained the record demonstrates claimant's proclivity to shape facts into a self-serving narrative,[7] and his subjective accounts of his psychological symptoms and ongoing pain, are not credible in light of the reports of Drs. Becker, Chong, Kumar, and Robinson, in which the physicians reported claimant engaged in significant symptom magnification and malingering. EX 43 at 264; EX 44 at 278; EX 52; EX 64 at 562, 568; EX 84 at 89, 91; EX 88 at 209-210; EX 91 at 233, 237-238; EX 106 at 437-438; MTR at 349-352.

[7] The administrative law judge found claimant's testimony inconsistent, self-serving and contrived. 2019 Decision and Order at 50. He explained claimant speculated at the modification hearing that the crane operator 150 feet above his truck on October 13, 2008, intentionally dropped the truck due to claimant's race because one of the stevedores on the dock could "possibly" have told the crane operator who was in the truck. MTR at 386, 391. However, the administrative law judge found this account of perceived racial discrimination "unconvincing[]" because claimant testified at the initial hearing that it is difficult for crane operators to hear and see what is going on, and he described how sometimes the locking mechanism on the crane simply does not work. 2019 Decision and Order at 58; Tr. at 70, 123. Further, the administrative law judge observed claimant regularly does not remember or only "vaguely" remembers incidents that are unfavorable to his case, MTR at 185-188, and his allegation that employer set him up for re-injury due to his race on July 27, 2011, when the foreman asked him to lift equipment exceeding his work restrictions, was implausible given the record evidence establishing foremen [it doesn't seem right that ER would not know accommodations} are not apprised of an employee's work accommodations. Tr. at 139; EX 56 at 480-481. Moreover, he found claimant told his new doctors that his injuries were more serious than they in fact were when he: 1) insisted to Drs. Robinson and Kane he lost consciousness and suffered a concussion in one of his work-related drop incidents; and, 2) reported on his August 20, 2015 intake form with Sound Mental Health that he was previously diagnosed with PTSD. 2019 Decision and Order at 50-51, 59; *see* CX 67 at 626; EX 68 at 709-711; CX 57 at 377-78; CX 56 at 322; CX 68A at 23; CX 72 at 856. The administrative law judge explained the record does not support either statement. 2019 Decision and Order at 51.

Further finding the record does not substantiate claimant's accounts of racially motivated attacks,[8] and Dr. Robinson's psychometric testing demonstrating "indiscriminate endorsement of all forms of psychopathology" belies claimant's alleged perception of any traumatizing, racially-discriminatory, work incidents, EX 91 at 233, the administrative law judge found claimant failed to establish actual or perceived hostile working conditions that could have caused or contributed to his psychological condition. 2019 Decision and Order at 51, 58-61. As claimant failed to establish a hostile work environment, the administrative law judge declined to credit the opinions of Dr. Martini, Dr. Kane and Mr. Watson attributing his PTSD and major depressive and adjustment disorders to a hostile work environment. *Id.* at 61-62.

With respect to whether claimant's physical work-related injuries aggravated his psychological condition, the administrative law judge considered: 1) the opinions of Drs. Martini and Kane, attributing claimant's psychological disorder, in part, to his work injuries or ongoing pain his work injuries caused, CX 3 at 38; CX 74 at 1023-1026; 2) Dr. Breen's 2010 and 2013 opinions that claimant's work injuries did not contribute to his mental health condition, EX 42 at 252; EX 46 at 317; EX 47 at 330; and 3) the record evidence of his significant symptom magnification and malingering, which included two physical capacity evaluations, EX 52; EX 84, and psychometric testing, EX 91 at 233, 237-238. As the opinions of Drs. Martini and Kane lacked objective support and were predicated on claimant's unreliable subjective complaints,[9] the administrative law judge found their opinions unreliable and insufficient to carry claimant's burden on the record as a whole. 2019 Decision and Order at 62.

[8] Although claimant's coworker, Mr. Nellams, testified he believed race played a role in the manner in which claimant was injured and photographed in July 2011, and in more recent incidents in which claimant was asked to leave a 2016 General Safety Training and employer's premises in 2017 while attempting to file a claim for medical authorization, the administrative law judge accurately observed Mr. Nellams did not explain the basis for his assertions that these incidents were race-based. 2019 Decision and Order at 58; MTR at 159, 162-164, 168-170. Similarly, although claimant's post-hearing brief in the modification proceedings summarily listed additional incidents with foremen, a co-worker, and two union officials, the administrative law judge accurately observed claimant did not file claims for these incidents. 2019 Decision and Order at 69 n.50; Cl. 2017 Br. at 5-6.

[9] Although Dr. Kane administered psychological tests to claimant which have validity scales, the administrative law judge accurately observed Dr. Kane did not include them with his report or consider them in his analysis. 2019 Decision and Order at 35, 51, 60; CX 74 at 988-990, 1029-1030; MTR at 291-293.

We affirm the administrative law judge's finding that claimant failed to establish a work-related psychological condition. The administrative law judge is authorized, pursuant to the Act's modification provisions, 33 U.S.C. §922, to correct any 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). Moreover, it is well established that an administrative law judge is entitled to address questions of witness credibility, weigh the medical evidence, and draw his own inferences therefrom. *See Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988). The Board will not interfere with an administrative law judge's credibility determinations unless they are "inherently incredible or patently unreasonable," *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979), and must accept the administrative law judge's findings unless they are contrary to law, irrational, or unsupported by substantial evidence. *Rhine v. Stevedoring Servs. of Am.*, 596 F.3d 1161, 1165, 44 BRBS 9, 10(CRT) (9th Cir. 2010). As the administrative law judge accurately characterized the record, his finding claimant not credible is neither "inherently incredible [n]or patently unreasonable." *Cordero*, 580 F.2d at 1335, 8 BRBS at 747. Further, as the record does not substantiate an actual hostile work environment, and as the administrative law judge reasonably found claimant's subjective complaints and perceptions are unreliable, the administrative law judge rationally concluded claimant failed to establish an actual or perceived hostile work environment. *Rhine*, 596 F.3d at 1165, 44 BRBS at 10(CRT). Claimant thus failed to establish the existence of working conditions that could have caused or contributed to his psychological condition. *Kooley*, 22 BRBS 142.

Similarly, we affirm the administrative law judge's finding that the preponderance of evidence does not establish a causal relationship between claimant's psychological condition and physical work injuries. 2019 Decision and Order at 62. Although the administrative law judge did not discuss whether employer presented substantial evidence to rebut the Section 20(a) presumption which he invoked in his 2014 Decision and Order, the error is harmless as his finding on the record is sufficient to support a rebuttal finding. *See Ogawa*, 608 F.3d at 652, 44 BRBS at 51(CRT) (error in weighing evidence at rebuttal harmless where finding on record as a whole is supported by substantial evidence); *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988) (failure to apply the presumption is harmless error if the evidence relied upon to find no causal connection is sufficient to rebut the presumption). In this regard, we note Dr. Breen's opinion is sufficient to rebut a causal relationship between claimant's work injuries/physical condition and psychological condition. EX 42 at 252; EX 46 at 317; EX 47 at 330; *Duhagon*, 169 F.3d at 618, 33 BRBS at 3(CRT). As the record contains objective evidence of claimant's malingering, and the opinions of Drs. Martini and Kane were predicated on claimant's unreliable subjective

reports, the administrative law judge rationally found the preponderance of evidence does not establish claimant's work injuries caused or contributed to his psychological condition. S*ee Rhine*, 596 F.3d at 1165, 44 BRBS at 10(CRT). Consequently, we affirm this finding. *See Ogawa*, 608 F.3d at 652, 44 BRBS at 51(CRT).

b. Four New Injury Claims

Additionally, we affirm the administrative law judge's denial of claimant's claims for injuries related to the February 14, 2017 physical capacity evaluation of Dr. Becker, the March 1, 2017 request for medical authorization, and the May 11, 2017 psychological evaluation with Dr. Robinson. As discussed above, the administrative law judge rationally found claimant's subjective complaints of pain and symptoms are not credible. As there is no objective evidence of injury and substantial evidence supports the finding that all supporting evidence was predicated on claimant's unreliable reports of his symptoms, the administrative law judge rationally found claimant failed to establish the injuries occurred as alleged. *Goldsmith*, 838 F.2d at 1081, 21 BRBS at 32(CRT).

c. Hypertension Claim

The administrative law judge invoked the Section 20(a) presumption of a causal relationship between claimant's hypertension and his work based on Dr. Rich's opinion attributing claimant's hypertension to his February 10, 2007 work accident and "job-related stress and other related problems." 2019 Decision and Order at 67; CX 63-B. The administrative law judge rationally found, however, employer rebutted the presumption with evidence that claimant had high blood pressure in 1993 and Dr. Johnson's opinion that claimant's elevated blood pressure readings on February 11, 2007 were "likely related to the acute traumatic incident," but his "[o]ngoing elevation in BP likely related to weight and genetic predisposition." 2019 Decision and Order at 68; CX 1 at 5, EX 97 at 275; *see Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT). As Dr. Rich did not explain his opinion or address the factors Dr. Johnson mentioned, and the record contains no other evidence relating claimant's hypertension to his work, the administrative law judge found the preponderance of evidence does not establish claimant's hypertension is work-related. This finding is supported by substantial evidence, and therefore we affirm it. *Rhine*, 596 F.3d at 1165, 44 BRBS at 11(CRT).

2. Compensation Awarded

a. January 1 – March 11, 2011: permanent total disability benefits awarded at FY-2008 maximum compensation rate

We now turn to the administrative law judge's disability award. We vacate his finding that modification of Judge Malamphy's temporary total disability award for the

period January 1, 2011 – March 11, 2011, to an award of permanent total disability benefits, yields "no change" in the amount of compensation payable to claimant. 2014 Decision and Order at 38, n.11. Under the Act, compensation for permanent total disability and temporary total disability is paid at two-thirds of the claimant's average weekly wage. 33 U.S.C. §908(a), (b). The award, however, is subject to the maximum rate allowable under the Act. 33 U.S.C. §906(b)(1). The maximum rate in effect at the time of disability applies to calculate temporary disability benefits, whereas the maximum rate in effect at the time of entitlement applies to calculate permanent total disability benefits. 33 U.S.C. §906(b)(1), (3), (c); *Roberts v. Sea-Land Services, Inc.*, 566 U.S. 93, 46 BRBS 15(CRT) (2012); 20 C.F.R. §§702.801(b)(3), 702.805, 702.806.

As the applicable rate at the time of claimant's October 13, 2008 disabling injury is the FY-2009 rate of $1,200.62,[10] and the applicable rate at the time of entitlement to permanent total disability benefits, January 1, 2011 – March 11, 2011, is the FY-2011 rate of $1,256.84,[11] the applicable weekly permanent total disability compensation rate exceeds the temporary total disability compensation rate by $56.22. As claimant's average weekly wage of $2,085.38[12] entitles him to permanent total disability benefits for this period at the FY-2011 rate[13] but Judge Malamphy awarded temporary total disability benefits for this period at the FY-2009 rate, claimant is entitled to an additional $562.20 in permanent total disability benefits for this period.[14] *Roberts*, 566 U.S. 93, 46 BRBS 15(CRT). We therefore modify the administrative law judge's award to reflect claimant's entitlement to an additional $562.20 in permanent total disability benefits for the period January 1, 2011 – March 11, 2011.

b. March 12 – May 20, 2011: permanent total disability awarded at the FY-2011 maximum compensation rate:

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[10] https://www.dol.gov/owcp/dlhwc/NAWWinfo.htm (last visited Apr. 10, 2020).

[11] https://www.dol.gov/owcp/dlhwc/NAWWinfo.htm (last visited Apr. 10, 2020).

[12] We affirm the administrative law judge's average weekly wage calculation on modification as it is supported by the earnings report of record, EX 108 at 504-513, and in accordance with law. *Rhine*, 596 F.3d at 1165, 44 BRBS at 11(CRT). The record does not support claimant's alleged average weekly wage of $2,365.

[13] Two-thirds of claimant's average weekly wage, $2,085.38, equals $1,390.25.

[14] There are exactly ten weeks/70 days between January 1, 2011 and March 11, 2011. $56.22 x 10 = $562.20.

As summarized above, the administrative law judge awarded permanent total disability for the period March 12, 2011 – May 20, 2011, at the FY-2011 maximum compensation rate. This award and the administrative law judge's underlying findings are proper and not adverse to claimant, and we need not further address them.

c. May 21, 2011 – July 26, 2011: permanent partial disability benefits awarded at the FY-2011 maximum compensation rate:

We affirm the administrative law judge's finding that claimant is entitled to permanent partial disability benefits, rather than permanent total disability benefits, for the period he returned to work, May 21, 2011 – July 26, 2011. It is undisputed claimant returned to work in May 2011,[15] during which time he performed only trucker and safety-trucker jobs for which he earned wages. Tr. at 52; EX 14. As claimant conceded he was capable of performing the safety-trucker job during this time, Tr. at 70, the administrative law judge rationally found the position suitable and that claimant's disability, at most, was partial during this period. 33 U.S.C. §908(c), (e); *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991). Moreover, as the administrative law judge awarded permanent partial disability benefits for this period at the applicable maximum compensation rate, *see Roberts*, 566 U.S. 93, 46 BRBS 15(CRT), any errors with respect to his finding the trucker position suitable does not adversely affect the award. We thus affirm the award of permanent partial disability benefits at the FY-2011 maximum compensation rate for the period May 21, 2011 – July 26, 2011. *See generally Ogawa*, 608 F.3d at 652, 44 BRBS at 51(CRT) (harmless error principle applies in cases arising under the Act).

[15] It is unclear how the administrative law judge determined claimant returned to work on "May 20, 2011," or why he commenced permanent partial disability benefits on May 21, 2011, in light of this finding. 2014 Decision and Order at 38, 45; 2019 Decision and Order at 9. Although the record establishes claimant returned to work in "May 2011," it does not establish the specific day he returned. *See* EX 14, EX 54 at 417. However, as the administrative law judge awarded both permanent total disability benefits and permanent partial disability benefits for this month at the FY-2011 maximum compensation rate, any error the administrative law judge may have made in finding claimant's total disability became partial on May 21, 2011, is harmless, as the precise date has no impact on the amount of the compensation award. *See generally Ogawa*, 608 F.3d at 652, 44 BRBS at 51(CRT) (harmless error principle applies in cases arising under the Act).

d. July 27, 2011 – November 21, 2011: temporary total disability benefits awarded at FY-2011 maximum rate for 2011 injuries

On July 27, 2011, claimant sustained a work-related aggravation injury at a time when he was permanently partially disabled. His period of temporary total disability for this injury lasted until November 21, 2011. The administrative law judge found claimant's residual wage-earning capacity at the time of this injury was $135.04 per week,[16] but he awarded benefits based only on claimant's 2008 average weekly wage, paid at the 2011 maximum rate. Under these circumstances, however, claimant's residual wage-earning capacity is his average weekly wage for the aggravating injury, and claimant is entitled to concurrent permanent partial and temporary total disability benefits to fully compensate him for the totality of his lost wage-earning capacity resulting from the separate injuries. *Stevedoring Services of America v. Price*, 382 F.3d 878, 38 BRBS 51(CRT) (9th Cir. 2004), *cert. denied*, 544 U.S. 960 (2005). The maximum amount of such an award is two-thirds of the claimant's higher average weekly wage pursuant to Section 8(b), here claimant's 2008 wages, or $1,390.25; the Section 6 maximum rates apply separately to each award. *Id.*, 382 F.3d at 1055, 1057-1058, 38 BRBS at 57-59(CRT); *Carpenter v. California United Terminals*, 37 BRBS 149 (2003), *vacated in part on recon.*, 38 BRBS 56 (2004). Because claimant's 2011 average weekly wage of $134.04 is lower than the applicable minimum weekly compensation rate of $314.21,[17] he is entitled to benefits for the loss of his residual wage-earning capacity based on his $134.04 per week wages. 33 U.S.C. §906(b)(2); 20 C.F.R. §702.809. Because claimant is concurrently entitled to an award of $1,256.84 for his ongoing permanent partial disability, and concurrent awards of $134.04 and $1,256.84

[16] Claimant withdrew from the record evidence concerning his 2011 wages. 2014 Decision and Order at 2; Tr. at 13, 208. The administrative law judge thus used claimant's 2012 wage rates as a trucker and safety-trucker, plus vacation and holiday pay, to calculate his wage-earning capacity at the time of his 2011 aggravating injury. 2014 Decision and Order at 40, CX 46. This calculation is based on a reasonable method given the limited evidence. 33 U.S.C. §§908(h), 910(c); *see generally Bonner v. National Steel & Shipbuilding Co.*, 5 BRBS 290 (1977), *aff'd in pert. part*, 600 F.2d 1288 (9th Cir. 1979) (administrative law judge has broad discretion in determining annual earning capacity under Section 10(c); *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982) (Section 10(c) determinations will be affirmed if they reflect a reasonable representation of earning capacity and claimant has failed to establish the basis for a higher award). Moreover, it is not adverse to claimant because, as discussed infra, it entitles him to the Section 8(b) maximum compensation rate for his concurrent awards.

[17] https://www.dol.gov/owcp/dlhwc/NAWWinfo.htm (last visited Apr. 10, 2020).

exceed the Section 8(b) maximum compensation rate of $1,390.25,[18] he is entitled to $1,390.25 per week in concurrent permanent partial and temporary total disability benefits for the period from July 27, 2011 to November 21, 2011. As the administrative law judge awarded $1,256.84 in compensation benefits for this period, we modify his award to reflect claimant's entitlement to additional compensation benefits of $133.41 per week,[19] or $2,229.85 total for this period.[20]

3. Compensation Denied

We affirm the administrative law judge's denial of benefits as of November 22, 2011, and continuing. It is claimant's burden to establish his inability to perform his usual work due to his work injury, *Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT), and he must satisfy this burden by a preponderance of the evidence. *See generally Santoro v. Maher Terminal, Inc.*, 30 BRBS 171 (1996).

In this case, the administrative law judge rationally inferred all of claimant's work-related injuries and disability resolved by November 21, 2011, based on: diagnostic studies of this date "confirm[ing] no ongoing injuries," EX 41 at 219-220; Dr. Zietak's July 12, 2010 evaluation and opinion that claimant has no residual disability due to his 2008 injuries, CX 2 at 33-35; Dr. Becker's 2010 and 2017 physical capacity evaluations and opinions that claimant was self-limiting and could return to his usual work without restriction, EX 52; EX 84 at 124; EX 106 at 447; Dr. Chong's 2012 evaluation and report, observing "complete volitional self-limitation and symptom magnification" and diagnosing "no musculoskeletal diagnosis as of examination today," EX 43 at 264-265; and Dr. Kumar's 2017 evaluation and opinion that claimant has "overwhelming symptom magnification and disability syndrome," all of his injuries achieved maximum medical improvement about four years earlier, and his physical capacity "is intact for full time medium-heavy exertion work" with no restrictions, EX 88 at 209. *See* 2014 Decision and Order at 16, 36, 41; 2019 Decision and Order at 55-56; *see also Rhine*, 596 F.3d at 1165, 44 BRBS at 10(CRT). Thus, although claimant's treating physicians, Drs. Hayes, Haynes, Irving, Seroussi, Rich, and Calkin, issued permanent restrictions and/or opined claimant's injuries prevented his return to his usual longshore work beyond November 21, 2011, the administrative law judge reasonably declined to credit their opinions because they failed to address the evidence of claimant's symptom magnification, relied on his unreliable

[18] $134.04 + $1,256.84 = $1,390.88

[19] $1,390.25 - $1,256.84 = $133.41.

[20] There are 117 days, or 16.714 weeks in the period from July 27, 2011, to November 21, 2011; 16.714 x $133.41 = $2,229.85.

subjective complaints, and lacked objective support. 2014 Decision and Order at 30-33; 2019 Decision and Order at 55-56; *see Rhine*, 596 F.3d at 1165, 44 BRBS at 10(CRT). As claimant did not establish a work-related injury or disability after November 21, 2011, we affirm the denial of disability and medical benefits as of this date. *See Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT); *see also Caudill v. Sea-Tac Alaska Shipbuilding*, 22 BRBS 10 (1998), *aff'd mem.*, 8 F.3d 29 (9th Cir. 1993) (claimant's burden to establish medical care is reasonable and necessary for a work-related condition).

4. Reimbursement Requests

With regard to claimant's requests for medical mileage reimbursement, we affirm the administrative law judge's use of IRS medical mileage rates, rather than the requested rate of $0.59/mile. 2014 Decision and Order at 43. The administrative law judge may use state or federal fee schedules to determine the prevailing community rate for this cost. *See* 20 C.F.R. §702.413. However, we modify the award to correct for calculation errors and for the 146.2-mile discrepancy between the total compensable medical mileage claimant requested (12,336.54 miles) and the total the administrative law judge awarded (12,190.32 miles). 2014 Decision and Order at 44; CXs 58, 62. Specifically, we modify the administrative law judge's award as follows:

Year	IRS $/mile	ALJ mileage (reimbursement)	Actual mileage (reimbursement)
2008	.19	177.68 ($33.76)	132.6 ($25.19)
2009	.24	4,676.80 ($1,122.43)	4,763.04 ($1,143.13)
2010	.165	0 ($0)	0 ($0)
2011	.19	2,440.66 ($402.71)	2,440.66 ($463.73)
2012	.23	3,360.66 ($772.95)	3,849.04 ($885.28)

2013	.24	1,534.54 ($368.29)	1,151.20 ($276.29)
Total		**12,190.32 ($2,700.14)**	**12,336.54 ($2,793.62)**

Thus, claimant is entitled to an additional $93.48 in medical mileage reimbursement.

We affirm the administrative law judge's denial of claimant's remaining reimbursement requests. Claimant is not entitled to recover the cost of meals while traveling to or from medical appointments ($357.55), *Suppa v. Lehigh Valley R.R. Co.*, 13 BRBS 374 (1981), or his non-medical transportation costs to attend the 2013 depositions, *Stokes v. George Hyman Constr. Co.*, 19 BRBS 110 (1986). He also is not entitled to recover his non-medical transportation costs to attend his own deposition or the April 2013 hearing in San Francisco. *Id.* In this regard, we note although witnesses may recover mileage costs under the Act, *see* 33 U.S.C. §928(d), a party is not a "witness" to his own claim under the Act.[21] *See generally Price v. Brady-Hamilton Stevedore Co.*, 31 BRBS 91 (1996) (party not entitled to witness fees related to taking his own testimony pursuant to Section 25 of Act).

We additionally affirm the denial of claimant's 20 itemized reimbursement requests for medical treatment submitted on modification. It is claimant's burden to establish medical expenses are for treatment of the compensable injury. 33 U.S.C. §907(a); 20 C.F.R. §702.401(a); *see Caudill*, 22 BRBS 10; *Suppa*, 13 BRBS 374. The administrative law judge credited substantial evidence that claimant's continuing medical treatment after November 2011 was not necessary for his work injuries, which had resolved. 2019 Decision and Order at 65-66 (citing EX 88 at 208-209; MTR at 327-328.) Thus, he denied reimbursement for all of claimant's treatment after this date, *i.e.*, Request Nos. 1-4, 6, 8-20. *See Caudill*, 22 BRBS 10. Further, although Request No. 5, a bill from a debt collection agency for money owed to "Martini Psychiatric Clinic," and No. 7, an inquiry from the Center from Diagnostic Imaging dated March 12, 2010, concern treatment rendered prior to November 21, 2011, substantial evidence supports the administrative law

[21] Moreover, the record reflects claimant traveled by plane, rather than car, to the hearing in San Francisco. Tr. at 84. He therefore did not accrue mileage costs of 1,579 miles for which he seeks reimbursement.

judge's finding claimant failed to establish the dates the services were rendered or the nature of the treatment. Claimant thus failed to establish these medical expenses are for treatment of a compensable injury and we affirm the findings as they accord with law. *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9 (2001), *aff'd*, 32 F. App'x 126 (5th Cir. 2002).

Finally, we affirm the denial of claimant's reimbursement request of $1,695.51 for treatment of his injuries due to his February 2012 car accident. 2014 Decision and Order at 44; 2019 Decision and Order at 69. Although claimant alleged in his pre-hearing statement on modification that the 2012 car accident is a secondary injury, he did not present any evidence of its being a natural or unavoidable result of his work-related injuries. *See* 33 U.S.C. §902(2). As the administrative law judge rationally found claimant's work-related injuries resolved by November 21, 2011, and as it is unclear how the 2012 accident occurred, any error the administrative law judge may have made in finding this issue was not before him is harmless. *See generally Ogawa*, 608 F.3d at 652, 44 BRBS at 51(CRT).

Accordingly, we modify the administrative law judge's Decision and Order and Decision and Order Denying Modification and Denying Benefits to reflect claimant's entitlement to an additional $2,895.53, representing $562.20 in permanent total disability benefits for the period January 1, 2011 – March 11, 2011; $2,229.85 in concurrent permanent partial and temporary total disability benefits for the period July 27, 2011 – November 21, 2011; and $93.48 in medical mileage reimbursement. In all other respects, we affirm the administrative law judge's decisions.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge