U.S. Department of Labor

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

BRB No. 22-0470

RAPHAEL M. STEVENS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MARINE REPAIR SERVICES, INCORPORATED	)	
	)	
	)	DATE ISSUED: 04/05/2024
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Dana Rosen, Administrative Law Judge, Department of Labor.

Allison S. Leard (Leard Law Firm, LLC) Goose Creek, South Carolina, for Claimant.

Brian P. McElreath and Erica B. McElreath (Lueder, Larkin & Hunter, LLC) Mount Pleasant, South Carolina, for Employer/Carrier.

Before: BOGGS, BUZZARD, and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Dana Rosen's Decision and Order (2019-LHC-00587) rendered on a claim filed pursuant to the Longshore and Harbor

Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (Act). We must affirm the ALJ's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant sustained injuries to his head, left arm, back, and left leg on June 30, 2014, while working for Employer as a container repair mechanic.[1] JX 1. Immediately following the accident, Claimant received treatment at Nason Medical Center at Employer's request. CX 1 at 1-2. Employer initially accepted the claim and paid Claimant temporary total disability (TTD) benefits of $1,346.88 per week. EX 11. Beginning on July 7, 2014, Claimant sought medical treatment from Dr. Jeffrey Buncher, whom he chose as his treating physician. CX 3 at 1. Dr. Buncher treated Claimant's injuries with medication, acupuncture, physical therapy, left infraspinatus injection, and lumber epidural corticosteroid injections in collaboration with other treating physicians. *See* CXs 3 at 2, 6, 11-13, 19; 10 at 1-2.

Claimant underwent a cervical spine MRI on July 25, 2014, a lumbar spine MRI on July 31, 2014, and a thoracic spine MRI on October 27, 2014. CXs 5-6; EX 3. The cervical spine MRI showed mild upper cervical spondylosis with no obvious neural effect; the lumbar spine MRI revealed mild intervertebral joint space narrowing at L1-L2 and L5-S1; and the thoracic MRI showed mild spondylosis at T3-T4 with mild active disc degeneration but no obvious neural effect. CX 5 at 1; CX 6 at 1; EX 3 at 2-3.

Dr. Buncher continued nonsurgical treatment because he considered Claimant nonviable for back surgery due to his diabetes and young age.[2] CX 3 at 86. At both Claimant's and Employer's request, Claimant saw several other physicians for medical evaluations and treatment between 2015 and 2018, including Drs. Gregory M. Jones, Michael Wildstein, Donald R. Johnson, II, and J. Robert Alexander. CX 8; EXs 2, 4, 6. Drs. Jones, Wildstein, Johnson, and Alexander separately examined Claimant, reviewed his MRIs, and indicated his pain sensitivity appeared exaggerated in comparison to the objective MRI findings. Nonetheless, they supported Dr. Buncher's recommendation

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the injury occurred in Charleston, South Carolina. 33 U.S.C. 921(c); *see Roberts v. Custom Ship Interiors*, 35 BRBS 65, 67 n.2 (2001), *aff'd*, 300 F.3d 510 (4th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003); 20 C.F.R. 702.201(a).

[2] Claimant was 32 years old at the time of the injury in 2014. CX 3 at 1.

against surgery.[3] CX 8; EXs 2, 4, 6. Dr. Buncher reported Claimant's back condition reached MMI on January 27, 2016, and restricted him from returning to work for Employer. CX 3 at 106-108. On April 18, 2016, Dr. Buncher further restricted Claimant from driving for longer than 30 minutes without stopping. *Id.* at 205.

At Employer's request, Claire Heusinger interviewed Claimant and completed a vocational assessment on April 12, 2018. EX 7. She assessed Claimant's education, work history, and restrictions placed by Drs. Buncher and Wildstein. *Id.* at 8-9. She identified six jobs Claimant could perform given his experience and physical restrictions on walking, standing, and prolonged activity. Those jobs include an entry level telecommunicator position in Charleston County, South Carolina, a customer care representative position with InterContinental Hotels Group, front desk agent and reservation sales agent positions with Wild Dunes Resort, a sales representative position with TruGreen-Charleston, and an administrative telecommunicator position with Charleston County, South Carolina.[4] *Id.* at 10-15.

[3] Dr. Jones, a pain management and rehabilitation physician, examined Claimant on January 5, 2015. He reported Claimant's condition had not reached maximum medical improvement (MMI), but Claimant could have been cleared to return to light-duty work provided he avoided any heavy lifting, pushing, or pulling greater than 25-30 pounds. EX 2 at 2-4. On September 18, 2015, Dr. Wildstein, an orthopedic specialist, examined Claimant and reviewed his records. EX 4 at 2. On November 3, 2015, Dr. Johnson, also an orthopedic specialist, examined Claimant and reviewed his records upon Dr. Buncher's referral. After recommending and reviewing an updated MRI, Dr. Johnson advised nonsurgical care and treatment with a pain management anesthesiologist. CX 8 at 3-4; CX 9. Dr. Wildstein evaluated Claimant a second time, on August 29, 2016, maintained he was not viable for surgery, and recommended treatment with a pain management specialist or anesthesiologist with pain management credentials. EX 4 at 4-6. On June 13, 2018, Dr. Alexander, a nonsurgical pain management specialist, examined Claimant at Employer's request and reviewed Claimant's records. He agreed with Dr. Wildstein's and Dr. Johnson's conclusions and recommended Claimant for light-duty work status with lifting not to exceed 20 pounds. EX 6 at 3.

[4] Following Dr. Alexander's medical report, Ms. Heusinger wrote an updated vocational assessment on July 27, 2018, based on limiting Claimant's lifting capacity to no greater than 20 pounds. EX 7 at 16-17. She determined Claimant would be able to work at five positions, including an administrative telecommunicator position with Charleston County, South Carolina, customer service representative and dispatcher positions with

Claimant subsequently obtained a labor market survey from David R. Price on May 24, 2018. Mr. Price interviewed Claimant, conducted intelligence assessments, and reviewed medical records from Nason Medical Center, Drs. Buncher, Jones, Johnson, and Wildstein, and Charleston Mental Health. CX 13 at 2-3. He opined Claimant had "no skills or experience appropriate for sedentary employment" and had a vocational history exclusive to manual labor. *Id.* at 6. He further noted Claimant was unemployable based on his lack of education, skills, experience, and physical capacity.[5] *Id.* On June 7, 2018, Dr. Buncher amended Claimant's restrictions to include no driving for any amount of time. CX 3 at 206.

Per the parties' stipulations, Employer paid Claimant TTD benefits from July 1, 2014, through July 1, 2018. They agreed his condition reached MMI on April 18, 2016. On July 2, 2018, Employer began paying Claimant permanent partial disability (PPD) benefits based on the labor market surveys. JX 1; EX 11. Claimant disputed the conversion from TTD benefits to PPD benefits, and the case was set for a hearing.

Meanwhile, on January 9, 2019, Claimant was involved in a motor vehicle accident while driving his wife's car. EX 16. As a result, he began reporting to Dr. Buncher more regularly, seeking treatment for increased back pain stemming from the accident. CX 3 at 217-221; EX 15. Claimant also sued the other driver in the United States District Court for the District of South Carolina, Charleston Division, on May 6, 2019. EX 16 at 2. The civil claim was dismissed with prejudice on July 25, 2019, without any adjudicatory action supporting or refuting the allegations of injury in Claimant's complaint. *See Stevens v. Grabovenko*, Stip. of Dismissal, No. 2:19-cv-01327-RMG (July 25, 2019).

Following two continuances, the ALJ conducted a telephonic hearing on November 10, 2020. At that time, Claimant asserted a claim for permanent total disability (PTD) benefits from July 2, 2018, and continuing. TR at 12. Employer disputed the claim, asserting Claimant has a retained earning capacity and can return to suitable work. Alternatively, Employer asserted Claimant suffered "substantial worsening" of his back issues, and the intervening January 2019 car accident severed its liability for benefits thereafter. Employer also raised the issue of whether Claimant failed to accurately report his post-injury earnings such that forfeiture of benefits under Section 8(j), 33 U.S.C. §908(j), applies. TR at 15-16.

LimRic Plumbing, reservation sales agent with Wild Dunes Resort, and entry level telecommunicator with Charleston County, South Carolina. *Id.* at 18-22.

[5] Mr. Price also recommended Claimant be referred to a pain management physician for a spinal cord stimulator trial to alleviate pain from his injuries. CX 13 at 7.

The ALJ issued her Decision and Order (D&O) on July 18, 2022. She found Claimant successfully invoked the Section 20(a) presumption that his head, left arm, back, and left leg injuries are work-related, 33 U.S.C. §920(a), by virtue of the parties stipulating the June 2014 injury arose out of and in the course of his employment. She also found Employer rebutted the presumption by proffering evidence that the January 2019 motor vehicle accident was an intervening event causing Claimant greater pain than he previously suffered. D&O at 19-21. After weighing the evidence as a whole, the ALJ concluded Employer's evidence was more credible, the January 2019 accident "is an intervening cause severing Employer's liability," and Claimant's disability from January 9, 2019, onward did not arise out of his employment with Employer. *Id.* at 22-23.

For the time period prior to the car accident, it was undisputed Claimant could not return to his usual work. JX 1; TR at 13-14. The ALJ determined Ms. Heusinger's vocational assessments showed the availability of suitable alternate employment from July 2, 2018, to January 8, 2019. D&O at 24. She further found Claimant did not submit any evidence to establish he performed a diligent job search, particularly because his testimony was inconsistent and not credible.[6] *Id.* at 25-27, 30. Thus, the ALJ found Claimant entitled to PPD benefits from July 2, 2018, to January 8, 2019, and awarded Employer a Section 14(j) credit, 33 U.S.C. §914(j), for any overpayments made between January 9, 2019, and July 18, 2022. *Id.* at 30-32.[7]

Claimant appeals the decision, contending the ALJ erred in determining the January 2019 auto accident constituted an intervening event completely severing Employer's liability. Claimant also argues the ALJ erred in finding he was not totally disabled from July 2, 2018, to the present and continuing. Employer responds, urging affirmance.[8]

Nature and Extent of Disability Before the Car Accident

Prior to the 2019 car accident, Claimant was receiving PPD benefits in the amount of $972.71 per week, commencing July 2, 2018. He contends he is permanently totally

[6] The ALJ's conclusion was influenced by inconsistencies regarding Claimant's involvement with his wife's liquor store as well as how he described his daily routine at the hearing versus in conversation with Ms. Heusinger. D&O at 25.

[7] The ALJ also determined Claimant properly reported his earnings on the LS-200 Form and denied Employer's request for a Section 8(j) forfeiture credit. *Id.* at 31.

[8] Neither Claimant nor Employer raise the Section 8(j) issue on appeal. As such, we affirm the ALJ's determinations with respect to this issue as unchallenged. *See Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

disabled and has been since his condition became permanent on April 18, 2016. Employer asserts it satisfied its burden of establishing the availability of suitable alternate employment, and Claimant could return to alternate work before the accident and is entitled to PPD benefits from July 2, 2018, to the time of the accident.

After a claimant establishes he is unable to perform his usual work, as in this case, the burden shifts to the employer to demonstrate the availability of realistic job opportunities within the geographic area where the claimant resides, which by virtue of his age, education, work experience, and physical and psychological restrictions, he can perform. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Brickhouse]*, 315 F.3d 286, 293 (4th Cir. 2002); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 543 (4th Cir. 1988); *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 202 (4th Cir. 1984). The employer need not obtain a job for the claimant but must establish the availability of realistic job opportunities which the claimant could secure if he diligently tried. *Marine Repair Services, Inc. v. Fifer*, 717 F.3d 327, 334 (4th Cir. 2013); *Trans-State Dredging*, 731 F.2d at 202. Evidence of a single job opening is insufficient; the employer must show a range of suitable jobs. *Lentz v. The Cottman Co.*, 852 F.2d 129 (4th Cir. 1988).

In considering the availability of suitable alternate employment, the ALJ should determine the claimant's physical and psychological restrictions based on the credited medical opinions and apply them to the available jobs identified by the employer's vocational expert. *Villasenor v. Marine Maint. Indus., Inc.*, 17 BRBS 99, *recon. denied*, 17 BRBS 160 (1985). If the employer demonstrates the availability of suitable alternate employment, a claimant may nonetheless be entitled to total disability benefits if he demonstrates he was unable to secure such work despite his diligent efforts. *See Tann*, 841 F.2d at 543-544; *see also International-Matex Tank Terminals v. Director, OWCP [Victorian]*, 943 F.3d 278 (5th Cir. 2019).

Claimant argues the ALJ erred in finding Employer met its burden. More specifically, he contends Ms. Heusinger's reports did not consider his education and lack of experience in telecommunications, hotel resort guest reservations, or HVAC-informed positions. Cl. Brief at 19. He avers Ms. Heusinger's positions do not fit within his permanent restrictions of no bending, climbing, lifting, pushing or pulling over 10 pounds, squatting, prolonged sitting, prolonged standing, operating a vehicle, or twisting. *Id.* Claimant also contends the ALJ errantly ignored Dr. Buncher's consideration of Ms. Heusinger's report. *Id.* at 20-21. He also claims the ALJ unjustifiably discredited Mr. Price's vocational assessment solely because he extended his opinion to include medical recommendations. *Id.* Finally, Claimant argues he conducted a diligent job search by researching each of the jobs in Ms. Heusinger's reports. *Id.* at 22.

We reject Claimant's allegations of error. Firstly, Ms. Heusinger accurately considered Claimant's educational background and work history in assessing his transferable skills. In her assessments, Ms. Heusinger indicated Claimant earned his high school diploma, though he repeated the 12th grade, received vocational technical training in carpentry and mechanical work, earned a certification in welding, and had experience using laptops and smartphones. EX 7 at 2-3. She also assessed his work history, including positions as a cook, fry cook, and cashier. *Id.* at 4. She used this information to conclude Claimant had transferable skills to perform the jobs she identified in her surveys. *Id.* at 8-9. As such, the ALJ permissibly credited Ms. Heusinger's assessments because she based them on Claimant's age, education, and work experience. D&O at 28-29; *see Jones v. Genco, Inc.*, 21 BRBS 12, 14 (1988) (holding vocational specialist's labor market survey and interview with claimant was sufficient to establish suitable alternate employment).

Secondly, Ms. Heusinger's vocational assessments indicated she considered medical records from Drs. Buncher, Wildstein, and Alexander in determining the alternate employment is suitable. EX 7 at 16. While Ms. Heusinger's 20-pound lifting limitation is beyond Dr. Buncher's prescribed 10-pound lifting restriction, the ALJ discredited Dr. Buncher's medical opinions based on his lack of explanation regarding how the imaging studies informed his decision to impose his limitations. D&O at 26; *see* CX 3. The ALJ's rationale is reasonable, and we may not overturn it based on alternative inferences that could be drawn from the evidence. *Tann*, 841 F.2d at 543; *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Hess]*, 681 F.2d 938, 941 (4th Cir. 1982). Similarly, we affirm, as supported by substantial evidence, her decision to give little weight to Mr. Price's vocational testimony based on his assessment that Claimant requires additional medical treatment including spinal cord manipulation before returning to work, which was outside of his expertise as a vocational specialist. CX 13. In addition, the ALJ permissibly discredited Dr. Buncher's opinion regarding the transferability of Claimant's vocational skills because of his lack of vocational expertise. D&O at 26; CX 3; *see Villasenor*, 17 BRBS at 103; *Alley v. Julius Garfinckel & Co.*, 3 BRBS 212, 214 (1976).

Finally, the ALJ permissibly concluded Claimant did not conduct a diligent job search. To establish total disability where the employer has shown the availability of suitable alternate employment, a claimant must show he was reasonably diligent in attempting to secure a job "within the compass of employment opportunities shown by the employer to be reasonably attainable and available." *Palombo v. Director, OWCP*, 937 F.2d 70, 74 (2nd Cir. 1991) (quoting *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1034 (5th Cir. 1981)). Claimant testified he did not apply for any of the jobs identified by Ms. Heusinger; rather, he said he discussed the positions with his family and with Dr. Buncher, all of whom believed he would be unable to perform any of the positions. TR at 61, 63-70, 75-76. Moreover, Claimant testified he did not make any attempt to apply to any type of work since his June 2014 injury, despite different medical professionals

telling him he can return to work in some capacity. TR at 76. As such, the ALJ did not err in concluding Claimant did not diligently attempt to secure suitable alternate employment. *Tann*, 841 F.2d at 543-544.

Therefore, we affirm the ALJ's determination that Claimant is entitled to PPD benefits from July 2, 2018, to January 8, 2019, at the rate of $972.71 based upon an average weekly wage calculation of $2,028.19 and a post-injury wage earning capacity of $481.60 per week. This determination forms the baseline of Claimant's work-related disability at the time of the car accident.

Intervening Cause

Next, we address Employer's liability for benefits from January 9, 2019, and continuing. Claimant contends the ALJ erred in finding the January 2019 motor vehicle accident was an intervening cause completely terminating Employer's liability. He asserts he is entitled to continuing benefits for his work-related disability, as he has established entitlement regardless of any additional disability caused by the car crash. He states that any increase in pain from the accident was temporary, and he has continued to experience pain at pre-January 2019 accident levels. Furthermore, even if the accident caused greater disability, Employer remains liable for the disability related to his work injury because both incidents contributed to his current condition. Cl. Brief at 14-16. Lastly, Claimant avers the ALJ erred in relying on allegations he raised in his civil complaint to find the accident severed all connection between his current disability and his employment because the case was dismissed without adjudication. *Id.*

If a claimant sustains a subsequent injury outside of work, any disability attributable to the intervening cause is not compensable. *See J.T. [Tracy] v. Global Int'l Offshore, Ltd.*, 43 BRBS 92, 101 (2009), *aff'd sub nom. Keller Found./Case Found. v. Tracy,* 696 F.3d 835 (9th Cir. 2012), *cert. denied*, 570 U.S. 904 (2013). If an employer asserts an intervening cause severs its liability, the employer must produce substantial evidence that the claimant's disability is the result of the intervening cause. *James v. Pate Stevedoring Co.*, 22 BRBS 271, 273 (1989). If an employer can show the subsequent progression of a claimant's condition is not a natural or unavoidable result of the work injury, but is the result of the intervening cause, the employer is relieved of liability for disability attributable to the intervening event. *James*, 22 BRBS at 273-274. However, subsequent unrelated medical conditions do not cut off an employer's liability for disability or medical benefits attributable to the work-related injury and to the natural progression of that injury. *Macklin v. Huntington Ingalls, Inc*., 46 BRBS 31, 32 (2012).

Even if Claimant had become totally disabled after the crash, Employer would be relieved only of liability for the additional disability related to the crash – not to its liability

for the work-related disability. *See Tracy*, 43 BRBS at 101; *James*, 22 BRBS at 273-274; *Drake v. Gen. Dynamics Corp.*, 11 BRBS 288, 291 (1979) (claimant's disability due to work-related lung condition remains compensable despite injuries sustained in subsequent non-work-related motorcycle accident). In *Drake*, the Board stated:

> There is no evidence that the loss of earning capacity due to claimant's lung disability magically disappeared on May 30, 1976, when he suffered the non-work-related injuries, only to reappear when he had recovered from the non-work-related injuries on October 18, 1976. Since claimant continued to suffer a work-related loss of earning capacity during this period, he should have continued to be compensated to the extent of that lost earning capacity.

Drake, 11 BRBS at 291.

The ALJ erred in relieving Employer of its liability without assessing the nature and extent of Claimant's disability attributable to the car accident. Indeed, after concluding the accident caused Claimant problems by increasing his symptoms and pain, the ALJ improperly jumped to the conclusion that Employer is relieved of all liability. D&O at 22. This is incorrect because, at this juncture, there has been no discussion of the disability caused by the January 2019 crash or why it nullifies liability for the work-related injury that rendered Claimant permanently partially disabled. *Tracy*, 43 BRBS at 101; *James*, 22 BRBS at 273-274; *Drake*, 11 BRBS at 291.[9] Unless Claimant's disability following the car crash was due solely to the car crash, Employer remains liable for the disability related to Claimant's work injury. *Id.*; *see generally Plappert v. Marine Corps Exch.*, 31 BRBS 109 (1997), *aff'g on recon. en banc* 31 BRBS 13 (1997) (if a condition is related to both causes, absent any apportionment evidence, the employer responsible for the work-related injury is liable for the entire disability). Therefore, we vacate the ALJ's termination of Claimant's benefits and remand the case for the ALJ to further consider this issue.

[9] We also note some of the ALJ's contradictory credibility findings are problematic. For example, despite finding Claimant is not a credible witness because of his inconsistent statements, the ALJ nevertheless fully relied on the statement in his civil complaint as the truth of the matter regarding the severity of his January 2019 injuries and resulting condition, finding it "more persuasive" than doctors' reports. D&O at 22, 24-25; EX 16. It is irrational to rely on Claimant's unsubstantiated, unadjudicated, civil complaint statements as persuasive evidence that the January 2019 accident was an intervening cause responsible for his overall condition. While the ALJ has the discretion to accept or reject all or any part of any testimony according to her judgment, *Perini Corp. v. Heyde*, 306 F. Supp. 1321 (D.R.I. 1969), on remand the ALJ must ensure her determinations are rationally explained and not contradictory.

Accordingly, we vacate the ALJ's findings regarding intervening cause and her termination of Employer's liability for benefits and remand the case for further consideration of that issue. In all other respects, we affirm the ALJ's Decision and Order.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge