U.S. Department of Labor

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

BRB No. 23-0114

LUCKY DRUMMOND	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
C P & O, LLC	)	
	)	
and	)	DATE ISSUED: 04/25/2024
	)	
PORTS AMERICA	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Granting Benefits in Part and Denying Benefits in Part of Monica Markley, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna Klein Camden, LLP), Norfolk, Virginia, for Claimant.

Christopher R. Hedrick (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for Employer/Carrier.

Before: GRESH, Chief Administrative Appeals Judge, BOGGS, and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Monica Markley's Decision and Order Granting Benefits in Part and Denying Benefits in Part (2019-LHC-00652) 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 law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On September 12, 2017, Claimant sustained work-related neck and low back injuries when he slipped, fell, and hit the handrail of the deck of a ship with his right side, jerking his neck before landing on his knees.[1] D&O at 35-36, 47; Employer's Exhibit (EX) 1 at 3; Hearing Transcript (Tr.) at 19-20. Claimant immediately sought emergency room care at Maryview Medical Center, where he was diagnosed with a rib contusion on his right side. EX 1; Claimant's Exhibit (CX) 8. On September 14, 2017, he began experiencing neck pain and notified Employer's Workers' Compensation Adjuster of this development on September 18, 2017. Tr. at 22-24; CXs 4, 9, 17 at 1-2; EX 2 at 2. Claimant saw his family doctor, Dr. Amy Campbell, on September 21, 2017, and she indicated there were no objective findings of any injury to the neck but recommended Claimant remain off work until a follow-up appointment. CX 9 at 1-2.

On September 28, 2017, Claimant began treating with Dr. Arthur Wardell who directed him to begin physical therapy, prescribed a rib belt, and diagnosed a rib contusion, sprains of cervical and thoracic spine ligaments, and a lumbar sprain.[2] CXs 10 at 2; 11. On April 23, 2018, Dr. Wardell referred Claimant to Dr. Paul Mitchell for a neurosurgical evaluation of the neck. CX 10 at 39. Dr. Mitchell diagnosed Claimant with multilevel cervical spondylosis with moderate to severe foraminal stenosis at the C3-4 and C4-5 vertebrae on his right side and indicated Claimant should have therapy and cervical epidural injections before attempting a C3-4, C4-5 anterior cervical discectomy and fusion. CXs 13 at 7-8; 24 at 7-10. Claimant elected conservative treatment instead of Dr. Mitchell's recommended surgery, prompting his return to Dr. Wardell in May and June 2018 for pain management. CXs 11; 13 at 10. He did not see Dr. Wardell again until April 8, 2019, at which time the doctor opined Claimant was permanently and totally disabled from waterfront work as of January 2, 2019. CXs 10 at 48-49; 11 at 17-18.[3] Meanwhile,

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the injury occurred in Portsmouth, Virginia. 33 U.S.C. §921(c); *see Roberts v. Custom Ship Interiors*, 300 F.3d 510 (4th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003); 20 C.F.R. §702.201(a).

[2] Based on the January 2018 MRI, Dr. Wardell diagnosed Claimant with a cervical spine strain, dorsal spine sprain, lumbar spine sprain, right rib contusion, and a "multi-level cervical spondylosis with uncovertebral and facet hypertrophy, worst at C4-5 and characterized as severe." CXs 10 at 1-2, 21; 15 at 1.

[3] The record, however, contains "patient work" notes dated January 2, 2019, and February 12, 2019, indicating Claimant had doctors' appointments both days. CX 11 at

on November 8, 2018, Dr. Mitchell referred Claimant for psychological treatment because he expressed he was experiencing some depression and wanted to talk to someone about his feelings related to his injuries. Tr. at 26-27; CXs 13, 18; *see* CXs 16, 23.

On January 15, 2019, Claimant began treating with Ms. Lesli Hughes, LCSW, who noted Claimant's depressed mood and diagnosed him with moderate major depressive disorder. CX 16 at 1-3. Claimant continued to treat with Ms. Hughes until December 2, 2019. *Id.* at 35. On November 14, 2019, Ms. Scarlett Jett, Psy.D., evaluated Claimant for purposes of his disability retirement. She stated Claimant had "mild" limitations on sustaining an ordinary routine and regular attendance at work, and interacting adequately with supervisors, co-workers, and the public due to his major depressive disorder, and "moderate" limitations on sustaining concentration and performing a task at a consistent pace. CX 23 at 5-6. Ms. Jett indicated the expected duration of Claimant's impairment was one year. *Id.*

On April 17, 2019, Dr. Mark Kerner evaluated Claimant and concluded Claimant's pain syndrome disables him from his usual longshore work. CXs 17 at 6-7; 22; 25; 26; EX 8. Claimant medically retired on May 31, 2019.[4] CXs 10 at 52; 17 at 7. After conservative treatment measures, including pain management, were not working, Claimant returned to Dr. Mitchell on September 10, 2019, to pursue the recommended neck surgery. CX 13 at 11; Tr. at 25-26.

Employer sent Claimant to Drs. Grant Skidmore, Jeffrey Laurent, and Andrew Pollak. EXs 2, 5, 7, 11. On January 9, 2018, Dr. Skidmore opined Claimant sustained a mild cervical strain and would be at maximum medical improvement if his scheduled MRI showed nothing acute. EX 2 at 1-2. On October 8, 2018, Dr. Laurent indicated there is no reason Claimant is unable to return to work, but the doctor was unwilling to opine whether Claimant's rib injury had reached maximal medical improvement. EX 5 at 1; 7 at 15. On December 15, 2019, Dr. Pollak diagnosed an acute exacerbation of cervical spinal pain and radiculopathy but determined Claimant could return to work without restriction as of January 9, 2018. EX 11 at 5-7.

17-18. These notes provide no further insight into those appointments, but merely state Claimant is "[p]ermanently and totally disabled from all waterfront work as of January 2, 2019." *Id*.

[4] Claimant's retirement status does not preclude an award of benefits if his injury causes lost capacity to earn after retirement, pursuant to Section 2(10). 33 U.S.C. §902(10); *Christie v. Georgia-Pac. Co.*, 898 F.3d 952, 959 (9th Cir. 2018); *Moody v. Huntington Ingalls, Inc.*, 879 F.3d 96, 100 (4th Cir. 2018).

Employer paid Claimant temporary total disability benefits from September 13, 2017, to October 10, 2018. Claimant, thereafter, sought temporary total disability compensation from October 11, 2018, to the present, medical benefits for psychiatric and pain management treatment, as well as the neck surgery Dr. Mitchell recommended.

The ALJ found Claimant invoked the Section 20(a) presumption, 33 U.S.C. §920(a), based on neck and low back injuries sustained as a result of the September 12, 2017 work accident; the ALJ also found Employer established rebuttal of the presumption as to those injuries. D&O at 25-30. In weighing the evidence as a whole, the ALJ found Claimant established his neck condition and low back injury were caused by the September 12, 2017 workplace accident.[5] *Id.* at 32-35. Ultimately, the ALJ determined Claimant's disability is temporary, the credible medical evidence established his pain is not so severe as to be totally disabling, and he could perform his usual work as a gangway man as of October 11, 2018. *Id.* at 38, 41, 43. She therefore denied Claimant's claim for ongoing disability benefits. Having concluded Claimant established compensable injuries to his neck and low back, as well as a compensable psychological condition, the ALJ awarded him medical benefits under Section 7, 33 U.S.C. §907, including the recommended neck surgery and mental health treatment. *Id.* at 43, 46-47.

On appeal, Claimant challenges only the ALJ's finding that he is not entitled to temporary total disability benefits after October 10, 2018.[6] Specifically, he asserts the ALJ erred in weighing the evidence regarding his ability to return to work and in not considering whether restrictions due to his work-related psychological condition prevent him from

[5] The ALJ also found sufficient evidence to establish a causal relationship between Claimant's work-related injuries and his need for psychological treatment. D&O at 47. We affirm the ALJ's conclusions that Claimant's neck, low back, and psychological conditions are work-related as they are unchallenged on appeal. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

[6] We affirm the ALJ's finding that Claimant's disability, if any, is temporary, as she rationally concluded Claimant was awaiting further treatment, including the disputed neck surgery, and, therefore, has not yet reached maximum medical improvement for his work-related neck and low back conditions. *See Monta v. Navy Exch. Serv. Command*, 39 BRBS 104, 109 (2005) (Board affirms ALJ's finding that the claimant's work-related injury is temporary because he was undergoing treatment with a view toward improvement); D&O at 38. Moreover, the ALJ's findings as to the nature of Claimant's work-related conditions are unchallenged on appeal. *Scalio*, 41 BRBS 57; D&O at 35-36.

returning to his usual work. Employer responds, urging affirmance of the ALJ's decision. Claimant filed a reply brief.

An injured employee bears the burden of establishing the nature and extent of his disability. *Gacki v. Sea-Land Serv., Inc*., 33 BRBS 127, 128 (1998); *Trask v. Lockheed Shipbuilding & Constr. Co*., 17 BRBS 56, 59 (1980). He may establish a prima facie case of total disability by demonstrating he is unable to return to his usual employment due to his work injury. *See, e.g., Norfolk Shipbuilding & Dry Dock Co. v. Hord*, 193 F.3d 797, 800 (4th Cir. 1999). To determine whether a claimant has shown he is totally disabled, an ALJ must compare his medical restrictions with the specific requirements of his usual employment. *Curit v. Bath Iron Works Corp*., 22 BRBS 100, 103 (1988); *Carroll v. Hanover Bridge Marina*, 17 BRBS 176, 178 (1985). An ALJ may find an employee able to do his usual work despite his complaints of pain, numbness, and weakness, when a physician finds no functional impairment. *Peterson v. Washington Metro. Area Transit Auth*., 13 BRBS 891, 896 (1981).

As the factfinder, the ALJ is entitled to evaluate the credibility of all witnesses (including physicians), weigh the medical evidence, and draw her own inferences and conclusions from the record. *Newport News Shipbuilding & Dry Dock Co. v. Cherry*, 326 F.3d 449, 452 (4th Cir. 2003); *Cooper v. Offshore Pipelines Int'l, Inc*., 33 BRBS 46, 52 (1999). It is within her discretion to accept or reject all or any part of anyone's testimony according to her judgment. *See, e.g., Jones Stevedoring Co. v. Director, OWCP* [*Taylor*], 133 F.3d 683, 687 (9th Cir. 1997); *Perini Corp. v. Heyde*, 306 F.Supp. 1321, 1324-1325 (D.R.I. 1969). The ALJ is entitled to determine the weight to be given to conflicting medical evidence. *See generally Pittman Mechanical Contractors, Inc. v. Director, OWCP* [*Simonds*], 35 F.3d 122, 127 (4th Cir. 1994). The Board may not reweigh the evidence but must affirm a decision supported by substantial evidence and in accordance with law. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP* [*Brickhouse*], 315 F.3d 286, 294 (4th Cir. 2002). Moreover, the Board will not interfere with the ALJ's credibility determinations unless they are inherently incredible or patently unreasonable. *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 543 (4th Cir.1988); *Cordero v. Triple A Mach. Shop*, 580 F.2d 1331, 1335 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403, 405 (2d Cir. 1961). If the ALJ's conclusion upon weighing the evidence is rational and supported by substantial evidence, it must be affirmed. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 264 (4th Cir. 1997); *see generally Carswell v. E. Phil & Sons*, 999 F.3d 18, 27-28 (1st Cir. 2021), *cert. denied*, 142 S. Ct. 1110 (2022).

In this case, Claimant contends the ALJ incorrectly rejected his credible complaints of pain in finding him capable of returning to his usual work. He asserts the ALJ's findings are inconsistent as she credited his testimony when addressing causation, but then, without

adequate explanation, discredited his testimony when determining the nature and extent of his disability.[7] In addition, he raises a similar contention regarding the ALJ's assessment of the medical opinions on the issue of disability. Specifically, he contends the ALJ erred in weighing the medical opinions to find he can return to work and made "inherently incredible and patently unreasonable" determinations in giving greater weight to the same physicians she previously found less persuasive on the matter of causation.

We reject Claimant's contentions. Again, the ALJ may accept or reject all or any part of anyone's testimony according to her judgment. *Taylor*, 133 F.3d at 687; *Perini Corp.*, 306 F.Supp. at 1324-1325. She has done that here – precisely and with explanation. First, the ALJ accurately found Claimant's duties as a gangway man involved about an hour of climbing ladders or stairs and reaching above shoulder height, communicating with the crane operator, standing for five hours, walking for three hours, and sitting for about an hour. D&O at 38, 41; CX 2. She also correctly noted the job did not involve work with arms above shoulder level, work with the body bent at the waist, stooping, kneeling, crawling, pushing, pulling, or lifting.[8] D&O at 38. Substantial evidence supports the ALJ's conclusion that the majority of Claimant's work as a gangway man involves standing and walking while communicating with others. *Id.*; *Moore*, 126 F.3d at 264; CX 2.

Next, the ALJ determined Claimant credibly reported neck and low back pain, and she specifically found the record established his pain was persistent and caused by his work injuries. However, in conjunction with the physicians' opinions, she also reasonably found his pain was not so severe as to be totally disabling or prevent him from performing his job duties. D&O at 32, 35-36, 41, 43. As the decision is for the ALJ with respect to which part of Claimant's testimony she accepts and for what purpose, we reject Claimant's assertion that the ALJ erred in not accepting his complaints of pain as evidence of total disability.

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[7] Claimant maintains he should not be penalized for electing to return to conservative treatment rather than pursue surgery, especially because the ALJ neglected to discuss why he opted to forgo the surgery – a decision which rests squarely with him. Cl. Brief at 14. Contrary to Claimant's argument, the ALJ merely found it "notable" that he elected to return to conservative treatment rather than pursue surgery after initially treating with Dr. Mitchell. D&O at 41. We note, however, that after conservative treatment did not work, Claimant opted to pursue surgical remedies. *Id.* at 45; CX 13 at 16-20. His election of how to treat his conditions is not at issue.

[8] The language on Claimant's "Regular Duty Job Analysis" form indicates his work did not involve working with his arms extended at shoulder level or lifting. CX 2.

On the issue of disability, the ALJ gave significant weight to the opinions of Drs. Laurent and Pollak and less weight to the opinions of Drs. Wardell, Mitchell, Skidmore, and Kerner. D&O at 43. In rejecting Claimant's doctors' opinions on disability, she stated they did not explain their rationale sufficiently. *Id.* at 39 ("Dr. Wardell never explained why Claimant's particular symptoms prevented him from performing his specific job duties" and the doctor gave "no explanations for" concluding Claimant is permanently totally disabled),[9] 40-41 (despite the lack of physical restrictions or functional limitations, and absent any acute changes, Dr. Mitchell "did not adequately explain why [limited range of motion] would prevent Claimant from performing the very limited amount of climbing and reaching that is required by the gangway position" and the doctor "never engaged in any meaningful consideration of Claimant's job requirements"),[10] 42 (Dr. Skidmore examined Claimant once and gave no opinion on disability), 42-43 (Dr. Kerner's opinion rests on Claimant's complaints of pain and a speculative conclusion that a Functional Capacity Evaluation (FCE) (if performed) would show "pain-inhibited functionality").[11] To the contrary, the ALJ explained she gave greater weight to Drs. Laurent's and Pollak's disability opinions. *Id.* at 41-42 (Dr. Laurent reviewed Claimant's job description and compared it with his conditions and complaints, specifically noting the job does not involve heavy lifting; the ALJ found his opinion "well explained and supported by the record"), 42 (Dr. Pollak reviewed Claimant's job description, acknowledged he has no functional deficiencies and is not taking medications that would prevent a return to work, and concluded he could have returned to work despite some on-going symptoms). We reject Claimant's assertion of error. *Pimpinella v. Universal Mar. Serv. Inc.*, 27 BRBS 154, 157 (1993) (Board rejected the claimant's argument that the administrative law judge erred in

[9] The ALJ rationally rejected Dr. Wardell's conclusory opinion that Claimant is permanently totally disabled from all waterfront work because it lacked reasoning and explanation. Dr. Wardell anticipated physical therapy would allow Claimant to reach maximum medical improvement but then failed to explain why that did not occur after his course of physical therapy was completed. D&O at 33, 35; CXs 10 at 48; 11 at 17. Contrary to Claimant's argument, it is Dr. Wardell's lack of explanation that makes the ALJ's credibility determination reasonable. *Pisaturo v. Logistec, Inc.*, 49 BRBS 77, 81 (2015).

[10] Substantial evidence supports the ALJ's credibility determination as Dr. Mitchell's notes twice indicated Claimant was to remain out of work until his next appointment and never otherwise mentioned Claimant's work or job duties. CXs 13 at 6, 9; 24.

[11] There is no evidence that Claimant underwent any FCE corresponding with Dr. Kerner's statement. CX 17 at 6-7.

relying on a doctor's opinion to deny disability benefits after having rejected that doctor's opinion in finding causation established; causation and disability are separate issues and the ALJ may accept or reject all or any part of any witness's testimony according to his judgment).

Finally, Claimant asserts the ALJ did not adequately consider limitations due to his work-related psychological condition in addressing his ability to return to his usual work. He maintains those limitations establish he cannot perform his usual employment.

As noted above, the ALJ found a causal relationship between Claimant's psychological condition, work-related injuries, and pain. D&O at 47. Although she concluded Claimant is entitled to reasonable and necessary psychological treatment, she did not address any limitations due to his work-related psychological condition when finding he could return to his usual work. *Id.* As the ALJ did not address any of the psychological evidence, despite finding Claimant's psychological condition is a work-related condition, we vacate her finding that Claimant has not established a prima facie case of total disability and remand the case for further consideration of this matter. On remand, the ALJ must determine whether Claimant has any psychological limitations which affect his ability to return to his usual work and then compare those restrictions, if any, with the requirements of his usual employment. *White v. Peterson Boatbuilding Co.*, 29 BRBS 1, 13 (1995) (ALJ erred by not considering the effect of the claimant's psychological problems on his employability).

Accordingly, we vacate the ALJ's finding that Claimant did not establish his prima facie case of total disability and remand the case for further consideration of this issue

consistent with this opinion. In all other respects, we affirm the ALJ's Decision and Order Granting Benefits in Part and Denying Benefits in Part.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge