U.S. Department of Labor

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

BRB No. 24-0328

STANLEY JARZOMBEK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	**NOT-PUBLISHED**
UNITED RIVERHEAD TERMINAL INCORPORATED	)	
	)	
	)	
and	)	DATE ISSUED: 04/27/2026
	)	
ACE AMERICAN INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Petitioners	)	
	)	DECISION and ORDER

Appeal of the Decision and Order – Awarding Benefits of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Timothy F. Schweitzer (Hofmann & Schweitzer), New York, New York, for Claimant.

Keith L. Flicker and Nicole M. Duggan (Flicker, Garelick & Associates, LLP), New York, New York, for Employer and its Carrier.

Before: GRESH, Chief Administrative Appeals Judge, ROLFE and ULMER, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Theresa C. Timlin's Decision and Order – Awarding Benefits (2021-LHC-00494) rendered

on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (Act).[1] We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[2] 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 361-362 (1965).

The issues in this appeal are limited to the nature and extent of Claimant's disability. There is no dispute as to the cause of Claimant's back injury or his various diagnoses.

On September 3, 2018, Claimant tripped and fell down a flight of stairs, injuring his back, while working as a lead terminal and boiler room operator for Employer. Hearing Transcript (HT) at 5-7, 16-21; Claimant's Exhibit (CX) 10 at 73-74. On October 19, 2018, Dr. Christopher Frendo began treating Claimant's back pain and right leg radiculopathy; based on Claimant's September 17, 2018 MRI, he diagnosed Claimant with multilevel degenerative disc disease with disc herniations and stenosis, while also noting evidence of myelomalacia. Joint Exhibit (JX) 1 at 1-23, 29-34. He ordered another MRI, conducted on October 30, 2018, which showed stenosis and cord compression with myelomalacia, and based on Claimant's lower extremity weakness, recommended T11-12 laminectomy and fusion. *Id.* at 32, 41. Other doctors who examined or treated Claimant also arrived at

[1] The ALJ issued an Order Correcting Scrivener's Error, excising the third order from page sixty-three of her Decision and Order – Awarding Benefits. May 9, 2024 Order Correcting Scrivener's Error.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Second Circuit because Claimant sustained the injury at issue in this case in New York. 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).

similar conclusions.[3] CX 10 at 66-67; CX 7 at 71-75;[4] Employer's Exhibit (EX) 1 at 2;[5] JX 1 at 856-862;[6] *see also* JX 11 at 13-16, 20, 29.[7]

On November 11, 2019, based on Dr. Chernoff's recommended work restrictions dated May 15, 2019, Employer requested Claimant return to, and it offered him, "light duty" work in the boiler room. JX 8. Claimant returned to work on December 1, 2019, but testified he was having "difficulty from day one."[8] CX 10 at 123; HT at 5-7. On May 27, 2020, Claimant aggravated his back while moving scaffolding outriggers while cleaning the floor of the boiler room and soon after he told his supervisor, Dara Kovarsky,

[3] Claimant had additional lumbar and thoracic MRIs conducted on August 19, 2019, August 26, 2020, and December 16, 2021, which documented his progressing stenosis and myelomalacia. JX 1; *see* JX 13 at 14-16, 32, 90; JX 11 at 38-49.

[4] On April 24, 2021, Dr. David Benatar diagnosed Claimant with thoracic disc herniation with cord compression and myelomalacia, multilevel lumber disc herniations with lumbar radiculopathy and left leg weakness, and multilevel stenosis. CX 7 at 75. Dr. Benatar opined Claimant should consider thoracic and lumbar surgeries but surmised they "may not help" and "may not improve the weakness" of his left leg but "may hopefully" decrease the progression of his condition. *Id.* at 76.

[5] At Employer's request, Dr. Robert Moriarty reviewed Claimant's medical records, examined him on August 27, 2020, and diagnosed him with a thoracolumbar sprain/strain with reported herniations and stenosis with reported myelomalacia. EX 1 at 2-3.

[6] Dr. Marc Chernoff examined Claimant on December 5, 2018, and diagnosed him with a lumbar sprain superimposed on significant lumbar spondylosis and with significant stenosis. JX 1 at 856-862. He agreed Dr. Frendo's recommendation for surgery was reasonable. *Id.* at 860, 869.

[7] Claimant sought a second opinion with Dr. Raphael Davis, who ordered additional physical therapy and referred him to Dr. Donald Macron for pain management. In January 2019, Dr. Macron diagnosed disc herniation, radiculopathy, myelomalacia, and stenosis and administered multiple epidural steroid injections to "decrease pain and increase function." *See generally* JX 1; *see also* JX 11 at 13-16, 20, 29. Following treatment, his physician's assistant reported Claimant could "potentially be a candidate for surgical intervention." JX 1 at 557, 607.

[8] Employer paid Claimant temporary total disability benefits from September 4, 2018, to December 1, 2019, and it provided all reasonable and necessary medical benefits. D&O at 3; HT at 5-7.

that he was "having difficulties" with the work. CX 10 at 124-126; HT at 47-48; JXs 7; 12 at 40, 43-44. Claimant stopped working on June 20, 2020, due to severe back pain and leg weakness.[9] D&O at 3; HT at 57-58; CX 10 at 119, 121, 124; JXs 7; 12 at 46. On September 8, 2020, and October 1, 2021, Employer again offered Claimant light duty work, but he did not return due to his pain. JXs 6, 9; HT at 116-117.

After Claimant filed his claim and Employer controverted it, the case was referred to the Office of Administrative Law Judges for a hearing. The ALJ accepted the parties' stipulations that Claimant sustained a work-related back injury while working for Employer on September 3, 2018, and that Employer paid Claimant temporary total disability (TTD) benefits from September 4, 2018, to December 1, 2019. D&O at 2-3. She noted the parties controverted the nature and extent of Claimant's disability from June 20, 2020, through the present. *Id.* at 3. Specifically, she found Claimant has a permanent disability and his condition reached maximum medical improvement (MMI) on April 24, 2021. *Id.* at 56. She then determined Claimant has a totally disabling back injury and is unable to perform any work, thereby finding Employer failed to establish the availability of suitable alternate employment (SAE). *Id.* at 59-60. Ultimately, she awarded Claimant permanent total disability (PTD) benefits from June 20, 2020, through the present and continuing. *Id.* at 63. The ALJ also awarded Claimant reasonable and necessary medical treatment for his work-related injury. *Id.*

On appeal, Employer contends the ALJ erred in finding Claimant is permanently and totally disabled and in finding it failed to establish the availability of SAE. It asserts the ALJ erred by relying "solely" on Dr. Benatar's opinion because she "incorrectly found that the remaining evidence 'merited little weight.'" Emp. Brief at 59. With respect to the nature of Claimant's disability, Employer asserts Claimant has not undergone the recommended surgery, so his condition cannot be permanent, and with respect to the extent of Claimant's disability, Employer asserts Claimant is able to perform many activities and Dr. Benatar's opinion is in the minority of the doctors' opinions, so he cannot be totally disabled. Claimant urges affirmance of the ALJ's decision, asserting Employer is seeking a reweighing of the evidence because it is dissatisfied with the outcome. Employer filed a reply brief reiterating its arguments and asserting they represent more than mere dissatisfaction.

[9] While the record includes conflicting information about whether Claimant's last day of work was June 20 or 22, 2020, the parties stipulated Claimant's last day was June 20, 2020, and the ALJ accepted the stipulation. D&O at 3.

Nature of Disability

The claimant has 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). A claimant's condition has reached MMI when he is no longer undergoing treatment intended to improve his work-related condition or when that condition is of a lasting and indefinite duration beyond a normal healing period. *See Gulf Best Elec., Inc. v. Methe*, 396 F.3d 601, 605 (5th Cir. 2004); *La. Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 125-126 (5th Cir. 1994); *McCaskie v. Aalborg Ciserv Norfolk, Inc.*, 34 BRBS 9, 12 (2000). The date that a claimant's disability reaches permanency is a question of fact determined solely by medical evidence. *SGS Control Servs. v. Director, OWCP* [*Barrios*], 86 F.3d 438, 443 (5th Cir. 1996). An irreversible condition is permanent per se. *Drake v. Gen. Dynamics Corp.*, 11 BRBS 288, 290 n.2 (1979).

The ALJ may rely on a physician's opinion to establish the date of MMI, *Miranda v. Excavation Constr., Inc.*, 13 BRBS 882, 884 (1981), and he may consider a claimant's testimony as to his ability to perform tasks. *Stoute v. Shea-Ball*, 13 BRBS 755, 758 (1981); *Tibbetts v. Bath Iron Works Corp.*, 10 BRBS 245, 249-250 (1979). If a physician believes further treatment should be undertaken, then a possibility of success exists. *Abbott*, 40 F.3d at 126. If surgery is anticipated, MMI has not been reached. *Victorian v. Int'l-Matex Tank Terminals*, 52 BRBS 35, 39 (2018), *aff'd sub nom. Int'l-Matex Tank Terminals v. Director, OWCP*, 943 F.3d 278 (5th Cir. 2019); *McCaskie*, 34 BRBS at 12. If, however, surgery is not anticipated or if the prognosis after surgery is uncertain, the claimant's condition may be permanent. *Victorian*, 52 BRBS at 39; *McCaskie*, 34 BRBS at 12-13.

The ALJ first determined there is no reason to doubt Claimant's credibility, as he was consistent about his abilities, there were no concerns about malingering, and Claimant was diligent with his treatment and his desire to return to work.[10] D&O at 52. In addressing the nature of Claimant's work-related disability after June 20, 2020, the ALJ acknowledged surgery is "an untested prospect" but found, based on Claimant's "aversion to invasive treatment" and Dr. Benatar's opinion that a surgical outcome is uncertain, the possibility of surgery did not prevent finding Claimant has a permanent condition. *Id.* at 54-55; *see*

[10] At his September 14, 2021 deposition, Claimant testified walking is one of the "hardest" activities he can currently perform, and he experiences back pain while standing and walking. CX 10 at 63-64, 144. Further, he explained he can comfortably lift three to five pounds, but he has trouble bending. *Id.* at 142-144. He testified he cannot perform desk work or work in any capacity due to pain and explained he cannot "really do anything without pain." *Id.* at 146-147, 153; HT at 107-109, 117, 126. In addition, he stated he was in pain from sitting during the deposition and the hearing. CX 10 at 147; HT at 108.

Worthington v. Newport News Shipbuilding & Dry Dock Co., 18 BRBS 200, 202 (1986) (rejecting the argument that the claimant's condition was not permanent because his congenital hearing defect was surgically correctable where surgery was not anticipated and the ALJ's determination that the claimant reasonably refused to undergo surgery was rational and supported by the record). She next found Claimant has a permanent condition, specifically myelomalacia, which cannot be corrected by surgery. D&O at 54-55; *see Drake*, 11 BRBS at 290 n.2.

The ALJ then weighed the medical opinions of Drs. Benatar and Moriarty that Claimant's disability is permanent against the differing opinions of Drs. Macron and Chernoff. D&O at 54-56. She found Drs. Benatar's and Moriarty's opinions to be "very persuasive," Dr. Macron's opinion to be not well-reasoned, and Dr. Chernoff's opinion to be unpersuasive and not well-documented. *Id.* at 55-56. Consequently, the ALJ determined Claimant's disability is permanent and, based on Dr. Benatar's April 24, 2021 report, concluded Claimant's condition reached MMI as of April 24, 2021. *Id.* at 56.

Dr. Benatar opined Claimant is permanently disabled and, after reviewing Claimant's most recent MRIs, explained Claimant's lumbar MRIs are "steadily getting worse," that he has severe stenosis and myelomalacia, his weakness and condition are worsening, and Claimant's myelomalacia "can never get better." CX 7 at 76; JX 13 at 14-16, 24-25, 27, 32, 90. Nevertheless, he opined Claimant should have lumbar surgery to "see if he gets some neurologic improvement" with his leg symptoms and if that surgery failed, then a "higher risk" thoracic surgery would be his remaining option. JX 13 at 29-32. Additionally, while Dr. Moriarty initially opined Claimant has a temporary disability, Dr. Moriarty explained at his August 20, 2021 deposition that Claimant's thoracic spine condition is a "permanent disability." EX 1 at 2-3, 5-6; JX 10 at 18-19, 26.

Dr. Macron opined Claimant had a temporary disability and, after reviewing Claimant's most recent MRIs, observed Claimant's stenosis had worsened, which he stated could "potentially" explain Claimant's continuing leg symptoms, and that Claimant's myelomalacia was "concerning" but "not necessarily disabling." JXs 1 at 106-107, 220; 11 at 38-49. While his physician's assistant indicated Claimant could "potentially be a candidate for surgical intervention," Dr. Macron testified at his deposition he was still considering whether Claimant needed to return to Dr. Davis to discuss surgical intervention for his conditions. JXs 1 at 557, 607; 11 at 49-50. Dr. Chernoff opined Claimant has responded to physical therapy and epidural steroid injections and that Dr. Frendo's recommendation for surgery was reasonable, but he did not otherwise address permanency, nor did he offer an opinion after Claimant left his modified light duty work. JX 1 at 856-876.

The ALJ accurately noted Dr. Benatar opined Claimant's condition had worsened, based on the most recent MRIs, and his myelomalacia was permanent. D&O at 18, 54; JX 13 at 24, 32; CX 7 at 76. Further, she noted Dr. Benatar opined surgery "may not help" and "may not improve the weakness of the left leg or the atrophy but it may hopefully decrease the progression of it." D&O at 54; CX 7 at 76. The ALJ found that although Dr. Benatar acknowledged surgery might have a "chance" to improve Claimant's weakness, he characterized any potential surgery "not as a cure to Claimant's injury, but more as a palliative option."[11] D&O at 16-17, 54-55. Further, she noted Dr. Moriarty similarly opined Claimant suffered from a "permanent disability" because of his thoracic spine condition. *Id.* at 55; EX 1; JX 10 at 18-19, 26. Based on the ALJ's review of the record, she found their opinions "very persuasive" and determined that while the recommended surgeries remained untested, surgery would not improve Claimant's myelomalacia and the resulting weakness. D&O at 55-56.

Conversely, the ALJ gave little weight to Drs. Macron's and Chernoff's opinions. D&O at 55-56. The ALJ accurately noted Dr. Macron opined Claimant's myelomalacia, as shown on his most recent thoracic MRI, is "not necessarily disabling," but in making this statement, Dr. Macron did not directly address whether this condition was permanent. D&O at 55; JX 11 at 42-44. The ALJ further determined Dr. Macron's opinion was "less compelling" than Dr. Benatar's opinion because it was less definitive with respect to permanency, though Dr. Macron expressed "continuing concerns" about Claimant's intermittent leg symptoms and spinal condition. D&O at 55; JX 11 at 19, 39-40. Therefore, the ALJ concluded Dr. Macron's opinion was not well-reasoned and was unpersuasive. D&O at 55. When considering the evidence together, the ALJ determined Dr. Chernoff's "opinion on permanency is not well documented" and entitled to little probative weight because he last examined Claimant in 2019, and he did not consider the most recent evidence when writing his reports, including the December 16, 2021 MRIs, which the ALJ had previously credited as demonstrating Claimant's current and irreversible condition. *Id.* at 54-56.

For these reasons, the ALJ found Drs. Benatar's and Moriarty's opinions outweighed Drs. Macron's and Chernoff's opinions and reasonably concluded, despite

[11] We are not persuaded by Employer's contention that the ALJ erred in framing Dr. Benatar's opinion regarding surgery as a "palliative option" because it is contradicted by his recommendation for two surgeries and his "indefinite and uncertain" discussion regarding the outcomes of the surgeries. Emp. Br. at 62. As discussed above, the ALJ specifically considered Dr. Benatar's recommendations and discussion that surgery "may" relieve pain and weakness alongside his opinion that Claimant's myelomalacia was permanent. D&O at 16-18, 54-56.

multiple recommendations for surgeries, that surgery would not improve Claimant's disabling myelomalacia and the resulting weakness.[12] *See Victorian*, 52 BRBS at 39; *McCaskie*, 34 BRBS at 12-13; D&O at 54-56. Because the ALJ is authorized to determine which opinions are entitled to determinative weight based on their reasoning, and because her conclusions are supported by substantial evidence, we affirm the ALJ's decision to rely on Drs. Benatar's and Moriarty's opinions that Claimant has a permanent disability.[13] *See Pietrunti v. Director, OWCP*, 119 F.3d 1035, 1042 (2d Cir. 1997); *Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 323 (2d Cir. 1993); *Pisaturo v. Logistec, Inc.*, 49 BRBS 77, 81 (2015). We also affirm, as supported by the medical evidence, the ALJ's determination that Claimant's condition reached MMI as of April 24, 2021. *See Pietrunti*, 119 F.3d at 1042; *Gasparic*, 7 F.3d at 323; *Pisaturo*, 49 BRBS at 81; D&O at 56. Because the ALJ found Claimant's condition became permanent as of April 24, 2021, however, he is not entitled to permanent disability benefits before that date. *Hoodye v. Empire/United Stevedores*, 23 BRBS 341, 344 (1990) (if MMI has not yet been reached and the claimant is disabled, the appropriate remedy is an award of temporary total or temporary partial disability benefits).

Extent of Disability

The Act defines disability as the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. §902(10). To establish a prima facie case of total disability, a claimant must demonstrate an inability to perform his usual employment due to his work injury. *Palombo v. Director, OWCP*, 937 F.2d 70, 73 (2d Cir. 1991). In determining

[12] Employer asserts Claimant has consistently been deemed "temporarily impaired," referencing Drs. Macron's and Davis's New York State Workers' Compensation Board forms from 2019 and 2020 which indicated Claimant was temporarily disabled. Emp. Br. at 66. The ALJ acknowledged these forms but did not otherwise rely on them in weighing the medical opinions. D&O at 25. As Employer has not explained how further consideration of these forms could have led to a different outcome, we reject the argument. *See Montoya v. Navy Exch. Serv. Command*, 49 BRBS 51, 52 n.1 (2015); *Plappert v. Marine Corps Exch.*, 31 BRBS 109, 111 (1997). Moreover, as Claimant's condition has lasted for years with little chance of improvement, it was reasonable for the ALJ to conclude Claimant's condition is permanent. *McCaskie*, 34 BRBS at 12.

[13] The ALJ noted that "although Employer did not specifically stipulate to the permanency of Claimant's injury, it did not discuss the nature of disability issue in its brief." D&O at 56 n.22. Nevertheless, the ALJ's findings are supported by substantial evidence.

whether a claimant can return to his usual work, the ALJ must compare the claimant's medical restrictions with the specific physical requirements of his usual employment. *See Obadiaru v. ITT Corp.*, 45 BRBS 17, 21 (2011). A claimant's credible complaints of pain alone may be enough to meet his burden of showing an inability to return to his usual work. *Hairston v. Todd Shipyards Corp.*, 19 BRBS 6, 7 (1986), *rev'd on other grounds*, 849 F.2d 1194 (9th Cir. 1988). If an ALJ finds, based on medical opinions or other evidence, that the claimant cannot perform any employment, the employer has not established his ability to perform alternate employment, and the claimant is totally disabled. *See Johnson v. Director, OWCP*, 911 F.2d 247, 251 (9th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 944-945 (5th Cir. 1991); *J.R.* [*Rodriguez*] *v. Bollinger Shipyard, Inc.*, 42 BRBS 95, 97 (2008), *aff'd sub nom. Bollinger Shipyards, Inc. v. Director, OWCP*, 604 F.3d 864 (5th Cir. 2010).

The ALJ found Claimant established a prima facie case of total disability based on his credible testimony. D&O at 52, 57-59. We affirm this finding as unchallenged on appeal. *See Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57, 58 (2007). The ALJ then determined Claimant cannot perform any work based on a combination of his credible complaints of pain and his "good faith effort" to return to modified light duty work for Employer, Ms. Kovarsky's testimony, and Dr. Benatar's opinion. D&O at 57-59. Conversely, the ALJ determined Drs. Chernoff's, Macron's, and Moriarty's opinions that Claimant could continue to do light or sedentary work were entitled to little weight. *Id.* at 58-59. Thus, the ALJ concluded Claimant is totally disabled, and Employer failed to establish the availability of SAE because Claimant cannot conduct any work. *Id.* at 59-60, 62. Employer contends the ALJ erred in finding Claimant is totally disabled because Claimant is "capable of returning to work within the prescribed work restrictions of light, (semi-) sedentary duty." Emp. Brief at 65-72; Emp. Reply at 3-8.

First, the ALJ determined Claimant's testimony and complaints of pain were persuasive and credible. D&O at 52, 57-58. The ALJ noted that in testifying about his return to light duty work, Claimant detailed specific examples of job duties that were difficult for him to perform and caused pain, including bending and twisting, that he had to use sick leave due to the intensity of his pain, and that he ultimately stopped working due to pain.[14] *Id.* at 57-58; HT at 25-57; CX 10 at 121. In addition, the ALJ considered the testimony of Claimant's supervisor, Ms. Kovarsky, describing her observations of Claimant's pain and struggles to safely perform his light duty work and how working

[14] For example, the ALJ concluded that Claimant's moving the scaffolding outriggers to clean the boiler room floor, which reaggravated his back injury, was "reasonably related" to his duty to "oversee[] boiler operations." D&O at 57; JX 8; HT at 47.

caused his condition to worsen. D&O at 57; JX 12 at 46-51. Based on their testimonies, the ALJ determined Claimant made a "good faith" effort to return to light duty work but was unable to continue due to pain and he was "unable to perform such duties without aggravating his substantial back injury." D&O at 58. We affirm these findings as unchallenged on appeal.[15] *See Scalio*, 41 BRBS at 58.

Next, we address the ALJ's weighing of the medical opinions. Dr. Chernoff initially opined Claimant could return to light duty sedentary work with no lifting greater than ten pounds. JX 1 at 859-860, 868-869. On December 11, 2019, after reviewing additional medical records including Claimant's August 19, 2019 MRIs, Dr. Chernoff opined Claimant could do light duty full-time work with restrictions, including no lifting greater than twenty pounds, not climbing ladders, and no repetitive bending. *Id.* at 874-876.

On August 27, 2020, after Claimant had left his light duty work for Employer, Dr. Moriarty examined Claimant and opined he could work in a modified light semi-sedentary capacity, which allowed for occasional bending and lifting up to fifteen pounds. EX 1 at 3. Dr. Moriarty maintained this opinion after reviewing additional medical records, including Claimant's August 26, 2020 MRI. *Id.* at 5-6; JX 10 at 21-22, 38.

On March 8, 2019, and July 21, 2020, Dr. Macron opined Claimant had a partial disability. JX 1 at 106-107, 220. On December 20, 2021, Dr. Macron opined Claimant's most recent MRIs were "very similar in terms of the changes" to his MRIs from 2019 and 2020 but showed Claimant's stenosis had worsened. JX 11 at 41, 48-49. He further opined Claimant could perform sedentary work but expressed concerns about Claimant's "intermittent leg" symptoms, which could affect his ability to walk and drive. *Id.* at 38-44, 46, 49.

At Dr. Benatar's December 30, 2021 deposition, Dr. Benatar testified that after reviewing Claimant's most recent MRIs, Claimant cannot return to any work, including a

[15] While Employer questions whether Claimant was "overdoing things" by conducting work that was outside of his light duty job restrictions, it raises no specific arguments about Claimant performing work outside his modified duties. Emp. Br. at 65-66. Consequently, we reject this contention as inadequately briefed. *See Montoya*, 49 BRBS at 52 n.1; *Plappert*, 31 BRBS at 111. Additionally, contrary to Employer's assertion that there is "no indication" that Claimant was unable to perform light duty tasks, such as desk work or recordkeeping, the ALJ accurately noted Claimant specifically testified he believed he could no longer perform this type of work due to pain from prolonged sitting. D&O at 51-52 (citing HT at 107-109, 117); Emp. Br. at 66 (citing EX 8 at 121-122); Emp. Reply at 5-6.

"very sedentary limited part-time job," because his condition will continue to worsen if he returns to work and because he is unable to "tolerate" sitting or standing for more than twenty minutes. JX 13 at 33-36; CX 7 at 76. Dr. Benatar also explained Claimant's lumbar MRIs are "steadily getting worse," that he has severe stenosis and myelomalacia, and his weakness and condition are worsening. JX 13 at 14-16, 32, 90.

We are not persuaded by Employer's contention that the ALJ erred in crediting Dr. Benatar's opinion. Emp. Br. at 69-70. The ALJ accurately noted Dr. Benatar opined Claimant cannot return to any work, including a "very sedentary limited part-time job," because his back condition will continue to worsen if he returns to work and Dr. Benatar could not "imagine an occupation that exists that would not make [Claimant's back condition] worse." D&O at 58; JX 13 at 33-36; CX 7 at 76. While Dr. Benatar agreed Claimant could watch television, read a clock or gauge at eye-level, have conversations, lift a gallon of milk, sit for up to an hour if he were allowed to change positions, and continue working on small engines, the ALJ rejected Employer's contention that this demonstrated Claimant's disability is not total. D&O at 59; JX 13 at 79-84; Emp. Post-Hearing Br. at 76-77; Emp. Br. at 70; Emp. Reply at 6-7. In light of the medical evidence and Claimant's testimony, the ALJ reasonably concluded "such examples [were] episodic in nature and merely incidental" to Claimant's daily life and therefore entitled to little weight. D&O at 59. The ALJ determined Dr. Benatar's opinion that Claimant is totally disabled is well-reasoned because he "rationally connected" Claimant's back issues to his inability to perform sedentary work duties. *Id.* at 58-59.

We are also not persuaded by Employer's contention that the ALJ erred in rejecting Drs. Chernoff's, Macron's, and Moriarty's opinions that Claimant could do light or sedentary work. Emp. Br. at 66-70; Emp. Reply at 4. Based on the ALJ's review of the record as a whole, the ALJ found Drs. Moriarty's and Chernoff's opinions entitled to little weight because they did not consider the most recent evidence, including the December 16, 2021 MRIs which showed Claimant's condition continued to worsen, and also did not consider Claimant's credible testimony and complaints of pain.[16] D&O at 58-59. Similarly, the ALJ found that although Dr. Macron opined Claimant could conduct sedentary work, Dr. Macron did not consider Claimant's credible testimony that sitting caused him pain. *Id.* at 58 (citing HT at 66, 94, 103, 108). The ALJ further found Dr. Macron's concerns about Claimant's ability to drive and walk and Dr. Macron's admission

[16] We reject Employer's contention that the ALJ "hypocritical[ly]" discredited Dr. Moriarty's opinion because Dr. Moriarty did not consider the December 16, 2021 MRIs but also not Dr. Benatar's report, which also predated those MRIs. Emp. Br. at 68-69. Dr. Benatar reviewed the December 16, 2021 MRIs before his deposition and he testified the results supported his prior impressions. JX 13 at 15-16, 88-91.

that Claimant's most recent MRI showed a worsening of his condition undermined his testimony that Claimant is not totally disabled. *Id.*; JX 11 at 44-49.

Additionally, to the extent Employer asserts all the MRI results showed "very similar changes," including evidence of myelomalacia in Claimant's first MRI, and therefore undermine the ALJ's conclusions, we again are not persuaded. Emp. Br. at 64-65, 67; Emp. Reply at 3. The ALJ considered the physicians' diagnoses, which were based in part on the various MRI results, and their diverging conclusions regarding the extent of Claimant's disability alongside Claimant's reported symptoms and complaints of pain, which she found credible, and drew a reasonable conclusion as to the extent of Claimant's disability based on the evidence as a whole. D&O at 57-59. Consequently, we decline Employer's invitation to reweigh the evidence. *Pietrunti*, 119 F.3d at 1042; *Gasparic*, 7 F.3d at 323 (Board may not reweigh the evidence even if it could support other conclusions); *Pisaturo*, 49 BRBS at 81.

The ALJ gave a clear rationale for her conclusions; therefore, her crediting of Dr. Benatar's opinion in combination with Claimant's complaints of pain and his worsening condition over Drs. Chernoff's, Macron's, and Moriarty's opinions is rational and within her discretion as the factfinder.[17] *See Pietrunti*, 119 F.3d at 1042; *Gasparic*, 7 F.3d at 323; *Pisaturo*, 49 BRBS at 81. Consequently, we affirm the ALJ's conclusion that Claimant is unable to perform any work and therefore has been totally disabled since June 20, 2020, when he had to leave his modified light duty work for Employer due to pain.[18] *See Johnson*, 911 F.2d at 251; *Mijangos*, 948 F.2d at 944-945; *Rodriguez*, 42 BRBS at 97; D&O at 59. Because we have affirmed the ALJ's determination that Claimant is unable to return to any work, we need not address Employer's contention that the ALJ erred in finding it did not

[17] Because the ALJ provided valid reasons for rejecting Drs. Chernoff's, Macron's, and Moriarty's opinions regarding the extent of Claimant's disability, we need not address Employer's remaining arguments regarding her weighing of their opinions. *See Pisaturo*, 49 BRBS at 81; D&O at 58-59; Emp. Brief at 66-70; Emp. Reply at 3-5.

[18] Employer argues the ALJ "erroneously relies" on the December 16, 2021 MRIs without determining whether Claimant's condition was "exacerbated by his post-employment activities" or whether the conditions noted in the December 2021 MRI findings were related to his post-employment activities. Emp. Br. at 71; Emp. Reply at 7-8. As Employer made no reference to post-employment activities exacerbating Claimant's condition to the ALJ, we reject this argument as it is being raised for the first time on appeal. *See Johnston v. Hayward Baker*, 48 BRBS 59, 63 (2014); *Turk v. E. Shore R.R., Inc.*, 34 BRBS 27, 32 (2000); *Boyd v. Ceres Terminals*, 30 BRBS 218, 223 (1997).

establish SAE.[19] D&O at 59-62; *Johnson*, 911 F.2d at 251; *Mijangos*, 948 F.2d at 944-945; *Rodriguez*, 42 BRBS at 97; Emp. Br. at 72-74.

Because we affirm the ALJ's finding that Claimant's condition reached MMI on April 24, 2021, he is not entitled to permanent disability benefits before that date. *Hoodye*, 23 BRBS at 344. Consequently, we modify the ALJ's order to award Claimant TTD benefits from June 20, 2020, through April 23, 2021, and PTD benefits from April 24, 2021, through the present and continuing.

[19] In addition to finding Claimant cannot return to his usual work, the ALJ also found Claimant made a diligent effort to return to light duty work. D&O at 58. Claimant's diligent effort, yet inability, to work also supports the ALJ's finding of total disability. *See Palombo*, 937 F.2d at 74-75.

Accordingly, we affirm in part and modify in part the ALJ's Decision and Order – Awarding Benefits.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

GLENN E. ULMER
Acting Administrative Appeals Judge