U.S. Department of Labor

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

BRB No. 21-0636

EDWIN EASON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 12/29/2022
VIRGINIA INTERNATIONAL TERMINALS, LLC	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer-Carrier Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits and the Order Denying Claimant's Motion for Reconsideration of Monica Markley, Administrative Law Judge, United States Department of Labor.

Charlene A. Morring (The Law Firm of Charlene Morring, P.C.) Norfolk, Virginia, for Claimant.

Megan B. Caramore (Vandeventer Black LLP) Norfolk, Virginia, for Employer-Carrier.

BEFORE: BOGGS, Chief Administrative Appeals Judge, BUZZARD and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Monica Markley's Decision and Order Denying Benefits and Order Denying Claimant's Motion for Reconsideration (2019-LHC-00772) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (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).

Claimant, a longshoreman, was injured while working as a railroad worker and train engineer on February 18, 2018, when his train collided with another train.[1] Claimant's Petition (Cl. Pet.) at 9. Claimant drove himself to Sentara Norfolk General Hospital and complained of pain on the left side of his neck. EX 1 at 3. He was diagnosed with "cervical strain, torticollis, muscle spasm, C spine injury, trauma, [and] radicular pain" and was released the same day. EX 1 at 8. On March 8, 2018, Claimant filed an LS-203 Claim for Compensation form with Employer. CX 4. There is no dispute this injury is work related, and Employer voluntarily paid Claimant $524.55 per week in temporary partial disability benefits from February 19 to February 25, 2018, and $1,471.78 per week in temporary total disability benefits from February 26 to November 28, 2018. CX 4; Decision and Order (D&O) at 3. The dispute concerns the extent of Claimant's disability. Claimant contends he is totally disabled as a result of his injury, while Employer contends he is not disabled and is capable of returning to his previous longshore work.

Claimant underwent treatment with Dr. Arthur Wardell which included Naprosyn and Flexeril prescriptions and physical therapy. CX 7 at 9. Dr. Wardell placed Claimant on out-of-work restrictions from February 28, 2018, through December 2, 2019. CX 8. Claimant has not worked since the accident. On September 19, 2018, Dr. Wardell administered a Functional Capacity Evaluation (FCE) and concluded Claimant had complaints of severe pain and could not return to his usual work. CX 10 at 19.

On February 21, 2019, Dr. David Goss examined Claimant at Employer's request. EX 5. Dr. Goss reviewed Dr. Wardell's records, the MRI and EMG results, and the FCE. EX 5 at 2. Regarding the FCE, Dr. Goss concluded "[Claimant's] symptoms should have resolved two to three months post-accident, with no need for ongoing medical management subsequent to that time. Indeed, by mid-May 2018, Mr. Eason should have reached

[1] As Claimant's injury occurred in Virginia, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. 33 U.S.C. §921(c); 20 C.F.R. §802.410.

maximum medical improvement, returned to his full duty status, and required no ongoing follow up, subsequent to that date." EX 5 at 5.

On October 10, 2019, Claimant was examined by Dr. Donald Hope who noted "[h]e sees Dr. Wardell monthly with similar complaints with no specific objective findings[…] there is nothing on any evaluation, electrical study or imaging study to support an actual disc injury, structural spine injury or radicular injury." EX 7 at 4, 8.

The parties stipulated Claimant's condition reached maximum medical improvement (MMI) on September 19, 2018. The ALJ found Claimant was able to return to work with no restrictions as of November 15, 2018, and he was not disabled in any capacity as of November 29, 2019. D&O at 40-41. Next, she found Claimant is not entitled to ongoing medical benefits because: she gave greater weight to the opinions of Drs. Goss and Hope that Claimant's subjective reports of severe pain do not correlate with the objective medical testing results; she found Claimant not credible; and she reviewed video footage of the incident which showed the train moving at a very slow speed, lending support to Dr. Hope's assessment that the accident would not have resulted in as serious a condition as Claimant alleges. D&O at 42.

Claimant appeals the ALJ's decision. He contends she erred in giving greater weight to Drs. Goss and Hope's opinions, in failing to credit his testimony, and in denying his motions to reopen the record and for reconsideration.[2] In response, Employer argues the ALJ properly weighed the medical evidence and, as substantial evidence supports her decision, urges the Board to affirm the denial of benefits.

With respect to the denial of continuing disability and medical benefits, Claimant contends the ALJ erred in giving greater weight to the opinions of Drs. Goss and Hope and in assigning little weight to Dr. Wardell's opinion. Cl. Br. at 27.

The employee has the burden of establishing the nature and extent of disability. *Gacki v. Sea-Land Serv., Inc.*, 33 BRBS 127 (1998); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1980). Contrary to Claimant's assertion, the Section 20(a) presumption, 33 U.S.C. §920(a), does not apply to these issues. *Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981); *Gacki*, 33 BRBS 127. To determine whether the claimant has shown he is totally disabled, the ALJ must compare his medical

[2] Claimant's first contention of error in his brief addresses whether "the opinions of Drs. Goss and Hope suffice as substantial evidence to rebut the Section 20(a) presumption as it relates to the extent of Mr. Eason's disability." As Section 20(a) does not relate to the extent of Claimant's work-related disability, it is clear Claimant has conflated the two issues. We therefore need not address his Section 20(a) arguments further.

restrictions with the specific physical requirements of his usual employment. *Curit v. Bath Iron Works Corp.*, 22 BRBS 100 (1988); *Carroll v. Hanover Bridge Marina*, 17 BRBS 176 (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 RRBS 891 (1981).[3]

Dr. Wardell began treating Claimant on February 28, 2018, and diagnosed him with a cervical spine sprain, left shoulder sprain, and a left acromioclavicular joint sprain. EX 4 at 4. He ordered x-rays of Claimant's left shoulder and neck, an ultrasound of the left shoulder, and an EMG. EX 4 at 6. Dr. Wardell testified those diagnostic exams resulted in normal or mild findings. EX 4 at 6-7.[4] Based on the FCE, however, Dr. Wardell released Claimant to only sedentary work. CX 10 at 19; EX 4 at 11.

Dr. Goss examined Claimant on February 21, 2019. He found Claimant had a full range of motion, although he had slight discomfort with manual manipulation of the left shoulder. In addition, Dr. Goss reviewed all of Dr. Wardell's records, the results of the diagnostic testing, including the FCE, and Claimant's job description. Dr. Goss concluded, based on the objective findings, that Claimant's symptoms should have resolved within

[3] 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. *Jordan v. SSA Terminals, LLC*, 973 F.3d 930, 54 BRBS 57(CRT) (9th Cir. 2020); *Hairston v. Todd Shipyards Corp.*, 19 BRBS 6 (1986), *rev'd on other grounds,* 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988). As Claimant here was adjudged not credible by the ALJ, her determination is rational, and her decision is supported by substantial evidence, he does not fall into this category of claimants.

[4] Dr. Wardell made the following statements: "I took x-rays of his left shoulder and found those x-rays to be normal. I took an x-ray of his neck, which showed some degenerative changes at the mid-neck level, which is C4/5-C5/6;" "Yes. On 3/13/18 he had a diagnostic ultrasound of the left shoulder, which was done primarily to evaluate the integrity of his rotator cuff, and I found that ultrasound study to be normal, that is, there was no evidence of a rotator cuff tear. Then on 4/24/18 he underwent an electrodiagnostic test of both upper extremities, which showed a C6 and C7 radiculopathy of mild degree;" "Yes. He did have [right ulnar neuropathy] but I could not say within a reasonable degree of medical certainty that that was related to his accident. A lot [sic] of longshoremen have ulnar neuropathy as a result of overuse;" "Yes. An MRI was performed on July 2nd of 2018 […] [t]hat just showed degenerative changes." EX 4 at 6-8.

two to three months after the accident, and he should have returned to full-duty work. EX 5 at 5; D&O at 20.

Dr. Hope reviewed Claimant's medical records and concluded the diagnostic reports do not support a diagnosis of acute radiculopathy. Dr. Hope further concluded Dr. Wardell's records are absent "of any meaningful findings on the cervical MRI to support any nerve root compression required for the subjective claims of radicular symptoms as well as the subjective episodic weakness of the Claimant throughout testing that has no anatomic correlate on multiple exams and imaging studies." EX 7 at 10. Dr. Hope also noted the September 2018 FCE results indicated that 9 out of the 12 FCE reliability tests were deemed unreliable.[5] EX 7 at 6-7. Dr. Hope further noted Ms. Fostek, the physical therapist who conducted two FCEs, commented that Claimant had "markedly inconsistent test results with functional symptoms out of proportion to the impairment." EX 7 at 7. In conclusion, Dr. Hope opined there is "nothing on any evaluation, electrical study or imaging study to support an actual disc injury, structural spine injury or radicular injury." EX 7 at 8.

The ALJ reviewed Drs. Wardell's, Hope's, and Goss's opinions and records in detail. She stated: "based on the objective medical findings, the well-reasoned and well-documented reports and opinions of Dr. Goss and Dr. Hope, and the functional capacity evaluations by Ms. Fostek documenting Claimant's true abilities, I find that Dr. Wardell's opinions regarding Claimant's physical capacity are poorly supported and unreasoned and

[5] Ms. Fostek conducted two FCE's and Dr. Wardell conducted one. EXs 9-11. Following the FCE on September 19, 2018, Dr. Wardell concluded Claimant is "functioning in the medium physical capacity demand level, but with noticeable compensation patterns due to left shoulder weakness and neck pain." EX 9 at 1. The second FCE, on November 1, 2018, indicated to Ms. Fostek that Claimant was self-limiting and had inconsistent range of motion throughout the examination. She also noted "[h]is shoulder ROM improved with activity and upper extremity ROM was equal right to left with distracted reaching tests." EX 10 at 1. Ms. Fostek concluded Claimant met the medium physical demand category. *Id*. On July 9, 2019, Ms. Fostek administered another FCE to measure Claimant's push-pull force. EX 10 at 15. The maximum force needed to pull and push switches was determined to be, on average, 39.9 pounds. *Id*. Claimant was able to perform within the heavy physical demand category; his pushing abilities were, on average, "49.31 horizontal force pounds at chest height and he was able to pull from a low position an average of 44.16 pounds of force and push down an average of 73.14 pounds of force." *Id*. Consequently, she opined Claimant was able to meet the force requirements to push and pull a switch and do his usual work. EX 10 at 16.

have been outweighed by the other evidence of record."[6] D&O at 40.[7] The Board may not reweigh the evidence. *Sea-Land Services, Inc., v. Director, OWCP* [*Ceasar*], 949 F.3d 921, 54 BRBS 9(CRT) (5th Cir. 2020); *Miffleton v. Briggs Ice Cream Co.*, 12 BRBS 445 (1980), *aff'd*, 659 F.2d 252 (D.C. Cir. 1981) (table). As the ALJ's findings are rational and supported by the record, we affirm them. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Perini Corp. v. Heyde*, 306 F. Supp. 1321 (D.R.I. 1969); *Cooper v. Offshore Pipelines Int'l, Inc.*, 33 BRBS 46 (1999).[8]

Next, Claimant contends the ALJ erred in denying his motion for reconsideration and his request to reopen the record to admit additional evidence. Claimant asked the ALJ to reconsider her decision in light of new and material evidence and because he did not have pre-existing neck problems. Motion for Reconsideration (Mot. For Recon.) at 2-4.

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[6] The ALJ concluded Drs. Hope's and Goss's opinions were supported by the objective testing showing "only normal findings or mild abnormalities" and the FCEs documenting "self-limiting" effort, whereas Dr. Wardell based his opinion largely on Claimant's subjective complaints of pain and failed to adequately explain his limiting Claimant to sedentary work in light of the FCEs indicating Claimant could perform work requiring a greater level of exertion. D&O at 37-38.

[7] The ALJ also questioned Claimant's credibility. She noted Claimant's description of the incident changed substantially over time from his head jerking to his falling out of the chair, to his being slammed against a metal door. D&O at 37-39. As these differing descriptions are supported by the record, TR1 at 47; EX 1.9; EX 3.3; EX 11 at 9-10, it was reasonable for the ALJ to have found Claimant's testimony lacks credibility. The ALJ has the discretion to make credibility determinations regarding a claimant's complaints of pain in view of the entire record. *Jordan v. SSA Terminals, LLC*, 973 F.3d 930, 54 BRBS 57(CRT) (9th Cir. 2020); *Gacki v. Sea-Land Serv., Inc.*, 33 BRBS 127 (1998). We, therefore, reject Claimant's argument that the ALJ erred in finding him not credible.

[8] We reject Claimant's argument that the ALJ should have considered only his testimony and Dr. Wardell's reports to establish his prima facie case of total disability. Contrary to Claimant's assertion, the ALJ must consider the entire record to determine whether Claimant has proven his inability to return to his usual work. *Gacki*, 33 BRBS 127. Only then does the burden shift to an employer to establish the claimant is not totally disabled due to the availability of suitable alternate employment. *Huntington Ingalls Indus., Inc. v. Eason*, 788 F.3d 118, 49 BRBS 33(CRT) (4th Cir. 2015), *cert. denied*, 136 S.Ct. 1376 (2016); *Caudill v. Sea Tac Alaska Shipbuilding, Inc.*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993); *Larsen v. Golten Marine Co.*, 19 BRBS 54 (1986).

Claimant asked to submit Dr. Paul Mitchell's medical records indicating Claimant is a surgical candidate, which Claimant stated were not available at the time the hearings were held on January 16, 2020, and February 20, 2020, because he had only been referred to Dr. Mitchell but had not yet been seen by him. Mot. For Recon. at 2. Employer responded, urging the record remain closed and no additional evidence be admitted because the medical records Claimant sought to admit were available to him prior to the time of the hearing, and Claimant mischaracterized the medical records, which it asserted shed no new information on the issue. Employer's Response to Reconsideration Motion (Emp. Recon. Resp.) at 2.

The ALJ has significant discretion concerning the admission or exclusion of evidence and such decisions may be overturned only if the challenging party shows they are arbitrary, capricious, or an abuse of discretion. *McCurley v. Kiewest Co.*, 22 BRBS 115 (1989); 20 C.F.R. §§702.338, 702.339. Nevertheless, the ALJ must fully inquire into matters that are fundamental to the disposition of the issues in a case and must receive into evidence all relevant and material testimony and documents. *Williams v. Marine Terminals Corp*., 14 BRBS 728, 732 (1981); *Bachich v. Seatrain Terminals of California*, 9 BRBS 184 (1978); 20 C.F.R. §702.338. The failure to inquire into a matter which is fundamental to the disposition of the issues in the case is a violation of 20 C.F.R. §702.338. *Gray & Co., Inc. v. Highlands Ins. Co.*, 9 BRBS 424 (1978). Such inquiry is necessary to insure an informed decision. *Sprague v. Bath Iron Works Corp*., 11 BRBS 134 (1979).

In this case, the ALJ denied both the motion to reconsider and the motion to reopen the record, finding that although three of the four documents Claimant sought to admit on reconsideration were not available to him at the time of the hearings, Claimant gave no "legitimate justification" for not submitting the one that was available at the time of the hearing and no reason why the other three could not have been submitted before the Decision and Order Denying Benefits was issued. She also stated Claimant's assertion that these medical records show he had no preexisting neck problems before the accident was a belated attempt to relitigate the issues already decided against Claimant. Therefore, she found the proposed new evidence was not submitted in a timely manner and did not support Claimant's arguments. Reconsideration Denial (Recon. Denial) at 3-4. We reject Claimant's arguments that the ALJ abused her discretion.

Claimant sought to enter Dr. Mitchell's medical reports from December 17, 2019, March 17, 2020, September 29, 2020, and February 18, 2021. Recon. Denial at 3; Mot. For Recon. Exhibits. Since the hearings took place on January 16, 2020, and February 20,

2020, only the first document pre-dated the hearing.[9] However, all of the documents pre-dated the Decision and Order, which was issued on March 24, 2021. And while an ALJ may admit post-hearing evidence, the party wishing to include the evidence must proceed with diligence. *Sam v. Loffland Bros. Co*., 19 BRBS 228, 230 (1987) ("party seeking to admit evidence must exercise due diligence in developing" claim); *see also Smith v. Ingalls Shipbuilding Div., Litton Sys., Inc.*, 22 BRBS 46 (1989). If a party wishes to submit new evidence in an effort to change an ALJ's decision, he generally must file a motion for modification. 33 U.S.C. §922. In this case, one of Dr. Mitchell's reports pre-dated the hearing and was or should have been available to Claimant before the hearing, but he failed to present it or explain why he did not do so. The remaining documents post-dated the hearing but existed before the ALJ rendered her decision, yet Claimant made no effort to submit them before issuance. Under these circumstances, it was rational and within the ALJ's discretion to deny Claimant's request to admit and consider this evidence, some of which was generated over one year before Claimant filed his motion to reopen the record.[10] *See, e.g., Brown v. Bethlehem Steel Corp.*, 19 BRBS 200, *aff'd on recon.*, 20 BRBS 26 (1987), *aff'd and rev'd on other grounds sub nom. Director, OWCP v. Bethlehem Steel Corp.*, 868 F.2d 759, 22 BRBS 47(CRT) (5th Cir. 1989) (no abuse of discretion in refusing to admit post-hearing evidence when counsel waited over two months before requesting an extension of time in which to make its post-hearing submission).

As to whether Claimant had neck issues prior to the accident and whether that indicates the accident was the cause of Claimant's neck pain, the ALJ reiterated portions of her prior discussion which addressed medical findings of pre-existing degenerative disease which did not affect his ability to work. To this end, she found the motion for reconsideration sought only to present a "different angle to make his argument here that he is unable to work" and this was an inappropriate attempt to relitigate "the issues surrounding my determination that his statements regarding his ongoing pain were not particularly credible." Recon. Denial at 4.

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[9] Therefore, while Claimant stated he had not visited Dr. Mitchell by the time of the hearing, Dr. Mitchell's initial appointment records contradict Claimant's assertion.

[10] The records, furthermore, do not support Claimant's assertion that he is a surgical candidate. As the ALJ found, Dr. Mitchell's records indicate "he recommended a cervical epidural steroid injection, physical therapy, and carpal tunnel splints" but "[h]e did not prescribe or recommend surgery, and only stated, on February 18, 2021, that surgery would be considered if Claimant did not get relief from an injection." Recon. Denial at 5; Mot. for Recon. exhibits.

A party is permitted to timely file a motion for reconsideration of the ALJ's decision. *Kuhn v. Associated Press*, 16 BRBS 46 (1983); 20 C.F.R. §802.206(b)(1); 29 C.F.R. §18.93. Although an ALJ is not bound by formal rules of procedure except those provided for in the Act, the ALJ may look to the Federal Rules of Civil Procedure for guidance in taking an action under the Act. *Bogdis v. Marine Terminals Corp.*, 23 BRBS 136 (1989). However, the party filing the motion is not entitled to relitigate the claim on reconsideration or raise issues which should have been anticipated before the ALJ decided the claim. *Mowl v. Ingalls Shipbuilding, Inc.*, 32 BRBS 51 (1998).

As is within her discretion, the ALJ in this case obtained guidance from FRCP Rule 59(e) to assess whether she should grant Claimant's motion to reconsider. *Bogdis*, 23 BRBS 136. She noted Rule 59(e) permits a court to alter or amend a judgment if the movant shows: (1) an intervening change in the controlling law; (2) new evidence that was not available at trial; or (3) a clear error of law or a manifest injustice. *Robinson v. Wix Filtration Corp. LLC*, 599 F.3d 403, 407 (4th Cir. 2010). Rule 59(e) motions may not be used to raise arguments which could have been raised prior to the issuance of the judgment, nor may they be used to argue a case under a legal theory the party had the ability to address in the first instance. *Pacific Ins. Co. v. Am. Nat'l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998). Furthermore, "a motion under Rule 59(e) is not authorized 'to enable a party to complete presenting his case after the court has ruled against him.'" *In re: Reese*, 91 F.3d 37, 39 (7th Cir.1996) (quoting *Frietsch v. Refco, Inc.*, 56 F.3d 825, 828 (7th Cir.1995)). The ALJ reasonably rejected Claimant's slightly different argument challenging her initial findings. She did not abuse her discretion in declining to reopen the record for Dr. Mitchell's reports or to reconsider her initial decision.

Accordingly, we affirm the ALJ's Decision and Order Denying Benefits and Order Denying Claimant's Motion for Reconsideration in its entirety.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge