U.S. Department of Labor

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

BRB No. 22-0047

FOUSSEINI TOUNKARA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GLACIER FISH COMPANY	)	
	)	
and	)	
	)	
CLARENDON NATIONAL INSURANCE COMPANY (Successor in interest to SEABRIGHT INSURANCE COMPANY)	)	DATE ISSUED: 02/24/2023
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	
	)	DECISION and ORDER

Appeal of the Decision and Order on Requests for Modification of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Fousseini Tounkara, Bronx, New York, without representation.

Pamela J. Lormand (Lormand Law, LLC), New Orleans, Louisiana, for Employer/Carrier.

David Casserly (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant, without representation, appeals Administrative Law Judge Theresa C. Timlin's Decision and Order on Requests for Modification (2019-LHC-00870) rendered on claims filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (Act). On appeal, Claimant generally challenges the ALJ's decision; therefore, the Benefits Review Board will review the findings adverse to him and address whether substantial evidence supports the ALJ's decision. *See Pierce v. Elec. Boat Corp.*, 54 BRBS 27 (2020). We must affirm the ALJ's Decision and Order if it is 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 filed a claim seeking benefits for eye injuries sustained in the course of his work as a fire watcher for Employer from July 22, 2008, to January 11, 2010, at its facility in Seattle, Washington.[1] On February 9, 2015, ALJ Adele Higgins Odegard issued a decision awarding Claimant temporary total disability benefits and medical benefits, payable by Employer, "beginning November 8, 2010 and continuing." The Board affirmed the award on appeal. *Tounkara v. Glacier Fish Co.*, 49 BRBS 89 (2016). Pursuant to Section 22, 33 U.S.C. §922, Claimant and Employer each filed a petition for modification in 2019. Both parties alleged Claimant's eye condition had reached maximum medical improvement (MMI); however, Claimant maintained he is now entitled to permanent total disability benefits, whereas Employer argued Claimant is no longer entitled to benefits. Settlement efforts before the Office of Administrative Law Judges (OALJ) proved

[1] Claimant asserted he developed cataracts in both eyes as a result of occupational exposure to the bright lights emitted from welders' torches. CXs 1-3, 7 and 8. Dr. Amarpreet Singh performed cataract surgery on Claimant's left eye on June 19, 2013, and Dr. Tal Raviv performed the same surgery on Claimant's right eye on April 13, 2015. CXs 1, 2, 7. This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit because Claimant's injury occurred in Seattle, Washington. 33 U.S.C. §921(c); *Hon v. Director, OWCP*, 699 F.2d 441 (8th Cir. 1983).

unsuccessful, prompting a formal hearing, which occurred in New York City on January 13, 2020.

In her decision dated September 29, 2021, ALJ Timlin (the ALJ) found a change in condition as of August 5, 2016, the date she found Claimant's eye condition reached MMI without any permanent disability. Decision and Order on Modif. (D&O) at 33. She therefore concluded Claimant's entitlement to temporary total disability benefits ceased as of that date and modified ALJ Odegard's prior award of temporary total disability benefits. In reaching this conclusion, the ALJ found Claimant capable of performing his usual work and, therefore, unable to establish a prima facie case of total disability. Alternatively, she found Employer established the availability of suitable alternate employment, and Claimant did not conduct a diligent job search. *Id.* at 39. Additionally, the ALJ rejected Claimant's position that he is entitled to a scheduled award of benefits, *see* 33 U.S.C. §908(c)(16), (19), because the evidence does not establish any loss of use of his eyes or visual abilities due to his workplace injury. *Id.* at 41. She therefore found Employer entitled to a credit for its overpayment of temporary total disability benefits from August 5, 2016, to be offset against "any future payments." However, she stated Employer must reimburse Claimant $369.84 for outstanding medical expenses.[2] *Id.* at 50. Accordingly, the ALJ denied Claimant's, but granted Employer's, request for modification. *Id.* at 53.

On appeal, Claimant contends the ALJ erred in denying his petition for modification and accompanying request for an ongoing award of permanent total disability benefits. Employer responds, urging affirmance of the ALJ's D&O.[3] The Director, Office of Workers' Compensation Programs (the Director), filed a limited response asking the

[2] The ALJ further ordered Employer, through its carrier, to "pay Claimant interest on all past due reimbursements of any unpaid medical benefits." D&O at 54.

[3] Claimant timely filed a notice of appeal in October 2021; he later filed a letter to support his appeal. Employer contends Claimant's appeal should be dismissed because his April 14, 2022 letter raising arguments in support of his appeal was not timely filed. *Milam v. Mason Technologies*, 34 BRBS 168 (2000); 20 C.F.R. §802.219(b). Assuming, arguendo, Claimant's pleading was filed late, we exercise our discretion to accept it because Claimant is not represented by legal counsel and is not required to file a brief supporting his petition for review. 20 C.F.R. §§802.211(d), 802.217. However, we deny Claimant's April 22, 2022 request to submit additional evidence in this case (an alleged audio recording transcript of Claimant's interview with vocational rehabilitation expert Kerry Skillin), as the Board is prohibited from considering evidence that was not submitted to the ALJ. 20 C.F.R. §802.301(b).

Board to clarify that Employer's overpayment of disability benefits cannot be used to offset reimbursements of medical benefits due to Claimant.[4]

Section 22 of the Act provides the only means for re-opening a claim that has been adjudicated and is final; it allows for modification of a prior decision if there has been a change in condition or a mistake in the determination of fact. 33 U.S.C. §922; *see Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). The party, or in this case parties, requesting modification due to a change in condition has the burden of proving the change in condition. *See, e.g., Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997). Once the proponent of the motion establishes changed circumstances, the normal legal standards apply. *Vasquez v. Cont'l Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990). Therefore, the standard for determining the nature and extent of a claimant's disability is the same in a modification proceeding as in the initial proceeding. *Id.*[5]

In this case, Claimant alleged the nature of his eye condition changed from temporary to permanent; he therefore sought modification of ALJ Odegard's 2015 award of total disability benefits from temporary to permanent.[6] In contrast, Employer alleged Claimant's eye condition fully resolved with no residual disability; it sought to modify the 2015 decision through termination of Claimant's award of ongoing temporary total disability benefits. Based on her review of the medical evidence, the ALJ found Claimant's eye condition reached MMI and became permanent on August 5, 2016. She next addressed

[4] We affirm the ALJ's findings that Claimant is entitled to $369.84 in reimbursement of medical expenses, as well as interest on all past due reimbursements of any unpaid medical benefits, as they are unchallenged on appeal. *See Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

[5] In *Vasquez*, the claimant was working in suitable alternate employment and receiving permanent partial disability benefits but was then laid off and remained unable to return to his usual longshore work. He therefore satisfied his burden of showing a change in condition. The burden then shifted to the employer to demonstrate the availability of suitable alternate employment. When it did not do so, the claimant was entitled permanent total disability benefits. *Vasquez*, 23 BRBS at 430.

[6] Claimant argued Dr. James Auran's report establishes he is permanently totally disabled because Dr. Auran opined Claimant should use bifocal glasses and eyedrops and characterized his vision impairment as mild with excellent uncorrected distance vision. CX 10.

the parties' assertions regarding the extent of disability, if any, of Claimant's permanent eye condition.

A claimant is considered permanently disabled if he has any residual disability after reaching MMI, the date of which is determined by medical evidence and is not dependent on economic factors. *See Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990); *Price v. Dravo Corp.*, 20 BRBS 94 (1987); *Trask v. Lockheed Shipbuilding and Construction Co*., 17 BRBS 56, 60-61 (1985). The Board must affirm the ALJ's finding of fact establishing the date of MMI if it is supported by substantial evidence. *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); *Mason v. Bender Welding & Machine Co.*, 16 BRBS 307 (1984). In asserting modification in this case, Employer was required to show Claimant has no residual disability and can return to his usual work after reaching MMI, and Claimant was required to show he is incapable of returning to his usual work and is totally disabled after reaching MMI. *Vasquez*, 23 BRBS at 430.

Upon reviewing the evidence, the ALJ found Dr. Tal Raviv reviewed and agreed with Dr. Robert Cykiert's June 11, 2016 opinion that Claimant's eyes had fully healed "with perfect results," so he needed no further treatment.[7] The ALJ also credited Dr. Cykiert's opinion that Claimant's eye condition had fully resolved, leading her to conclude Claimant could return to any job, including his prior employment as a fire watcher.[8] In contrast, she found Claimant's treatment notes, including those written by Drs. Joah Aliancy, Marlene Wang, and James Auran, "merit very little weight" because they: 1) rely on Claimant's subjective complaints, which she found lack credibility;[9] and 2) do not

[7] Dr. Raviv, who performed Claimant's right eye cataract surgery, stated "I agree with all of the findings" in Dr. Cykiert's report as "[t]hey are accurate and consistent with [Claimant's] past ocular history." CX 9.

[8] In his June 11, 2016 report, Dr. Cykiert opined "[t]here is no restriction whatsoever in performing any job-related, educational, vocational or recreation activities as a result of [the] cataract surgery." CX 9. He additionally acknowledged Claimant's complaints of experiencing glares and halos when looking at lights are "very common after cataract surgery" and while such symptoms "may possibly be an annoyance in certain situations," they are not "disabling in any way and would not prevent normal functioning and performing normal job-related or other activities." *Id.* In his September 5, 2016 follow-up report, Dr. Cykiert stated "clearly and unequivocally that [Claimant] has no vision or ocular disability whatsoever," meaning "he has 0% (zero %) vision and ocular disability." *Id.*

[9] The ALJ found Claimant was not credible because he had to be compelled by a court order to attend a vocational interview; he exhibited evasive behavior, including

discuss the permanency of any impairment or how it would affect Claimant's ability to return to work. D&O at 35. The ALJ therefore determined the record established the requisite change in condition, reopened the case pursuant to Section 22, and concluded the evidence established Claimant is not totally disabled and has no loss of use of his eyes or visual abilities due to his workplace injury. Consequently, she modified ALJ Odegard's award to reflect Claimant's entitlement to temporary total disability benefits ceased as of August 5, 2016.

The ALJ has the discretion to weigh, evaluate, credit, or discredit the medical evidence. *See Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *see also Suarez v. Serv. Employees Int'l, Inc.*, 50 BRBS 33 (2016). The Board is not empowered to reweigh the evidence but must affirm the ALJ's findings that are rational and supported by substantial evidence. *See, e.g., Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 25 BRBS 85(CRT) (9th Cir. 1991); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988). The ALJ's discretionary weighing of the evidence and her decision to accord greatest weight to Drs. Cykiert's and Raviv's opinions as well-reasoned is rational and supported by the record. *Id*. Consequently, we affirm her finding that Claimant's work-related eye condition reached MMI and is fully resolved, without any residual impairment.[10] *Ezell*, 33 BRBS

"veiled threats of physical harm" and refusing to answer questions, during the interview conducted by Ms. Skillin, the vocational specialist; he engaged in doctor-shopping; and he wrongly alleged Carrier purposefully interfered with his medical care. D&O at 25, 27, 51, n.45. The ALJ further found it suspect that Claimant's subjective complaints of eye pain and symptoms "only arose after" the district director suggested he may no longer be entitled to temporary disability compensation as his condition had reached MMI. *Id.* at 35. Accordingly, the ALJ found "the treatment notes merit little weight" because Claimant "is an unreliable narrator of his subjective symptoms." *Id.*

[10] Dr. Cykiert's credited opinion that Claimant has 0% vision and ocular disability and Dr. Raviv's agreement with that assessment constitute substantial evidence in support of the ALJ's conclusion that Claimant has no further disability and is not entitled to a scheduled award of permanent partial disability benefits in accordance with the provisions of Sections 8(c)(5) and 8(c)(16) of the Act, 33 U.S.C. §908(c)(5), (16). *See generally King v. Director, OWCP*, 904 F.2d 17, 23 BRBS 85(CRT) (9th Cir. 1990) (ALJ may base her determination of the extent of disability under the schedule on credible medical opinions); *Pisaturo v. Logistec, Inc.*, 49 BRBS 77 (2015). Moreover, in contrast to Claimant's contention, substantial evidence supports the ALJ's finding that the Carrier did not interfere with Claimant's medical treatment. D&O at 6-7, 33-34, 51-52.

19; *Mason*, 16 BRBS 307; CX 9. We also affirm her findings that Claimant has no eye restrictions and, therefore, can return to his usual employment since reaching MMI.[11] *Christie*, 898 F.3d 952, 52 BRBS 23(CRT); *Gacki v. Sea-Land Service, Inc.*, 33 BRBS 127. Because the record supports the ALJ's finding of a change in the nature and extent of Claimant's work-related eye disability, we affirm her decision to modify the prior award to reflect that Claimant's entitlement to disability benefits ceased as of August 6, 2016.[12]

Accordingly, we affirm the ALJ's Decision and Order on Requests for Modification but modify it to clarify that Employer may use any overpayment of disability benefits only to offset any future disability payments.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

[11] Consequently, we need not address the ALJ's alternative findings regarding the availability of suitable alternate employment and whether Claimant diligently sought such employment.

[12] Although the ALJ did not explicitly articulate it, D&O at 51, 53-54, we agree with the Director's position that an employer's overpayment of disability benefits may not be credited against any medical benefits. *See Aurelio v. Louisiana Stevedores, Inc.*, 22 BRBS 418 (1989), *aff'd mem.*, 924 F.2d 1055 (5th Cir. 1991) (table).