U.S. Department of Labor

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

BRB No. 23-0049

DEREK HYMAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CP&O, LLC	)	
	)	DATE ISSUED: 02/27/2024
and	)	
	)	
PORTS INSURANCE COMPANY, INCORPORATED	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of Decision and Order Awarding Benefits of Paul C. Johnson, Jr., 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:

Employer appeals Administrative Law Judge (ALJ) Paul C. Johnson, Jr.'s Decision and Order Awarding Benefits (2019-LHC-00454) 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 administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant sustained an injury in a work-related forklift accident on December 12, 2008, resulting in a below-the-knee left leg amputation.[1] CX 19; ALJX 1. He originally sought benefits under the Virginia workers' compensation system, CX 5, but later filed a claim under the Act. Employer paid temporary total disability (TTD) benefits from December 13, 2008, to July 25, 2018, and permanent partial disability (PPD) benefits from July 26, 2018, through October 24, 2018, and continuing. CX 17; ALJX 1.

Following Claimant's leg amputation and subsequent rehabilitation, he began seeking pain management treatment with Dr. Mark A. Ross. EX 1. In addition to pain management treatment, Claimant also sought psychological treatment for conditions related to the December 12, 2008 incident, beginning with Dr. Edward H. Spain in January 2009, and continuing with Dr. Charles S. Broadfield.[2] CXs 30, 41. Employer initially refused to pay for Dr. Broadfield's treatment and sent Claimant to Dr. Jerome S. Blackman for a medical evaluation on September 6, 2012. CX 9. Dr. Blackman confirmed Dr. Spain's assessments that Claimant had Schizotypal Personality Disorder based on the December 12, 2008 incident, and Employer subsequently agreed to pay for Claimant's psychological treatment with Dr. Broadfield. CXs 9 at 19-21; CX 11. Drs. Broadfield and

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

[2] Dr. Spain performed several psychological tests and determined that, while Claimant intended to answer related questions honestly to produce valid results, his "distress has an odd quality and may prove difficult for a therapist to understand clearly." CX 30 at 10. Dr. Spain diagnosed Claimant with Undifferentiated Somatoform Disorder, Schizotypal Personality Disorder, recent injury in industrial accident with multiple traumatic injuries including left below-the-knee amputation and reported strained relations with partner. *Id.* Dr. Broadfield diagnosed Claimant with post-traumatic stress disorder (PTSD) complicated with phantom leg pain and endogenous depression. CXs 10 at 9-12; *see generally* CX 41.

Blackman both opined Claimant's mental condition rendered him psychologically disabled and unable to work. CXs 9 at 24; 10 at 20, 25-26, 33-35.

Claimant continued treatment with Dr. Broadfield through 2016.[3] On August 8, 2017, Employer's counsel asked Dr. Ross via letter if he maintained his opinion that Claimant was permanently disabled and unable to work. CX 12. Dr. Ross opined Claimant has the physical capacity to work full time and said he had no reason to believe Claimant was still receiving mental-health-related care. *Id.* at 2. Subsequently, Employer requested a vocational expert, Ms. Rebecca Griffin, perform a labor market survey on July 23, 2018, to assess suitable alternate employment available for Claimant.[4] EX 7. Ms. Griffin identified eighteen jobs Claimant could perform based on Dr. Ross's physical restrictions; Dr. Ross approved fifteen of those jobs. EX 7 at 4-22. Consequently, Employer converted its payments from TTD to PPD benefit payments pursuant to Section 8(c)(23), 33 U.S.C. §908(c)(23). CXs 14, 17; JX 1.

Following the December 21, 2018 informal conference, Claimant visited Dr. Errol Liebowitz on February 26, 2019, for a psychological evaluation and treatment.[5] CXs 27, 28. Dr. Liebowitz diagnosed Claimant with chronic PTSD and opined that, pending further treatment, Claimant is totally disabled because of his psychological condition. CX 27 at 4. At Employer's request, Claimant was also evaluated by Dr. Laura Dabney on August 19, 2019. EX 4. Dr. Dabney determined Claimant had adjustment disorder with mixed disturbance of emotions and conduct casually related to the December 12, 2008 workplace incident along with personality disorder unspecified with Schizotypal, Obsessive Compulsive and Borderline traits unrelated to his workplace accident. EX 4 at 11. However, unlike Dr. Blackman, Dr. Dabney stated Claimant could perform work on a part-time basis and was not disabled because of his psychological condition. *Id.* At 12-13. Following Dr. Dabney's evaluation, Ms. Griffin updated her labor market survey on

[3] Dr. Broadfield's medical records, CX 9, do not include any treatment notes beyond 2013. However, the Memorandum of Informal Conference from December 21, 2018, indicates Claimant provided Employer with proof he sought treatment from Dr. Broadfield in 2016. CX 15 at 2.

[4] Ms. Rebecca Griffin nee Seaford worked with Claimant to attempt to place him in alternate employment between 2011 and 2012 in connection with his Virginia workers' compensation claim. *See generally* CX 4.

[5] Employer refused to authorize payment for Claimant's treatment by Dr. Liebowitz. CX 16 at 2.

September 24, 2019, identifying nine positions suitable for Claimant based on Dr. Dabney's part-time work recommendation and Dr. Ross's physical restrictions. EX 9.

The ALJ held a formal hearing on October 22, 2019, and issued his Decision and Order Awarding Benefits (D&O) on November 3, 2022. First, the ALJ found Claimant was entitled to treatment by Dr. Liebowitz, the physician of his choice following Dr. Broadfield's retirement, because the psychologists and psychiatrists of record unanimously agreed Claimant suffers from a work-related psychological condition. D&O at 52-54. Nevertheless, in addressing disability, the ALJ discounted the older opinions of Drs. Spain, Blackman, and Broadfield as they were not based on more recent information. *Id.* at 55. Therefore, he weighed the medical evidence from Drs. Liebowitz and Dabney who provided the most recent reports and determined Dr. Liebowitz's opinion is entitled to greater weight because Dr. Liebowitz treated Claimant over several months and created a plan for future treatment while Dr. Dabney evaluated Claimant only once. *Id.* The ALJ further found Claimant has been totally disabled from September 12, 2012, onward[6] and discounted Ms. Griffin's 2018 labor market survey because she did not consider Claimant's psychological injuries in her job search criteria. *Id.* at 56-57.

Employer appeals the ALJ's decision, contending he erred in finding Claimant totally disabled from September 12, 2012, to the present and continuing. More specifically, Employer asserts the ALJ erred in discrediting Ms. Griffin's labor market surveys, assigning greater weight to the opinion of Dr. Liebowitz, and not considering Claimant's decision to reject the Busch Gardens job offer as proof of both suitable employment and Claimant's failure to perform a diligent job search. Claimant responds, urging affirmance.

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

[6] Both parties stipulated Claimant's condition reached maximum medical improvement on September 12, 2012. AJX 1.

must show a range of suitable jobs. *Lentz v. The Cottman Co.*, 852 F.2d 129 (4th Cir. 1988). The ALJ should determine the claimant's physical and psychological restrictions based on the credited medical opinions and apply them to the available jobs identified by the employer's vocational expert. *Villasenor v. Marine Maint. Indus., Inc.*, 17 BRBS 99, *recon. denied*, 17 BRBS 160 (1985). If the employer demonstrates the availability of suitable alternate employment, a claimant may nonetheless be entitled to total disability benefits if he demonstrates he was unable to secure such work despite his diligent efforts. *See Tann*, 841 F.2d at 543-544; *see also International-Matex Tank Terminals v. Director, OWCP [Victorian]*, 943 F.3d 278, 290 (5th Cir. 2019).

We reject Employer's allegations of error. First, Employer contends the ALJ erred by rejecting Ms. Griffin's September 24, 2019 updated labor market survey wherein she considered Dr. Dabney's psychological report and found nine suitable positions for Claimant. Emp. Brief at 15. So, Employer argues the ALJ erred in weighing Dr. Liebowitz's opinion over Dr. Dabney's, and in failing to consider Dr. Blackman's opinion. *Id.* at 16. Employer contends the ALJ should have given greater deference to Dr. Dabney because she is more qualified as a psychiatrist than Dr. Liebowitz, who is a psychologist, and because Dr. Liebowitz cited irrelevant New York state workers' compensation statistics in reaching his conclusions. *Id.* at 16-17.

As a threshold matter, the ALJ is not required to base his credibility determinations on the respective credentials or qualifications of the medical experts. *See Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 691 (5th Cir. 1999) (affirming an ALJ's discretion in assessing expert credibility regardless of credentialing). Consequently, we reject Employer's argument that Dr. Dabney should be afforded greater weight because of her position as a psychiatrist over Dr. Liebowitz's position as a psychologist. Second, the ALJ's rationale that Dr. Liebowitz should be afforded greater weight based on his continued treatment history with Claimant over Dr. Dabney's one-time evaluation is reasonable and supported by the record. Dr. Liebowitz's medical records indicate Claimant received continued and repeated treatment from him over the course of several months, while Dr. Dabney only saw Claimant once. *Compare* CX 28 *and* EX 5. Further, while Dr. Liebowitz cited New York workers' compensation data to support his claims that Claimant is unable to work, he also based his findings on DSM-5 testing for PTSD and on Claimant's Social Security Disability benefits eligibility.[7] CX 38 at 1-3.

[7] Dr. Liebowitz's DSM-5 testing showed Claimant met the five stated criteria for PTSD, including: exposure to actual or threatened death, injury or sexual violence; presence of one or more intrusive symptoms associated with the traumatic event; persistent avoidance of stimuli associated with the traumatic event, after the event occurred; negative alterations in cognition and mood associated with the traumatic event, beginning after the

In evaluating the evidence, the ALJ is entitled to weigh the medical evidence and draw inferences from it, and he is not bound to accept the opinion or theory of any particular medical expert. *Perini Corp. v. Heyde*, 306 F.Supp. 1321, 1325-1326 (D.R.I. 1969). The Board is not free to reweigh the evidence, *Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 323 (2d Cir. 1993), and will not interfere with credibility determinations unless they are "inherently incredible or patently unreasonable." *Cordero v. Triple A Mach. Shop*, 580 F.2d 1331, 1335 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Thus, we see no reason to disturb the ALJ's credibility determinations with respect to Drs. Liebowitz and Dabney. *Tann*, 841 F.2d at 543; *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Hess]*, 681 F.2d 938, 941 (4th Cir. 1982).

Moreover, we reject Employer's contention that the ALJ erred in discrediting Ms. Griffin's labor market surveys. First, as the ALJ indicated, Ms. Griffin's July 2018 labor market survey did not consider Claimant's psychological condition in assessing potential jobs he could perform. *See* EX 6. The ALJ's refusal to credit this survey was reasonable. *Armfield v. Shell Offshore*, 25 BRBS 303, 306 (1992). Second, while he admitted and summarized Ms. Griffin's September 2019 updated labor market survey, he recognized this survey relied only on Dr. Dabney's opinion for Claimant's psychological condition. As he gave Dr. Liebowitz's opinion greater weight than Dr. Dabney's opinion, it was rational to give little or no weight to Ms. Griffin's survey that relied solely on Dr. Dabney's opinion.

Finally, we reject Employer's assertion that Claimant's job offer from Busch Gardens constitutes evidence of suitable alternate employment. Dr. Liebowitz was asked to comment on the suitability of two other jobs at Busch Gardens, a cashier job and a toll booth operation job. CX 42. He opined the jobs at Busch Gardens entail working in a setting involving large numbers of people, which is inadvisable for people with PTSD because they suffer from issues of over-activation and over-reactivity. CX 42 at 1. Although Dr. Liebowitz's response directly related to the cashier and toll booth positions, and Claimant received an offer to work as a tram spieler, all three positions are in the same environment. *Compare* CX 42 at 1-3 *and* EX 10. Because the ALJ permissibly gave greater weight to Dr. Liebowitz's opinion over Dr. Dabney's, his determination that the tram spieler position does not constitute suitable alternate employment based on Dr. Liebowitz's assessment regarding the suitability of jobs at Busch Garden is permissible as

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event occurred; and marked alterations in arousal and reactivity associated with the traumatic event, beginning or worsening after the event occurred. CX 38 at 1-3. Dr. Liebowitz also acknowledged Claimant received disability benefits from the Social Security Administration as a result of his injuries. *Id.* at 3.

well.[8] *Marathon Ashland Petroleum v. Williams*, 733 F.3d 182, 189 (6th Cir. 2013). We therefore affirm the ALJ's conclusions that Employer did not establish the availability of suitable alternate employment, and Claimant is permanently and totally disabled from September 12, 2012, and continuing.[9] *Id.*; *Bunge Corp. v. Carlisle*, 227 F.3d 934, 942 (7th Cir. 2000).

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

[8] The ALJ credited Claimant's statement that "he realized that the particular job, which would cause him to hear screaming from the amusement park rides, would be a constant reminder of the screaming that accompanied his workplace accident and would cause him to relive that accident." D&O at 57.

[9] As a result of our holding, we need not address any remaining arguments regarding Claimant's diligence in searching for work. *Tann*, 841 F.2d at 542-543.