U.S. Department of Labor

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

BRB No. 20-0276

WILLIAM PRICE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DEPARTMENT OF THE AIR FORCE	)	
	)	DATE ISSUED: 7/26/2022
and	)	
	)	
AIR FORCE INSURANCE FUND	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

William Price, Baker, Florida.

Before: BUZZARD, GRESH, and JONES, Administrative Appeals Judges

PER CURIAM:

Claimant, without representation, appeals Administrative Law Judge (ALJ) Patrick M. Rosenow's Decision and Order (2019-LHC-00184) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171, *et seq.* (Act).[1] On appeal, Claimant generally challenges the ALJ's denial of benefits;

[1] The Benefits Review Board's processing of this case was substantially delayed due to the COVID-19 pandemic, which impacted the Board's ability to obtain parts of the record from the Office of Administrative Law Judges and the Office of Workers'

therefore, the Benefits Review Board addresses whether substantial evidence supports the Decision and Order below. *See Pierce v. Elec. Boat Corp.*, 54 BRBS 27 (2020). In an appeal by a claimant without legal representation,[2] 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 has a history of receiving treatment for a pre-existing back condition.[3] On January 30, 1997, he sustained a work-related right shoulder injury while working for Employer.[4] He reported the accident to his supervisor, Billy Davis, who, according to Claimant, subsequently recommended Claimant see a chiropractor, Dr. Al Fulford.

Compensation Programs. After remanding this case for reconstruction of the record, the Board reinstated the appeal on June 10, 2022.

[2] R. Alan Andrews, Claimant's counsel before the Office of Administrative Law Judges, filed Claimant's appeal and submitted a petition for review and accompanying brief challenging the ALJ's determinations regarding "the full nature and extent" of Claimant's January 30, 1997 work-related injury. On March 30, 2022, Mr. Andrews advised the Board that his office was withdrawing from the case.

[3] Claimant sustained a back injury on July 13, 1989, while working for a prior employer, Crestview Housing Authority (CHA). EX 1. Dr. Thomas Dlabal treated him for back, hip, and leg pain from November 27, 1989, through October 25, 1991. Dr. Dlabal diagnosed a bulging disc at the L4-L5 vertebrae and provided Claimant facet blocks and medication. *Id.* He also stated Claimant reached maximum medical improvement for his injury on September 14, 1990, with a five percent total body impairment. HT at 29. Claimant returned to work with CHA, with restrictions against repeated bending and stooping and no lifting over twenty pounds. EX 1. He left CHA and held a series of other jobs before applying for work with Employer on February 3, 1996. HT at 16-18; EX 4. At that time, he executed a statement of physical ability denying any medical and hospital care in the past five years and attesting he could lift up to 100 pounds and carry up to fifty pounds frequently. EX 4. Claimant continued to receive treatment periodically from Dr. Dlabal and his primary care physician, Dr. R. Lee Thigpen, for continued back, hip and leg pain.

[4] Claimant stated that while working for Employer as an auto mechanic on January 30, 1997, he "fell forward over the car and the hood hit [him] in the back of the head" causing him to lose "all the feelings in my right arm and such." HT at 19. Claimant later reported he hurt his right shoulder while using a wrench. EX 7.

Hearing Transcript (HT) at 19. On February 5, 1997, Dr. Fulford diagnosed Claimant with a sprain/strain of the right shoulder and advised him to take time off work to recover. CX 1. Claimant disregarded the advice and returned to his usual work from February 6-8, 1997, but then saw Dr. Fulford again on February 10 and 12, 1997, with continued complaints of right shoulder pain. At those visits, Dr. Fulford repeated his advice that Claimant stay off work. *Id.* On March 19, 1997, Dr. Fulford opined Claimant could return to his regular work duties. EX 9. Claimant, however, never returned to work with Employer. On April 8, 1997, Employer terminated Claimant from employment for job abandonment. EX 11.

Meanwhile, on February 26, 1997, Claimant visited Dr. Dlabal, an orthopedic surgeon who had been periodically treating Claimant for back, leg, and hip pain since November 1989. EXs 1, 8; *see* n.3, *supra*. Dr. Dlabal diagnosed right acromioclavicular joint inflammation secondary to functional activities and a right cervical shoulder strain, gave Claimant a cortisone injection into his right shoulder, and advised him to pursue "flexibility exercises" to improve his range of motion. EX 8. On March 31, 1998, Dr. Dlabal opined Claimant is permanently disabled due to the severity of his right shoulder condition and incapable of "lifting tools and other activities related to being a mechanic." CX 2. On June 8, 1998, he reiterated that upon review of Dr. Fulford's report, Claimant "was unable to work as a mechanic" due to his shoulder condition which constitutes a part of his overall condition that "forced him into a permanent unemployed status." *Id.* Claimant stated he thereafter never looked for any other work. HT at 42.

Dr. R. Barry Lurate, an orthopedic surgeon, examined Claimant on December 17, 1998. He stated Claimant, at most, sustained a brachial plexus stretch injury which would have fully resolved within two to three months of his January 1997 work incident, without any resulting impairment, and there is nothing to suggest Claimant's current symptoms are attributable to the work incident.[5] EX 14. In a letter dated February 16, 1999, Dr. Thigpen stated he had been treating Claimant since early 1991 for severe problems with numbness and pain in his right hand and numbness in his legs. CX 3; *see* n.3, *supra*. Dr. Thigpen opined Claimant is permanently disabled due to his chronic underlying problems. *Id.* In a follow-up report, Dr. Thigpen stated on February 9, 2005, that Claimant continued to be

[5] Dr. Lurate opined that based on a "[c]areful review of medical records and examination" of Claimant, there is nothing to indicate Claimant sustained "any obvious injury that can be attributed to the mechanism described on 1/30/97." EX 14. He further stated Claimant "likely had a brachial plexus stretch injury resulting in numbness" which would have resolved within a month, so "it would defy all known medical science to suggest a permanent injury" or "suggest that his current collection of symptoms can be attributed" to the isolated January 30, 1997 work event. *Id.*

disabled and was unable to lift tools or perform other activities related to being a mechanic due to his 1997 on-the-job injury. *Id.*

Based on the medical records of Drs. Fulford, Dlabal, and Lurate, and Claimant's prior work history, Employer had a rehabilitation counselor conduct a labor market survey which identified six jobs deemed suitable for Claimant in March-April 1999. EX 15. Claimant reiterated he never returned to work because Dr. Dlabal "said I'm 100 percent disabled," HT at 42, though he acknowledged he could have done the sedentary work identified in the labor market survey and would have done sedentary work for Employer if it had been offered. *Id.* at 42-43.

Claimant filed claims for benefits on January 26, 1998, and again on September 3, 2004, alleging injuries to his right arm, shoulder, and neck. He sought temporary total disability benefits from February 10, 1997, through March 10, 1998, and permanent total disability benefits thereafter due to his January 30, 1997, work injury. Employer controverted the claims. The claim was eventually referred to the Office of Administrative Law Judges on November 8, 2018, and a telephonic formal hearing was held before the ALJ on September 10, 2019.

The ALJ initially found Claimant sustained a temporary, work-related aggravation of a pre-existing right shoulder problem on January 30, 1997. He found the evidence established Claimant's condition from that work injury fully resolved, and, as of March 19, 1997, he could have returned to his original job and required no further medical care. For the period from February 9, 1997 to March 18, 1997, the ALJ found Employer established the availability of suitable alternate employment, with "a post-injury weekly earning capacity of $244.50." Decision and Order at 12. He ordered Employer to pay Claimant temporary partial disability benefits for that time frame and denied benefits thereafter. Claimant appeals the decision, contending the ALJ erred in denying temporary total disability benefits before March 19, 1997, and permanent total disability benefits thereafter. Employer has not responded.

We first address the nature and extent of Claimant's condition for the period commencing March 19, 1997. A claimant's condition is permanent when it has reached maximum medical improvement (MMI). This means the claimant is no longer undergoing treatment with a view toward improving his work-related condition or the condition is of a lasting and indefinite duration and beyond a normal healing period. *See Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004); *Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994); *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969); *see also McCaskie v. Aalborg Ciserv Norfolk, Inc.*, 34 BRBS 9 (2000); *see also SGS Control Services v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996) (the nature of a disability

is determined solely by medical evidence). The Board must affirm a 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). To establish a prima facie case of total disability, a claimant must show he cannot return to his usual work due to his work injury.[6] *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998). Credible complaints of pain or medical evidence may be sufficient to meet this burden. *Jordan v. SSA Terminals, LLC*, 973 F.3d 930, 54 BRBS 57(CRT) (9th Cir. 2020).

Regarding the nature and extent of Claimant's disability, the ALJ rationally credited Dr. Fulford's March 19, 1997 release of Claimant to return to his regular work and Dr. Lurate's December 17, 1998 report stating Claimant's work-related right shoulder condition "certainly" reached MMI within two to three months of his January 30, 1997, work incident,[7] EX 14; *Del Monte Fresh Produce v. Director, OWCP [Gates]*, 563 F.3d

[6] Although Claimant testified that his January 1997 work incident produced a combination cervical and right shoulder injury, the ALJ concluded Claimant's work injury was limited to a temporary aggravation of his pre-existing right shoulder condition consisting of a right shoulder sprain/strain. Decision and Order at 10. In reaching this conclusion, the ALJ found Claimant's testimony "unreliable" because it contained multiple inconsistencies regarding his January 1997 work accident and the extent of his resulting injuries. *Id.* For example, in contrast to Claimant's hearing testimony, the ALJ found none of the doctors nor his supervisor contemporaneously reported anything about his having been struck in the head by the hood of a car. *Id.* Moreover, the ALJ found it significant that Claimant did not mention neck numbness or pain in his first post-injury visit to Dr. Fulford, yet he complained of it later. *Id.* The ALJ was well within his discretion to determine Claimant's testimony was inconsistent and unreliable and therefore insufficient to establish his January 1997 work incident produced both a cervical and right shoulder injury. *Bis Salamis, Inc. v. Director, OWCP* [*Meeks*], 819 F.3d 116, 129, 50 BRBS 29, 37(CRT) (5th Cir. 2016). As it is rational and supported by substantial evidence, we affirm the ALJ's finding that Claimant sustained a work-related aggravation of his pre-existing right shoulder condition. *Pierce v. Elec. Boat Corp.*, 54 BRBS 27 (2020).

[7] In contrast, the ALJ gave "little probative value" to Dr. Thigpen's opinion that Claimant is permanently and totally disabled by the entirety of his physical ailments, because it "was largely conclusory" and "accepted virtually everything Claimant reported at face value, regardless of corroboration or consistency with other physician opinions." Decision and Order at 11. The ALJ also accorded diminished weight to Dr. Dlabal's opinion that Claimant was permanently disabled due to his right shoulder condition

1216, 43 BRBS 21(CRT) (11th Cir. 2009). We affirm, as supported by substantial evidence, the ALJ's findings that Claimant's work-related injury reached MMI as of March 19, 1997, and Claimant, from that point forward, was not disabled by his work injury. *Ezell,* 33 BRBS 19; *Mason,* 16 BRBS 307. Therefore, the ALJ properly denied compensation beyond that date.

Claimant also contends he is entitled to total disability benefits during the period between February 9, 1997 and March 18, 1997. When the claimant has established a prima facie case of total disability, as he did for this period, the burden shifts to the employer to show suitable alternate employment. The employer must show the realistic availability of job opportunities within the geographic area where the claimant resides, which he is capable of performing by virtue of his age, education, work experience, and physical restrictions. *See New Orleans (Gulfwide) Stevedores v. Turner,* 661 F.2d 1031, 14 BRBS 156(CRT) (5th Cir. 1981). The employer can meet its burden by offering the claimant a job in its facility that the claimant is capable of performing. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996); *Buckland v. Dep't of the Army/NAF/CPO*, 32 BRBS 99 (1998).

In assessing the extent of Claimant's disability for this time frame, the ALJ found Employer established the availability of suitable alternate employment through Claimant's testimony that "he would have been capable of working at Employer's auto shop in the tool crib, handing out tools and acting as a cashier." Decision and Order at 11. Although the ALJ correctly stated Employer "has the burden of establishing suitable alternate employment" for the period from February 9 through March 18, 1997, *id.*, he failed to properly address the evidence in terms of this burden. While Claimant's testimony indicated he believed he was capable of performing light duty work in the tool crib at Employer's auto shop, HT at 41-45, and he "asked for that [light-duty] job," *id.* at 44, there is no evidence Employer ever made such work available or offered it to Claimant. Rather, Claimant's undisputed testimony establishes his supervisor clearly stated Employer would not return him to work until he was "100 percent" capable of doing all the tasks required of him in his pre-injury job as an auto mechanic, *id.* at 22, 40, 41-42, a point the ALJ explicitly confirmed with Claimant during the hearing.[8] *Id.* at 44-45. Under these

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because the ALJ concluded "[a] key component of most of [Claimant's] visits [with the doctor] was Claimant's request for disability certifications." *Id.*

[8] Although the ALJ did not make any specific findings regarding Claimant's work limitations during this period, his error is harmless. Claimant has shown he was unable to return to his usual work, and Employer did not satisfy its burden of showing the availability of, or providing, suitable alternate employment during that time.

circumstances, the potential tool room job cannot constitute suitable alternate employment for the period in question. *See generally Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999). As the record is devoid of any other evidence showing the existence of suitable alternate employment prior to March 19, 1997,[9] we reverse the ALJ's finding that Employer established the availability of suitable alternate employment as of February 9, 1997. We hold Claimant is, as a matter of law, entitled to temporary total disability benefits from February 9, 1997 through March 18, 1997 and remand this case for a specific calculation of that award, including any credit to which Employer may be entitled for compensation benefits already paid. *See generally Pietrunti v. Director OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997).

Accordingly, we modify the ALJ's Decision and Order to reflect Claimant's entitlement to temporary total disability benefits between February 9, 1997 and March 18, 1997, and remand the case for calculation of those benefits. In all other respects, we affirm the ALJ's Decision and Order.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

[9] Although the record contains Employer's labor market survey, EX 15, this survey identified potentially available work in March and April 1999 and therefore is not relevant to Employer's burden to establish the availability of suitable alternate employment prior to March 19, 1997.