

U.S. Department of Labor

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



BRB Nos. 24-0386
and 24-0386A

ERVIN POLK

Claimant-Petitioner
Cross-Respondent

v.

PORTS AMERICA GULFPORT,
INCORPORATED

and

PORTS INSURANCE COMPANY,
INCORPORATED

Employer/Carrier-
Respondents
Cross-Petitioners

NOT-PUBLISHED

DATE ISSUED: 06/03/2026

DECISION and ORDER

Appeals of the Decision and Order of Tracy A. Daly, Administrative Law Judge, and the Decision and Order Denying Motion for Reconsideration of Paul R. Almanza, Associate Chief Administrative Law Judge, United States Department of Labor

William S. Vincent, Jr. (Law Offices of William S. Vincent, Jr.), New Orleans, Louisiana, for Claimant.

Donald P. Moore (Galloway, Johnson, Tompkins, Burr & Smith), Gulfport, Mississippi, for Employer and its Carrier.

Before: ROLFE, JONES, and ULMER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and Employer and its Carrier (Employer) cross-appeal, Administrative Law Judge (ALJ) Tracy A. Daly's Decision and Order and Associate Chief ALJ Paul R. Almanza's Decision and Order Denying Motion for Reconsideration (2022-LHC-00067) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (Act). The Benefits Review Board must affirm the ALJ's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law.¹ 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

The Accident

Claimant worked for Employer as a truck driver at the Port of Gulfport, Mississippi. Hearing Transcript (TR) at 112-118, 131. On May 5, 2018, he was involved in an incident that caused neck, left shoulder, and alleged psychological injuries. Joint Exhibit (JX) 1; HXs 2 at 2, 49 at 5. A container failed to unlock from the chassis of his truck, and a crane lifted both it and the truck off the ground approximately twelve to twenty feet before dropping it. TR at 144-148.

Claimant went to Memorial Hospital later that day, complaining of right leg, low back, and neck pain and feeling "woozy." HX 10 at 3-6. Dr. Andrew Nakamoto diagnosed Claimant with cervical, lumbar, and left knee strains and discharged him with instructions to follow-up with his primary doctor. HX 10 at 2; TR at 150-151, 376. On May 9, 2018, Claimant presented to Dr. John T. Pessoney at Memorial Physician Occupational Medicine Clinic, complaining of left knee and neck pain. HX 3 at 2. At subsequent follow-up appointments, Dr. Pessoney also assessed Claimant with a left shoulder strain and referred him to physical therapy and an orthopedist. *Id.* at 7-23. Dr. Pessoney also restricted Claimant to no lifting, pulling, or pushing more than twenty pounds and stated he cannot drive a truck or trailer in reverse "since rotation of head is limited." *Id.* at 15.

Claimant's Follow-up Treatment

Claimant's family members recommended he see Dr. Robert L. Kimber. On August 1, 2018, Claimant signed a form electing Dr. Kimber as his choice of "ortho/spine"

¹ This case arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit because Claimant sustained the injury at issue in this case in Gulfport, Mississippi. 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).

physician and presented for an initial evaluation, complaining of neck pain. HXs 4 at 1, 57 at 1, 64; TR at 152-153. Dr. Kimber diagnosed Claimant with disc herniation at C5-6 and C6-7 and ordered a CT scan. HX 4 at 1-3. He recommended Claimant begin physical therapy with Joe Frame (PT Frame) at Coastal Rehabilitation and returned him to work with restrictions of no backing up trucks, lifting more than fifteen pounds, climbing ladders or stairs, working overhead, or vibrating motion. *Id.* at 1-2, 57, 64, at 7, 12, 17, 57-59. On October 18, 2018, Dr. Kimber performed a two-level cervical discectomy and fusion at C5-6 and C6-7. HXs 4 at 11-12, 33.

On July 18, 2019, Dr. Kimber performed revision fusion surgery to help alleviate Claimant's pain and facilitate his return to work. HXs 4 at 26-27, 34 at 16-17, 64 at 24-25. On October 30, 2019, Dr. Kimber opined Claimant's fusion revision was healing with no movement in flexion or extension. HXs 4 at 37-39, 64 at 29, 31-34. He ordered physical therapy for two weeks, after which he released Claimant to return to work with "light duty restrictions." *Id.*

On December 6, 2019, Claimant returned to work for Employer in a light-duty capacity as a painter. TR at 320-321, 338. For approximately forty-five minutes, Claimant painted three or four stripes on a truck's tire with a handheld paintbrush using his right hand, and then he stopped, complaining of neck pain, a headache, and peripheral neuropathy. *Id.* Claimant went to Memorial Hospital the same day, and Dr. Nakamoto discharged him with pain relief medicine, as he appeared well, "non-toxic," and neurologically intact. HX-11 at 5-7.

On January 13, 2020, Claimant returned to Dr. Kimber. He opined, to a reasonable degree of medical certainty, that Claimant's condition had reached maximum medical improvement (MMI). HXs 4 at 45-48, 64 at 40-42. He concluded no further treatment was necessary and there was no objective reason why Claimant could not return to work without restriction. *Id.* He referred Claimant to Industrial Rehab for an impairment rating. *Id.*

On January 15, 2020, pursuant to his counsel's referral, Claimant visited Dr. Justin Lundgren, a physical medicine and rehabilitation specialist in New Orleans, complaining of severe neck pain, limited range of motion, chronic headaches, and poor posture. HXs 5, 7; TR at 306. Dr. Lundgren found Claimant had limited range of motion in the neck due to pain, full shoulder range of motion, and tender cervical paraspinals. HX 5 at 3. Dr. Lundgren recommended changes to Claimant's medications and prescribed a home TENS unit. *Id.* at 3-5. On January 30, 2020, Dr. Lundgren completed a Form OWCP-5, indicating Claimant was unable to perform his usual employment due to his neck pain and headaches, and he restricted Claimant from all work. *Id.* at 6.

On March 4, 2020, Claimant again saw Dr. Lundgren who determined Claimant's x-ray results showed no instability. HX 5 at 8. He also opined there was nothing to be done "interventionally at this juncture," modified Claimant's medications, and referred him for a functional capacity evaluation (FCE) that occurred on April 2, 2020. *Id.* at 8-10. As confirmed by Dr. Lundgren, the FCE demonstrated Claimant's consistent efforts and estimated his physical demand level capacity as "sedentary-light." As a result, Dr. Lundgren stated Claimant was unable to return to his previous work as a truck driver without restrictions.² *Id.* at 11-13, 31.

On June 15, 2020, Claimant presented to Dr. Kimber for the last time. HXs 4 at 49-50. On examination, Dr. Kimber stated Claimant had "normal gait and station, normal muscle spasm" and "range of motion is abnormal with pain to extremes of flexion, extension, and side bending, tenderness to palpation, abnormal strength and tone." *Id.* He also opined Claimant's bones were healing normally. HXs 4 at 50, 64 at 52-56, 59. He had no explanation for Claimant's subjective pain being out of proportion to his objective findings. HX 4 at 50. He again opined that Claimant's condition reached MMI and further treatment would have no additional effect. HXs 4 at 50, 64 at 52-54. He released Claimant to "moderate work" with no restrictions and deferred to a vocational specialist as to whether Claimant can perform specific types of work. HX 4 at 50.

On July 8, 2020, on referral of his counsel, Claimant saw Dr. John R. Macgregor, a psychoanalyst, for an initial evaluation. HXs 25, 26. Dr. Macgregor diagnosed Claimant with Major Depressive Disorder, Post-Traumatic Stress Disorder (PTSD), Panic Disorder, and Somatic Symptom Disorder with Predominant Pain. HX 25 at 2. Dr. Macgregor recommended psychotherapy in combination with psychotropic medication. *Id.* Claimant subsequently visited with Dr. Macgregor for multiple sessions from July 2020 through May 2022. *Id.* at 6-17. On September 30, 2020 Dr. Macgregor restricted Claimant from working around docks, cranes, or trucks due to his PTSD. *Id.* at 5.

On August 3 and 18, 2020, pursuant to Dr. Lundgren's referral, Claimant visited Dr. Richard Wakeman, a clinical psychiatrist, for an evaluation. HXs 5 at 14, 27, 28. Dr. Wakeman diagnosed Claimant with depression and anxiety because of the pain he was experiencing from his workplace accident. HX 27 at 2-3.

² Claimant also visited with Dr. Lundgren on May 22, 2020, June 17, 2020, September 16, 2020, March 11, 2021, May 6, 2021, July 13, 2021, January 11, 2022, March 15, 2022, and April 26, 2022. During these visits Claimant complained of neck pain, headaches, poor range of motion, depression and hopelessness, and Dr. Lundgren recommended psychiatric treatment for his depression, physical therapy, trigger point injections, Botox, or medical marijuana to treat his pain. HX 5 at 14-40.

On August 17, 2020, at Employer's request, Claimant presented to Dr. Richard Roniger, clinical psychiatrist, for an evaluation. HXs 65, 66. Dr. Roniger diagnosed Claimant with somatic symptom disorder due to his pain, and he recommended therapy and anti-depressants. HX 65 at 6. He further opined that Claimant is not psychiatrically disabled but could not assess whether his condition had reached MMI. *Id.*

On January 14, 2021, at Employer's request, Claimant visited with Dr. Kevin Greve, a clinical psychologist. HXs 67, 68. Dr. Greve reviewed Claimant's medical records, interviewed him, and performed psychometric tests. HX 67 at 1-14. He opined there is no reliable basis for a mental health diagnosis or evidence that Claimant is disabled for any mental health reason. HX 67 at 16-18; TR at 551-53, 569, 587, 590.

On April 5, 2022, pursuant to Dr. Lundgren's recommendation, Claimant presented for a second FCE with PT Frame. HXs 5 at 38-40, 23. PT Frame noted Claimant was unable to perform certain tasks and terminated others due to subjective complaints of pain. HX 23 at 2-3. He stated Claimant was "hypersensitive to palpation in the left upper trapezius muscle. He flinches away from light touch." *Id.* at 3. He also reported a decreased range of motion of his shoulder and subjective reports of neck and shoulder pain when elevating his arm. *Id.* at 4. PT Frame opined Claimant "gave poor effort throughout the testing procedures" and engaged in self-limiting behavior during several tasks. *Id.* at 2-4. Based on observed performance, PT Frame concluded Claimant exhibits the ability to perform light work with restrictions in maximum weight loads and postures. *Id.* at 4-5.

Procedural History

Employer accepted the injuries to Claimant's neck and shoulder as work-related.³ Claimant filed a claim under the Act on May 5, 2018, seeking additional benefits for his alleged neck, left knee,⁴ left shoulder, and psychological injuries. HX 2 at 2. The Office of Workers' Compensation Programs (OWCP) notified Employer of the claim via letter dated July 25, 2018, and Employer controverted the claim on July 30, 2018. HXs 1 at 33,

³ From May 6, 2018, to January 12, 2020, Employer paid \$45,450.90 in disability benefits and \$108,290.82 in medical benefits. It ceased all payments on January 13, 2020, because Dr. Kimber determined Claimant's condition reached MMI on that date. AX 1; HXs 1, 4 at 45, 64 at 41.

⁴ On June 19, 2018, Claimant reported to Dr. Thriffiley that his left knee pain was resolved. HX 44 at 1. The ALJ also noted Claimant did not claim any disability related to his left knee injury. D&O at 36 n.12. Consequently, the knee injury is not at issue here.

50, 51. The case was transferred to the Office of Administrative Law Judges (OALJ) for a hearing that took place from March 14 to 16, 2023.

On January 29, 2024, in his Decision and Order (D&O), ALJ Daly (the ALJ) concluded Claimant sustained work-related neck and left shoulder injuries but no compensable psychological injury. D&O at 36. He also determined Claimant met his burden of proving a prima facie case of total disability from the date of the accident on May 5, 2018, until his FCE on April 5, 2022. *Id.* at 42. However, the ALJ also determined Employer established the availability of suitable alternate employment (SAE) on December 6, 2019, as a painter at its facility, and he awarded temporary partial disability benefits until April 5, 2022, when he found Claimant was able to return to his usual work and was no longer disabled.⁵ *Id.* at 42, 48. The ALJ also awarded Claimant all reasonable and necessary medical expenses for treatment of his neck and left shoulder injuries. D&O at 50. He found Dr. Kimber is Claimant's chosen physician for his neck and spinal injuries, and Dr. Salloum is Claimant's choice of physician for his left shoulder injury. *Id.* at 52. He also found Employer is responsible for reasonable and necessary future pain management. *Id.* at 52-53. Claimant filed a motion for reconsideration.⁶

On June 20, 2024, ALJ Almanza⁷ issued a D&O denying Claimant's motion for reconsideration. He found Claimant failed to show ALJ Daly was biased or committed any manifest error.⁸ Almanza D&O at 8-14. He also determined the ALJ did not err in weighing the evidence or in making his credibility findings. *Id.* at 15-17. On July 12, 2024, ALJ Almanza denied Claimant's second motion for reconsideration as untimely. Claimant appeals the ALJs' decisions. Employer responds, and Claimant filed a reply

⁵ For his left shoulder and neck injuries, the ALJ ordered Employer to pay temporary total disability (TTD) benefits from May 5, 2018, through December 5, 2019, temporary partial disability (TPD) benefits from December 6, 2019, through January 12, 2020, and permanent partial disability (PPD) benefits from January 13, 2020, through April 4, 2022. *Id.* at 53; *see* 33 U.S.C. §908(b), (c)(21), (e).

⁶ Claimant alleged ALJ Daly showed bias and committed error by: interfering with Claimant's direct testimony; limiting his cross-examination of Employer's vocational expert, Ronnie Smith; threatening to disallow objections; making off-the-record comments; and excluding relevant evidence submitted past the discovery deadline.

⁷ The case was transferred to ALJ Almanza after ALJ Daly's retirement.

brief. BRB No. 24-0386. Employer cross-appeals the ALJs' decisions. Claimant responds, and Employer filed a reply brief. BRB No. 24-0386A.

Issues on Appeal

On appeal, Claimant first contends ALJ Daly made erroneous evidentiary findings and was biased against him. Cl.'s Br. at 35-38. He further asserts the ALJ erred in finding: 1) he suffered no compensable psychological injury; 2) Employer established SAE on December 6, 2019; 3) his disabling neck and shoulder conditions resolved on April 5, 2022, and he was able to return to his usual work; 4) Dr. Kimber is his choice of physician for his neck injury; and 5) Employer is not responsible for treatment by Drs. Lundgren and Macgregor and their referrals. *Id.* at 38-39, 41-53. Finally, he alleges ALJ Almanza erroneously denied his motion for reconsideration. *Id.* at 54-56, 66-68. Employer responds, urging affirmance on the issues Claimant raises, and Claimant filed a reply brief.

On cross-appeal, Employer argues: 1) the ALJ 'should have accepted Dr. Kimber's full-duty release on January 13, 2020; 2) it is not liable for pain management treatment; and 3) Dr. Lundgren is not an appropriate replacement as Claimant's physician of choice. Emp's Br. at 24-34. Claimant responds to the cross-appeal, urging affirmance on the issues Employer raises. Employer filed a reply brief.

Discovery Issues & Allegations of Bias

First, we reject Claimant's contention that the ALJ erred in not reopening the record for additional discovery and in refusing to admit evidence after the discovery deadline, thereby demonstrating bias against Claimant in his procedural rulings. Cl.'s Br. at 35-38. We further reject his argument that ALJ Almanza erred on reconsideration in determining ALJ Daly's actions were reasonable.

An ALJ has great discretion concerning the admission of evidence, and any decisions to admit or exclude evidence are reversible only if arbitrary, capricious, an abuse of discretion, or not in accordance with law. *Everson v. Stevedoring Servs. of Am.*, 33 BRBS 149, 152 (1999); *Ramirez v. S. Stevedores*, 25 BRBS 260, 264 (1992); 20 C.F.R. §§702.338, 702.339. In this case, on January 10, 2022, the ALJ issued an order requiring "all discovery to be completed within one hundred fifty (150) days of this Notice," or no later than June 10, 2022. *See* Notice of District Office Assignment and Scheduling Order at 2-3. However, Claimant had medical examinations and treatments after the discovery deadline and continued to send Employer his medical records.⁹ July 28, 2022 Notice of

⁹ The medical evidence Claimant attempted to submit past the deadline, which the ALJ excluded, included the following: 1) Dr. Lundgren's report relating to the FCE and the OWCP5; 2) PT Frame's notes from April 2022 which Claimant asserts show they were

Mots. Ruling at 2; *see* Cl.'s Br. at 35; Emp.'s Resp. at 6. On July 11, 2022, the parties filed a joint motion to extend the discovery deadline, which the ALJ denied because the parties "failed to establish grounds to continue the discovery process." *Id.*

On June 14, 2023, after the hearing, Claimant filed a motion to reopen the record to admit two exhibits he claimed would impeach Ben Clark's testimony.¹⁰ The ALJ denied Claimant's motion pursuant to 29 C.F.R. §18.90 because Claimant failed to provide any evidence as to why he was unable to obtain the proposed exhibits with reasonable diligence during the discovery period. June 27, 2023 Min. Order at 2. The ALJ did not consider these two exhibits in reaching his decision.

The ALJ's decision to reject extending the discovery deadline is not erroneous, as he has the discretion to exclude evidence for failure to comply with the terms of his pre-hearing order. *Everson*, 33 BRBS at 152; *Ramirez*, 25 BRBS at 264. Therefore, we affirm ALJ Almanza's finding that the ALJ's exclusion of evidence submitted after the discovery deadline was neither incorrect nor an abuse of discretion. *Id.*

Despite Claimant's statement that he filed the April 2022 FCE after the discovery deadline on June 16, 2022, ALJ Almanza accurately found the ALJ's admission of the April 2022 FCE was appropriate because neither party objected to it and because the document had a facsimile date and a "Received" stamp of April 13, 2022, indicating the OALJ had timely received it months before the discovery deadline. Also, there was no

not copied or received until July 2022; 3) Dr. Tomijian's April 2022 to February 2023 reports; 4) Bienville Orthopaedic Specialists' April 2022 reports; 5) NeoLife Physical Therapy's January 2023 records; and 6) Dr. Macgregor's supplemental reports. Cl.'s Br. at 36.

¹⁰ Ben Clark held prior roles with Employer as the maintenance and repair superintendent, a mechanic, and an instructor who provided training to truck drivers on the procedure for using a truck's side mirrors for aligning and connecting to a trailer and the practice of some drivers to physically turn to look through the back door of the truck. TR at 362-435, 655-661. We reject Claimant's argument that the ALJ erred in crediting Ben Clark's testimony because Mr. Clark deleted a video of the accident before the hearing and "did not know injuries could result in, I guess a lawsuit." Cl's Br. at 49; *see* TR. at 430-435. The record shows Mr. Clark testified the video system was new, the video was from the port's cameras rather than Employer's cameras, the system automatically deleted videos after fourteen days, and no one instructed him to retain a video when there was an accident or to ensure the system did not delete the video. *Id.*; Almanza D&O at 9 n.7.

indication that it was first provided to Employer and Carrier after the discovery deadline. HX 23 at 1; *see* Almanza D&O at 14.

Further, contrary to Claimant's assertion, it was reasonable for the ALJ to refuse Claimant's request to reopen the record after the hearing. Cl.'s Br. at 35-38. A party requesting the record be reopened must do so "promptly after the additional evidence is discovered" and must show the evidence in question is "new," "material," and "could not have been discovered with reasonable diligence before the record closed." 29 C.F.R. §18.90(b)(1); *see Sam v. Loffland Bros. Co.*, 19 BRBS 228, 230 (1987) ("party seeking to admit evidence must exercise due diligence in developing" claim). As the ALJ rationally found, Claimant failed to make this necessary showing. 29 C.F.R. §18.90(b)(1); June 27, 2023 Minute Order at 2. And ALJ Almanza did not abuse his discretion in finding no error in the ALJ's decision.

Finally, we reject Claimant's argument that the ALJ showed bias against him and his attorney during the hearing. Cl.'s Br. at 54-66. Allegations of judicial bias are not established by adverse rulings alone. *See Olsen v. Triple A Mach. Shops, Inc.*, 25 BRBS 40, 45-46 (1991), *aff'd mem. sub nom. Olsen v. Dir., OWCP*, 996 F.2d 1226 (9th Cir. 1993). Trial conduct will not support a finding of bias, except in "exceptional circumstances" where "a judge's attitude toward an attorney is so hostile that the judge's impartiality toward the client may be reasonably questioned." *See In re Cooper*, 821 F.2d 833, 838-839 (1st Cir. 1987). The record demonstrates the ALJ made appropriate evidentiary rulings regardless of which counsel proffered the evidence or objected to it, asked supplemental questions of each witness who testified, and required both attorneys to make proper objections at the hearing. *See, e.g.*, TR at 158, 162-167, 526, 543-544, 615, 651. These actions do not demonstrate "the rare" instance of reversible error because of bias. *Olsen*, 25 BRBS at 45-46; Almanza D&O at 7, 13-15.

As neither ALJ committed error with respect to evidentiary rulings, we affirm the findings of both ALJs that the evidentiary rulings and manner with which the ALJ conducted the hearing are not arbitrary, capricious, or an abuse of discretion, and are in accordance with law.¹¹ 5 U.S.C. §556(c); *McCracken v. Spearin, Preston & Burrows, Inc.*,

¹¹ On November 22, 2024, Employer filed a motion to strike Claimant's references to excluded evidence in his appellate brief. It argues Claimant is ignoring the procedural rules and the ALJs' evidentiary rulings by incorporating excluded evidence to support his brief before the Board. Mot. to Strike at 5-6; *see, e.g.*, Mot. for Recons. and Supporting Br., Exhibits "A" to "E"; Cl.'s Br. at 6-39, 44, 47, and 61. As we have affirmed both ALJs who properly exercised their discretion to exclude of this evidence, we grant Employer's motion to strike. The Board will not consider the excluded evidence or any arguments based on it. *See Wynn v. Clevenger Corp.*, 21 BRBS 290, 293 (1988); 20 C.F.R. §802.301.

36 BRBS 136, 138 (2002); *Jackson v. Universal Mar. Serv. Corp.*, 31 BRBS 103, 107 (1997); 20 C.F.R. §§702.338, 702.339; 29 C.F.R. §18.16.

Psychological Injury - Causation

Claimant contends the ALJ erred in finding he suffered no compensable psychological injury, as he did not properly weigh the medical opinions of Drs. Greve, Macgregor, Roniger, and Wakeman.¹² Cl.'s Br. at 52-53. Employer counters substantial evidence supports the ALJ's decision and urges affirmance. We reject Claimant's assertions.

If the employer rebuts the Section 20(a) presumption, as here, it drops out of the analysis, and the issue of causation must be resolved on the record as a whole with the claimant bearing the burden of persuasion by a preponderance of the evidence. *Dir., OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267 (1994); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996). The Board may not reweigh the evidence but may only inquire into the existence of substantial evidence to support the ALJ's findings. *Sea-Land Servs., Inc. v. Dir., OWCP [Ceasar]*, 949 F.3d 921, 927 (5th Cir. 2020); see *Bis Salamis, Inc. v. Dir., OWCP [Meeks]*, 819 F.3d 116, 127 (5th Cir. 2016) (the Board may not second-guess or disregard an ALJ's factual findings because other inferences could have been drawn from the evidence).

Claimant relies on the medical opinions of Drs. Wakeman, Macgregor, and Roniger, who diagnosed him with PTSD, anxiety, depression, and somatic symptom disorder due to pain from his workplace injury, to support his assertion of a compensable psychological injury. HXs 25, 27. The ALJ found Dr. Wakeman's opinions are unreasoned, unsupported and conclusory. D&O at 11. He determined Dr. Wakeman did not cite any objective testing, and he failed to explain the basis of his opinion that Claimant's pain resulted in his overreporting or magnification of symptoms, stating only that Claimant "obvious[ly]" suffers anxiety and depression due to his workplace accident. D&O at 11, 37; HX 27 at 2. For these reasons, he assigned Dr. Wakeman's opinion little weight. *Id.* The ALJ also assigned Dr. Macgregor's opinion little weight. D&O at 10; HX 25. He determined Dr. Macgregor failed to adequately explain the significance of Claimant's psychological test scores beyond stating they might have been caused by his pain. D&O at 10; HX 25 at 2. He also found Dr. Macgregor's opinion undermined by the facts that Claimant's treatment sessions were conducted via telephone without any visual assessment and that his report

¹² We affirm as unchallenged on appeal the ALJ's findings that Claimant invoked the Section 20(a) presumption and Employer rebutted it for his psychological injury. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57, 58 (2007); D&O at 36.

contained conflicting information which made the accuracy of his records questionable. *Id.*

The ALJ assigned the most weight to the opinions of Dr. Greve, Employer's doctor, who concluded no reliable evidence shows that Claimant suffers any psychological or psychiatric condition and that Claimant's severe, pervasive, and consistent overreporting undermined his credibility. D&O at 37; HX 67 at 16-18. He found Dr. Greve provided the most comprehensive report based on a thorough evaluation of Claimant, including a clinical interview and psychological testing. D&O at 11-12, 36-37; HX 67 at 11. The ALJ credited Dr. Greve's opinion that some of Claimant's scores were the highest that can possibly be generated for a given scale and were consistent with symptom malingering and overreporting. D&O at 37; HX 67 at 12-14. He concluded Dr. Greve's report is reasoned and supported with full explanations and references to specific test results, the DSM-5, and the American Academy of Neuropsychology. D&O at 37; HX 67. Furthermore, the ALJ assigned less weight to Dr. Roniger's opinion, Employer's other expert, than to Dr. Greve's opinion, because he found Dr. Roniger's diagnosis of somatic symptom disorder was based on Claimant's subjective complaints, which he determined are "unreliable" and are of "little probative value" as demonstrated by his psychological testing.¹³ D&O at 13, 36-37. The ALJ relied on Dr. Greve's explanation that Claimant's degree of exaggeration and overreporting on psychological testing "demonstrated an intentional effort to appear impaired, not a somatic level of unintentional transfer of mental symptoms." D&O at 37; *see* HX 67 at 12-14.

The ALJ's summaries of the reports are accurate, and he fully explained his reasons. Therefore, we affirm his finding that Claimant did not successfully establish he suffered a work-related psychological injury and his denial of benefits. *Ceasar*, 949 F.3d at 927; *Meeks*, 819 F.3d at 127.

Nature and Extent of Neck and Shoulder Injuries

Next, while the parties agree Claimant suffered work-related injuries to his neck and shoulder, both Claimant and Employer challenge the ALJ's assessment of Claimant's

¹³ We reject Claimant's argument that Drs. Roniger and Macgregor, who are psychiatrists, are far more qualified to render an opinion than Dr. Greve, a psychologist. Cl.'s Br. at 53. An ALJ is not required to base his credibility determinations on the respective credentials or qualifications of the medical experts. *See Conoco, Inc. v. Dir., OWCP [Prewitt]*, 194 F.3d 684, 691 (5th Cir. 1999) (affirming an ALJ's discretion in assessing expert credibility regardless of credentialing).

disability during various periods. They each assert some of his findings are not supported by substantial evidence.¹⁴

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). Disability is generally addressed in terms of its nature, permanent or temporary, and its extent, total or partial. The nature of a disability is determined solely by medical evidence, *see, e.g., SGS Control Servs. v. Dir., OWCP [Barrios]*, 86 F.3d 438 (5th Cir. 1996); *Trask*, 17 BRBS at 60-61, while the extent of disability is an economic as well as a medical concept. *Pietrunti v. Dir., OWCP*, 119 F.3d 1035 (2d Cir. 1997);

December 6, 2019 - Suitable Alternate Employment

Claimant argues the ALJ erred in finding Employer established SAE with the painter job it made available on December 6, 2019, because he was unable to perform the job due to his pain. Cl.'s Br. at 41-47. We disagree.

Employer identified a light-duty position as a painter at its facility for Claimant on December 6, 2020. This is permissible evidence of the availability of suitable alternate employment. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 688 (5th Cir. 1996). The ALJ considered the position description in assessing whether the job was suitable for Claimant.¹⁵ D&O at 47; *see* HXs 4 at 44, 63 at 5. The position required painting with a brush, roller, or spray gun with paint brought to the worker by the supervisor. HXs 4 at 44, 63 at 5. The physical requirements permitted the worker to change posture at will, take seated rest breaks as directed by a physician, and perform some tasks from a seated position. *Id.* Also, stair climbing could be eliminated if necessary, and lifting requirements were between zero and ten pounds. *Id.*

¹⁴ We affirm as unchallenged the ALJ's finding that Claimant established a prima facie case of total disability for his neck and shoulder injuries, along with his award of TTD benefits from May 5, 2018, until December 5, 2019. *Scalio*, 41 BRBS at 58; D&O at 42.

¹⁵ Because the ALJ found the painter's job constituted SAE, he did not consider the vocational report or the testimony of vocational expert, Ronnie Smith. D&O at 47. Therefore, we reject Claimant's arguments that the ALJ improperly limited Mr. Smith's cross-examination, as Claimant has not explained how the ALJ's alleged errors in this instance make any difference in the outcome of this case. *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (appellant must explain how the "error to which [it] points could have made any difference").

The ALJ properly determined Dr. Kimber approved the painting job, as its physical requirements were within Claimant's assigned work restrictions. *Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 225 (5th Cir. 2001); *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 905 (5th Cir. 1999). On October 30, 2019, and November 25, 2019, Dr. Kimber released Claimant to light-duty work and restricted him to no climbing or lifting more than ten to twenty pounds. HX 4 at 38-39, 41-43. He determined Claimant's fusion was healing, and he could see no reason why Claimant could not perform the painting job. *Id.* at 37-39. Accordingly, the ALJ permissibly found this position suitable.¹⁶ See *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 500-501 (5th Cir. 1995); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 944 (5th Cir. 1991); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693, 696 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Pisaturo v. Logistec, Inc.*, 49 BRBS 77, 81 (2015); D&O at 47 n.18.

Although the ALJ acknowledged Claimant stopped performing the paint job on December 6, he credited other evidence that indicated Claimant should have been able to perform those duties. D&O at 23, 47. As the ALJ noted, on November 17, 2019, and on December 6, 2019 – the date of the purported inability to work – Dr. Nakamoto stated that despite Claimant's reported headaches and neck pain, he is neurologically intact and negative for neck stiffness, has full range of motion, and appears "nontoxic" and well. *Id.*; see HX-11 at 1-7. Therefore Dr. Nakamoto discharged him home with medicine and instructions to follow-up with a neurosurgeon. HX 11 at 3, 7. Further, the ALJ considered Dr. Kimber's testimony that on November 20, 2019, his CT scan and x-ray demonstrated there is "nothing bad happening," and the "facet spurring" that is causing Claimant's neck pain is "long-standing" and is due to chronic arthritis, not his workplace injury. D&O at 23, 47; HX 64 at 38-340. Dr. Kimber also continued Claimant on light-duty restrictions and indicated he was neurologically intact and had full strength, normal gait and station, normal muscle spasm, and a well-healing surgical incision. HX 4 at 40-43. The ALJ considered Claimant's brief attempt to work and evidence of his overreporting of symptoms generally were not persuasive of a diligent attempt to return to work. D&O at 47-48.

Considering the evidence, while the ALJ found Claimant met his burden of proving a prima facie case of total disability from the date of his accident on May 5, 2018, until his second FCE on April 5, 2022, he permissibly concluded that Claimant's disability became partial when Employer met its burden of demonstrating SAE available as of December 6,

¹⁶ The ALJ also found the restrictions contained in the April 2020 FCE were consistent with the physical demands of Employer's light-duty painting position, which allowed for some seated work and required two hours a day of walking and lifting of ten pounds or less. D&O at 47; HX 13 at 4.

2019, which is consistent with Dr. Kimber's work restrictions and Dr. Nakamoto's treatment notes at that time. *Gen. Constr. Co. v. Castro*, 401 F.3d 963, 968-969 (9th Cir. 2005), *cert. denied*, 546 U.S. 1130 (2006); D&O at 42, 47-48. As they are rational and supported by substantial evidence, we affirm the ALJ's findings that Employer established the availability of SAE on December 6, 2019, and Claimant's total disability became partial disability as of that date. *Hinton*, 243 F.3d at 225; *Ledet*, 163 F.3d at 905; *Mendoza*, 46 F.3d at 500-501; *Mijangos*, 948 F.2d at 944; *Calbeck*, 306 F.2d at 696.

After January 13, 2020

On cross-appeal, Employer asserts the ALJ should have found Claimant's disability resolved on January 13, 2020, when Dr. Kimber released him to return to work. Emp.'s Br. at 24-27. It also argues the ALJ erred in finding Claimant's April 2, 2020 FCE was highly probative and reliable evidence of the impact of his pain on his ability to work.¹⁷ *Id.* at 28-32. We are not persuaded by its arguments.

We reject Employer's contention that the ALJ should have credited Dr. Kimber's full-duty release of Claimant as evidence of his work capacity. Employer cites an unpublished decision by the Board, *Barker*, for support of its argument that Dr. Kimber's statement that he would order an FCE without following through does not affect his full-duty release of Claimant. *Barker v. Serv. Emps. Int'l, Inc.*, BRB No. 09-0550, 2009 WL 4759868 (DOL Ben. Rev. Bd. Nov. 25, 2009) (unpub.); Emp.'s Br. at 27; HX 4 at 41, 43.¹⁸ At the outset, we note that unpublished decisions lack precedential value. *See Lopez v. S.*

¹⁷ As Claimant asserts he should have been entitled to PTD benefits from January 13, 2020, to April 4, 2022, and neither party challenges the ALJ's finding that Dr. Kimber's opinion constitutes substantial evidence that Claimant's condition had reached MMI by January 13, 2020, we affirm the finding of permanency as of that date. *Scalio*, 41 BRBS at 58; D&O at 44; Cl.'s Br. at 49; Cl.'s Reply at 15-16.

¹⁸ In *Barker*, the ALJ found the claimant established her TTD from July 21 through October 31, 2007, and her condition reached MMI on the latter date. *Barker*, 2009 WL 4759868 at *2. The ALJ determined that while Dr. Brewer had released the claimant to return to work without restrictions on October 31, 2007, the doctor did not release claimant to perform her former job with the employer in the absence of an FCE. *Id.* Pursuant to this finding, the ALJ concluded the claimant demonstrated she remained totally disabled after October 31, 2007, which was based solely on the doctor's statement regarding an FCE. *Id.* The Board held that while an FCE is probative evidence regarding a claimant's physical capabilities, the ALJ's finding on this issue, based "*solely*" on the absence of such a report, could not be affirmed. *Barker*, 2009 WL 4759868 at *4 (emphasis added).

Stevedores, 23 BRBS 295, 300 n.2 (1990). Nonetheless, the instant case is distinguishable from *Barker*.

First, the Board determined in *Barker* that the doctor's October 31, 2007 release and subsequent testimony established the claimant was released to return to work without restrictions, and the doctor's statement regarding the aid of an FCE did not alter his opinion. *Barker*, BRB No. 09-0550, 2009 WL 4759868 at *2. But in the present case, the ALJ considered Dr. Kimber's statement on November 25, 2019, that he would see Claimant in two months to perform an FCE to evaluate Claimant's ability to return to regular duty work. D&O at 13, 23, 39, 41; HX 4 at 41, 43. Two months later, however, on January 13, 2020, Dr. Kimber instead released Claimant to full duty without performing the FCE. HX 4 at 45-47. This course of action led to the ALJ's permissible finding that Dr. Kimber "failed to adequately explain his subsequent change in opinion," thereby reducing the "probative value" of his statement that Claimant was capable of full-duty release to his usual employment at that time. *Gacki*, 33 BRBS at 128; *Calbeck*, 306 F.2d at 695; D&O at 13, 41; HX 4 at 45-47. That is, Dr. Kimber first stated he wanted to review FCE results to determine if Claimant could return to his usual work but abandoned that course of action without explanation and found Claimant capable of full-duty work.

Unlike *Barker*, in this instance, the ALJ found the FCEs are highly probative and reliable evidence of Claimant's ability to perform work activities and of his restrictions. The ALJ based his conclusion not only on Dr. Kimber's initial request for an FCE but also on the additional medical opinions seeking information from FCEs. D&O at 41. For example, the ALJ noted that Dr. Lundgren's treatment notes reflected his general interpretation of the first FCE and a discussion with Claimant regarding "activity restrictions." D&O at 14, 41; HX 5 at 8-10. He also observed the testimony of Dr. Samir Tomajian, an interventional pain management specialist, regarding his preference in relying on an FCE to determine Claimant's work restrictions. D&O at 41; TR at 93. The ALJ found from these doctors' statements, FCEs are "highly probative – if not conclusive – to each provider's assessment of Claimant's ability to return to work." D&O at 41.

Therefore, the ALJ credited Claimant's first FCE, which took place on April 2, 2020, to support the finding that Claimant's condition was not yet to a point where he could return to his usual work. D&O at 41; HX 31 at 4. The FCE demonstrated Claimant's estimated physical demand level capacity was "sedentary-light," with assigned restrictions of occasional lifting of up to ten to fifteen pounds, frequent lifting of up to five to 7.5 pounds, and occasional carrying of up to ten to fifteen pounds. HX 31 at 4. It also stated, "Claimant was unable to demonstrate sufficient residual functional capacities to safely return to his prior job as a truck driver without the restrictions." *Id.* For these reasons, the ALJ permissibly concluded Claimant's condition had not resolved as of January 13, 2020, and his April 2020 FCE is the most credible evidence of his ability to perform work at that

time. As it demonstrated Claimant was unable to return to his regular and usual employment as a truck driver without restrictions, we affirm the finding that Claimant remained disabled after Dr. Kimber's January 2020 "release." *Duhagon v. Metro. Stevedore Co.*, 19 F.3d 615, 618 (9th Cir. 1999) (it is the ALJ's duty to weigh the evidence and make credibility determinations); *Gacki*, 33 BRBS at 128; D&O at 41-42; HX 31 at 4.

After April 5, 2022

Claimant contends the ALJ erred in finding he was capable of returning to his usual employment and was no longer disabled as of April 5, 2022, following the results of his second FCE. Cl.'s Br. at 47-49. We disagree.

Given his finding that FCEs are the most probative evidence of Claimant's ability to perform work, the ALJ gave great weight to, his April 5, 2022 FCE, which assessed Claimant with the ability to perform light work, defined as exerting up to twenty pounds of force occasionally or up to ten pounds of force frequently or a negligible amount of force constantly to move objects. Additionally, the ALJ observed the 2022 FCE reported that Claimant "gave poor effort throughout the testing procedures" and engaged in self-limiting behavior during several tasks, which may cause the physical therapist's recommendations to "underestimate the client's true functional capabilities." *Id.* Contrary to Claimant's contention, despite any pain he reported during the second FCE, which the ALJ considered, an ALJ may find an employee able to do his usual work despite his complaints of pain, numbness, and weakness, when a medical expert finds no functional impairment.¹⁹ *Peterson v. Washington Metro. Area Transit Auth.*, 13 BRBS 891, 896 (1981); see D&O at 41-42; Cl.'s Br. at 47. Based on the foregoing, the ALJ concluded Claimant's physical abilities improved since the time of the prior FCE, and he possessed the ability to perform light work as of April 5, 2022. D&O at 33, 41-42.

Further, the ALJ noted the 2022 FCE included specific restrictions in maximum weight loads and postures but did not assess Claimant's ability to return to work in the position of a truck driver. D&O at 33, 41-42; HX 23. Consequently, the ALJ also compared the requirements of Claimant's job to his work restrictions. *Obadiaru v. ITT Corp.*, 45 BRBS 17, 21 (2011); *Carroll v. Hanover Bridge Marina*, 17 BRBS 176, 178 (1985); D&O at 41-42. As the truck driver job position-description is not in the record, he considered the testimony of Claimant, Ben Clark, and Anthony Howell regarding the duties of the truck driver position to determine whether Claimant's condition allowed him to

¹⁹ We decline to consider Claimant's argument that the ALJ should have considered Dr. Lundgren's July 7, 2022 medical opinion, as it was not part of the record, and Claimant improperly attempted to admit it after the discovery deadline. 20 C.F.R. §702.334; Cl.'s Br. at 47-48.

return to his usual work.²⁰ D&O at 42. As their testimony corroborated the skills needed for the job fall within Claimant's abilities per the April 5, 2022 FCE, we affirm the ALJ's finding that as of that date Claimant is no longer disabled and is able to return to his usual work. *Mendoza*, 46 F.3d at 500-501; *Mijangos*, 948 F.2d at 944; *Calbeck*, 306 F.2d at 696; *Duhagon*, 19 F.3d at 618; *Pisaturo*, 49 BRBS at 81; D&O at 42.

Section 7(b)- Choice of Physician for Neck Injury

Claimant next contends ALJ Daly erred in rejecting Dr. Lundgren as his physician of choice for his neck injuries. Cl.'s Br. at 38. He argues that, as of January 2020, Dr. Kimber expressed he could not offer further medical treatment and subsequently moved out of town.²¹ *Id.* at 38-39. Claimant asserts it was reasonable for him to seek and choose Dr. Lundgren for additional medical attention after Dr. Kimber refused treatment. We disagree.

An employer's liability for medical treatment is governed by Section 7 of the Act, 33 U.S.C. §907. It states an injured employee is permitted his initial free choice of a physician to treat his work injury, 33 U.S.C. §907(b), but he

may not change physicians after his initial choice unless the employer, carrier, or [district director] has given prior consent for such change. Such consent shall be given in cases where an employee's initial choice was not of a specialist whose services are necessary for and appropriate to the proper care and treatment of the compensable injury or disease. In all other cases, consent may be given upon a showing of good cause for change.

33 U.S.C. §907(c)(2); 20 C.F.R. §702.406. Therefore, if a claimant wishes to change physicians after making his initial choice, he must obtain prior written approval from his employer, the carrier, or the district director. 33 U.S.C. §907(b), (c); 20 C.F.R. §702.406;

²⁰ Anthony Howell is a truck driver for Employer who testified regarding the procedure he followed to connect his truck to a trailer, including the jolt he felt at impact, the condition of Employer's trucks, and how trucks were selected by drivers. TR at 345-359, 508-514.

²¹ As neither party challenges ALJ Daly's findings that Dr. Salloum is Claimant's free choice of physician for his shoulder injury and that Employer is responsible for all reasonable and necessary past medical expenses related to Claimant's shoulder treatment by Dr. Salloum, we affirm them. *Scalio*, 41 BRBS at 58; D&O at 52.

Hunt v. Newport News Shipbuilding & Dry Dock Co., 28 BRBS 364, *aff'd mem.*, 61 F.3d 900 (4th Cir. 1995).

Based on the evidence of record before us, we agree with the ALJ's conclusion that Dr. Kimber was Claimant's initial choice of physician for his "ortho/spine" injury, as indicated on his choice of physician form dated August 1, 2018. HX 57. Although Dr. Kimber released Claimant to return to work full-duty and determined his condition reached MMI on January 13, 2020, he did not refuse to provide further treatment to Claimant. HXs 4 at 45-48, 64 at 40-42. Claimant maintains he began treating with Dr. Lundgren two days later, on January 15, 2020, because Dr. Kimber moved and refused further treatment. Cl.'s Br. at 38-39. However, Dr. Kimber saw Claimant again six months later, in June 2020, when he returned with additional complaints. HXs 4 at 49-50, 64 at 42-56. The record indicates Dr. Kimber has not refused treatment to Claimant since his last appointment on June 15, 2020, but during that visit he found nothing on the radiological imaging after Claimant reached MMI to prevent him from returning to work, so he deferred to an occupational specialist regarding Claimant's ability to perform specific types of work. *Id.*

As the ALJ correctly found, Claimant presented no evidence of a prior written approval by Employer, Carrier, or the district director to change physicians to Dr. Lundgren or any other physician for his "ortho/spine" injury.²² D&O at 52. On September 2, 2021, an OWCP claims examiner issued a report following a second informal conference, recommending Employer authorize Dr. Lundgren as Claimant's treating physician because Dr. Kimber had moved. HX 1 at 29-32. Employer controverted this recommendation. *Id.* at 33. The only evidence Claimant offers in support of his assertion that Dr. Kimber moved away is a letter from Employer dated July 10, 2024, two years after the close of discovery and more than six months after the ALJ's Decision and Order. As the letter demonstrating that Dr. Kimber moved to Florida in January 2021 was never made a part of the record, the Board cannot consider it.²³ As such, we affirm the ALJ's finding that Dr. Kimber is Claimant's choice of physician for the treatment of his work-related neck and spine

²² On May 20, 2020, the district director issued a Memorandum of Informal Conference on Reconsideration affirming Claimant's free choice of physician as Dr. Kimber and denying his request to change to Dr. Lundgren. HX 1 at 16-18.

²³ A claimant is free to request a change of physician at any time, and for good cause he may obtain approval from Employer, Carrier, or the district director. Any treatment must be preceded by a request for authorization. 33 U.S.C. §907(b), (c); 20 C.F.R. §§702.403, 702.406.

injuries, as it is supported by substantial evidence.²⁴ 33 U.S.C. §907(b); 20 C.F.R. §702.406(a); D&O at 52.

Section 7 Medical Benefits

Lastly, Employer contends the ALJ erred in awarding Claimant continuing pain management treatment at its expense.²⁵ Emp.'s Br. at 32-34. It asserts the ALJ's finding is irrational and unsupported by the evidence due to Claimant's symptom exaggeration and failure to mitigate his pain symptoms and his failure to treat with authorized physicians. *Id.*

We reject Employer's assertion. Drs. Lundgren, Wolfson, and Tomajian advised Claimant that he required continuing pain treatment. HXs 5 at 23-25, 12, 14 at 1-4; TR at 58-67. Dr. Lundgren referred Claimant to Dr. Eissa for Botox injections in September 2020, as a treatment for Claimant's chronic neck pain and headaches. D&O at 53; HX 5 at 23-25. Dr. Wolfson referred Claimant to pain management in February 2021 to treat chronic neck pain and headaches, and Claimant subsequently began treating with Dr. Tomajian in March 2021. D&O at 53; HX 12. Dr. Tomajian opined Claimant would benefit from pain management, cervical ablations, and injections. HX 14 at 1-4; TR at 58-67.

The ALJ relied on these medical opinions to inform his finding,²⁶ and as the recommended treatment is due to a work-related injury, Employer is liable for that

²⁴ On cross-appeal, Employer contends ALJ Almanza erred in rendering a hypothetical finding that he would have found Dr. Lundgren as Claimant's physician of choice for his neck condition if he had proven Dr. Kimber moved his practice out of state. Almanza D&O at 17 n.22. ALJ Almanza's hypothetical finding is dicta and not binding; therefore, any error is harmless. *See generally Brown v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 110 (1989).

²⁵ From late 2020 to early 2022, to manage his pain, Claimant sought treatment with Dr. Hazem Eissa, a physical medicine, rehabilitation, and pain management specialist, and Dr. Samir Tomajian, an interventional pain management specialist. HXs 8, 9, 14, 16. Further, to assist with Claimant's chronic neck pain, headaches, and cervical dystonia, Dr. Tomajian administered Botox injections on April 8, 2021, bilateral cervical facet joint injections at C4-5, C5-6, and C6-7 on June 14, 2021, and bilateral intraarticular facet injections on January 6, 2022. HX 14 at 1-14; TR at 58-67.

²⁶ We reject Employer's argument on cross-appeal that the ALJ erred in finding Claimant is entitled to continuing pain management treatment because he assigned the most credit to Dr. Kimber, who did not refer Claimant to pain management, as compared to Drs.

reasonable and necessary treatment. 33 U.S.C. §907(a); 20 C.F.R. §702.402; D&O at 53. The work-related injury need not be economically disabling for a claimant to be entitled to Section 7 medical benefits. *Crawford v. Dir., OWCP*, 932 F.2d 152, 154 (2d Cir. 1991) (citing *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 59 (1989)). The ALJ has the authority to determine the reasonableness and necessity of medical treatment based on the evidence of record, *Weikert v. Universal Mar. Serv. Corp.*, 36 BRBS 38, 40 (2002), and the discretion to weigh conflicting evidence and to draw inferences from it. See *Mijangos*, 948 F.2d at 944; *Donovan*, 300 F.2d at 742. He is not confined to relying on only the opinions from treating or authorized practitioners. *Kkunsa*, 59 BRBS at 1, 3-4.

Based on the opinions of Drs. Lundgren, Wolfson, and Tomajian, the ALJ permissibly concluded Claimant established the need for ongoing pain management “deemed reasonable and necessary by Claimant’s physician of choice.” *Weikert*, 36 BRBS at 40; D&O at 53-54. Therefore, as it is rational and supported by substantial evidence, we affirm the ALJ’s finding that Employer is liable for this treatment.²⁷ *Mijangos*, 948 F.2d at 944; *Donovan*, 300 F.2d at 742; D&O at 53.

Lundgren, Wolfson, and Tomajian, whom it alleges the ALJ found less credible. Emp.’s Br. at 32. None of the ALJ’s credibility findings with respect to these doctors related to their opinions about continuing pain management treatment. While the ALJ relied on their opinions to award continuing treatment, he did not order Employer to pay for their unauthorized treatment. That, too, is affirmed.

²⁷ Claimant must comply with the Section 7 requirements to hold Employer liable for this treatment.

Accordingly, we affirm ALJ Daly's Decision and Order and ALJ Almanza's Decision and Order Denying Motion for Reconsideration.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

GLENN E. ULMER
Administrative Appeals Judge