

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



BRB No. 21-0258

CHARLES J. DRAKE

## Claimant-Petitioner

V.

VIRGINIA INTERNATIONAL  
TERMINALS, LLC

and

SIGNAL MUTUAL INDEMNITY  
ASSOCIATION, LTD.

## Employer/Carrier- Respondents

[illegible]

DATE ISSUED: 3/24/2022

## DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Monica Markley,  
Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna Klein Camden, L.L.P.), Norfolk, Virginia,  
for Claimant.

Lawrence P. Postol (Postol Law Firm, P.C.), McLean, Virginia, for Employer/Carrier.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Monica Markley's Decision and Order Denying Benefits (2019-LHC-00610) rendered on a claim filed pursuant to the

Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (Act).<sup>1</sup> We must affirm the ALJ's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant, with a history of back problems,<sup>2</sup> injured his low back, as well as his thoracic and cervical spine, after he slipped and fell on ice while working as an electronics technician for Employer on January 10, 2017. HT at 23-24. He reported the injury immediately and was sent home that day without finishing his shift. *Id.* at 24. Claimant visited Dr. Arthur W. Wardell on January 12, 2017. Dr. Wardell made "provisional diagnoses" of cervical, dorsal and lumbar spine sprains, prescribed medication and physical therapy, ordered MRIs for Claimant's lumbar and thoracic spine, and took him out of work. EX 13. Dr. Wardell subsequently referred Claimant for a neurological evaluation with Dr. David A. Vincent, who diagnosed Claimant with low back pain, lumbar spondylolysis, and lumbar stenosis, and referred Claimant to Dr. Brian S. Weaver for pain management.<sup>3</sup> EX 16; CX 11.

Dr. Weaver advised Claimant on March 7, 2017, he could perform light-duty work with no lifting over 10 pounds.<sup>4</sup> Dr. Weaver also recommended a series of back injections and ordered, per Claimant's request, a functional capacity evaluation. EX 17. Claimant received one injection from Dr. Weaver, which he stated was unhelpful, and thereafter

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<sup>1</sup> 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 records from the Office of Administrative Law Judges and the Office of Workers' Compensation Programs.

<sup>2</sup> Claimant stated he had been experiencing back problems for about 6 years prior to the work injury for which he occasionally sought treatment with Dr. Wardell. HT at 24.

<sup>3</sup> In his March 29, 2017 follow-up report, Dr. Vincent stated Claimant has had "some episodes of back pain in the past, but the recent flare-up is different in character," thereby suggesting Claimant's ongoing lower back complaints are related to the January 2017 work injury. EX 16; CX 11.

<sup>4</sup> Dr. Weaver further advised Claimant against climbing and descending ladders and stairs and stated if there is no light-duty work available, he should remain out of work until it was appropriate and safe for him to return. EX 16.

returned to treat with Dr. Wardell who stated Claimant could return to full-duty work as of November 20, 2017.<sup>5</sup> EX 13.

Claimant returned to a full-duty position in Employer's straddle shop on November 10, 2017. HT at 27. He worked in this capacity until June 5, 2018, when Employer terminated him for violating its drug policy.<sup>6</sup> *Id.* at 27-30. Claimant stated he still had lower back pain, which had only worsened since his January 2017 work accident. *Id.* at 30. He continued to treat with Dr. Wardell, periodically receiving epidural injections. *Id.* Dr. Wardell removed Claimant from full-duty work again on July 5, 2018; he released Claimant to full-duty work on August 20, 2018, at Claimant's request; but then on October 11, 2018, he recommended Claimant stay out of work. EX 13. Claimant has not returned to work since. HT at 31.

At Employer's request, Dr. David G. Goss examined Claimant on August 30, 2018, and June 3, 2019. EX 23. He opined Claimant's January 2017 work injury involved simple sprains of the cervical, thoracic, and lumbar spine which should have completely resolved with nonsurgical conservative care within 12 weeks post-accident. *Id.* He therefore stated Claimant should have reached maximum medical improvement for his work injuries and should have been able to return to full-duty work by mid-April 2017 with no need for ongoing management or treatment for those conditions. *Id.* He further opined that any continued complaints of back symptoms by Claimant and/or ongoing treatment should be considered related to his known pre-existing spinal condition and not his January 2017 work injury. *Id.*

On June 18, 2019, Dr. Bernardo Ordonez, a neurosurgeon, recommended Claimant have surgery at the L3-4 and L4-5 levels, which he performed on August 19, 2019.<sup>7</sup> EX 18. In an October 2019 follow-up, Claimant reported to Dr. Ordonez he was doing well with only occasional back discomfort. CX 16. On October 3, 2019, Dr. Ordonez opined

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<sup>5</sup> At Employer's behest, Dr. Jeffrey J. Laurent examined Claimant, diagnosed low back pain, and released him to work with no restrictions as of October 5, 2017. EX 21.

<sup>6</sup> Claimant was terminated after testing positive twice for using a prescription medication, Adderall, without a valid prescription. EX 24. Claimant testified he had previously been prescribed the medication, but the prescription had expired. HT at 29-30.

<sup>7</sup> The procedure involved an L3 through L5 laminectomy, bilateral facetectomies, bilateral foraminotomies, L3-4 and L4-5 discectomy and interbody fusion, and L3-5 posterior lateral arthrodesis and instrumentation.

there was both a causal and temporal relationship between Claimant's work injury and his ensuing medical problems. *Id.*

Employer paid Claimant temporary total disability benefits from January 12 to November 10, 2017, and from July 5 to August 20, 2018, as well as medical benefits. CX 8; EX 7. Claimant thereafter sought additional benefits under the Act, asserting the ongoing medical treatment for his back condition, including the August 2019 back surgery, is related to his January 2017 work injury. Employer controverted and rejected the district director's recommendation that it pay Claimant temporary total disability benefits from August 21, 2018, and authorize medical treatment to include an MRI and physical therapy for Claimant's back injury. CX 10. It asserted Claimant's continuing disability and the surgery are not causally related to the fully-resolved January 2017 work injury. The case was transferred to the Office of Administrative Law Judges and a formal hearing was held on November 14, 2019.

The ALJ found Claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), relating his back condition after August 21, 2018, to his work, and Employer rebutted the presumption. She then determined Claimant did not prove by a preponderance of the evidence as a whole that his low back condition from August 21, 2018, onward and need for surgery were caused by the January 2017 work injury. Accordingly, she denied Claimant's claim for medical benefits and additional disability compensation from August 21, 2018.

On appeal, Claimant challenges the ALJ's finding that his low back condition as of August 21, 2018, is not work-related and her resulting denial of benefits. Employer responds, urging affirmance of the ALJ's denial of benefits.

Claimant contends the ALJ improperly weighed the record as a whole, asserting the totality of the evidence proves his need for ongoing medical treatment is directly related to his work injury. He asserts the ALJ's decision to accord greatest weight to Dr. Goss's medical opinion is not supported by substantial evidence; and he disputes her finding discrediting his own testimony.<sup>8</sup> He contends his testimony about a significant increase in back pain and symptoms since the January 2017 work injury is verified by the opinions of Drs. Wardell, Vincent, and Ordonez, and contradicts Dr. Goss's conclusion, thereby proving his work-related injury aggravated his pre-existing condition and his post-August 2018 treatment, including his August 2019 back surgery, is compensable. Claimant further contends Dr. Goss's testimony actually supports his need for ongoing medical treatment.

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<sup>8</sup> Claimant contends the ALJ incorrectly found substantial problems with his credibility because she failed to adequately address the relevance of, and his reasons for, any inconsistencies in his testimony.

Once the Section 20(a) presumption is invoked and rebutted, as here, the issue of causation must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *See Ceres Marine Terminals, Inc. v. Director, OWCP [Jackson]*, 848 F.3d 115, 50 BRBS 91(CRT) (4th Cir. 2016); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). It is well established an ALJ is entitled to weigh the medical evidence and draw her own inferences therefrom. *See, e.g., Newport News Shipbuilding & Dry Dock Co. v. Cherry*, 326 F.3d 449, 37 BRBS 6(CRT) (4th Cir. 2003). The Board may not reweigh the evidence but must affirm the ALJ's decision if supported by substantial evidence and in accordance with law. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Brickhouse]*, 315 F.3d 286, 36 BRBS 85(CRT) (4th Cir. 2002).

The ALJ gave great weight to Dr. Goss's opinion that Claimant's January 2017 work injury involved temporary sprains of his cervical and lumbar spine which completely resolved, and that any ongoing pain complaints after 12 weeks is due entirely to the natural progression of his pre-existing degenerative condition. As the ALJ found, Dr. Ordonez's causation opinion is largely based on Claimant's statement that "he was completely asymptomatic prior to his work injury" and Dr. Vincent's causation opinion is based on Claimant's representations that the post-injury "flare-up is different in character"; she rationally found these bases refuted by Claimant's pre-injury medical records.<sup>9</sup> As for Dr. Wardell, the ALJ rationally inferred his causation opinion is heavily based on Claimant's representations that his lower back pain worsened immediately after the work accident, representations she found unsupported by Dr. Wardell's pre- and post-injury reports. In this regard, the ALJ found Dr. Wardell's treatment notes document Claimant's complaints of back pain from May 4, 2015, through November 16, 2016, which "were, quite literally, entirely unchanged after his January 2017 work injury." Decision and Order at 29.

In contrast, the ALJ found Dr. Goss fully explained the underlying rationale for his opinion. First, he relied on the fact that Claimant's pre- and post-work injury lumbar spine MRIs "showed similar degenerative changes at a couple of levels, L3-4 and L4-5, and the

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<sup>9</sup> The record documents Claimant's "long-standing history of back pain with increasing sciatica symptoms" with complaints of and treatment for low back pain going as far back as 2005. EXs 11, 25, 26, 37, 58. It also shows treatment for "suddenly worsened" lower back pain from May 4, 2015, through November 16, 2016, including for symptoms of "radiating [pain] down the right and left buttocks," akin to those raised by Claimant following his work injury. EX 11.

changes were similar both pre-accident and post-accident.”<sup>10</sup> EX 74, Dep. at 14. Second, he explained:

Prior to the work injury [Claimant] had complaints consistent with lumbar disk degeneration and spinal stenosis. After the work injury, he had complaints consistent with lumbar disk degeneration and spinal stenosis and a lumbar sprain. Those - - the lumbar sprain complaints resolved over that 12-week span, and what he was left with was those same old complaints of lumbar disk degeneration and lumbar stenosis.

*Id.*, Dep. at 31. As such, he explained Claimant’s pre-injury and post-injury complaints “are related to the same underlying pathology, meaning that lumbar disk degeneration, and that’s the natural history of lumbar disk degeneration and spinal stenosis” which involves “a steady deterioration over time.” *Id.*, Dep. at 31-32. Third, he found it significant that Claimant’s March 2017 urine test was negative for pain medication which he stated “is consistent with the work injury having resolved.” *Id.*, Dep. at 21. Dr. Goss explained this is because “if he’s receiving medication because of complaints of pain that he says are related to the work injury, but then, when we test him, he’s not actually – he doesn’t have those medications in his system, then obviously he didn’t need the medication for the work injury.” *Id.* Fourth, Dr. Goss stated Dr. Wardell’s release and Claimant’s successful return to full-duty work for over six months “absolutely” supports his opinion. *Id.*, Dep. at 23.

The ALJ’s decision to credit Dr. Goss’s opinion over those of Drs. Wardell, Vincent, and Ordonez, is supported by substantial evidence. *Cherry*, 326 F.3d 449, 37 BRBS 6(CRT); *Brickhouse*, 315 F.3d 286, 36 BRBS 85(CRT); *Pisaturo v. Logistec, Inc.*, 49 BRBS 77 (2015) (affirming the crediting of the employer’s medical expert over claimant’s treating physician as the latter’s opinion was not well reasoned). Contrary to Claimant’s contention, the ALJ properly weighed causation on the record as a whole. She discussed all the relevant evidence, reviewed the underlying bases for each doctor’s opinion, and adequately explained the rationale for her credibility determinations, including her finding Claimant’s credibility is “poor.”<sup>11</sup> *Id.* As discussed, the ALJ’s decision to discredit

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<sup>10</sup> Dr. Goss stated all changes revealed by the 2015 to 2019 MRIs are degenerative in nature. EX 74, Dep. at 36.

<sup>11</sup> The ALJ found the record includes multiple references to Claimant’s drug-seeking behavior or other substance use problems. She also found: he had repeated employment and substance-related violations; he was less than truthful with some of his medical providers regarding the extent of his pre-2017 work-related back problems; and his allegations regarding the longevity of the effects of his January 2017 work injury are belied by his return to full-duty work in November 2017. This credibility determination is

Claimant's testimony, and consequently, the medical opinions of Drs. Wardell, Vincent, and Ordonez, is neither inherently incredible nor patently unreasonable.<sup>12</sup> *Id.*; *see also Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Hess]*, 681 F.2d 938, 14 BRBS 1004 (4th Cir. 1982).

Therefore, we reject Claimant's contentions. The ALJ sufficiently discussed all the relevant evidence and rationally weighed the evidence and concluded Claimant's lumbar spine condition after August 21, 2018, is not work-related. Her conclusion is supported by Dr. Goss's opinion. We affirm the ALJ's credibility determinations and conclusion that Claimant did not establish his case by a preponderance of the evidence. *Jackson*, 848 F.3d 115, 50 BRBS 91(CRT); *Simonds*, 35 F.3d 122, 28 BRBS 89(CRT).

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supported by substantial evidence. *Bartelle v. McLean Trucking Co.*, 687 F.2d 34, 15 BRBS 1(CRT) (4th Cir. 1982); *see generally Compton v. Avondale Industries, Inc.*, 33 BRBS 174 (1999); *Pittman Mechanical Contractors, Inc. v. Director, OWCP [Simonds]*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994). For instance, in contrast to Claimant's testimony he had experienced back pain since 2011, the record reveals he had been experiencing back pain as far back as 2005. Additionally, although Claimant stated his post-injury symptoms were different, the record documents his pre- and post-work accident complaints of lumbar pain and symptomology were essentially the same. HT at 44-47. As Claimant also acknowledged, 2 months before the work injury his lumbar spine pain level was at a 7/8 requiring narcotic medication and by August 2017, 8 months after the work injury, his pain level was down to a 5/6 with no need for narcotic medication. HT at 48-49. Moreover, Claimant stated, as confirmed by the testimony of his supervisor, Charles Taylor, he successfully performed full-duty work from November 20, 2017, through his termination on June 5, 2018, without any complaints of back pain or problems. HT at 36-39, 59-62. Accordingly, we affirm the ALJ's finding that Claimant's testimony is replete with inconsistencies and as such his credibility is "poor."

<sup>12</sup> Moreover, in contrast to Claimant's contention that Dr. Goss's statements support finding his post-August 2018 condition and 2019 surgery are work-related, Dr. Goss clearly and repeatedly opined that any treatment rendered beyond 12 weeks from the date of the work injury, including any surgical procedure, is related to Claimant's underlying degenerative process and not caused by the work accident. EX 74, Dep. at 36, 45, 46; EX 23 ("Any ongoing treatment [Claimant] appears to require to help alleviate his spinal and sciatica complaints, should be considered related to his known pre-existing spinal pathology.")

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

SO ORDERED.

GREG J. BUZZARD

Administrative Appeals Judge

JONATHAN ROLFE

Administrative Appeals Judge

MELISSA LIN JONES

Administrative Appeals Judge