

## BRB No. 24-0007

MONICO LANGAMIN

# Claimant-Petitioner

V.

SALTCHUK YOUNG BROTHERS,  
LIMITED

and

**SIGNAL MUTUAL INDEMNITY  
ASSOCIATION, LIMITED**

## Employer/Carrier- Respondents

DATE ISSUED: 3/18/2025

## DECISION and ORDER

Appeal of Decision and Order of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Jay Lawrence Friedheim (Admiralty Advocates), Honolulu, Hawaii, for Claimant.

Before: GRESH, Chief Administrative Appeals Judge, BOGGS and JONES,  
Administrative Appeals Judges

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Richard M. Clark's Decision and Order (2020-LHC-00343, -00476, -00477, -00478, -00479, -00820, and -00821) rendered on claims filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (Act). 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.<sup>1</sup> 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

<sup>1</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit because Claimant sustained his injuries in Hawaii. 33 U.S.C. §921(c);

This case involves seven claims Claimant filed for back and shoulder injuries that occurred over several years while working for Employer.<sup>2</sup> Employer's Exhibits (EXs) 2, 5, 8, 10, 27, 30; Claimant's Exhibit (CX) 1 at 20. At least four of the claims "have been pending at the [Office of Administrative Law Judges] off and on" since January 2019, at one point being remanded for lack of preparation and "progress towards hearing."<sup>3</sup> Decision and Order (D&O) at 3 n.3.

On May 24, 2021, the ALJ held a prehearing conference and determined the case was not ready to go forward due to confusion over the issues before him. Prehearing Conference Transcript (PCT) at 15-16. He noted this time was designated for the hearing, but because the prehearing filings failed to "be enlightening or helpful" in identifying the disputed issues, he took the opportunity to clarify and identify the five issues in dispute: 1) Claimant's entitlement to additional temporary total disability benefits from April 22 to June 18, 2019, due to the April 2019 injury;<sup>4</sup> 2) Claimant's entitlement to reimbursement

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*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).

<sup>2</sup> The alleged injuries occurred on December 15, 2012 (2020-LHC-00476), April 15, 2013 (2020-LHC-00477), May 7, 2014 (2020-LHC-00478), March 7, 2017 (2020-LHC-00479), August 3, 2018 (2020-LHC-00821), March 22, 2019 (2020-LHC-00820), and April 20, 2019 (2020-LHC-00343). Tr. at 49-52, 56-59; Employer's Exhibits (EXs) 2, 5, 8, 10, 27, 30; Claimant's Exhibit (CX) 1 at 20. Employer paid Claimant both disability and medical benefits for the December 2012 and March 2017 claims but terminated disability benefits when Claimant returned to full duty work. EXs 33, 36. It paid only medical benefits for the April 2013, May 2014, and August 2018 claims, but it did not pay disability or medical benefits for the March and April 2019 claims. EXs 28, 31, 34, 35, 37.

<sup>3</sup> The four earliest claims – all for back injuries – were docketed with the Office of Administrative Law Judges (OALJ) on January 31, 2019 (OALJ Nos. 2019-LHC-00342, -00344, -00345, and -00346). While these four claims were pending before the OALJ, Claimant filed three additional claims for benefits for shoulder injuries he allegedly sustained in August 2018 and March 2019, and for lower back and shoulder injuries he allegedly sustained in April 2019. CX 1 at 20; EXs at 27, 30. On January 21, 2020, ALJ Steven B. Berlin remanded the four original claims, finding Claimant was not adequately prepared for the upcoming formal hearing. Nevertheless, Claimant again requested referral to the OALJ, this time for all seven claims. Five of the claims were docketed on February 21, 2020 (OALJ Nos. 2020-LHC-00343, -00476, -00477, -00478, and -00479), and the remaining two were docketed on July 23, 2020 (OALJ Nos. 2020-LHC-00820 and -00821).

<sup>4</sup> Claimant's claim for disability benefits is limited to the April 2019 injury; he is not seeking disability benefits related to any of the remaining six claimed injuries. D&O

for out-of-pocket medical expenses totaling \$3,576.76; 3) Claimant's entitlement to reimbursement for any outstanding liens asserted by his private health insurer; 4) Claimant's entitlement to reimbursement for vacation pay and sick leave used to seek work-related medical treatment; and 5) the reasonableness and necessity of certain recommended medical treatments.<sup>5</sup> PCT at 4, 16-18, 33-34; Order Continuing Hearing issued June 24, 2021 (Continuance Order) at 2.

The formal hearing took place on July 27, 2021, and both parties subsequently submitted closing briefs. On October 3, 2023, the ALJ issued his Decision and Order. He found Claimant established he was disabled from April 22 to June 18, 2019, due to the April 2019 "work-related flare-up" and awarded Claimant temporary total disability benefits for that period. *Id.* at 42. However, the ALJ denied Claimant's requests for reimbursement of out-of-pocket medical expenses and the outstanding lien, and he also concluded there was a "failure of proof" as to the vacation pay and sick leave issue. *Id.* at 43-47. Finally, the ALJ found Claimant failed to prove any of the recommended treatments were either reasonable or necessary for his work-related conditions. *Id.* at 48-51, 62, 64.

Claimant appeals the ALJ's finding on one issue.<sup>6</sup> He identifies the issue as:

Whether the employer's payment of sick leave or vacation pay for days when the claimant is disabled by an employment related injury justifies the denial of payment of compensation under the Longshore Act for those days.

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at 36. However, he is seeking medical treatment generally due to all seven work-related back and shoulder injuries. *Id.* at 47. Employer originally stipulated to the compensability of all the alleged injuries except the August 2018 shoulder injury. Hearing Transcript (HT) at 27-28. However, its counsel subsequently withdrew these stipulations, clarifying Employer was contesting causation in all seven claims. *Id.* at 33. Consequently, the ALJ evaluated causation and applied the Section 20(a) analysis, 33 U.S.C. §920(a), to all seven claims. D&O at 37-40, 48-51. He found all seven injuries compensable as a matter of law, as Claimant invoked the Section 20(a) presumption and Employer failed to present substantial rebuttal evidence. *Id.*; D&O at 37-40, 48-51. Claimant is not appealing the ALJ's causation findings; therefore, we affirm them as unchallenged. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57, 58 (2007).

<sup>5</sup> Claimant is seeking radiofrequency ablations, injections, aqua therapy, physical therapy, and occupational therapy that his treating physician, Dr. Jerald Garcia, recommended. D&O at 47.

<sup>6</sup> As Claimant does not challenge the remainder of the ALJ's findings, we affirm them. *Scalio*, 41 BRBS at 58.

Claimant's Brief in Support of Petition Review (Cl. PR) at 4. He contends that after Employer controverted his claim for benefits related to the April 2019 workplace injury, it paid him sick leave or vacation pay for the days he missed work because of his employment-related injury, instead of paying disability compensation in accordance with the Act.<sup>7</sup> *Id.* at 4-5. Thus, Claimant requests we remand the case with instructions for the ALJ to "identify the precise period of disability for which the employer has not paid disability compensation," and enter an award of temporary total disability (TTD) benefits for those days he missed work due to his work-related injury and used his sick leave or vacation days. *Id.* at 2, 5. Employer does not respond to Claimant's appeal.

The Benefits Review Board has held an award of temporary total disability benefits is appropriate for days an injured employee uses sick leave or vacation pay due to his work-related injury. *Kerch v. Air. Am, Inc.*, 8 BRBS 490 (1978), *aff'd in part, part sub nom. Air Am., Inc. v. Director, OWCP*, 597 F.2d 773 (1st Cir. 1979). Claimant's argument, therefore, has merit as there appears to be no dispute that this occurred. However, Claimant bears the burden of establishing the existence, and the nature and extent, of his disability. *Kalama Services, Inc. v. Director, OWCP*, 354 F.3d 1085, 1090 (9th Cir. 2004); *Moody v. Huntington Ingalls, Inc.*, 50 BRBS 9, 10 (2016); *see also* 5 U.S.C. §556(d); *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994).

Here, the ALJ rationally and reasonably found Claimant failed to carry his burden because he failed to prove on which specific days he took sick leave or vacation pay when he was entitled to disability benefits. D&O at 46-47; *see Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 1159 (9th Cir. 2002); *see also Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 467 (1968); *O'Keeffe*, 380 U.S. 359. The ALJ found Claimant contradicted himself by testifying he used either vacation pay or sick leave to cover time he took off work due to his work-related injuries but also denying ever using vacation days. D&O at 46; Hearing Transcript (HT) at 77-78; EX 23 at 71-72. Regardless, Claimant acknowledged there was no way for him to know what days he took off when he was actually sick and what days he took off because of his work-related injuries. D&O at 46; EX 23 at 71-72. Claimant offered no other evidence related to the issue and he failed to provide any argument as to how a reimbursement for this time should be calculated. D&O at 47. The ALJ concluded:

The relief in question is speculative at best at this point. I agree in theory that if Claimant is not able to work due to a work-related injury or flare up

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<sup>7</sup> In his Post-Hearing Brief, Claimant did not limit his reimbursement request for vacation pay and sick time to any specific one of his claimed injuries. Claimant's Post-Hearing Brief (Cl. PH Br.) at 7-8. However, in his Petition for Review, he specifically references only the April 2019 injury. Cl. PR at 4.

of a work injury, he should be entitled to workers' compensation for the missed days. However, Claimant cannot sit on his rights, provide no notice to Employer that he is injured and needs to take time off, and then expect Employer to reimburse him. Claimant did not provide an amount he thought he was owed, and he never specified the dates he believes he was off work due to injury but used his personal sick time.

*Id.* Therefore, the ALJ denied Claimant's "request for reimbursement for vacation pay and sick time, including any paid taxes used for this out-of-pocket medical treatment." *Id.*

Although the ALJ is duty bound to inquire into all matters and relevant evidence before him, 20 C.F.R. §702.338, the duty to develop that evidence lies with the parties. *Pimpinella v. Universal Maritime Service Inc.*, 27 BRBS 154, 158 (1993); *Smith v. Ingalls Shipbuilding Division, Litton Systems Inc.*, 22 BRBS 46, 50 (1989); *Sam v. Loffland Bros. Co.*, 19 BRBS 228, 230 (1987). In this case, there is nothing in the record from either party indicating what dates, or even the number of days, Claimant used sick leave or vacation days when he allegedly should have received disability compensation. Thus, the ALJ's finding that Claimant failed to carry his burden of proof with respect to entitlement to additional temporary total disability benefits is supported by substantial evidence, rational, and in accordance with law. *Sestich*, 289 F.3d at 1159; *see also Banks*, 390 U.S. at 467; *O'Keefe*, 380 U.S. 359.

Moreover, while Claimant generally asserts the ALJ erred in failing to award disability benefits for his sick leave or vacation days, mere allegations of error are not sufficient to lead to success before the Board. *Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 214, 218 (1988). A party challenging the ALJ's finding must demonstrate why, in terms of law and evidence, the finding is not supported by substantial evidence or in accordance with law. 20 C.F.R. §802.211(b). In this case, Claimant is improperly requesting remand for additional fact-finding or re-litigation of the claim. Claimant's disagreement with the ALJ's conclusion does not justify overturning it, if it is based on substantial evidence in the record as a whole, as in this case, and the Board generally will not remand a claim for additional fact-finding when Claimant was provided with an opportunity to present specific evidence but failed to do so.<sup>8</sup> *Lynch v. Newport News*

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<sup>8</sup> At the formal hearing, Claimant's Counsel indicated he attempted to get records related to time that Claimant took for vacation or sick leave, but Employer refused to provide them. HT at 23-24. The record confirms Claimant's initial discovery, propounded while his earliest four claims were pending before the OALJ, requested that Employer provide his "entire personnel file," but Employer responded that it had already provided such documents. CX 10 at 322. There is no evidence Claimant disputed Employer's response or made any additional attempts to obtain the requested records. In fact, there is no indication in the record that either party conducted any written discovery upon referral

*Shipbuilding and Dry Dock Co.*, 39 BRBS 29, 33 (2005); *Compton v. Avondale Indus., Inc.*, 33 BRBS 174, 177 (1999).

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

SO ORDERED.

DANIEL T. GRESH, Chief  
Administrative Appeals Judge

JUDITH S. BOGGS  
Administrative Appeals Judge

MELISSA LIN JONES  
Administrative Appeals Judge

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of all seven claims to the OALJ in 2020; the only discovery contained in the record relates to the four claims before the OALJ in 2019 that were subsequently remanded in January 2020. CXs 10, 15-17.