U.S. Department of Labor

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

BRB No. 24-0244

JELANI A. GARRETT

Claimant-Petitioner

v.

DYNCORP INTERNATIONAL

and

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA

DYNCORP INTERNATIONAL

and

ALLIED WORLD NATIONAL ASSURANCE COMPANY

Employer/Carrier-Respondents

NOT-PUBLISHED

DATE ISSUED: 03/31/2026

DECISION and ORDER

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

Jelani Garrett, Austin, Texas.

Limor Ben-Maier and Nicholas W. Earles (Schouest, Bamdas, Soshea, Ben-Maier & Eastham), Houston, Texas, for Employer and its Carrier.

Richard L. Garelick (Flicker, Garelick & Associates, LLP), New York, New York, for Allied World National Assurance Company.

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

PER CURIAM:

Claimant, without representation, appeals Administrative Law Judge (ALJ) Patrick M. Rosenow's Decision on Remand (2017-LDA-00041, 2017-LDA-00040, 2016-LDA-00184) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (Act), as extended by the Defense Base Act, 42 U.S.C. §§1651-1655 (DBA). In an appeal a claimant files without representation, the Benefits Review Board reviews the ALJ's decision below to determine if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with applicable law.[1] 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 361-362 (1965). This case is before the Board for a second time.[2]

Claimant allegedly sustained bilateral shoulder, nasal, pulmonary, right calf, and spinal injuries, eosinophilic esophagitis, post-traumatic stress disorder (PTSD), and tinnitus due to his work for Employer in Afghanistan as a warehouseman and logistics coordinator from 2005 to 2014. The Board previously affirmed the ALJ's finding that Claimant established work-related bilateral shoulder, nasal, pulmonary, and right calf injuries, and PTSD but failed to establish work-related spinal injuries or tinnitus.[3] *Garrett*

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit because the office of the district director who filed the ALJ's decision is located in Texas. 33 U.S.C. §921(c); *Glob. Linguist Sols., LLC v. Abdelmeged*, 913 F.3d 921, 922 (9th Cir. 2019); *see also McDonald v. Aecom Tech. Corp.*, 45 BRBS 45, 47 (2011).

[2] We incorporate by reference the procedural history of this case as set forth in *Garrett v. Dyncorp Int'l*, BRB No. 20-0167 (Apr. 28, 2021) (unpub.).

[3] The Board reversed the ALJ's finding that Claimant's right leg claim was untimely and modified his decision to reflect Claimant's entitlement to permanent partial disability benefits payable by the Insurance Company of the State of Pennsylvania (AIG) once Claimant is no longer totally disabled. 33 U.S.C. §908(c)(2), (19); *Garrett*, BRB No. 20-0167, slip op. at 6. The Board reversed the ALJ's finding that Employer rebutted the Section 20(a) presumption, 33 U.S.C. §920(a), regarding Claimant's eosinophilic esophagitis and held that injury is work-related as a matter of law. *Garrett*, BRB No. 20-

v. Dyncorp Int'l, BRB No. 20-0167, slip op. at 7-10 (Apr. 28, 2021) (unpub.). Regarding Claimant's bilateral shoulder injuries, the Board affirmed the ALJ's finding that Claimant's right shoulder injury was not at maximum medical improvement (MMI) but vacated his finding that Claimant's left shoulder injury reached MMI on December 1, 2017. *Id.* at 10-11. It also vacated the ALJ's finding Employer and its Carrier (Employer) established suitable alternate employment (SAE) because the ALJ failed to consider Claimant's pre-existing, spine-related physical restrictions.[4] *Id.* at 13. In all other respects, the Board affirmed the ALJ's findings. *Id.* at 18. The Board therefore remanded the case to the ALJ for reconsideration of (1) when Claimant's left shoulder injury reached MMI and (2) whether Employer established SAE "in light of all of Claimant's pre-existing and work-related restrictions."[5] *Id.* at 10-11, 13.

On February 27, 2024, the ALJ issued his Decision on Remand finding Claimant's left shoulder condition is not at MMI and Employer established the availability of SAE.[6]

0167, slip op. at 8. It also reversed the ALJ's denial of benefits for Claimant's nasal surgery and held Employer is liable for surgery reasonable and necessary for the work-related nasal condition. *Id.* at 17.

[4] AIG was Employer's carrier until July 1, 2014, after which Allied World National Assurance Company (AWAC) became Employer's responsible carrier. Prelim. Findings at 3.

[5] On June 30, 2021, the Board denied Claimant's motion for reconsideration of whether the ALJ erred in finding he failed to establish a work-related spine injury. *Garrett*, BRB No. 20-0167, *recon. denied* (June 30, 2021) (unpub.). On April 23, 2025, Claimant appealed the district director's January 29, 2025 default order under 33 U.S.C. §914(f), which the Board dismissed for lack of jurisdiction. *Garrett v. Dyncorp Int'l*, BRB No. 25-0192, slip op. at 1-3 (Apr. 23, 2025) (unpub.). On June 16, 2025, Claimant filed a motion for reconsideration of the Board's dismissal, which the Board denied. *Garrett*, BRB No. 25-0192, *recon. denied* (June 16, 2025) (unpub.).

[6] On March 5, 2024, the ALJ issued an Order Correcting Decision on Remand adding the word "adjusted" before "post-injury weekly wage" and correcting typographical and clerical errors. Order Correcting Decision on Remand at 1-3. On March 11, 2024, the ALJ issued a Decision on Claimant's Motion for Reconsideration of Decision on Remand, denying Claimant's motion for reconsideration for being "overwhelmingly" a revisitation of arguments he previously made. Decision on Claimant's Mot. for Recon. of Decision on Remand at 3.

Decision on Remand at 6-8. On appeal, Claimant challenges the ALJ's findings.[7] Employer and Allied World National Assurance Company (AWAC) respond separately, urging the Board to affirm the ALJ's findings. Claimant filed a reply reiterating his arguments on appeal.

Nature and Extent of Disability – Left Shoulder

First, we address the ALJ's finding that Claimant's left shoulder injury has not yet reached MMI. Decision on Remand at 5-9. 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). A claimant's condition has reached MMI when he is no longer undergoing treatment intended to improve his work-related condition or when that condition is of a lasting and indefinite duration beyond a normal healing period. *See Gulf Best Elec., Inc. v. Methe*, 396 F.3d 601, 605 (5th Cir. 2004); *La. Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 125-126 (5th Cir. 1994); *see also McCaskie v. Aalborg Ciserv Norfolk, Inc.*, 34 BRBS 9, 12 (2000). If a physician believes further treatment should be undertaken, then a possibility of improvement exists. *Abbott*, 40 F.3d at 126. 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, 24 (1999); *Mason v. Bender Welding & Mach. Co.*, 16 BRBS 307, 309 (1984).

In his initial decision, the ALJ found Claimant's left shoulder condition reached MMI by December 1, 2017, based on Dr. Louis Seade's opinion.[8] The ALJ acknowledged Dr. Seade performed an arthroscopic labral repair surgery on Claimant's right shoulder on September 13, 2017, and stated Claimant will require an additional surgery on his right shoulder, but until then, he had no restrictions other than to avoid overuse and inflammation. Prelim. Findings at 33. He also acknowledged Dr. Seade performed the same surgery on Claimant's left shoulder sometime after the right shoulder surgery and stated no additional surgeries were planned for the left shoulder. *Id.* at 32. The ALJ found that because Dr. Seade did not opine Claimant needed additional surgery on his left shoulder, his left shoulder condition reached MMI on December 1, 2017, three months

[7] On May 8, 2024, Claimant filed a motion to expedite, and on August 7, 2024, Claimant requested an appeal acknowledgment letter. Claimant's Mot. to Expedite at 1-16; Claimant's Req. for Appeal Acknowledgment Letter at 1-5. As Claimant received an acknowledgement letter on August 7, 2024, and because we have processed this appeal, Claimant's motion and request are moot. 20 C.F.R. §802.219.

[8] Dr. Seade is a board-certified orthopedic surgeon specializing in shoulder injuries. AIGX 27 at 2-3.

after his first surgery. *Id.* at 45. The Board vacated the ALJ's finding because he failed to discuss Dr. Seade's testimony regarding Claimant's subsequent left shoulder surgery which was performed after the right shoulder surgery. *Garrett*, BRB No. 20-0167, slip op. at 11. It remanded the case for the ALJ to consider the relevant evidence on this issue. *Id.*

On remand, the ALJ considered Dr. Seade's testimony that Claimant had arthroscopic surgery on both shoulders. AIG Exhibit (AIGX) 27 at 17. The doctor first performed surgery on Claimant's right shoulder in September 2017, then "a couple of months later," he performed the same surgery on Claimant's left shoulder. *Id.* He explained Claimant required additional surgery on his right shoulder, but there is "nothing planned right now" for his left shoulder. *Id.* at 18-19. He stated he gave Claimant restrictions to "cool off his shoulder" and to "get him to not overdo it." *Id.* at 19. He opined Claimant will have restrictions after his next right shoulder surgery. *Id.* Because Claimant's right shoulder requires an additional surgery, Dr. Seade opined Claimant is not at MMI. *Id.* at 19-21.

The ALJ acknowledged Dr. Seade testified to both surgeries: one on the right shoulder in September 2017, and one on Claimant's left shoulder around December 2017, and post-surgical recovery lasts about three months. Decision on Remand at 6-7. He found Dr. Seade's testimony indicated Claimant requires additional surgery, and he declined to "substitute any alternative permanency date." *Id.* at 6. Therefore, the ALJ permissibly concluded Claimant's left shoulder condition has not yet reached MMI.[9] *See Abbott*, 40 F.3d at 126; *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 1042 (2d Cir. 1997) (ALJ may not substitute his opinion for that of a medical expert); Decision on Remand at 6, 9. We affirm the ALJ's finding as it is rational and supported by substantial evidence.[10] *Ezell*, 33 BRBS at 24; Decision and Order at 9.

[9] The ALJ found Claimant's request for an order for a second left shoulder surgery falls within his initial order for reasonable and necessary medical care for the work-related shoulder injuries. Decision on Remand at 6.

[10] Claimant asserts the ALJ failed to consider the "newly-discovered evidence" he submitted. Claimant's Br. at 2, 17-18, 49. We disagree. The ALJ declined to reopen the record as the Board's remand did not require it. Mar. 11, 2024 Decision on Claimant's Mot. for Recons. of Decision on Remand at 3. Because the ALJ permissibly exercised his discretion in refusing to admit additional exhibits on remand, we will not disturb his exclusion of these exhibits. *See Ezell v. Direct Labor, Inc.*, 33 BRBS 19, 29 (1999). Moreover, the Board is prohibited by law from considering new evidence submitted on

Suitable Alternate Employment

Next, we address the ALJ's finding that Employer established the availability of SAE as of March 1, 2018. Decision on Remand at 6-10. After a claimant establishes he is unable to perform his usual work, as here, the burden shifts to the employer to demonstrate the availability of SAE within the geographic area where the claimant resides that he can perform considering his age, education, work experience, and physical and psychological restrictions. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1039 (5th Cir. 1981); *Gacki*, 33 BRBS at 128. In determining whether an employer establishes the availability of SAE, the ALJ must compare the requirements of the jobs identified with the claimant's restrictions and vocational factors. *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); *Montoya v. Navy Exch. Serv. Command*, 49 BRBS 51, 52 (2015).

Initially, the ALJ found any restrictions or limitations caused by Claimant's spine condition are not relevant in assessing the alternate work and, instead, considered his restrictions and limitations resulting from his shoulder, nasal, pulmonary, and psychological injuries. Prelim. Findings at 48-50. He observed Claimant was restricted from activities that would cause overuse or inflammation of his shoulder including picking up wood, throwing sandbags, off-loading trucks, and lifting overhead; from returning to Afghanistan due to his nasal, pulmonary, and PTSD conditions; and from work in austere environments with inhalation exposures due to his nasal and pulmonary conditions. *Id.* at 45-48.

Based on Employer's labor market survey dated October 23, 2017, he accepted Claimant could perform work up to a medium physical demand level given his limitations and restrictions. *Id.* at 37-38, 49; AWAC Exhibit (AWACX) 5 at 6. The labor market survey included eleven jobs; eight were in Claimant's geographic area and three were located in England, outside of Claimant's relevant labor market. AWACX 5 at 6-22. Of the eight jobs in Claimant's geographic area, three jobs involved sedentary duties, and five jobs involved light duties. AWACX 5 at 6-18. He found none of the jobs Employer identified would require Claimant to exceed any of the restrictions recommended by the providers treating his work injuries. Order at 45-49.

In addition, Claimant agreed he could perform the duties of the Parks and Recreation Departments job as a facilities process manager and the Texas Department of Transportation job as a freight systems branch manager as they require light and sedentary

---

appeal that was not submitted to the ALJ. *Wynn v. Clevenger Corp.*, 21 BRBS 290, 293 (1988); 20 C.F.R. §802.301(b).

duty, respectively. July 24, 2018 Claimant Depo. at 14-20. Although Claimant stated he was not qualified for either of those jobs because he lacked a four-year degree in business, architecture, engineering, or construction, the ALJ noted Claimant has a degree in business administration and thus would qualify for those jobs. Prelim. Findings at 49; July 24, 2018 Claimant Depo. at 15, 18. Therefore, he determined Employer established the availability of SAE with the eight jobs identified in Claimant's geographic area.[11] *Id.* at 50.

On appeal, the Board noted Dr. William Nemeth opined Claimant's spinal conditions are degenerative or congenital and his neck and back complaints are related to his pre-existing spondylosis and scoliosis.[12] *Garrett*, BRB No. 20-0167, slip op. at 13; July 25, 2018 Depo. at 11; AWACX 3 at 5. Because Claimant's pre-existing and work-related restrictions "are to be included in addressing [his] ability to work in alternate employment," and because the ALJ failed to consider Claimant's pre-existing spine-related physical restrictions, the Board vacated the ALJ's SAE findings and remanded the case for further consideration. *Id.* (citing *J.V. Vozzolo, Inc. v. Britton*, 377 F.2d 144, 147-148 (D.C. Cir. 1967); *Fox v. W. State, Inc.*, 31 BRBS 118, 121 (1997)).

On remand, the ALJ found his reconsideration of the date Claimant's left shoulder reached MMI resulted in no changes to Claimant's physical restrictions for his shoulders at the time of the labor market survey. Decision on Remand at 7 n.13. He also found Claimant's description of his eosinophilic esophagitis symptoms did not render him unable to perform any of the jobs in the labor market survey. *Id.* at 7 n.14. Regarding any restrictions related to the pre-existing spine condition, the ALJ found Dr. Nemeth opined Claimant has "minimal" neck and back restrictions but can perform up to a medium physical demand – as shown by his ability to lift heavy weights at the gym. AWACX 3 at 5; July 25, 2018 Depo. at 7-8; Order at 7. Dr. Nemeth noted Claimant demonstrated restricted motion and tenderness but was neurologically intact, "well-developed," and "muscular." AWACX 3 at 4; July 25, 2018 Depo. at 11-12. The ALJ again noted Claimant testified he could perform the Parks and Recreation Departments job as a facilities process manager and the Texas Department of Transportation job as a freight systems branch manager depending on what the job involved as he "can use a computer and work with the

[11] The ALJ accepted the parties' stipulation that Claimant's average weekly wage (AWW) was $1,789.48. Prelim. Findings at 4, 50.

[12] Dr. Nemeth is a board-certified orthopedic surgeon. July 25, 2018 Depo. at 5. As the ALJ noted, Dr. Nemeth's deposition was not marked as a specific exhibit but is part of the evidentiary record. Prelim. Findings at 2 n.5.

typical Microsoft [O]ffice programs." Decision on Remand at 7; July 24, 2018 Claimant Depo. at 14-20.

In reconsidering the jobs along with Claimant's shoulder and spine limitations, the ALJ permissibly found those limitations would not prevent him from performing the jobs identified in the labor market survey. *Turner*, 661 F.2d at 1039; *Gacki*, 33 BRBS at 128; Decision on Remand at 8, 10; Claimant's Br. at 4. Indeed, Claimant conceded he could perform two of the jobs identified, and the remaining six jobs within his geographic location are within Claimant's medium physical demand level. *See Hinton*, 243 F.3d at 225; *Montoya*, 49 BRBS at 52; July 24, 2018 Claimant Depo. at 14-20. Because it is supported by substantial evidence, we affirm the ALJ's finding Employer established the availability of SAE. *See Turner*, 661 F.2d at 1039; *Gacki*, 33 BRBS at 128; Decision on Remand at 8, 10. Therefore, we find no error in the ALJ's Decision on Remand as it is in accord with the Board's initial decision and its remand instructions.[13]

[13] Claimant raises several arguments on appeal that the Board has previously addressed, such as the date of temporary total disability for his nasal injury; that his work-related shoulder injury aggravated his pre-existing spinal condition; out-of-pocket medical expenses; average weekly wage; entitlement to a Section 14 assessment, 33 U.S.C. §914; and reimbursement for travel and health premiums. Claimant's Br. at 3-7. As the Board's prior decision fully discussed and resolved these issues, and there has been no change in the underlying circumstances or intervening law in the case, the Board's prior decision constitutes the law of the case. *Kirkpatrick v. B.B.I., Inc.*, 39 BRBS 69, 71 (2005); *Wayland v. Moore Dry Dock*, 25 BRBS 53, 58 (1991); *Garrett*, BRB No. 20-0167, slip op. at 2-18; Claimant's Reply at 1-16; Employer's Br. at 7-18. Further, we decline to address Claimant's remaining arguments on appeal for the same reason as the ALJ: They are beyond the scope of our review. 33 U.S.C. §921(b)(3); *see Williams v. Hunt Shipyards, Geosource, Inc.*, 17 BRBS 32, 34-35 (1985); 20 C.F.R. §802.301; Mar. 11, 2024 Decision on Claimant's Mot. for Recons. of Decision on Remand at 2-3; Claimant's Br. at 3-7.

Accordingly, we affirm the ALJ's Decision on Remand.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

GLENN E. ULMER
Administrative Appeals Judge