U.S. Department of Labor

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

BRB No. 18-0476

ANTHONY JORDAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 01/23/2019
SSA TERMINALS	)	
	)	
and	)	
	)	
HOMEPORT INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Further Benefits of Christopher Larsen, Administrative Law Judge, United States Department of Labor.

Philip R. Weltin and Michael J. Villeggiante (Weltin, Streb & Weltin, LLP), Oakland, California, for claimant.

Alan J. Chang and Gursimmar S. Sibia (Bruyneel Law Firm, LLP), San Francisco, California, for employer/carrier.

Before: BOGGS, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Further Benefits (2016-LHC-01611) of Administrative Law Judge Christopher Larsen rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and

in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant is a class "B" longshoreman. Most of the jobs available to him involve driving tractors, but also include positions such as lasher, dockworker and car mover, as well as other jobs involving passenger cruise ships. Tr. at 70-71. On September 17, 2014, claimant was assigned to drive a loaded tractor from a container yard where other workers would unload the cargo container from the tractor. *Id.* at 58-60. The cargo container was not properly unlocked from the tractor so that when the crane operator attempted to lift the container, it lifted the tractor as well. When the container came loose, the tractor fell. *Id.* at 60-61; EX 2 (LS-202). Claimant testified that he went forward and then "slammed [] back and down." Tr. at 62.

Claimant was diagnosed with a compression fracture of his spine and started physical therapy. EX 7. He reported a constant dull headache, some neck pain, and constant mid to lower back pain. *Id.* Dr. Chiang diagnosed claimant with bilateral lumbar facet syndrome, left cervical facet syndrome, left sacroiliitis, headaches, and a likely old thoracic and lumbar compression fracture, along with a herniated disc fragment at L1-2. *Id.* at 21. Dr. Chiang released claimant to return to modified duty on February 26, 2016, stating that he should not do repetitive bending at the waist greater than 50 percent of the time, lift, carry, pull or push anything heavier than 20 pounds, or cumulative walking for more than 1 hour at a time. EX 10 at 57. But after viewing surveillance videos showing claimant engaging in his daily activities over a number of days in 2015 and 2016, Dr. Chiang concluded on December 12, 2016 that claimant would have been able as of February 26, 2016, to perform the activities of his daily life, including bending at the waist frequently and carrying heavy items without difficulty.[1] EX 11. She concluded that claimant would be able to "drive autos, cars, tractors," but said that working as a lasher might be too much. EX 30.

Dr. Reynolds has treated claimant since November 2015. He diagnosed claimant with a central herniated disc at L-4/5, severe foraminal stenosis, and spondylolisthesis that pre-existed the accident. Tr. at 30-31. Dr. Reynolds performed lumbar fusion surgery on claimant on March 28, 2018. He stated that claimant has not been able to return to work as a longshoreman because he cannot work an eight-hour day in a regular fashion but would need to take breaks and do things to decrease the pressure on his back. *Id.* at 49. Dr. Reynolds did not watch any of employer's surveillance videos. *Id.* at 54.

[1] Employer engaged investigators to film claimant at his landscaping business and while performing other activities. Ex 15. The videos were shown to Drs. Chiang, Skomer and Su.

Dr. Skomer examined claimant on two different occasions and diagnosed persistent lumbar pain radiating down the lower extremities, lumbar disc disease, and chronic lumbar degenerative disease. EX 13. He concluded that claimant could return to modified work at semi-sedentary employment with restrictions of working four hours per day and breaks for stretching every 30 minutes. *Id.* After reviewing the surveillance videos, however, Dr. Skomer concluded on October 17, 2016 that claimant was able to return to "all normal employment activities" full time without any restrictions. EX 14.

In addition, Dr. Su examined claimant, reviewed his medical records, and viewed the surveillance videos. He stated that the activities observed in the video were inconsistent with claimant's physical complaints. Dr. Su agreed with Dr. Chiang and Dr. Skomer that claimant could return to work as a longshoreman without restrictions. EX 16; EX 32 at 17.

Claimant has not returned to his longshore work since the accident. Claimant has worked in his landscaping business since his accident but testified that he worked in spite of pain and because, as his own boss, he has the ability to control the schedule so he can take breaks, "go home a lot and stretch and ice and basically relax." Tr. at 64.

Employer voluntarily paid claimant temporary total disability benefits from the date of injury through April 13, 2016. Claimant filed a claim for temporary total disability benefits from April 14, 2016 through March 27, 2018.[2] The administrative law judge found that claimant failed to meet his burden of establishing that his work injury precluded his ability to return to his usual work. The administrative law judge credited the opinions of Drs. Chiang, Skomer and Su that claimant was able to return to work without any restrictions.[3] Decision and Order at 14. Therefore, he denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that he did not establish that he was totally disabled from April 14, 2016 to March 27, 2018.[4] Employer filed a response brief, urging affirmance. Claimant filed a reply brief.

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[2] The parties stipulated, inter alia, that claimant's injury occurred in the course and scope of his employment and that he has not reached maximum medical improvement. In addition, the parties stipulated to claimant's temporary total disability status commencing March 28, 2018, when he had surgery.

[3] The administrative law judge thus noted that he did not need to discuss employer's evidence of suitable alternate employment.

[4] Attached to claimant's brief to the Board are a number of claimant's medical records that were not part of the record before the administrative law judge. The Board is

A claimant must establish a prima facie case of total disability by demonstrating an inability to perform his usual employment due to his work injury, defined as the employee's regular duties at the time that he was injured. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). If a claimant has established a prima facie case of total disability, the burden shifts to employer to establish the availability of suitable alternate employment. *Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994).

In crediting the opinions of Drs. Chiang and Skomer, the administrative law judge noted that they changed their initial opinions that claimant could not return to his usual work after viewing the surveillance videos, ultimately concluding that claimant was able to return to work without any restrictions. The administrative law judge also credited the opinion of Dr. Su, who interviewed claimant and reviewed his medical records, and stated that claimant is able to return to work after he viewed the surveillance videos. The administrative law judge found that Dr. Reynolds's opinion that claimant was unable to return to his usual work is entitled to less weight because he did not view the surveillance videos. The administrative law judge found significant the disparity between what the surveillance videos showed claimant doing and claimant's description of his own limitations. The administrative law judge thus concluded that claimant did not establish that he was temporarily totally disabled from April 14, 2016 until March 27, 2018 and accordingly denied further benefits for that time period.

We affirm the administrative law judge's conclusion that claimant did not establish he was disabled between April 14, 2016 and March 27, 2018. It is well established that claimant bears the burden of establishing the nature and extent of his disability as a result of a work-related injury. See *Gacki v. Sea-Land Service, Inc.*, 33 BRBS 127 (1999); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). The administrative law judge has the discretion to weigh the evidence and the credibility of all witnesses and to draw his own inferences from the evidence. *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999). In addition, an administrative law judge is not bound to accept the opinion of any particular medical examiner. *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *Coffey v. Marine Terminals Corp*., 34 BRBS 85 (2000). The Board is not empowered to reweigh the evidence or disregard an administrative law judge's findings merely because other inferences could have been drawn from the evidence. *Rhine v. Stevedoring Services of America*, 596 F.3d 1161, 44 BRBS 9(CRT) (9th Cir. 2010). In light of the discrepancies between claimant's testimony and the surveillance videos, the administrative law judge rationally determined that

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prohibited from considering evidence that was not admitted into evidence by the administrative law judge. 33 U.S.C. §921(b)(3); 20 C.F.R. §802.301(b).

claimant's statements regarding his inability to return to work are not creditable. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Moreover, the administrative law judge permissibly gave greater weight to the opinions of the physicians who viewed the surveillance videos. *See Richardson v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 74 (2005), *aff'd mem. sub nom. Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 245 F. App'x 249 (4th Cir. 2007).

Thus, the administrative law judge's finding that claimant did not establish that he was unable to return to his usual work is supported by substantial evidence in the record and therefore is affirmed. We affirm the denial of benefits between April 14, 2016 and March 27, 2018. *See Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 242 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP*, 909 F.2d 1488 (9th Cir. 1990).

Accordingly, the administrative law judge's Decision and Order Denying Further Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge