U.S. Department of Labor

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

BRB No. 22-0332

MOHAMED A. ELGHOBASHY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GLOBAL TERMINAL & CONTAINER SERVICES, INCORPORATED	)	
	)	
	)	DATE ISSUED: 12/19/2023
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD.	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Jorden N. Pederson, Jr. (Javerbaum, Wurgaft, Hicks, Kahn, Wikstrom & Sinins, P.C.), Elizabeth, New Jersey, for Claimant.

John F. Karpousis, William H. Yost, and Blaine R. Payer (Freehill Hogan & Mahar, LLP), New York, New York, for Employer/Carrier.

Before: GRESH, Chief Administrative Appeals Judge, BOGGS and BUZZARD, Administrative Appeals Judges.

Employer appeals Administrative Law Judge (ALJ) Theresa C. Timlin's Decision and Order Awarding Benefits (2018-LHC-00998 and 2019-LHC-00168) rendered on consolidated claims filed pursuant to the Longshore and Harbor Workers' Compensation

Act, as amended, 33 U.S.C. §901 *et seq.* (Act).[1] 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 worked as a hustler driver for Employer since 2004, transporting containers around the port. Hearing Transcript (HT) at 25-26. Attached to the hustler was a chassis, upon which crane operators from the ship or top loader operators in the yard would place 40-foot containers. *Id*. at 26-27, 93. The containers were placed using a spreader bar, which would connect to the four corners of the container and either lower it onto or lift it up off the chassis. *Id*. at 27, 29.

Claimant alleged two workplace incidents, the first occurring on April 24, 2013, which Employer does not dispute, and the second on January 29, 2014, which it does dispute. HT at 6, 8. On April 24, 2013, Claimant brought twin containers alongside a ship for unloading; however, the containers were spaced too far apart for the spreader bar to attach, leading the crane operator to use the spreader bar to knock them into place. *Id*. at 32-34. According to Claimant, at some point the crane operator attempted to lift the containers, but they were not attached properly and fell back onto the chassis. *Id*. at 36. Claimant, who was sitting in the hustler's cab, was jostled when the containers dropped and began experiencing pain in his back and neck.[2] *Id*. at 38-39. He reported his injury that day and was taken by ambulance to a local emergency room. *Id*. at 40.

Although the parties disputed when Claimant was able to return to work,[3] he returned to his regular employment as a hustler driver on January 23, 2014. HT at 53; Claimant's Exhibit (CX) 12 at 12.

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[1] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit because the injury occurred in New Jersey. 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, 36 BRBS 51(CRT) (4th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003); 20 C.F.R. §702.201(a).

[2] Claimant has a history of neck and back injuries from a 2008 car crash as well as a 2011 dropped-container incident similar to what occurred in 2013. D&O at 42; CX 24 at 21-24, 30.

[3] Employer paid Claimant temporary total disability (TTD) benefits from April 25 through May 19, 2013, at a stipulated rate of $1,325.18 per week. HT at 6-8; Decision and Order Awarding Benefits (D&O) at 3. Employer terminated benefits based on the opinion of its expert orthopedic surgeon, Dr. Robert Dennis, who opined Claimant could return to

The second alleged workplace incident occurred shortly thereafter, on January 29, 2014. HT at 8. According to Claimant, after he brought a container from a ship to the yard, the top loader operator in the yard brought the spreader bar down too fast and struck the container, which made the hustler's cab bounce and shake, causing a recurrence of his back and neck pain. HT at 56-61. He testified he reported this incident that same day, and records show he sought medical treatment (CX 14); however, George Reynolds, Employer's Director of Safety and Security, testified Claimant merely reported pain associated with his prior injury, and so he did not investigate the incident or complete a Report of Injury Form. HT at 157, 164. Claimant has not returned to work since the alleged January 29, 2014 incident. *Id*. at 6.

A dispute arose between the parties regarding Claimant's entitlement to benefits as a result of both incidents. The ALJ issued a Decision and Order Awarding Benefits (D&O) on April 21, 2022. Because the parties stipulated to the occurrence of the April 24, 2013 workplace injury, she focused her causation analysis on the alleged January 29, 2014 incident. D&O at 47-53. The ALJ found Claimant invoked the Section 20(a) presumption of compensability, 33 U.S.C. §920(a), and that Employer successfully rebutted the presumption with the report of its expert, biomechanical engineer Dr. Anastasios Tsoumanis,[4] who opined the incident that Claimant described could not have produced sufficient force to aggravate his prior injuries. *Id*. at 49-51; Employer Exhibit (EX) I. Weighing the evidence as a whole, the ALJ found Claimant credible and assigned little weight to Employer's expert, finding his report was based on "inaccurate premises." *Id*. at 51-52. She also assigned little weight to Dr. Robert Dennis's causation opinion, also submitted by Employer, as it was premised on the biomechanical engineer's report. *Id*. at

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work as of May 20, 2013. Employer's Exhibit (EX) E at 7-8. However, Claimant's treating orthopedist, Dr. Anthony Parks, continued to opine Claimant was unable to work. Claimant's Exhibit (CX) 11 at 3, 5. Dr. Parks released Claimant to return to regular duty work as of June 24, 2013; Claimant attempted to work that day, but was unable to do so due to pain, leading Dr. Parks to extend his no work recommendation until Claimant could be seen by a spine specialist. CX 11 at 7, 10; CX 20 at 1, 3. In the meantime, on July 22, 2013, Claimant underwent an Independent Medical Examination (IME) by Dr. Kenneth Seslowe at the request of the Department of Labor (DOL). Dr. Seslowe opined Claimant was able to return to his regular employment. CX 7 at 2. However, shortly thereafter, Claimant's chosen spine specialist, Dr. David Basch, continued to keep Claimant off all work through January 23, 2014. CX 12 at 3, 5, 7-8, 11.

[4] Dr. Tsoumanis became ill and retired after issuance of his report; therefore, he was not available to testify at the hearing. Instead, his former supervisor, Dr. Richard Baratta, testified in his place. D&O at 8.

51. Therefore, the ALJ found "the preponderant evidence" established Claimant suffered an aggravation of his underlying pre-existing work-related spinal condition as a result of the January 29, 2014 incident. *Id*. at 53. The ALJ further found Claimant's spinal condition reached maximum medical improvement (MMI) on June 8, 2017, at which point he became permanently and totally disabled (PTD). *Id*. at 55-58.

Employer appeals, contending the ALJ erred in finding Claimant suffered a disabling back and neck injury on January 29, 2014, and in finding Claimant permanently and totally disabled. Employer's Petition for Review (Emp. PR) at 2. It maintains the ALJ improperly discredited its experts' opinions and also failed to consider evidence showing Claimant was not disabled. Employer's Brief in Support of Petition for Review (Emp. PR Br.) at 2. Claimant responds, urging affirmance. Employer filed a reply.

Expert Report

Employer submitted the report of biomechanical engineer Dr. Tsoumanis as proof the alleged incident of January 29, 2014, did not in fact occur, thereby rendering Claimant's testimony incredible. Employer's Post-Hearing Brief (Emp. Br.) at 9-16, 23; D&O at 44. The report, dated October 17, 2019, documented Dr. Tsoumanis's efforts to "reconstruct the dynamics of the incident [and] determine the motions and loads that [Claimant] would have experienced" while sitting in the hustler's cab on January 29, 2014. EX I at 1. Based on his findings, Dr. Tsoumanis concluded the forces Claimant experienced, even if the incident occurred exactly as he alleged, would have been insufficient to cause "structural spinal injuries or aggravation of pre-existing injuries." *Id*. at 2, 6-7.

The ALJ discredited Dr. Tsoumanis's report as being based on two "incorrect premises." D&O at 46. First, the ALJ found the report incorrectly identified the mechanism of injury, calling into question the accuracy of the test results. *Id*. Claimant testified he was injured on January 29, 2014, when the top loader's spreader bar came down too fast, striking the container already positioned on the hustler's chassis. HT at 56-61. However, Dr. Tsoumanis described the incident and injury as occurring when a loaded 40-foot container was dropped onto the trailer, documented his efforts at reconstructing the incident as he understood it, and provided results based on the moment the container contacted the trailer. EX I at 1-3, 5. The ALJ determined "Dr. Tsoumanis's questionable understanding of the January 29, 2014 incident tends to undermine the validity of the engineering report, which attempted to forensically reconstruct the January 29, 2014 incident." D&O at 46. In addition, the ALJ found Dr. Tsoumanis's experiment, conducted on a flat concrete surface, failed to account for Claimant's testimony that the incident occurred on uneven ground. *Id*. at 46, 52.

Employer argues the ALJ's reasons for discrediting Dr. Tsoumanis's report are flawed and unsupported by substantial evidence. Emp. PR Br. at 19. It acknowledges Dr. Tsoumanis's narrative description of the January 29, 2014 incident is "imprecise," but argues Dr. Baratta's testimony confirms the testing Dr. Tsoumanis performed accurately reconstructed the alleged incident. *Id*. at 20, 23. Lastly, Employer argues the ALJ failed to consider that Dr. Baratta's testimony contradicts the ALJ's invalidation of the test results based on "topography." *Id*. at 23.

The ALJ has the authority and discretion to weigh, credit, and draw her own inferences from the evidence of record; she is not bound to accept the opinion or theory of any particular expert. *See Calbeck v. Strachan Shipping Co*., 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Perini Corp. v. Heyde*, 306 F. Supp. 1321 (D.R.I. 1969). Questions of witness credibility are for the ALJ as the trier-of-fact, and the Board must respect her evaluation of all testimony, including that of medical witnesses. *Calbeck*, 306 F.2d 693; *Hughes*, 289 F.2d 403. The Board will not interfere with credibility determinations unless they are "inherently incredible or patently unreasonable." *Cordero v. Triple A Mach. Shop*, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Moreover, in reviewing findings of fact, 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 Services, Inc., v. Director, OWCP* [*Ceasar*], 949 F.3d 921, 54 BRBS 9(CRT) (5th Cir. 2020); *see generally Bis Salamis, Inc. v. Director, OWCP [Meeks]*, 819 F.3d 116, 130, 50 BRBS 29, 37(CRT) (5th Cir. 2016) (the Board may not second-guess an ALJ's factual findings or disregard them merely because other inferences could have been drawn from the evidence).

Here, the ALJ's reasons for discrediting Dr. Tsoumanis's report – his incorrect description of the incident he attempted to reconstruct and his failure to account for Claimant's testimony that the top loader was positioned on uneven ground – is supported by substantial evidence, and therefore the ALJ's finding that they detracted from the credibility of his report is neither "inherently incredible [n]or patently unreasonable." *Cordero*, 580 F.2d at 1335, 8 BRBS at 747; *see also Ceasar*, 949 F.3d 921, 54 BRBS 9(CRT); *Calbeck*, 306 F.2d 693; *Hughes*, 289 F.2d 403. Although Dr. Baratta's testimony indicated his understanding that Dr. Tsoumanis's testing involved the spreader bar hitting the container, which entailed consideration of the speed at which the spreader bar could be lowered, Dr. Baratta was not present when Dr. Tsoumanis's testing occurred. HT at 194-195, 199-201. The ALJ also considered but dismissed as unsupported Dr. Baratta's assertion that the top loader's position on a flat concrete surface during testing had no meaningful effect on Dr. Tsoumanis's test results, because "Dr. Tsoumanis did not conduct the experiment with any unevenness in mind." D&O at 46; HT at 212-213. As substantial evidence supports the ALJ's conclusion, and respecting the ALJ's discretion in making

credibility determinations, we affirm the ALJ's decision to give Employer's expert's report little weight in determining whether a workplace incident occurred on January 29, 2014.[5]

Extent of Disability

In determining the extent of Claimant's work-related disability, the ALJ weighed the conflicting medical opinions of Claimant's expert orthopedic surgeon, Dr. Richard Rosa, and Employer's expert orthopedic surgeon, Dr. Dennis. D&O at 54-59. Dr. Rosa opined Claimant's condition reached MMI on June 8, 2017, and he remained permanently and totally disabled (CX 30), while Dr. Dennis concluded Claimant's work-related conditions reached MMI on November 27, 2017, with no residual work-related disability (EX E). Although the ALJ found both doctors similarly credentialed and noted both examined Claimant several times, she ultimately gave more weight to Dr. Rosa's opinion, finding it more well-reasoned than Dr. Dennis's opinion and corroborated by other medical evidence of record.[6] D&O at 54-55.

Employer argues the ALJ improperly ignored critical pieces of evidence which it alleges establish Claimant could return to work, and therefore was not disabled, as of November 16, 2015: first, Dr. Marc Cohen's release of Claimant to return to regular employment as of that date,[7] and second, evidence of Claimant's attempts to return to work following that release. Emp. PR Br. at 28. Contrary to Employer's assertions, the ALJ considered Dr. Cohen's release of Claimant to unrestricted employment on November 16, 2015 (D&O at 6, 21), as well as Employer's contention that evidence of Claimant's attempts to return to work following that release constituted proof he was no longer disabled; however, she found the preponderance of the medical evidence supported a

[5] The ALJ's finding that a workplace incident occurred on January 29, 2014, is supported by other evidence of record. Mr. Reynolds testified Claimant came to see him that day because his back was hurting. HT at 156-157. Claimant went to the emergency room that same day, complaining of neck and back pain following an incident at work. CX 14 at 2. Dr. Basch, whom Claimant had been seeing prior to the incident, noted on February 4, 2014, that Claimant had attempted to return to work, but had to stop due to the severity of his pain. CX 22 at 1.

[6] Specifically, the ALJ found Dr. Rosa's opinions as to the nature and extent of Claimant's disability corroborated by the medical records of Drs. Parks, Basch, and Cohen, as well as objective testing. D&O at 55-56.

[7] The ALJ found Dr. Cohen to be Claimant's chosen treating physician. D&O at 43 n.31.

finding of permanent and total disability (D&O at 59 n.43). Because this finding is rational and supported by substantial evidence, we affirm the ALJ's finding that Claimant is permanently totally disabled due to his work injury. *See Ceasar*, 949 F.3d 921, 54 BRBS 9(CRT).

The medical evidence shows Claimant was consistently restricted from all work following the January 29, 2014 incident, first by Dr. David Basch (CX 22; *See* D&O at 17-18, 55), and then by Dr. Cohen (CX 25, *see* D&O at 21-22, 55). Dr. Cohen released Claimant on November 16, 2015, at Claimant's own insistence, because Employer refused to authorize the discogram he recommended.[8] D&O at 21-22; CX 25 at 7-8, 12; CX 26. Dr. Cohen honored Claimant's request, but noted:

> I did inform the patient that obviously if his complaints and symptoms should become significant and unmanageable and that if he cannot work, he should return to my office for reevaluation at that time.

CX 25 at 7; *see also* D&O at 21. When Dr. Cohen next evaluated Claimant on January 14, 2016, he noted continued complaints of pain and stated Claimant's work status was "unclear." CX 25 at 9, 12; *see also* D&O at 21. Dr. Rosa subsequently confirmed Claimant's permanent and total disability as a result of his work-related injuries. CXs 30, 33, 35. Otherwise, the only post-aggravation medical opinion asserting Claimant was physically able to work was Dr. Dennis's, whose opinion the ALJ found lacked credibility.[9] D&O at 56-58.

[8] Dr. Wayne Fleischhacker, a pain management physician who evaluated Claimant at Dr. Cohen's request, seconded Dr. Cohen's recommendation that Claimant undergo a discogram and requested authorization to proceed on July 13, 2015. CXs 26, 27. Claimant subsequently underwent the recommended discogram on November 9, 2016; however, there is no evidence of Claimant receiving additional medical treatment until June 8, 2017, when Dr. Rosa first evaluated Claimant. D&O at 22-24 (citing CX 29); CX 30. Dr. Rosa noted the discogram results indicated a need for surgery, but Claimant elected not to proceed; as a result, Dr. Rosa placed Claimant at MMI, and opined he was permanently and totally disabled from work. D&O at 23-24 (citing CX 30).

[9] Employer's argument, *inter alia*, that the ALJ erred in finding Dr. Dennis lacked credibility because his causation opinion relied upon Dr. Tsoumanis's report (Emp. PR Br. at 37) is not persuasive. Not only have we affirmed the ALJ's credibility finding with respect to Dr. Tsoumanis's report, *supra*, she provided several other reasons for discrediting Dr. Dennis's medical opinion beyond his reliance on that report. She also noted his failure to explain why he attributed the objective evidence of multilevel disc

In sum, this medical evidence, all of which the ALJ documented and considered, supports her finding that Claimant carried his burden of showing an inability to return to his usual employment, despite Dr. Cohen's "release."[10] D&O at 58-59; *see Ceasar*, 949 F.3d 921, 54 BRBS 9(CRT); *Donovan*, 300 F.2d 741; *Perini Corp.*, 306 F. Supp. 1321; *Cooper v. Offshore Pipelines Int'l, Inc.*, 33 BRBS 46 (1999). The burden then shifted to Employer to establish Claimant is not totally disabled due to the availability of suitable alternate employment. *McCabe v. Sun Shipbuilding & Dry Dock Co.*, 602 F.2d 59, 10 BRBS 614 (3d Cir. 1979); *Young v. Todd Pac. Shipyards Corp.*, 17 BRBS 201 (1985); *Pilkington v. Sun Shipbuilding & Dry Dock Co.*, 9 BRBS 473 (1978). As Employer provided no evidence of suitable alternate employment,[11] Claimant is totally disabled as a

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degeneration solely to age despite acknowledging Claimant's history of prior traumatic back injuries, his unreasonable discrediting of objective electromyography (EMG) results, and his attempt to impeach Claimant based on an altered gait despite other medical evidence of ambulation issues. D&O at 56-58.

[10] In its Post-Hearing Brief, Employer only fleetingly refers to Dr. Cohen's release as proof of Claimant's ability to return to work, but instead relies on the release primarily as evidence of Claimant's lack of credibility, arguing it was highly improbable a licensed physician would release a patient without restrictions merely because the patient asked him to. ER PH Brief at 26-27. Dr. Cohen's own records, which note Claimant's request for a release (CX 25 at 7), undermine Employer's argument; regardless, the ALJ ultimately concluded Claimant was a credible witness, a finding Employer has not specifically requested we review. D&O at 44-47; *see Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

[11] Employer asserts the ALJ failed to consider Claimant's alleged attempts to return to work following Dr. Cohen's release, citing several ALJ decisions as proof that such evidence is sufficient to establish the absence of disability. Emp. PR at 30-31. However, in addition to lacking precedential value, the cases upon which Employer relies pointed to the claimants' attempts to return to work as evidence of a lack of credibility, not the absence of disability, and are therefore distinguishable. *Moses v. Meek Construction Co.*, 51 BRBS 1021, 1030 n.77 (ALJ 2017); *Willis v. Service Employees International*, 44 BRBS 897 (ALJ 2010); *Casil v. Matson Terminals, Inc.*, 35 BRBS 4 (ALJ 2000). Moreover, a claimant's willingness to obtain work has no bearing on the employer's ability to meet its burden of establishing suitable alternate employment opportunities, as employer need only show such jobs are available. *Crum v. Gen. Adjustment Bureau*, 16 BRBS 101 (1983), *aff'd in pert. part* 738 F.2d 474, 16 BRBS 115(CRT) (D.C. Cir. 1984). If a claimant diligently tries but is unable to secure suitable alternate employment on his own, he is totally disabled. *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986); *Fox v. W. State, Inc.*, 31

matter of law. *MacDonald v. Trailer Marine Transp. Corp.*, 18 BRBS 259 (1986), *aff'd mem. sub nom. Trailer Marine Transp. v. Benefits Review Board*, 819 F.2d 1148 (11th Cir. 1987); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986); *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989); *Burke v. San Leandro Boat Works*, 14 BRBS 198 (1981).

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

BRBS 118 (1997); *Dove v. Sw. Marine of San Francisco, Inc.*, 18 BRBS 139 (1986); *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232 (1985).