U.S. Department of Labor

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

BRB No. 21-0078

MARTIN ALMEIDA	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED: 05/18/2021
ELECTRIC BOAT CORPORATION	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

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

Lance G. Proctor (Attorney Lance G. Proctor, LLC), Groton, Connecticut, for Claimant.

Jeffrey E. Estey, Jr. (McKenney, Clarkin & Estey, LLP), Providence, Rhode Island, for Self-Insured Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge Jonathan C. Calianos's Decision and Order Awarding Benefits (2018-LHC-00743) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (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 applicable law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant injured his back on March 6, 2014, during the course of his employment for Employer at its North Kingstown, Rhode Island facility. CX 2. He attempted to return

to work from March 25, 2014 to April 6, 2014, and in August 2014, but had to stop working due to back pain. Tr. at 9. He has not returned to work since August 2014. *Id*. Claimant received partial disability benefits until March 2020 under Rhode Island's workers' compensation law. *Id*. at 11, 19; ALJX 10; CXs 11, 12.

The administrative law judge awarded Claimant temporary total disability compensation, 33 U.S.C. §908(b), from March 7, 2014 to March 24, 2014, and from April 7, 2014 to May 21, 2015, and permanent total disability compensation, 33 U.S.C. §908(a), from May 22, 2015 to the present and continuing. Decision and Order at 2. Prior to issuing his decision, on August 24, 2020, the administrative law judge rendered credibility determinations and findings of fact from the bench. At that time, he determined Claimant's back condition reached maximum medical improvement on May 22, 2015, and Employer did not establish the availability of suitable alternate employment.[1] Bench Decision at 9, 44.

On appeal, Employer challenges the administrative law judge's finding that it did not establish the availability of suitable alternate employment. Claimant responds, urging affirmance of the total disability award.

Employer contends the administrative law judge erred in rejecting the jobs that its vocational consultant, Susan Chase, identified because they are not within Claimant's work restrictions, as per Dr. Thomas Morgan's evaluation, and in finding Ms. Chase did not consider Claimant's subjective pain complaints.

Where, as in this case, the claimant is unable to perform his usual employment duties due to his work injury, the burden shifts to the employer to demonstrate that suitable alternate employment is available in the claimant's community. *See CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991). In order to meet this burden, the employer must establish "there exists a reasonable likelihood that, given the claimant's age, education, and background, he would be hired if he diligently sought the job." *Id.*, 935 F.2d at 434, 24 BRBS at 207(CRT), *citing New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981).

In his bench decision, the administrative law judge found Claimant's testimony that he experiences chronic back pain to be credible,[2] as he found it consistent with Claimant's

[1] Employer did not dispute Claimant cannot return to his usual employment. Emp. Post-Hearing Br. at 1-2.

[2] Claimant testified he has lower back pain that is aggravated by activity, such as prolonged sitting, standing, or lifting, and, when aggravated, requires him to "relax, lay

physical demeanor at the hearing and his hearing testimony; the administrative law judge found he did not magnify his symptoms and injury-related problems or minimize his capabilities. Bench Decision at 16-25. In addition, the administrative law judge determined Ms. Chase did not "attribute any significant weight" to Claimant's subjective pain and instead "focused solely on the medical evidence." *Id*. at 27. He determined Ms. Chase misinterpreted and should not have relied on Claimant's April 15, 2015 functional capacity examination (FCE) because Claimant stopped the examination after 61 minutes due to back pain.

The administrative law judge stated he did not understand from the FCE report how the examiner was able to partially determine Claimant's capabilities and found the report's conclusions unclear.[3] *Id*. at 28-31; *see* EX 12. He found it "surprising" that no doctor or Ms. Chase surmised Claimant's inability to complete a second FCE on March 8, 2016 indicated either a need for another FCE or invalidated the conclusions from the April 2015 FCE. Bench Decision at 31; *see* CX 6. He found Dr. Morgan's January 25, 2016 opinion unreliable when the doctor indicated Claimant could work with a 30-pound lifting restriction because the doctor did not sufficiently explain the worsening of Claimant's back condition since his prior exam in November 2014[4] or discuss his findings of mild depression, dysfunction, and deconditioning in relation to Claimant's ability to work. Bench Decision at 32-36; *see* EXs 7 at 3-4, 8 at 4. The administrative law judge also

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down, take my medication, and just try not to do anything physically exerting." Tr. at 13-14. Claimant testified he takes ibuprofen for everyday pain, Flexeril to help him sleep, and Lyrica, when his pain extends down his leg. *Id*. at 14. The administrative law judge found Claimant's credibility supported, in part, by his testimony that he could work 15 to 20 hours a week. Bench Decision at 21-22; *see* Tr. at 22-23/103-104. He stated, "after having not worked for five and a half years and having physical issues, [Claimant] thinks he could probably do 15 to 20 hours a week right off the bat. That's not magnification, in my opinion. That's somebody who is trying to be truthful and give me an accurate picture of what he experiences on a daily basis." Bench Decision at 21-22.

[3] The FCE report concluded Claimant could frequently walk, bend/stoop, lift up to 25 or 30 pounds, carry up to 20 pounds, occasionally sit, stand, crouch, or kneel and grip. EX 12 at 2. The examiner was unable to determine Claimant's tolerance for standing, climbing ladders, pushing/pulling, reaching and handling. *Id*.

[4] Dr. Morgan reported: "mild evidence of a left L2 radiculopathy with some mild weakness to the left hip flexor and sensory decreased pin prick to the left L2 nerve root distribution." EX 7 at 4.

rejected Dr. Ira Singer's April 2018 opinion that Claimant could work with a 30-pound lifting restriction because the doctor also stated Claimant is deconditioned and would benefit from a structured exercise routine, core strengthening, and a physiatry consultation. Bench Decision at 36-37; *see* EX 1 at 4.

He therefore determined Ms. Chase's reliance on the opinions of Drs. Morgan and Singer to identify full-time jobs with up to a 30-pound lifting requirement cannot be credited. Bench Decision at 37-38; *see* EXs 14-16. The administrative law judge instead gave weight to the opinion of Claimant's vocational expert, Carl Barchi, that Claimant is not capable of a 40-hour work week and needs to see a physiatrist to address his deconditioning, which the administrative law judge found supported by the reports of Drs. Singer and Morgan.[5] *Id*. at 41-43; *see* CXs 9 at 4-6, 15 at 14-18; EXs 1at 4, 7 at 3-4, 8 at 4. Accordingly, the administrative law judge concluded Employer did not establish the availability of suitable alternate employment. *Id*. at 44.

It is well-established that the administrative law judge is entitled to assess the credibility of all witnesses and to determine the weight to be accorded to the evidence of record. *See, e.g., Bath Iron Works Corp. v. U.S. Dept. of Labor* [*Knight*], 336 F.3d 51, 37 BRBS 67(CRT) (1st Cir. 2003); *Bath Iron Works Corp. v. Director, OWCP* [*Hutchins*], 244 F.3d 222, 35 BRBS 35(CRT) (1st Cir. 2001); *Perini Corp. v. Heyde*, 306 F. Supp. 1321 (D.R.I. 1969). Moreover, the Board must accept the administrative law judge's factual findings and inferences which are supported by the record, and may not disregard his findings merely on the basis that the evidence also permits other inferences. *Id.*; *see also Bath Iron Works Corp. v. Director, OWCP [Harford]*, 137 F.3d 673, 32 BRBS 45(CRT) (1st Cir. 1998); *Bath Iron Works Corp. v. Director, OWCP [Shorette]*, 109 F.3d 53, 31 BRBS 19(CRT) (1st Cir. 1997).

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[5] Dr. Singer examined Claimant on April 10, 2018. He opined Claimant was "somewhat deconditioned and would benefit from a structured exercise routine and core strengthening." EX 1 at 4. Dr. Morgan examined Claimant on November 6, 2014. He opined Claimant should continue a core-based strengthening program and diagnosed chronic pain syndrome "associated with disuse, mild depression and anxiety, unwillingness to take pain medication, and subjective dysfunction." EX 8 at 4. Dr. Morgan reexamined Claimant at Employer's request on January 21, 2016. EX 7. He diagnosed "[C]omplaints of disuse, mild depression, dysfunction and deconditioning." *Id*. at 3. Dr. Timothy Smith opined in his March 29, 2018 report that Claimant could benefit from pain physiatry. EX 2 at 2.

The administrative law judge may rely on labor market surveys and the testimony of a vocational counselor that suitable job openings exist to establish the availability of suitable jobs. *Seguro v. Universal Mar. Serv. Corp.*, 36 BRBS 28 (2002); *Jones v. Genco, Inc.*, 21 BRBS 12 (1985). However, a labor market survey may be discredited if it fails to take into consideration all relevant restrictions found by the administrative law judge. *See Marathon Ashland Petroleum v. Williams*, 733 F.3d 182, 47 BRBS 45(CRT) (6th Cir. 2013); *Carlisle v. Bunge Corp.*, 33 BRBS 133 (1999), *aff'd*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000); *Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1992).

In assessing the sufficiency of Employer's labor market evidence, the administrative law judge permissibly rejected Ms. Chase's reliance on the 30-pound lifting restriction that Drs. Morgan and Singer imposed. Instead, he rationally relied on Claimant's inability to complete either the April 2015 or March 2016 FCEs, the less than clear partial conclusions in the April 2015 FCE, and the deconditioning findings of Drs. Morgan and Singer.[6] Moreover, he permissibly found Claimant's testimony addressing his pain symptomatology and capabilities to be credible,[7] as well as Mr. Barchi's conclusion that Claimant requires treatment to address his deconditioning before he can successfully work full time.[8] *See Knight*, 336 F.3d at 56, 37 BRBS at 70(CRT); *Hutchins*, 244 F.3d at 231, 35 BRBS 40-41(CRT). Thus, the administrative law judge permissibly rejected the labor market surveys. *Meehan Seaway Service, Inc. v. Director, OWCP [Hizinski]*, 125 F.3d 1163, 31 BRBS 114(CRT) (8th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998); *Dupre*, 23 BRBS 86; *Dygert v. Manufacturer's Packaging Co.,* 10 BRBS 1036 (1979). Accordingly,

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[6] Drs. Morgan and Singer referenced the April 2015 FCE as support for the 30-pound lifting restriction. EXs 1 at 4, 7 at 4.

[7] Contrary to Employer's contention, there is no evidence Ms. Chase considered Claimant's pain symptomatology. At her November 21, 2019 deposition, Ms. Chase testified she determined Claimant's physical capabilities based on Claimant's medical records and FCE results. EX 17 at 12-13, 17, 88. She rejected Mr. Barchi's assessment that Claimant is limited to part-time work because it is unsupported by the medical opinions. *Id*. at 85.

[8] Accordingly, we reject Employer's contention that the administrative law judge applied an improper legal standard by giving weight to the length of time Claimant has been unemployed and his not having participated in a work hardening program, as these considerations are supported by Claimant's credible testimony and rational inferences from the medical evidence regarding his deconditioned state.

we affirm the administrative law judge's finding that Employer did not establish the availability of suitable alternate employment and his consequent finding that Claimant is totally disabled as supported by substantial evidence.

Accordingly, we affirm the administrative law judge's Decision and Order Awarding Benefits.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge