**U.S. Department of Labor**

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

BRB No. 21-0316

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| (NFN) SHILOH | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
| | ) | DATE ISSUED: 09/16/2021 |
| HUNTINGTON INGALLS INDUSTRIES, INCORPORATED | ) | |
| | ) | |
| | ) | |
| Self-Insured Employer-Respondent | ) | DECISION and ORDER |

Appeal of the Decision and Order Denying Benefits of Monica Markley, Administrative Law Judge, United States Department of Labor.

Shiloh, Jacksonville, Florida.

Jonathan H. Walker (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for Self-insured Employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals Administrative Law Judge (ALJ) Monica Markley's Decision and Order Denying Benefits (2019-LHC-00889) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (Act). In an appeal by a claimant without the assistance of counsel, the Benefits Review Board will review the administrative law judge's findings of fact and conclusions of law to determine if they are rational, supported by substantial evidence, and in accordance with law. If they are, they must be affirmed.

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

Claimant was born in Jamaica and has been living in the United States since he was 14. Tr. at 24-26. He did not finish high school but went to technical school and trained to be an electrician. He first started working as a welder for Employer in Pascagoula, Mississippi, but after a few months, in November or December 2016, was transferred to Newport News, Virginia. *Id.* at 27.

He was injured on February 10, 2018, when he fell into an uncovered manhole in the shipyard, hitting his back on the steel edge of the manhole. Tr. at 31. He was seen a few days later at the shipyard clinic and given pain medication and referrals to physical therapy. *Id.* at 35; EX 3. He also consulted Dr. Arthur Wardell, who recommended physical therapy which Employer did not approve. Claimant tried to work as a fire watch man following his accident but found it too painful. Dr. Wardell took Claimant off work in March 2018, and Claimant stopped working on March 14, 2018. CX 1 at 1; CX 7 at 1; Tr. at 37.

Dr. John Aldridge, who examined Claimant at Employer's request, recommended physical therapy and a sacroiliac joint injection. CX 2 at 3-4. He assigned Claimant temporary work restrictions on April 24, 2018, including no ladders or stairs, no lifting more than 10-15 pounds, and no repetitive bending. *Id*. at 4. Thereafter, Claimant moved to Jacksonville, Florida, to be nearer to his family. In Florida, Claimant saw Dr. Arnold Smith, who opined he was totally disabled due to a probable work-related left sacroiliac injury which, Dr. Smith stated, required additional treatment. He also saw Dr. Stephan Esser, who sent him for an MRI and recommended physical therapy, which Employer again did not approve. Claimant further received medical care at the emergency room (ER) where he was treated with ibuprofen. Tr. at 50, 65.

Employer paid temporary total disability benefits from March 14 to May 20, 2018, and temporary partial disability benefits from May 20 to June 24, 2018, after which Employer alleges Claimant was no longer entitled to benefits. CX 7. Claimant filed a claim seeking additional total disability benefits, alleging he remains unable to work. On May 15, 2018, Barbara Harvey, a vocational rehabilitation counselor, completed a labor market survey in which she identified seven jobs as suitable for Claimant based on Dr. Aldridge's temporary restrictions as of April 2018. Two jobs were located in Jacksonville, Florida, where Claimant currently lives, and the remaining five were located near Newport

News, Virginia, where Claimant lived at the time of his injury.[1] EX 9. Dr. Aldridge reviewed the jobs and approved five of them as meeting Claimant's restrictions. EX 10.

The parties disputed the extent of Claimant's disability during certain periods, Employer's liability for medical benefits, and Claimant's entitlement to additional compensation under Section 14(e) of the Act, 33 U.S.C. §914(e). Initially, the ALJ found the parties agreed Claimant could not perform his usual work between May 21 and June 23, 2018; however, she found Employer established the availability of suitable alternate employment for that period. Decision and Order at 21. She gave probative weight to Dr. Aldridge's restrictions and found Ms. Harvey's reliance on those restrictions to be appropriate. *Id.* at 23. The ALJ further found Virginia, rather than Jacksonville, Florida, to be the relevant labor market because Claimant had just moved, and she concluded the three jobs in Virginia were suitable for Claimant. *Id.* at 24-26. The ALJ also found Claimant did not meet his burden of showing he engaged in a diligent job search and, therefore, was only partially disabled from May 21 to June 23, 2018. *Id.* at 26.

Next, the ALJ found Claimant was no longer disabled as of June 24, 2018. *Id.* at 27. Because she found it supported by objective medical evidence in the record, she accepted Dr. Esser's opinion that Claimant had no functional restrictions as of that date and his work injury had healed. *Id.* at 26-27.

With regard to the payment of Claimant's medical expenses, the ALJ found his treatment with Dr. Smith not reasonable and necessary to treat his work-related injury. She found Dr. Smith's assessment of Claimant's condition is based on his subjective complaints, which she determined were not credible, and not supported by any objective findings. Decision and Order at 29-30. She also denied Claimant's request for reimbursement for the cost of his ER visits, finding he did not sufficiently explain why he chose to go to the ER to obtain ibuprofen rather than simply go to a pharmacy. *Id.* at 30-31.

Finally, the ALJ denied Claimant's request for additional compensation under Section 14(e) of the Act, 33 U.S.C. §914(e), finding benefits did not become due until March 15, 2018, when Claimant stopped working for Employer, and Employer timely paid compensation within 14 days of that date. Decision and Order at 32.

[1] Ms. Harvey was not able to interview Claimant prior to completing her labor market survey. EX 13 at 7.

Claimant, now without the assistance of counsel, appeals the ALJ's Decision and Order.[2] Employer filed a response brief, urging affirmance. As Claimant has appealed without the assistance of counsel, we will address those findings of the ALJ's which are adverse to him, beginning with the extent of his disability.

We first address the ALJ's decision to accept Dr. Aldridge's work restrictions. In March 2018, Dr. Wardell, despite normal x-ray reports, removed Claimant from work completely due to his physical examination. He noted no improvement in two follow-up visits in April 2018. CX 1. Dr. Esser found Claimant's June 2018 MRI to be normal with no signs of injury due to Claimant's work accident and opined his back injury had resolved by June 23, 2018, because there was no objective evidence to support Claimant's ongoing complaints. He also concluded Claimant's complaints of debilitating pain were out of proportion with his negative examination and clinical findings, and the soft tissue and bony contusion had resolved. CX 3 at 6, 9; EX 6 at 9-10. Dr. Aldridge examined Claimant in April 2018 and found he had full, pain-free movement, minimal to no tenderness, and negative straight leg raising. Nevertheless, he issued temporary restrictions in April 2018 because his examination revealed some continuing symptoms and because he believed Claimant had "not had full conservative care" due to Employer's disapproval of Dr. Wardell's recommendations. CX 2 at 3-4. In October 2019, he reviewed Dr. Esser's records, agreed Claimant's work injury had resolved by June 23, 2018, because Dr. Esser's examination findings were similar to his own, and concluded Claimant could return to his previous work as of that date. EX 8. Despite Claimant's normal imaging, Dr. Smith relied on his own examination of Claimant and opined he was totally disabled as of September 2018. CX 4 at 2.

The administrative law judge has the discretion to determine the weight to be accorded to the evidence, make credibility assessments, and is not required to accept the opinions of any medical expert. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *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). The Board is not permitted to reweigh the evidence or disregard an administrative law judge's findings merely because other inferences and conclusions could have been drawn from it. *Newport News Shipbuilding & Dry Dock Co. v. Ward*, 326 F.3d 434, 37 BRBS 17(CRT) (4th Cir. 2003); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988).

The ALJ gave probative weight to Dr. Aldridge's opinion of Claimant's physical restrictions for the period from May 21 to June 23, 2018. She gave little weight to the

[2] Claimant was represented by counsel before the ALJ.

opinions of Drs. Wardell and Smith that Claimant remained unable to do any work. She explained she found their opinions not supported by any objective evidence and based primarily on Claimant's subjective complaints, which she determined were not credible.[3] She also found neither Dr. Wardell nor Dr. Smith thoroughly reviewed Claimant's medical history. Decision and Order at 21-23. Further, she noted Claimant's credibility is called into question by his own noncompliance with recommended treatment. Decision and Order at 23. Consequently, we affirm the ALJ's decision to accept Dr. Aldridge's opinion of Claimant's restrictions as it is rational and supported by substantial evidence.

We next address the issue of suitable alternate employment. Where, as in the instant case, the claimant has established a prima facie case of total disability, the burden shifts to the employer to demonstrate the availability of suitable alternate employment that the claimant is capable of performing. *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988); *see also Tann*, 841 F.2d at 540, 21 BRBS at 13(CRT); *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74(CRT) (4th Cir. 1984). If an employer establishes the availability of suitable alternate employment, the claimant nevertheless can establish total disability if he demonstrates he diligently tried but was unable to secure such employment. *See Tann*, 841 F.2d at 540, 21 BRBS at 13(CRT); *Hooe v. Todd Shipyards Corp.*, 21 BRBS 258 (1988).

We begin with the ALJ's finding that Virginia, where Claimant lived at the time he was injured, rather than Florida, where Claimant currently lives, is the relevant labor market for demonstrating the availability of suitable alternate employment. In general, an employee's chosen community is presumptively the relevant labor market for determining

[3] The ALJ found Claimant was not credible with respect to his level of pain as he was non-compliant with his physical therapy sessions with two different providers. EXs 3-4. She found he stopped going to the first provider because he was in too much pain and stopped attending the second series without explanation. Decision and Order at 23. She also discredited Claimant's complaints because of his "arguably drug-seeking behavior" as his providers prescribed nothing more than ibuprofen, and he "was discouraged when [Dr. Esser] would not prescribe opiate medication." *Id.* at 23; CX 3 at 4; CX 11 at 1; EX 5 at 23). Based on Claimant's failure to comply with recommended physical therapy, his exaggerated complaints of pain, his apparent desire for stronger medication, all of which are inconsistent with objective medical findings, and the ALJ's observations at the hearing, the ALJ determined Claimant is not credible and his reports are not reliable. Decision and Order at 23. The ALJ's findings are reasonable, and 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).

the availability of suitable alternate employment. *See Wilson v. Crowley Maritime*, 30 BRBS 199 (1996). Where, as here, a claimant relocates after an injury, an administrative law judge should determine the relevant labor market after considering such factors as the claimant's residence at the time he files for benefits, his motivation for relocating, the legitimacy of that motivation, the duration of his stay in the new community, his ties to the new community, the availability of suitable jobs in the community as opposed to those in his former residence, and the degree of undue prejudice to the employer in proving suitable alternate employment in a new location. *See Wood v. U.S. Dep't. of Labor*, 112 F.3d 592, 31 BRBS 43(CRT) (1st Cir. 1997); *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96(CRT) (4th Cir. 1994).

The administrative law judge found Claimant resided in Virginia for years before and months after his injury, but moved to Florida days before the labor market survey was conducted in order to be closer to and receive financial support from his family. However, as the ALJ noted, he did not have long-standing ties to the community. Decision and Order at 24. She also noted he stayed only briefly with his sister after moving to Florida and moved out shortly thereafter to live in an apartment that his father paid for, after which the financial support that his family provided ended for unexplained reasons, resulting in Claimant living in his car. Claimant also testified he could return to Virginia to work if given assistance to get there and if he found a job he could perform. Finally, she found Employer would be prejudiced by having to establish the availability of suitable alternate employment in Florida because it was not given prior notice of Claimant's move nor did it have any certainty how long he would be staying in Florida. The ALJ considered all the relevant factors and explained her reasons for finding Virginia to be the relevant labor market. We affirm her conclusion as it is rational and supported by substantial evidence in the record.

Next, we address the ALJ's conclusion that Employer established the three jobs in Virginia constituted suitable alternate employment.[4] She summarily concluded Employer established the availability of suitable alternate employment through Ms. Harvey's labor market survey because Dr. Aldridge and Ms. Harvey believed the jobs satisfied Claimant's physical restrictions. Decision and Order at 23, 25. We agree with Claimant that the ALJ's findings on suitable alternate employment cannot be affirmed. She did not

[4] Ms. Harvey identified seven jobs she felt were suitable. Dr. Aldridge approved of five, three in Virginia and two in Florida. EX 9. The ALJ rejected Claimant's specific objection to one of the jobs in Florida, finding no evidence that his accent impedes his ability to communicate. She stated, however, if Florida was the relevant market, the two jobs identified there would also constitute suitable alternate employment. Decision and Order at 25.

adequately explain her conclusion or consider any of the other relevant factors, such as Claimant's age, education, and vocational background to assess the jobs' suitability. Mere physical ability to perform the job is not the only factor to be considered in determining whether the employer has established suitable alternate employment. *See Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1999). An administrative law judge is required to independently assess the jobs to determine if they are such that Claimant is able to perform them and if there is a reasonable likelihood that he would be hired considering his age, education, and background. *See Trans-State Dredging*, 731 F.2d at 201, 16 BRBS at 76(CRT).

The evidence in the record does not support the ALJ's conclusion that Claimant is qualified for at least one of the jobs she found suitable. The Dispatcher/Customer Service Representative position for RS Andrews lists among its qualifications "experience gathering customer information and keying it into a computer." EX 9 at 13. However, while Claimant stated he knows how to use a computer, he also explained he has never held a job which required computer use.[5] Tr. at 43-44. In addition, the two other jobs, as a Repair Dispatch Specialist for U-Haul Moving and a Driver for Hertz, list a good driving record as one of their qualifications. The record does not contain information as to Claimant's driving record nor did the ALJ address whether Claimant's driving record would qualify him for those positions. The ALJ also did not consider whether Claimant's age and background would affect the likelihood of his being hired for any particular position.

We therefore vacate the ALJ's finding that Employer established the availability of suitable alternate employment and remand this case for her to reconsider the issue. On remand, she must independently assess whether the jobs Ms. Harvey identified as suitable are, in fact, suitable given all relevant factors. Specifically, she should consider, in addition to any physical concerns, whether Claimant's background and experience satisfy the stated job requirements and qualifications. *See White v. Peterson Boatbuilding Co.*, 29 BRBS 1 (1995).

In the interest of judicial economy, we will briefly address the ALJ's conclusion that Claimant did not perform a diligent job search during his more than one year of

[5] Claimant testified he set up an account on Indeed.com in order to look for jobs. Tr. at 43. Aside from his work as a welder-electrician, Claimant's previous work history includes owning a nightclub and a cleaning service. *Id.* at 45. Claimant explained he did not believe he could currently perform either of those jobs because they would require physical work such as purchasing cleaning supplies or alcohol, which he is not able to do. Tr. at 46-48.

unemployment. Decision and Order at 25-26. The ALJ found Claimant searched for a job only during a one-week period and, in that time, appeared to apply for jobs "in bulk," "hit[ting] the 'submit' button many times over a short period for a wide variety of jobs that he may or may not be suited for," rather than conducting a targeted search. *Id.*; Tr. at 43, 58-59. She further noted Claimant did not submit his application materials into evidence so she could not determine if he provided sufficient and good-faith information that he intended to obtain any position. *Id.* at 26. Consequently, the ALJ's conclusion that Claimant did not establish he conducted a diligent job search is supported by substantial evidence. *See Fortier v. Electric Boat Corp.*, 38 BRBS 75 (2004). We affirm that finding. If, on remand, the ALJ again finds Employer has met its burden of establishing the availability of suitable alternate employment, she may again find Claimant was partially disabled for the period from May 21 to June 23, 2018.

We further address the ALJ's finding that Claimant is not disabled as of June 24, 2018. A claimant bears the burden of establishing the nature and extent of his disability. *See Gacki v. Sea-Land Serv.*, Inc., 33 BRBS 127 (1998). Dr. Esser and Dr. Aldridge both concluded Claimant did not have any physical restrictions and was able to return to work as of June 23, 2018. CX 3 at 6, 9; EX 6 at 2; EX 8. Dr. Smith also found Claimant's MRI appeared normal but based his diagnosis of "Probable chronic sprain left sacroiliac joint" on Claimant's subjective complaints without additional explanation. *See* CX 4. The ALJ gave probative weight to the opinions of Dr. Esser and Dr. Aldridge that Claimant's work injury had totally healed by June 24, 2018. Decision and Order at 26-27. She found their opinions supported by the other evidence in the record, including Claimant's normal MRI and the fact that at his ER visits, he was noted to have normal range of motion with a normal gait and strength. *Id.* at 27. In contrast, she determined Dr. Smith's and Dr. Wardell's opinions that Claimant remained unable to work are not entitled to great weight because they are based on Claimant's subjective complaints which she had already found were not credible.

The administrative law judge explained her reasons for discrediting the opinions of Drs. Wardell and Smith as to Claimant's ability to work and for giving probative weight to Dr. Esser's opinion.[6] She acted well within her discretion in finding Claimant's subjective complaints of pain not credible. *See Ward*, 326 F.3d at 438, 37 BRBS at 19-20(CRT). Her decision to give greater weight to Dr. Esser's opinion is rational and supported by

[6] Moreover, Dr. Wardell opined only that Claimant was unable to work as of April 2, 2018; he did not provide an estimate for how much longer Claimant should remain out of work. CX 1 at 7-9.

substantial evidence. We therefore affirm her conclusion that Claimant was able to return to his usual work as of June 23, 2018, and is no longer disabled due to his work injury.

*Medical Expenses*

Section 7 of the Act, 33 U.S.C. §907, requires an employer to pay reasonable and necessary medical expenses related to a claimant's work injury. It is the claimant's burden, however, to show the expenses are necessary and are related to the injury. *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988). A claimant may establish a prima facie case that medical treatment is compensable where a qualified physician indicates treatment is necessary for a work-related condition. *See Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989).

The ALJ denied payment for Claimant's treatment with Dr. Smith. She found the proposed treatment with Dr. Smith after September 2018 is not reasonable and necessary because there are no objective findings that Claimant's work injury still requires treatment and Dr. Smith's assessment of Claimant's condition is based only on Claimant's subjective complaints. *See* CX 4. She gave greater weight to Dr. Esser's opinion that Claimant's work injury had resolved as of June 23, 2018, and required no further treatment except for "a short period of rest followed by 4 weeks of [physical therapy] if the patient described persistent pain." EX 6 at 7. Dr. Esser's opinion was based on Claimant's normal MRI. *Id.* The ALJ acted within her discretion in giving probative weight to Dr. Esser's opinion over Dr. Smith's. We therefore affirm her conclusion that Claimant's treatment with Dr. Smith is not reasonable and necessary, and Employer is not liable for it. *See Brown v. Nat'l Steel & Shipbuilding Co.*, 34 BRBS 195 (2001).

The ALJ also denied reimbursement for the cost of Claimant's ER visits and the cost of ibuprofen obtained during those visits. Decision and Order at 30-31. She found it not reasonable or necessary for Claimant to obtain ibuprofen from the ER when it is readily available in a pharmacy at a much lower cost, and she denied reimbursement. The ER notes reported Claimant was told he could "get motrin from store … instead of coming to the [Emergency Department] for his back pain," but Claimant chose not to do so. EX 7 at 5. Claimant testified the medication given at the hospital is stronger, and he preferred to take one hospital-dispensed pill instead of four store-bought pills. Tr. at 65-66. The ALJ acted within her discretion in finding Claimant did not satisfactorily explain his reason for ignoring the ER's advice and instead going to the ER to obtain ibuprofen. Decision and Order at 31. As no treating physician told Claimant he should obtain over-the-counter pain medication from the ER, we affirm the ALJ's finding that Claimant's ER visits were not reasonable and necessary. Therefore, we affirm her denial of the reimbursement of the cost of Claimant's ER visits.

*Additional Assessments Under Section 14*

Lastly, we address the ALJ's denial of an additional assessment under Section 14 of the Act. Section 14(b) of the Act provides that the first installment of compensation becomes due on the fourteenth day after the employer has been notified of the injury pursuant to Section 12(d), 33 U.S.C. §912(d), or after the employer has knowledge of the injury. 33 U.S.C. §914(b). Section 14(e) provides that the employer is liable for a ten percent assessment for failure to pay compensation when due unless the employer timely files a notice of controversion pursuant to Section 14(d), 33 U.S.C. §914(d); *Caudill v. Sea Tac Alaska Shipbuilding*, 22 BRBS 10 (1988), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993). In cases where a claimant loses no time from work or has returned to work, a controversy arises at the time the employer first gains knowledge of the permanency of the Claimant's condition or the extent of impairment. *See DeRobertis v. Oceanic Container Serv., Inc.*, 14 BRBS 294 (1984).

In this case, Employer had notice of Claimant's injury on the date it occurred. However, Claimant was off work only two days and then returned to work as a fire watch man until he stopped working completely on March 14, 2018. *See* Tr. at 30-36; CX 7 at 1. Employer began paying temporary total disability benefits on March 14, 2018, and filed its notice of controversion on March 19, 2018. CX 7. The ALJ correctly noted that payments did not become due until after Claimant stopped working and Employer timely filed its notice of controversion. Decision and Order at 32. As Employer timely paid benefits and timely filed a notice of controversion, Claimant is not entitled to an additional assessment under Section 14(e). We therefore affirm the ALJ's denial of an assessment under Section 14(e) as it is supported by the evidence in the record and in accordance with the law. *See Hitt v. Newport News Shipbuilding & Dry Dock Co.*, 38 BRBS 47 (2004).

Accordingly, we vacate the ALJ's finding that Employer established suitable alternate employment for the period from May 21 to June 23, 2018, and we remand the case for the ALJ to reconsider the issue. In all other respects, we affirm the ALJ's Decision and Order Denying Benefits.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge