U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0189

AZIZ EL HAJJAMI	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TRIPLE CANOPY	)	
	)	DATE ISSUED: Feb. 9, 2016
and	)	
	)	
CONTINENTAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Disability Compensation Benefits and Awarding Medical Benefits of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Ronald S. Webster (Webster Law Group), Orlando, Florida, for claimant.

Marcy Singer Ruiz (Law Offices of Edward J. Kozel), Chicago, Illinois, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order (2013-LDA-00417) of Administrative Law Judge Paul C. Johnson, Jr., 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *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 injured his lower back on November 26, 2011, while unloading heavy equipment from an armored truck during the course of his employment as an interpreter

in Iraq. Claimant received treatment in Iraq, but requested early leave and returned to the United States on December 31, 2011. Tr. at 41. After receiving authorization from employer, claimant began treating with Dr. Meinhardt on March 28, 2012. CX 25 at 122-123. An MRI showed a herniated disc at L5-S1 and lumbar spine degeneration. *Id*. at 124-127. Claimant received epidural injections and physical therapy, which did not relieve his lower back pain. A second MRI in August 2012 showed no changes. *Id*. at 114-115, 124-125. Dr. Meinhardt recommended surgery on August 19, 2012, which claimant refused; therefore, Dr. Meinhardt rated claimant's back as having a six percent impairment and he referred claimant for a functional capacity evaluation (FCE). *Id*. at 115; Tr. at 45. The September 7, 2012 FCE concluded that claimant is capable of light-duty work, but incapable of meeting the requirements of his position with employer. CX 6 at 1. Claimant reported feeling much improved at his September 20, 2012 appointment with Dr. Meinhardt, and he requested a second FCE so that he could attempt to regain his job. CX 25 at 112. The September 25, 2012 FCE indicated claimant was capable of medium to heavy duty work. CX 7 at 2. Claimant returned to Dr. Meinhardt on October 1, 2012; he reported no pain, which was consistent with Dr. Meinhardt's physical examination. Dr. Meinhardt, therefore, released claimant to work without restrictions. CXs 8 at 1; 25 at 111. Claimant emailed employer that day and asked to return to work. EX 9 at 1. Employer gave claimant a physical fitness test on November 14, 2012, which he failed.[1] *Id*. at 3-5. Claimant requested a re-test, but employer did not provide one. *Id*.; Tr. at 53-55.

In August 2013, claimant obtained authorization from employer for another examination by Dr. Meinhardt. Tr. at 59. Dr. Meinhardt examined claimant on August 19, 2013, at which time he placed claimant on light-duty restrictions, and he referred clamant for another MRI. CX 25 at 108-109. On September 11, 2013, Dr. Meinhardt noted that the September 10, 2013 MRI results were unchanged from the prior MRI results, but that claimant had agreed to undergo microdiscectomy surgery. *Id.* at 106-107. Claimant testified that he did not receive authorization from employer for surgery. Tr. at 61. He moved to Italy on September 23, 2013, to work as a translator for a

[1] Claimant ran a mile and a half in 11 minutes and 47 seconds, which is four seconds longer than employer requires. Claimant explained to employer in an email dated November 16, 2012, that he was out of shape because he had not exercised while recovering from his injury. EX 9 at 3-5. Claimant also told the examiner he had a cold, in order to hide his physical condition from employer. Tr. at 54-55, 81-83.

subcontractor of a U.S. government agency.[2] *Id*.; EX 2 at 9-10. Claimant sought disability compensation from August 20, 2012, and medical benefits.[3]

In his decision, the administrative law judge found that claimant established a prima facie case of a work-related back injury, which employer did not rebut. The administrative law judge found that claimant's injury reached maximum medical improvement on August 20, 2012, when Dr. Meinhardt rated claimant's back as having a six percent impairment. The administrative law judge awarded claimant temporary total disability compensation, 33 U.S.C. §908(b), from April 11, 2012 to August 19, 2012.[4] The administrative law judge found that, thereafter, claimant was physically capable of to returning to his usual work for employer, and he denied additional compensation. Decision and Order at 33-39. However, the administrative law judge also found claimant entitled to continuing medical treatment for his back injury, including surgery. *Id*. at 40.

On appeal, claimant contends the administrative judge erred in finding that he could return to his usual employment on August 20, 2012. Employer responds, urging affirmance of the administrative law judge's decision.

At the hearing, claimant's job duties for employer were described as: carrying over 60 pounds of equipment, including body armor; uninterrupted travel for hours at a time in a cramped armored vehicle; jumping in and out of the vehicle; standing; and running to secure a perimeter.[5] Tr. at 64; *see also id*. at 32-38. Claimant testified that his work-related back pain never resolved and that he could not return to work for employer in Iraq due to the physical demands of the position. *Id*. at 47-50, 59, 62-63. Claimant bears the burden of establishing he is unable to perform his usual work due to his work-related injury. *See, e.g., Newport News Shipbuilding & Dry Dock Co. v. Riley,* 262 F.3d

[2] Claimant testified at his deposition that he began working for Valbin Corporation for a salary of $45,000, plus a per diem rate, which is set by the State Department. EX 2 at 9-10.

[3] Claimant sought total disability compensation until he started working in Italy in September 2013 and partial disability compensation thereafter based on a loss of wage-earning capacity, 33 U.S.C. §908(a), (c)(21), (h). Cl. Post-Hearing Br. at 22-24.

[4] Employer had voluntarily paid claimant compensation for this period. Decision and Order at 2.

[5] This description is the only evidence of the physical demands of claimant's job. Claimant also testified that he worked six days a week and had almost daily missions outside the base where he was stationed. Tr. at 68.

227, 35 BRBS 87(CRT) (4th Cir. 2001); *Devor v. Dep't of the Army*, 41 BRBS 77 (2007); *Delay v. Jones-Washington Stevedoring Co.*, 31 BRBS 197 (1998).

The administrative law judge declined to credit claimant's testimony that he has been unable to return to his usual work. The administrative law judge found that claimant's testimony was inconsistent and that claimant admitted instances of untruthfulness.[6] Decision and Order at 36-38. The administrative law judge also declined to credit Dr. Meinhardt's March 14, 2014 deposition testimony that claimant is disabled and unable to return to his usual work because his testimony contradicts the contemporaneous medical records. *Id*. at 39. In finding that claimant could return to work, the administrative law judge stated that Dr. Meinhardt's "work releases" on October 1, 2012 and September 11, 2013, and the September 25, 2012 FCE "are examples of strong medical evidence that Claimant is able to return to his former employment." *Id*. at 34. The administrative law judge concluded that claimant was able to return to his usual work and he denied benefits after August 20, 2012. For the reasons which follow, we vacate the administrative law judge's finding that claimant was capable of returning to his usual work on August 20, 2012. *Goins v. Noble Drilling Corp.*, 397 F.2d 392 (5th Cir. 1968); *see also Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997).

The administrative law judge acted within his discretion in determining that the 2012 contemporaneous medical reports of Dr. Meinhardt, claimant's treating physician, are the best evidence concerning claimant's physical ability to return to his usual work in the August to October 2012 time frame.[7] *See generally Del Monte Fresh Produce v. Director, OWCP [Gates]*, 563 F.3d 1216, 43 BRBS 21(CRT) (11th Cir. 2009). However, the administrative law judge did not provide a sound rationale for finding that claimant's disability ended on August 20, 2012. On this date, the administrative law judge found that claimant's back condition reached maximum medical improvement based on Dr. Meinhardt's report assigning claimant a six percent impairment and several subsequent reports in which Dr. Meinhardt noted that August 20, 2012 was the date of maximum

[6] We note, however, that claimant's "untruthfulness" largely involved his understating the requirements of his usual work or overstating his physical capabilities in an attempt to regain his employment.

[7] Thus, the administrative law judge did not err in declining to credit the disability assessments of Dr. Abdel-Al and Dr. Caruso. *See* Cl. Br. at 13; *see generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991).

medical improvement.[8] Decision and Order at 33; CX 25 at 54, 68, 172, 174, 176, 178, 180. The date of maximum medical improvement delineates permanent from temporary disability and is not determinative of the date a claimant is capable of returning to his usual work. *See generally Director, OWCP v. Bethlehem Steel Corp. [Dollins]*, 949 F.2d 185, 25 BRBS 90(CRT) (5th Cir. 1991); *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69(CRT) (D.C. Cir. 1990).

The record contains inconsistent medical evidence concerning the date claimant was released to return to his usual work. There are two Florida Workers' Compensation Uniform Medial Treatment/Status Reporting Form[s] (FWC) dated August 20, 2012. Decision and Order at 12-13. On one form, Dr. Meinhardt noted that claimant was referred for an FCE, he listed claimant's physical restrictions, and stated that claimant was not at maximum medical improvement. CX 25 at 52, 182. On the other FWC form, Dr. Meinhardt checked the boxes indicating that claimant had no physical restrictions and was at maximum medical improvement. *Id*. at 54, 184. The September 7, 2012 FCE report concluded that claimant was unable to return to work for employer. CX 6 at 2. The September 20, 2012 FWC form completed by Dr. Meinhardt listed work restrictions. CX 25 at 180. Dr. Meinhardt's September 20, 2012 report states, "I am going to continue some light duty restrictions" based on the results of the September 7 FCE. *Id.* at 113. The September 25, 2012 FCE report states that claimant could perform medium to heavy work and the physical therapist opined that claimant's prognosis was good. EX 6 at 14. Based on his October 1, 2012, examination of claimant and the September 25 FCE, Dr. Meinhardt stated that claimant was pain free and could return to his work for employer without restrictions.[9] CX 8. As the administrative law judge did not state on what evidence he relied in selecting August 20, 2012, as the date claimant could return to work, and as the record contains conflicting evidence on this issue, we must remand for the administrative law judge to identify a date, supported by evidence of record, that claimant was physically capable of returning to his usual work. In this respect, the administrative law judge should compare claimant's physical abilities to the requirements of his usual work. *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 49 (2005); *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990); *Carroll v. Hanover Bridge Marina*, 17 BRBS 176 (1985).

[8] The parties agreed that claimant's back was at maximum medical improvement, but they did not agree on a date of maximum medical improvement. Decision and Order at 33. The finding as it pertains to permanency is not challenged on appeal.

[9] In this report, however, Dr. Meinhardt stated that claimant's usual work was "sedentary." CX 8.

Moreover, the administrative law judge did not adequately address evidence that claimant could not pass employer's running test, which was required by employer in order for claimant to be rehired. EX 9. Section 2(10) of the Act, 33 U.S.C. §902(10), provides: "'Disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." Thus, "disability" has an economic as well as a medical component. *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991). "[A] claimant establishes an inability to perform his usual employment if a claimant's job is no longer available to him after his injury" because of his work-related injury. *Service Employees Int'l, Inc. v. Director, OWCP [Barrios]*, 595 F.3d 447, 455-56, 44 BRBS 1, 6(CRT) (2d Cir. 2010) (citing *McBride v. Eastman Kodak Co.*, 844 F.2d 797, 799-800, 21 BRBS 45, 49(CRT) (D.C. Cir. 1988)).

The administrative law judge addressed claimant's testimony and the documentary evidence concerning claimant's attempt to pass employer's physical examination in November 2012. *See* Decision and Order at 38. However, the administrative law judge did not address this evidence in view of the aforementioned law, and, moreover, erred in considering claimant's "lack of physical conditioning" to be something separate from his work-related injury.[10] Irrespective of whether claimant informed employer of pain from his herniated disc, *see* n.6, *supra*, it is clear that claimant contemporaneously informed employer that his lack of conditioning was due to the injury. *See* EX 9-4. If claimant's lack of conditioning from the injury caused him to fail employer's running requirement, which, in turn, prevented claimant from returning to his usual work, claimant has established a prima facie case of total disability. *Barrios*, 595 F.3d at 456, 44 BRBS at 6(CRT); *McBride*, 844 F.2d at 799-800, 21 BRBS at 49(CRT); *Rice v. Service Employees Int'l, Inc.*, 44 BRBS 63 (2010). Therefore, on remand, the administrative law judge must address this issue in determining if claimant established his inability to return to his usual employment.[11] *Rice*, 44 BRB 63.

[10] Our dissenting colleague errs in perpetuating this misapprehension.

[11] If claimant was unable to return to his usual work, employer bears the burden of establishing the availability of suitable alternate employment in order to avoid liability for total disability benefits. *Del Monte Fresh Produce v. Director, OWCP [Gates]*, 563 F.3d 1216, 43 BRBS 21(CRT) (11th Cir. 2009). If necessary, the administrative law judge should address whether employer met this burden prior to claimant's obtaining work in Italy; the administrative law judge also should address the degree of claimant's loss of wage-earning capacity after claimant obtained this job. *Id.;* 33 U.S.C. §908(h).

Should the administrative law judge find on remand that claimant was capable of returning to his usual work in 2012, we reject claimant's contention that he lapsed into total disability upon his return to Dr. Meinhardt on August 19, 2013. On this date, claimant reported continuing back pain; Dr. Meinhardt wrote that "[I] have placed [claimant] on some light duty restrictions" while he ordered another MRI. CX 25 at 108-109. The MRI was unchanged from the previous study. *Id.* at 106. Dr. Meinhardt again offered claimant a surgical option, in which claimant was interested. *Id.* However, Dr. Meinhardt also stated in his March 14, 2014 deposition that, as of September 11, 2013, claimant "was on no specific restrictions at that point." *Id.* at 23, 35-36. Dr. Meinhardt stated that had claimant undergone the surgery, he would have had temporary restrictions before and after the surgery. *Id.* at 24-25. Claimant did not undergo surgery and accepted a job in Italy later that month. The administrative law judge was entitled to conclude from this evidence that Dr. Meinhardt remained of the opinion that claimant was capable of returning to his usual work, notwithstanding contradictory statements in Dr. Meinhardt's deposition.[12] *Perini Corp. v. Heyde*, 306 F.Supp. 1321, 1327 (D.R.I. 1969) ("it was solely within [the administrative law judge's province to accept or reject all or any part of the[] testimony according to his judgment"); *see, e.g.*, CX 25 at 39. The Board is not empowered to substitute its judgment for that of the administrative law judge. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). Therefore, we reject claimant's contention.

Accordingly, the administrative law judge's Decision and Order Denying Disability Compensation Benefits and Awarding Medical Benefits is vacated and the case is remanded for further proceedings in accordance with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur:

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JONATHAN ROLFE
Administrative Appeals Judge

[12] Dr. Meinhardt explained that because claimant was not working, he saw no point in imposing work restrictions. CX 25 at 23-24.

BUZZARD, Administrative Appeals Judge, concurring and dissenting:

I concur on the narrow question of whether the administrative law judge adequately explained his determination that claimant was capable of returning to work on August 20, 2012.[13] I also concur in the rejection of claimant's contention that he lapsed into total disability as of August 19, 2013, as the administrative law judge permissibly accorded little weight to Dr. Meinhardt's opinion regarding claimant's ongoing disability.[14] However, for the period between August 20, 2012 and August 19, 2013, I respectfully dissent from the majority's determination that the administrative law judge must reconsider whether claimant's failure to pass his employer's running test rendered him disabled under the Act.

In the present claim, the administrative law judge was tasked with resolving several inconsistencies between claimant's testimony, Dr. Meinhardt's testimony, and the evidentiary record on the issue of whether claimant's workplace injury prevents him from returning to work. In one instance, claimant argues that Dr. Meinhardt's report of October 1, 2012, indicating that he "continues to describe absolutely no pain" and releasing him for work "without restriction," does not reflect claimant's actual physical condition because he intentionally misled Dr. Meinhardt about his pain and over-

[13] The administrative law judge might be able to justify his selection of this date; however, it appears that he improperly relied upon the date Dr. Meinhardt, claimant's physician, determined that claimant reached maximum medical improvement, as opposed to October 1, 2012, the date on which Dr. Meinhardt stated that claimant was pain free and could return to work with no restrictions. In any case, such a finding must be made by the administrative law judge.

[14] On August 19, 2013, Dr. Meinhardt examined claimant and placed him on light duty restrictions pending the outcome of an updated MRI. CX 25 at 108-109. He also testified during his deposition on March 14, 2014 that claimant is currently disabled and unable to return to work. *Id*. at 26-29. However, the administrative law judge permissibly concluded that Dr. Meinhardt's opinion regarding claimant's ongoing disability is entitled to little weight, as Dr. Meinhardt's opinion is contradictory. Decision and Order at 39. Specifically, his report of September 11, 2013, the last time he examined claimant, did not identify any work restrictions and he further testified that claimant was not on any specific restrictions at that time. CX 25 at 23-24, 35-36, 106-107. Claimant similarly testified that Dr. Meinhardt released him to work with no limitations as of September 11, 2013. Tr. at 87-88.

performed on his second Functional Capacity Evaluation (FCE).[15] CX 25 at 111; Tr. at 49, 79-80. While claimant testified that he did so with the good intention of returning to work, the administrative law judge permissibly rejected claimant's explanation and concluded that, "[c]laimant's testimony about his inability to return to his former employment is not supported by the medical evidence in the record" and is "not credible." Decision and Order at 36; Tr. at 80.

In another instance, claimant admitted to being untruthful to employer about the reason he narrowly failed the running portion of employer's yearly physical fitness test. Tr. at 81-83. Specifically, the day after taking the test, claimant informed employer via email that he failed because "[i]t has only been a month since my doctor cleared me to go back to normal life and I have not run or worked out since January due to my injury." EX 9. A few days later, he offered employer another explanation, that he was suffering from a cold at the time of the test. *Id*. During his hearing, however, he asserted that he failed the test, not because of his lack of physical conditioning or having a cold, but because of his ongoing disability attributable to his November 26, 2011 injury. Tr. at 54, 81-82.

While the majority remands this claim for the administrative law judge to consider whether claimant's injury caused him to fail the running portion of employer's physical fitness test, such a remand presupposes the accuracy of at least one of the three reasons claimant offered. The first reason – that he suffers from an ongoing disability as of November 26, 2011 – was permissibly rejected by the administrative law judge. In concluding that "[c]laimant does not currently suffer from a disability under the Act," the administrative law judge determined that Dr. Meinhardt's October 1, 2012 and September 11, 2013 reports, releasing claimant to work without restriction, along with the September 25, 2012 FCE, indicating that claimant was able to perform at a "medium-

[15] Claimant also argues that Dr. Meinhardt's opinion regarding his ability to return to work as of October 1, 2012 is not credible, because Dr. Meinhardt inaccurately identified his job requirements as "sedentary." CX 25 at 111. However, as the administrative law judge accurately found, Dr. Meinhardt later issued a report clarifying that, as of October 1, 2012, claimant "was released to work without restriction" and could "return to full duty in *whatever capacity*." Decision and Order at 35; CX 25 at 110. Additionally, the administrative law judge permissibly found that Dr. Meinhardt's testimony, that he was not aware of the physical requirements of claimant's job until the date of his deposition, was "less than credible," considering that the first time Dr. Meinhardt examined claimant, he noted that claimant sustained an injury "unloading a truck full of heavy equipment" in Iraq, and claimant's first FCE, which Dr. Meinhardt reviewed, listed his occupation as "Diplomatic Security." Decision and Order at 39; CX 25 at 27-30, 112, 122; EX 6 at 2.

heavy physical demand level," constitutes "strong medical evidence that [c]laimant is able to return to his former employment." Decision and Order at 34-36; CX 25 at 106-107, 111; EX 6 at 14. The other two reasons – that he has been unable to train and that he had a cold at the time of the test – were discredited by claimant himself when he admitted that they were untruthful.

Although claimant may have had good intentions in misleading Dr. Meinhardt and employer, I cannot find fault in the administrative law judge's decision to accord greater weight to the medical records, and no weight to claimant's testimony, as "[i]t is impossible to say whether [c]laimant was untruthful to his doctor and the FCE therapist in 2012, or when undergoing his [physical fitness test with employer], or when communicating with [e]mployer in November 2012, or at the hearing, or at some combination of the foregoing." Decision and Order at 38. *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).

For the foregoing reasons, I would affirm the administrative law judge's Decision and Order, with the exception of the narrow question regarding the initial date claimant was able to return to work.

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GREG J. BUZZARD
Administrative Appeals Judge