



BRB No. 23-0182

TONY L. TERRY)	
)	
Claimant-Respondent)	
)	
v.)	
)	DATE ISSUED: 07/17/2024
ELECTRIC BOAT CORPORATION)	
)	
Self-Insured)	
Employer-Petitioner)	DECISION and ORDER

Appeal of Decision and Order on Remand of Jonathan C. Calianos, Administrative Law Judge, United States Department of Labor.

Scott N. Roberts (The Law Office of Scott Roberts, LLC), Groton, Connecticut, for Claimant.

Edward W. Murphy (Morrison Mahoney LLP), Boston, Massachusetts, for Self-Insured Employer.

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

GRESH, Chief Administrative Appeals Judge, and BUZZARD, Administrative Appeals Judge:

Employer appeals Administrative Law Judge (ALJ) Jonathan C. Calianos’s Decision and Order on Remand (2021-LHC-00463) rendered on a claim filed pursuant to the Longshore and Harbor Workers’ Compensation Act, as amended, 33 U.S.C. §§901-950 (Act). 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.¹ 33 U.S.C. §921(b)(3); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This is the second time this case has been before the Benefits Review Board (the Board). In 2004, Claimant, a pipefitter, filed a claim seeking benefits for work-related neuropathy and carpal tunnel syndrome in both hands. Claimant’s Exhibit (CX) 3 at 4; CX 4 at 8. Employer accepted liability and voluntarily paid him scheduled permanent partial disability (PPD) benefits under 33 U.S.C. §908(c)(3). Claimant’s Motion for Summary Decision (Cl. M/SD.) at 5. It based its payment on Dr. Philo Willets’s 2004 impairment ratings of four and five percent to Claimant’s left and right hands, respectively. *Id.*; *see also* CX 4.

On February 11, 2020, Claimant filed a new claim for benefits, arguing his ongoing sixteen years of work aggravated his 2004 work-related bilateral hand condition. CX 1 at 2. Dr. Willets re-examined Claimant on June 24, 2020. CX 3. Claimant reported his hand symptoms “were about the same or a little worse” since his previous examination on May 20, 2004, and he experienced increased symptoms with “gripping, pinching, tool usage, cold exposure, and driving.” *Id.* at 1-2. Dr. Willets diagnosed Claimant with ongoing bilateral hand neuropathy but found no evidence of worsening impairment despite the increased symptoms. *Id.* at 4-5. On May 17, 2021, Dr. Willets clarified his opinion. Referencing his 2004 impairment ratings of four and five percent, which have not increased, he stated Claimant’s ongoing work and use of vibrational tools from 2004 through his 2020 examination contributed to his increased bilateral hand symptoms but not to increased impairment. CX 2.

Shortly thereafter, Claimant filed a motion for summary decision (M/SD) alleging there is no dispute of material fact regarding his entitlement to additional benefits based on his increased symptoms and “the differential between the respective average weekly wage of 2004 and 2020.” Cl. M/SD. at 1. Employer filed a cross-motion for summary decision (cross-M/SD) arguing Claimant is not entitled to additional benefits because there is no dispute that his ongoing employment did not increase his impairment. ER cross-M/SD at 1.

The ALJ held a conference call on June 22, 2021, during which he issued a bench decision denying Claimant’s M/SD, granting Employer’s cross-M/SD, and denying

¹ This case arises within the jurisdiction of the United States Court of Appeals for the First Circuit because Claimant’s injury occurred in Rhode Island. 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 (4th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003); 20 C.F.R. §702.201(a).

Claimant benefits. Transcript (TR) at 8-9. He found Employer rebutted the Section 20(a) presumption that Claimant suffered a work-related aggravation injury, 33 U.S.C. §920(a), because Claimant's own medical expert found no increase in his bilateral hand impairment. *Id.* at 7. Upon weighing the evidence, the ALJ found Claimant failed to prove he suffered an employment-related aggravation injury "because ... the better weight of the evidence, which is Claimant's own medical expert, reports on this gentleman's symptoms as being the same in 2020" as they were in 2004. *Id.* He issued a short, written order on August 4, 2021, incorporating his bench decision. Order Denying Claimant's Motion for Summary Decision, Granting Employer's Cross-Motion for Summary Decision and Dismissing Claim (Order) at 1.

Claimant appealed, arguing the ALJ misapplied the Section 20(a) presumption.² The Board agreed, holding the ALJ erred in finding Dr. Willets's opinion regarding Claimant's level of impairment is sufficient to rebut the presumption that Claimant's increased symptoms are work-related. *Terry v. Electric Boat Corp.*, BRB No. 21-0567 at 5 (Oct. 31, 2022). As Employer offered no evidence in response to Claimant's M/SD showing Claimant's increased symptoms were not related to his continued employment, the Board held Claimant's 2020 aggravation claim was work-related under the Act as a matter of law. *Id.*

Significant to this appeal, upon holding Claimant established a work-related aggravation injury, the Board remanded the matter to the ALJ "for a determination as to Claimant's entitlement, if any, to additional benefits." *Terry*, slip op. at 5. Thus, while the Board held Claimant established a work-related injury by operation of the unrebutted Section 20(a) presumption, the Board did not address the *extent* of Claimant's disability, if any, as the issue was not raised on appeal. *See* 20 C.F.R. §802.211(b). However, the Board provided instructions as to the calculation of Claimant's average weekly wage (AWW) should the ALJ find Claimant entitled to benefits. *Terry*, slip op. at 5-6.

On remand, the ALJ acknowledged the Board's specific instruction to determine Claimant's entitlement to additional benefits, "if any," but found the Board's additional instruction regarding the calculation of AWW indicated the Board held Claimant was, in fact, entitled to additional benefits:

Moreover, while the Board remanded the claim for "a determination as to Claimant's entitlement, *if any*, to additional benefits," its instructions on remand make clear that all that remains for determination on remand is the

² Claimant's appeal was limited to the issue of causation and the ALJ's application of the Section 20(a) analysis.

recalculation of benefits based on Claimant's average weekly wage as of the 2020 date of injury.

Decision and Order on Remand (Remand DO) at 4-5 (emphasis added by ALJ). The ALJ therefore ordered Employer to pay additional scheduled PPD benefits based on the impairment ratings Dr. Willets assigned in 2004 and Claimant's stipulated AWW in 2020, minus a dollar-for-dollar credit for Employer's 2004 payment of benefits. *Id.* at 5. In addition, the ALJ found Employer liable for all reasonable and necessary medical expenses related to the 2020 aggravation injury.³ *Id.* at 6.

Employer appeals, arguing that both the ALJ and the Board "failed to see the critical distinction" between Claimant's increased symptoms for purposes of establishing an injury and his lack of increased impairment for purposes of establishing disability. Brief of Employer/Petitioner (ER Br.) at 1. Claimant responds, maintaining increased symptoms are sufficient to establish entitlement to benefits.

We agree with Employer that the issues of causation and disability have been conflated throughout this claim, though not by the Board. The only issue previously before the Board in this claim was the ALJ's application of the Section 20(a) analysis to Claimant's alleged aggravation injury.⁴ *See Terry*, slip op. at 3-5. Its holding that the ALJ erred in relying on Employer's evidence of no increased impairment rating (disability) as rebutting the work-relatedness of Claimant's injury (causation) constitutes the law of the case.⁵ *See Schwirse v. Marine Terminals Corp.*, 45 BRBS 53, 55 (2011), *aff'd sub nom.*

³ Employer has not requested review of the ALJ's finding on Claimant's entitlement to medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907. Therefore, we affirm this finding as unchallenged on appeal. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57, 58 (2007).

⁴ On remand, the ALJ dismissed Employer's argument that the Board failed to address its position that Claimant was required to demonstrate increased impairment to prove injury under the Act, finding the Board previously considered and rejected this argument. Remand DO at 4. This finding is correct, but only as to the issue before the Board: application of the Section 20(a) analysis to Claimant's aggravation claim. The Board did not address the issue of Claimant's impairment in terms of the extent of his disability, if any, because that issue was not before it. In fact, the Board specifically remanded the claim for the ALJ to consider that issue. *Terry*, slip op. at 5.

⁵ No exception to the law of the case doctrine applies, as there has not been a change in the underlying factual situation, there has been no intervening controlling case authority,

Schwirse v. Director, OWCP, 736 F.3d 1165 (9th Cir. 2013) (a fully and previously addressed issue is law of the case); *Irby v. Blackwater Security Consulting*, 44 BRBS 17, 20 (2010); *Kirkpatrick*, 39 BRBS at 70 n.4; *Ravalli v. Pasha Maritime Services*, 36 BRBS 91, 92 (2002), *denying recon. in* 36 BRBS 47 (2002).

However, holding Claimant’s aggravation claim compensable under the Act did not automatically entitle him to scheduled PPD benefits. Awards under the schedule, the exclusive remedy for PPD benefits for body parts enumerated therein, are based, in part, on medical ratings of the degree of permanent physical impairment. 33 U.S.C. §908(c)(3); *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 271 (1980); *Barker v. U.S. Department of Labor*, 138 F.3d 431, 434-435 (1st Cir. 1998). This is a factual determination the ALJ should decide as the trier-of-fact. 33 U.S.C. §§919(a), (d); 20 C.F.R. §§702.332, 702.338, 702.339; 29 C.F.R. §18.12(b).

In doing so, the ALJ is not bound by any particular standard or formula and may base his determination of the extent of disability under the schedule on credible medical opinions and observations, as well as on the claimant’s symptoms and the physical effects of his injury. *Cotton v. Army & Air Force Exch. Services*, 34 BRBS 88, 89 (2000); *Pimpinella v. Universal Maritime Services, Inc.*, 27 BRBS 154, 159-160 (1993).⁶ That is why the Board, after holding Claimant’s aggravation injury was work-related as a matter of law, remanded the claim to the ALJ “for a determination as to Claimant’s entitlement, *if any*, to additional benefits.” *Terry*, slip op. at 5 (emphasis added).

While the Board went on to note Claimant’s argument that he is entitled to “additional compensation based on [his] allegedly higher average weekly wage” as of his aggravation, the Board neither expressed an opinion on the merits of the argument nor stated that he suffered any disability. *Terry*, slip op. at 5-6; *see* 33 U.S.C. §§921(b)(3)-(4); *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 606-607 (1st Cir. 2004); *Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157, 159 (1990); *Randolph v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 443, 446 (1989); *Stokes v. George Hyman Construction Co.*, 19 BRBS 110, 113 (1986); 20 C.F.R. §§802.301(a), 802.405(a).

nor has Employer demonstrated the Board’s first decision was clearly erroneous. *See generally Kirkpatrick v. B.B.I., Inc.*, 39 BRBS 69, 70 n.4 (2005).

⁶ The Act and regulations do not require impairment ratings to be based on medical opinions using the American Medical Association (AMA) *Guides* except in cases involving compensation for hearing loss and voluntary retirees. 33 U.S.C. §§908(c)(13), 902(10); *see Pierce v. Elec. Boat Corp.*, 54 BRBS 27, 30 (2020); *Alexander v. Triple A Mach. Shop*, 34 BRBS 34, 37 (2000), *rev’d on other grounds sub nom. Alexander v. Director, OWCP*, 297 F.3d 805 (9th Cir. 2002); 20 C.F.R. §§702.441, 702.601.

Because the ALJ misinterpreted the Board's instructions, he did not "consider a central issue, and one which was properly before him." *Hoodye v. Empire/United Stevedores*, 23 BRBS 341, 344 (1990).

The Act and its regulations mandate that an ALJ set forth findings of fact and conclusions of law and adequately detail the rationale behind his decision, specifying which evidence he relied upon and why. 33 U.S.C. §919(c); 20 C.F.R. §702.348; *Dodd v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 245, 248 (1989). Thus, remand is appropriate when an ALJ does not make necessary findings. Because the ALJ did not make factual findings or conclusions of law after considering the parties' arguments as to the extent of Claimant's disability or if he has any disability at all, we must remand the claim.⁷ See *Gelinas v. Electric Boat Corp.*, 45 BRBS 69, 71 (2011); *Shrout v. General Dynamics Corp.*, 27 BRBS 160, 165 (1993); *Dodd*, 22 BRBS at 248; see also *Frazier v. Nashville Bridge Co.*, 13 BRBS 436, 437 (1983) (ALJ must provide enough detail for reviewing body to assess the decision).⁸

⁷ The Board's prior decision addressed the ALJ's rationale for denying Claimant's M/SD and dismissing the claim (i.e., the ALJ's finding that Claimant did not suffer a work-related aggravation injury). It did not address, however, whether either party is entitled to summary decision based on their arguments to the ALJ regarding Claimant's disability or lack thereof. Instead, the Board remanded the claim for the ALJ to consider the disability question in the first instance. Thus, procedurally speaking, upon this remand the parties' M/SD and cross-M/SD will still be pending with the ALJ. While the Board's prior decision makes clear Section 20(a) is not a basis for denying the claim, the ALJ still must rule on the parties' motions for summary decision by addressing their arguments with respect to the extent of Claimant's alleged disability and entitlement to additional compensation. Considering the ALJ is not bound by a physician's impairment opinion in determining the extent of a claimant's scheduled permanent partial disability, see *Cotton*, 34 BRBS at 89, on remand he must evaluate and fully explain whether the record before him eliminates any issues of material fact as to Claimant's entitlement to additional compensation, or whether there remains a potential factual dispute as to the extent of Claimant's disability, thereby necessitating a formal hearing. 29 C.F.R. §18.72(a); see also *Morgan v. Cascade General, Inc.*, 40 BRBS 9, 11 (2006).

⁸ We note the first time this claim came before the Board, the Board did not address the ALJ's alternate finding "for appellate purposes" that even if Claimant's aggravation claim is compensable, he would "find that there's been no change in disability." TR at 7-8. The ALJ's alternate finding was unaccompanied by specific evidentiary or legal support and, regardless, his conflating the issues of causation and disability necessitated the

Accordingly, we vacate the ALJ's Decision and Order on Remand and remand for the ALJ to determine whether the parties have presented sufficient evidence such that no genuine issue of fact exists as to the extent of Claimant's disability, if any, consistent with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §§551-559.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring in part and dissenting in part:

I continue to respectfully dissent from the original Board decision to reverse outright the ALJ's conclusion, in his August 4, 2021 Order, that Claimant's aggravation claim is not compensable. I would have vacated the ALJ's finding and remanded the case for the ALJ to reconsider the issue. As I noted before, the Board is not permitted to engage in fact-finding. *See Director, OWCP v. Jaffe New York Decorating*, 25 F.3d 1080 (D.C. Cir. 1994); *LaFaille v. Benefits Review Board*, 884 F.2d 54 (2d Cir. 1989). Therefore, remand was required for the ALJ to properly apply the Section 20(a) analysis and credit and weigh the evidence, if he gets that far into the analysis. *Rajotte v. Gen. Dynamics Corp.*, 18 BRBS

Board's reversal on causation and remand on the question of disability. 5 U.S.C. §557(c)(3)(A); *Gelinas*, 45 BRBS at 71.

85 (1986); *Adams v. Gen. Dynamics Corp.*, 17 BRBS 258 (1985); *Dower v. Gen. Dynamics Corp.*, 14 BRBS 324 (1981).

Otherwise, I concur with my colleagues that the ALJ's Decision and Order on Remand should be vacated and remanded for a determination of the extent of Claimant's disability, if any.

JUDITH S. BOGGS
Administrative Appeals Judge