U.S. Department of Labor

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

BRB No. 20-0446

LORENZ A. SERSHEN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 03/12/2021
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.

Richard B. Donaldson, Jr. (Jones, Blechman, Woltz & Kelly, P.C.), Newport News, Virginia, for Claimant.

Benjamin M. Mason (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured Employer.

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

PER CURIAM:

Claimant appeals Administrative Law Judge Monica Markley's Decision and Order Denying Benefits (2017-LHC-01049) 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 began working for Employer in 1983. He sustained a back injury in 1994 which ultimately resulted in his having back surgery, performed by Dr. J. Abbott Byrd, III, in December 2004. In January 2005, Dr. Byrd imposed permanent light-duty work restrictions of no lifting greater than 25 pounds and limited bending. CX 2A. Claimant thereafter worked for Employer in a light-duty capacity involving waterfront support. On March 10, 2011, he was injured at work in the course of doing laundry, when he went to sit in a chair and its legs "snapped off" and he was thrown "very hard" to the ground. HT at 12-13. He reported severe pain in his arm, hip, back and buttocks which was different than the pain he had been experiencing before the injury, and he returned to Dr. Byrd for an evaluation. *Id.* at 13-14.

Dr. Byrd diagnosed a contusion of the lumbar spine, prescribed medication, and instructed Claimant to continue to treat with his pain management specialist, Dr. Antonio Quidgley-Nevares, "for his low back pain from his original work injury."[1] CX 2. He also advised Claimant "will return to work tomorrow with his permanent light duty restrictions." *Id.* Claimant returned to the same light-duty job in waterfront support.[2] HT at 18-19. He sustained additional work injuries to his arms on September 4, 2014, and September 21, 2015. Following the latter injury, he submitted to a drug test. Employer terminated him on October 14, 2015, as a result of a failed drug test.[3] HT at 24. Claimant has not worked since. *Id.* at 27; EX 3, Dep. at 15-16, 19.

On September 22, 2016, Dr. Quidgley-Nevares recommended Claimant "stop working and apply for disability" due to increased back pain and his report that he fell asleep on the job due to his medications. CX 6. On January 10, 2017, he opined that Claimant is totally and permanently disabled as a result of his July 18, 1994 work injury and subsequent aggravating back injury on March 10, 2011. *Id.* Claimant thereafter filed a claim for his March 10, 2011 injury, alleging he is permanently totally disabled as of September 22, 2016. Employer controverted the claim. The administrative law judge denied the claim, finding Claimant did not establish his inability to return to his usual work due to his March 10, 2011 injury.

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[1]In April 2011, Dr. Quidgley-Nevares diagnosed chronic low back pain, lumbar radiculopathy and spondylosis, muscle spasm and chronic pain syndrome. CX 6.

[2]Employer voluntarily paid Claimant temporary total disability benefits for March 21, 2011. EX 9.

[3]The parties stipulated that Claimant, through his union, was contesting his termination. Decision and Order at 3.

On appeal, Claimant challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's decision.

Claimant contends the administrative law judge erred in finding he did not establish his prima facie case of total disability. He asserts the administrative law judge failed, "as required by law," to give determinative weight to the unequivocal, well-supported opinion of his treating physician, Dr. Quidgley-Nevares, which, Claimant adds, constitutes the only evidence of record addressing Claimant's ability to work following his 2011 work injury. He further contends the administrative law judge erred in finding it is "not believable" that he continued to work for Employer for four years following his March 2011 injury, but then became totally and permanently disabled only after he was terminated. Claimant maintains this finding neglects to consider that his post-March 2011 work involved tasks outside the lifting restriction Dr. Byrd imposed, as well as the principle that an employee may be found totally disabled despite continued employment.

We reject Claimant's contentions. A claimant establishes a prima facie case of total disability by demonstrating he is unable to return to his usual employment due to his work injury. *See, e.g., Marine Repair Services, Inc. v. Fifer*, 717 F.3d 327, 47 BRBS 25(CRT) (4th Cir. 2013); *Norfolk Shipbuilding & Dry Dock Co. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999). The administrative law judge is entitled to weigh the evidence and draw inferences therefrom. *Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994). The Board may not reweigh the evidence, but must affirm a decision supported by substantial evidence and in accordance with law. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP* [*Brickhouse*], 315 F.3d 286, 36 BRBS 85(CRT) (4th Cir. 2002).

The administrative law judge discussed the relevant evidence pertaining to Claimant's ability to work following his March 10, 2011 work injury. She provided rational reasons for according greater weight to Dr. Byrd's returning Claimant to work with the same restrictions, as corroborated by evidence that Claimant successfully performed this work for four years before being terminated. Dr. Byrd's March 21 and April 20, 2011 reports both state Claimant is capable of working within the permanent light duty restrictions originally imposed following his 2005 back surgery. CXs 2B, 2C. Thus, contrary to Claimant's contention, Dr. Quidgley-Nevares's reports do not constitute the only evidence addressing Claimant's ability to work following his 2011 work injury. The administrative law judge permissibly accorded less weight to Dr. Quidgley-Nevares's opinion. She rejected Dr. Quidgley-Nevares's opinion because it lacks contemporaneous treatment notes or objective support and therefore is conclusory in nature. In this regard, she found it significant that the "massive change" in Claimant's work status Dr. Quidgley-Nevares recommended, i.e., from minimal limitations in April 2015 to no work in September 2016, lacks any support, other than Claimant's self-reporting in September 2016

that he was falling asleep at work due to his medication. The administrative law judge found this representation belied by the fact Claimant was not working at the time he made that statement. She permissibly accorded less weight to Claimant's testimony that he could no longer perform this light duty job. She found Claimant's testimony lacks credibility due to the circumstances surrounding his termination and because she found, upon reflection of the entire record, it is "too coincidental" and "not believable" that he continued to perform his usual work with Employer for over four years following his March 2011 work injury and then allegedly became permanently and totally disabled only after he was terminated, for cause, from that job. Decision and Order at 2-10; *see, e.g., Ceres Marine Terminals, Inc. v. Director, OWCP* [*Jackson*], 848 F.3d 115, 50 BRBS 91(CRT) (4th Cir. 2016). Contrary to Claimant assertion, no "mechanical" deference is accorded to the opinions of treating physicians. Their opinions are to be weighed and credited along with the opinions of any other expert of record – an analysis the administrative law judge performed in this case. Decision and Order at 12-13; *see, e.g., Pisaturo v. Logistec, Inc*., 49 BRBS 77 (2015) (affirming the crediting of the employer's medical expert over that of claimant's treating physician as the latter's opinion was not well reasoned); *see also generally Consolidation Coal Co. v. Held*, 314 F.3d 184 (4th Cir. 2002).

Moreover, we reject Claimant's contention that the administrative law judge erroneously rejected his testimony regarding his ability to work. The administrative law judge rationally accorded Claimant's testimony diminished weight based on "the circumstances under which his job with Employer ended."[4] Decision and Order at 13; *see generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). In addition, she rationally rejected Claimant's contention that his light-duty position involved tasks beyond the lifting restriction Dr. Byrd imposed, based on the job Tab Pake, a general foreman in Claimant's department, described because Mr. Pake credibly testified that lifting a respirator involved lifting less than 25 pounds, only an overloaded bag would weigh over that amount, and Claimant did not complain that he was required to work outside his restrictions (which included not lifting over 25 pounds). Decision and Order at 13. The administrative law judge's finding that Claimant failed to establish his work injury caused an inability to perform his usual

[4]Claimant does not dispute he stopped working for Employer because he was terminated for cause, not due to any work-related injuries/disabilities. *See generally Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993) (where claimant had been fired from a suitable post-injury job with employer because of the violation of a company rule, employer had met its burden of establishing the availability of suitable alternate employment – thus, claimant's inability to perform the post-injury job was due to his own misfeasance and not because of his work-related disability).

work is supported by substantial evidence. Consequently, we affirm the denial of disability benefits.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge