U.S. Department of Labor

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

BRB No. 22-0181

RIFAT DEDIC	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
FLUOR FEDERAL GLOBAL PROJECTS	)	
	)	DATE ISSUED: 5/26/2023
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Steven B. Berlin, Administrative Law Judge, United States Department of Labor.

Clifford R. Mermell (Gillis, Mermell, & Pacheco P.A.), Miami, Florida, for Claimant.

John F. Karpousis and Michael J. Dehart (Freehill, Hogan & Mahar, LLP), New York, New York, for Employer/Carrier.

BEFORE: GRESH, Chief Administrative Appeals Judge, BOGGS and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Steven B. Berlin's Decision and Order on Remand (2017-LDA-00648) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (Act), as

extended by the Defense Base Act (DBA), 42 U.S.C. §1651 *et seq*. 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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). This case is before the Benefits Review Board for the second time.

Claimant, a tow truck driver and mechanic, sustained a back injury when he fell to the ground while pulling a cable from a disabled vehicle on September 12, 2016, while working for Employer in Afghanistan.[1] Hearing Transcript (TR) at 25-26. He was driven to a medical clinic where he stayed for four days. Ultimately, Employer sent Claimant to Dubai for further examination, but he did not receive treatment there and was then sent home to Bosnia. TR at 28-31. Claimant was referred to Dr. Asmir Hrustic, an orthopedic specialist who ordered a magnetic resonance imaging (MRI) scan, recommended physical therapy and spa treatments, prescribed Claimant anti-depressants, and referred him to Dr. Zoraj Sijercic, a neuropsychiatrist, for anxiety and depression. TR 33, 37, 39-41.

In the initial Decision and Order, ALJ Morris D. Davis found Claimant established a prima facie case for his psychological injury and was entitled to the Section 20(a) presumption, 33 U.S.C. §920(a). 2018 Decision and Order Denying Benefits (D&O#1) at 13. He determined Employer rebutted the presumption with Dr. John Tsanadis's opinion who noted the lack of reliability of Claimant's self-reported symptoms and there was no evidence of a specific event that would produce the symptoms Claimant described. *Id*. ALJ Davis then weighed the evidence as a whole and found Claimant not credible and, because his therapists relied heavily on his subjective complaints of psychiatric symptoms, gave less weight to the diagnoses of Drs. Sijercic, Zihnet Selimbasic, and Mirsad Jarakovic. *Id*. at 14.

Moreover, he determined their "diagnoses are stated summarily with little explanation for how they reached their conclusions." *Id*. at 14. Specifically, ALJ Davis found Claimant not credible because: 1) he told physicians he could not work, but numerous AirBNB reviews identified him by name as administering the rental of his family's property; 2) he travelled with his family on a beach vacation despite stating he has agoraphobia; and 3) his score on the Test of Memory Malingering (TOMM) resulted in implausible results. *Id*. at 15. Therefore, ALJ Davis found Claimant did not establish a

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Second Circuit because the district director who filed the ALJ's decision is in New York. 33 U.S.C. §921(c); *McDonald v. Aecom Tech. Corp.*, 45 BRBS 45 (2011).

work-related psychological injury. *Id.* at 16. With respect to the claimed work-related orthopedic injury, he determined Claimant did not establish a prima facie case of total disability and that Claimant can return to his usual work; therefore, he denied Claimant disability and medical benefits. *Id.* at 17-18.

Claimant appealed, challenging the denial of benefits. The Board vacated ALJ Davis's determination that Employer's expert, Dr. Tsanadis, rebutted the Section 20(a) presumption, 33 U.S.C. §920(a), because he did not state that Claimant did not have anxiety or depression, nor did he opine that those conditions are not related to Claimant's work. *Dedic v. Fluor Federal Global Projects*, BRB No. 19-0149 (Sept. 12, 2019), slip op. at 3 (Board Remand). The Board reversed ALJ Davis's finding that Employer rebutted the Section 20(a) presumption for Claimant's psychological condition and held that in the absence of any other rebuttal evidence in addition to Dr. Tsanadis's opinion, Claimant's depression and anxiety are work-related as a matter of law. Board Remand at 4. Thus, the Board remanded the matter for additional determinations related to that injury in accordance with its holding. The Board affirmed ALJ Davis's determination that Claimant did not establish a prima facie case of total disability for his orthopedic injury because he did not show he could not return to his usual work due to that injury. *Id.* at 3-6.

On remand, as ALJ Davis had retired, ALJ Carrie Bland issued an Order on March 5, 2020, informing the parties of the pending reassignment of the case and allowing them to brief the "issues raised in the Board's remand." The case was reassigned to ALJ Steven B. Berlin.

In his 2022 Decision and Order on Remand (D&O#2), the subject of this appeal, the ALJ found Claimant failed to establish a prima facie case of total disability with regard to his psychological injury and denied disability benefits. Although the ALJ concluded Claimant is not disabled within the meaning of the Act, he found Claimant entitled to past and future medical benefits for that work-related psychological injury, with the exception of a 2.5-month period when Claimant was undergoing outpatient treatment. *Id*. at 18. Claimant appeals the ALJ's decision.

On appeal, Claimant contends the ALJ erred in finding he is not disabled due to his psychiatric condition and that the out-patient program he attended was not medically necessary. He asserts the ALJ should have awarded him temporary total disability (TTD) benefits for his work-related psychological injury commencing March 28, 2017, until June 15, 2018. Specifically, Claimant argues he is entitled to TTD from June 16, 2018, and continuing, because only one doctor changed his opinion. Claimant also contends the ALJ erred in denying reimbursement for the costs of the doctor-recommended outpatient program he attended. Employer responds, urging affirmance of the ALJ's decision on remand. Claimant filed a reply brief.

Claimant first argues the ALJ should not have engaged in a credibility determination on remand because he is not the trier-of-fact in this case; rather, Claimant asserts, as the Board held his psychological condition is work-related, the only issue for the ALJ to address on remand was whether to award benefits. Claimant is mistaken. In remanding the case, the Board stated the ALJ erred in finding Employer rebutted the Section 20(a) presumption with Dr. Tsanadis's opinion and, absent any other rebuttal evidence, held Claimant's psychological injury is work-related as a matter of law. Board Remand at 3. The Board remanded the case for the ALJ to make the determinations to resolve the remaining disputes related to this injury. *Id*. at 4. Among those determinations is whether Claimant is disabled by the work injury. Therefore, the ALJ permissibly interpreted the Board's remand instruction as focusing his inquiry on whether Claimant is disabled. *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 1354, 27 BRBS 41, 57(CRT) (9th Cir. 1993) ("The ALJ properly restricted the scope of the remand proceedings to the terms of the Board's remand order. *See* 20 C.F.R. §802.405."). As the employee bears the burden of establishing the nature and extent of his disability, and the Section 20(a) presumption does not apply to this issue, it follows that the ALJ cannot award any benefits until he determines what type of benefits are due. *Gacki v. Sea-Land Serv., Inc.*, 33 BRBS 127 (1998); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1980). In order to conduct this analysis, the ALJ must weigh the evidence related to the nature and extent of the disability. Therefore, we reject Claimant's assertion that the ALJ should not have weighed the evidence on remand.[2]

Claimant contends the ALJ erred in finding he is not disabled due to his psychological condition as that finding is not supported by substantial evidence and should be reversed. He maintains all medical reports and opinions for the period between March 28, 2017, and June 15, 2018, agreed he was unable to work and, therefore, he is entitled to TTD compensation for that time period. Claimant also argues the ALJ erred in finding he is not credible.

To establish a prima facie case of total disability, the claimant must show he cannot return to his regular or usual employment due to his work-related injury. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991). The mere diagnosis of an occupational disease does not establish a disability. *Liberty Mut. Ins. Co. v. Commercial Union Ins. Co.*, 978 F.2d 750, 26 BRBS 85(CRT) (1st Cir. 1992). In order to determine whether the claimant has shown total disability, the ALJ must compare the claimant's medical restrictions with the specific requirements of his usual employment. *Carroll v.*

[2] Moreover, both ALJ Davis and ALJ Berlin found Claimant's testimony relating to his ability to work was not credible; therefore, any alleged error is harmless. D&O#1 at 14-16; D&O#2 at 6-8.

Hanover Bridge Marina, 17 BRBS 176 (1985). However, 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 testimony regarding his symptoms and the physical effects of his injury. *Pimpinella v. Universal Mar. Serv. Inc.*, 27 BRBS 154 (1993).

In addressing whether Claimant's psychological injury disables him, the ALJ in this case reviewed the opinions of Drs. Selimbasic, Jarakovic, and Tsanadis. He found Dr. Selimbasic's opinion insufficient to support a conclusion that Claimant cannot return to work because "[a]n opinion that a patient should continue to receive therapy is not an opinion that the patient is incapable of any work." D&O#2 at 15; EX DD at 39:6-19. He also determined Dr. Jarakovic's opinion was internally inconsistent because, while Dr. Jarakovic stated Claimant's condition was critical and recommended a check-up in one or two months, he did not place any restrictions on Claimant's ability to work. D&O#2 at 16. The ALJ credited Dr. Tsanadis's opinion, except as to the six weeks of cognitive behavioral therapy he recommended, because that recommendation was based on Claimant's erroneous statement that he was an inpatient in a psychiatric hospital. *Id*.

Dr. Selimbasic examined Claimant while he was in the outpatient clinic, diagnosed him with mixed anxiety depressive disorder, and recommended Claimant continue psychotherapy and regular checkups with a neuropsychiatrist at the outpatient clinic. CX 11 at 54. Dr. Selimbasic opined: "based on the case history, clinical features, previous medical documents and treatment, the development of the condition and the effects of the daily hospital treatment[,]" Claimant has anxiety depressive disorder. Although his discharge note did not address Claimant's ability to work, he testified in his deposition that Claimant did not work while under outpatient care and "is still not able to work" as it is "essential for him to be still in this therapy[.]" EX DD at 35-37. The ALJ found Dr. Selimbasic's opinion that Claimant cannot work unpersuasive because he relied on Claimant's incredible self-reporting and was unaware of Claimant's rental property business and related dealings with the pubic, and because the doctor seemed more like an advocate and attempted to discount Claimant's high scores on the General Assessment of Functioning test by stating the test does not account for Claimant's emotional functioning, fear, or anxiety. D&O#2 at 14-15.

Dr. Tsanadis opined "[t]here is no consistent and/or reliable evidence to conclude that the claimant is literally incapable of performing material and substantial duties of his occupation due to mental illness" and "[t]here is no consistent and/or reliable evidence that the claimant would be incapable, from a psychological/neuropsychological perspective, of performing an occupation for which he has reasonable skills, training, or experience […] there are questions regarding the reliability of his self-report[.]" EX G at 7, 9. He also noted Claimant scored 80 out of 85 on the General Assessment of Functioning test, which

equated to mild symptoms that would not impact functioning. EX BB at 19. The ALJ accepted Dr. Tsanadis's opinion that Claimant's psychological injury did not prevent him from returning to work, but he did not credit the doctor's earlier initial opinion that Claimant required outpatient treatment before returning to work. He did not credit the earlier opinion because it conflicted with his assessment that Claimant was exaggerating his symptoms and was made when the doctor understood Claimant had required inpatient psychiatric hospitalization. D&O#2 at 16. Claimant saw Dr. Jarakovic on November 10, 2017, who diagnosed Claimant with mixed anxiety depressive disorder. CX 13. While he opined Claimant's condition was "rather critical," he recommended only continued psychotherapy with a "check-up examination in a month to two months, sooner if necessary." *Id*. He said nothing about work limitations due to this condition. CX 14.

As no doctor limited Claimant's work activities, the ALJ's weighing of the evidence is rational and supported by the record. *Chong v. Todd Pac. Shipyards Corp.*, 22 BRBS 242 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP*, 909 F.2d 1488 (9th Cir. 1990); *Peterson v. Washington Metro. Area Transit Auth.*, 13 RRBS 891 (1981). Questions of witness credibility are for the ALJ as the trier-of-fact, and the Board must respect his evaluation of all testimony, including that of medical witnesses. *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). Furthermore, it is solely within the ALJ's discretion to accept or reject all or any part of any testimony according to his judgment. *Perini Corp. v. Heyde*, 306 F. Supp. 1321 (D.R.I. 1969). 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). Additionally, the choice among reasonable inferences is left to the ALJ. The Board does not have the authority to engage in *de novo* review of the evidence, nor may the Board substitute its credibility determinations for those of the ALJ. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). We, therefore, affirm the ALJ's conclusion that Claimant has not established he is disabled because of his work-related psychological injury by a preponderance of the evidence.

Claimant also contends the ALJ erred in finding his participation in an outpatient program from March 28 to June 9, 2017, was not necessary or reasonable, and therefore erred in denying medical benefits for that 2.5-month period. The ALJ found the outpatient program was not medically necessary because Claimant stated to one of the doctors that he did not believe his symptoms were serious enough to warrant an outpatient program. D&O#2 at 18; *see* EX G at 6.

Section 7 of the Act, 33 U.S.C. §907, does not require an injury to be economically disabling in order for a claimant to be entitled to medical expenses; it requires only that the

injury be work-related. *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). In order for medical care to be compensable, it must be appropriate for the injury, and the claimant must establish the medical expenses are reasonable, necessary, and related to the injury. *Id.*; 20 C.F.R. §702.402. While the ALJ is entitled to authorize or refuse a claimant treatment, he cannot refuse treatment as unnecessary and unreasonable if a physician prescribed it and no other physician found the treatment to be unnecessary or unreasonable. *Amos v. Director, OWCP*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir.), *cert. denied*, 528 U.S. 809 (1999); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20, 25 (1989).

The ALJ's reasoning for denying benefits for Claimant's outpatient treatment does not comport with any of the doctors' opinions. Dr. Sijercic diagnosed anxiety depressive disorder and referred Claimant to the University Clinic, a psychiatric clinic, for admittance and examination because he was not improving with therapy. CX 10 at 48, 52. Dr. Selimbasic diagnosed Claimant with anxiety depressive disorder, agreed with the outpatient treatment, and recommended continued psychotherapy after Claimant's discharge from the outpatient clinic as well as returning there for regular check-ups. CX 11 at 54. Dr. Jarakovic diagnosed mixed anxiety depressive disorder and prescribed on-going individual and support psychotherapy and a check-up in a month or two. CX 13 at 56. Dr. Tsanadis acknowledged Claimant showed signs of distress and concluded there may have potentially been a degree of depression and anxiety despite Claimant's exaggerations. EX G at 7. He later retracted those diagnoses because of inadequate data due to Claimant's providing unreliable information and upon learning Claimant did not spend time in a mental health facility as an inpatient but was participating in an outpatient program. He did not comment on the program. EXs G, BB. Therefore, none of the doctors opined Claimant's treatment at the outpatient clinic was unreasonable or unnecessary.

In contrast with the doctors' opinions, the ALJ, without explanation, relied on Claimant's own statement that he "did not believe his psychological condition was that serious" to warrant outpatient treatment in order to deny him medical benefits for the outpatient program. EX G at 6; D&O#2 at 17; Cl. Pet. at 36. Claimant is not an expert and is not in a position to render his own medical advice. As no doctor opined Claimant's outpatient treatment was unnecessary or unreasonable, the ALJ erred in denying these benefits based solely on Claimant's non-medical statements.[3] Therefore, we reverse the ALJ's denial of those medical expenses and hold Employer is liable for medical benefits

[3] The Board, as the reviewing body, is not bound to accept an ultimate finding or inference if the decision discloses it was reached in an invalid manner, *Howell v. Einbinder*, 350 F.2d 442 (D.C. Cir. 1965), nor must it accept the fact-finder's decision when it is unable to conscientiously conclude the decision is supported by substantial evidence, *Goins v. Noble Drilling Corp.*, 397 F.2d 392 (5th Cir. 1968).

incurred during Claimant's outpatient treatment at the psychiatric clinic between March 28 to June 9, 2017. We remand the case for the ALJ to assess the amount of these benefits. *Watson v. Huntington Ingalls Indus., Inc.*, 51 BRBS 17 (2017).

Accordingly, we reverse the ALJ's denial of medical benefits for the period between March 28 and June 9, 2017, for Claimant's outpatient treatment and remand the case for an award of medical benefits in accordance with this opinion. In all other respects, we affirm the ALJ's Decision and Order on Remand.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge