U.S. Department of Labor

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

BRB No. 20-0411

TERRY T. ROBERTS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HUNTINGTON INGALLS, INCORPORATED-PASCAGOULA OPERATIONS	)	
	)	
Self-Insured Employer-Petitioner	)	DATE ISSUED: 11/23/2021
	)	
HORIZON SHIPBUILDING, INCORPORATED	)	
	)	
and	)	
	)	
AMERICAN LONGSHORE MUTUAL ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Angela F. Donaldson, Administrative Law Judge, United States Department of Labor.

Robert E. O'Dell, Vancleave, Mississippi, for Claimant.

Paul B. Howell (Franke & Salloum, PLLC), Gulfport, Mississippi, for Huntington Ingalls, Inc.-Pascagoula Operations.

Douglas L. Brown (Brady Radcliff & Brown, LLP), Mobile, Alabama, for Horizon Shipbuilding, Inc., and American Longshore Mutual Association, Limited.

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

PER CURIAM:

Huntington Ingalls, Incorporated-Pascagoula Operations (Ingalls) appeals Administrative Law Judge (ALJ) Angela F. Donaldson's Decision and Order (2018-LHC-00956, 2019-LHC-00155) rendered on claims filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (Act).[1] 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).

Claimant injured his back on May 25, 1992, during the course of his employment for Ingalls. Decision and Order at 4. He sustained a large central herniated disc at L4-5, with radicular symptoms, which he treated conservatively. HIX 18 at 11-12.[2] The parties settled this claim, 33 U.S.C. §908(i), on April 3, 1995, for $85,000, leaving medical benefits open. Decision and Order at 5.

Claimant subsequently returned to his former employment as a welder in 1996 and, relevant to this appeal, worked for Horizon Shipbuilding, Incorporated (Horizon) from March 9, 2017, until he retired on September 17, 2017. *Id*. at 5, 12. On May 12, 2017, Ingalls controverted its liability for continuing medical care. HIX 9. Claimant filed a claim against Horizon on July 16, 2018, solely for medical benefits, 33 U.S.C. §907, alleging his work activities there aggravated the pre-existing lower back injury he suffered in 1992 while working for Ingalls. HSX 1 at 1; Tr. at 9. The Office of Administrative Law Judges consolidated the claims against Ingalls and Horizon on January 10, 2019, for a hearing on August 30, 2019. Decision and Order at 2.

[1] The Board's processing of this case was substantially delayed due to the COVID-19 pandemic, which impacted the Board's ability to obtain records from the Office of Administrative Law Judges and the Office of Workers' Compensation Programs.

[2] HIX refers to Ingalls' exhibits; HSX refers to Horizon's exhibits.

After finding Claimant entitled to invocation of the Section 20(a) presumption, 33 U.S.C. §920(a), against both Employers, the ALJ weighed the evidence as a whole and concluded Claimant's permanent back condition is due to the natural progression of his May 1992 work injury with Ingalls.[3] Decision and Order at 25-28. Accordingly, the ALJ determined Ingalls must continue paying Claimant's medical benefits. *Id.* at 33.

On appeal, Ingalls challenges the ALJ's responsible employer determination. Horizon and Claimant respond, urging affirmance.

The responsible employer issue in this case is limited to whether Claimant's back disability permanently increased during the course of his employment for Horizon from March 9 to September 17, 2017. If Claimant's disability resulted from the natural progression of the 1992 injury, Ingalls remains liable; if Claimant's employment with Horizon aggravated, accelerated, or combined with the prior injury to result in disability, Horizon is the responsible employer. *Sea-Land Services, Inc. v. Director, OWCP [Ceasar]*, 949 F.3d 921, 54 BRBS 9(CRT) (5th Cir. 2020); *Marinette Marine Corp. v. Director, OWCP*, 431 F.3d 1032, 39 BRBS 82(CRT) (7th Cir. 2005); *Delaware River Stevedores, Inc. v. Director, OWCP*, 279 F.3d 233, 35 BRBS 154(CRT) (3d Cir. 2002); *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991).

Aggravation of an underlying condition need not be produced by an identifiable traumatic incident, but may be caused by cumulative trauma resulting from work activities or conditions. *Foundation Constructors*, 950 F.2d 621, 25 BRBS 71(CRT); *Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986); *Steed v. Container Stevedoring Co.*, 25 BRBS 210 (1991). The aggravation rule applies not only where the underlying condition itself is affected but also where the work causes a claimant's underlying condition to become symptomatic. *Delaware River Stevedores, Inc. v. Director, OWCP*, 279 F.3d 233, 35 BRBS 154(CRT) (3d Cir. 2002) (subsequent employer liable only for period of temporary disability); *Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981); *Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986). Each potential employer bears the burden of persuading the fact-finder that its evidence is entitled to greater weight.

The ALJ relied on Dr. Chen's opinion to conclude that Claimant did not aggravate his back condition while working for Horizon. She credited Dr. Chen's medical records showing consistent pain scores and only slight and gradual increases in Claimant's pain medication, and Dr. Chen's deposition testimony describing a natural progression of

[3] The ALJ mentioned rebuttal of the Section 20(a) presumption, but she based her decision only on her weighing of the evidence as a whole. Decision and Order at 27-28

Claimant's back condition since the 1992 work injury with Ingalls. Decision and Order at 29; *see* HIX 23 at 66, 68, 72, 80-85, 87-113, 123-126, 133. Specifically, Dr. Chen was asked at his deposition whether Claimant's work activities subsequent to his working for Ingalls permanently or temporarily aggravated his back condition. HIX 36 at 27. Rather than identifying an employer, Dr. Chen replied by analogizing to wear and tear on a car that has been driven 200,000 miles, and he opined the wear and tear on Claimant's back is due to ageing and to work and non-work-related activity. *Id*. Dr. Chen also used "twin brother" and "professional athlete" analogies to opine, generally, that greater activity causes greater progression of a back condition and, in Claimant's case, his pain medication has gradually increased whereas most of his patients stay on the same dosage. *Id*. at 28-30.

The ALJ found Dr. Chen's testimony "non-committal" as to whether Claimant sustained any permanent or temporary work aggravations and whether the work activities at Horizon caused changes in Claimant's condition:

> [I]n context, the undersigned found Dr. Chen to be commenting on the irreversibility, or permanency, of such expected wear and tear, not any particular aggravating injury or sustained exacerbation . . . . [D]r. Chen did not opine that Claimant's work activities with any maritime employer including Horizon caused Claimant to sustain an injury that accelerated, aggravated, or combined with his prior injury to form his ultimate disability.

Decision and Order at 28, 29.

The ALJ gave partial weight to the opinion of Dr. James West (that Claimant's need for medical care is related to his 1992 injury with Ingalls) to the extent it is consistent with Dr. Chen's opinion and the medical evidence.[4] She gave little weight to the opinion of Dr. Chris Wiggins (that Claimant had recurrent or sustained exacerbations from subsequent employment) because he had not examined Claimant in over 26 years. Decision and Order

[4] Dr. West examined Claimant in 2019 on behalf of Horizon. HSX 7. Dr. West was asked to comment on whether the "patient's present pain medicine regimen and whether the requirement for this medication is related to the 1992 injury or a subsequent injury." Dr. West noted Claimant reported "no significant injury subsequent to the 1992 injury" and opined the need for his present medication is related to the 1992 injury.

The ALJ gave partial weight to this opinion because Dr. West addressed the original 1992 injury and Claimant's comments denying any subsequent injury, but did not specifically address the question of aggravation. She also found Dr. West's report did not reflect whether he had a good understanding of Claimant's work after he left Ingalls.

at 29-30; HIX 18 at 23-24, HSX 7. She also "considered" Claimant's testimony that, while welding temporarily "bothered" his back, he did not have another discrete back injury after May 1992. Decision and Order at 30; Tr. at 54, 57, 73. The ALJ relied on Claimant's return to baseline after temporary exacerbations, and "only gradual or slight medication changes and consistent pain scores" to conclude there was no permanent aggravation and Ingalls is the responsible employer. Decision and Order at 29, 31.

Ingalls challenges the ALJ's reliance on evidence that Claimant suffered only a slight increase in pain levels and medication dosage as support for her finding there was no permanent aggravation from his employment subsequent to the 1992 injury. It relies on the comparison between Dr. Chen's first examination of Claimant on April 2, 2003, where Claimant reported a pain level of 4-5 out of 10 and a prescription for Lortab 7.5 daily, with his last visit on June 25, 2019, where he reported a pain level of 7 out of 10 and was prescribed Percocet 10 three times a day.[5] *Compare* HIX 23 at 1 *with Id*. at 160s.

Employer's argument misses the mark. Despite Employer's characterization of this as a significant increase in medication, Dr. Chen testified it was actually a gradual increase between 2003 and 2014 and, thereafter, Claimant's medication dosage stayed the same. HIX 36 at 28-33. Ingalls' reliance on the increase in pain medication to shift liability to Horizon is belied by Dr. Chen's testimony of stable pain medication since 2014, before Claimant went to work for Horizon, and it has, therefore, failed to demonstrate the ALJ's finding is unreasonable. *Sea-Land Services, Inc. v. Director, OWCP [Ceasar]*, 949 F.3d 921, 54 BRBS 9(CRT) (5th Cir. 2020).

Similarly, the reports of pain levels do not support Ingalls' position. At Dr. Chen's office visits, Claimant reported his average pain level during the week prior to the exam and his pain level at its worst. Claimant's reported pain levels in 2017 while working for Horizon varied from an average of 5 to 7 and a worst pain rating from 7 to 8.[6] HIX 23 at 126, 133, 136, 139, 142. At his office visits from May 26, 2016 to January 9, 2017, prior to working for Horizon, Claimant's reported pain levels varied from an average of 7 to 8 and a worst pain rating from 8 to 9. HIX 23 at 111, 114, 117, 120, 123. Thus, Claimant's self-reported pain levels actually improved while he worked for Horizon. This

[5] Dr. Chen compared Lortab to 10 milligrams of morphine and stated Percocet 10 equates to 15 grams of morphine. HIX 36 at 33. He also testified in January 2019 that Claimant's pain scores have "maintained" between 5 and 7 out of 10. *Id*. at 34.

[6] Claimant similarly reported scores of 5 for average pain and 8 for worst pain on November 6, 2017, which was his first office visit after he stopped working for Horizon. HIX 23 at 144.

improvement, the relatively stable average pain scores with Horizon, and Claimant's testimony that work only temporarily increased his symptoms supports the ALJ's finding of consistent pain scores. The Board must uphold the factual findings of the administrative law judge if they are supported by substantial evidence. *Ceres Gulf, Inc. v. Director, OWCP [Plaisance],* 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012); *Pool Co. v. Cooper,* 274 F.3d 173, 178, 35 BRBS 109, 112(CRT) (5th Cir. 2001). Accordingly, we reject Ingalls' contention that the pain scores and medication dosage changes establish Horizon is the responsible employer.[7]

We further disagree with Ingalls that the ALJ erred in finding Dr. Chen did not unequivocally opine Claimant's work with Horizon contributed to his back disability. To support its argument, Ingalls points to Dr. Chen's testimony that working "would play a role in the aggravation of his pain to some degree," his opinion that Claimant's post-Ingalls work activities contributed to his condition, his analogy relating to the wear and tear a car would accumulate after being driven 200,000 miles, and his "twin brother" comparison. Ingalls Pet. For Rev. at 9-12; *see* HIX 36 at 26-31, 36-38. The ALJ reasonably found, however, Dr. Chen did not say Claimant's work activities with Horizon "caused sustained aggravations or changes in Claimant's condition," and he did not state Claimant sustained a back injury with Horizon. Decision and Order at 28.

In so doing, the ALJ permissibly characterized Dr. Chen's opinion as insufficient to establish aggravation and inferred from it that he was not commenting on whether Claimant's last employment with Horizon permanently aggravated his condition. The United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, has held the employer challenging an ALJ's responsible employer determination "must demonstrate that no reasonable mind could have arrived at the ALJ's conclusion." *Ceasar,* 949 F.3d at 926, 54 BRBS at 11(CRT). As the ALJ properly recognized even a small contribution from work can shift liability to a subsequent employer, Decision and Order at 32, but permissibly interpreted Dr. Chen's opinion as not establishing Claimant's employment at Horizon contributed to his disability, we reject Ingalls' challenge. *Id.* at 25-28. An ALJ is entitled to draw her own inferences from the evidence, and her selection among competing inferences must be affirmed if supported by substantial evidence and in accordance with law. *See James J. Flanagan Stevedores, Inc. v. Gallagher,* 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000); *Mendoza v. Marine Personnel Co., Inc.,* 46 F.3d 498,

[7] Moreover, the evidence as to the rise in pain occurring before Claimant's employment with Horizon supports the ALJ's determination that Horizon was not responsible for a compensable aggravation or new injury.

29 BRBS 79(CRT) (5th Cir. 1995). As Ingalls has not established any error, we affirm the ALJ's conclusion that Ingalls is the responsible employer.[8]

Accordingly, we affirm the ALJ's Decision and Order.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[8] Claimant's testimony and Social Security records establish he worked for Friede Goldman from 1997 to 2001, VT Halter Marine from 2006 to 2016 and possibly other employers who were covered under the Act. Tr. at 48-55; HIX 41 at 5-7/3 at 397-399. Neither Ingalls nor Horizon sought to join other longshore employers. Accordingly, Ingalls is liable for any permanent aggravation of Claimant's back before he started working for Horizon in March 2017. *See Reposky v. Int'l Transp. Services*, 40 BRBS 65 (2006); *see also Everson v. Stevedoring Services of Am.*, 33 BRBS 149 (1999).