U.S. Department of Labor

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

BRB Nos. 21-0242
and 21-0242A

BOBBY HENRY	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED: 09/24/2021
CERES GULF, INCORPORATED	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	DECISION and ORDER

Appeals of the Decision and Order of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Dennis L. Brown (Dennis L. Brown, PC), Bellaire, Texas, for Claimant.

Lawrence P. Postol (Postol Law Firm, P.C.), McLean, Virginia, for self-insured Employer.

Before: BUZZARD, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and Employer cross-appeals Administrative Law Judge (ALJ) Paul C. Johnson, Jr.'s Decision and Order (2019-LHC-00047) 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 sustained a back injury while working for Employer on August 11, 2016. Employer sent him to the emergency room, where he was diagnosed with back pain, given medication and a work excuse, and advised to follow up with his doctor in three days. Employer thereafter directed Claimant to Dr. Larry Likover for further evaluation commencing on August 29, 2016. Based on a September 2, 2016 MRI of Claimant's back, Dr. Likover diagnosed spinal stenosis, a posterior annular tear at L5-S1 and a disc protrusion at L4-5, which he opined were all degenerative and pre-existing conditions. EXs 17, 18. He recommended physical therapy and anti-inflammatories, and opined Claimant could perform modified-duty work.[1] EX 18.

On September 26, 2016, Dr. Stephen Esses opined Claimant cannot return to work. EX 20. He diagnosed Claimant with "very significant stenosis in the lateral recesses at L2-3 and L3-4," and central and lateral recess stenosis at L4-5 and L5-S1. *Id.* He requested an electromyography (EMG) to document Claimant's radiculopathy, which Dr. Likover opined was "not a medical necessity related to his work-related event."[2] EX 19. On December 5, 2016, Dr. Esses stated the EMGs confirmed a right L5 and/or S1 radiculopathy for which he "offered to carry out surgery," specifically "a decompression from L2 to S1" given that non-operative management of his pain had failed. *Id.*

On May 25, 2017, Dr. Likover stated: Claimant has degenerative disc disease; his August 11, 2016 work event caused, at most, a lumbar strain that by then needed no further treatment, had reached maximum medical improvement (MMI), and should have completely resolved; and Claimant was capable of working without limitation and needs no work restrictions. EX 23. He disagreed with Dr. Esses's statement that a four-level decompressive surgery was reasonable or necessary treatment for Claimant's work-related spine condition. *Id.* On June 13, 2017, Dr. Esses performed right-side decompression surgery at L2, L3, L4, L5 and S1. CX 14; EX 20. In follow-up appointments, Dr. Esses

[1] On September 9, 2016, Dr. Likover approved jobs with Employer as a debris collection worker, a sweeping worker, a foliage maintenance worker, and a safety observation worker, as they all involved duties within Claimant's capabilities. EX 18.

[2] Dr. Likover stated this is because Claimant's spinal stenosis is not caused by a work-related event; any claimed aggravation of a pre-existing arthritic and/or stenotic condition "would not cause a radiculopathy," the stated reason for conducting the EMG; and any work-related back injury would have been at maximum medical improvement "in eight weeks in most cases." EX 19.

prescribed Claimant medication and physical therapy, and on January 25, 2018, referred him to Dr. Triet Huynh for pain management. CX 11; EX 20.

Meanwhile, Dr. Nicholas Ahn performed a record review on July 2, 2017; he diagnosed Claimant with varying degrees of spinal stenosis from L2-3 through L5-S1, with the vast majority of nerve compression appearing at L4-5 and L5-S1. EX 24. He opined Claimant's underlying lumbar stenosis is degenerative in nature and had no relationship to the work incident, aggravation of any pre-existing condition is not supported by the records provided, and the work incident itself resulted in, at most, a lumbar sprain/strain which he expected would have completely resolved after six weeks. *Id.* He further opined the requested decompression surgery "would only be considered reasonable and appropriate at L4-5 and L5-S1," and reiterated Claimant's underlying lumbar stenosis has no relationship to his work incident. *Id.*

Employer offered Claimant light duty work on September 22, 2016, per Dr. Likover's recommendation, but Claimant declined because his doctor said he needed back surgery.[3] He returned to work in August 2017, after that surgery, but stopped working between June and October 2018 because of pain in his back and legs. At the time of the hearing, Claimant was performing the same work he was doing at the time of his August 2016 work injury. Employer paid temporary total disability benefits from August 12 through September 21, 2016, and temporary partial disability benefits from September 22 through December 22, 2016. EX 13. Claimant filed a claim seeking additional benefits, Employer controverted, and the case was forwarded to the Office of Administrative Law Judges for a formal hearing, which occurred on May 7, 2019.

In his decision, the ALJ invoked the Section 20(a) presumption, 33 U.S.C. §920(a), finding Claimant sustained a back injury as a result of his August 11, 2016 work accident, but Employer established rebuttal of the presumption. In weighing the evidence as a whole, he found Claimant's work-related back sprain or strain completely resolved by May 25, 2017. He therefore found Claimant entitled to temporary total disability benefits from August 12 through September 21, 2016, and temporary partial disability benefits from September 22, 2016, through May 25, 2017. He further found Employer not liable for any

[3] Claimant stated he did not return to work on September 22, 2016, because his doctor told him he needed back surgery. The record, however, indicates back surgery was not an option that any physician suggested until Dr. Esses "offered to carry out surgery" in his December 5, 2016 note. EX 20 at 8.

further medical treatment, including any claims for reimbursement,[4] relating to Claimant's work injury.

On appeal, Claimant contends the ALJ erred in finding he sustained only a temporary back sprain or strain which had fully resolved and in concluding he is not entitled to additional disability and medical benefits for his ongoing back condition. Employer responds, urging affirmance of the ALJ's findings that Claimant's work injury resolved within eight weeks and that it is not liable for any additional benefits. BRB No. 21-0242. In its cross-appeal, Employer contends its liability ended on October 6, 2016, eight weeks from the date of Claimant's injury, and thus maintains the ALJ erred in awarding Claimant any benefits beyond that date. Claimant did not respond to the cross-appeal. BRB No. 21-0242A.

Claimant's Appeal

Section 20(a)/Causation

Claimant contends the ALJ erred in finding he did not meet his burden to show his ongoing back condition, and need for treatment and surgery, was related to his work accident. He maintains the ALJ erred in not applying the "aggravation rule" to this case, at both invocation and on weighing the evidence as a whole. He further avers the credible evidence of record, particularly his own testimony and Dr. Esses's opinion, supports a conclusion that his current disability and need for ongoing medical benefits is, at least in part, due to his work accident. He asserts the ALJ's decision does not comport with the requirements of the Administrative Procedure Act because the ALJ did not evaluate the full record and ignored important objective factors supporting Dr. Esses's opinion. Claimant maintains the ALJ further erred by not according special weight to Dr. Esses's opinion to account for his status as Claimant's treating physician. Moreover, in crediting Dr. Ahn's opinion over Dr. Esses's, he argues the ALJ did not adequately consider that the physicians held equal credentials and Dr. Ahn never examined him, which Claimant asserts automatically "should have been a disqualifying factor" in comparing their competing opinions.

In determining whether an injury is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked if the claimant establishes a prima facie case that: (1) he suffered a harm; and (2) an accident occurred or conditions existed at work

[4] The ALJ found Employer not liable to pay any purported liens from Cigna or the Maritime-ILA Welfare Fund or to reimburse Claimant for any claimed out-of-pocket medical expenses. Claimant does not challenge these findings on appeal.

which could have caused that harm. *See Bis Salamis, Inc. v. Director, OWCP [Meeks]*, 819 F.3d 116, 50 BRBS 29(CRT) (5th Cir. 2016); *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000). Where the claimant has a pre-existing condition and aggravation is raised, Section 20(a) applies to whether the injury is caused directly by the claimant's employment or is the result of the aggravation of the prior condition.[5] *See Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). If the claimant establishes the two elements of his prima facie case, Section 20(a) presumes the harm was caused by the work incident. *Hunter*, 227 F.3d 285, 34 BRBS 96(CRT); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *see U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). The burden then shifts to the employer to rebut the presumed causal connection with substantial evidence that the claimant's injuries were not caused or aggravated by the work incident. *See Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 287, 37 BRBS 35, 37(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003); *Hunter*, 227 F.3d at 288, 34 BRBS at 97(CRT). If an employer succeeds in rebutting the presumption, it falls out of the case, and the claimant bears the burden of showing his injury was caused by his working conditions based on the record as a whole. *Meeks*, 819 F.3d 116, 50 BRBS 29(CRT).

Claimant's contentions, insofar as invocation of the Section 20(a) presumption is concerned, lack merit. While the ALJ did not specifically discuss the aggravation rule in analyzing Section 20(a), his findings that Claimant sustained a work-related back sprain or strain and that "working conditions could have caused the more significant back injuries" that Claimant alleged, including his "bulging disc and stenosis," Decision and Order at 36, sufficiently encompass a consideration of whether Claimant's August 2016 work injury aggravated, exacerbated, or combined with his pre-existing degenerative back conditions. Indeed, the ALJ recognized the parties' dispute involved "whether the injury was a back sprain or strain that resolved within eight weeks, or involved disc injuries that caused continuing pain and led to significant medical treatment." *Id.* Therefore, contrary to Claimant's contentions, the ALJ neither placed an "undue burden" on Claimant's ability to establish his prima facie case nor failed to consider whether his work accident/injury aggravated any pre-existing back conditions. *Prewitt*, 194 F.3d 684, 33 BRBS 187(CRT). We therefore affirm the ALJ's finding that Claimant is entitled to the Section 20(a)

[5] Under the aggravation rule, if the work injury aggravates, exacerbates, or combines with a prior condition, the entire resulting disability is compensable. *See Strachan Shipping v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (en banc).

presumption linking his back condition, including any aggravation of pre-existing degenerative conditions, to his work.[6]

Next, while Claimant correctly asserts the ALJ did not discuss the evidence in terms of the aggravation rule when weighing the record as a whole, a review of his decision reveals he adequately addressed whether Claimant's degenerative conditions, identified as stenosis, an annular tear, and a disc protrusion/herniation, were in any way related to his August 2016 work incident. The ALJ properly addressed whether the work incident "damaged his discs and other back components to the extent that Claimant's narrow spinal canal caused the discs to impinge on the nerves, causing his pain and his radiculopathy," Decision and Order at 36, and discussed the relevant evidence of record. In particular, the ALJ extensively reviewed Dr. Esses's reports and testimony, including his opinion that Claimant's pre-existing conditions "were aggravated by the workplace accident." *Id.* at 24-31, 39-40. He also identified the "crux" of the causation issue as "whether Dr. Esses on the one hand, or Drs. Likover and Ahn on the other, have the better of the dispute" and particularly "whether the evidence is sufficient for a finding that Claimant has met his burden of showing that Dr. Esses's position is the correct one." *Id.* at 36.

To answer the question, the ALJ considered "whether their opinions are well documented and reasoned" and examined the doctors' respective credentials, citing their curriculum vitae. Decision and Order at 36-38. The ALJ reviewed the underlying documentation in support of each of the doctors' causation opinions. *Id.* at 38-40. He found all the opinions were based on the medical records; however, he found Dr. Esses's opinion largely premised on his belief that there was an acute finding indicative of a traumatic injury on Claimant's September 2, 2016 MRI; a belief, which the ALJ stated, was based on an equivocal report that the radiologist issued and that Drs. Likover and Ahn refuted. Because he found the opinions of Drs. Esses, Likover and Ahn all "well reasoned and documented,"[7] he assessed the weight to give each opinion based on "the physicians'

[6] We also affirm the ALJ's finding that Employer rebutted the presumption as it is unchallenged on appeal, *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007), and is supported by substantial evidence in the form of the opinions of Drs. Likover and Ahn. *See Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 287, 37 BRBS 35, 37(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003).

[7] The ALJ recognized that although Dr. Ahn did not examine Claimant, "his opinion was, like those of Dr. Likover and Dr. Esses, based on a review of the available medical records and diagnostic testing." Decision and Order at 40. For that reason, he concluded Dr. Ahn's opinion is equally well-documented and reasoned. Contrary to Claimant's contention, the fact that Dr. Ahn did not examine Claimant does not automatically disqualify his opinion from consideration, particularly where, as here, the ALJ was

respective credentials" and "the force with which they support their opinions." *Id.* at 40; *see generally Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). He accorded greatest weight to Dr. Ahn's credentials because he is "on the Ohio Bureau of Workers' Compensation's executive committee for spine care" and "serves on the American Board of Orthopedic Surgery."[8] Decision and Order at 38, 40-41. The ALJ also clearly considered Dr. Esses's curriculum vitae, as evidenced by his reference to Claimant's Exhibit 23, which contains that document, and his summary of Dr. Esses's credentials. *Id.* at 36-37. Thus, we reject Claimant's assertion that the ALJ did not adequately address Dr. Esses's credentials.

Having considered the physicians' credentials and the bases of their opinions, the ALJ credited Dr. Ahn's opinion to find: Claimant sustained, at most, a back sprain or strain on August 11, 2016; his ongoing pain and radiculopathy were due to his degenerative conditions; and those conditions were unrelated to his work injury. He concluded Claimant did not meet his burden to establish his present back condition, i.e., his degenerative stenosis, annular tear, and/or disc protrusion, is work-related.

It is well established that an ALJ, as the fact-finder, has the authority to weigh the evidence and is not required to accept the opinion of any particular medical examiner. *See Meeks*, 819 F.3d at 127, 50 BRBS at 35-36(CRT); *see also Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 500-501, 29 BRBS 79, 80-81(CRT) (5th Cir. 1995) ("The ALJ determines the weight to be accorded to evidence and makes credibility determinations. Moreover, where the testimony of medical experts is at issue, the ALJ is entitled to accept any part of an expert's testimony or reject it completely.") (internal citations omitted). Although the opinion of a treating physician may be entitled to considerable weight, an "ALJ may give less weight to a treating physician's opinion when there is good cause shown to the contrary." *Sea-Land Services, Inc., v. Director, OWCP [Ceasar]*, 949 F.3d 921, 54 BRBS 9(CRT) (5th Cir. 2020). The Board may not reweigh

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cognizant of that fact, fully considered the underlying bases of his causation opinion, and found it reasoned and documented. *See generally Bis Salamis, Inc. v. Director, OWCP [Meeks]*, 819 F.3d 116, 50 BRBS 29(CRT) (5th Cir. 2016).

[8] The ALJ noted Dr. Ahn possessed these credentials "[i]n addition to his clinical and academic endeavors." Decision and Order at 40. As the ALJ accorded more weight to Dr. Ahn's credentials for reasons unrelated to his association with a medical school, any failure on the ALJ's part to specifically mention Dr. Esses's association with a medical school constitutes harmless error. *See generally Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010) (harmless error principle applies in cases arising under the Act).

the evidence or draw its own inferences, but may assess only whether there is substantial evidence to support the administrative law judge's decision. *Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT). Here, the ALJ rationally credited the opinion of Dr. Ahn over that of Claimant's treating physician, Dr. Esses, as more consistent with the objective evidence. He rationally found the evidence as a whole shows Claimant sustained a work-related lumbar strain/sprain which completely resolved and Claimant's present lumbar condition is not work-related.[9] Consequently, we affirm the ALJ's conclusion that Claimant failed to carry his burden of proof as it is supported by substantial evidence. *Meeks*, 819 F.3d at 127, 50 BRBS at 35(CRT).

Medical Benefits

Claimant contends a proper application of the aggravation rule compels a finding that all treatment Dr. Esses and Dr. Huyhn rendered is reasonable and necessary for his work-related injury and is compensable. Section 7 of the Act describes an employer's duty to provide medical services necessitated by its employee's work-related injuries. Generally, an employer is liable for all reasonable and necessary medical expenses that result from the work injury. 33 U.S.C. §907(a). Where an employer has refused to provide treatment, a claimant may obtain reimbursement if he establishes that the treatment was necessary for his work injury. *See Atlantic & Gulf Stevedores, Inc. v. Neuman*, 440 F.2d 908 (5th Cir. 1971).

The ALJ found Employer responsible for providing medical treatment for Claimant's work-related lumbar sprain or strain, but not for providing medical treatment for the subsequent and ongoing issues involving his spinal stenosis, disc abnormalities, or nerve compression. In this regard, he found Employer bore no liability for the treatment Dr. Esses provided, including the June 13, 2017 surgical procedure to address Claimant's

[9] As previously noted, the ALJ did not explicitly discuss the aggravation rule in weighing the evidence relevant to causation. Nevertheless, any error is harmless given he rationally accorded less weight to the medical opinion of Dr. Esses, the only evidence of record sufficient to support a finding of causation under an aggravation theory. *See generally Hice v. Director, OWCP*, 48 F. Supp. 2d 501 (D. Md. 1999). Additionally, the credited opinion of Dr. Ahn definitively counters Claimant's theory of aggravation. Finally, contrary to Claimant's contention, the ALJ's decision comports with the Administrative Procedure Act, 5 U.S.C. §557, as he provided a detailed summary of the medical evidence of record, Decision and Order at 16-33, 39-40, sufficiently explained the rationale underlying his conclusions, and specified the evidence upon which he relied, *id.* at 40-41. *See generally H.B. Zachry Co. v. Quinones*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996).

stenosis, or the treatment Dr. Huynh provided as it related entirely to Claimant's non-work-related degenerative conditions.

The opinions of Drs. Likover and Ahn constitute substantial evidence in support of the ALJ's finding that the treatment Drs. Esses and Huynh rendered did not involve any work-related condition. *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9 (2001), *aff'd*, 32 F. App'x 126 (5th Cir. 2002); *see also Meeks*, 819 F.3d 116, 50 BRBS 29(CRT). Dr. Likover stated that although the surgery was medically necessary, it was not for Claimant's work injury because "[e]verything done by Dr. Esses is due to pre-existing and degenerative disease. Period," EX 35, Dep. 19, such that "[t]here was absolutely nothing done on that surgery by Dr. Esses that was directed at an injury."[10] *Id.*, Dep. at 47. He also opined the epidural injections Dr. Huynh administered were not for Claimant's work injury as evidenced by the fact "there was no work injury identifiable on the MRI" and the "indication for epidurals is only degenerative disease." *Id.*, Dep. at 21-22. Dr. Ahn similarly opined that "[f]urther treatment, disability or diagnostic testing would neither be considered reasonable nor appropriate beyond 6 weeks post incident." EX 24 at 3. He also stated the degenerative changes "which would justify the lumbar decompression from L4 to S1 do not appear to be reasonably related to the [work] incident," and "[t]he decompression surgery at L2-3 and L3-4 would neither be considered reasonable nor appropriate as there is no significant neurocompression at those levels." *Id.* Accordingly, we affirm the ALJ's finding that the treatment that Drs. Esses and Huynh provided Claimant was not related to his work injury and the consequent denial of medical benefits for those services. *Arnold*, 35 BRBS 9; *see generally Haynes v. Rederi A/S Aladdin*, 362 F.2d 345 (5th Cir. 1966), *cert. denied*, 385 U.S. 1020 (1967) (an employer is not liable for medical expenses due to the degenerative processes of aging).

Denial of total disability benefits after September 21, 2016

Claimant contends the ALJ erred in finding he was not entitled to total disability benefits from September 26, 2016, the date of Dr. Esses's opinion stating Claimant is incapable of working, through his most recent return to work with Employer in October 2018. Claimant premises his contention on his aggravation theory, which we have rejected, and on Dr. Esses's opinion, which the ALJ rejected and we affirm. The ALJ found Claimant established a prima facie case of total disability from August 12 through

[10] Dr. Likover explained "the surgery was for spinal stenosis, and that's what caused [Claimant's] pain," EX 35, Dep. at 48, and "the work injury that he had with picking up a heavy object does not give you a need for having your bony stenosis alleviated by surgery," *id.*, Dep. at 57. He therefore concluded Claimant's "surgery was a hundred percent for pre-existing degenerative disease." *Id.* Dep. at 54.

September 21, 2016. He found it undisputed that Claimant could not work from the date of his injury through September 9, 2016, when Dr. Likover opined Claimant could return to modified work and approved a number of modified jobs available within Employer's facility. He also found Employer did not offer Claimant any modified work until September 22, 2016, and established suitable alternate employment as of that date, but Claimant did not report to work on that date. Additionally, the ALJ found that although Dr. Esses took Claimant out of work on September 26, 2016, his rationale for doing so was not attributable to Claimant's work injury or to the natural progression of his work injury. The ALJ therefore found Claimant entitled to, and Employer liable for, total disability benefits from August 12 through September 21, 2016, and partial disability benefits from September 22, 2016, through May 25, 2017.

Disability is generally addressed in terms of its nature, permanent or temporary, and its extent, total or partial. The nature of a disability is determined solely by medical evidence, *see, e.g.*, *SGS Control Services v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996), while the extent of disability is an economic as well as a medical concept. *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *E. S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940). 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. *See New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (5th Cir. 1986), *cert. denied*, 497 U.S. 826 (1986). Once the claimant establishes a prima facie case of total disability, the burden shifts to the employer to establish the availability of suitable alternate employment. *See Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 35 BRBS 7(CRT) (5th Cir. 2001); *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998). An employer may establish suitable alternate employment by offering claimant an appropriate job within its own facility. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996).

In this case, the ALJ rationally found Employer's September 22, 2016 offer of modified work involving duties that Dr. Likover deemed to be within his post-injury capabilities constituted suitable alternate employment. *Darby*, 99 F.3d 685, 30 BRBS 93(CRT). Claimant does not challenge the suitability of the identified jobs. We therefore affirm the ALJ's denial of total disability benefits after September 21, 2016, as well as his award of temporary partial disability benefits from September 22, 2016, through May 25, 2017. We also affirm his denial of any disability benefits after May 25, 2017, as his finding that Claimant's work injury had fully resolved by that date, thereby rendering Claimant capable of returning to his usual pre-injury work, is supported by substantial evidence and in accordance with law. *Turner*, 661 F.2d 1031, 14 BRBS 156.

Employer's Cross-Appeal

Employer contends the ALJ incorrectly determined the MMI date and the date upon which Employer's liability for benefits ended. It maintains the ALJ confused the declaration of a date of MMI with the issue of when Claimant's work injury actually resolved. In this regard, it states the ALJ properly credited the opinions of Drs. Likover and Ahn that Claimant's work injury, and aggravation of any underlying, pre-existing condition of the spine, would have completely resolved within eight weeks, and as such should have concluded that its liability for any benefits ceased at that time, i.e., on October 6, 2016. Employer further asserts the ALJ is "factually mistaken" in relying on Dr. Likover's May 25, 2017 opinion to find Claimant reached MMI for his work injuries as of that date, because the record establishes Dr. Likover conclusively and repeatedly opined Claimant reached MMI for his work-related injuries within eight weeks of the date of his injury.

A claimant's condition has reached MMI when he is no longer undergoing treatment with a view toward improving his work-related condition or that condition is of a lasting and indefinite duration and beyond a normal healing period. *See Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004); *Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994); *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969); *see also McCaskie v. Aalborg Ciserv Norfolk, Inc.*, 34 BRBS 9 (2000). We must affirm a finding of fact establishing the date of MMI if it is supported by substantial evidence. *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); *Mason v. Bender Welding & Machine Co.*, 16 BRBS 307 (1984).

The ALJ's MMI finding and determination that Claimant's entitlement to disability benefits ended simultaneously on May 25, 2017, are supported by substantial evidence. In addressing MMI, the ALJ reviewed Drs. Likover's and Ahn's opinions but determined their initial statements that Claimant's work-related back sprain/strain should have resolved within six to eight weeks were too vague and speculative to render a finding in terms of a specific date.[11] Decision and Order at 43. He instead rationally relied on Dr. Likover's May 25, 2017 report to find Claimant reached MMI as of that date, finding it significant that Dr. Likover, at that time, had actually examined Claimant. In that report,

[11] The speculative nature of their opinions is exhibited by each physicians' use of qualifying phrases explaining that Claimant's work-related condition should reach MMI within six to eight weeks. For example, Dr. Likover used "in most cases" in his October 28, 2016 note, and Dr. Ahn used "would be expected" in his July 2, 2017 report. EXs 19, 24.

when answering whether Claimant's August 11, 2016 injury had reached MMI, Dr. Likover unequivocally replied, "[Claimant] has reached Maximum Medical Improvement." EX 23 at 3. Dr. Likover also opined Claimant "is capable of working without limitation at this point in time" and "does not need work restrictions." *Id.* at 2. This represents a change from Dr. Likover's August 29, 2016 report, in which he believed Claimant "should be off work for a short period of time," and from his September 9, 2016 approval of modified jobs at Employer's facility. EXs 9, 16. It also represents the first time a physician deemed Claimant capable of returning to his usual work. These statements constitute substantial evidence in support of the ALJ's findings regarding the nature and extent of Claimant's work-related disability. *Ezell,* 33 BRBS 19; *Mason,* 16 BRBS 307. We therefore affirm the ALJ's findings that Claimant's work-related condition reached MMI and that Employer's liability for disability benefits ceased as of May 25, 2017, as Claimant's work-related condition had resolved with no remaining disability.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge