U.S. Department of Labor

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

BRB No. 21-0559

WILLIAM ROSS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
M.T.C. EAST D/B/A PORTS AMERICA, INCORPORATED	)	
	)	
and	)	
	)	
PORTS INSURANCE COMPANY, INCORPORATED	)	DATE ISSUED: 9/30/2022
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Andrew Hanley (Crosslet, McIntosoh, Collier, Hanley & Edes, PLLC), Wilmington, North Carolina, for Claimant.

Brian P. McElreath and Cassandra L. Sereta (Lueder, Larkin & Hunter, LLC), Mount Pleasant, South Carolina, for Employer/Carrier.

Jennifer A. Ledig (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

BEFORE: BOGGS, Chief Administrative Appeals Judge, BUZZARD and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Larry W. Price's Decision and Order Denying Benefits (2021-LHC-00027) 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 ALJ's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant, a longshoreman, was injured while working as a lasher on November 26, 2016, when a metal rod fell, hitting his shoulder and head. Claimant presented to an urgent care facility that day and complained of head and neck pain. CX 12 at 1. He was diagnosed and treated for muscle sprain and took a leave of absence due to the injury.[1] There is no dispute this injury was work-related, and Employer voluntarily paid him disability compensation from November 27, 2016, to March 27, 2018. Decision and Order (D&O) at 2.

On March 28, 2018, Claimant attempted to return to work. He was successful until May 24, 2018, when his work duties aggravated his shoulder condition. EX 12 at 42-43; ALJX 1. He revisited the urgent care facility, complained of neck pain, reported a history of rotator cuff injury, and was released with a treatment plan for muscle sprain. CX 12 at 2-3.

Claimant underwent conservative treatment under the care of Dr. Douglas Messina comprised of lidocaine shots, Robaxin prescriptions, and physical therapy. CXs 4, 5. Dr. Messina noted Claimant wished to avoid surgery if possible but given that his symptoms had not improved he wished to proceed with arthroscopy of his shoulder. CX 5. Dr. Messina wrote a letter before Claimant's surgery to the claims adjuster, stating he did not

[1] Claimant treated with three physicians, Dr. Claudis Jarrett at Wilmington Health Orthopedics, Dr. Robert Coles from Carolinas Center for Surgery, and Dr. Douglas Messina from Carolina Sports Medicine and Orthopaedic Specialists.

believe Claimant would be able to return to full-duty work as a longshoreman. *Id.* Following additional treatment, on November 8, 2019, Dr. Messina performed left shoulder arthroscopy surgery. His post-operative diagnosis was left shoulder impingement with partial rotator cuff tear and labral tear. CX 14. Claimant testified his pain lessened but was not completely resolved. TR at 11.

On March 19, 2021, the parties sent the ALJ a joint letter stipulating that Employer voluntarily paid Claimant temporary total disability benefits from November 27, 2016, until October 5, 2020, at a compensation rate of $1,436.48 per week and permanent partial disability benefits from October 6, 2020, until the present at a compensation rate of $1,216.58 per week. They also stipulated Employer had paid over $343,000 in medical benefits. EX 11; ALJX 1.[2]

The ALJ found Claimant's work-related condition reached MMI on May 26, 2020, and he presented a prima facie case of total disability. The ALJ then found Employer met its burden of presenting the availability of suitable alternate employment (SAE). Next, he found Claimant did not meet his burden to diligently search for a job because Claimant neither attempted to use his seniority status to obtain a less rigorous job at the waterfront nor applied to any of the positions the vocational specialist identified in a labor market survey. Decision and Order (D&O) at 20. Because Claimant did not conduct a diligent job search, the ALJ concluded he was not disabled as of May 26, 2020, and denied benefits. D&O at 16, 20-21.

Claimant appeals the decision. He contends the ALJ erred in not awarding disability or medical benefits, in finding he was not disabled, and in admitting the testimony of Ms. Amy Bouchard, Employer's vocational expert, and of Mr. Christopher Harrington, operations manager for Ports American in Wilmington. In response, Employer urges the Board to dismiss Claimant's request for review of his entitlement to medical benefits; it states the issue is not in dispute, and it has paid for, and continues to authorize, reasonable and necessary medical treatment. Employer further asserts the ALJ did not abuse his discretion in allowing the testimony of Ms. Bouchard and Mr. Harrington because their testimony was relevant and properly admitted and because Claimant had notice that Employer would call them as witnesses. It thus urges affirmance of the ALJ's denial of disability compensation.

[2] Although Employer filed a notice of controversion on May 26, 2020, indicating it would cease benefits, its Notice of Payments form dated February 22, 2021, indicates it continued to pay all benefits. ALJX 1; CX 18; EX 11.

The Director, Office of Workers' Compensation Programs (Director), responds in support of Claimant's position and urges the Board to vacate the denial of benefits and remand the case for further consideration of SAE, for an award of disability benefits, and for an award of medical benefits. The Director argues the ALJ erred in finding Employer established the availability of SAE because Claimant is not able to perform the jobs identified by the vocational rehabilitation counselor and cannot perform any job on the waterfront; the Director also argues the ALJ did not properly apply the test set forth in *New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 1043, 14 BRBS 156, 165 (5th Cir. 1981). Director's Brief (Dir. Br.) at 8. The Director asserts a proper SAE analysis under *Turner* will result in finding Employer has not met its burden, and there is no need to address whether Claimant conducted a diligent job search. If, however, the ALJ finds Employer established the availability of SAE, the Director urges the Board to order the ALJ to make a specific finding as to Claimant's loss of wage-earning capacity and award partial disability benefits accordingly. Claimant filed a reply brief.

Claimant first contends the ALJ erred by admitting Mr. Harrington's and Ms. Bouchard's testimony because Employer failed to identify them as witnesses in its responses to Claimant's interrogatories requesting information about expert witnesses and the types of available jobs Claimant could perform at the port.[3] We reject Claimant's contention that the ALJ erred in admitting Employer's witness testimony. The ALJ has broad discretion concerning the admission of evidence and must fully inquire into matters that are fundamental to the disposition of the case. *Olsen v. Triple A Mach. Shops, Inc.*, 25 BRBS 40 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP*, 996 F.2d 1226 (9th Cir. 1993); *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153, 155 n.1 (1985); *Williams v. Marine Terminals Corp.*, 14 BRBS 728 (1981); 20 C.F.R. §702.338.[4] His decisions regarding the admission or exclusion of evidence may be overturned only if the challenging party shows they are arbitrary, capricious, or an abuse of discretion. *Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988).

[3] On March 11, 2021, Claimant, in both his pre-hearing brief and motion in limine, argued Employer did not identify any expert witness in its discovery response in accordance with the ALJ's January 11, 2021 scheduling order. Claimant's Pre-Hearing Brief at 4.

[4] The standards governing the admissibility of evidence in administrative hearings are generally less stringent than those which govern trials in federal court. *Casey v. Georgetown Univ. Med. Ctr.*, 31 BRBS 147 (1997); *Brown v. Washington Metro. Area Transit Auth.*, 16 BRBS 80 (1984), *aff'd*, No. 84-1046 (D.C. Cir. 1984).

At the hearing, the ALJ disagreed with Claimant's assessment that Mr. Harrington should have been identified as an expert witness;[5] instead, the ALJ found he was a "fact witness" capable of testifying about his knowledge of jobs available at the port. TR at 99. Additionally, the ALJ rationally concluded that because Mr. Harrington was a fact witness testifying about his direct knowledge of jobs at the port, he did not come within the purview of Claimant's interrogatory requesting information about individuals Employer expected to call as expert witnesses.[6] Thus, as Mr. Harrington testified regarding his direct knowledge of the availability and types of jobs on the waterfront, we hold it was within the ALJ's discretion to admit Mr. Harrington's testimony. *Picinich v. Seattle Stevedore Co.*, 19 BRBS 63 (1986).

As for Ms. Bouchard's testimony, while Claimant argues Employer did not provide previous notice of her identification as an expert witness in violation of the ALJ's discovery order, Claimant was given notice of the possibility of her being called to testify in Employer's March 24, 2021 Witness List before the hearing. Further, Claimant did not object to Ms. Bouchard's testimony during the hearing, and her testimony was admitted in its entirety. However, in his post-hearing brief, Claimant again raised the issue that Employer had not disclosed an expert witness during discovery in accordance with the ALJ's scheduling order. Claimant's Post-Hearing Brief at 8.[7] As Ms. Bouchard's testimony was received at the hearing without objection, and it was relevant and material to the issue at hand, we hold the ALJ's decision to admit her testimony was within his broad discretion. *Picinich*, 19 BRBS 63 (1986) (Board affirmed admission of relevant evidence despite submission being in violation of the ALJ's own order). We affirm his decision regarding the admission of her expert witness testimony.

Next, Claimant and the Director contend the ALJ erred in finding Employer established the availability of SAE. The Director specifically argues the ALJ did not properly apply the inquiry required by *Turner*. We agree with this position.

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[5] Claimant reiterated his objection in his post-hearing brief.

[6] Moreover, Mr. Harrington was listed in Employer's pre-hearing witness list, dated March 24, 2021.

[7] Claimant's argument in both his pre- and post- hearing briefs regarding Ms. Bouchard are procedural in that he argues Employer's discovery non-compliance should bar Ms. Bouchard's testimony. Claimant does not argue Employer's pre-hearing Witness List, submitted 9 days prior to the hearing, was untimely, nor does he argue he was not aware of Ms. Bouchard's vocational involvement.

This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. Once a claimant establishes a prima facie case of total disability, as here, the burden shifts to his employer to show the availability of SAE. *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74(CRT) (4th Cir. 1984); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Chappell]*, 592 F.2d 762, 10 BRBS 81 (4th Cir. 1979). If the employer succeeds in establishing SAE, the burden shifts back to the claimant to demonstrate he conducted a diligent job search but was unable to secure employment. *Id.*; *Turner*, 661 F.2d 1031, 14 BRBS 156. The court in *Turner* stated a determination on SAE should turn on the answer to two questions:

> (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do? (2) Within this category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant can compete and which he could realistically and likely secure?

Turner, 661 F.2d at 1042-1043, 14 BRBS at 164-165.[8]

Employer submitted Ms. Bouchard's testimony and labor market survey, identifying four types of non-waterfront jobs (cashier, receptionist, car transporter, and porter) which Claimant could perform. Although Claimant doubts his ability to perform these jobs because he does not have the requisite skills, experience, or education, Ms. Bouchard indicated she spoke with the employers and confirmed they would accommodate Claimant's physical restrictions and give him on-the-job training. CX 25; EX 6; TR at 72-74, 82-90. Employer also identified jobs on the waterfront which it asserts Claimant can perform and has performed previously (flagman/spotter).[9] EX 4; TR at 100-107, 124-125. Dr. Messina approved all the jobs, provided the work would be performed below Claimant's shoulder level. EXs 4, 7.

After finding Claimant cannot return to his usual heavy waterfront work, the ALJ found Employer established the availability of SAE. D&O at 17-20. He found the identified jobs satisfied the first part of the *Turner* test because they are suitable given Claimant's background and work restrictions, so he can perform or be trained to perform

[8] The Fourth Circuit cited *Turner* with approval in *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74(CRT) (4th Cir. 1984).

[9] Employer also identified a shuttle/van driver; the ALJ specifically found the driver job is not available at the port. D&O at 20.

those types of jobs. In applying the second part of the test, the ALJ found the jobs Dr. Messina approved are "reasonably available" and "[t]here also may be many jobs like them available." D&O at 20. He also found "Claimant would have been reasonably likely to secure these or other similar jobs had he diligently sought one." *Id.*

The Director asserts the ALJ failed to adequately analyze the SAE issue because while he considered the first *Turner* question, i.e., what jobs Claimant is capable of performing, he failed to meaningfully consider and apply the second *Turner* question, i.e., whether there are jobs reasonably available in the community that Claimant could realistically and likely secure. With respect to the waterfront and non-waterfront jobs identified, the Director asserts the ALJ erred by only considering Dr. Messina's statements about working at and below shoulder level. Instead, he asserts, a proper analysis would explain how Claimant's age, experience, literacy status, and limited education make him a competitive applicant for the jobs presented and then would consider whether Claimant would be able to realistically obtain those jobs.

We agree with the Director's position: the ALJ's analysis of the second part of the *Turner* test is insufficient. His discussion focused on the physical aspects and Dr. Messina's approval of those jobs. However, other factors apply with respect to whether there are "jobs reasonably available in the community for which the claimant can compete and which he could realistically and likely secure." The ALJ did not meaningfully address the duties of the jobs and Claimant's education, skill set, age, and experience to render a decision as to whether Claimant could realistically secure any of the jobs. Although Claimant had secured and performed some of the waterfront jobs previously, it is unclear whether he could do so now. While the ALJ found Claimant could have used his seniority status and returned to work on the waterfront, he neglected to resolve the conflicting evidence of the ILA's union policy prohibiting light-duty work, Mr. Harrington's acknowledgment that the union controls who works each day and where, and Mr. Harrington's testimony that he has witnessed longshoremen return to work in less strenuous jobs after an injury.

For these reasons, the SAE analysis is incomplete, and we remand the case to the ALJ for a full and meaningful application of both parts of the *Turner* inquiry and a complete SAE analysis. *Trans-State Dredging*, 731 F.2d 199, 16 BRBS 74(CRT); *Turner*, 661 F.2d at 1042-1043, 14 BRBS at 164-165. On remand, the ALJ should consider all evidence related to waterfront and non-waterfront jobs identified as potential SAE in both the labor market survey and the testimony. He should also consider evidence related to union policy and practice and how that might affect Claimant's ability to secure work, and he must resolve any conflicts in the evidence.

If, on remand, the ALJ finds Employer has not met its burden to establish the availability of SAE, Claimant is entitled to total disability benefits. *Moody v. Huntington Ingalls, Inc.*, 879 F.3d 96, 51 BRBS 45(CRT) (4th Cir. 2018); *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). If he finds Employer has met its burden, the ALJ may reinstate his finding that Claimant did not diligently search for employment, as that finding is supported by substantial evidence.[10] However, contrary to the ALJ's original conclusion, finding Claimant failed to diligently seek work results in establishing he is partially disabled – it does not preclude him from receiving any disability compensation. Claimant, therefore, would be entitled to permanent partial disability benefits based on his loss of wage-earning capacity, which is another finding for the ALJ to make. *J.T. [Tracy] v. Global Int'l Offshore, Ltd.*, 43 BRBS 92 (2009), *aff'd sub nom. Keller Found./Case Found. v. Tracy*, 696 F.3d 835, 46 BRBS 69(CRT) (9th Cir. 2012), *cert. denied*, 570 U.S. 904 (2013).

Finally, Claimant argues the ALJ erred in denying medical benefits.[11] He contends he still requires medical treatment, and medical benefits do not terminate upon his condition reaching MMI. Employer argues Claimant testified there are no outstanding medical bills, and the last time Claimant received medical treatment was with Dr. Messina on March 10, 2021. Nevertheless, Employer also stated in its brief to the Board that it does not dispute liability for causally-related medical benefits and would approve and pay for

[10] Claimant does not directly contest the ALJ's finding that he "failed to make any attempt to obtain alternative employment." D&O at 20. He instead argues, "The employer suggested that Mr. Ross has a legal duty to make a diligent job search. However, the state of North Carolina prohibited, and the [Centers for Disease Control (CDC)] recommended that Mr. Ross refrain from mingling with the general public." Claimant's Brief at 20-21. In support, he provides web links to Executive Orders issued by the Governor of North Carolina and information from the CDC, which do not appear to be in the record. Construing Claimant's argument to be that he was not required to diligently search for certain jobs, he identifies no evidence, medical or otherwise, indicating the pandemic was a reason he did not seek employment, and we thus reject that argument. *See* Employer's Brief at 42-43 ("[T]here is no testimony or documentation otherwise confirming COVID-19 had any effect on his efforts, or lack thereof, to secure alternative employment.").

[11] Although he identified Claimant's entitlement to future medical benefits as an issue in dispute before him, D&O at 3, the ALJ did not address such entitlement in his decision, and he denied "Claimant's claim for benefits[.]" *Id.* at 21. It is reasonable for Claimant to interpret this denial as a denial of all benefits, including a denial of medical benefits, and challenge it on appeal.

them should Claimant need future medical treatments related to and arising from his work injury. Emp. Br. at 19.

Section 7 describes an employer's duty to provide medical and related services necessitated by its employees' on-the-job injuries, claimant and employer's rights and obligations regarding compensable services, and the Secretary's authority to oversee claimant's medical treatment. 33 U.S.C. §907. As Claimant's condition is undisputedly work-related, and as Employer agrees it is liable for future, causally-related medical benefits, the ALJ's decision on remand must include an order entitling Claimant to future medical benefits related to this injury. *Luttrell v. Alutiiq Global Solutions*, 45 BRBS 31 (2011); *Davis v. Delaware River Stevedores, Inc.*, 39 BRBS 5 (2005); 20 C.F.R. §702.348.

Accordingly, we affirm the ALJ's admission of Mr. Harrington's and Ms. Bouchard's testimony; however, we vacate the Decision and Order Denying Benefits and remand the case to the ALJ for proceedings consistent with our decision.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge