Jordan v. SSA Terminals, LLC.: The Ninth Circuit Provides a Legal Standard for Analyzing Claims of Disability Based on Pain

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Section 2(10) of the Longshore and Harbor Workers' Compensation Act ("the Act" or "LHWCA") defines "disability" as the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or other employment."[1] 33 U.S.C. § 902 (10). It is an economic concept based on a medical foundation.[2]

To establish total disability, a claimant must first establish a *prima facie* case of total disability by showing that he cannot return to his or her regular or usual employment due to the work-related injury.[3] Credible complaints of pain alone may be enough to meet this burden.[4] If claimant meets this burden, then the employer has the burden of showing the availability of suitable alternate employment. If the employer succeeds, claimant can establish total disability by showing that he or she was unable to secure such work despite diligent efforts.

While case law recognizes that pain can be disabling, the legal standard for evaluating disability claims based on pain is not well-settled. In *Jordan v. SSA Terminals, LLC*, 973 F.3d 930 (9th Cir. 2020), the Ninth Circuit has provided a standard for how to evaluate these claims.

The Background

The Board has held that an award of total disability concurrent with continued employment is limited to two situations:

> The fact that claimant works after his injury does not preclude a finding of total disability where claimant demonstrates he was working solely due to the

[1] Except in cases involving awards to retirees with occupational diseases compensated under Section 8(c)(23).
[2] *See, e.g., Bath Iron Works Corp. v. White*, 584 F.2d 569, 8 BRBS 818 (1st Cir. 1978).
[3] *See, e.g., Carroll v. Hanover Bridge Marina*, 17 BRBS 176 (1985)(To determine whether claimant has shown total disability, the ALJ must compare claimant's medical restrictions with the specific physical requirements of his usual employment.)
[4] *Hairston v. Todd Shipyards Corp.*, 19 BRBS 6 (1986), *rev'd on other grounds*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988); *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982); *Miranda v. Excavation Constr., Inc.*, 13 BRBS 882 (1981); *Golden v. Eller & Co.*, 8 BRBS 846 (1978), *aff'd*, 620 F.2d 71, 12 BRBS 348 (5th Cir. 1980). *Cf. Peterson v. Washington Metro. Area Transit Auth.*, 13 RRBS 891 (1981) (An ALJ may find an employee able to do his usual work despite his complaints of pain, numbness, and weakness, when a physician finds no functional impairment.)

> beneficence of employer[5] or due to extraordinary effort and in spite of excruciating pain. *See CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991); *Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51(CRT) (11th Cir. 1988); *Haughton Elevator Co. v. Lewis*, 572 F. 2d 447, 7 BRBS 838 (4th Cir. 1978), *aff'g* 5 BRBS 62 (1976); *Walker v. Pac. Architects & Eng'rs, Inc.*, 1 BRBS 145 (1974); *Offshore Food Serv., Inc. v. Murillo*, 1 BRBS 9 (1974), *aff'd sub nom. Offshore Food Serv., Inc. v. Benefits Review Board*, 524 F.2d 967, 3 BRBS 139 (5th Cir. 1975). . . . .
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> The Board has cautioned against a broad application of these holdings, emphasizing that circumstances which warrant an award of total disability concurrent with a period where claimant is working are the exception and not the rule. *Shoemaker v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 141 (1980); *Chase v. Bethlehem Steel Corp.*, 9 BRBS 143 (1978); *Ford v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 687 (1978).

The BRB Longshore Deskbook ("Deskbook"), Part XI at 105.[6] *See also La. Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 297 (5th Cir. 2000) ("Even if able to work, [a claimant] may be found to be totally disabled if he is working with extraordinary effort and in excruciating pain.")

Further, the Board has held that where claimant's pain and limitations do not rise to this level, these factors may provide a basis for a finding that claimant's actual earnings do not represent his or her wage-earning earning capacity ("WEC") under Section 8(h) and that claimant therefore has a loss in earning capacity.[7] Deskbook at 207 (citing *Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213(CRT) (9th Cir. 1991)[8]). Board precedent holds that a party contending that the employee's actual earnings are not representative of his or her WEC has the burden of establishing an alternative reasonable WEC.[9]

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[5] The Board has also referred to such work as "sheltered employment." *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (1980).

[6] The Board has also held that "[a] doctor's opinion that [a claimant's] return to his usual work would aggravate his condition may support a finding of total disability." *Care v. Wa. Metro. Area Transit Auth.*, 21 BRBS 248, 251 (1988)); *Lobue v. Army & Air Force Exch. Serv.*, 15 BRBS 407, 408–09 (1983) (affirming an ALJ's finding that the claimant was disabled based on a physician's statement that continued work would "aggravate" his spondylolisthesis.))

[7] Section 8(h) provides that the post-injury WEC of a partially disabled employee for whom compensation is determined pursuant to Section 8(c)(21) or 8(e) shall be equal to the employee's actual earnings if they fairly and reasonably represent his WEC. If they do not, or if he has no actual earnings, the ALJ may fix a reasonable WEC "having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of the disability as it may naturally extend into the future." 33 U.S.C. § 908(h).

[8] In *Container Stevedoring,* the court upheld the ALJ's finding that claimant's increased earnings did not represent his earning capacity because he was able to work after his injury only with pain and limitations. The ALJ credited claimant's testimony that he worked fewer hours due to his pain and continued working due to his financial obligations to his family. The ALJ also relied on a treating physician's view that continuing to work would lead to worsening symptoms and worsening disability.

[9] *See, e.g.*, *Misho v. Dillingham Marine & Mfg.*, 17 BRBS 188 (1985); *Hughes v. Litton Sys., Inc.*, 6 BERBS 301 (1977) (stating that this allocation of the burden of proof is premised on Section 556(d) of the Administrative Procedure Act, 5 U.S.C. § 556(d), and the common law rule that the moving party has the burden of proof).

The *Jordan* Decision

The recent decision in *Jordan* squarely addressed the issue of disability based on pain. Claimant worked as a longshoreman, with eighty-five percent of his time spent driving a heavy truck. He also had a landscaping business. In 2014, the tractor claimant was driving was lifted and dropped by a crane, causing extensive damage to his lower back, including herniated discs, stenosis, and nerve impingement. Despite conservative treatments, claimant continued to complain of back pain and spasms, as well as pain and numbness in his legs. Claimant saw Dr. James Reynolds, a spine surgeon, who recommended spinal fusion; it was successfully performed in March of 2018. The parties agreed to some periods of disability, but disputed whether claimant was disabled for a period of two years preceding the surgery. Employer relied on surveillance videos obtained in 2015 and 2016, which showed claimant lifting and carrying objects, bending, and doing push-ups; as well as attending sporting events where he appeared to sit and stand for long periods without difficulty. Claimant testified, "There's nothing I can't do, but it all either is painful, elevates the pain, or I can't do it for the amount of time that would be considered a job." *Id*. at 934. He testified that he continued to do landscaping, but more in a supervisory capacity. Dr. Reynolds corroborated claimant's complaints of pain, and opined that claimant could not work as a longshoreman, mainly because he couldn't work an eight-hour day and would need breaks. He did not view the surveillance videos. Three physicians retained to perform independent medical examinations ("IME")[10] opined that claimant could return to his regular duties after they reviewed the surveillance videos. The two IME physicians who initially reached the opposite conclusion had not seen the videos at the time of their initial reports and changed their opinions after viewing them.

The ALJ found that claimant's testimony was "ambiguous," and further stated that claimant's complaints of pain were not wildly improbable and that a lazier person might well have stayed at home.[11] The ALJ rejected Dr. Reynolds' opinion because he did not see the surveillance videos. He also noted a striking difference between claimant's self-described limitations and the activities shown in the videos, and the effect that the videos had on the IME physicians. The ALJ stated that if claimant "can" work, the Act presumes that he will, and denied the claim. The Board affirmed,[12] and claimant appealed.

The Ninth Circuit vacated the decision and remanded the case. In so doing, it "set forth the standards for evaluating pain under the Act." *Jordan*, 973 F.3d at 933. The court held, "as a matter of first impression, that credible complaints of severe, persistent, and prolonged pain can establish a prima facie case of disability, even if the claimant can literally perform his or her past work." *Id*. at 936 (citation omitted).

The court discussed past decisions by the Board and appellate courts, and concluded that "[a]lthough the cases have not clearly identified the quantum of pain that is sufficient to create a

[10] The IME physicians included an osteopath with a Board certification in pain medicine, a neurologist, and an orthopedist.

[11] *See Jordan v. SSA Terminals*, 2016-LHC-01611 (ALJ May 29, 2018). Claimant underwent back surgery while the case was pending before the ALJ, and the nature of the surgery is not detailed in the ALJ's decision.

[12] *See Jordan v. SSA Terminals*, BRB No. 18-0476 (BRB Jan. 2019) (unpub.). The Board reasoned that, in light of the surveillance videos, the ALJ rationally discredited claimant's statements regarding his inability to return to work, and that the ALJ did not err in giving greater weight to the opinions of physicians who viewed the videos.

disability under the LHWCA, the statute's definition of 'disability' and the case law in this area support our holding that the level of pain must be sufficiently severe, persistent, and prolonged to significantly interfere with the claimant's ability to do his or her past work." *Id.* at 937. The court cautioned that this holding "should not be taken to mean that any amount of pain is per se disabling." *Id.* "On the other hand, a claimant need not experience excruciating pain to be considered disabled. . . . . Torture should not be the benchmark for disability under the LHWCA, a statute which is to be liberally construed in favor of injured employees." *Id.* (internal quote and citation omitted).

As the Ninth Circuit saw it, past decisions by the Board and the Fifth Circuit do not suggest that "excruciating" is the threshold for disabling pain; they simply rejected the proposition that continued employment precluded a finding of disability in the face of evidence that the work subjected the claimant to such extreme pain. "Between the poles of 'any' pain (which is not sufficient), and 'excruciating' pain (which is not necessary to show), lies a considerable range. There is, in other words, a vast middle ground between occasional discomfort and torture." *Id.* (citations omitted).

The court instructed that:

> We leave it to ALJs to determine, based on consideration of all the facts and circumstances of a particular case, whether a claimant's complaints of pain are (1) credible and (2) if so, whether the level of pain described is so severe, persistent, and prolonged that it significantly interferes with the claimant's ability to do his or her past work.

Id. at 937-38. Noting that it was not attempting an across-the-board definition of disabling pain, the court offered the following "guideposts." *Id.* at 938. First, the pain must relate to an injury "arising out of and in the course of employment." 33 U.S.C. § 902(2). In addition, "the pain must be sufficiently severe, persistent, and prolonged to adversely impact the claimant's ability to do his or her job in some significant way." *Id.* This includes pain that renders an activity literally impossible, as well as extreme or "excruciating" pain. "But it might also impact the employee's ability to perform the activity over a full workday. Or it might simply cause the severe, persistent, and prolonged pain that would make a reasonable employee stop doing the activity. In other words, whatever the level of pain, the employee need not make an 'extraordinary effort' to overcome it and should not be penalized if he or she does so." *Id.* at 938 (citation omitted). Relatedly, "an employee need not perform work that, according to the medical evidence, will exacerbate his or her injury to a degree that significantly impedes the claimant's ability to perform his or her past work." *Id.* (collecting cases).

In this case, the central issue was whether claimant's complaints of pain described a covered disability under Section 2(10). The court concluded that the ALJ applied an improperly high standard to claimant's disability claim. The ALJ framed his analysis as an inquiry into the difference between "difficulty" and "impossibility," or between "can" and "cannot," indicating that he applied the "impossibility standard" rejected by the court in this case. *Id.* at 938-39. Contrary to the Board's description, the ALJ did not clearly discredit claimant. The ALJ incorrectly described claimant's testimony about his pain as "ambiguous" and did not

sufficiently analyze his credibility. Despite the ALJ's apparent reliance on the medical opinions and surveillance videos, the ALJ's opinion as a whole suggested that the ALJ believed claimant had to establish that it was literally impossible for him to do his past work.

The court next addressed claimant's additional challenges. Claimant asserted that the ALJ erred in crediting the opinions of the non-treating physicians over those of Dr. Reynolds, and that the surveillance videos alone are not substantial evidence of his ability to work. The court stated that those issues are potentially relevant to claimant's credibility. The weight of this evidence is to be determined by the ALJ. In addition to their independent evidentiary weight, the surveillance videos provided a basis from which the medical experts could draw inferences regarding claimant's ability to work, and the ALJ can determine the weight to be given to these inferences. In a footnote, the court stated that "[a]s in Social Security cases, the opinions of treating physicians in LHWCA cases are 'entitled to special weight.' *Amos v. Dir., Office of Workers Comp. Programs*, 153 F.3d 1051, 1054 (9th Cir. 1998). However, that deference is given because a treating physician 'has a greater opportunity to know and observe the patient as an individual.' *Id.* (quoting *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989))." *Id.* at 939, n.2. In this case, Dr. Reynolds saw claimant on only three occasions, while one of the examining physicians saw him four times. Claimant did not argue that Dr. Reynolds's status as a treating physician entitled his opinion to any particular deference.

On remand, the ALJ was instructed to review all the evidence in deciding whether claimant's complaints of pain were credible, and if so, decide whether the pain described significantly affected his ability to do his past work. If the ALJ finds claimant's complaints of pain not credible, then they need not be taken into account.

Commentary

Disability compensation claims under the Longshore Act are often based, at least in part, on claimant's complaints of pain. The *Jordan* decision is significant, whether it is viewed as a novel interpretation of the Act or as a refinement of the prior approach to analyzing pain and disability.[13] Future decisions by the Board and other circuits would have to clarify this point.

Recognizing that pain is a spectrum, the Ninth Circuit set forth a standard for analyzing disability claims that is fact-specific. The court emphasized the ALJ's discretion in evaluating the credibility of pain complaints, characteristics of the pain, and its effect on a claimant's ability to do work, as long as the ALJ's credibility determinations are rational and the ALJ's decision is supported by substantial evidence. The court stressed the importance of considering all relevant evidence. Claims based on pain complaints may also give rise to disputes over reasonableness and necessity of particular treatment under Section 7 of the Act, including surgery and pain management,[14] and the *Jordan* decision may also have relevance in this context.

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[13] The court made a point of reconciling its standard with prior holdings by other tribunals.

[14] In recent years, at least two ALJs have denied reimbursement of the cost of medical marijuana in cases arising under the Longshore Act on the grounds that marijuana is currently listed on Schedule I of the Controlled Substances Act ("CSA"), 21 U.S.C. § 801, *et seq*., and thus has no accepted medical use under federal law. *Garcia v. Calzadilla Construction Corp.*, 2020-LHC-00796 (Sept. 15, 2020); *Bowman v. Fluor Daniel Corp.*, 2016-LDA-00320 (Nov. 19, 2019).

In *Jordan*, claimant did not actually perform his pre-injury work during the period in question. The decision suggests that, under the standard adopted by the Ninth Circuit, if a claimant were to continue working, the inquiry would focus on whether the pain is sufficiently severe, persistent, and prolonged as to make a reasonable employee stop doing the activity.[15]

While the *Jordan* decision focused on pain and disability, it may have broader implications in analyzing disability claims under the Act. It is noteworthy that the court referenced for comparison a prior case where claimant was awarded total disability for a work-related stroke based, in part, on work restrictions that would allow him to avert more pronounced cognitive difficulties.[16]

The Ninth Circuit's latest statement in *Jordan* regarding the weight to be accorded to a treating physician's opinion is also likely to resonate in future decisions. The court clarified that, under its precedent, deference is accorded a treating physician if the physician has a greater opportunity to know and observe the patient as an individual. The Fifth Circuit also has addressed this issue in recent decisions under the LHWCA, rejecting arguments that the ALJs were required to defer to treating physicians on the facts presented. *Bourgeois v. Director, OWCP*, 946 F.3d 263 (5th Cir. 2020);[17] *Sea-Land Servs., Inc. v. Director, OWCP [Ceasar]*, 949 F.3d 921 (5th Cir. 2020).[18] The Board continues to hold that, in cases arising under the LHWCA, an ALJ is not required to give dispositive weight to a treating physician's opinion, but has the prerogative to independently determine the weight to be given any expert's opinion.[19] *See*, *e.g.*, *Rivera v. Ceres Marine Terminals, Inc.*, BRB No. 19-0390 (BRB Dec. 3, 2019)

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[15] The court repeatedly referenced *Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000), as consistent with its analysis. *See Jordan*, 973 F.3d at 936-38. In *Bunol*, the Fifth Circuit affirmed an ALJ's award of permanent partial disability benefits for the period from 1980 to 1988, reasoning that the ALJ's findings that claimant worked with "substantial" and "constant pain" were relevant factors in determining whether claimant has a loss in WEC.

[16] *Id.* at 938 (citing *Haw. Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 653 (9th Cir. 2010)).

[17] In *Bourgeois*, the court upheld the ALJ's finding that claimant did not suffer a work-related labral tear, stating that the ALJ was not required to credit treating physician's testimony. The ALJ properly considered the testimony and opinions of both experts, and found employer's expert more credible. In an unpublished decision in that case, the Board sought to limit *Amos* by stating that "[a]s the issue is the work-relatedness of claimant's condition and not the reasonableness of treatment, *Amos* is inapplicable at this juncture." *Bourgeois v. Fab-Con, Inc.*, BRB No. 18-0253 (BRB Nov. 15, 2018) (unpub.). The court did not follow this line of reasoning.

[18] In *Ceasar*, the court affirmed the ALJ's responsible employer determination, stating that "[i]t is true . . . that the opinion of a treating physician may be entitled to considerable weight in determining disability. Nevertheless, an ALJ may give less weight to a treating physician's opinion when there is good cause shown to the contrary." *Id.* at 926-27 (citation omitted). The court concluded that the ALJ was within his power to discount treating physician's testimony based on findings that it was contradicted by claimant's testimony, internally inconsistent, and undermined by credible and well-reasoned opinions of three independent physicians.

[19] The Board follows a similar approach in Black Lung cases:

> A properly documented report by the miner's attending physician *may* be given additional weight on the basis that an attending physician is probably more familiar with a claimant's medical condition than a physician who examines or treats a claimant only episodically.
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> The principle that an attending physician's report *may* be accorded greater probative value, however, should not be applied mechanically without regard to the other evidence of record.

See BRB's Black Lung Deskbook, Part IV-D.4(f) at 1, 2-5 (collecting cases).

(unpub.) (citing *Pisaturo v. Logistec, Inc.*, 49 BRBS 77 (2015));[20] *cf. Monta v. Navy Exchange Service Command*, 39 BRBS 104 (2005).[21]

[20] *See also* Yelena Zaslavskaya, *Evaluation and Weighing of Medical Opinion Evidence in Longshore Cases*, 49 BENEFITS REVIEW BD LONGSHORE RPTR STATUTES & REGS 4/15-1 (Apr. 2015) (collecting cases).

[21] In *Monta*, the Board affirmed the ALJ's finding that when presented with two valid options for treatment, the decision should be left with the claimant to choose between them, and employer is liable for the option she chooses.