U.S. Department of Labor

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

BRB No. 20-0501

ROBERT MOCKEL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	**NOT-PUBLISHED**
	)	
SSA TERMINALS, LLC	)	
	)	
and	)	DATE ISSUED: 11/29/2021
	)	
HOMEPORT INSURANCE COMPANY	)	
	)	
Employer/Carrier- Respondents	)	
	)	DECISION and ORDER

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

Amie C. Peters (Blue Water Legal PLLC), Edmonds, Washington, and Steven M. Birnbaum (Law Office of Steven M. Birnbaum, PC), San Rafael, California, for Claimant.

Gursimmar S. Sibia and Conrad A. Postel (Bruyneel Law Firm, LLP), San Francisco, California, for Employer/Carrier.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Steven B. Berlin's Decision and Order and Order on Reconsideration Modifying Decision and Order (2016-LHC-00210) rendered on a claim 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 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, while working for Employer as a mechanic, allegedly sustained back injuries in December 2010, March 2011, and May 2015. Following treatment of his back condition in 2010 and 2011 with Dr. David Chow at the California Spine Center (CSC), Claimant returned to modified full-duty work with Employer on September 18, 2011.[2] On May 20, 2015, he began feeling back pain in the course of an assigned work project. He took medication almost immediately, completed the project, took a second dose of medication once home, but awoke the next morning to significant back pain, prompting him to call out sick. He sought treatment with the CSC on May 28, 2015, and a nurse practitioner took him off work. CX 5 at 134. In a progress note dated July 2, 2015, CSC staff assessed Claimant as "[p]ermanent and stationary with open future medical treatments" and able to work full-time at modified duty within the previously imposed 2011 physical restrictions. *Id.* at 132. Meanwhile, Dr. Yi Chiang evaluated Claimant for low back pain and right sciatic pain on June 19, 2015. In terms of his 2015 work injury, she diagnosed Claimant with a "greatly improved" lumbar strain/sprain and "resolved" pre-existing lumbar radiculopathy and opined Claimant is able to return to his usual modified duty. EXs 8, 34. She, however, recommended modifying the permanent work restrictions Dr. Chow imposed because they "appear more limited than what the patient reports he can do easily."[3] *Id.*

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[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] Dr. Chow, in his progress note dated September 13, 2011, released Claimant to "full-time with modified duty" in accordance with the following permanent restrictions: no bending, twisting, or lifting below the waist, no lifting greater than 20 pounds, and no sitting, standing or walking for longer than 15 minutes at a time. EXs 31, 2, Dep. at 14-15. Claimant's modified work duties largely consisted of "tagging containers," driving a side-pick, and performing some other odd jobs at Employer's facility. HT at 34, 160-161, 342-345.

[3] Dr. Chiang recommended altering Claimant's permanent work restrictions as follows: walking up to 45 (rather than 15 minutes) continuous; standing up to 1 hour (rather than 15 minutes) continuous; no lifting/carrying/push/pull greater than 30 pounds (previously limited to 20 pounds); and no limitations on sitting or driving. EXs 8, 34.

Claimant filed a claim, dated June 3, 2015, alleging he sustained a back injury in the course of his work with Employer on May 20, 2015. EX 1. He also alleged Employer discriminated against him, violating Section 48a of the Act, 33 U.S.C. §948a, by conducting surveillance on him prior to his May 2015 work injury and by purposely delaying his return from his 2015 work injury to his usual modified work. Employer controverted the claim,[4] the case was forwarded to the Office of Administrative Law Judges, and a formal hearing was held on October 5 and 6, and November 7, 2017.

In his decision, the ALJ found Claimant established a prima facie case entitling him to the Section 20(a) presumption, 33 U.S.C. §920(a), that his May 2015 back injury is work-related, and Employer established rebuttal of the presumption. Considering the evidence as a whole, the ALJ found Claimant sustained a work-related lumbar back sprain/strain on May 20, 2015. Decision and Order at 51-54. He next found Claimant's 2015 lumbar sprain/strain rendered him incapable of performing his usual modified work with Employer until June 9, 2015, but Employer did not offer Claimant any modified work until March 9, 2017. *Id.* at 56. He also found Claimant impeded Employer's reasonable efforts to identify suitable alternate employment from September 12, 2016, due to Claimant's "recalcitrance" in agreeing to meet with its vocational expert. *Id.* at 65.

The ALJ therefore awarded Claimant temporary total disability benefits from May 21 to June 8, 2015, permanent total disability benefits from June 19, 2015 through September 11, 2016,[5] and from December 12, 2016 through March 9, 2017, as well as medical benefits. *Id.* at 73. He further concluded Employer did not engage in discrimination in violation of the Act and denied Claimant's Section 48a claim. *Id.* Addressing Employer's motion for reconsideration, the ALJ modified his award of benefits to reflect Claimant was not entitled to total disability benefits from June 9 through October 28, 2015, because Claimant, though no longer medically disabled as a result of his 2015 work injury, did not ask to return to work or establish Employer would not allow him to return to work during that time. Order on Recon. at 7.

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[4] Nevertheless, Employer voluntarily paid medical benefits, as well as partial disability benefits totaling $5,026 covering two periods of time, i.e., temporary partial from October 13-26, 2015, and permanent partial from October 27, 2015, to January 18, 2016. EX 6.

[5] Based on Dr. Chiang's assessment, the ALJ found Claimant's 2015 work-related back injury reached maximum medical improvement (MMI) on June 19, 2015. Decision and Order at 55.

On appeal, Claimant challenges the ALJ's suspension of benefits for two distinct periods and denial of his Section 48a discrimination claim. Employer responds, urging affirmance of the ALJ's decisions. Claimant has filed a reply brief.

Disability is defined as the "incapacity *because of injury* to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. §902(10) (emphasis added). To be entitled to total disability benefits, a claimant must establish he cannot return to his usual work due to his work injury. *Christie v. Georgia-Pacific Co.*, 898 F.3d 952, 52 BRBS 23(CRT) (9th Cir. 2018). This may be established by evidence of a claimant demonstrating a physical inability to perform his job or showing his former job is no longer available to him and the unavailability is related to, or was precipitated by, his work injury. *Id.; see Service Employees Int'l, Inc. v. Director, OWCP,* 595 F.3d 447, 455-456, 44 BRBS 1, 6(CRT) (2d Cir. 2010); *McBride v. Eastman Kodak Co.,* 844 F.2d 797, 21 BRBS 45(CRT) (D.C. Cir. 1988); *Rice v. Service Employees Int'l, Inc.,* 44 BRBS 63 (2010). Only after a claimant has established a prima facie case of total disability does the employer bear the burden of establishing the availability of suitable alternate employment to show the claimant's disability is, at most, partial. *See generally Gacki v. Sea-Land Serv., Inc.*, 33 BRBS 127 (1998).

In assessing whether Claimant established a prima facie case of total disability, the ALJ properly required him to show he was unable to return to his usual work. The ALJ found Claimant had so shown, but only until June 8, 2015. Upon his being adjudged able to return to work as of June 9, the ALJ then required Claimant to show Employer did not allow him to return to his usual employment until October 29. Decision and Order at 57-62; Order on Recon. at 4-6. In this regard, the ALJ found Employer "had an obligation to allow Claimant to return to work." Order on Recon. at 5; *see also* Decision and Order at 62. On reconsideration, however, he modified his finding to reflect Employer's obligation did not attach until Claimant "ask[ed Employer] to return" to work. Order on Recon. at 5. He then found Claimant's failure to make such a request in June 2015, or at any time prior to October 2015, precluded him from "carry[ing] the burden of showing that Employer would not allow him to return [to work] at that time." *Id.* at 6.

Claimant's contentions regarding his entitlement to continuing total disability benefits from the date of his injury and beyond June 9, 2015, center on a flawed premise that once he demonstrated an inability to return to his usual work due to his May 2015 work injury, the burden permanently shifted to Employer to establish the availability of suitable alternate employment.[6] Cl. Br. at 17-18. He maintains he need not show he conducted a

[6] For example: Claimant states, "[p]er the shifting burdens of the Act, [he] provided evidence he was restricted from at least some of his work," thereby making Employer "responsible for showing alternative work once [he] was restricted from his job;" a legal

diligent job search until Employer meets its burden, so he is not required to inform Employer of his readiness to return to work. Claimant states Employer's burden, along with Dr. Chiang's release, required it to offer Claimant his prior modified job, as such an offer could have triggered a functional capacity evaluation and given Employer control over when Claimant could return to work. These contentions, however, do not recognize that Claimant first bears the burden of establishing he is totally disabled *before* the employer bears its burden of showing the availability of suitable alternate employment. *Gacki*, 33 BRBS 127 (the claimant bears the burden of proving he is disabled).

It is undisputed Claimant was incapable of returning to his usual modified work from the date of his injury until June 9, 2015,[7] when the ALJ determined Claimant was no longer disabled. In reaching this conclusion, the ALJ examined Claimant's statements in his June 9, 2015 CSC intake form that his general health is between "[a]bout the same as one year ago" and "[s]omewhat better now than one year ago," EX 29 (RF 5 at 468) and his reporting to Dr. Chiang on June 19, 2015, that: "[h]is symptoms have improved significantly" and "are back to his normal baseline;" "he is able to return to his usual modified duty with his prior work restrictions;" and "currently, he is able to perform his usual modified work duty with restrictions,"[8] EX 8. Decision and Order at 53. He permissibly found Claimant's statements in this regard belie what the CSC reports stated in terms of Claimant's employability.

The ALJ additionally found the CSC/Dr. Chow's opinions on Claimant's condition and his ability to work were otherwise "unfounded,"[9] and, contrary to Claimant's

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burden which Claimant states Employer failed to meet once it did not offer him modified duty work. Cl. Br. at 17-18.

[7] Consequently, we affirm the ALJ's finding that Claimant is entitled to temporary total disability benefits, payable by Employer, from May 21, 2015 up to and including June 8, 2015. *See Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

[8] The June 9, 2015 report issued by the CSC stated "[t]he patient will be off work through 6/25/15," but then also identified his "work status" as "Full-time with modified duty. Permanent and stationary with open future medical treatments." CX 5 (RF 5 at 398). The next report the CSC issued on July 2, 2015, made no specific statement as to whether Claimant should be off work and instead similarly identified his "work status" as "Full-time with modified duty. Permanent and stationary with open future medical treatments." CX 5 (RF 5 at 392).

[9] The ALJ cited multiple problems adversely impacting the reliability of the CSC reports. First, although "Dr. Chow's signature appears repeatedly on reports opining that

contentions, "Dr. Chow did not meet the requirements to be accorded the deference generally given to a treating physician."[10] Order on Recon. at 2, 6. As such, the ALJ permissibly accorded "almost no weight to the opinions of Dr. Chow." Decision and Order at 51. He rationally concluded, based on crediting Claimant's subjective reports to the CSC on June 9, 2015, as bolstered by Dr. Chiang's "credible" June 19, 2015 opinion, Claimant is able to return to his usual modified duty,[11] and "in fact could have returned to his usual job as early as June 9, 2015," when "he was no longer medically disabled by reason of the [May 2015] injury." Order on Recon. at 6; *see also* Decision and Order at 53; *see generally Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010) (ALJ is entitled to evaluate the credibility of all witnesses, to weigh the evidence, and to draw his own inferences and conclusions from the evidence); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979) (ALJ's credibility determinations are not to be disturbed unless they are "inherently incredible or patently unreasonable."). We therefore affirm his finding as it is supported by substantial evidence and in accordance with law.[12] *See generally Chong v.*

Claimant is temporarily totally disabled," he saw Claimant "only rarely." Order on Recon. at 2. Second, Dr. Chow primarily "left Claimant's care to an unsupervised nurse practitioner" without ever communicating "with the nurse practitioner about Claimant's condition." *Id.* Third, "the nurse practitioner's chart notes are filled with errors," such as referencing medical procedures performed on some other patient and simultaneously stating Claimant was both temporarily totally disabled but also permanent and stationary, and capable of "[f]ull-time work with modified duty." *Id.* Fourth, Dr. Chow essentially conceded "it was his 'standard practice' to give patients medical releases to return to work when the patient asked for one." Claimant's testimony confirms that once he "told the doctor she said, 'Well, we'll change your doctor's note to go back to work.'" HT at 129. Moreover, the ALJ found "[a]ll of the several medical experts in the case opined that the [CSC] chart notes were unreliable, and even Dr. Chow conceded the many errors." *Id.*

[10] The ALJ found Dr. Chow "had too little contact with Claimant" and the "contact he had was too sporadic." Order on Recon. at 2.

[11] The ALJ found "Dr. Chiang's opinion and supporting findings and analysis credible and worthy of substantial weight as [it is] within her specialization in pain medicine, based on a reliable history, a record review, a thorough examination of Claimant close in time to the alleged injury, and a detailed report with well-explained findings." Decision and Order at 53.

[12] Moreover, we note Claimant neglects to adequately address, or for that matter challenge, the ALJ's credibility determinations in support of his finding that Claimant was capable of returning to his usual employment as of June 9, 2015. Claimant instead argues

Todd Pacific Shipyards Corp., 22 BRBS 242 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP*, 909 F.2d 1488 (9th Cir. 1990). We also reject Claimant's assertion that, by demonstrating a prima facie case of total disability between May 20 and June 8, 2015, he imposed on Employer a "permanent" burden to establish the availability of suitable alternate employment after that. Once Claimant has been found capable of returning to his usual work, Employer no longer bears the burden to establish the availability of suitable alternate employment. *See generally Gacki*, 33 BRBS 127.

Affirming the ALJ's finding that Claimant was able to return to his usual modified work as of June 9, 2015, ends our review.[13] Claimant is not entitled to disability benefits for his injury beyond that date. Claimant's failure to challenge this finding renders his remaining suitable alternate employment arguments irrelevant, and the ALJ's awarding of disability benefits after June 8, 2015 is erroneous as a matter of law.[14] *Christie*, 898 F.3d 952, 52 BRBS 23(CRT). The issues pertaining to disability in the post-June 9, 2015 time-frame are irrelevant given the undisputed fact that Claimant failed to establish a prima facie case of total disability as of June 9, 2015.[15] *Gacki,* 33 BRBS 127 For this reason, we

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he should not be obliged to follow the opinions of Employer's expert rather than those of his own treating physician.

[13] The ALJ's unchallenged finding that "there is no dispute that there was plenty of work within Claimant's restrictions to which Claimant could have returned in mid-June 2015; the tagging work was still at its most active," Decision and Order at 63 n.59, further establishes Claimant could not, as of that date, show his former job was unavailable to him as a result of his injury. *See Service Employees Int'l, Inc. v. Director, OWCP,* 595 F.3d 447, 455-456, 44 BRBS 1, 6(CRT) (2d Cir. 2010); *McBride v. Eastman Kodak Co.,* 844 F.2d 797, 21 BRBS 45(CRT) (D.C. Cir. 1988); *Rice v. Service Employees Int'l, Inc.,* 44 BRBS 63 (2010).

[14] The ALJ needlessly addressed which party was required to take the first step in terms of renewed employment in 2015, whether Employer established the availability of suitable alternate employment, and whether Claimant failed to cooperate with Employer's vocational expert in 2016. Claimant bears the burden to prove a prima facie case of total disability before Employer's burden of establishing the availability of suitable alternate employment arises, circumstances not presented in this case after June 9, 2015. *See generally Gacki v. Sea-Land Serv., Inc.*, 33 BRBS 127 (1998).

[15] We therefore need not address Claimant's challenge to the ALJ's suspension of benefits from June 9, 2015 through October 29, 2015, and September 12, 2016 through December 11, 2016.

vacate the ALJ's findings regarding the nature and extent of Claimant's disability after June 9, 2015, and, as a matter of law, reverse his award of permanent total disability benefits from October 29, 2015 through September 11, 2016, and from December 12, 2016 through March 9, 2017. *Christie*, 898 F.3d 952, 52 BRBS 23(CRT); *Rhine v. Stevedoring Services of America*, 596 F.3d 1161, 44 BRBS 9(CRT) (9th Cir. 2010) (the Board must accept the ALJ's findings "*unless they are contrary to the law,* irrational, or unsupported by substantial evidence." (emphasis added)). Claimant is not entitled to disability benefits as of June 9, 2015.[16]

Section 48a

Claimant contends the ALJ erred in finding Employer did not engage in discrimination in violation of the Act. He maintains Employer's use of surveillance evidence[17] and other purposeful actions to delay Claimant's return to work established discriminatory animus which the ALJ should have considered. Claimant's contentions lack merit.

Section 48a of the Act prohibits an employer from discharging or discriminating against an employee because the employee has claimed compensation under the Act. If the employee can show he is the victim of such discrimination, and if he is qualified to return to work, he is entitled to reinstatement and back wages. 33 U.S.C. §948a;[18] *see Babick v. Todd Pacific Shipyards Corp.*, 49 BRBS 11 (2015). The essence of

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[16] We note Employer cannot recoup its payment of benefits because the Act limits an employer to a credit against benefits being paid or an offset against future payments, and neither situation presently applies to this case. 33 U.S.C. §§903(e), 914(j), 933(f).

[17] Unbeknownst to Employer, at the time of Claimant's May 20, 2015 work injury, Carrier had already placed Claimant under surveillance for issues pertaining to medical benefits from his 2010 and 2011 work injuries. CX 15, Dep. at 22-23.

[18] Section 48a of the Act provides:

> It shall be unlawful for any employer or his duly authorized agent to discharge or in any manner discriminate against an employee as to his employment because such employee has claimed or attempted to claim compensation from such employer, or because he has testified or is about to testify in a proceeding under this chapter.

33 U.S.C. §948a.

discrimination is in treating like individuals differently. *See Mueller Brass Co. v. N.L.R.B.*, 544 F.2d 815 (5th Cir. 1977); *Jaros v. Nat'l Steel & Shipbuilding Co.*, 21 BRBS 26 (1988). In order to establish a prima facie case of discrimination, a claimant must demonstrate his employer committed a discriminatory act motivated by discriminatory animus or intent; if he does so, he is entitled to a rebuttable presumption that his employer violated Section 48a. *Babick*, 49 BRBS at 12-13; *Dunn v. Lockheed Martin*, 33 BRBS 204 (1999). An employer's burden on rebuttal is one of production: it must produce substantial evidence that it acted for non-discriminatory reasons; if it does so, the presumption falls from the case. *Id.* The claimant then bears the ultimate burden of persuasion and must prove by a preponderance of the evidence that his employer committed a discriminatory act against him motivated by his claim for compensation under the Act. *Id.*

The ALJ found Claimant presented two bases for his discrimination claim. First, he asserted pre-injury surveillance demonstrated discrimination. Second, he asserted the events which resulted in a 17-month delay in returning him to work also established possible discriminatory animus. The ALJ found the former basis did not support a prima facie case of discrimination, while the latter did. Nevertheless, he also found Employer rebutted the presumption and, on the record as a whole, found Employer's actions were legitimate and non-discriminatory.[19] Consequently, the ALJ denied Claimant's Section 48a claim. Decision and Order at 66-73. Therefore, the questions before us are whether the ALJ erred in denying a prima facie case of discrimination based on the surveillance and in denying a discrimination claim based on the record as a whole regarding the delay in returning Claimant to work. We first address Claimant's surveillance arguments, as those are most pertinent to the time-frame for which we affirmed benefits.

In terms of the claim based on the surveillance evidence, the ALJ found it insufficient to establish Claimant's prima facie case of discrimination.[20] He found Carrier's use of surveillance relating to Claimant's 2011 workplace back injury is something it "routinely uses" in Longshore cases as "part of information-gathering in an adversarial system," which "is no more discriminatory than requiring an independent medical examination or compelling a claimant to provide sworn deposition testimony." Decision and Order at 68. Additionally, he found the record contained no evidence that Employer was involved in, authorized, or was even aware of any surveillance prior to

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[19] The findings of invocation and rebuttal are affirmed as unchallenged on appeal. *See Scalio*, 41 BRBS 57.

[20] Thus, contrary to Claimant's contention, the ALJ considered whether the surveillance information exhibited Employer had a discriminatory animus.

Claimant's May 2015 work injury.[21] *Id.* Rather, he found the evidence established Carrier unilaterally hired investigators in regard to Claimant's 2011 injury and only informed Employer of the surveillance after Claimant reported his May 2015 injury, and then only because the videos taken in the days immediately following his May 2015 injury were inconsistent with his statements. *Id.*

In reaching this conclusion, the ALJ credited the testimony of Mr. John Bell, Claimant's manager, that he had no knowledge of the surveillance until he contacted Carrier's representative, Mr. Anthony Walker, to report Claimant's May 20, 2015 work injury. CX 8, Dep. at 22-24. The ALJ also credited Mr. Walker, who stated he alone made the decision to put Claimant under surveillance for his 2011 injury without any input from Employer[22] and did not share any surveillance video with Employer until sometime after Carrier was notified of the May 20, 2015 work accident. CX 15, Dep. at 9-10, 19, 21, 23, 25-26; *see also* HT at 346-347. He further found Claimant presented no evidence to dispute this testimony. He therefore concluded Carrier's surveillance of Claimant revealed "nothing about Employer's intent or any animus Employer might have had toward Longshore Act claimants generally or Claimant in particular." Decision and Order at 68.

It is well established that an ALJ is entitled to address questions of witness credibility, weigh the medical evidence, and draw his own inferences from the evidence. *See Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988). 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, 1327 (D.R.I. 1969). The Board will not interfere with an ALJ's credibility determinations unless they are "inherently incredible or patently unreasonable," *Cordero*, 580 F.2d 1331, 1335, 8 BRBS 744, 747, and must accept his findings unless they are contrary to law,

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[21] The ALJ also found Employer's actions relating to his 2011 workplace back injury, i.e., accommodating Claimant with modified duty and paying Dr. Chow's bills, are not indicative of any discriminatory animus toward Claimant.

[22] Mr. Walker stated he ordered surveillance on Claimant in October 2014 because Dr. Chow modified Claimant's sitting restriction from 2 hours to 15 minutes, which appeared to conflict with Claimant's daily hour and forty-five minute one-way commute to and from work. CX 15, Dep. at 19. He wanted to determine whether Claimant was regularly exceeding his restrictions or whether those restrictions remained accurate. *Id.* Mr. Walker explained he has used surveillance for this purpose in other cases. *Id.*, Dep. at 24-25.

irrational, or unsupported by substantial evidence. *Rhine*, 596 F.3d at 1165, 44 BRBS at 10(CRT).

In this case, the ALJ rationally concluded Employer's evidence was credible, and Carrier's surveillance of Claimant was a legitimate and routine procedure with respect to claims it pays. Claimant offered nothing to contradict the witnesses regarding Employer's lack of involvement in the pre-injury surveillance that was conducted or the use of the surveillance video after that. Therefore, we affirm the ALJ's finding that the surveillance does not establish a prima facie case of discrimination, as it is supported by substantial evidence and in accordance with law. Claimant does not establish Employer discriminated against him on this basis.

Next, we address Claimant's delayed return to work as a basis for discrimination.[23] After finding the presumption rebutted, the ALJ examined the relevant testimony from Claimant, his union representative, Donald Crosatto, his foreman, Edward Klim, and Mr. Bell, regarding the delay from when Claimant was declared medically capable of returning to his usual modified work to when Employer offered him an actual job. He also reviewed the work restrictions the CSC and Dr. Chiang imposed, and Dr. Chow's related testimony. First, he found it made "economic sense" for Employer to not bring Claimant back to work until it had full-time work available within his restrictions. In this regard, he credited the testimony of Mr. Bell, Mr. Klim and Mr. Crosatto, regarding the collective bargaining agreement's 40-hour pay guarantee,[24] in conjunction with the statements of Mr. Bell and Mr. Klim that they did not have a job requiring 40 hours of work available within Claimant's restrictions in October 2015.[25]

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[23] Although this part of the discrimination claim relies on post-June 2015 activities, which we have now deemed irrelevant with regard to any entitlement to benefits, we address the discrimination aspect because that is a separate claim under the Act.

[24] All three testified the collective bargaining agreement required Employer to pay Claimant for 40 hours of work per week, even if it brought him back to a job requiring fewer than 40 hours of work per week. HT at 349, 352-353, 363, 372; CX 8, Dep. at 42-45; CX 13, Dep. at 340.

[25] The ALJ stated a determination of discriminatory animus required him to look at the information the relevant decision-makers for Employer considered in order to discern whether they made a reasonable inquiry into Claimant's employability given his skills, experience, and post-injury restrictions. Decision and Order at 70, n.63. He found Mr. Bell and Mr. Klim made such an inquiry only to find there was no such full-time work available. The ALJ added "Employer had no obligation to create unneeded work." *Id.*

Second, the ALJ found "credible, legitimate" reasons existed why Employer wanted to discuss Claimant's restrictions with Dr. Chow before returning him to work. He found the records that the CSC and Dr. Chow provided were full of inconsistencies, significantly flawed, and lacked any "valid, medically-based" rationale for waiting until October 2015 to release Claimant to return to work. The ALJ found this delay suggested a more serious injury which, when combined with other evidence, "raised questions" about those restrictions. Not only did the ALJ find some restrictions changed back and forth for no apparent reason, and some of the language in the stated restrictions was ambiguous, he found video evidence showed Claimant energetically engaged in activities exceeding those restrictions without any sign of injury. Combined, he found these facts bolstered Employer's decision to seek clarification from Dr. Chow. The ALJ also found it reasonable to expect Employer would want to discuss with Claimant what tasks he thought he could perform, especially because his prior modified work tagging containers had ended. Furthermore, the ALJ found it significant that Employer undertook the delay at its own risk because it resulted in its continued "obligation to pay compensation" until it offered Claimant a "roadability" job in March 2017. The ALJ therefore found no evidence of pretext in Employer's actions and concluded it did not engage in discrimination in violation of the Act. Decision and Order at 73.

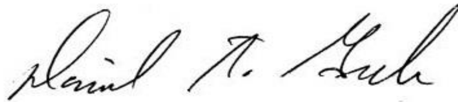
In addressing the record as a whole, the ALJ thoroughly discussed the relevant evidence in terms of Claimant's discrimination claim and, acting within his discretion, rationally found the record established Employer had credible, legitimate reasons for delaying Claimant's return to work. Substantial evidence supports the ALJ's conclusion that Claimant did not establish his filing of a compensation claim, or any discriminatory animus, motivated Employer to not offer Claimant a job sooner than March 2017. As Claimant has not established any basis of discriminatory animus, we affirm the ALJ's denial of Claimant's Section 48a claim. *See Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998); *Manship v. Norfolk & Western Ry. Co.*, 30 BRBS 175 (1996).

Accordingly, we affirm the ALJ's award of temporary total disability benefits payable by Employer from May 20, 2015 through June 8, 2015, and his finding that Claimant was capable of returning to his usual modified work with Employer on June 9, 2015. We also affirm the ALJ's denial of Claimant's Section 48a claim. We reverse, as a

matter of law, his award of disability benefits for Claimant's May 2015 injury for any period of time after June 8, 2015.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge



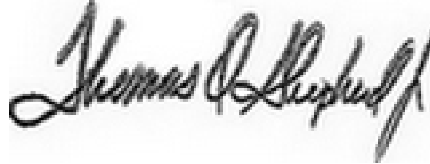
DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

CERTIFICATE OF SERVICE

2020-0501-LHCA Mr. Robert Mockel v. SSA Terminals - Oakland, (Case No. 2016-LHCA-00210) (OWCP No. 13302799)

I certify that the parties below were served this day.



11/29/2021
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