NOT FOR PUBLICATION

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TROY OWEN, Petitioner, v. SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD.; et al., Respondents.	No. 21-71247 MEMORANDUM*

On Petition for Review of an Order of the
Department of Labor

Argued and Submitted October 7, 2022
Portland, Oregon

Before: OWENS and MILLER, Circuit Judges, and PREGERSON,** District Judge.

Troy Owen appeals from a decision of the Benefits Review Board of the United States Department of Labor. We have jurisdiction under 33 U.S.C. § 921(c), and we grant the petition in part and deny it in part.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Dean D. Pregerson, United States District Judge for the Central District of California, sitting by designation.

Owen worked as a longshoreman in Portland, Oregon until 2016, when he tore his rotator cuff. Ultimately, Owen decided to retire rather than continue working in the limited number of longshore jobs he could still perform. After Owen retired, an administrative law judge (ALJ) determined that he was entitled to permanent partial disability benefits under the Longshore and Harbor Workers' Compensation Act (Longshore Act), 33 U.S.C. §§ 901–950.

1. The Board did not err in affirming the ALJ's finding that Owen was permanently partially disabled within the meaning of the Longshore Act. "We . . . review the Board's interpretation of the Act de novo." *Christie v. Georgia-Pacific Co.*, 898 F.3d 952, 956 (9th Cir. 2018). The Longshore Act defines "disability" as "incapacity *because of injury* to earn the wages which the employee was receiving at the time of injury." 33 U.S.C. § 902(10) (emphasis added). "The plain language . . . makes no reference to retirement or its timing, nor to whether an employee decides to retire voluntarily or involuntarily." *Christie*, 898 F.3d at 958. The decision to retire may prevent one from returning to work, but that is not "incapacity because of injury." Because Owen is still physically capable of performing some longshoreman jobs, he is not totally disabled.

Our case law confirms that decisions about retirement do not factor into the disability determination. In *Christie*, we held that a claimant's decision to retire early to take advantage of a retirement package did not prevent him from later

receiving permanent total disability benefits under the Longshore Act. 898 F.3d at 958–60. But in *Christie*, unlike here, the claimant's work-related injury *itself* prevented him from returning to work. *Id.* at 959–60. Rejecting the idea "that retirement necessarily *causes* a loss of wage-earning capacity," *id.* at 957, we held that "retirement status alone, in and of itself, is not dispositive to determining disability under the Act," *id.* at 959. *See Rhine v. Stevedoring Servs. of Am.*, 596 F.3d 1161, 1166 (9th Cir. 2010) (explaining that "the availability of alternative employment"—and thus the extent of disability under the Act—"is determined by reference to two criteria: the claimant's physical abilities and the economic availability of particular jobs in the market").

2. Substantial evidence does not support the Board's affirmance of the ALJ's finding regarding the number of work hours available to Owen. We review the Board's factual findings for substantial evidence. *See Christie*, 898 F.3d at 956. "A decision by the [Board] is supported by substantial evidence if there exists 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Van Skike v. Director, Off. of Workers' Comp. Programs*, 557 F.3d 1041, 1045–46 (9th Cir. 2009) (quoting *E.P. Paup Co. v. Director, Off. of Workers' Comp. Programs*, 999 F.2d 1341, 1353 (9th Cir. 1993)).

The ALJ accepted the testimony of Stuart Strader, a Portland longshoreman and union representative, regarding the physical demands of various longshore

jobs. The ALJ noted Strader's "intimate understanding of the positions" and his "comprehensive knowledge of the physical requirements." But the ALJ went on to discount Strader's testimony that Owen could perform only half of all mechanical hopper-opener jobs. The ALJ discounted that testimony because Owen's employment records, showing occupational codes for the hours Owen worked, did not distinguish between different types of hopper-opener jobs. But the fact that the Pacific Maritime Association's occupation codes do not distinguish between different hopper-opener jobs is not inconsistent with Strader's testimony that half of those jobs are too physically demanding for Owen to perform.

To be sure, an ALJ may accept part of a witness's testimony while rejecting the rest. *Nardella v. Campbell Mach., Inc.*, 525 F.2d 46, 49 (9th Cir. 1975). Here, however, the reason the ALJ gave for accepting part of Strader's testimony—namely, Strader's deep familiarity with longshore jobs in the Portland area—appears to be equally applicable to the part of the testimony that was rejected. No evidence contradicted Strader's testimony on this point. On this record, we conclude that substantial evidence does not support the rejection of Strader's testimony that Owen could perform only half of all hopper-opener jobs.

We remand to the agency for further proceedings to recalculate the number of work hours available to Owen.

The parties shall bear their own costs.

PETITION GRANTED in part and DENIED in part; REMANDED.