U.S. Department of Labor

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

BRB No. 21-0622

STEVEN FRANKE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
FORCE PROTECTION, INCORPORATED	)	
	)	DATE ISSUED: 12/08/2022
and	)	
	)	
ALLIED WORLD NATIONAL ASSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Granting Modification and Order Granting in Part and Denying in Part Claimant's Motion for Reconsideration[1] of Monica Markley, Administrative Law Judge, United States Department of Labor.

Lara D. Merrigan (Merrigan Legal), Sausalito, California, and Howard S. Grossman (Grossman Attorneys at Law), Boca Raton, Florida, for Claimant.

Limor BenMaier and Rebecca Vanas (Schouest, Bamdas, Soshea, BenMaier & Eastham), Houston, Texas, for Employer/Carrier.

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

[1] The full title of the ALJ's order is "Order Granting in Part and Denying in Part Claimant's Motion for Reconsideration and Order Modifying Decision and Order and Order Denying Employer's Motion for Leave to Introduce New Evidence."

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Monica Markley's Decision and Order Granting Modification and Order Granting in Part and Denying in Part Claimant's Motion for Reconsideration (2019-LDA-00885) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (Act), as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq*. (DBA). 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 applicable law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On January 15, 2013, Claimant filed a claim seeking benefits for spinal/orthopedic injuries arising from a 2012 work incident with Employer in Kuwait. Employer accepted the claim in terms of Claimant's lower back injury and paid him temporary total disability benefits from October 6, 2012 to November 28, 2014, and permanent partial disability benefits from that point forward. A dispute, however, arose regarding the ongoing nature and extent of Claimant's orthopedic injury, culminating in ALJ Daniel F. Solomon's issuance of a Decision and Order Awarding Benefits on February 23, 2016. Judge Solomon found Claimant entitled to, and Employer liable for, permanent total disability benefits from August 5, 2013,[2] for work-related injuries to Claimant's neck, back, legs, feet, and erectile dysfunction.

Pursuant to Section 22 of the Act, 33 U.S.C. §922, on May 15, 2019, Employer filed a petition for modification of ALJ Solomon's 2016 award of permanent total disability benefits, alleging a change in Claimant's physical and economic conditions. Employer submitted surveillance videos from 2019 and 2020 showing Claimant engaged in a range of physical activities which it alleged establishes his physical condition had improved to a point that he was capable of either returning to his usual work or engaging in suitable alternate employment as of either October 2014 or August 2019. ALJ Monica Markley (the ALJ) held a formal hearing by video conference on September 17, 2020, at which time both Claimant and Employer admitted evidence into the record.

In her decision, the ALJ found Employer established a change in Claimant's condition pursuant to Section 22 as the evidence of record showed improvement in

[2] The parties stipulated to August 5, 2013, as the date Claimant's injuries reached maximum medical improvement.

Claimant's physical abilities since the issuance of Judge Solomon's 2016 decision.[3] Decision and Order (D&O) at 30, 31.[4] She next found although Claimant remained incapable of returning to his usual employment, Employer established the availability of suitable alternate employment (SAE) through four positions identified in its 2019 and 2020 labor market surveys. Finding Claimant did not engage in a diligent job search, the ALJ granted Employer's request for modification and modified ALJ Solomon's award to reflect Claimant's entitlement to an ongoing award of permanent partial, rather than permanent total, disability benefits as of October 29, 2019.[5]

Claimant filed a motion for reconsideration with the ALJ, arguing she erred by not factoring inflation into the calculation of his residual wage-earning capacity (WEC) and in finding three of the jobs constituted SAE, because they required training and licensure which Claimant did not possess. In response, Employer filed a motion to introduce new evidence from its vocational expert to counter Claimant's residual WEC argument. The ALJ granted Claimant's motion in terms of his WEC contention but denied it on the establishment of SAE. She therefore modified her award of permanent partial disability

[3] Claimant does not contest the ALJ's crediting of Employer's surveillance footage, along with other evidence, as supporting Employer's burden to establish his physical condition improved under Section 22. Rather, he argues he remains totally disabled because Employer failed to identify jobs suitable for his ongoing physical and psychological limitations and, alternatively, he was diligent but unsuccessful in seeking employment. While Employer discusses at length its surveillance of Claimant and its own conclusions as to what that evidence reveals about his physical capabilities, Employer's Brief at 11-12, 16, 40-44, the ALJ rationally relied on Dr. Pinzon's medical opinion to determine whether the jobs Employer identified are physically suitable for Claimant. Employer also alleges (and the ALJ found) its surveillance contradicts Claimant's description of his physical limitations but does not assert it constitutes proof of his psychological abilities. *Id*. at 11. As discussed below, however, the ALJ permissibly found that while Claimant has a preexisting psychological condition, his alleged employment limitations from that condition are unsupported by the record.

[4] The ALJ's D&O was filed and served by the district director in Jacksonville, Florida; therefore, the case falls within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. D&O at 2; *see McDonald v. Aecom Tech. Corp.*, 45 BRBS 45 (2011).

[5] The ALJ also found Employer entitled to a credit for "all compensation paid to date against the compensation ordered" in her decision on modification.

compensation to reflect a residual WEC of $519.94 adjusted for inflation rather than $626.44 per week.

On appeal, Claimant challenges the ALJ's findings that Employer established SAE and that he did not undertake a diligent job search. Employer responds, urging affirmance of the ALJ's decisions.

Claimant first contends the ALJ erred in finding Employer established SAE. He asserts the ALJ made a "foundational" error by rejecting and therefore not considering the adverse impact his uncontroverted history of cognitive and emotional difficulties due to his pre-existing, diagnosed Post-Traumatic Stress Disorder (PTSD) and Traumatic Brain Injury (TBI) have on his employability.[6] In contrast to the ALJ's finding, Claimant also maintains his failed effort to pursue courses at an online university does not disprove he has limited computer skills due to his longstanding TBI, PTSD, and general lack of experience. He adds it is unclear whether Employer's vocational expert, Stacie Nunez, determined the full educational requirements of the jobs listed in her labor market survey or considered Claimant's psychological condition and resulting cognitive difficulties when concluding this work is suitable for him. In terms of the jobs the ALJ deemed suitable, Claimant asserts he lacks the skills, experience, and qualifications to obtain such work and is otherwise incapable of obtaining any necessary certifications and licensures.[7]

Once a claimant establishes he is unable to perform his usual work, as in this case, the burden shifts to the employer to demonstrate the availability of realistic job

[6] Claimant conceded these injuries are entirely related to a head trauma incident he experienced while serving in the United States Army and that he is not claiming they are related to his time working for Employer. HT at 40-42. Regardless, Claimant's psychological limitations are relevant to determining whether Employer established the availability of suitable alternate employment.

[7] Claimant maintains he cannot secure the Inside Sales Representative job with Arrow Exterminators because he lacks: any required state regulatory licensing; excellent telephone skills; proficiency in Microsoft Excel; and a background in the sales industry. He asserts the Claims Adjuster Trainee position with Progressive Insurance is not suitable because he lacks the requisite exceptional customer service skills, strong analytical skills, and the ability to multitask, organize, prioritize, and negotiate and because it is premised on completion of a training program. He further asserts he does not have the transferrable skills or cognitive capacity to perform the Entry Level Recruiter/Sales Trainee position with Aerotek nor the customer service experience and/or computer skills required for the Customer Service Representative position with Express Employment Professionals.

opportunities within the geographic area where the claimant resides, which the claimant, by virtue of his age, education, work experience, and physical and psychological restrictions, can perform. In demonstrating the availability of SAE, the employer need not obtain a job for the claimant but must establish the availability of realistic job opportunities which the claimant could secure if he diligently tried. *See Del Monte Fresh Produce v. Director, OWCP [Gates]*, 563 F.3d 1216, 43 BRBS 21(CRT) (11th Cir. 2009). In order to satisfy its burden, the employer does not have to find an actual job offer for the claimant but "must merely establish the existence of jobs open in the claimant's community that he could compete for and realistically and likely secure." *Palombo v. Director, OWCP*, 937 F.2d 70, 74, 25 BRBS 1, 6(CRT) (2d Cir. 1991). The employer must present some suitable jobs that are available to the claimant. *Del Monte*, 563 F.3d 1216, 43 BRBS 21(CRT). Finding suitable jobs that exist is a factual determination for the ALJ, and the Board must uphold such findings when "substantially supported by the record." *Del Monte*, 563 F.3d 1216, 43 BRBS 21(CRT).

Having found Claimant established an inability to return to his usual employment, the ALJ addressed whether Employer established the availability of SAE through nine jobs Ms. Nunez identified in her 2019 and 2020 labor market surveys. EX 4. She noted Ms. Nunez concluded, based on her review of Claimant's "extensive medical and vocational records," Decision and Order at 17, that Claimant had acquired transferrable skills and work abilities from his prior semiskilled and skilled positions and had demonstrated average aptitude in general intelligence, meaning he could learn new job tasks.[8] EX 4; EX 7, Dep. at 17-18. The ALJ also found the only new restrictions submitted on modification were those from Dr. Pinzon, who opined Claimant could perform full-time, light-to-medium-duty work with occasional carrying, lifting, pulling, and pushing up to thirty pounds, and limited bending and stooping.[9] She further found Dr. Pinzon also stated

[8] Ms. Nunez's review included Dr. Gerber's 2013 report, Dr. Schultz's medical records, Dr. Pinzon's 2018 report, Claimant's Department of Veterans Affairs (VA) medical records, Susan Rapant's 2014 vocational report, and Judge Solomon's 2016 decision. Ms. Nunez also stated she had "a dialog back and forth" with each of the prospective employers in which they discussed Claimant's background, transferrable skills, and physical restrictions in terms of the requirements and duties of those positions "to see if it'll be a good fit" for Claimant. EX 7, Dep. at 33.

[9] The ALJ found Dr. Pinzon "agreed with the past restrictions for Claimant issued by Dr. Schultz of full-time, light-medium duty with occasional carrying, lifting, pulling, and pushing up to 30 pounds, and limited bending/stooping." D&O at 15. She stated, "only Dr. Pinzon has both examined Claimant and offered an updated opinion as to his functional abilities." *Id.* at 33.

Claimant could work an 8-hour day, 40 hours per week, with 10-15 minute rest breaks every two hours. Applying these parameters, the ALJ rejected five of the nine positions before addressing the remaining four positions.[10] Decision and Order at 35-36.

In considering these four jobs, the ALJ directly rejected Claimant's arguments that his alleged pre-existing psychological and cognitive deficits, lack of transferrable skills, and inability to use a computer render him incapable of performing such work. She found the Claims Adjuster Trainee position with Progressive Insurance qualifies as SAE as consistent with Dr. Pinzon's 2018 physical restrictions, and Ms. Nunez credibly testified as to her belief that Claimant could be successfully trained to perform this job, including the necessary computer use. She next found the Entry Level Recruiter/Sales Trainee position with Aerotek constituted SAE because the job duties and physical requirements fall within Claimant's post-work injury capabilities as articulated by Dr. Pinzon and Ms. Nunez. The ALJ also determined Claimant is capable of performing the position of Inside Sales Representative with Arrow Exterminators. She found the job duties and physical requirements consistent with Claimant's abilities, including its requirement for computer and customer service skills. She concluded the requirement that the candidate pass licensure and technical examinations does not preclude Claimant from successfully performing this job. In this regard, the ALJ determined Claimant's earning an associate degree in psychology and pursuit of classes towards a criminal justice degree, as well as his skilled and semi-skilled work experience, particularly in mechanics, establish he has the aptitude to handle technical examinations and pass required licensure examinations.

Finally, the ALJ found the Customer Service Representative position with Express Employment Professionals likewise consistent with the physical restrictions imposed by Dr. Pinzon and, as indicated by Ms. Nunez, within Claimant's skills and experience. She again rejected Claimant's contentions that this job required computer skills beyond his experience because although a familiarity with Microsoft Office is listed in the job description as helpful, it is not required, and Claimant admitted during the hearing that he has previous experience using Microsoft Word and PowerPoint. The ALJ additionally noted the prospective employer, Express Employment Professionals, indicated it would provide training for the position, which the ALJ found "would certainly allay any issue

[10] The ALJ rejected two dispatcher positions because "each require shifts in excess of eight hours" and three other positions with Whalen Security/Garda World (safety operations center technician), First Group (dispatcher), and Security Finance (entry level recruiter/sales trainee) because subpoena responses from those prospective employers indicated the positions were not available as of when they were cited in Ms. Nunez's surveys. D&O at 35-36.

with Claimant not hav[ing] experience in the specific database they use, particularly as he clearly has some experience using computers." D&O at 39.

The ALJ, therefore, concluded Employer established the availability of SAE through four positions: (1) Claims Adjuster Trainee with Progressive Insurance; (2) Entry Level Recruiter/Sales Trainee with Aerotek; (3) Inside Sales Representative with Arrow Exterminators; and (4) Customer Service Representative with Express Employment Professionals. Averaging the wages for these four positions, the ALJ calculated Claimant's residual wage-earning capacity at $626.44 per week and, as noted, adjusted it for inflation to $519.94 on Claimant's motion for reconsideration. D&O at 5; Order on Recon. at 5.

We reject Claimant's allegations of error. First, as the ALJ found, the record contains no medical evidence imposing any restrictions on Claimant's ability to work due to his cognitive and emotional difficulties from his pre-existing psychological conditions. Indeed, the ALJ found Claimant's objective mental status examinations "have been intact with regard to memory, thought processes, orientation, [and] thought content" and no medical providers have opined he has any mental limitations on his ability to work. CX 5.[11] Moreover, Claimant stated he presently considers himself to have a "zero percent" impairment related to his pre-existing head trauma and resulting PTSD and TBI.[12] HT at 41. Therefore, the ALJ's conclusion that Claimant does not have psychological restrictions on his ability to work is supported by substantial evidence.

Second, the ALJ permissibly concluded, based on the record evidence, that Claimant has the requisite skills and underlying experience to perform four of the positions identified by Ms. Nunez. She rationally credited Ms. Nunez's testimony and overall "approach" in discerning Claimant's work capabilities over Claimant's allegations that he has significant limitations due to his lack of computer skills, and sales and customer service experience. She found Ms. Nunez adequately explained the underlying bases for her conclusions which she found supported by the totality of the evidence. In this regard, she

[11] Although Claimant's VA records contain diagnoses of PTSD and other psychological issues and a mental health treatment plan involving counseling and medication, his psychological evaluations consistently reflected that his memory is "grossly intact," his "thoughts are logical" and "without impairment," and he is "goal-oriented." *See, e.g.*, CX 5 at 7, 12, 14, 22, 25, 28, 31, 44, 47.

[12] Claimant further stated while doctors have generally told him to "stay away from large crowds" and other things that "set you off or trigger you," no physician has formally provided any restrictions or issued any statement precluding him from working as a result of those conditions because "it never came up." HT at 42.

found Claimant's prior work and education history support Ms. Nunez's explanations for her assessment that Claimant has sufficient customer service skills,[13] the ability to pass any minimal examinations and/or licensure requirements, and an ability to perform or be trained in some computer work,[14] insofar as the four SAE positions are concerned.

Citing *Hoard v. Willamette Iron & Steel Co.*, 23 BRBS 38 (1989), Claimant asserts none of the jobs requiring licensure or training can be found suitable as a matter of law because his ability to obtain them is speculative. In *Hoard*, however, the Board did not conclude that any jobs requiring training or licensure are inherently speculative. Rather it identified several factors leading to its conclusion that the claimant's "ability to earn an income as an insurance agent was entirely speculative" in that case: the licensure required the claimant to enroll in an "insurance school, attending lectures at a designated facility for approximately two to three weeks, and studying at home in the evenings[;]" the job was not available until he obtained the licensure and he would not be paid while completing the training; and once he theoretically obtained the licensure and then the job, he would be paid only on commission and it was possible he would "not be able to make a salary at all." The Board further noted the evidence the ALJ credited indicated "it would take three to five months to determine whether claimant could support himself in this field." As Claimant has not persuaded us that the jobs the ALJ found suitable here are speculative as a matter of law, we decline to apply *Hoard* to the facts of this case.

The ALJ is vested with the authority to make findings of fact and to draw rational inferences from the record; the Board may not substitute its views for those of the ALJ. *See, e.g., Gates*, 563 F.3d 1216, 43 BRBS 21(CRT); *Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 36 BRBS 15(CRT) (9th Cir. 2002); *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). The ALJ's findings that Claimant has the vocational skills and physical and psychological ability to work as a

[13] The ALJ credited Ms. Nunez's testimony that Claimant's resume indicated past work at a bar/grill and fitness club which provided him with customer service experience. CX 8 at 3.

[14] The ALJ found it significant that Claimant, from February 2013 through November 2017, achieved grades from As to Cs with a 3.19 cumulative GPA while earning 108 college credits in online courses through the University of Phoenix. She found this evidence establishes Claimant "clearly" has the ability to handle technical examinations and "undermines" Claimant's credibility in terms of his allegation that he cannot handle his cognitive limitations and his characterization of his having a diminished work capacity due to a lack of computer skills. D&O at 36, 38.

Claims Adjuster Trainee with Progressive Insurance, an Entry Level Recruiter/Sales Trainee with Aerotek, an Inside Sales Representative with Arrow Exterminators, and a Customer Service Representative with Express Employment Professionals are rational and supported by substantial evidence. Therefore, we affirm the ALJ's conclusion that Employer established the availability of SAE.[15] *See Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *see Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 107 (2003); *Seguro v. Universal Maritime Serv. Corp.*, 36 BRBS 28 (2002).

Claimant next contends the ALJ erred in finding he did not conduct a diligent job search. He maintains upon receiving the list of positions identified by Employer's vocational expert he applied to as many of those jobs as possible, including the four positions the ALJ deemed suitable. Additionally, he asserts he performed his own, independent, job search. Claimant states he received no interviews and was never hired for any job to which he applied. He maintains "common sense" dictates why he has struggled to get hired given the extensive physical and psychological impediments he faces.

Where, as in this case, the employer establishes the availability of SAE, the claimant may demonstrate he remains totally disabled by showing he diligently tried but was unable to secure employment. *See Tann*, 841 F.2d 540, 21 BRBS 10(CRT); *Fox v. West State, Inc.*, 31 BRBS 118 (1997). "The claimant merely must establish that he was reasonably diligent in attempting to secure a job within the compass of employment opportunities shown by the employer to be reasonably attainable and available." *Palombo v. Director, OWCP*, 937 F.2d 70, 74, 25 BRBS 1, 8(CRT) (2d Cir. 1991). The inquiry into the claimant's diligence in seeking post-injury employment is not limited to his diligence in seeking the jobs identified by employer. *Livingston v. Jacksonville Shipyards, Inc.*, 32 BRBS 123 (1998). The ALJ is required to make specific findings regarding the nature and sufficiency of the job search undertaken by Claimant in order to establish whether the job search was, in fact, diligent. *See Palombo*, 937 F.2d at 70, 25 BRBS at 1 (CRT); *Livingston*, 32 BRBS at 129.

The ALJ relied on "several factors" to conclude Claimant did not undertake a diligent job search. First, she found Claimant, despite the length of time he has been out of work, applied for only five positions, including only four of the nine identified by Ms. Nunez. She noted although Claimant stated he applied for other jobs beyond those listed in the labor market surveys, there is no supporting documentation in the record to show what he submitted, which specific positions he applied for, and/or when he applied for

[15] Because we affirm the ALJ's finding that four jobs were suitable, we need not address Claimant's argument regarding whether a single job satisfies Employer's burden.

them. Because Claimant did not submit his application materials into evidence, the ALJ stated she was unable to determine whether Claimant provided sufficient and good-faith information intended to obtain those alleged jobs or whether he submitted incomplete or self-sabotaging materials intended to ensure he was not contacted further. The ALJ found this particularly important given information from one prospective employer, Security Finance, that Claimant did not submit his resume for the two positions he applied for even though he was specifically asked to do so. She also found Claimant's allegations of diligence undermined by his lack of credibility with respect to other parts of his testimony.[16] Furthermore, the ALJ found no evidence that Claimant provided an affirmative response or participated in the Department of Labor's solicitation to participate in vocational rehabilitation.[17] For these reasons, the ALJ concluded Claimant's evidence did not satisfy his burden to show he was unable to secure SAE, despite his allegedly diligent efforts. D&O at 26, 42.

In contrast to Claimant's assertion, the ALJ's analysis is consistent with the appropriate standard. In this regard, she discussed the particular jobs relied upon by Claimant, and considered both the nature and sufficiency of Claimant's efforts, *see* D&O at 7-9, 13-14, 19-20, in determining whether Claimant was diligent in seeking alternate employment within the compass of employment opportunities shown by the employer to be reasonably attainable and available. The ALJ has broad discretion in weighing Claimant's testimony and the conflicting evidence, and her findings regarding the nature and sufficiency of Claimant's job search efforts are rational and supported by substantial evidence. *See Palombo*, 937 F.2d at 74, 25 BRBS at 8(CRT); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969); *Fortier v. Electric Boat Corp.*, 38 BRBS 75 (2004); *Berezin v. Cascade General, Inc.*, 34 BRBS 163 (2000). The Board cannot reweigh the evidence. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). At this stage of the proceedings Claimant, therefore, did not rebut any showing of suitable alternate employment after October 29, 2019, because he did not establish a diligent job search. *See generally 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); *Wilson v. Virginia Int'l Terminals*, 40 BRBS 46 (2006);

[16] Earlier in her decision the ALJ found Claimant's testimony regarding his physical limitations, cognitive abilities, and computer skills lacked credibility in view of the other evidence of record.

[17] Consequently, we need not address the ALJ's alternative finding that Claimant's alleged diligence was undermined by his refusal to meet with Ms. Nunez.

Berezin, 34 BRBS 163. Consequently, we affirm the ALJ's decision to modify ALJ Solomon's 2016 award of ongoing permanent total disability benefits, to reflect Claimant's entitlement to permanent partial disability benefits from October 29, 2019, and continuing, based on a stipulated average weekly wage of $2,386.36 and an inflationary adjusted residual post-injury WEC of $519.94. Order on Recon. at 5; *see also* D&O at 42-43.

Accordingly, we affirm the ALJ's Decision and Order Granting Modification and Order Granting in Part and Denying in Part Claimant's Motion for Reconsideration.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge