

U.S. Department of Labor

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



BRB No. 22-0458

| | | |
|--|---|-------------------------|
| STEVEN T. YOUNG |) | |
| |) | |
| Claimant-Petitioner |) | |
| |) | |
| v. |) | |
| |) | DATE ISSUED: 02/09/2024 |
| HUNTINGTON INGALLS INDUSTRIES, INCORPORATED |) | |
| |) | |
| Self-Insured |) | |
| Employer-Respondent |) | DECISION and ORDER |

Appeal of the Decision and Order on Remand of Monica Markley,
Administrative Law Judge, United States Department of Labor.

Matthew H. Kraft (Matthew H. Kraft, P.L.C.), Virginia Beach, Virginia, for
Claimant.

Before: GRESH, Chief Administrative Appeals Judge, BUZZARD and
JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Monica Markley’s Decision and
Order on Remand (2018-LHC-00691) 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 applicable law. 33 U.S.C. §921(b)(3);
O’Keefe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

This is the fifth time Claimant’s claim has been before the Benefits Review Board.
We will briefly reiterate the facts and procedural history of this case. Claimant was
employed as a welder for Employer from June 1977 until May 1989. In early 1988,

Claimant suffered work-related injuries to his hands, wrists, elbows, and neck.¹ He stopped working for Employer in May 1989 and has essentially remained out of work since then. *See Young v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 04-0842 (June 30, 2005) (unpub.) (Board’s third decision), *aff’d mem.*, 199 F. App’x 274 (4th Cir. 2006).² Claimant was ultimately awarded permanent partial disability (PPD) benefits beginning June 27, 2000, the date Employer established the availability of suitable alternate employment (SAE); the Board later modified this award to include temporary total disability benefits from January 18, 2000, the date Claimant underwent neck surgery, until July 27, 2000. *See id.* at 2.

Claimant underwent a series of surgeries between 1990 and 2000, and later underwent a second neck surgery in 2008. *See CXs 22-24.* Initially, Claimant’s treating neurosurgeon, Dr. Jonathan P. Partington, restricted Claimant to lifting no more than ten pounds, no pushing or pulling, no overhead work, and “no fine manipulation.” *See Young v. Newport News Shipbuilding & Dry Dock Co.*, Case Nos. 1999-LHC-3081, 2000-LHC-1692, Decision and Order on Remand (Nov. 14, 2002), at 6. However, Claimant’s conditions worsened and, in 2015, Dr. Partington placed additional permanent restrictions on him, including a five-pound lifting limit and an avoidance of hand manipulation. *See CX 24 at 70.*

Subsequently, Claimant filed a motion for modification based on a change in condition. The ALJ found Claimant established a change in condition based on Dr. Partington’s new restrictions. *See Decision and Order Denying Modification*, Case No. 2018-LHC-00691 (Dec. 15, 2020) at 22-23. However, she also determined Employer established the availability of SAE based on those new restrictions, giving greater weight to Employer’s vocational expert, Barbara Harvey, than to Claimant’s vocational expert, H. Gray Broughton. *See id.* at 29-30. She found fifteen jobs identified by Ms. Harvey were compatible with Claimant’s physical limitations. *Id.* at 30-31.

Claimant appealed the ALJ’s decision, asserting she erred by accepting Ms. Harvey’s interpretations of Dr. Partington’s hand manipulation restrictions, finding her

¹ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant sustained his injuries in Newport News, Virginia. 33 U.S.C. 921(c); *see Roberts v. Custom Ship Interiors*, 35 BRBS 65, 67 n.2 (2001), *aff’d*, 300 F.3d 510 (4th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003); 20 C.F.R. 702.201(a).

² The two prior decisions are: *Young v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 03-0199 (Oct. 31, 2003) (unpub.); *Young v. Newport News Shipbuilding & Dry Dock Co.*, BRB Nos. 01-0543/A (Mar. 18, 2002) (unpub.).

more credible than Mr. Broughton, and ignoring Claimant's vocational factors, such as his age and length of absence from the workforce. While the Board affirmed the ALJ's credibility determinations with respect to Ms. Harvey, it also held she erred by failing to consider Claimant's vocational factors, age, and background in determining the suitability of the jobs Employer proffered. *See Young v. Huntington Ingalls Indus., Inc.*, BRB No. 21-0205 (Aug. 27, 2021) (unpub.) (Board's fourth decision), at 5-7.

The Board thus vacated only the ALJ's SAE finding and remanded the case for her to consider whether the jobs Ms. Harvey identified as suitable were, in fact, suitable, given all relevant factors. *See id.* at 7-8. Specifically, the Board instructed her to address Claimant's likelihood of obtaining a job given his age and length of absence from the workforce, noting the ALJ had not assessed the suitability of other jobs requiring a variety of skills (such as customer service abilities, written and oral communication, interpersonal skills, or certification requirements) and whether Claimant's lack of relevant experience would disqualify him from those positions. *Id.*

On remand, the ALJ noted Claimant was 60 years old at the time of the October 24, 2019 hearing on modification and had not worked since suffering his injuries in 1988. *See* Decision and Order on Remand (D&O), at 6. However, she also noted Ms. Harvey's hearing testimony that the job market in Hampton Roads, Virginia, where Claimant resides is generally good for people seeking employment and she considered the "whole individual" in assessing Claimant's employability, including his physical restrictions, medical history, demographics, employment history, and educational history. *Id.* From this testimony, further supported by the ALJ's determination that all the jobs accepted as SAE were for either unskilled or semiskilled work and would be entry-level jobs which would provide the necessary training, the ALJ found Ms. Harvey properly considered Claimant's age and lack of recent work history in identifying jobs that would be suitable for him as of the dates of her surveys. *Id.*

Considering the specific jobs Ms. Harvey identified, the ALJ determined the Service Greeter, Service Valet, and Lot Attendant positions were not suitable because they required customer service skills which Claimant's vocational history did not demonstrate he had. *Id.* Still, she concluded nine of the jobs identified in Ms. Harvey's 2018 and 2019 labor market surveys satisfied Employer's burden of establishing the availability of SAE considering all relevant factors, and she denied Claimant's motion to modify his award of PPD benefits to one for permanent total disability (PTD) benefits. *Id.* at 7-8.

Claimant appeals the ALJ's findings, arguing she failed to fully consider and sufficiently address his age and work history, did not comply with the Administrative Procedure Act (APA), 5 U.S.C. §554, and errantly relied on Employer's vocational evidence. Employer has not responded.

We reject Claimant's contentions. Where, as here, it is undisputed that a claimant is unable to perform his usual work due to his injury, he has established a prima facie case of total disability, and the burden shifts to his employer to demonstrate the availability of SAE. *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 542-543 (4th Cir. 1988); *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 201 (4th Cir. 1984). In order to meet its burden, the employer must present evidence that a range of available jobs exists which the disabled employee is realistically able to secure and perform. *Lentz v. The Cottman Co.*, 852 F.2d 129, 131 (4th Cir. 1988); *see also Trans-State Dredging*, 731 F.2d at 201.

In determining whether an employer meets this burden, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has stated an ALJ should consider not only a claimant's physical conditions, but also "whether there exists a reasonable likelihood, given the claimant's age, education, and vocational background that he would be hired if he diligently sought the job." *Trans-State Dredging*, 731 F.2d at 201 (quoting *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1043 (5th Cir. 1981)). "Disability under the Act is determined not only on the basis of physical condition, but also on factors such as age, education, employment history, rehabilitative potential, and the availability of work that the claimant can do." *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Brickhouse]*, 315 F.3d 286, 295 (4th Cir. 2002) (quoting *Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 127 (5th Cir. 1994)). Consequently, the ALJ must compare a claimant's vocational factors with the requirements of the identified jobs. *Pilkington v. Sun Shipbuilding & Dry Dock Co.*, 9 BRBS 473, 479 (1978).

On remand, the ALJ reassessed the suitability of the fifteen jobs she initially accepted as SAE, taking into consideration Claimant's age, absence from the workforce, and vocational background. D&O at 6. She determined Ms. Harvey adequately considered Claimant's age and workforce history based on her hearing testimony that she "considers the whole individual, including their physical restrictions, medical history, demographics, employment history, and educational history." *Id.*; Hearing Transcript (TR.) at 80. In addition, she noted the positions Ms. Harvey offered in her labor market surveys were either unskilled or semiskilled and would be considered entry-level. *Id.*

The ALJ found the Service Greeter, Service Valet, and Lot Attendant jobs are not suitable because they specifically require customer service skills which Claimant's vocational history did not demonstrate he had. Decision and Order at 6. Further, the ALJ found the Shuttle Driver position with Hall Honda unsuitable because there is no evidence Claimant has the ability to operate a manual transmission as the job requires. *Id.* at 7.

However, she determined Claimant is capable of performing other Transportation Dispatcher, Shuttle Driver, and Driver positions based on Ms. Harvey's assessment that he

possesses transferable skills that include communication abilities, and the positions do not require previously proven customer service skills. *Id.* at 6-7. She also specifically found Claimant able to perform the Repair Dispatch Specialist position with U-Haul Moving and Storage given Claimant's transferable skills, valid driver's license, and ability to communicate orally and in writing. *Id.* Finally, for similar reasons she determined the Transportation Dispatcher, Security Officer, Shuttle Driver with Pearson Toyota and Casey Auto Group, and Driver positions with National/Alamo Car Rental are all within Claimant's abilities and qualify as SAE.³ *Id.* at 7-8.

The record supports the ALJ's findings. Contrary to Claimant's assertions, the ALJ permissibly found that Ms. Harvey adequately considered Claimant's age and work history in her testimony and reports. Ms. Harvey's September 6, 2018 report indicated she met with Claimant, performed vocational testing, and asked about his work history (noting that his past jobs were "long ago") and concluded that her initial April 29, 2018 report findings remained unchanged regarding his employability. EX 60 at 2; EX 63 at 2. Both Ms. Harvey's April 2018 and May 2019 Labor Market Survey reports also indicated she reviewed Claimant's work history before assessing positions she deemed suitable for him. EX 59 at 4-5; EX 63 at 4-5.

At the hearing, Ms. Harvey testified that in preparing labor market surveys, she assesses the individual's physical restrictions, demographic information, employment history, and educational history. TR. at 80. While Ms. Harvey stated an individual's age and absence from the workforce could impact his ability to work, she also testified that the job market in Claimant's community is improving for people seeking employment. TR. at 93-94, 135-136. Thus, the ALJ permissibly found Ms. Harvey based her opinions on all relevant factors. *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 107 (2003); *Fox v. W. State, Inc.*, 31 BRBS 118 (1997);⁴ *Wilson v. Dravo Corp.*, 22 BRBS 463

³ With respect to the Security Officer positions, the ALJ noted they would require Claimant to maintain a Virginia Department of Criminal Justice Services (VADCJS) Unarmed Security Officer Certification. D&O at 7. While she acknowledged Ms. Harvey's findings that Claimant does not have the certification, she found Claimant's transferable skills and history of vocational testing, as evidenced by Ms. Harvey's 2018 report, would enable him to easily obtain the certificate. *Id.* Also, she noted Ms. Harvey's testimony that the companies hiring for Security Officers frequently hire candidates without the certification and give them time to obtain it. *Id.*

⁴ In *Fox*, the Board stated it was not necessary for the employer to elicit specific language from the vocational counselor that the jobs were "realistically available" given the claimant's history. Rather, where "a vocational expert testifies that specific jobs are available which are suitable given [the] claimant's age, education, history, and restrictions,

(1989); *see also Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941 (5th Cir. 1991) (the choice among reasonable inferences is left to the ALJ).

Further, Claimant's assertion that the ALJ did not specify her rationale for deeming the nine positions suitable is incorrect. As discussed above, the ALJ adequately explained why she deemed certain jobs suitable and others unsuitable. D&O at 6-8. Her descriptions for each of these positions is supported by the labor market surveys in the record. EXs 59, 63. The ALJ's findings are rational and supported by substantial evidence. *See Tann*, 841 F.2d at 542-543 (an employer meets its burden by showing evidence of available work for which a claimant could realistically compete). The Board may not substitute its views for those of the ALJ. *See Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Hess]*, 681 F.2d 938, 941 (4th Cir. 1982). Therefore, we affirm the ALJ's SAE determinations and consequently her denial of Claimant's motion for modification and PTD benefits.⁵

it is implicit in such evidence that the jobs are reasonably available to the claimant." *Fox*, 31 BRBS at 121.

⁵ We likewise reject Claimant's remaining arguments. While Claimant asserts the ALJ's reliance on Employer's evidence violated the APA, Claimant does not explain his contentions or how her decision violates the APA. *See* Cl. Brief at 12-13. Therefore, we decline to address this argument. 20 C.F.R. §802.211(b); *Bonner v. Ryan-Walsh Stevedoring Co.*, 15 BRBS 321, 325 (1983) (the Board will not address an inadequately briefed issue). Further, to the extent Claimant contends the ALJ erred in weighing Employer's vocational evidence over Claimant's evidence, specifically with regard to his physical abilities, we disagree. *See* Cl. Brief at 51-54. In its previous decision the Board affirmed the ALJ's decision to give Ms. Harvey's opinion greater weight, *Young v. Huntington Ingalls Indus., Inc.*, BRB No. 21-0205 (Aug. 27, 2021) (unpub.), at 5-7, and that is the law of the case. *Ion v. Duluth, Missabe & Iron Range Ry. Co.*, 32 BRBS 268 (1998) (the Board need not address a previously addressed issue which is the law of the case); *Dean v. Marine Terminals Corp.*, 15 BRBS 394, 397 (1983) (same).

Accordingly, we affirm the ALJ's Decision and Order on Remand.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge