



BRB No. 24-0004

ASHLEY ALSTON )  
 )  
 Claimant )  
 )  
 v. )  
 )  
 CONSTELLIS GROUP/TRIPLE CANOPY, )  
 INCORPORATED )  
 )  
 and )  
 )  
 STARR INDEMNITY and LIABILITY )  
 COMPANY )  
 )  
 Employer/Carrier- )  
 Petitioners )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Respondent )

**NOT-PUBLISHED**

DATE ISSUED: 02/10/2026

DECISION and ORDER

Appeal of the Decision and Order of Angela F. Donaldson, Administrative Law Judge, United States Department of Labor.

John F. Karpousis (Freehill Hogan & Mahar LLP), New York, New York, for Employer and its Carrier.

Ann Marie Scarpino (Jonathan Berry, Solicitor of Labor; Jennifer Feldman Jones, Acting Associate Solicitor; William M. Bush, Acting Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Angela F. Donaldson's Decision and Order (2022-LDA-00355) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (Act), as extended by the Defense Base Act, 42 U.S.C. §§1651-1655 (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.<sup>1</sup> 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked in various administrative, logistics, and managerial positions for Employer in Afghanistan from 2011 through December 17, 2020. JX 10 at 1-2. On October 19, 2020, she sustained a work-related right ankle injury while walking at a fast pace to prepare for a physical fitness test.<sup>2</sup> JX 1 at 8-10; TR at 35-36; JX 13 at 57-58. After injuring her ankle, she sought medical treatment at a clinic and missed one or two days of work. JX 13 at 58-59. Claimant passed her physical fitness test on December 4, 2020, and went to the medical clinic the following day with complaints of low back pain that developed after her physical, as well as ongoing right ankle pain from the previous injury. JX 1 at 10. On December 8, 2020, she returned to the clinic due to left hip and left knee pain she experienced after slipping and falling on the stairs while carrying boxes of printer paper. *Id.* at 11. On December 17, 2020, she traveled home to the United States

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<sup>1</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit because the office of the district director who filed the ALJ's decision is located in Jacksonville, Florida. 33 U.S.C. §921(c); *McDonald v. Aecom Tech. Corp.*, 45 BRBS 45 (2011); *see also Global Linguist Solutions, L.L.C. v. Abdelmeged*, 913 F.3d 921 (9th Cir. 2019).

<sup>2</sup> Prior to Claimant's right ankle injury which is the subject of this appeal, Claimant sustained work-related injuries to her left knee and left hip when she fell on November 19, 2018, while working for Employer. JX 1 at 1-7; TR at 27-29. She also alleged injuries to her back, left hip, sciatic nerve, left knee, left calf, and "body generally" resulting from the November 19, 2018 work incident, as well as an aggravation of those injuries due to repetitive trauma while performing her job duties through the last day she worked for Employer. JX 2 at 1 (Form LS-203: Employee's Claim for Compensation, dated March 31, 2021); JX 9 (Form LS-18: Pre-Hearing Statement, dated October 12, 2021); TR at 67-68.

for regularly scheduled rest and relaxation (R&R) and to get medical treatment for her injuries. TR at 75-76; JX 13 at 59-63. While on R&R, Claimant notified her supervisor she could not return to her job because of her pain. TR at 37, 75-77; JX 13 at 61-63. Employer placed Claimant in a leave of absence status on January 6, 2021, and administratively separated her from her job on April 21, 2021. JX 11.

Upon returning home, Claimant was initially treated for her right ankle injury at the Veterans Administration (VA) Medical Center in Charleston, South Carolina. She was given a walking boot and told she could return to light duty work in one week with restrictions on walking and standing. JX 1 at 13-16; JX 13 at 63-65. Claimant thereafter transferred her medical treatment to Dr. Keith Lamberson, who is located closer to her home in Georgia. On April 16, 2021, an MRI was taken of her right ankle: it revealed “partial if not complete tearing at the fibular insertion of anterior talofibular ligament.” JX 1 at 22. On April 22, 2021, Dr. Lamberson diagnosed a right ankle sprain, prescribed a walking boot and physical therapy, and assigned sedentary work restrictions, stating Claimant was unable to take a physical fitness test or shoot a weapon due to her right ankle pain. *Id.* at 24-26. On October 21, 2021, he issued work restrictions based on right ankle instability: no commercial driving, alternate sitting to standing, and limit walking and standing to two hours per day. *Id.* at 49.

Employer’s vocational expert, Claire Heusinger, interviewed Claimant on September 7, 2021, and issued a vocational report and a labor market survey (LMS) on November 16, 2021.<sup>3</sup> She identified six available jobs considering Claimant’s vocational profile, work history, transferable skills, and work restrictions Dr. Lamberson assigned on September 9, 2021 (no bending, climbing, kneeling, or squatting). JX 17 at 11.

Claimant has not worked overseas since returning to the United States. TR at 37, 75-77; JX 13 at 61-63. In November 2021, she started driving for Uber and Lyft, and she worked full-time remotely as a Hiring Coordinator Assistant for Piedmont Hospital from

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<sup>3</sup> Ms. Heusinger noted Claimant’s symptoms at that time included:

lower back pain with the inability to sit or stand for prolonged periods of time, pain with walking and pain with prolonged driving . . . pain that radiates into her sciatica and lower hip down to her left knee and her left leg . . . dull achy pain in her hip and left knee that is constant and at all times . . . occasionally, as a result of her back pain, she will suffer pain in her right leg . . . difficulties with ambulating and limps on occasion.

JX 17 at 9. Ms. Heusinger also noted Claimant reported that she can sit, stand, and walk approximately fifteen minutes before needing to change positions. *Id.* at 11.

March 2, 2022,<sup>4</sup> until her contract was terminated on December 2, 2022, for reasons unrelated to her limitations and work restrictions.<sup>5</sup> J. Stip. 4; TR at 8, 48-49.

Claimant received several employment offers after she posted her resume on Indeed.com in mid-2022. TR at 87-89; JX 13 at 95. She was offered an overseas job in Israel that did not require a physical fitness test, but she declined the offer because of her health concerns. TR at 45-46; JX 13 at 93-95. In addition, she was offered an administrative job with a hospital in Atlanta but declined the offer because she would be required to work in the office every day and felt she would not be able to do so because of her pain. TR at 88; JX 13 at 96. She also attended a seminar for a remote personnel operations manager position at a startup company but was not selected for the role. TR at 88-89; JX 13 at 97-98. In early 2022, she took an exam for an overseas position with the State Department but did not pass the exam. She stated she likely would not have accepted the job even if she passed the exam because she needed to be home with her daughter who was attending university at that time. TR at 89-90. At the hearing, Claimant testified she would continue driving for Uber and Lyft but hoped to obtain a light duty job within her field of human resources and health administration,<sup>6</sup> preferably one that allows remote work because it is “less tenuous on [her] body,”<sup>7</sup> and she “won’t be able to lift anything or withstand just going into the office, lifting supplies, office supplies, anything.” *Id.* at 46-47, 49-50.

Employer initially accepted the claims arising from Claimant’s November 2018 and October 2020 injuries but controverted Claimant’s repetitive trauma/aggravation claim. JX 3 at 1. It authorized medical treatment and paid temporary total disability (TTD)

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<sup>4</sup> Claimant’s position at Piedmont Hospital involved onboarding new employees. TR at 46-47. She worked nine hours per day sitting at the computer at home and was not required to do any heavy lifting. TR at 83, 94. She testified she was able to move around, stand, and sit as necessary. *Id.* at 46.

<sup>5</sup> Claimant was directly hired for the Piedmont Hospital job by the hospital’s director of human resources, whom she met while driving for Uber. TR at 80-81. She was hired on a contract basis but expected to become permanent. JX 13 at 95; *see also* TR at 87. A few days before the hearing, she was assigned to a new manager. The next day, she received a call from the contractor who advised her that her “contract was terminated” and she was “no longer needed.” TR at 8, 47-49.

<sup>6</sup> Claimant earned her bachelor’s degree in health administration, with a minor in human resources management, in 2017. TR at 50, 81-82, 84; JX 10.

<sup>7</sup> Presumably, Claimant meant “strenuous.”

compensation for Claimant's right ankle injury from December 18, 2020, through April 13, 2021, and continued paying TTD benefits until August 3, 2021, for Claimant's November 2018 injuries. J. Stip. 5; JX 4 at 1-2. On July 30, 2021, Employer controverted disability compensation and medical benefits for Claimant's November 2018 injuries. JX 3 at 3-4. Claimant sought additional disability compensation and medical benefits for all her injuries. On December 7, 2022, the ALJ held a formal hearing on all claims.

In her decision and order (D&O), the ALJ found Claimant's left hip and right ankle injuries are work-related as a matter of law, and Claimant established her initial left knee injury was work-related, but she failed to establish by a preponderance of the evidence that her lumbar spine and ongoing left knee conditions are work-related.<sup>8</sup> D&O at 21-26. In addressing the nature and extent of Claimant's disability, the ALJ found Claimant's right ankle injury has not reached maximum medical improvement (MMI) and has prevented her from returning to her former employment with Employer, thereby establishing a prima facie case of total disability.<sup>9</sup> *Id.* at 27-29. Accordingly, the ALJ awarded TTD benefits from December 18, 2020, through October 31, 2021.

The ALJ found Claimant's post-injury work for Uber, Lyft, and Piedmont Hospital was both suitable and available during the periods Claimant performed that work and awarded temporary partial disability (TPD) benefits from November 1, 2021, through December 2, 2022. In calculating these benefits, she used two distinct post-injury wage earning capacity (WEC) calculations: one based on Claimant's average weekly earnings from Uber and Lyft from November 1, 2021, through December 31, 2021, and another based on the sum of Claimant's 2022 average weekly earnings from Uber and Lyft plus her earnings from Piedmont Hospital from March 2, 2022, through December 2, 2022. Because the ALJ found Claimant's full-time employment for Piedmont Hospital became unavailable when it ended on December 2, 2022, Employer did not show similar positions were available afterwards, and the jobs Employer's vocational expert identified did not constitute suitable alternate employment (SAE), she awarded TPD compensation from December 2, 2022, and continuing, based solely on Claimant's average earnings from Uber and Lyft in 2021. *Id.* at 28-33.

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<sup>8</sup> The ALJ found Employer did not rebut the Section 20(a) presumption, 33 U.S.C. §920(a), with respect to Claimant's left hip and right ankle injuries but did so with respect to Claimant's lumbar spine and left knee conditions. D&O at 22-24.

<sup>9</sup> The ALJ found Claimant failed to establish any disability attributable to her work-related left hip injury and initial left knee pain. D&O at 26.

On appeal, Employer challenges the ALJ's calculation of Claimant's ongoing WEC from December 3, 2022, and her finding that Employer did not demonstrate the availability of SAE after Claimant's employment at Piedmont Hospital ended. The Director, Office of Workers' Compensation Programs (Director), responds, urging affirmance of the ALJ's WEC calculation and her finding that Claimant's post-injury employment at Piedmont Hospital cannot establish her continuing WEC because it "was eliminated by Piedmont and is no longer available."<sup>10</sup> Dir. Br. at 3. Claimant has not filed a response.

Because Employer asserts Claimant's Piedmont Hospital job reflects her educational background, employment history, and future employment goals, is consistent with her physical restrictions, and is similar to other employment opportunities she sought, it contends Claimant's earnings from that job most accurately represent her ongoing WEC.<sup>11</sup> In the alternative, Employer maintains it met its burden of establishing available SAE through Ms. Heusinger's un rebutted vocational opinion, the LMS, and the specific offers of employment from other employers; therefore, it asserts the ALJ should have used the Piedmont Hospital wages in calculating Claimant's WEC, as it is representative of the jobs available to her. In response, the Director contends substantial evidence supports the ALJ's finding that Claimant's Piedmont Hospital job was not regular and continuous but was a contract position that ended after nine months; therefore, the ALJ properly concluded the job does not constitute SAE regularly available to Claimant. As Claimant's earnings from that "temporary" job were not regular and continuous, the Director asserts those earnings cannot establish Claimant's WEC after she was terminated and were properly excluded from the ALJ's calculation of Claimant's ongoing WEC. Dir. Br. at 4.

The dispute on appeal is not whether Claimant is entitled to TPD benefits, but rather how much. Compensation payable for TPD is based on the difference between a claimant's average weekly wage and her post-injury WEC in the same or other employment. 33 U.S.C. §908(e). Section 8(h) provides that a claimant's WEC shall be her actual post-injury earnings if these earnings "fairly and reasonably represent [her] wage-earning capacity." 33 U.S.C. §908(h). If the ALJ determines the claimant's actual wages do not fairly and reasonably represent her WEC, the ALJ may calculate a dollar amount which reasonably represents what the claimant would be paid under normal employment conditions post-injury. *Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 722 (11th Cir. 1988)

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<sup>10</sup> The Director takes no position on whether Employer established SAE via its vocational expert's opinion and the LMS. Dir. Brief at 1 n.2.

<sup>11</sup> Employer does not challenge the ALJ's findings regarding Claimant's entitlement to TTD and TPD benefits. Rather, it challenges the amount of TPD benefits awarded after Claimant lost her job at Piedmont Hospital.

(citing *Van Dyke v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 388, 392 (1978)); *Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 88 (5th Cir. 1990); *Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39, 41-42 (1990).

In determining whether a claimant's actual post-injury earnings fairly and reasonably represent her WEC, the ALJ may consider the claimant's physical condition, age, education, employment history, the availability of employment she can perform after the injury, and any other reasonable variables that could form a factual basis for the decision. *Mangaliman*, 30 BRBS at 43; *Cook v. Seattle Stevedoring Co.*, 21 BRBS 4, 6 (1988); *Devillier v. Nat'l Steel and Shipbuilding Co.*, 10 BRBS 649, 652 (1979). Where a claimant is working post-injury, her post-injury earnings are more likely to be found to reasonably and fairly represent her WEC if the post-injury work is found to be continuous and stable. *Burkhardt v. Bethlehem Steel Corp.*, 23 BRBS 273, 276 (1990); *Devillier*, 10 BRBS at 658 ("The continuousness or impermanence of the post-injury earnings and work is important because the post-injury employment may be sufficiently regular and continuous to establish a true earning capacity."). If the claimant obtained post-injury work but was unable to maintain that work, relevant considerations include the length of time at that job, the reason she lost the job, and her "reasonable prospects for continuing in that field." *Devillier*, 10 BRBS at 656. The party contending the claimant's actual wages do not represent her WEC bears the burden of proof. *Misho v. Dillingham Marine & Manufacturing*, 17 BRBS 188, 190 (1985); *Bethard v. Sun Shipbuilding and Dry Dock Co.*, 12 BRBS 691, 693 (1980).

Because the determination of Claimant's post-injury WEC depends on establishing what work she can physically perform, we must first address the ALJ's findings regarding Claimant's restrictions. *Van Dyke*, 8 BRBS at 393-394 ("[Disability] is an economic concept based on a medical foundation."). In determining the extent of Claimant's disability, the ALJ appropriately referenced record evidence regarding physical restrictions attributable to Claimant's compensable right ankle injury. She credited work restrictions from the Charleston VA on December 28, 2020, JX 1 at 13-14, and from Dr. Lamberson on April 22, 2021, JX 1 at 24, 26, to find Claimant cannot perform her prior job duties for Employer. D&O at 27-28. Further, she found Claimant's post-injury employment with Uber, Lyft, and Piedmont Hospital suitable based on Claimant's testimony that she was able to physically perform those jobs and did. In contrast, she determined all the jobs Ms. Heusinger identified in the LMS do not constitute SAE because they "exceed the sedentary range of exertion" per Dr. Lamberson's April 2021 work restrictions.<sup>12</sup> D&O at 29. While

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<sup>12</sup> Ms. Heusinger apparently offered her vocational opinion based on Claimant's back, left hip and knee conditions, and left knee pain, which the ALJ found are not work-related or not disabling. D&O at 24-26; see JX 17 at 1 (vocational report listing November

the ALJ properly referred to the record, she nevertheless failed to resolve some of the record's internal inconsistencies. Consequently, we do not know on which restrictions she specifically based her findings. And, as those findings affected her decision on SAE, they consequently also affected her decision on which jobs' wages to use to compute Claimant's post-injury WEC. Accordingly, for the reasons that follow, we vacate the ALJ's findings on Claimant's work restrictions, SAE, and WEC.<sup>13</sup>

The ALJ found Dr. Lamberson's April 2021 work restrictions "limited Claimant to sedentary work and precluded prolonged standing or walking for more than fifteen minutes per hour, no prolonged running, no ladder or repetitive stair climbing, and limited pushing, pulling, lifting, squatting, kneeling, and climbing." D&O at 28. However, on April 22, 2021, Dr. Lamberson issued *two separate sets* of work restrictions for Claimant's right ankle injury that contain materially contradictory limitations regarding the specific

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29, 2018, as the date of Claimant's accident). In preparing the LMS, Ms. Heusinger utilized Dr. Lamberson's September 2021 work restrictions, which she noted were no bending, climbing, kneeling, or squatting, and which she discussed in a paragraph describing medical opinions regarding recommended treatment for Claimant's non-work-related back injury. JX 17 at 11. These restrictions are not contained in the record before the Benefits Review Board, but Dr. Lamberson's referral of Claimant to physical therapy on the same date – September 9, 2021 – further suggests the treatment he provided on that date was for Claimant's non-work-related back condition, as opposed to her work-related right ankle injury. *See* JX 1 at 45-47.

<sup>13</sup> We affirm, as unchallenged on appeal, the ALJ's findings that Claimant's post-injury employment with Uber, Lyft, and Piedmont Hospital is suitable, and the employment with Uber and Lyft remains suitable and available. *See Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57, 58 (2007).

activities Claimant can perform and for what duration. See JX 1 at 24, 26.<sup>14</sup> The ALJ did not address or resolve these inconsistencies.<sup>15</sup>

In finding Claimant's "physical injuries with unresolved symptomatology" limited her employment opportunities on the open market, the ALJ failed to explain which right ankle symptoms she was referencing or the evidence supporting "unresolved symptomatology." D&O at 26. Although the ALJ indicated a focus on Claimant's right ankle injury in her WEC analysis, it appears she may have improperly also considered the effects of other non-disabling (left knee pain and left hip condition) or non-work-related (back condition, left knee condition, and general body pains) injuries and conditions. *J.T.[Tracy] v. Global Int'l Offshore, Ltd.*, 43 BRBS 92, 102 (2009), *aff'd sub nom. Keller Found./Case Found. v. Tracy*, 696 F.3d 835 (9th Cir. 2012) (employer not liable for disability relating to restrictions for subsequent non-work-related event/condition); *but see Collins v. Elec. Boat Corp.*, 45 BRBS 79, 82-83 (2011) (restrictions relating to pre-existing physical condition relevant in determining suitability of alternate jobs). It also is unclear whether the ALJ considered Claimant's preference for remote work or flexibility to manage her physical limitations as a *de facto* work restriction and, if so, whether those physical limitations are related to her work-related right ankle injury, a pre-existing

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<sup>14</sup> In the Work Capacity Evaluation (Form OWCP-5c), Dr. Lamberson stated Claimant is limited to sedentary duty and cannot take a physical fitness test or shoot a weapon due to her right ankle pain. He restricted Claimant from prolonged standing, walking, and running yet indicated she was unable to do any walking, standing, pushing, pulling, lifting, squatting, kneeling, climbing, or operating a vehicle at work and to and from work for any amount of time. He opined Claimant's condition had not reached MMI and indicated the work restrictions would apply for one year. JX 1 at 26. Meanwhile, in his "Visit Status Report" on the same date, Dr. Lamberson restricted Claimant from ladder or repetitive stair climbing and prolonged standing or walking for more than fifteen minutes per hour due to her right ankle sprain. JX 1 at 24. He otherwise indicated no restrictions or limitations on sitting, lifting, driving, or other activities.

<sup>15</sup> Dr. Lamberson assigned additional work restrictions on October 21, 2021, due to right ankle instability. He restricted Claimant to alternate from sitting to standing every fifteen minutes, limiting standing and walking to two hours per day, and no commercial driving. JX 1 at 49. The ALJ afforded minimal weight to Dr. Lamberson's October 2021 work restrictions because he provided no explanation for the restrictions, and there are no medical studies, exam findings, or narrative reports to support or explain the restrictions. D&O at 16.

condition, a subsequent intervening event, or personal preference.<sup>16</sup> *Rhine v. Stevedoring Services of Am.*, 596 F.3d 1161, 1166 (9th Cir. 2010) (claimant’s preferences and unrelated consequences of accepting alternate work irrelevant in determining availability of suitable alternate work); *Tracy*, 43 BRBS at 102; *Collins*, 45 BRBS 82-83; *see also Moore v. Universal Maritime Corp.*, 33 BRBS 54, 61 (1999).

The inconsistencies within the evidence the ALJ apparently relied on, and the ambiguity in her findings as to Claimant’s right ankle restrictions, are exacerbated by her assessment of the physical demands of the LMS jobs and the ways in which she found they exceeded the credited work restrictions. While she found “all of the positions . . . exceed[ed] the sedentary range of exertion,” one LMS job was, in fact, sedentary, and two others were classified as light duty. *Compare D&O at 29, with JX 17 at 18* (E911 Communications Officer); *see also JX 17 at 14-15* (Laboratory Administrative Supervisor and Administrative Coordinator).<sup>17</sup> The ALJ found five of the six LMS jobs necessitated “more lifting, standing, walking, and sitting” than Dr. Lamberson recommended, despite the absence of sitting limitations in either set of restrictions. *Compare D&O at 29, with JX 1 at 24, and JX 1 at 26*. Although she determined Claimant’s lifting ability is limited, the

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<sup>16</sup> Claimant testified her current symptoms and pain are in her back, left leg, sciatic nerve, left knee, and left hip, and that they prevent her from doing any heavy lifting. TR at 40, 43, 50. At the hearing, she did not mention any ongoing symptoms related to her work-related right ankle injury, and beyond October 2021, there are no treatment notes in the record documenting ongoing right ankle medical treatment or symptoms. *See generally* JXs 1, 14-16; *but see* JX 13 at 88-89 (Claimant testifying at her deposition in October 2022 that her right ankle is still swollen and audibly pops and cracks).

Claimant testified she prefers a remote job because she is unable “to lift anything or withstand just going into the office” due to her pain levels. She specifically declined the post-injury employment offer from a hospital in Atlanta because she experiences chronic bodily pain daily and would not be able to go to an office to work every day. TR at 50, 88. Further, she testified she was able to work for Uber, Lyft, and Piedmont Hospital because she was not required to do any heavy lifting, and working remotely for Piedmont Hospital allowed her to move around, stand up, and sit down as needed for her comfort. TR at 46, 94.

<sup>17</sup> The sedentary and light duty job descriptions indicated the positions required frequent sitting, occasional lifting (between ten to twenty pounds), and occasional standing and walking. JX 17 at 14-15, 18.

ALJ did not specify the extent of that limitation.<sup>18</sup> D&O at 28-29. Moreover, while the ALJ found Claimant cannot stand or walk for more than fifteen minutes per hour, she did not clarify how this limitation precluded the “occasional” standing or walking required for the LMS jobs but, instead, summarily found the jobs exceeded Claimant’s ability to stand or walk.<sup>19</sup> JX 17 at 14-18.

The evidence the ALJ apparently relied on in finding Employer failed to establish SAE is internally inconsistent.<sup>20</sup> While the ALJ is entitled to evaluate the credibility of the witnesses, *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 1042 (2d Cir. 1997); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403, 405 (2d Cir. 1961), accept parts of a witness’s testimony while rejecting others, *Banks v. Chicago Grain Trimmers Ass’n*, 390 U.S. 459, 467 (1968); *Pimpinella v. Universal Mar. Serv. Inc.*, 27 BRBS 154, 157 (1993), and draw her own inferences and conclusions from the evidence, *Compton v. Avondale Indus., Inc.*, 33 BRBS 174, 176-177 (1999), the Board is not bound to accept an ultimate finding or inference if the decision discloses it was reached in an invalid manner, *Howell v. Einbinder*, 350 F.2d 442 (D.C. Cir. 1965), or is not supported by substantial evidence, *Director, OWCP v. Bethlehem Steel Corp.*, 620 F.2d 60, 65 (5th Cir. 1980) (citing *Goins v. Noble Drilling Corp.*, 397 F.2d 392 (5th Cir. 1968)). The ALJ did not address the inconsistent restrictions, explain which portions of which document she credited, specify what these restrictions mean in practical application, or reconcile them with Claimant’s functionality and what Claimant stated she could or could not do. Her findings on Claimant’s work restrictions and on SAE, therefore, cannot be affirmed.

Certainty surrounding the evidence and findings regarding Claimant’s right ankle restrictions is equally necessary and important to the WEC analysis. 33 U.S.C. §908(h);

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<sup>18</sup> In one set of work restrictions, Dr. Lamberson restricted Claimant from lifting any weight for any amount of time, whereas the other set contained no specific limitations on lifting weight or lifting frequency. *Compare* JX 1 at 26, *with* JX 1 at 24.

<sup>19</sup> Dr. Lamberson’s work restrictions do not provide any clarification: he stated both that Claimant is unable to perform “prolonged standing or walking” for more than fifteen minutes per hour and, contrarily, she cannot stand or walk for any amount of time. *Compare* JX 1 at 24, *with* JX 1 at 26.

<sup>20</sup> The ALJ found Claimant’s post-injury employment for Uber, Lyft, and Piedmont Hospital is suitable based on the parties’ stipulation and Claimant’s testimony that she can perform that work, yet in one set of credited work restrictions, Dr. Lamberson opined cannot drive to and from work or drive at work for any amount of time. *Compare* D&O at 28-29, *with* JX 1 at 26.

*Penrod Drilling Co.*, 905 F.2d at 87; *B.H. [Holloway] v. Northrop Grumman Ship Systems, Inc.*, 43 BRBS 129, 132 (2009); *Mangaliman*, 30 BRBS at 43; *Devillier*, 10 BRBS at 656. Without coherent, specific, and internally consistent work restrictions, we cannot determine whether the ALJ's findings regarding available SAE and Claimant's post-injury WEC from December 2022 onward are supported by substantial evidence. Consequently, we also vacate the ALJ's calculation of Claimant's ongoing WEC and remand the case for further analysis. On remand, the ALJ must identify the physical restrictions attributable to Claimant's work-related right ankle injury and the evidence she relies on, compare these work restrictions to the specific physical requirements of the LMS jobs, and provide a rational explanation for why the LMS positions either comport with or exceed Claimant's physical abilities. *Hernandez v. National Steel & Shipbuilding Co.*, 32 BRBS 109 (1998); *Fox*, 31 BRBS 118; *Bryant v. Carolina Shipping Co.*, 25 BRBS 294 (1992). If the ALJ determines any positions are suitable, she must consider them when addressing Claimant's post-injury WEC. *Holloway*, 43 BRBS at 132; *Mangaliman*, 30 BRBS at 43; *Devillier*, 10 BRBS at 656.

Next, turning to whether the ALJ properly excluded Piedmont Hospital wages from the calculation of Claimant's ongoing WEC, the ALJ determined those actual earnings reasonably and fairly represented Claimant's post-injury WEC only while she was performing the job through December 2, 2022. Once her contract with Piedmont Hospital was terminated, the ALJ found the unavailability of the position removed it from consideration as SAE and, therefore, from having any influence on Claimant's continuing post-injury WEC. Having found Claimant's actual earnings in 2022 do not reasonably represent her continuing WEC, the ALJ instead relied solely on Claimant's Uber and Lyft earnings from 2021.<sup>21</sup>

The ALJ permissibly considered Claimant's age, education, employment history, and vocational skills and found those factors supported Ms. Heusinger's opinion that

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<sup>21</sup> The ALJ found Claimant's average weekly wage while working remotely for Piedmont Hospital was \$1,072.13 per week (approximately \$56,000 per year), and her average weekly earnings with Uber and Lyft (between November 1, 2021, and December 31, 2021) was \$503.79 (approximately \$26,000 per year). D&O at 31-32; *see also* JX 15. The ALJ utilized her previous calculation of Claimant's average earnings from Uber and Lyft in 2021 as opposed to in 2022, when she found Claimant logically earned less from Uber and Lyft while simultaneously working full time at Piedmont Hospital, because her reduced earnings in 2022 do not fairly or reasonably represent her ongoing WEC. D&O at 31-32.

Claimant “possesses a ‘significant number or transferable skills.’”<sup>22</sup> D&O at 32-33. She considered the fact that Claimant worked for Piedmont Hospital for nine months and was terminated for reasons unrelated to her abilities or her right ankle injury. However, because Piedmont Hospital directly hired Claimant “due to a fortuitous but chance encounter” and “Employer did not demonstrate such positions have been available to Claimant since that time,” the ALJ found Claimant’s “stint of employment with Piedmont Hospital was not sufficiently regular, reliable, or continuous” to establish her ongoing WEC after her hospital employment ended. *Id.*

Employer asserts Claimant demonstrated the ability to earn wages at the Piedmont Hospital rate, and those earnings should be included in her WEC going forward. The Director urges affirmance of the ALJ’s decision to exclude the Piedmont Hospital wages from the calculation. Initially, we reject the Director’s argument that Employer may not rely on Claimant’s employment with Piedmont Hospital to satisfy its burden of establishing the availability of SAE, or on the wages from that employment to form the basis of Claimant’s ongoing WEC. Because Claimant’s Uber and Lyft employment constitutes available SAE and her disability is partial, findings no party disputes, the issue is not whether Employer rebutted Claimant’s prima facie case for total disability, but rather what wages “fairly and reasonably represent [Claimant’s] wage-earning capacity.” 33 U.S.C. §908(h); *see Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 1045 (5th Cir. 1992). Therefore, the question is not whether the Piedmont Hospital job constituted SAE in the technical sense, but whether the wages Claimant earned in that position or comparable wages for similar positions that may be identified in the labor market, reasonably represent what she can earn in work she can perform given her work restrictions. The Piedmont Hospital employment is relevant evidence of Claimant’s functional abilities and earning capacity, and while the job itself became unavailable on December 2, 2022, earnings similar to those for that job may otherwise be “realistically and regularly” available to Claimant in a number of other jobs, provided those jobs are deemed suitable and “realistically and regularly” available. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 431 (5th Cir. 1991) (approving use of specific job and “general employment opportunities and categories” to establish SAE). Whether those wages should be used to calculate ongoing TPD benefits from December 2022 and onward thus depends on whether Employer sufficiently demonstrated the general availability of similar, suitable work, which cannot be determined without the ALJ first clarifying Claimant’s work restrictions and reassessing the labor market evidence. Thus, we decline to preemptively preclude the ALJ’s

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<sup>22</sup> The ALJ found Claimant was 37 years old at the time of Ms. Heusinger’s vocational evaluation in 2021 and has a degree in human resources management, years of experience in logistics and administrative management, a history of holding supervisory positions, and office skills. D&O at 32.

consideration of Claimant's Piedmont Hospital wages. *Accord Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 88 (5th Cir. 1990).

Because we are remanding this case for further findings on Claimant's work restrictions and SAE, we also vacate the ALJ's exclusion of Claimant's Piedmont Hospital earnings and remand for her to reconsider whether they should be included in the WEC calculations based on her reassessment of the record as a whole. *Johnson*, 905 F.2d at 88; *Mangaliman*, 30 BRBS at 43. For example, if the ALJ finds on remand that Claimant's work restrictions, properly clarified and applied, permit her to perform sedentary or light-duty work with specified limitations, and the LMS identifies suitable positions in Claimant's field that she can perform within those restrictions at wage levels comparable to her Piedmont Hospital earnings, then Claimant's Piedmont Hospital wages would constitute direct evidence of an earning capacity she can achieve in the competitive labor market. Under such circumstances, the fact that the specific Piedmont Hospital position became unavailable due to the termination of Claimant's contract would not preclude using those wages or comparable labor market wages to calculate her ongoing WEC, as she would have demonstrated the ability to earn at that level, and Employer would have established the availability of similar work. *Guidry*, 967 F.2d at 1043; *see also Devillier*, 10 BRBS at 655 (wage-earning capacity determination seeks "to determine the wage that would have been paid in the open labor market under normal employment conditions"). Conversely, if the ALJ finds on remand that Claimant's properly clarified work restrictions preclude the performance of the LMS positions, or that suitable positions exist but at wage levels significantly below her Piedmont Hospital earnings, then the ALJ's determination that the Piedmont Hospital wages do not represent ongoing earning capacity may be reasonable and supported by substantial evidence. *Devillier*, 10 BRBS at 658-659; *see also Edwards v. Director, OWCP*, 999 F.2d 1374, 1376 (9th Cir. 1993).

Further, Employer points to potential evidence of wages Claimant could earn in other jobs within her field that were available to her, and in some instances were actually offered to her, which the ALJ did not consider.<sup>23</sup> These jobs, both domestic and overseas,

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<sup>23</sup> The office manager position Claimant was offered with a hospital in Atlanta, but declined, paid between \$60,000 and \$65,000 per year. TR at 88; JX 13 at 96. The personnel operations manager position at a startup company, for which she applied but was ultimately not selected, paid between \$120,000 and \$130,000 per year and would have allowed her to work remotely. TR at 88-89; JX 13 at 97-98. The overseas job with the State Department, for which she applied and interviewed but did not pass the entrance exam, paid between \$70,000 and \$80,000 per year. TR at 89-90; JX 13 at 98-99. Though no pay scale was established, Claimant also testified a recruiter for another employer encouraged her to apply for a position in Israel that did not require a physical fitness test

administrative and human resources positions are of the type Claimant testified she intends to pursue—provided no heavy lifting is required. TR at 94; JX 13 at 98. This evidence, along with the Piedmont Hospital job, bears directly on the availability of SAE and Claimant’s “ability to earn on the open labor market” within the WEC framework and may affect Claimant’s ongoing WEC or justify an alternative ongoing WEC. *Devilleier*, 10 BRBS at 659; *see also Mangaliman*, 30 BRBS at 43 (“[D]eterminations of wage-earning capacity under Section 8(h) require a comprehensive review of all relevant factors and evidence, including that related to the open market.”).<sup>24</sup> *Mangaliman*, 30 BRBS at 43. On remand, the ALJ should address this evidence and any other factors that are relevant to Claimant’s ongoing WEC. 33 U.S.C. §908(h); *Johnson*, 905 F.2d at 88; *Edwards*, 999 F.2d at 1375; *Mangaliman*, 30 BRBS at 43.

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or weapon certification, but she decided not to do so because of her concerns about pain and her ability to receive adequate medical treatment for her conditions. JX 13 at 93-95.

<sup>24</sup> To be clear, on remand, the ALJ may, but is not required to, calculate Claimant’s ongoing WEC based on her Piedmont Hospital wages or comparable labor market wages. That determination must be made based on her findings regarding the work Claimant can physically perform within her properly clarified work restrictions, whether the LMS or other evidence establishes the availability of suitable positions Claimant can perform, the wage levels for any such suitable positions, and whether Claimant’s actual Uber and Lyft earnings, her demonstrated Piedmont Hospital-level earnings, or wages reflected in suitable available positions reasonably and fairly represent her WEC in light of all the relevant evidence and factors. 33 U.S.C. §908(h); *Mangaliman*, 30 BRBS at 43.

Accordingly, we vacate the ALJ's award of benefits from December 3, 2022, and remand the case for further analysis in accordance with this decision. In all other respects, we affirm the ALJ's Decision and Order.

SO ORDERED.

DANIEL T. GRESH, Chief  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge

MELISSA LIN JONES  
Administrative Appeals Judge