U.S. Department of Labor

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

BRB No. 21-0114

ANDREW HOFFMAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
VIGOR SHIPYARD, INCORPORATED	)	
	)	
Self-Insured	)	DATE ISSUED: 03/16/2023
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order and Order Denying Motion to Reconsider and Denying Motion for Modification of Stewart F. Alford, Administrative Law Judge, United States Department of Labor.

Amie C. Peters (Blue Water Legal PLLC), Edmonds, Washington, for Claimant.

Raymond H. Warns, Jr. (Holmes Weddle & Barcott, P.C.), Seattle, Washington, for self-insured Employer.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Stewart F. Alford's Decision and Order and Order Denying Motion to Reconsider and Denying Motion for Modification (2018-LHC-00718) 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 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).

Claimant filed a claim seeking benefits for a lumbar spine injury he sustained while working for Employer as a marine painter on December 4, 1990.[2] Employer voluntarily paid Claimant benefits[3] but also controverted aspects of the claim. In a Compensation Order dated June 21, 1993, the district director awarded Claimant temporary total disability (TTD) benefits for the periods from December 27, 1990 through February 14, 1992, and July 10, 1992 through October 14, 1992, as well as ongoing permanent partial disability (PPD) benefits from February 15, 1992, based on an average weekly wage at the time of injury of $737.57 and a post-injury wage-earning capacity of $271.82. EX 1 at 20. The district director modified her order on July 12, 1993, to provide for annual Section 10(f), 33 U.S.C. §910(f), adjustments and to assign liability for the payment of Claimant's PPD benefits beginning on May 20, 1994, to the Special Fund pursuant to 33 U.S.C. §908(f). EX 1 at 23. She further modified her award of benefits on July 12, 1996, to reflect Claimant's entitlement to TTD benefits from November 11, 1994 through April 10, 1995. EX 1 at 28-29. The Special Fund continues to pay Claimant PPD benefits at a compensation rate of $310.50.[4]

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[1] The Benefits Review Board's processing of this case was substantially delayed due to the COVID-19 pandemic, which impacted the Board's ability to obtain parts of the record from the Office of Administrative Law Judges and the Office of Workers' Compensation Programs. After remanding this case for reconstruction of the record, the Board reinstated the appeal on January 24, 2023.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit because the injury occurred in Seattle. 33 U.S.C. §921(c); *Hon v. Director, OWCP*, 699 F.2d 441 (8th Cir. 1983).

[3] Employer voluntarily paid temporary total disability benefits from December 27, 1990 through October 16, 1991, and temporary partial disability benefits from October 17, 1991 through October 14, 1992. EX 1-13.

[4] This reflects two-thirds of the difference between Claimant's average weekly wage of $737.57 and post-injury wage-earning capacity of $271.82. 33 U.S.C. §908(c)(21).

Meanwhile, Claimant returned to work, with a permanent 35-pound lifting restriction, first in a part-time capacity in 1996, and then in a full-time capacity from 2000 with various entities.[5] Pursuant to Employer's requests, Claimant filed LS-200 Forms reporting his earnings for the calendar years 1996 ($13,396.93), 2014 ($48,567.79), and 2015 ($57,803.79), and for periods covering March 24, 2016 through April 30, 2016 ($5,861.90), May 10, 2016 through September 30, 2016 ($17,000), and October 1, 2016 through September 30, 2017 ($62,950.66). EX 3 at 34-36. Employer also obtained information regarding Claimant's post-injury earnings history from the Washington State Employment Security Department (reflecting earnings from the first quarter of 1996 through the second quarter of 2018), EX 4, and an Itemized Statement of Earnings from the Social Security Administration (reflecting earnings from 1996 through 2017), EX 5.

On September 27, 2017, Employer filed a petition for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, alleging Claimant's actual earnings established the requisite change in conditions in his post-injury wage-earning capacity. It therefore asserted the district director's 1993 award of PPD benefits to Claimant should be reduced to reflect his increased wage-earning capacity. It also averred payment of Claimant's PPD award should be suspended until the Special Fund recovered the credit for overpayments made to Claimant in prior years. In response, Claimant engaged an economic expert, Christina Tapia, Ph.D., to refute Employer's allegations that his wage-earning capacity has increased.[6] Dr. Tapia stated her analysis revealed underpayments of benefits to Claimant for fiscal years 1997 through 2018, which, with interest, totaled $151,114. Based on Dr. Tapia's reports, Claimant maintained Employer's allegations that his wage-earning capacity has increased is inaccurate as his actual earnings do not fairly represent his current earning capacity. The case was forwarded to the Office of Administrative Law Judges (OALJ) and a formal hearing was held on January 24, 2020, in Seattle, Washington.[7]

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[5] Claimant's post-injury employment is as follows: in 1996 he worked part-time as a security guard for Northwest Protective Service; 1996 to 1999, he worked part-time as a cashier for Bryant Hardware & Implement Company; 2000 to 2006, he worked for Pacific Construction Systems as a commercial, interior painter; 2007 to 2009, he worked for the Seattle Housing Authority; 2009 to 2015, he worked for Westcoast Painting; and in 2016, he worked for Todd Robinson Painting before taking a job with the Mukilteo School District, a position he continues to hold. EX 8, Dep. at 21-34; EXs 3-6, 11, 12.

[6] Dr. Tapia stated she was retained to assess whether Claimant has been paid for the entirety of his loss in wage-earning capacity due to his 1990 work-related injury.

[7] No court reporter appeared at the hearing so there is no transcript of the proceedings. The parties, however, agreed to go forward with the admission of evidence

In his decision dated June 16, 2020, the ALJ initially found Employer established a change in Claimant's economic condition through evidence of Claimant's actual earnings from January 1, 1997. He therefore granted Employer's request for modification of the district director's compensation order. Finding the record demonstrated Claimant's actual earnings fairly and reasonably reflect his post-injury wage-earning capacity, the ALJ recalculated the compensation rate for Claimant's PPD for each fiscal year from 1997 through 2016.[8] Based on those calculations, the ALJ modified the district director's award of PPD to reflect Claimant's new compensation rates. Upon comparison of the old and new compensation rates he concluded Claimant received a weekly underpayment in PPD in 1997-1999, 2001, and 2012 and an overpayment in each of the remaining years. Accordingly, he found Claimant entitled to PPD benefits from October 1, 2016, at a compensation rate of $111.58 per week, but otherwise ordered the district director to make all the calculations necessary, including a determination of any overpayment and credit to the Special Fund. In his order dated October 30, 2020, the ALJ denied Claimant's motions for reconsideration and modification.

On appeal, Claimant challenges the ALJ's findings that Employer established a change in conditions for purposes of Section 22 modification and that his actual earnings, as adjusted by the National Average Weekly Wage (NAWW), fairly and reasonably represent his post-injury wage-earning capacity.[9] Employer responds, urging affirmance of the ALJ's conclusions.[10] Claimant has filed a reply brief.

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and stipulations off the record. On January 24, 2020, the ALJ issued an Order Setting Deadlines in which he memorialized the hearing proceedings, including acknowledging his admission of the parties' evidence, and his setting of a briefing schedule.

[8] The ALJ adjusted Claimant's actual earnings for each of those years downward to the date of injury to account for inflation and then compared those figures to Claimant's pre-injury average weekly wage to arrive at the modified compensation rates.

[9] We affirm the ALJ's denial of Claimant's request, on reconsideration, for Section 22 modification as it is unchallenged on appeal. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

[10] We reject Employer's contention that Claimant's appeal should be dismissed because his Petition for Review and supporting brief were not timely filed. Assuming, arguendo, Claimant's pleading was late, we exercise our discretion to accept the pleading. 20 C.F.R. §§802.211, 802.217.

Claimant contends the ALJ misapplied the burden of proof for purposes of Section 22 modification and therefore improperly found an increase in his post-injury wages constituted a change in conditions warranting modification. He asserts the ALJ incorrectly addressed whether his actual earnings fairly and reasonably represented his wage-earning capacity without first determining whether Employer established the requisite change in conditions for purposes of Section 22, particularly since his post-injury situation, in terms of his physical and economic conditions, has not changed. He avers Employer's mere assertion of a change through evidence of his wages in current dollars does not adequately address the entirety of his situation and is therefore insufficient for purposes of Section 22 modification. Claimant further contends his actual post-injury earnings do not fairly and reasonably represent his true wage-earning capacity. He maintains the ALJ, in reaching this conclusion, failed to fully consider the evidence of record, including the information contained in the report of his expert, Dr. Tapia, as well as the significant variations in his wages over the years due to the seasonal nature of his commercial painting work. Given the stability of his work duties, he contends the changes in his actual earnings are, as Dr. Tapia suggested, more likely because of variation in wages and transient changes in the economy rather than any actual change in his economic condition relevant to his work-related injury.

Modification pursuant to Section 22 of the Act, 33 U.S.C. §922, is permitted if the petitioning party demonstrates a mistake in a determination of fact, *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459 (1968), or a change in the claimant's physical or economic condition, *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). A disability award may be modified under Section 22 where there is a change in the employee's wage-earning capacity, even without any change in the employee's physical condition. *See Rambo I*, 515 U.S. 291, 30 BRBS 1(CRT); *Ramirez v. S. Stevedores*, 25 BRBS 260 (1992); *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 282 (1984), *aff'd*, 776 F.2d 1225, 18 BRBS 12(CRT) (4th Cir. 1985). It is well established that the party requesting modification due to a change in condition has the burden of showing the change in condition. *See, e.g.*, *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 138, 31 BRBS 54, 61(CRT) (1997); *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 107, 109 (2003). Employer in this case therefore bore the burden of demonstrating a change in Claimant's economic condition. *Id.* Once the proponent of modification has established a change in condition, the standard for determining disability is the same in a Section 22 modification proceeding as it is in an initial proceeding under the Act. *See Rambo II*, 521 U.S. 121, 31 BRBS 54(CRT); *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998); *Vasquez*, 23 BRBS 428.

An award for permanent partial disability in a case the schedule does not cover is based on the difference between the claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21), (h). Wage-earning capacity is

determined under Section 8(h), 33 U.S.C. §908(h),[11] which provides that a claimant's wage-earning capacity shall be his actual post-injury wages if these earnings fairly and reasonably represent his wage-earning capacity. In making this determination, relevant considerations include the employee's physical condition, age, education, industrial history, earning power on the open market, and any other reasonable variable that could form a factual basis for the decision. *See Deweert v. Stevedoring Services of Am.*, 272 F.3d 1241, 36 BRBS 1(CRT) (9th Cir. 2002); *Container Stevedoring Co. v. Director, OWCP [Gross]*, 935 F.2d 1544, 24 BRBS 213(CRT) (9th Cir. 1991); *Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149(CRT) (9th Cir. 1985); *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979).[12] The party contending the claimant's actual wages do not represent his wage-earning capacity bears the burden of so proving. *Gross*, 935 F.2d 1544, 24 BRBS 213(CRT); *see also Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108(CRT) (5th Cir. 1990).

Once calculated, the claimant's post-injury wage-earning capacity should be adjusted to account for inflation to reflect the wages his post-injury employment would have paid at the time of the claimant's injury such that average weekly wage and wage-earning capacity are on equal footing. *See Petitt v. Sause Bros.*, 730 F.3d 1173, 47 BRBS 35(CRT) (9th Cir. 2013); *Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 36 BRBS 15(CRT) (9th Cir. 2002). The Board held in *Richardson v. General Dynamics*

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[11] Section 8(h) provides:

> The wage-earning capacity of an injured employee in cases of partial disability under subdivision (c)(21) of this section or under subdivision (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: *Provided, however,* That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

33 U.S.C. §908(h) (emphasis in original).

[12] The ALJ stated he "specifically considered" the *Devillier* factors in reaching his determination. D&O at 13 n.11.

Corp., 23 BRBS 327 (1990), that when the record is devoid of evidence of the wages paid at the time of injury, the ALJ should use the percentage change in the National Average Weekly Wage (NAWW) to adjust the post-injury wages for inflation. *See also Johnston v. Director, OWCP*, 280 F.3d 1272, 36 BRBS 7(CRT) (9th Cir. 2002); *Quan v. Marine Power & Equipment Co.* 30 BRBS 124 (1996).

The ALJ recognized Employer sought Section 22 modification based on a change in condition relating to Claimant's wage-earning capacity since 1996. D&O at 11. Noting Claimant undisputedly has regularly worked since 1996, the ALJ properly focused on whether Employer established Claimant's wage-earning capacity of $271.82 per week had changed.[13] *Id.* After setting out the law relating to the calculation of Claimant's post-injury wage-earning capacity and discussing the relevant evidence in terms of the parties' positions, *id.*, at 11-12, the ALJ found the record, in its entirety, demonstrates Claimant's actual post-injury earnings fairly and reasonably reflect his wage-earning capacity, *id.*, at 13.

Reviewing Claimant's post-injury work history, he found it significant that Claimant has worked steadily since 1996, first in part-time security work, then as a commercial painter for over a decade, and most recently since May 2016, in full-time work for a school district. *Id.* He additionally found Claimant's work over those years was relatively stable. *Id.* In this regard, the ALJ found although Claimant was laid off once in 2003 and terminated another time in December 2015, those job losses were unrelated to his work-related injury and in each instance, Claimant shortly thereafter returned to work with a different employer in a job opening generally available on the open market. *Id.* The ALJ further found the medical records indicate Claimant's back pain did not impact his wage-earning capacity, as he was able to successfully perform his work regularly over the years while managing any back pain with ibuprofen and chiropractic care.[14] *Id.*, at 5, 12-

[13] The parties stipulated Claimant's current PPD award is based on a retained wage-earning capacity of $271.82 per week. *See* AE 1 at 2-3; Decision and Order at 3. The ALJ, however, recognized the parties "primarily dispute how to compare" Claimant's actual post-injury wages with the existing figure. Decision and Order at 3.

[14] The ALJ relied on Claimant's testimony that he still suffers from back pain, which he treats with ibuprofen, and when his back pain gets particularly bad, he visits his chiropractor, Kathy Bateman, but he does not regularly see a doctor for his back. EX 8, Dep. at 16-18. He also relied on Claimant's Veterans' Administration medical records which indicate his back pain was stable as of 2017 and is "currently not an issue" though he does have some neuropathy. EX 9.

13. He therefore concluded Claimant's work, and actual earnings each year since 1996, "are the best evidence" of his actual wage-earning capacity. *Id.*, at 13.

Having found Claimant's actual earnings fairly and reasonably reflect his post-injury wage-earning capacity, the ALJ appropriately used the percentage changes in the NAWW between Claimant's December 4, 1990 work injury and the beginning of each fiscal year from 1997, to convert his post-injury wage-earning capacity for those years to time-of-injury dollars, D&O at 14. *Johnston*, 280 F.3d 1272, 36 BRBS 7(CRT); *Quan*, 30 BRBS at 127. Focusing first on Claimant's earnings for fiscal year 2017, the ALJ adjusted Claimant's actual wages for that time frame of $1,200.70 per week ($62,436.14 divided by 52 weeks) downward to reflect a post-injury wage-earning capacity, in 1990 dollars, of $570.21 ($1,200.70 times .4749 percent change in the NAWW for the corresponding period). *Id.* He next calculated Claimant's compensation rate for fiscal year 2017 at $111.58 per week by taking two-thirds of the difference between Claimant's stipulated pre-injury average weekly wage of $737.57 and his inflationary-adjusted post-injury wage earning capacity of $570.21. *Id.*, at 15. Based on this, he concluded Employer established a change in conditions and modified the district director's prior PPD award of $310.50 per week to $111.58 per week beginning in fiscal 2017. *Id.* Applying these same calculations for fiscal years 1997 through 2016, the ALJ further modified the district director's prior order to reflect Claimant's receipt of weekly underpayments in fiscal years 1997-1999, 2001 and 2012, and weekly overpayments in the remaining fiscal years (2000, 2002-2011, 2013-2016).[15] *Id.*, at 15-16. He therefore found the Special Fund entitled to a credit for the total overpayment since 1997 and instructed the district director to make all calculations necessary. *Id.*, at 16.

In making these calculations, the ALJ accorded no weight to the method used by Dr. Tapia, CX 2, whereby she adjusted Claimant's 1990 earnings upwards to compare to the actual earnings, because it does not accord with "how the Longshore Act operates under existing, binding legal authority." D&O at 14. In this regard, the ALJ correctly found Dr. Tapia's methodology is directly contrary to the Act which contemplates wages at the time of the injury as the baseline for comparison with actual post-injury earning capacity. *Keenan v. Director, OWCP*, 392 F.3d 1041, 1045-46, 38 BRBS 90, 93(CRT) (9th Cir. 2004) (court explicitly rejected the claimant's argument, akin to Dr. Tapia's methodology in this case, that his entitlement to compensation under Section 8(c)(21) should be calculated by taking the difference between his actual post-injury wages and the

[15] Contrary to Claimant's contention, the ALJ is not limited to finding only one post-injury wage-earning capacity. *See, e.g., Petitt,* 730 F.2d 1173, 47 BRBS 35(CRT); *Long*, 767 F.2d 1578, 17 BRBS 149(CRT).

hypothetical wages he may have earned "but for" his injury as this calculation is contrary to the statutory scheme); *see also Sestich*, 289 F.3d 1157, 36 BRBS 15(CRT). The ALJ also rationally rejected Dr. Tapia's opinion, and thus Claimant's position, that an employer moving for modification must demonstrate the actual salary at the time of injury for the specific post-injury job, as it too demonstrated a general lack of understanding of the Act. *Id.* In contrast, he found "the appropriate measure" for adjusting Claimant's actual wages to the date of injury is, as articulated by case law, to adjust his post-injury wages downward by using the corresponding NAWW. *Id.*

After consideration of the ALJ's decision, the arguments raised on appeal, and the evidence of record, we affirm the ALJ's grant of modification as it is supported by substantial evidence. Our review of the ALJ's decision also reflects, in contrast to Claimant's assertions, that he correctly placed the burden of proof in terms of Section 22 modification on Employer as the proponent of the motion, *Rambo II*, 521 U.S. at 138, 31 BRBS at 61(CRT) (1997); *Wheeler*, 37 BRBS at 109, and his analysis of the change in economic conditions issue, *id.*, as well as his consideration of Claimant's wage-earning capacity, *Petitt*, 730 F.3d at 1175, 47 BRBS at 36(CRT); *Devillier*, 10 BRBS at 654-658, is in accordance with law. After evaluating the relevant evidence of record,[16] the ALJ rationally found Claimant's actual post-injury wages from 1996 through 2017 fairly and reasonably represent his wage-earning capacity, and Claimant's loss in wage-earning capacity has predominantly decreased since the initial award. 33 U.S.C. §908(h); EXs 4, 5, 11; CX 1. This establishes a change in Claimant's post-injury wage-earning capacity and constitutes a sufficient basis for granting Employer's Section 22 motion for modification. *See* 33 U.S.C. §922; *Rambo I*, 515 U.S. at 301, 30 BRBS 5(CRT) (1995); *Price v. Brady-Hamilton Stevedore Co.*, 31 BRBS 91 (1996); *see generally Vasquez*, 23 BRBS 428 (1990). Consequently, we affirm the ALJ's modification of Claimant's award as his finding that Employer established a change in Claimant's post-injury wage-earning capacity is rational and supported by substantial evidence. *See O'Keeffe*, 380 U.S. 359.

[16] Contrary to Claimant's contention, the ALJ addressed the entirety of Dr. Tapia's reports. D&O at 8-9, 14. We affirm his decision to accord no weight to Dr. Tapia's opinion in determining whether Employer established a change in Claimant's economic condition through his actual post-injury wages as this credibility determination is neither inherently incredible nor patently unreasonable. *Cordero v. Triple A Mach. Shop*, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Moreover, his underlying rationale is consistent with the appropriate law regarding Section 22 modification and the calculation of benefits under the Act. 33 U.S.C. §§922, 908(c)(21), (h).

Accordingly, we affirm the ALJ's Decision and Order and Order Denying Motion to Reconsider and Denying Motion for Modification.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge