**U.S. Department of Labor**

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

BRB No. 22-0281

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| DONALD R. NELSON | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
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| VIGOR SHIPYARDS, INCORPORATED | ) | |
| | ) | DATE ISSUED: 10/23/2023 |
| and | ) | |
| | ) | |
| FREMONT COMPENSATION | ) | |
| | ) | |
| Employer/Carrier-Petitioners[1] | ) | DECISION and ORDER |

Appeal of the Decision and Order Denying Section 22 Modification of Christopher Larsen, Administrative Law Judge, Department of Labor.

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

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

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

PER CURIAM:

[1] According to Employer's Petition for Review and Supporting Brief at 1 n.1, Freemont Compensation is in liquidation, and Employer is proceeding as an uninsured party.

Employer appeals Administrative Law Judge Christopher Larsen's Decision and Order Denying Section 22 Modification (2019-LHC-00274) 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant sustained a lower back injury on September 5, 1990,[2] while working for Employer as a shipfitter.[3] Hearing Transcript 1 (TR I) at 12, 63; CX 1 at 1. On November 24, 1993, ALJ Ellin M. O'Shea found Claimant permanently partially disabled, determined he reached maximum medical improvement on August 27, 1991, found he had an average weekly wage of $540, and concluded he retained an earning capacity of $322.50 per week. CX 3 at 6.[4] Consequently, ALJ O'Shea awarded Claimant compensation at a rate of $145 per week, and she acknowledged the Special Fund had been making payments since August 27, 1993. *Id.* at 7.

On September 27, 2017, Employer filed a petition for modification, 33 U.S.C. §922, of ALJ O'Shea's permanent partial disability award, alleging Claimant's earning capacity had increased due to changes in his physical and economic conditions. EX 2 at 10-11. Employer argued earnings generated from Claimant's trucking business, Efficient Transport, have exceeded the September 1990 equivalent of his pre-injury wages since 1998. *Id.* Alternatively, Employer argued its vocational counselors demonstrated suitable alternate employment where Claimant would earn more than his pre-injury average weekly wage. *Id.* at 11. ALJ Larsen (the ALJ) held a videoconference hearing over two days, March 23, 2021, and March 26, 2021. TR I at 1; Hearing Transcript 2 (TR II) at 1.

On March 25, 2022, the ALJ issued a Decision and Order Denying Section 22 Modification. Decision and Order (D&O) at 2. In his decision, the ALJ found Employer failed to establish a change in Claimant's physical or economic condition. D&O at 19. He

[2] The parties agree the ALJ's identification of the injury date as December 4, 1990, is incorrect.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit because Claimant sustained his injury in Washington. 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, 36 BRBS 51(CRT) (4th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003); 20 C.F.R. 702.201(a).

[4] Page numbers cited represent the pages collated by the parties' exhibits as a whole, rather than the page numbers noted on the original documents themselves.

determined Employer's evidence regarding a change in physical condition – a September 18, 2002 medical report from Dr. Charles Brooks – was insufficient to support its burden of proof because Dr. Brooks opined Claimant's condition had not changed significantly since his initial injury. *Id.* at 20. The ALJ further found Employer failed to show a change in Claimant's economic condition because it proffered evidence showing that since his injury there were only three calendar years during which his actual earnings exceeded his wage-earning capacity of $322.50 per week in September 1990 dollars. *Id.* at 22-23. Instead, he credited Claimant's economist, Mr. Eric Knowles, whose evaluation of Claimant's earnings since his injury reflected he earned less than $322.50 in at least 24 of the 28 years analyzed. *Id.* The ALJ also determined Employer did not establish the availability of suitable alternate employment (SAE), as the positions Employer's vocational expert identified did not fully account for Claimant's continued physical limitations. *Id.* at 25-26.

On appeal, Employer challenges the ALJ's denial of modification, specifically disputing his credibility determinations and decision to accord greater weight to Claimant's vocational expert. Employer further asserts the ALJ erred by failing to address its Section 8(j), 33 U.S.C. §908(j), forfeiture argument. Claimant responds, urging affirmance. Employer filed a reply to Claimant's response.

Modification of a prior award 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). The party seeking modification – in this case Employer – bears the burden of demonstrating a change in condition. *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997); *Vasquez v. Continental Mar. of San Francisco, Inc.*, 23 BRBS 428 (1990). While modification may be based on a change in a claimant's wage-earning capacity, wage-earning capacity is not demonstrated by "every variation in actual wages or transient change in the economy." *Rambo II*, 521 U.S. at 131 n.3. An employer may also show a change in economic condition by proffering evidence of SAE. *Lucas v. Louisiana Insurance Guar. Association*, 28 BRBS 1 (1994).

Employer contends the ALJ erred in denying its motion for modification because it has shown Claimant's economic condition changed.[5] It argues the ALJ erred in crediting

[5] Employer does not challenge the ALJ's determination that it failed to show a change in Claimant's physical condition. As such, we affirm it as unchallenged. *See Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

Mr. Knowles and in conferring greater weight to Claimant's vocational expert, Ms. Anne Harrison, over its own expert, Mr. Neil Bennett. Emp. Brief at 10.

First, Employer asserts the ALJ erred by considering Mr. Knowles's opinions regarding accounting matters, as well as SAE, because he is an economist but not a vocational expert. Emp. Brief at 12-13. Employer contends Mr. Knowles lacked the expertise to calculate Claimant's post-injury earnings in September 1990 dollars because he has no familiarity with expenses in the trucking industry and does not know what data reflects an appropriate measure of Claimant's earning capacity. Emp. Brief at 14.

We reject these arguments. As a threshold matter, it is the ALJ's duty and responsibility to weigh the evidence and make credibility determinations. *See Duhagon v. Metropolitan Stevedore Co.*, 19 F.3d 615, 618, 33 BRBS 1, 2(CRT) (9th Cir. 1999). In reviewing the ALJ's decision, the Board may not substitute its views for those of the factfinder but must instead accept the ALJ's credibility findings unless they are inherently incredible or patently unreasonable. *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Even when evidence could support a finding in favor of either party, the Board may not disturb the ALJ's reasonable inferences and supported credibility determinations. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991).

Employer's argument that the ALJ irrationally relied on Mr. Knowles's testimony on matters outside his expertise is inconsistent with the ALJ's decision. Mr. Knowles is an economist with an MBA and nearly a decade of experience analyzing economic data and developing present value estimates to present in depositions and trials. CX 11 at 65. In crediting his opinion, the ALJ stated:

> With respect to Mr. Nelson's earnings, I find Mr. Knowles's testimony clear, thorough, proffered in good faith and within his area of expertise. Accordingly, I credit his testimony full evidentiary weight. But I ascribe it limited evidentiary weight with respect to Mr. Nelson's alternative employment, given he himself is not a vocational expert.

D&O at 14. Contrary to Employer's contention, the ALJ limited his reliance on Mr. Knowles's testimony to computations involving Claimant's earnings. As such, he rationally limited his crediting of Mr. Knowles's testimony to his area of expertise as an economist, i.e., accepting his calculations to determine Claimant's earnings in 1990 dollars. D&O at 13. Nowhere in the decision did the ALJ use Mr. Knowles's testimony as vocational evidence or to determine the veracity or validity of Employer's vocational evidence. Employer has thus shown no reason to set aside the ALJ's credibility

determinations with respect to Mr. Knowles. *Duhagon.*, 19 F.3d at 618, 33 BRBS at 2(CRT).

Employer also contends the ALJ erred by crediting Ms. Harrison's vocational opinion over that of its expert, Mr. Bennett. Employer argues Ms. Harrison's report and testimony should have been given less weight because she used information from her conversations with prospective employers in 2020 to provide evidence of job requirements from 2019, while Employer's expert relied on information collected during a more relevant time period. Emp. Brief at 16. Further, Employer asserts the ALJ did not consider Ms. Harrison's failure to offer "significant evidence" that Claimant could not perform any of the jobs identified in Mr. Bennett's March 2021 labor market survey. Emp. Brief at 16-17. Finally, Employer maintains the ALJ did not adequately consider the relative experience and qualifications of the two experts. Emp. Brief at 17.

Employer's arguments are not sufficient for the Board to disturb the ALJ's credibility determinations with respect to either vocational expert. As previously stated, the Board may not disturb an ALJ's credibility determinations unless they are inherently incredible or patently unreasonable. *Ogawa*, 608 F.3d at 650, 44 BRBS at 49(CRT); *Todd Pacific Shipyards Corp. v. Director, OWCP*, 914 F.2d 1317, 1321 (9th Cir. 1991). First, the ALJ's explanation for not discounting Ms. Harrison's decision due to her contacting prospective employers one year after Mr. Bennett drafted his report is reasonable. He found Ms. Harrison testified that the time lapse is immaterial because the duties for the positions identified in Mr. Bennett's reports remain consistent over time compared to other industries. D&O at 26; TR I at 173. While vocational experts are not required to contact prospective employers, *Universal Mar. Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Hogan v. Schiavone Terminal, Inc.*, 23 BRBS 290 (1990), the ALJ rationally gave Ms. Harrison's opinion, bolstered by direct confirmation of the work demands, greater weight.

Second, Employer's contention regarding Ms. Harrison not offering "significant evidence" to rebut the March 2021 labor survey amounts to a request for the Board to reweigh evidence and substitute its own credibility determinations for those made by the ALJ.[6] The ALJ detailed his rationale for crediting Ms. Harrison's report and testimony over Mr. Bennett's, namely her greater consideration of Claimant's physical limitations as

[6] The hearing took place on March 23 and March 26, 2021, only a few weeks after Mr. Bennett wrote his March 8, 2021 report. TR I; TR II; EX 19 at 207. Employer does not make clear what it means by "significant evidence;" however, to the extent it means Ms. Harrison must refute Mr. Bennett's supplemental report, "substantial evidence" does not require a one-for-one response.

well as her personal research regarding the alternative employers, as opposed to Mr. Bennett's reliance on and knowledge of alternative employment from his subordinate. D&O at 25-26.

A comparison between the two expert reports and hearing testimony supports the ALJ's determinations. In his October 2019 report, Mr. Bennett makes no mention of Claimant's physical limitations when assessing jobs. EX 17. Ms. Harrison's September 2020 report details Claimant's physical restrictions and how each position identified in Mr. Bennett's survey exceeds them. CX 12 at 71-75. Mr. Bennett issued a second report in March 2021 to respond to Ms. Harrison's report, suggesting using specialized seats or driving in teams; however, the ALJ credited Ms. Harrison's trial testimony regarding her subsequent contacts with the potential employers to rebut Mr. Bennett's contentions regarding the availability of air-ride seats and team driving as practical accommodations. *Compare* EX 19 at 207-209 *with* TR I at 143-151, 156-157. Finally, Employer's contention regarding the experts' experience levels is inconsequential as the ALJ is free to make reasonable and rational credibility determinations regardless of one expert's level of experience or education. *See Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999) (affirming an ALJ's discretion in assessing expert credibility regardless of credentialing). We affirm the ALJ's credibility determinations as they are reasonable.

Next, Employer contends the ALJ erred in determining Claimant's actual post-injury earnings fairly represent his earning capacity. In support of its contention, Employer argues the ALJ improperly relied on Claimant's unsupported description of his physical limitations and erroneously interpreted Claimant's work preferences as necessary work conditions. Emp. Brief at 18-20.

Under 33 U.S.C. §908(c)(21), workers with unscheduled injuries, such as Claimant's back injury, are entitled to "66 2/3 per centum of the difference between [their] average weekly wage … and [their] wage earning capacity." 33 U.S.C. §908(c)(21). Physical impairment alone will not entitle claimants to benefits under Section 8(c)(21); claimants must establish a loss in wage-earning capacity. *Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190 (1984). Under Section 8(h), earning capacity is determined by actual earnings "if such actual earnings fairly and reasonably represent [a claimant's] wage earning capacity." 33 U.S.C. §908(h). If the actual earnings do not fairly and reasonably represent the claimant's wage-earning capacity, an ALJ may fix a reasonable amount as the wage earning capacity. *Id*. Higher post-injury wages, in and of themselves, do not preclude compensation if the claimant actually suffered a loss of wage-earning capacity. *Todd Shipyards Corp. v. Allan*, 666 F.2d 399, 14 BRBS 427 (9th Cir. 1982), *cert. denied*, 459 U.S. 1034 (1982). Where a claimant has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, wage-earning

capacity may be determined by other factors, including the nature of the injury, the degree of physical impairment, the claimant's usual employment, and the effect of disability as it may naturally extend into the future. 33 U.S.C. §908(h). The ALJ's findings on wage-earning capacity may be overturned only if they are not supported by substantial evidence. *Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149(CRT) (9th Cir. 1985).

Contrary to Employer's contentions, the ALJ's findings regarding Claimant's physical limitations are supported by the record. Medical evidence from the time of the injury supports the ALJ's determinations regarding Claimant's work limitations: he struggles with bending or crouching for a prolonged period of time, climbing ladders with a load greater than 10-15 pounds, working in confined spaces for prolonged periods, and lifting more than 35-40 pounds. CX 5 at 20-24. The record also indicates Claimant would have required ergonomic accommodations to continue in his former employment. CX 5 at 21. Employer's own medical evidence does not contradict earlier medical testimony as Dr. Brooks confirmed Claimant's L4-5 and L5-S1 herniated discs and stated his condition has not changed significantly since 1993. EX 15 at 182. Further, Employer's medical expert expressed concern regarding any requirement for Claimant to sit for prolonged periods as it could exacerbate his injury. *Id.*

The ALJ's description of Claimant's physical limitations mirrors the record. He stated:

> I find Mr. Nelson's physical limitations preclude his ability to work as a heavy truck driver for another company. He has significant physical limitations. He cannot stay seated for too long, and must take intermediate breaks, and is limited to shorter distances. He can rarely lift, and cannot lift heavier weights at all, so he must choose freight and routes where he is not expected to load or unload. (TR 69:11). He cannot sit in a truck without a specialized chair with massager capabilities.

D&O at 25. Thus, the ALJ's reliance on Claimant's physical limitations and necessary accommodations in determining his wage-earning capacity is supported by substantial evidence. Further, an ALJ is permitted to use a claimant's credible complaints of severe, persistent, and prolonged pain, which significantly interfere with his ability to perform work tasks, as proof of disability, *Jordan v. SSA Terminals, LLC*, 973 F.3d 930, 54 BRBS 57(CRT) (9th Cir. 2020), and the ALJ found Claimant's complaints credible. Employer has not established any error in using Claimant's self-reported physical limitations to assist in determining his post-injury wage earning capacity.

Employer also contends the ALJ erred in assigning no significance to Claimant's 2001 – 2003 earnings exceeding $322.50 per week in 1990 dollars. Emp. Brief at 22, 24.

Employer argues Claimant had the capacity to increase his earnings by employing more drivers for his business but opted not to over several years due to market conditions. Emp. Brief at 23. Employer contends the ALJ also used Claimant's decision to not hire more drivers to conflate Claimant's actual earnings with Claimant's wage-earning capacity. Emp. Brief at 23-24. Employer ultimately maintains the ALJ's decision should be vacated because he afforded too much weight to Claimant's fluctuating wages rather than Claimant's retained earning capacity. Emp. Brief at 24.

Employer's argument, however, suggests the ALJ should have weighed four years out of 28 as sufficient to determine Claimant's wage-earning capacity is greater than $322.50 per week in 1990 dollars.[7] We reject this contention. The record supports the ALJ's determination that Claimant's actual earnings for the other 24 years, calculated by Mr. Knowles as consistently under $322.50 per week in 1990 dollars, is a better indicator of Claimant's post-injury wage-earning capacity than the few years where Claimant was able to employ more drivers and make his business more profitable. TR I at 109, 201-204; CX 10 at 61-62. Employer's contention runs afoul of the general principle that continuous and stable post-injury earnings are more likely to reasonably and fairly represent a claimant's wage-earning capacity than aberrations. *See Rambo I*, 515 U.S. at 301, 30 BRBS at 5(CRT); *Long*, 767 F.2d at 1528, 17 BRBS at 153(CRT).

Employer seems to further argue, without evidence, that but for Claimant's decision to not hire more drivers, he would have an increased earning capacity. However, Employer proffers no evidence and nothing in the record indicates Claimant had a greater capacity to hire more drivers in additional years. Increased income from business decisions does not necessarily indicate an increase in an individual's earning capacity. *Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213(CRT) (9th Cir. 1991). As such, we reject Employer's argument and affirm the ALJ's wage-earning capacity determinations. Consequently, we also affirm his denial of Employer's motion for modification for failure to show a change in Claimant's economic condition. *Lombardi v. Universal Mar. Serv. Corp.*, 32 BRBS 83 (1998).

Finally, Employer contends the ALJ erred in failing to address its Section 8(j), 33 U.S.C. §908(j), forfeiture argument. Claimant objects, alleging he "timely" and "in good

[7] In addition to 2001-2003, Mr. Knowles testified he calculated Claimant's earnings as $493 per week in 2016, in 1990 equivalent dollars. TR I at 197. However, Mr. Knowles testified 2016 was an outlier because Claimant listed a large sum under "Other Income," which was not included in other tax forms. TR I at 197-199. Claimant testified he received a significant payout from royalties in 2016, which artificially inflated his income. TR I at 113.

faith" reported his earnings. Section 8(j) requires claimants to respond to an employer's request to report post-injury earnings. If a claimant fails to report earnings from employment, or knowingly and willfully omits or understates his earnings, he forfeits his disability benefits for the period of noncompliance. 33 U.S.C. §908(j); *Cutietta v. Nat'l Steel & Shipbuilding Co.*, 49 BRBS 37 (2015). Employer raised this argument in its post-hearing brief, asserting Claimant timely filed the requested LS-200 but his filing was incomplete because he failed to report his earnings for 2020 as requested. Emp. Brief at 24-25.

As the ALJ did not address or analyze Employer's Section 8(j) argument, and according to Claimant did not provide him with an opportunity to respond, we remand the claim for the ALJ to consider these matters in the first instance. *See Hoodye v. Empire/United Stevedores*, 23 BRBS 341 (1990) (ALJ must address all timely issues raised by the parties).

Accordingly, we remand this case for the ALJ to consider and render a decision on the parties' Section 8(j) forfeiture arguments. In all other respects, we affirm the ALJ's Decision and Order Denying Section 22 Modification.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge