U.S. Department of Labor

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

BRB No. 22-0393

ALBERT R. LEWIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 02/09/2024
ARMY & AIR FORCE EXCHANGE SERVICE	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order – Denying Modification of Jodeen M. Hobb, Administrative Law Judge, United States Department of Labor.

Jonathan S. Beiser (Beiser Law Firm), Rockville, Maryland, for the Claimant.

Jonathan H. Walker (Mason, Mason, Walker & Hedrick, PC), Newport News, Virginia, for Employer.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Jodeen M. Hobbs's Decision and Order – Denying Modification (2020-LHC-00931) 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 Nonappropriated Fund Instrumentalities Act, 5 U.S.C.

§§8171-8173 (NFIA).[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).

This case is before the Board for the fourth time. Claimant, a warehouse worker, originally injured his back in 2001 and suffered a re-injury in the course of his employment on April 8, 2005. Hearing Transcript (HT) at 19, 34. Following a formal hearing, ALJ Janice K. Bullard awarded Claimant permanent partial disability (PPD) benefits in a Decision and Order issued July 28, 2008. *A.L.* [*Lewis*] *v. Army & Air Force Exchange Serv.*, OALJ No. 2006-LHC-02061 (*Lewis I*). On Claimant's appeal, the Board vacated the ALJ's finding that Employer established suitable alternate employment and remanded the claim for reconsideration of that issue. *A.L.* [*Lewis*] *v. Army & Air Force Exchange Serv.*, BRB No. 08-0841 (Jul. 23, 2009).

On remand, ALJ Bullard found the jobs Employer proffered as alternate employment were suitable because they were sedentary, office-based, within Claimant's physical restrictions, and did not conflict with his use of pain medication. *Lewis v. Army & Air Force Exchange Servs.*, OALJ No. 2006-LHC-02061 (Feb. 12, 2010). Thus, ALJ Bullard again awarded Claimant PPD benefits, not permanent total disability (PTD) benefits. *Id.* The Board affirmed ALJ Bullard's findings and her award of PPD benefits. *Lewis v. Army & Air Fore Exchange Servs.*, BRB No. 10-0394 (Jan. 26, 2011).

Claimant subsequently sought modification of the award pursuant to Section 22 of the Act, 33 U.S.C. §922, on the grounds that his physical condition had deteriorated to the point he was no longer able to perform any job, including those ALJ Bullard previously found suitable. ALJ Linda S. Chapman denied the motion for modification in a Decision and Order Denying Benefits issued May 15, 2013, finding Claimant failed to establish a change in his physical condition. *Lewis v. Army & Air Force Exchange*, OALJ No. 2011-LHC-01673 (May 15, 2013). Claimant appealed, and the Board affirmed ALJ Chapman's finding and her denial of PTD benefits. *Lewis v. Army & Air Force Exchange Serv.*, BRB No. 13-0411 (April 15, 2014).

Claimant filed for Section 22 modification a second time, again arguing his physical condition had deteriorated to the point that he could no longer perform any job, thereby

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant was injured in Maryland. 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).

seeking to convert his entitlement under the Act from PPD benefits to PTD benefits. Following a formal hearing and submission of new evidence by both parties, ALJ Jodeen M. Hobbs (hereinafter, the ALJ) issued a Decision and Order – Denying Modification (D&O), finding Claimant failed to show a change of either his physical or economic condition sufficient to modify ALJ Bullard's original award of PPD benefits. D&O at 23, 25. She found Claimant failed to establish his physical condition had substantially worsened since the award of PPD benefits (*id*. at 22-25), and Employer established available suitable alternate employment (*id*. at 26-28). Consequently, the ALJ concluded Claimant's disability remained partial and denied his modification request.[2] *Id*. at 28-29.

Claimant appeals, arguing the ALJ erred in finding he did not establish a change in his physical condition and in finding Employer established the availability of suitable alternate employment. Specifically, Claimant asserts the ALJ improperly ignored medical evidence showing he was unable to perform even sedentary work and failed to accurately evaluate the suitability of the jobs Employer proffered as alternate employment in light of his physical restrictions, lack of technological skills, and drowsiness due to prescription medication. Employer responds, urging affirmance.

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, 463-464 (1968), or a change in the claimant's physical or economic condition, *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 301 (1995). The party seeking modification, in this case Claimant, bears the burden of demonstrating a change in condition. *See, e.g., Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 138 (1997). Once the proponent establishes changed circumstances, the normal legal standards apply. *Vasquez v. Cont'l Maritime of San Francisco, Inc.*, 23 BRBS 428, 430 (1990). Evidence that alternate employment is not suitable or available may provide grounds for modifying prior awards. *Jensen v. Weeks Marine, Inc.*, 346 F.3d 273, 277 (2d Cir. 2003); *R.V. [Vina] v. Friede Goldman Halter*, 43 BRBS 22, 24 (2009); *see also Universal Maritime Corp. v. Moore*, 126 F.3d 256, 264 (4th Cir. 1997); *Lentz v. Cottman Co.*, 852 F.2d 129, 131 (4th Cir. 1988).

In her 2008 award of benefits (*Lewis I*), ALJ Bullard found Claimant was unable to return to his usual employment, as he was physically limited to sedentary work with

[2] The ALJ did not alter the awarded PPD rate, finding the average wage-earning capacity of the 2021 suitable available employment ($13.05 per hour), when compared to the average wage-earning capacity that ALJ Bullard found in 2008 ($8.66 per hour in 2006 dollars), had not increased or decreased by a significant amount when accounting for inflation. D&O at 29.

restrictions against repetitive bending or stooping, frequent lifting or carrying of more than ten pounds, and sitting on a bench or stool, and he must be able to change position at will. D&O at 23 (quoting *Lewis I* at 20). Subsequent to that award, Claimant continued to receive medical treatment for his back from Dr. Joshua Ammerman,[3] who issued updated restrictions in 2010 and 2012: no prolonged sitting, no repetitive bending at the waist, crawling, stooping, or lifting of more than five to ten pounds, no continuous walking for more than thirty minutes, and Claimant must be allowed to use a cane and a sacrococcygeal pillow and to change position from seated to standing approximately every hour. Claimant's Exhibit (CX) 6 at 6, 8, 11-12.

More recently, upon Dr. J. Ammerman's referral, Claimant began receiving treatment from pain management physician Dr. Caleb Kroll in January 2018. CX 2 at 42. Dr. Kroll recommended implantation of a spinal cord stimulator (SCS), which was done in June 2019.[4] HT at 20; CX 2 at 18, 30, 32; CX 3. In April 2020, Dr. Kroll disagreed with Dr. J. Ammerman's 2012 restrictions and opined that even sedentary work would be difficult for Claimant in light of his pain with any movement and daily dosage of pain medication. CX 2 at 11-14. However, he agreed a functional capacity evaluation (FCE) would be reasonable and "clinically appropriate." *Id.* at 13.

Upon Dr. Kroll's referral, Claimant underwent the FCE in May 2021, which demonstrated his ability to perform sedentary work. Employer's Exhibit (EX) 10 at 7. However, the physical therapist who conducted the testing, Ashley Rader, noted several instances of invalid test results due to Claimant's inconsistent and self-limiting behavior. *Id*. at 5-7. Likewise, Dr. Zachary Levine, an orthopedic surgeon who conducted a medical evaluation of Claimant at Employer's request in June 2021, found no "anatomical correlation" or objective evidence supporting Claimant's low back pain complaints and opined Claimant was physically capable of working sedentary duty. EX 8 at 4.

The ALJ found Claimant's case for a change in physical condition rested on his subjective complaints of drowsiness and worsening pain, the implanting of the SCS in 2019, ongoing pain despite continued medication and the SCS implant, and Dr. Kroll's statements that he cannot perform even sedentary jobs. D&O at 23. She found Claimant's testimony and the medical evidence indicated neither his pain nor drowsiness had worsened since issuance of *Lewis I*, as Claimant and his physicians noted an improvement of his pain

[3] Claimant initially received treatment from Dr. Bruce Ammerman until that physician's death; Dr. Bruce Ammerman's son, Dr. Joshua Ammerman, took over Claimant's care in 2007. HT at 18-19; Claimant's Exhibit (CX) 6 at 20.

[4] Dr. Christopher Kalhorn performed the trial SCS and permanent SCS procedures. HT at 21; Employer's Exhibit (EX) 7.

and functionality after the SCS implant;[5] Claimant was able to sit for two full hours without medication during his April 2021 deposition;[6] Claimant testified he was regularly walking two to four miles a day from at least 2014 until January 2021 (when he had to stop due to an unrelated leg condition);[7] he was taking the same medications;[8] and his subjective complaints of drowsiness had not significantly changed.[9] D&O at 24-25 (citing HT at 21-22, 24, 26, 38-39, 47, 48, 50).

The ALJ further found Claimant failed to establish his physical limitations had changed, noting the only significant difference between the restrictions ALJ Bullard accepted in 2008 and those Dr. J. Ammerman subsequently assigned was the mandate that he be able to use a cane and sacrococcygeal pillow. D&O at 25. While acknowledging Dr. Kroll opined Claimant was incapable of even sedentary work because his "pain and use of daily medication would make any work difficult and…even with the SCS Claimant could not 'work without pain'" (*id.* at 25 (quoting CX 2 at 9)),[10] the ALJ found Claimant's ability to work without pain did not, in and of itself, establish total disability (*id.*). She also found Dr. Kroll's opinion regarding Claimant's functional abilities to be based on incomplete information in light of Claimant's admission that he did not inform Dr. Kroll that he was taking regular and lengthy walks prior to the manifestation of his unrelated leg condition. *Id.* (citing HT at 40).

The ALJ likewise found Claimant failed to establish a change in his economic condition since *Lewis I.* D&O at 25-28. Considering Claimant's physical restrictions,[11]

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[5] CX 2 at 3, 6, 9, 15, 17-18, 30, 32; CX 5 at 3-6; EX 1 at 1, 45; EX 2 at 7; EX 6 at 25-26, 32-33; EX 7 at 3-5; EX 8 at 3.

[6] EX 6; EX 8 at 3.

[7] EX 6 at 57-58, 80, 82.

[8] CX 2; EX 6 at 32.

[9] HT at 22, 25-26, 28.

[10] ALJ Hobbs incorrectly cited CX 2 at 14; the correct cite is CX 2 at 9.

[11] Based on the opinions of Dr. J. Ammerman and Dr. Kroll, the FCE results, and the reports of Dr. Louis Levitt and Dr. Levine, the ALJ found Claimant capable of performing unskilled sedentary work with no lifting or carrying more than ten pounds, with the ability to use a sacrococcygeal pillow and cane and to change position as needed. D&O at 26.

education, technological skills, medication usage, and access to transportation, the ALJ evaluated six available positions identified by Employer's vocational rehabilitation counselor Dr. Gerald Wells, Ph.D.,[12] and found three of them constituted suitable alternate employment.[13] *Id*. at 27-28 (citing EX 4 at 8-10; EX 9 at 24, 27, 30-31, 38-39). As Claimant failed to show any diligence in attempting to secure these jobs, the ALJ found Employer established the availability of suitable alternate employment, and therefore Claimant remained partially disabled. *Id*. at 28.

The ALJ has broad discretion under Section 22 to determine if the old and new evidence warrants modification of the finding that Claimant is partially, not totally, disabled as a result of his work-related injury. *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *Dobson v. Todd Pacific Shipyards Corp.*, 21 BRBS 174, 175-176 (1988). Here, the ALJ addressed and discussed the relevant evidence presented, *see Dobson*, 21 BRBS at 175-176, and found Claimant did not offer any creditable evidence showing deterioration of either his physical or economic condition since issuance of *Lewis I* in July 2008. *See generally Island Operating Co., Inc. v. Director, OWCP* [*Taylor*], 738 F.3d 663 (5th Cir. 2013).

The ALJ permissibly rejected Claimant's testimony concerning his limitations and subjective complaints as not supported by medical evidence, *see generally Goldsmith v. Director, OWCP*, 838 F.2d 1079, 1081 (9th Cir. 1988), finding he lacked credibility. D&O at 23-24. The ALJ has the discretion to make credibility determinations regarding a claimant's complaints of pain in view of the entire record. *Jordan v. SSA Terminals, LLC*, 973 F.3d 930, 937-938 (9th Cir. 2020); *Gacki v. Sea-Land Serv., Inc.*, 33 BRBS 127, 128 (1998). She has the discretion to draw inferences from the evidence; the Board may not overturn her findings simply because other inferences could have been drawn. *Ceres Marine Terminals, Inc. v. Director, OWCP [Jackson]*, 848 F.3d 115, 120 (4th Cir. 2016); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 945 (5th Cir. 1991).

The ALJ also permissibly gave little weight to Dr. Kroll's understanding of Claimant's physical limitations due to his lack of awareness of Claimant's lengthy and

[12] This is the fourth labor market survey Dr. Wells has generated in this case. He previously issued vocational reports and labor market surveys on April 7, 2006 (EX 9 at 79-86), October 16, 2007 (EX 9 at 90-97), and December 22, 2012 (EX 9 at 99-106).

[13] The ALJ eliminated the cafeteria cashier job because it did not specify whether Claimant would be able to change positions as needed, the dispatcher job because it may not be accessible by public transportation (Claimant's primary means of travel), and the emergency security dispatcher job because it was not low-stress employment. D&O at 27-28.

regular walks from approximately 2014 through January 2021. D&O at 25. While it is true the opinion of a treating physician may be entitled to "considerable weight in determining disability," *Loza v. Apfel*, 219 F.3d 378, 395 (5th Cir. 2000), an "ALJ may give less weight to a treating physician's opinion when there is good cause shown to the contrary." *Sea-Land Servs., Inc. v. Dir., Off. of Workers' Comp. Programs*, 949 F.3d 921, 926-927 (5th Cir. 2020).

Having established Claimant failed to show a change in his physical condition, the ALJ evaluated whether modification was warranted due to a change in his economic condition by analyzing whether the jobs identified by Employer's vocational expert constituted suitable alternate employment. D&O at 25-28. In doing so, the ALJ properly considered factors beyond Claimant's physical limitations, analyzing the suitability of the proffered jobs in light of Claimant's education, his transferable skills, his medical history (including the use of pain medication), his familiarity with technology,[14] and his ability to commute, considering his reliance upon public transportation. *Id*. at 27-28; *see Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 201 (4th Cir. 1984); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Brickhouse]*, 315 F.3d 286, 295 (4th Cir. 2002) ("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.").

Based on her evaluation, the ALJ rationally rejected three identified jobs as unsuitable, but found the remaining three positions "vocationally appropriate" considering his education, skills, and experience, their accessibility through public transportation, and Claimant's physical limitations. D&O at 27-28. As the ALJ's findings and inferences with respect to the suitability of Employer's proffered suitable alternate employment are rational, supported by substantial evidence, in accordance with the law, and contain no reversible error, they are affirmed. *Mijangos*, 948 F.2d at 945; *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 1234-1235 (4th Cir. 1985).

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[14] Claimant alleges the ALJ erred in finding "no support" for his assertion that he has "no computer or keyboarding skills." D&O at 26 n.16; Claimant's Brief at 13-14. Although Claimant testified he does not own a computer at home and has not taken a keyboarding class, he also testified he owns a smartphone, uses it to watch virtual church services, make calls, and send text messages, and knows how to send and respond to email messages. EX 6 at 60-63. Based on Claimant's testimony, the ALJ rationally rejected his argument that he lacks any computer or keyboarding skills. *Jackson*, 848 F.3d at 120 citing *Newport News Shipbldg. & Dry Dock Co. v. Tann*, 841 F.2d 540, 543 (4th Cir. 1988) (ALJ's findings "may not be disregarded on the basis that other inferences might have been more reasonable").

Having adequately considered Claimant's contentions and evidence, the ALJ did not abuse her discretion in finding Claimant failed to establish grounds for modification of the prior award of benefits. *See generally Kinlaw v. Stevens Shipping & Terminal Co*., 33 BRBS 68 (1999), *aff'd mem*., 238 F.3d 414 (4th Cir. 2000).

Accordingly, we affirm the ALJ's Decision and Order – Denying Modification.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge