

U.S. Department of Labor

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



BRB No. 23-0127

PATRICK LOCK)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
PASHA STEVEDORING & TERMINALS,)	DATE ISSUED: 05/21/2024
LP)	
)	
and)	
)	
SIGNAL MUTUAL INDEMNITY)	
ASSOCIATION LTD.)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order Granting, in Part, Claim for Benefits of Susan Hoffman, Administrative Law Judge, United States Department of Labor.

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

Marcin M. Grabowski (Bauer Moynihan & Johnson LLP), Seattle, Washington, for Employer/Carrier.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Susan Hoffman's Decision and Order Granting, in Part, Claim for Benefits (2021-LHC-00152) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (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 law. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On November 30, 2017, Claimant, a longshoreman, suffered a work-related left shoulder injury when he slipped and fell at the Port of Grays Harbor (Port).¹ Hearing Transcript (Tr.) at 54-56. Immediately following the incident, he went to the emergency room, where he was diagnosed with a suspected left rotator cuff/labrum tear and was released with anti-inflammatories and a sling. Employer's Exhibit (EX) 10. Claimant remained off work through February 20, 2018, and briefly returned for three shifts before having surgery.² EX 2 at 35. On February 28, 2018, Dr. Bradley C. Christ performed a left shoulder arthroscopic rotator cuff repair, subacromial decompression, lysis of adhesions, and shoulder manipulation. CX 2 at 16, 41-43; Tr. at 56. On May 6, 2018, after the surgery, Claimant returned to longshore employment with restrictions; he continued working without interruption until August 20, 2019, when he began a work-hardening program that ended on September 17, 2019. CX 4 at 244-334; EX 12. The parties stipulated Claimant returned to his usual employment on September 24, 2019. Tr. at 6-7; D&O at 3.

There is no dispute Claimant's left shoulder injury is work-related. Employer voluntarily paid temporary total disability benefits from December 1, 2017, to April 17, 2018, temporary partial disability benefits from April 18, 2018, to May 17, 2019, and temporary total disability benefits from August 20, 2019, to September 17, 2019. EX 1 at

¹ This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit because the injury occurred in Westport, Washington. 33 U.S.C. §921(c); *see Roberts v. Custom Ship Interiors*, 300 F.3d 510 (4th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003); 20 C.F.R. §702.201(a).

² Claimant saw Dr. Dominic Femiano, a non-surgical orthopedic specialist from December 2017 to January 2018 and began physical therapy on January 5, 2018. Tr. at 56; Claimant's Exhibit (CX) 2 at 15-100; EX 9 at 202-204, 210-221. Claimant's January 15, 2018 MRI revealed a high-grade partial thickness bursal surface tear of the distal aspect of the subscapularis tendon, a linear high-grade partial thickness or full thickness tear of the distal aspect of the subscapularis tendon, and a partial thickness tear within the long bicep's head tendon. EX 11 at 276.

4, 10, 17-18. A dispute arose thereafter over the nature and extent of Claimant's disability,³ prompting the ALJ to hold videoconference hearings on July 13, 2021, August 3, 2021, and August 17, 2021.⁴

In her decision dated December 21, 2022, the ALJ found Claimant's condition reached maximum medical improvement (MMI) on September 23, 2019,⁵ and that he failed to meet his burden of establishing a prima facie case of total disability after June 10, 2019, aside from the work-hardening period from August 15, 2019, to September 23, 2019. D&O at 22, 26, 29-30. She therefore awarded temporary total and temporary partial disability benefits for various periods from December 1, 2017, to September 23, 2019. *Id.* at 16, 22, 27, 30-31.⁶

On appeal, Claimant challenges the ALJ's denial of permanent partial disability benefits presumably from September 24, 2019, and continuing.⁷ He argues the ALJ failed to consider whether his post-injury physical restrictions precluded his return to certain pre-

³ Claimant alleged he is entitled to, and Employer is liable for, additional periods of temporary total and temporary partial disability benefits beyond those Employer voluntarily paid, as well as to an ongoing award of permanent partial disability benefits as of September 24, 2019.

⁴ The Hearing Transcripts from July 13, 2021, August 3, 2021, and August 17, 2021, are consecutively paginated and therefore will be referenced collectively as Hearing Transcript (Tr.).

⁵ We affirm the ALJ's conclusion that Claimant's shoulder condition reached MMI on September 23, 2019, as it is unchallenged on appeal. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

⁶ The ALJ awarded temporary total disability benefits from December 1, 2017, to February 20, 2018; temporary partial disability benefits for February 21-25, 2018; temporary total disability benefits from February 26, 2018, to May 5, 2018; temporary partial disability benefits from May 6, 2018, to June 9, 2019; and temporary total disability benefits from August 15, 2019, to September 23, 2019. D&O at 30-31.

⁷ In his brief, Claimant repeatedly asserts he established his entitlement to permanent partial disability benefits and requests the Board reverse the ALJ's denial of such benefits. Cl. Br. at 5, 14, 18, 51. It appears he asserts the ALJ erred in failing to find he suffered a loss of wage-earning capacity (WEC). Before the ALJ, Claimant argued he is entitled to permanent partial disability after September 23, 2019, when he reached MMI. D&O at 5 n.9, 14; *see also* Cl. Post-Hearing Br. at 13, 17, 24, 25; Tr. at 25.

injury jobs and improperly shifted the burden for determining his post-injury wage-earning capacity (WEC). Employer responds, urging affirmance of the ALJ's decision. Claimant filed a reply brief.

Extent of Disability

Claimant asserts the ALJ's denial of permanent partial disability benefits is contrary to law and not supported by substantial evidence.⁸ He avers, although he returned to longshore work, he is entitled to permanent partial disability benefits because his job options were limited due to his post-injury restrictions. Specifically, he maintains the physical restrictions that his treating surgeon, Dr. Christ, imposed, as well as Dr. Jonathan Dickens's statements, establish he had post-injury restrictions preventing him from performing all the longshore work he performed prior to the work-injury. He also contends that when the ALJ assessed his ability to work post-injury, she ignored the descriptions of the physical requirements of the jobs that he and Billy Duane Swor provided.⁹ Further, Claimant avers the ALJ erred by not comparing his pre-injury average weekly wage (AWW), which the parties stipulated was \$3,554.35, with his actual post-injury weekly wages, from September 24, 2019, to September 23, 2020, of \$2,582.46. He alleges the

⁸ Based on the parties' stipulation that "Claimant is working his usual employment and started that work on September 24, 2019," the ALJ's unchallenged MMI finding, and Claimant's repeated assertions that the ALJ erred in denying permanent *partial* disability benefits, we reject his contentions that the ALJ "failed to properly consider the shifting burdens" and "failed to address" whether Employer produced evidence of suitable alternate employment. Through his arguments and stipulations, Claimant has conceded he is not totally disabled. Further, he has not suggested that he is presenting separate alternative and inconsistent positions as to disability (i.e., presenting both permanent total disability and permanent partial disability claims). Thus, we review the ALJ's findings pertaining to any loss in Claimant's WEC from September 24, 2019, when Claimant returned to his usual employment. Tr. at 6-7; D&O at 3. But first we address the ALJ's findings regarding Claimant's work from June 10, 2019, as the ALJ found Claimant failed to meet his burden of establishing a *prima facie* case of total disability after June 10, 2019. D&O at 30-31.

⁹ Mr. Swor is a long-time longshoreman, dispatcher, and president of the local union. Tr. at 147. Claimant states his and Mr. Swor's testimony establish he is physically unable post-injury to perform numerous positions including jobs as a mechanic, scupper, lasher, and work involving the loading/unloading of grain cars and log ships. Because of his restrictions, Claimant states he is unable to work on the waterfront without carefully choosing his jobs, and, even then, he needs extra time off when his pain increases. As such, he maintains his work-related left shoulder injury limits his job opportunities and impedes his ability to earn wages post-injury.

comparison reveals a significant loss in his WEC directly attributable to his work-related left shoulder injury. For these reasons, Claimant asserts that, contrary to the ALJ's conclusion, his post-injury ongoing pain and restrictions from September 24, 2019, have limited the availability of work he can perform and, therefore, should have been considered by the ALJ in her calculation of his post-injury WEC.

In this case, the ALJ considered Claimant's contentions that physical limitations resulting from his work-related shoulder injury restricted his post-injury job opportunities, at least in finding Claimant did not establish a prima facie case of total disability after June 10, 2019. When considering the jobs available to Claimant pre-and post-injury, she thoroughly reviewed the evidence of record including the physical restrictions Drs. Christ and Dickens imposed¹⁰ and testimony from Claimant, his wife, and Mr. Swor. D&O at 6-14, 22-30. She also considered this evidence when concluding Claimant did not establish a prima facie case of total disability from June 10, 2019, through August 14, 2019, and then from September 24, 2019. *Id.* at 30. In reaching this conclusion, she found Claimant's usual employment essentially had not changed, as he selectively performed a variety of longshore jobs both pre- and post-injury¹¹ including positions as a log loader/snapper and

¹⁰ The ALJ found Claimant's treating physician, Dr. Christ, released him to work with the following restrictions: occasionally perform work on a ladder and above the shoulder about 1-3 hours a day; crawl and reach about 3-6 hours a day; but otherwise, no restrictions on his activities, including any lift, carry, or push/pull limits. D&O at 23; EX 8; CX 11. She further found Dr. Christ released Claimant to modified duty on September 23, 2019, with essentially the same restrictions, but then testified that, as of that date, he would not put any restrictions on Claimant and would instead leave Claimant "to self-regulate" his limitations, CX 11, Dep. at 38-39. The ALJ found Dr. Dickens testified Claimant could perform any longshore job as long as it had no requirement of lifting over fifty pounds, only occasional reaching overhead and repetitive use of his non-dominant hand, and he specifically opined Claimant could physically perform work as a dockman/stickerman, holdman (logs), lift truck driver, and log loader operator. D&O at 20-21; EX 6 at 96-99.

¹¹ The ALJ acknowledged Claimant's statements that he "typically really pick[s] and choose[s] his jobs" based on what he can perform and that before his injury he "took any and all jobs," but that afterwards he is "not as physical as [he] once was because [he] can't shovel." Tr. at 86. She, however, primarily focused on Claimant's explanation that:

I basically pick and choose my jobs. I look at what pays the most with the least amount of work. If I am in line for a freebie is what we call it, or a witness, or something that's less physical, those are my – that's what I look at first. What's available on the board for a job. I look at the highest paying

lift-truck operator which represented his “top two out of three job categories during” both time periods. *Id.* at 26-27. Additionally, the ALJ properly compared Claimant’s medical restrictions with the requirements of his work to find, in contrast to Claimant’s contention, that the jobs Claimant performed before his injury were within his post-injury work restrictions.¹² *Carroll v. Hanover Bridge Marina*, 17 BRBS 176, 178 (1985). To the extent Claimant challenges the ALJ’s consideration of this evidence, we affirm the ALJ’s credibility determinations as they are neither inherently incredible nor patently unreasonable. *See generally Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 648 (9th Cir. 2010) (ALJ is entitled to evaluate the credibility of all witnesses, to weigh the evidence, and to draw her own inferences and conclusions from the evidence); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 1335 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979) (ALJ’s credibility determinations are not to be disturbed unless they are “inherently incredible or patently unreasonable.”). Accordingly, we affirm the ALJ’s conclusion that Claimant performed his usual employment from June 19, 2019, through August 14, 2019,¹³ and her denial of disability benefits for this period as they are supported by substantial evidence, rational, and in accordance with law. *See generally Ramos v. Global Terminal & Container Services, Inc.*, 34 BRBS 83, 84-85 (1999); *Chong v. Todd Pac. Shipyards*

with the least amount of physical work that I do. And if it comes down to what’s left is a physical job, I don’t take the jobs at all. I just pass on it, hope the next ship or the next bay I can get something that I can do.

Id. at 87. The ALJ further noted Claimant stated that when he cannot take other jobs, he will “just patiently go up and dig, because [he] can do that for a few shifts in a row before [his] arm starts hurting.” *Id.* at 88. She also found the reduction in the number of shifts Claimant took post-injury may be attributed to his “strategizing about his work shifts” and “[m]anaging” his work “schedule to complete less physical work for the same pay;” something the ALJ believed “most, if not all, reasonable workers would do.” D&O at 29.

¹² Based on the opinions of Drs. Christ and Dickens, the ALJ concluded that as of June 10, 2019, Claimant had no lift, carry, or push/pull limits, he could work on a ladder and above his shoulder for 1-3 hours a day, crawl and reach about 3-6 hours a day, but otherwise had no activity restrictions. D&O at 23. She further found all longshoremen should be physically fit and capable of lifting as much as 100 pounds, but the “general summary of longshoremen duties” does not account for the actual pre-injury jobs and corresponding duties Claimant performed. *Id.* at 26.

¹³ The ALJ noted Claimant’s wage records show he worked “consistently after June 10, 2010, until August 14, 2019, and after September 24, 2019.” D&O at 25.

Corp., 22 BRBS 242 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP*, 909 F.2d 1488 (9th Cir. 1990).

Nevertheless, while the record supports the ALJ's finding that Claimant returned to his usual longshore work after September 24, 2019, it also contains evidence that, as Claimant suggests, may support his contention his pain and physical limitations have caused him to not engage in certain post-injury work.¹⁴ A claimant working post-injury in his former job but with pain and restrictions nevertheless can establish a loss in WEC. *See, e.g., Container Stevedoring Co. v. Director, OWCP [Gross]*, 935 F.2d 1544, 1550 (9th Cir. 1991); *Todd Shipyards Corp. v. Allan*, 666 F.2d 399, 14 BRBS 427 (9th Cir.), *cert. denied*, 459 U.S. 1034 (1982); *Ramirez v. Sea-Land Services, Inc.*, 33 BRBS 41, 45 n.5 (1999). Given this law, and Claimant's related assertion that he is entitled to permanent partial disability benefits, the ALJ should have addressed whether Claimant sustained a loss of WEC as of September 24, 2019, that is attributable to his work injury pursuant to Section 8(h). 33 U.S.C. §908(c)(21), (h); *Ezell*, 33 BRBS 19; *see also Cooper v. Offshore Pipelines International, Inc.*, 33 BRBS 46 (1999).

Under Section 8(c)(21) of the Act, the ALJ must determine the claimant's lost WEC, if any, which can be accomplished only by comparing his pre-injury AWW with his post-injury WEC. 33 U.S.C. §908(c)(21); *Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 1160 (9th Cir. 2002); *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649, 652 (1979). WEC is determined under Section 8(h), 33 U.S.C. §908(h),¹⁵ which provides

¹⁴ It is undisputed the ALJ found Claimant returned to his usual longshore work with restrictions. D&O at 23. Both Employer and Claimant submitted evidence relating to the work undertaken by Claimant before his injury and after reaching MMI.

¹⁵ 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

a claimant's WEC shall be his actual post-injury wages if these earnings fairly and reasonably represent his WEC. 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, 1246-1247 (9th Cir. 2002); *Gross*, 935 F.2d at 1549; *Long v. Director, OWCP*, 767 F.2d 1578, 1582-83 (9th Cir. 1985); *Devillier*, 10 BRBS at 655-657. An ALJ's WEC findings may be overturned only if unsupported by substantial evidence. 33 U.S.C. §921(b)(3); *Long*, 767 F.2d at 1582; *Portland Stevedoring Co. v. Johnson*, 442 F.2d 411, 412 (9th Cir.1971).

In this case, the ALJ's disability analysis concluded with her determination that Claimant returned to his usual work after September 24, 2019. This necessarily infers Claimant had no loss in WEC due to his work injury after that date; however, Claimant's actual earnings from September 24, 2019, through June 3, 2021, as reflected in the Pacific Maritime Association's Payroll records, *see* EX 2 at 40-45, reveal his actual post-injury wages,¹⁶ adjusted for inflation, are significantly less than the parties' stipulated AWW of \$3,554.35. As the ALJ's decision does not contain any specific discussion of Claimant's WEC dating from September 24, 2019, we must vacate her denial of permanent partial disability benefits from that date. On remand, the ALJ must consider Claimant's post-injury WEC from September 24, 2019, pursuant to Section 8(h) of the Act. 33 U.S.C. §908(h). She must first determine whether Claimant's actual wages from that date "fairly and reasonably" represent his WEC, as Section 8(h) requires.¹⁷ If she finds Claimant's

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).

¹⁶ In awarding Claimant periods of temporary total disability from February 21-25, 2018, and May 6, 2018, to June 9, 2019, the ALJ found "Claimant's actual wages from his employment as a longshoreman most fairly and reasonably represent" his WEC during those periods. D&O at 31.

¹⁷ We recognize the ALJ found the decreased number of shifts Claimant worked post-injury may "be attributed to other reasons aside from his work-related injury," including Claimant's "strategizing" and "economic factors outside of anyone's control." D&O at 28-29. However, she did this solely in determining whether such factors impeded Claimant's ability to return to his usual work and not in assessing whether they adversely impacted his actual post-injury wages. Because a determination of WEC pursuant to Section 8(h) encompasses factors such as the availability of employment that Claimant can perform post-injury, the ALJ may, on remand, consider this evidence in assessing whether

actual earnings do not fairly and reasonably represent his post-injury WEC, she may find an alternate amount which does so based on the record evidence and relevant factors. Either way, she must then compare Claimant's post-injury WEC with his pre-injury AWW to determine whether he has sustained a loss in WEC and is, therefore, entitled to an award of permanent partial disability benefits from September 24, 2019. 33 U.S.C. §908(c)(21); *Sestich*, 289 F.3d at 1160; *Devilleir*, 10 BRBS at 652.

Accordingly, we vacate the ALJ's denial of disability benefits after September 24, 2019, and remand this case for her to address Claimant's entitlement to an ongoing award of permanent partial disability benefits from that date. In all other aspects, we affirm the ALJ's Decision and Order Granting, in Part, Claim for Benefits.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

Claimant's actual wages fairly and reasonably represent his post-injury WEC. *Gross*, 935 F.2d at 1550.