U.S. Department of Labor

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

BRB No. 22-0235

RICARDO SINDAYEN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
VIGOR SHIPYARD, INCORPORATED	)	
	)	DATE ISSUED: 7/13/2023
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION LIMITED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and the Order Denying Motion for Reconsideration of Susan Hoffman, Administrative Law Judge, United States Department of Labor.

David B. Condon (Welch & Condon), Tacoma, Washington, for Claimant.[1]

Scott E. Holleman (Bauer Moynihan & Johnson LLP), Seattle, Washington, for Employer/Carrier.

[1] Claimant substituted David B. Condon in place of Terri L. Herring-Puz, also of Welch & Condon, as attorney of record on January 27, 2023. *See* Notice of Withdraw and Substitution of Counsel. However, this Decision responds to Claimant's briefs filed with the Benefits Review Board on May 26, 2022, and August 15, 2022. Claimant's Brief (Cl. Brief) at 15; Claimant's Reply Brief at 6.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Susan Hoffman's Decision and Order Awarding Benefits and Order Denying Motion for Reconsideration (2019-LHC-00856) 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).[2]

Claimant worked intermittently for Employer as a journeyman painter when he was in the United States. CX 1; Cl. Brief at 2. On December 19, 2018, he underwent an audiogram which showed he sustained a binaural hearing loss of 44.69% while working for Employer. CX 2 at 14, 21-22. Subsequently, Claimant filed a claim for compensation under the Act on January 11, 2019.[3] CX 1 at 2. Employer controverted the claim, and the case was forwarded to the ALJ, where the parties opted for a decision on the record. Decision and Order (D&O) at 1.

The parties stipulated Claimant's hearing loss is work-related, and he is entitled to disability and medical benefits. D&O at 2. They disputed the extent of his hearing loss and his average weekly wage (AWW). D&O at 2. In her decision, the ALJ found Claimant entitled to permanent partial disability benefits based on his 44.69% binaural hearing impairment. D&O at 12. She determined neither Section 10(a) nor 10(b), 33 U.S.C. §910(a), (b), could be applied to calculate Claimant's AWW as his employment was

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit because Claimant sustained his injuries in Seattle, 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).

[3] This is Claimant's second claim for hearing loss with Employer. Employer previously paid him permanent partial disability benefits under Section 8(c)(13), 33 U.S.C. §908(c)(13), for a 34.44% hearing impairment. CX 1 at 6. Consequently, following this second claim, Employer sought, and in a separate decision, the ALJ awarded, Section 8(f) relief, 33 U.S.C. §908(f). D&O at 2; Cl. Brief at 3 n.1.

generally not regular and continuous[4] and evidence of the earnings of other workers provided for calculations under Section 10(b) would be unreasonable and unfair.[5] D&O at 10.

In calculating AWW under Section 10(c), 33 U.S.C. §910(c), the ALJ used the 52-week pre-injury period spanning from December 14, 2017, to December 14, 2018. D&O at 7. She then determined Claimant was available and willing to work from December 14, 2017, through April 1, 2018, before he voluntarily removed himself from the workforce between April 2, 2018, and June 7, 2018, by failing to check in with his union and confirm his availability. *Id.* at 11. Consequently, the ALJ adjusted the 52-week divisor by excluding 16.571 weeks, representing time from December 14, 2017, through April 2, 2018, when Claimant had been laid off and was willing and available to work, as well as one week, from June 8, 2018, to June 15, 2018, for the period after Claimant's reinstatement with the union until he returned to full-time work with Employer. *Id.* Using the adjusted divisor, she divided Claimant's 2017 gross wages of $33,293.64 by 35.429 weeks (the weeks Claimant worked plus the weeks Claimant voluntarily removed himself from employment), to arrive at an AWW of $939.73.

Following her decision, Claimant filed a motion for reconsideration (Cl. Recon. Motion) on March 17, 2021, asking the ALJ to reduce the divisor by excluding additional weeks from the AWW calculation. Cl. Recon. Motion at 3. Claimant asserts the weeks between August 25, 2018, and October 28, 2018, and November 17, 2018, and November 27, 2018, should be excluded from the 52-week divisor because he was also available and willing to work those weeks. This would increase the weeks excluded from the calculation from 16.571 weeks to 27.427 weeks, resulting in an AWW of $1,354.89 ($33,293.64 divided by 24.573). *Id.* at 5-6. The ALJ denied Claimant's motion, concluding this increase would misrepresent the amount of work normally available to Claimant. Order Denying Motion for Reconsideration (Recon. D&O) at 3. She found Claimant's suggested AWW of $1,354.89 would not be a fair and reasonable approximation of his earning capacity at the time of his injury because it would amount to annual earnings of $70,454.28, which greatly exceeds his annual earnings from 2008 to 2018. *Id.*

[4] The ALJ found Claimant did not work substantially the whole of the year because he worked only 18 out of 52 weeks in the year preceding his injury. D&O at 9.

[5] The ALJ found Claimant worked intermittently during the four years preceding his injury, some quarters with no earnings, and that using the earnings of other employees would result in an inflated AWW. D&O at 10.

Claimant appeals the ALJ's Decision and Order and Order Denying Reconsideration, alleging she erred in calculating his AWW by failing to exclude the additional weeks he was allegedly willing and able to work. Employer responds, urging affirmance. Claimant also filed a reply brief.

Claimant asserts the ALJ's AWW divisor analysis focused solely on the period from December 14, 2017, to June 15, 2018, and thus she failed to conduct a week-by-week analysis of the period from June 16, 2018, to December 14, 2018. As a result, he alleges the ALJ's decision to exclude some weeks in the first part of the year based on his being willing and able to work, but not account for other such weeks in the latter half of the year, is inconsistent and not supported by substantial evidence.[6] Cl. Brief at 8. Citing union records, he contends the ALJ should have excluded from the AWW divisor weeks he was "periodically laid off, yet available and willing to work," specifically, August 25, 2018, through October 28, 2018, and November 17, 2018, through November 27, 2018. *Id.* at 9-10; CX 3 at 46; CX 6 at 138-146.

Under Section 10(c), the ALJ has broad discretion to arrive at a fair approximation of a claimant's annual earning capacity at the time of his injury. *Obadiaru v. ITT Corp.*, 45 BRBS 17, 23 (2011). As noted, the goal of Section 10(c) is to reach a *fair and reasonable approximation* of a claimant's earning capacity at the time of the injury. *Obadiaru*, 45 BRBS at 23; *Barber v. Tri-State Terminals Inc.*, 3 BRBS 244 (1976). In calculating a claimant's AWW under Section 10(c), an ALJ may, in her discretion, account for lost time due to a layoff. *Holmes v. Tampa Ship Repair & Dry Dock Co.*, 8 BRBS 455 (1978). She may also adjust the 52-week divisor to reflect the number of weeks a claimant was involuntarily unable to work. *Taft v. Lockheed Martin Corp.*, 52 BRBS 159, 163 (2018). These AWW determinations will be affirmed if they reflect a reasonable representation of a claimant's earning capacity, and the claimant fails to establish a basis for a higher award. *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982). The ALJ

[6] In a footnote, Claimant disagrees with the ALJ's conclusion that applying Section 10(b) would be unreasonable and unfair. He notes the ALJ did not discuss why it would be unfair to apply Section 10(b), especially because Claimant was unable to work for substantially the whole 52 weeks due to layoffs and a lack of work. Cl. Brief at 7, n. 2. Employer responds, asserting the other workers identified by Claimant worked far more than Claimant and had more seniority, so they would not be considered part of Claimant's "same class." Emp. Brief at 6, n. 4. However, as Claimant is not directly appealing the ALJ's Section 10(b) determination, nor did he fully develop this argument in his brief, we decline to address it further. *See generally Carnegie v. C&P Telephone Co.*, 19 BRBS 57, 59 (1986) (outlining the requirements for an argument in a Petition for Review); 20 C.F.R. §802.211(b).

may also consider other factors, including work and earning patterns over the course of several prior years and actual prior wages. *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 823 (5th Cir. 1991).

Here, the ALJ's AWW calculation under 10(c) is substantiated by the relevant evidence in the record. She analyzed union records as well as Claimant's testimony to determine his work was not regular and continuous, as there was a pattern of intermittent employment throughout each of the four years preceding his injury.[7] D&O at 10; CX 6. Although the ALJ analyzed many of the weeks of the year preceding Claimant's injury in her original Decision and Order, in her Order Denying Motion for Reconsideration she more thoroughly explained her decision for rejecting Claimant's suggestion to exclude other weeks from the divisor. She found Claimant's suggested calculations would approximate his annual earnings to be $70,454.28, which would be far greater than his average annual earnings in the previous ten years.[8] Recon. D&O at 3. The ALJ rationally concluded such a finding would undercut the nature of AWW calculations under Section 10(c) and would not reach a fair and reasonable approximation of Claimant's earning capacity at the time of his injury. Claimant has never, in the tenure of his employment with Employer, earned as much as the $70,454.28 annual earnings figure he seeks, even when working for a full year, and in most years, he earned significantly less. *See* CX 6 at 128-136. The ALJ's calculation of an AWW of $939.73 approximates Claimant's annual earnings to be $48,865.96, which the ALJ acknowledged exceeds all but one of the ten years of Claimant's earnings in evidence, but which the ALJ reasonably found fairly represents his earning capacity as of the date of his injury. The function of Section 10(c) is to determine "the amount of earnings the claimant would have the potential and opportunity to earn absent injury." *Jackson v. Potomac Temporaries Inc.*, 12 BRBS 410, 413 (1980).

As the ALJ determined, it is clear Claimant's employment has been intermittent over the years for a variety of reasons and awarding him benefits based on an AWW of $1,354.89 would not be a fair and reasonable approximation of his earning power based on his opportunities to earn absent his injury and intermittent layoffs. *See Hicks v. Pac.*

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[7] Even beyond the four years preceding Claimant's injury that the ALJ noted to show Claimant's work was irregular, the record indicates Claimant's irregular work with Employer resulted in disparate quarterly and annual earnings from 2008-2018. CX 3 at 34-36.

[8] Between 2008 and 2018, Claimant's average annual earnings were $28,609.58. He earned $63,818.06 in 2014, but in other years earned significantly less than his proposed AWW for compensation purposes. Recon. D&O at 2-3; CX 3 at 34-36.

Marine & Supply Co., Ltd., 14 BRBS 549, 556 (1981) (reinforcing an ALJ's broad authority to determine AWW under Section 10(c) so long as it reasonably reflects the claimant's earning capacity). Here, the ALJ looked at Claimant's earning history over the previous ten years with Employer, then adjusted calculations from the 52 weeks preceding his injury to come to a reasonable approximation. *Richardson*, 14 BRBS 855.

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits and Order Denying Motion for Reconsideration.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge