U.S. Department of Labor

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

BRB Nos. 23-0109
and 23-0443

SCOTT E. HORTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SPECIALTY FINISHES, LLC	)	DATE ISSUED: 06/27/2024
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeals of the Decision and Order and the Attorney Fee Order of Stewart F. Alford, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz (Law Office of Charles Robinowitz), Portland, Oregon, for Claimant.

Robert E. Babcock (Babcock Holloway Caldwell & Stires, PC), Lake Oswego, Oregon, for Employer.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Stewart A. Alford's Decision and Order (2019-LHC-00046; 2019-LHC-01420) 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 ALJ Alford'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 also appeals ALJ Alford's Attorney Fee Order (2013-LHC-01724). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, based on an abuse of discretion or not in accordance with law. *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 952 (9th Cir. 2007).

These matters have been before the Benefits Review Board several times[1] and arise from the following facts. Claimant injured his lower back on January 21, 2013, while working for Employer as a blaster.[2] Oct. 21, 2020 Hearing Transcript (TR) at 45-46. He immediately sought medical treatment with Concentra Occupational Health and subsequently was referred for supplemental physical therapy with People's Injury Network Northwest (PINN) in an effort for him to recover enough to return to work. *Id.*; CXs 10, 11. However, Claimant was discharged from PINN's physical therapy program on September 18, 2013, after Dr. John Hart determined he was unable to return to work in his former position as a blaster because he could not fulfill the physical requirements of the job. CXs 10, 11 at 86.[3]

Occupational therapist Dominique Martin-Mitchell and physical therapist Jim Franck, representing PINN, conducted an additional five-hour evaluation of Claimant on December 5, 2013, and determined he could not stand or walk for longer than 15 minutes at a time, and no more than two and a half hours total in an eight-hour shift, and should intermittently switch between sitting, standing, and walking. CX 11 at 87. They noted Claimant had made "minimal progress" in the work conditioning program and concluded

[1] We incorporate by reference the Board's prior decisions and orders in *Horton v. Specialty Finishes, Inc.*, BRB No. 21-0492 (Dec. 29, 2022) (unpub.); *Horton v. Specialty Finishes, Inc.*, BRB No. 20-0082 (Feb. 20, 2020) (unpub.); and *Horton v. Specialty Finishes, Inc. and Industrial Marine, Inc.*, BRB Nos. 17-0168 and 17-0168A (Nov. 15, 2017) (unpub.). We limit our discussion of the factual and procedural history to those facts relevant to the present appeals.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit because the injury occurred in Portland, Oregon. 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).

[3] Claimant Exhibit (CX) and Employer Exhibit (EX) page numbers refer to the labeling by the parties rather than the pagination in the original documents.

he could not return to his position as a blaster because the position's lifting requirement surpassed his physical capabilities and he could not consistently squat, crouch, kneel, crawl, or bend "on a constant basis." *Id.* at 86.

Following his discharge from PINN, Claimant briefly returned to work for his former longshore employer, Industrial Marines.[4] He also performed odd jobs, including painting and needle gunning. TR at 74, 94-95. In 2016, Claimant obtained employment with the Veteran's Health Administration (VA) Hospital in Vancouver, Washington, first as a landscaper through a comprehensive work training program and now as a laundry room employee. TR at 56-57. He handles bedding, sorts laundry, and feeds clothes through ironing machines. *Id.* at 59, 78-79. The position requires him to stand for up to ten hours per day and lift no more than fifteen to twenty pounds. *Id.* at 58; CX 16 at 122.

Procedural History

In February 2013, Claimant filed a claim for compensation and medical benefits against Employer. Employer joined Industrial Marine to the proceedings and asserted it was the last responsible employer. *Horton v. Specialty Finishes, LLC*, 2013-LHC-01724, slip op. at 2 (Nov. 16, 2016). ALJ William J. King held a hearing on November 19-20, 2015, and issued a Decision and Order Awarding Benefits on November 16, 2016.[5] CX 1; EX 6. ALJ King determined Employer was the last responsible employer and Claimant was permanently partially disabled due to his work-related back injury. CX 1 at 12, 15. He calculated Claimant's average weekly wage under Section 10(c), 33 U.S.C. §910(c), as $494.95 and his post-injury wage-earning capacity as $400 based on Employer's identification of suitable alternate employment as a parking lot attendant earning $10 per hour. *Id.* at 12, 16.

Following this decision, Claimant moved for reconsideration to fix clerical errors and amend his average weekly wage and wage-earning capacity, which ALJ King granted. ALJ King revised his original decision to reflect an average weekly wage of $500.08 and a post-injury wage-earning capacity of $384.80. CX 2 at 19-20. Both Claimant and Employer appealed ALJ King's decision to the Board. On appeal, the Board affirmed the

[4] Claimant worked for Industrial Marines as a blaster from 2000 to 2013 before working for Employer. TR at 47; EX 8 at 72-73.

[5] CX 1 and EX 6 contain excerpts from ALJ King's November 16, 2016, decision. However, the entirety of ALJ King's decision is in the evidentiary record. Any references to ALJ King's decision not found in the exhibits will be cited to directly as *Horton v. Specialty Finishes, LLC*, 2013-LHC-01724 (Nov. 16, 2016).

decision. *Horton v. Specialty Finishes, LLC*, BRB Nos. 17-0168 & 17-0168A, slip op. at 8 (Nov. 15, 2017) (unpub.).

Subsequently, both parties appealed the Board's decision to the United States Court of Appeals for the Ninth Circuit. The court denied Employer's petition for review and granted in part and denied in part Claimant's petition. *Horton v. Specialty Finishes, LLC*, 770 F. App'x 889, 890 (9th Cir. 2019) (unpub.). The Ninth Circuit determined the Board did not err in affirming ALJ King's last responsible employer and average weekly wage determinations but found Claimant was entitled to permanent total disability benefits specifically for March 31, 2014. *Id.* at 890.

After Claimant reported his earnings from the VA Hospital to the Office of Workers' Compensation Programs, Employer filed a motion for modification on September 21, 2018, seeking to terminate Claimant's benefits because his earnings exceeded his post-injury wage-earning capacity. Subsequently, on August 12, 2019, Claimant filed a motion for modification of ALJ King's average weekly wage determination. Addressing Employer's motion,[6] ALJ Alford issued a Decision and Order Terminating Benefits (D&O Terminating Benefits) on September 26, 2019, granting Employer's request for modification and concluding Claimant's earnings at the VA Hospital reasonably reflected his wage-earning capacity. He also found the record did not justify a nominal award. D&O Terminating Benefits at 11-12.

On October 25, 2019, Claimant appealed ALJ Alford's D&O Terminating Benefits. The Board dismissed Claimant's appeal because his August 12, 2019 motion for modification of ALJ King's decision was still pending.[7] *Horton v. Specialty Finishes, LLC*, BRB No. 20-0082, slip op. at 2 (Feb. 11, 2020) (unpub.). It thus remanded the claim to the Office of Administrative Law Judges (OALJ) for modification proceedings.

In his first modification request, Claimant contended that ALJ King erred by failing to determine his average weekly wage based on the earnings of comparable workers. In his amended request, he asserted that ALJ Alford made a mistake of fact in determining he "can perform his present job as a laundry worker . . . without exceeding his physical limitations due to his [2013] work-related back injury." CX 13 at 107-108.

[6] Claimant's August 12, 2019 motion for modification was originally assigned to ALJ Susan Hoffman. D&O at 3. However, the motion was reassigned to ALJ Alford after Claimant filed an amended motion on January 29, 2020, to also modify ALJ Alford's September 26, 2019 D&O Terminating Benefits. *Id.*

[7] Claimant amended his motion for modification on January 29, 2020, to also modify the ALJ's D&O Terminating Benefits. CX 13.

ALJ Alford conducted a hearing on Claimant's amended motion for modification on October 21, 2020, and issued his Decision and Order (D&O) on December 8, 2022, the subject of this appeal. He found ALJ King did not err by calculating Claimant's average weekly wage based on his previous employment with Industrial Marines rather than on Claimant's proffer of wages from purportedly comparable co-workers/employees. He found those employees were not comparable because they had different skills and experiences, obtained certifications Claimant did not have, worked longer hours than Claimant, and were on track for supervisory roles. D&O at 24-26.

Further, ALJ Alford determined Claimant's VA Hospital laundry job reasonably represented his retained wage-earning capacity because Claimant failed to provide evidence on modification showing his work exacerbates his condition to the degree that it significantly impedes his ability to work or that his pain significantly interferes with his ability to perform his job. *Id.* at 30. Finally, he concluded Claimant did not establish a significant possibility that he would have to leave his laundry job or reduce his hours in order to warrant a nominal award. *Id.* at 32. Consequently, ALJ Alford denied Claimant's requests for modification of ALJ King's Decision and Order Awarding Benefits and his Decision and Order Terminating Benefits. *Id.*

Claimant appeals, contending ALJ Alford erred in denying modification. He specifically challenges ALJ Alford's average weekly wage and wage-earning capacity findings, and his decision to deny a nominal award. Employer responds, urging affirmance. Claimant filed a reply brief, reiterating his contentions.

Appeal of Order Denying Modification (BRB No. 23-0109)

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 (1995). Under Section 22, the ALJ has broad discretion to correct mistakes of fact, whether demonstrated by new evidence, cumulative evidence, or further reflection on the evidence initially submitted. *Dobson v. Todd Pacific Shipyards Corp.*, 21 BRBS 174 (1988). The party seeking modification bears the burden of demonstrating there was a mistake in a determination of fact. *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 107 (2003); *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998).

Average Weekly Wage (AWW) Calculations

Claimant first asserts ALJs King and Alford erred by basing his AWW on his actual earnings from Industrial Marine instead of on the earnings of his former co-workers Ron

Anderson, Jarel Riley, Lance Wilson, and Royal Kruesi.[8] Cl. Brief at 5, 8, 23. He avers ALJ Alford disregarded the similarities between his work and his coworkers' general labor duties before they earned their promotions or obtained certifications. He also asserts ALJ Alford overemphasized his co-workers' supposed superior work ethic, skills, and abilities while ignoring his own extensive experience and superior skills. *Id.* at 16-21. We reject Claimant's contention of error.

Section 10 of the Act sets forth three methods for determining a claimant's AWW. Section 10(c) is a catch-all provision used to calculate a claimant's AWW when neither Section 10(a) nor Section 10(b) can be reasonably and fairly applied. 33 U.S.C. §910(c); *see Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98, 101 (1997), *aff'd,* 169 F.3d 615 (9th Cir. 1999). Under Section 10(c), a claimant's AWW may be based on: (1) the previous earnings of the injured employee in the employment in which he was working at the time of the injury; and (2) the earnings of other employees of the same or most similar class working in the same or most similar employment; or (3) the other employment of the injured employee if it reasonably represents the annual earning capacity of the injured employee. *Palacios v. Campbell Indus.*, 633 F.2d 840, 842 (9th Cir. 1980).

The objective under Section 10(c) is to arrive at a fair and reasonable approximation of the claimant's earning capacity as of the time of his injury. *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 433 (5th Cir. 2000). The ALJ has broad discretion in making this determination. *Rhine v. Stevedoring Services of Am.*, 596 F.3d 1161, 1164-1165 (9th Cir. 2010); *Bonner v. Nat'l Steel & Shipbuilding Co.*, 5 BRBS 290, 293 (1977), *aff'd in pert. part*, 600 F.2d 1288 (9th Cir. 1979).

In denying modification, ALJ Alford thoroughly reviewed the relevant wage evidence. D&O at 5-11. In addition, he reviewed ALJ King's AWW findings and acknowledged Claimant's new argument that his AWW should be calculated based on the salaries of his former co-workers Anderson, Wilson, and Riley before they became supervisors or obtained certifications. *Id.* at 22-24. He rejected Claimant's arguments and agreed with ALJ King's finding that Mr. Anderson, Mr. Wilson, and Mr. Riley were not comparable workers.[9] Consequently, ALJ Alford declined to recalculate Claimant's

[8] Mr. Kruesi was hired shortly after Claimant was injured. Claimant asserts Mr. Kruesi replaced him; therefore, he submitted Mr. Kruesi's hours and earnings into the record in the modification proceedings, as they were not in the record before ALJ King. CX 9.

[9] ALJ Alford determined Mr. Wilson and Mr. Anderson became supervisors after only working a few weeks, and Mr. Riley pursued obtaining a certification, resulting in a wage increase after four months. D&O at 23. Thus, ALJ Alford determined calculating

AWW, stating Claimant's argument would require him to use "selective excerpts of wage records from incomparable workers" and speculate on both the type of work and the number of hours Claimant would have done in comparison to those workers. *Id.* at 24.

After rejecting the same evidence ALJ King rejected, ALJ Alford acknowledged Claimant's new evidence – Mr. Kruesi's earnings. However, he found Claimant was not comparable to Mr. Kruesi for purposes of a wage calculation because Mr. Kruesi was an above average worker who had received additional work opportunities due to his work ethic despite not having additional certifications or supervisory positions. D&O at 25. Thus, ALJ Alford determined Claimant did not present any evidence to support his assertion that Mr. Kruesi was hired to replace him or that their jobs were comparable. *Id.*

Finally, ALJ Alford addressed Claimant's argument that ALJ King erred in using his 2012 wages from Industrial Marine as the best evidence of his AWW at the time of his 2013 injury because 2012 was a slow work year. ALJ Alford observed that ALJ King had recognized, in calculating Claimant's AWW, the availability of work in the industry is "relatively unpredictable." D&O at 24. ALJ Alford similarly found the record demonstrates "a fluctuating amount of work was not unusual in the industry." *Id.* at 26. Considering Claimant's testimony regarding fluctuations in work based on shipyard competition and layoffs, ALJ Alford found 2012 was actually not an unusually slow work year. *Id.* at 26. Thus, he determined the periodic fluctuations were "not so unusual as to establish a mistake of fact or necessitate a different method of calculating" Claimant's AWW. *Id.*

The record supports ALJ Alford's determinations. During the hearing, three current or former supervisors testified that Mr. Wilson, Mr. Riley, Mr. Anderson, and Mr. Kruesi had greater skills, credentials, or supervisory status than Claimant. TR at 148-149, 158-149; EX 8 at 74-75. It was within ALJ Alford's discretion, as the factfinder, to conclude based on this evidence that these workers were not comparable to Claimant for purposes of calculating his wages under Section 10(c). *See Bonner*, 600 F.2d at 1293. Further, based on the limited timeframes these employees were allegedly in roles similar to Claimant, ALJ Alford rationally found their wages during "these short time periods" did not provide a

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Claimant's AWW based on the short timeframes these workers were potentially "comparable" to Claimant would force him to calculate based on weeks and months, rather than an entire year. *Id.* at 24.

sufficient basis to determine Claimant's AWW. *See Rhine*, 596 F.3d at 1165 (determining limited evidence supports an ALJ's AWW findings).[10]

Further, ALJ Alford permissibly concluded ALJ King did not commit a mistake of fact in finding Claimant's earnings from 2011 and 2012 with Industrial Marine are the best available evidence of his earning capacity at the time of his injury. During the hearing, shipyard supervisor, James Butler, testified Employer and Industrial Marine engaged in competition over the years, resulting in work opportunities shifting back and forth between the two companies. TR at 154-155. During the November 2015 hearing, Mr. Anderson testified that, contrary to Claimant's contentions regarding Employer's stability compared to Industrial Marine, his hours with Employer had slowed between 2012 and 2013. CX 8 at 68. Thus, the record supports ALJ Alford's determination that 2012 was not a unique outlier work year and, rather, was indicative of periodic fluctuations in the industry. We, therefore, affirm ALJ Alford's calculation of Claimant's AWW as it is supported by substantial evidence.[11] *See Healy Tibbitts Builders, Inc. v. Director, OWCP*, 444 F.3d 1095, 1103 (9th Cir. 2006).

Post-Injury Wage-Earning Capacity

Next, Claimant argues ALJ Alford erred by finding his VA Hospital laundry job was suitable and reasonably represents his post-injury wage-earning capacity. Specifically, he asserts his position requires him to stand nearly 100% of his work shift, which is far more than the physical limits that PINN imposed. Cl. Brief at 27. Claimant contends he

[10] Claimant also contends the ALJ erred in relying on Employer's argument, based on Mr. Wilson's testimony, that Claimant refused to learn new jobs or do additional work. But Claimant offered nothing to contradict Employer's contentions and otherwise failed to show he had the ability or willingness to do the work for the comparable wages which he is claiming. *See Jackson v. Potomac Temporaries, Inc.*, 12 BRBS 410, 416 (1980) (in order for claimant to base his AWW on evidence other than his previous earnings, he must show he has the ability, willingness, and opportunity to do the work for the wages which he is claiming). Further, as the Board previously held, the ALJ was not required to conclude Claimant would have worked additional hours but for his injury. *See Horton v. Specialty Finishes, LLC*, BRB No. 17-0168 & 17-0168A, at 9-10; *Todd Pac. Shipyards Corp. v. Director, OWCP*, 913 F.2d 1426, 1432 (9th Cir.1990) ("Credibility determinations, of course, are within the ALJ's province, and we must give them great weight.").

[11] These arguments we reject are essentially the same as the arguments the Board rejected previously in affirming ALJ King's AWW findings. *Horton*, BRB Nos. 17-0168/A, slip op. at 10.

is only able to perform his job with the assistance of pain medication and acupuncture and continues to work to support his family. *Id.* at 28-29. He argues ALJ Alford placed undue emphasis on his four years of employment in the laundry department in contravention of the holding in *Container Stevedoring Co. v. Director, OWCP [Gross]*, 935 F.2d 1544 (9th Cir. 1991) (claimant's present wages do not fairly reflect his wage-earning capacity in part because he only kept the job and worked with pain and limitations because of his financial obligations to his family). Cl. Brief at 27. Finally, he claims ALJ Alford misapplied *Jordan v. SSA Terminals, LLC*, 973 F.3d 930 (9th Cir. 2020) in determining his pain was not severe. *Id.* at 30-31.

Under Section 8(h), 33 U.S.C. §908(h),[12] a claimant's wage-earning capacity is his actual post-injury wages if they fairly and reasonably represent his wage-earning capacity. 33 U.S.C. §908(h). 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 (9th Cir. 2002); *Gross*, 935 F.2d at 1549 (9th Cir. 1991); *Long v. Director, OWCP*, 767 F.2d 1578, 1852 (9th Cir. 1985). If the claimant's post-injury work is continuous and stable, the claimant's post-injury earnings are more likely to reasonably and fairly represent his wage-earning capacity. *See generally Wayland v. Moore Dry Dock*, 25 BRBS 53, 57 (1991).

Relevant questions in determining whether the claimant's post-injury earnings represent his wage-earning capacity include whether the post-injury work is suitable, whether the claimant is physically capable of performing it, and whether the claimant has

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[12] 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).

the seniority to stay in the job. *See Bethard v. Sun Shipbuilding and Dry Dock Co.*, 12 BRBS 691 (1980). The fact that a claimant receives actual post-injury wages similar to or higher than his pre-injury earnings does not mandate a conclusion that he has no loss of wage-earning capacity. *Gross*, 935 F.2d at 1549. A claimant's pain and limitations are relevant in determining his post-injury wage-earning capacity and may reflect a greater loss in earning capacity than that demonstrated by his actual post-injury earnings alone. *Gross*, 935 F.2d at 1549-1550.

Thus, the fact that a claimant works after his injury does not preclude a finding of total disability where the claimant demonstrates he was working solely due to the beneficence of his employer or due to extraordinary effort and in spite of excruciating pain. *See generally Haughton Elevator Co. v. Lewis*, 572 F.2d 447, 450-451 (4th Cir. 1978); *Ramirez v. Sea-Land Services, Inc.*, 33 BRBS 41, 45 n.5 (1999). Moreover, a claimant's credible complaints of pain can support a disability finding. *Gross*, at 1550; *see Eller & Co. v. Golden*, 620 F.2d 71 (5th Cir. 1980). However, the pain must be "sufficiently severe, persistent, and prolonged to significantly interfere with the claimant's ability" to do his or her work. *Jordan*, 973 F.3d at 937-938.

We affirm ALJ Alford's finding that Claimant's position with the VA Hospital is suitable, and his wages fairly represent his post-injury wage-earning capacity. ALJ Alford considered Claimant's testimony along with newly submitted evidence – which included his 2013 PINN medical report and a labor market survey from vocational expert Amy Williams – and concluded no adjustment to his post-injury wage-earning capacity was warranted. D&O at 29. He determined Claimant's testimony and complaints about his pain were credible but did not establish that his pain significantly interfered with his ability to perform his laundry job. *Id.* at 30. Specifically, ALJ Alford referenced Claimant's testimony where he acknowledged his pain had remained relatively stable since starting his VA Hospital position, despite feeling new pain on his right side, and stated his acupuncture treatments helped alleviate his pain and that his reliance on pain medication has decreased. *Id.* at 29-30; TR at 61-64, 91-93. In addition, ALJ Alford noted that although Claimant relaxed in his car during breaks, Claimant never needed extra breaks, did not need extra time to complete work, and did not require less than a full-time work schedule during his four years of employment. *Id.*; TR at 44, 72, 77. Thus, ALJ Alford found Claimant's testimony did not establish that he was able to complete his work only with extraordinary effort and in spite of severe pain. D&O at 30-31.

Turning to the new evidence, ALJ Alford concluded Claimant's 2013 PINN medical report was too far removed to establish Claimant works in the VA Hospital laundry department only with extraordinary effort and severe pain or that his condition impedes his ability to perform the job. D&O at 30. He found Claimant did not offer any updated medical records to support his contention that his VA Hospital job exceeds his physical limitations. *Id.*

ALJ Alford accorded little weight to Ms. Williams's vocational assessment because she relied primarily on the 2013 PINN medical report to reach her conclusions. *Id.* at 31. He also found her report contradicts Claimant's own testimony, in that she mentions Claimant no longer enjoys the same hobbies due to his VA Hospital position, while Claimant testified, he stopped doing those activities well before accepting the VA Hospital job. *Id.*; CX 16 at 116; TR at 95-96. In addition, ALJ Alford found Claimant admitted to lifting much less than what was stated in the job descriptions Ms. Williams reviewed. *Id.*

ALJ Alford acted within his discretion in giving little weight to Ms. Williams's vocational assessment as she relied on the PINN medical report and on information about Claimant that was contradicted by Claimant's own testimony. ALJ Alford also rationally found Claimant's ability to maintain his work with the VA Hospital and reduce his pain medication, despite complaints of pain, indicates his position represents his post-injury wage-earning capacity. *See Sprague v. Director, OWCP*, 688 F.2d 862, 866 (1st Cir. 1982) (it is within the ALJ's authority to evaluate evidence of the record and to draw inferences based on that evidence); *see also Deweert*, 272 F.3d at 1248 (a claimant's continuing to work and engage in activities requiring the same motions as the work in question indicates the position adequately represents the claimant's post-injury wage-earning capacity).

Contrary to Claimant's assertions, ALJ Alford's decision is rational and supported by substantial evidence. As ALJ Alford found, Claimant relied upon the September and December 2013 PINN medical reports, which focused entirely on his condition and physical restrictions related to his former blaster position but did not address any alleged extraordinary effort and pain associated with his current VA Hospital position. CXs 10, 11.

Claimant's reliance on *Gross, Cooper v. Offshore Pipelines Int'l Inc.*, 33 BRBS 46 (1999), and *Jordan* is misplaced. In both *Gross* and *Cooper*, the claimants' complaints of pain were substantiated by recent medical evidence in the record. *Gross*, 935 F.2d at 1548-1550; *Cooper*, 33 BRBS at 51-52. Here, Claimant only points to reports dating from 2013, three years before beginning his employment with the VA Hospital (and five years before his current employment in the laundry room), to support his complaints of severe pain while performing that job. While *Jordan* holds that a claimant's credible complaints of pain are sufficient to establish disability, Claimant's assertion that ALJ Alford misapplied *Jordan* is incorrect. *Jordan* sets forth the following test: (1) whether a claimant's complaints of pain are credible and (2) whether the level of pain described is so severe, persistent, and prolonged that it significantly interferes with the claimant's ability to do his work. D&O at 28; *Jordan*, 973 F.3d at 937-938.

Consistent with *Jordan*, ALJ Alford appropriately considered the relevant evidence regarding Claimant's alleged pain or inability to perform his laundry job work. He found that while Claimant's complaints were credible, "the level of pain that he described at both

hearings and in his deposition is not so severe, persistent, or prolonged as to render his job at the VA an unfair or unreasonable measure of his earning capacity." D&O at 30-31. As ALJ Alford properly considered the relevant evidence and his finding is supported by substantial evidence, we affirm it. *Long*, 767 F.2d at 1583.

Nominal Award

Finally, Claimant argues ALJ Alford erred by denying him a nominal award.[13] He contends ALJ Alford should have found his testimony about his increasing back pain sufficient to grant a *de minimis* award. We disagree.

The Supreme Court of the United States has held that a worker is entitled to an award of nominal compensation when his work-related injury has not diminished his present wage-earning capacity but there is a significant potential the injury will cause diminished capacity in the future. *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121 (1997); *see Keenan v. Director for Benefits Review Board*, 392 F.3d 1041, 1046-1047 (9th Cir. 2004).[14] The purpose of such awards is to account for Section 8(h)'s mandate that the future effects of an injury be considered in calculating an injured employee's post-injury wage-earning capacity. *See* 33 U.S.C. §908(h).[15] They protect a claimant's right to seek modification in the event his physical or economic condition deteriorates, despite having no present loss in wage-earning capacity under 33 U.S.C. §908(c)(21).

Thus, nominal awards are appropriate when there is a significant potential of future economic harm as a result of the injury. *Rambo II*, 521 U.S. at 121 ("There must, in other words, be a cognizable category of disability that is potentially substantial, but presently

[13] In his D&O Terminating Benefits, ALJ Alford found the record does not contain justification for a nominal award. D&O Terminating Benefits at 11. In his D&O, he noted Claimant "only briefly addresse[d]" the issue in his closing argument.

[14] In *Keenan*, the court reversed the Board's affirmance of the denial of a nominal award and held that, under *Rambo II*, a nominal award is justified if there is a chance of future changed circumstances which, together with the continuing effects of the claimant's injury, create a significant potential of diminished earning capacity. *Keenan*, 392 F.3d at 1046-1047.

[15] *See supra* note 12.

nominal in character."); *see Buckland v. Dep't of the Army/NAF/CPO*, 32 BRBS 99, 101 (1997). The claimant bears the burden of proving by a preponderance of the evidence that "the odds are significant that his wage-earning capacity will fall below his pre-injury wages at some point in the future." *Rambo II*, 521 U.S. at 139; *see Barbera v. Director, OWCP*, 245 F.3d 282, 288 (3d Cir. 2001); *Gilliam v. Newport News Shipbuilding & Dry Dock Co.*, 35 BRBS 69, 71 (2001).

As ALJ Alford found, Claimant's only evidence in support of a nominal award are the 2013 PINN medical reports, Ms. Williams's vocational assessment, and his testimony that he believes his back pain is worsening despite stabilizing treatment. D&O at 32; TR at 93; CXs 10, 11, 16. ALJ Alford permissibly concluded that nothing in the record indicates Claimant's pain is worsening to the point where he would no longer be able to maintain his current VA Hospital job as *Rambo II* requires. *Gilliam*, 35 BRBS at 71. Therefore, we affirm ALJ Alford's determination that there was no mistake in ALJ King's denial of Claimant's request for a nominal award. *Buckland*, 32 BRBS at 101.

Appeal of Attorney's Fee Order (BRB No. 23-0443)

Claimant also appeals the ALJ Alford's Attorney Fee Order. On December 27, 2016, following ALJ King's decision, Claimant's counsel, Charles Robinowitz, filed an Attorney Fee Petition for Fees and Costs. 33 U.S.C. §928; 20 C.F.R. §§802.203, 802.219. Claimant's counsel sought $87,370.40 in fees, representing $82,784.90 for 177.65 attorney hours at an hourly rate of $466, $4,140 for 18.40 associate hours at an hourly rate of $225, and $445.50 for 2.70 legal assistant hours at an hourly rate of $165, along with $19,502.13 in costs for work performed before ALJ Alford between July 2013 and December 2016. Declaration of Attorney Fees and Costs (Fee Petition) at 21. Employer objected to Claimant's counsel's requested hours and hourly rate, arguing he was entitled to no more than $48,660.20 in fees and no more than $12,261.58 in costs. Employer Objection at 26.

Following several delays and reassignments,[16] ALJ Alford issued an Attorney Fee Order on March 9, 2021, awarding counsel $64,357.87 in fees, representing $58,725.72 for 164.65 attorney hours at an hourly rate of $356.67, $371.65 for one attorney hour at an hourly rate of $371.65, $4,815 for 21.4 associate hours at an hourly rate of $225, and

[16] Claimant's counsel's fee petition was reassigned to ALJ Jennifer Gee after ALJ King left the OALJ before ruling on the fee petition. ALJ Gee held the fee petition in abeyance pending the outcome of the appeals to the Ninth Circuit. Order on Pending Att'y Fee Pet., Nov. 14, 2017. Subsequently, in November 2019, counsel's fee petition was reassigned to ALJ Richard Clark after ALJ Gee's retirement. The fee petition was then again reassigned to ALJ Alford on December 4, 2020, as Claimant's other motions for modification were consolidated and assigned to him. *See* Fee Order at 3.

$445.50 for 2.70 legal assistant hours at an hourly rate of $165, plus $18,828.28 in costs. Attorney Fee Order, March 9, 2021 (March 2021 Fee Order), at 14. ALJ Alford denied counsel's motion for reconsideration.

Counsel appealed to the Board, raising the same arguments he raised in his motion for reconsideration to ALJ Alford.[17] The Board held ALJ Alford acted within his discretion in placing counsel in the 75th percentile but erred in not adjusting the proxy rate for inflation and not granting travel time. *Horton v. Specialty Finishes, LLC*, BRB No. 21-0492, slip op. at 4-6 (Dec. 29, 2022) (unpub). The Board further held ALJ Alford erred by not addressing the requested interest on costs. *Id.* at 8. As a result, the Board vacated ALJ Alford's fee award and remanded for further consideration. *Id.* at 9.

On remand, ALJ Alford adjusted Claimant's counsel's hourly rate to $400 based on the 2017 Oregon State Bar Economic Survey. Attorney Fee Order (Fee Order) at 16-17. He also granted a delay enhancement to 2021 rates to award counsel a $460.44 hourly rate based on the Consumer Price Index Data Tables – Pacific Cities and U.S. City Average. *Id.* at 19-21. He further awarded interests on costs and travel time. *Id.* at 27-28. In total, ALJ Alford adjusted counsel's fee award to $83,028.82, representing $77,768.32 for 168.9 attorney hours at an hourly rate of $460.44, $4,815 for 21.4 associate attorney hours at an hourly rate of $225, and $445.50 for 2.70 legal assistant hours at an hourly rate of $165, plus $18,828.28 in costs. *Id.* at 28-29.

Counsel again appeals ALJ Alford's Fee Order, raising six issues: 1) whether ALJ Alford's failure to inquire about counsel's current hourly rate before issuing his Fee Order was an abuse of discretion in light of the Ninth Circuit's decision in *Seachris v. Brady-Hamilton Stevedore Co.*, 994 F.3d 1066 (9th Cir. 2021); 2) whether ALJ Alford erred by using a $400 attorney hourly rate as of December 31, 2016; 3) whether ALJ Alford erred by not adjusting the proxy rate to account for the delay in issuing a fee order between December 31, 2021, and August 1, 2023; 4) whether ALJ Alford erred by not adjusting the rates of his associate attorney and paralegal; 5) whether ALJ Alford erred by reducing some of the requested travel time; and 6) whether ALJ Alford should have permitted counsel to submit a supplemental declaration of fees for time spent on his motion for reconsideration.

Employer responds, urging affirmance, as ALJ Alford complied with the Board's remand order. Claimant's counsel filed a reply brief, reiterating his contentions.

[17] Counsel contended the ALJ erred by rejecting market rate evidence, placing him in the 75th percentile of the Oregon State Bar, denying inflationary adjustments for the market rate, not awarding interest on costs, and denying travel time for depositions and witness conferences.

Counsel's Hourly Rate

Claimant's counsel first contends ALJ Alford erred by failing to ask him to submit an updated fee declaration pursuant to the Ninth Circuit's decision in *Seachris.* We reject this argument. While *Seachris* provides that fee awards should be based on current rather than historical market conditions, *Seachris*, 994 F.3d at 1077, it does not require an ALJ to request an amended fee declaration from the attorney, and it was not an abuse of discretion for ALJ Alford to rely on the fee petition submitted.[18] As historical rates may be relevant and may be adjusted for inflation and time lapse, counsel's existing evidence is not inherently "outdated." *Id.* at 1077-1078. We note, moreover, that counsel did not attempt to submit an updated fee declaration without prompting from ALJ Alford.

Next, Claimant's counsel asserts ALJ Alford erred in determining that his fee should be based on an attorney hourly rate of $400 as of December 31, 2016. He argues ALJ Alford's use of general litigation rates from the Oregon State Bar Survey were legally improper under *Seachris.* Further, he asserts an hourly rate of $400 amounts to placing him in the bottom half of all Portland attorneys with more than thirty years of experience and contradicts the Board's holding in *Christensen v. Stevedoring Services of America*, 44 BRBS 39, 40 (2010) (Oregon workers' compensation practice hourly rates are not comparable).

The Supreme Court has held the lodestar method, in which the number of hours reasonably expended in preparing and litigating the case is multiplied by a reasonable hourly rate, presumptively represents a "reasonable attorney's fee" under a federal fee-shifting statute such as the Longshore Act. *See Perdue v. Kenny A.*, 559 U.S. 542 (2010); *City of Burlington v. Dague*, 505 U.S. 557 (1992). The Court has also held an attorney's reasonable hourly rate is "to be calculated according to the prevailing market rates in the relevant community." *Blum v. Stenson*, 465 U.S. 886, 895 (1984); *see Perdue*, 559 U.S. at 551. Thus, once ALJ Alford accepted the parties' agreement that Portland, Oregon, is the relevant community for determining counsel's hourly rate, *see* Fee Order at 4-5, the burden was on Claimant's counsel to produce satisfactory evidence "that the requested hourly rates are in line with those prevailing in the relevant community for similar services by lawyers of comparable skill, experience, and reputation." *Blum*, 465 U.S. at 896 n.11; *see Loranger v. Stierheim*, 10 F.3d 776, 781 (11th Cir. 1994).

In ALJ Alford's initial fee order, he relied only on the Oregon State Bar Survey's (OBS) practice categories without accounting for years of experience. March 2021 Fee

[18] Indeed, the *Seachris* court was clear that the burden of production to establish the reasonableness of the fee or the relevant market rates is borne by the attorney seeking the fee. *Seachris*, 994 F.3d at 1077.

Order at 6. On appeal, the Board held ALJ Alford erred in not considering both years of experience and practice areas. *Horton v. Specialty Finishes, LLC*, BRB No. 21-0492, slip op. at 4 (Dec. 29, 2022) (unpub); *see Seachris*, 994 F.3d at 1078-1080. On remand, ALJ Alford averaged Civil Litigation – Plaintiff, Civil Litigation – Plaintiff Personal Injury, General Litigation, and 30+ Years of Practice, to arrive at an hourly rate of $391.25. Fee Order at 11-12. He then gave limited weight to counsel's other rate evidence, such as the Morones Survey, to arrive at a $400 hourly rate. Fee Order at 16. ALJ Alford did not err in calculating counsel's hourly rate and did not rely on incorrect OBS evidence. On remand, he thoroughly considered the evidence and corrected his earlier fee order by incorporating OBS data accounting for years of experience and followed the Ninth Circuit's guidance in *Seachris* and the Board's prior decision. *Seachris*, 994 F.3d at 1079; *see Blum*, 465 U.S. at 896 n.11. Thus, we affirm ALJ Alford's determination to base counsel's fee on a $400 attorney hourly rate.

Proxy Rate

Claimant's counsel also argues ALJ Alford erred by not adjusting the proxy rate to account for the delay from December 31, 2021, to August 1, 2023. He contends ALJ Alford misinterpreted the Board's prior decision and should have used the date he issued the fee order on remand in 2023 as the date to calculate the proxy rate, not 2021 when he issued his first fee order.

We disagree with counsel's arguments. In its prior decision, the Board determined ALJ Alford "erred in not awarding a delay enhancement up to when he issued his fee order in 2021." *Horton*, BRB No. 21-0492, slip op. at 5. Specifically, the Board instructed ALJ Alford on remand to "adjust the proxy rate for inflation to 2021 or calculate the fee using counsel's current rates." *Id.* The Board also noted an attorney is not entitled to a fee enhancement for delay caused by an appeal of a fee award. *Id.* at 5 n.6.

On remand, ALJ Alford followed the Board's instructions to account for inflation by using the Consumer Price Index for All Urban Consumers (CPI-U) in Portland, Oregon, to award Claimant's counsel a rate of $460.44, representing a 4.9% enhancement as of December 31, 2021. Fee Order at 19-21. Contrary to counsel's assertions, his decision to use 2021 CPI-U enhancements aligns with the Board's previous decision. The delays from the issuance of the ALJ Alford's original fee order to the issuance of his remanded fee order were due to counsel's appeals of the fee award itself. The Ninth Circuit has stated that an attorney cannot recover for delays due to the appeals of a fee award. *Anderson v. Director, OWCP*, 91 F.3d 1322, 1325 n.3 (9th Cir. 2006); *see Hobbs v. Director, OWCP*, 820 F.2d 1528, 1531 (9th Cir. 1987) (fee awards under the Act are not final judgments entitled to interest under 28 U.S.C. §1961 and therefore any enhanced recovery for the extraordinary time of taking an appeal would amount to an award of unauthorized interest); *see also Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) ("A request for attorney's fees

should not result in a second major litigation."). Thus, we reject counsel's contention that he is entitled to have the fee computed based on his current rates or inflated to some date after 2021.

Travel Time

Counsel next claims ALJ Alford erred in reducing his travel time based on the miles traveled without accounting for downtown traffic and parking. He contends ALJ Alford's rationale amounted to determining counsel lied under oath and, consequently, was arbitrary and capricious in his determination.

We reject this argument. In ALJ Alford's initial fee order, he denied 4.75 hours of travel time between Portland, Oregon, and Vancouver, Washington, for depositions and conferences. March 2021 Fee Order at 9-10. The Board determined attendance at depositions and conferences was a reasonable expense and vacated ALJ Alford's denial. The panel instructed him on remand to address whether the amount of travel time requested was reasonable and necessary. *Horton*, BRB No. 21-0492, slip op. at 7.

On remand, ALJ Alford found it was unreasonable to take forty-five minutes to drive between Portland, Oregon, and Vancouver, Washington, given other evidence showing the drive can be made in eighteen minutes, and evidence counsel submitted showing he made the trip in half the time on November 20, 2013. Fee Order at 26-27. ALJ Alford thus approved 2.75 hours of travel time. *Id.* at 28. As this is a permissible assessment of counsel's travel time, and is supported by the evidence, we affirm ALJ Alford's determinations. *Swain v. Bath Iron Works Corp.*, 14 BRBS 657, 666 (1982).

Counsel, who bears the burden of supporting his fee request and establishing an abuse of discretion on appeal of a fee award, has not persuaded us of any error by ALJ Alford in awarding a fee in accordance with the Board's prior decision in this case. *See Corcoran v. Preferred Stone Setting*, 12 BRBS 201, 206-207 (1980).

Accordingly, we affirm ALJ Alford's Decision and Order denying Claimant's motion for modification and his Attorney Fee Order.[19]

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

[19] We reject counsel's remaining arguments regarding the hourly rates for his associate attorney and paralegal. Counsel did not raise these issues in his initial fee petition appeal and may not do so for the first time on this subsequent appeal. *See Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007); *Norwood v. Ingalls Shipbuilding, Inc.*, 26 BRBS 66, 69 n.3 (1992).