U.S. Department of Labor

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

BRB Nos. 20-0435, 23-0086
and 23-0086A

TODD O. BROWN	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
GLOBAL INTEGRATED SECURITY, INCORPORATED	)	
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, c/o AIG GLOBAL CLAIMS SERVICES, INCORPORATED	)	DATE ISSUED: 5/13/2024
	)	
Employer/Carrier-Petitioners Cross-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Monica Markley, Administrative Law Judge, United States Department of Labor.

Lara D. Merrigan (Merrigan Legal), Sausalito, California, and Jeffrey M. Winter (Law Office of Jeffrey Winter), San Diego, California, for Claimant.

John F. Karpousis and Matthew J. Pallay (Freehill Hogan & Mahar LLP), New York, New York, for Employer/Carrier.

Ann Marie Scarpino (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Jennifer Feldman Jones, Deputy Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

GRESH, Chief Administrative Appeals Judge, and JONES, Administrative Appeals Judge:

Employer appeals, and Claimant cross-appeals, Administrative Law Judge (ALJ) Monica Markley's Decision and Order on Remand (2017-LDA-00592; 2017-LDA-00945) 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 Defense Base Act, 42 U.S.C. §§1651-1655 (DBA).[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 claim is before the Board for the second time. Claimant injured his back in August 2013 while working for Employer in Iraq. Hearing Transcript (HT) at 39; Claimant's Exhibit (CX) 1. He continued to work his regular employment but sought and received treatment for his back while on leave in the United States from June through December 2014.[2] *See* CX 10; CX 17; CX 23. Following a release to full duty status,

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit because the district director who filed the ALJ's decision is in Jacksonville, Florida. 33 U.S.C. §921(c); *McDonald v. Aecom Tech. Corp.*, 45 BRBS 45 (2011).

[2] Claimant's primary care physician, Dr. Douglas Roberts, recommended an MRI, which was done and showed a herniated disc at L5-S1. Claimant's Exhibit (CX) 10 at 94; CX 11. He referred Claimant to neurosurgeon Dr. C. Philip Toussaint, who, in turn, referred Claimant to pain management physician Dr. Ryan Krafft for a series of epidural

Claimant returned to Iraq in December 2014, where he remained until Employer's contract was terminated in April 2015. HT at 32, 126; CX 10 at 95, 97. Claimant returned to the United States and applied for a job with the Columbia, South Carolina, police department, passed the physical, underwent training, and was hired in August 2015. Employer's Exhibits (EXs) K, L. He was still working there in May 2016 when he next sought treatment for back pain from his primary care physician, Dr. Douglas Roberts. CX 10 at 105-107. Dr. Roberts referred Claimant to a neurosurgeon, Dr. Brett Gunter, who evaluated Claimant on July 19, 2016. CX 13 at 121. On October 17, 2016, Claimant underwent left lumbar fusion surgery. CXs 13 at 126-128, 29. Claimant subsequently sought compensation and medical benefits for the August 2013 traumatic back injury, and he also claimed a cumulative back injury. CX 3. Employer controverted both claims. CX 4.

Procedural Background

On June 30, 2020, ALJ Monica Markley issued a Decision and Order (D&O) denying Claimant's claims for disability benefits. She found Claimant's traumatic back injury was untimely filed under Section 13 of the Act, 33 U.S.C. §913, as he had the requisite awareness of his work-related injury in July 2014 but did not file a claim until October 2016.[3] D&O at 24-25. Nevertheless, she found Claimant's 2013 traumatic back injury claim was related to his employment, and therefore awarded future reasonable and necessary medical benefits for that injury pursuant to Section 7 of the Act, 33 U.S.C. §907.[4] *Id*. at 35, 39. As for Claimant's cumulative back injury claim, the ALJ found he failed to invoke the Section 20(a) presumption of compensability, 33 U.S.C. §920(a), and denied that claim in its entirety. *Id*. at 35-37.

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steroid injections. CX 17; CX 23 at 178. Dr. Toussaint recommended and scheduled back surgery but noted the procedure might not be necessary if the epidural steroid injections provided relief. CX 23 at 178. As Claimant received relief from the injections, he canceled the scheduled surgery, obtained a full duty release, and returned to work. Hearing Transcript (HT) at 125-126; CX 10 at 95, 97.

[3] The ALJ further found the time limitation period was not tolled under Section 30(f), 33 U.S.C. §930(f), as Employer established it did not have notice of Claimant's injury until October 6, 2016. Decision and Order (D&O) at 29.

[4] The ALJ denied Claimant's request for reimbursement of past medical treatment, including his lumbar fusion surgery, due to his failure to request authorization prior to obtaining such treatment in accordance with Section 7(d)(1) of the Act, 33 U.S.C. §907(d)(1). D&O at 38-39.

Claimant appealed to the Board, seeking review of the ALJ's findings on the timeliness of his traumatic back injury claim and on causation with respect to his alleged cumulative back injury claim. On September 24, 2021, the Board issued a Decision and Order affirming the ALJ's finding as to the lack of evidence of causation for Claimant's cumulative back injury claim but reversing on the issue of the timeliness of his traumatic back injury claim. *Brown v. Global Integrated Security, Inc.*, BRB No. 20-0435 (Sept. 24, 2021). The Board reversed the ALJ's finding that Claimant's date of awareness of his traumatic back injury was July 2014; rather, the Board held the uncontroverted evidence showed Claimant "was not and could not have been aware of the full nature and extent of his injury until after he resumed treatment in May 2016" and therefore, as a matter of law, the claim filed on October 27, 2016, was timely filed.[5] *Id.* at 8. As a result, the Board remanded the claim for resolution of the remaining issues concerning the August 2013 traumatic back injury. *Id.*

On remand, the ALJ found Claimant's October 14, 2016 written notice of injury was timely under Section 12 of the Act, 33 U.S.C. §912, as he became aware of the extent of his 2013 traumatic back injury on September 21, 2016, the date Dr. Gunter completed a short-term disability form indicating Claimant had elected to proceed with surgery and would be out of work. Decision and Order on Remand (D&O on Remand) at 5. Having previously found Claimant's traumatic back injury compensable, the ALJ found Claimant established a prima facie case of total disability as of the date of his surgery on October 17, 2016, and his condition reached maximum medical improvement on May 18, 2017, but Employer successfully rebutted Claimant's prima facie case of total disability with evidence of available suitable alternate employment (SAE) from a labor market survey dated July 11, 2018.[6] *Id.* at 7-8, 10. She found Claimant failed to show he was unable to obtain employment despite a diligent effort and, therefore, awarded permanent partial disability (PPD) benefits from July 11, 2018, through the present and continuing. *Id.* at 11-13. The ALJ used Claimant's earnings for the 52 weeks prior to his August 2013 injury to determine his average weekly wage (AWW).[7] *Id.* at 18-19. Having found three of the

[5] The Board upheld the ALJ's finding that the time for Claimant to file a claim was not tolled under Section 30(f), 33 U.S.C. §930(f), as Employer established it had no notice of injury until October 6, 2016. *Brown*, slip op. at 6.

[6] Accordingly, the ALJ awarded temporary total disability (TTD) benefits from October 17, 2016, through May 17, 2017, and permanent total disability (PTD) benefits from May 18, 2017, through July 10, 2018. D&O on Remand at 21.

[7] Relying on Section 10(c) of the Act, 33 U.S.C. §910(c), the ALJ found Claimant's wage records reflected gross earnings of $161,364.12 during the 52 weeks preceding the

identified jobs from Employer's labor market survey were suitable, she used the average of the wages those jobs would pay, adjusted to pre-injury levels, to determine Claimant's residual wage-earning capacity (WEC).[8] *Id.* at 14-15.

Employer appeals, arguing the ALJ erred in finding Claimant's notice of injury was timely and in using the date of Claimant's 2013 injury, rather than the date his back injury manifested, in calculating his AWW. Both Claimant and the Director, Office of Workers' Compensation Programs (Director), respond to Employer's appeal, urging affirmance of the ALJ's findings on both issues. Employer filed a reply brief, reiterating its contentions. BRB No. 23-0086. Claimant cross-appeals, contending the ALJ erred in finding he failed to show he conducted a diligent job search and in using the labor market survey jobs for calculating his residual WEC instead of his actual earnings as a real estate agent. Employer responds, urging affirmance of the ALJ's findings on both issues; the Director has not responded to Claimant's cross-appeal.[9] BRB No. 23-0086A.

August 2013 injury. D&O on Remand at 18-19. She divided this amount by 52 weeks pursuant to Section 10(d), 33 U.S.C. §910(d), resulting in an AWW of $3,103.16. *Id.* at 19.

[8] The ALJ found the three suitable jobs from Employer's labor market survey would pay an average of $482.48 per week, which she then reduced by 10% to adjust to pre-injury levels, resulting in a residual wage-earning capacity of $434.23 per week. D&O on Remand at 15.

[9] We note both Employer's and Claimant's petitions for review reiterate contentions they previously made before the Board, asserting the Board erred in its review of the ALJ's original Decision and Order in its prior decision in this case. Employer contends the Board improperly reversed the ALJ's finding as to the claim's timeliness under Section 13 and, therefore, improperly impeded the ALJ with respect to making findings on the timeliness of Claimant's Section 12 notice. It states it explicitly reserves that issue for an appeal of the Board's decision. Employer's Petition for Review (ER's PR) at 9, 18-22. Claimant, while acknowledging the law of the case doctrine, contends the Board erred in affirming the ALJ's finding that he failed to invoke the Section 20(a) presumption of compensability with respect to his cumulative trauma claim. He also indicated his intent to appeal the Board's decision to the court. Claimant's Cross-Petition for Review and Response to Petition (Cl's PR) at 13-14. But, as the parties note, the Board fully considered these issues in its prior decision in this case. *Brown*, BRB No. 20-0435.

Employer's Appeal (BRB No. 23-0086)

Timeliness under Section 12

Employer argues the ALJ's finding of Claimant's date of awareness of his traumatic back injury is arbitrary and unsupported by the evidence, as the record suggests Claimant elected surgery prior to the date Dr. Gunter completed a short-term disability form and there is no legal support for equating scheduling surgery with awareness. Employer's Petition for Review (ER's PR) at 15-17. Claimant responds, arguing the determination of a claimant's date of awareness is within ALJ's discretion and should not be reversed if supported by substantial evidence; alternatively, Claimant argues any error in the ALJ's finding the September 2016 date as his date of awareness is harmless, because even if his notice of his injury was not timely, Employer is unable to prove it was prejudiced by the untimely notice under Section 12(d) of the Act, 33 U.S.C. §912(d).[10] Claimant's Cross-Petition for Review and Response to Petition (Cl's PR) at 3-5. The Director urges affirmance based on the law of the case doctrine. Dir. Brief at 3-4.

Section 12(a) of the Act provides that in a traumatic injury case, a claimant must give the employer written notice of his injury within 30 days of the injury or the date the claimant is aware, or, in the exercise of reasonable diligence or by reason of medical advice, should have been aware of the relationship between the injury and his employment.[11] 33

No exception to the law of the case doctrine applies, as there has not been a change in the underlying factual situation, there has been no intervening controlling case authority, nor has Employer demonstrated the Board's first decision was clearly erroneous. *See generally Kirkpatrick v. B.B.I., Inc.*, 39 BRBS 69, 70 n.4 (2005). Consequently, we hold the Board's prior decision on these issues constitutes the law of the case, and we decline to address the parties' contentions. *See Schwirse v. Marine Terminals Corp.*, 45 BRBS 53, 55 (2011), *aff'd sub nom. Schwirse v. Director, OWCP*, 736 F.3d 1165 (9th Cir. 2013) (fully addressed issue is law of the case); *Irby v. Blackwater Security Consulting*, 44 BRBS 17, 20 (2010); *Kirkpatrick*, 39 BRBS at 70 n.4; *Ravalli v. Pasha Maritime Services*, 36 BRBS 91, 92 (2002), *denying recon. in* 36 BRBS 47 (2002).

[10] The Director's response did not directly address Employer's arguments with respect to the ALJ's date of awareness finding within the context of Section 12, other than to state the Board, in its first decision, left the issue open and the ALJ appropriately considered it on remand. Director's Response Brief at 4.

[11] Section 20(b) of the Act provides a claimant with a presumption that his notice of injury and claim were timely filed. 33 U.S.C. §920(b); *Shaller v. Cramp Shipbuilding &*

U.S.C. §912(a); 20 C.F.R. §§702.211, 212(a), 214. "Awareness" for purposes of Section 12 in a traumatic injury case occurs when the claimant is aware, or should have been aware, of the full character, extent, and impact of the harm done to him, including when he knows or should have known his work-related injury is likely to impair his capacity to earn wages. *See Brown v. Jacksonville Shipyards Inc.*, 893 F.2d 294, 296 (11th Cir. 1990); *see also generally Dyncorp Int'l v. Director, OWCP [Mechler]*, 658 F.3d 133, 136-137 (2d Cir. 2011); *Suarez v. Service Employees Int'l, Inc.*, 50 BRBS 33, 39 (2016). The date a claimant becomes aware of the relationship between his work and his disabling injury is often a date that a physician states there is a connection. However, a physician's opinion relating the condition to the employment is not necessarily controlling; the ALJ may consider other facts as to when the claimant should have been aware of that relationship. *Ceres Gulf v. Director, OWCP [Fagan]*, 111 F.3d 17, 19-20 (5th Cir. 1997); *Wendler v. American Red Cross*, 23 BRBS 408, 411 (1990); *see also V.M [Morgan] v. Cascade General, Inc.*, 42 BRBS 48, 52 (2008), *aff'd mem.*, 388 F. App'x 695 (9th Cir. 2010). Failure to give timely notice will bar the claim unless one of the exceptions under Section 12(d) applies.[12] 33 U.S.C. §912(d); 20 C.F.R. §702.216.

Dry Dock Co., 23 BRBS 140, 145 (1989). To rebut the presumption of timely notice, an employer must establish it had no knowledge of the injury and was prejudiced by the late notice. *Bustillo v. Southwest Marine, Inc.*, 33 BRBS 15, 16 (1999); *Cox v Brady-Hamilton Stevedore Co.*, 25 BRBS 203, 207 (1991). Mere conclusory allegations of prejudice or of an inability to investigate the claim when it was fresh are insufficient to rebut the presumption. *ITO Corp. v. Director, OWCP [Aples]*, 883 F.2d 422, 424 (5th Cir. 1989) (Court rejected an employer's general claim that it was prejudiced by lack of timely notice of injury due to its inability to investigate the claim when fresh, finding such a conclusory allegation unpersuasive); *Bustillo*, 33 BRBS at 16 (A conclusory allegation of prejudice or of an inability to investigate the claim when it was fresh is insufficient to meet employer's burden).

[12] Under Section 12(d) of the act, 33 U.S.C. §912(d), failure to provide timely notice will not bar a claim under the following circumstances:

> (1) if the employer…or the carrier had knowledge of the injury or death, (2) the deputy commissioner determines that the employer or carrier has not been prejudiced by failure to give such notice, or (3) if the deputy commissioner excuses such failure on the ground that (i) notice, while not given to a responsible official designated by the employer…, was given to an official of the employer or the employer's insurance carrier, and that the employer or carrier was not prejudiced due to the failure to provide notice…, or (ii) for

The ALJ acknowledged the Board's holding in its original decision in this case that Claimant could not have had full awareness of his injury until after he resumed treatment in May 2016. D&O on Remand at 4; *Brown*, slip op. at 8. She found that on May 11, 2016, following a six-month break in treatment, Claimant presented to his primary care physician, Dr. Roberts, with renewed complaints of left-sided back pain and posterior left leg pain, and wanted an MRI and to discuss surgery. D&O on Remand at 4-5; *see* CX 10 at 105. Noting Dr. Roberts subsequently referred Claimant to a neurosurgeon, Dr. Gunter, she found he first evaluated Claimant on July 19, 2016, at which time he discussed treatment options with Claimant, including surgery. *Id*. at 5; *see* CX 10 at 107, 111; CX 13 at 123. Finally, she found Dr. Gunter completed a short-term disability form on September 21, 2016, indicating Claimant elected to proceed with surgery and opined he would be off work from the date of the scheduled surgery on October 17, 2016, through April 24, 2017. *Id*. at 5; *see* CX 18 at 164. Because Claimant's written notice on October 14, 2016, was provided within thirty days of Dr. Gunter's written indication that Claimant had elected to proceed with surgery, the ALJ concluded the notice was timely under Section 12. *Id*. This constitutes substantial evidence in support of the ALJ's finding that Claimant was not aware of the "full character, extent and impact" of his back condition on his earning power until at least September 21, 2016. *Brown*, 893 F.2d at 296 (citing *Todd Shipyards Corp. v. Allen*, 666 F.2d 399, 401 (9th Cir. 1982)). Accordingly, we affirm the ALJ's finding.[13]

Calculation of Claimant's Average Weekly Wage

The ALJ determined Claimant's traumatic back injury occurred on or around August 23, 2013, based on the first medical record of treatment for that injury. D&O on Remand at 17-18. Pursuant to Section 10(c) of the Act, 33 U.S.C. §910(c), she divided Claimant's gross earnings during the year prior to that date by 52 weeks, resulting in an AWW of $3,103.16 per week.[14] D&O on Remand at 19. Employer contends the ALJ

> some satisfactory reason such notice could not be given; nor unless objection to such failure is raised before the deputy commissioner at the first hearing of a claim for compensation in respect to such injury… .

[13] As we affirm the ALJ's finding that Claimant's notice was timely, we need not reach the issue of whether Employer proved it suffered prejudice under Section 12(d), an inquiry limited to whether an untimely notice should be excused. 33 U.S.C. §912(d).

[14] The ALJ found Section 10(a) could not be used to calculate Claimant's AWW because the record did not contain evidence of the actual number of days Claimant worked during the year prior to the traumatic back injury, an element crucial to that calculation.

should have used the date Claimant's latent traumatic injury manifested when determining his AWW, rather than the date of injury, in accordance with *Johnson v. Director, OWCP*. 911 F.2d 247 (9th Cir. 1990). ER's PR at 22-24. Both the Director and Claimant respond, arguing the ALJ properly applied the law by calculating AWW based on the date of injury. Director's Response Brief at 4-6; Cl's PR at 6-9.

Section 10 of the Act provides: "Except as otherwise provided in this chapter, the average weekly wage of the injured employee at *the time of the injury* shall be taken as the basis upon which to compute compensation …." 33 U.S.C. §910 (emphasis added). Section 10(i) of the Act provides the exception to this rule, stating in the case of an occupational disease that does not immediately result in disability, the "time of injury" for AWW purposes is "deemed" to be the time the claimant becomes aware or should have been aware of the relationship between his employment, the disease, and his disability. 33 U.S.C. §910(i); *see, e.g., Leathers v. Bath Iron Works Corp.*, 135 F.3d 78 (1st Cir. 1998). In *Johnson*, 911 F.2d 247, the claimant suffered a traumatic injury, but his disability from that injury was latent and unknown for three years, during which time he continued to work. The United States Court of Appeals for the Ninth Circuit used the date of manifestation to calculate the claimant's AWW, rather than the date of the traumatic injury, as latent traumatic injuries are similar to occupational diseases because the effect of the injury, or impact on earning capacity, is not known until it becomes manifest. *Johnson*, 911 F.2d at 250; *see also Kubin v. Pro-Football, Inc.*, 29 BRBS 117, 121-122 (1995).

The Ninth Circuit's reasoning, however, has since been rejected by both the United States Court of Appeals for the Fifth Circuit and the Board because the statutory language of Section 10 mandates use of the date of injury for traumatic injuries, regardless of whether they are latent or the injury's disabling effect is delayed. *LeBlanc v. Cooper/T. Smith Stevedoring, Inc.*, 130 F.3d 157, 160-162 (5th Cir. 1997);[15] *McKnight v. Carolina Shipping*

D&O on Remand at 18; *see* 33 U.S.C. §910(a). Likewise, because the record showed Claimant worked the entire year prior to the August 2013 injury, the ALJ found Section 10(b) was also inapplicable. *Id.*; *see* 33 U.S.C. §910(b) (the record also does not contain evidence of similarly situated coworkers' wages).

[15] The United States Court of Appeals for the Second Circuit has similarly held the development of an arthritic knee condition years after a claimant's injury was not an occupational disease but rather a traumatic injury, and, therefore, it was statutorily constrained to calculate the claimant's AWW using the date of the traumatic injury. *Director, OWCP v. General Dynamics Corp. [Morales]*, 769 F.2d 66, 68 (2d Cir. 1985).

Co., 32 BRBS 165, 172-173, *aff'd on recon. en banc*, 32 BRBS 251 (1998).[16] Moreover, the Ninth Circuit has since held that the use of the manifestation date for calculating AWW for latent traumatic injuries is limited to "exceptional" circumstances. *Deweert v. Stevedoring Services of America*, 272 F.3d 1241, 1246 (9th Cir. 2001); *see also Port of Portland v. Director, OWCP*, 192 F.3d 933, 937-938 (9th Cir. 1999), *cert. denied*, 529 U.S. 1086 (2000).

In her original Decision and Order, the ALJ found Claimant's 2013 injury could not be classified as an occupational disease, but rather was traumatic in nature. D&O at 21-22. This finding has not been challenged on appeal and therefore remains the law of the case. *See Schwirse*, 45 BRBS at 55; *Irby*, 44 BRBS at 20; *Kirkpatrick*, 39 BRBS at 70 n.4; *Ravalli*, 36 BRBS at 920. As Section 10 of the Act mandates using the date of injury for calculating AWW in traumatic injury claims, we reject Employer's contention that the ALJ should have used the date Claimant's latent traumatic injury manifested when determining his AWW. 33 U.S.C. §910; *McKnight*, 32 BRBS at 172-173.

Claimant's Cross-Appeal (BRB No. 23-0086A)

Establishment of Suitable Alternate Employment

Claimant argues the ALJ erred in finding that his search for post-injury employment, including the jobs within Employer's labor market survey, was not diligent and, therefore, did not rebut Employer's establishing the availability of SAE. Cl's PR at 12. He argues the ALJ placed an improperly heightened burden on him to show diligence in his attempts to obtain post-injury employment by requiring that he show he continuously applied for new jobs.[17] *Id.* at 12-13.

Where, as in this case, the employer establishes the availability of SAE, the claimant may demonstrate he remains totally disabled by showing he diligently tried but was unable to secure employment. *Newport News Shipbuilding and Dry Dock Co. v. Tann*, 841 F.2d

[16] The Board stated it would only apply the holding in *Johnson* in the Ninth Circuit, where it is controlling precedent. *McKnight*, 32 BRBS at 173.

[17] Claimant has not specifically requested review of the ALJ's determination that Employer successfully established the availability of SAE. Therefore, we affirm that finding as unchallenged on appeal. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57, 58 (2007).

540, 542 (4th Cir. 1988); *Fox v. West State, Inc.*, 31 BRBS 118, 122 (1997). "The claimant merely must establish that he was reasonably diligent in attempting to secure a job within the compass of employment opportunities shown by the employer to be reasonably attainable and available." *Palombo v. Director, OWCP*, 937 F.2d 70, 74 (2d Cir. 1991). The inquiry into the claimant's diligence in seeking post-injury employment is not limited to his diligence in seeking the jobs the employer identified. *Livingston v. Jacksonville Shipyards, Inc.*, 32 BRBS 123, 125 n.7 (1998). The ALJ must make specific findings regarding the nature and sufficiency of the claimant's job search in order to establish whether the search was, in fact, diligent. *See Palombo*, 937 F.2d at 70; *Livingston*, 32 BRBS at 129.

The ALJ noted Claimant applied for almost all of the twelve jobs identified in Employer's labor market survey, even interviewing for one of the positions, and also applied for a job not included in the survey. D&O on Remand at 12-13; *see* CX 52; HT at 90-97. However, she recognized all of Claimant's applications were submitted over a period of two days on August 27 and 28, 2018, *see* CX 52, and concluded:

> This one-time push of applying for jobs is not indicative of a diligent job search, particularly given that Dr. Gunter, [Claimant's] treating physician, released him to return to some level of work as of mid-2017, and he had about 1.5 years between that time and the date of the formal hearing to pursue employment.

Id. at 13; *see* CX 13 at 135C-135F; CX 52. She further found no evidence Claimant followed up on any of his job applications, other than the one he interviewed for; however, he decided not to pursue that job because he did not believe he was capable of performing the physical requirements of the job. *Id* at 12-13; *see* HT at 94. Finally, because Claimant did not submit his application materials into evidence, the ALJ was unable to determine whether he "provided sufficient and good-faith information intended to obtain the positions." *Id*. at 13; *see* HT at 168. For these reasons, the ALJ found Claimant did not conduct a diligent job search. *Id*.

In contrast to Claimant's assertions, the ALJ's analysis is consistent with the appropriate standard. She considered both the nature and sufficiency of Claimant's job search efforts in determining whether he was diligent in seeking alternate employment within the compass of employment opportunities Employer showed to be reasonably available. D&O on Remand at 10-13. The ALJ has broad discretion in weighing Claimant's testimony and the conflicting evidence, and her findings regarding the nature and sufficiency of Claimant's two-day job search efforts are rational and supported by substantial evidence. *See Palombo*, 937 F.2d at 74; *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693, 695 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp.*

v. Hughes, 289 F.2d 403, 405 (2d Cir. 1961); *Perini Corp. v. Heyde*, 306 F.Supp. 1321, 1325 (D.R.I. 1969); *Fortier v. Electric Boat Corp.*, 38 BRBS 75, 79 (2004); *Berezin v. Cascade General, Inc.*, 34 BRBS 163, 167 (2000). Further, the Board cannot reweigh the evidence. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 944 (5th Cir. 1991). We therefore affirm her finding that Claimant did not rebut Employer's showing of the availability of SAE because he did not establish he conducted a diligent job search. *See generally J.T. [Tracy] v. Global Int'l Offshore, Ltd.*, 43 BRBS 92, 103 (2009), *aff'd sub nom. Keller Found./Case Found. v. Tracy*, 696 F.3d 835 (9th Cir. 2012), *cert. denied*, 570 U.S. 904 (2013); *Wilson v. Virginia Int'l Terminals*, 40 BRBS 46, 48 (2006); *Berezin*, 34 BRBS at 167.

Calculation of Claimant's Residual Wage-Earning Capacity

Claimant maintains the ALJ erred in not using his actual post-injury earnings as a real estate agent in calculating his residual WEC, instead using the average earnings of the jobs she deemed suitable from Employer's labor market survey. Cl's PR at 10-11. Under Section 8(h) of the Act, a claimant's post-injury earning capacity is determined by actual earnings "if such actual earnings fairly and reasonably represent [a claimant's] wage earning capacity." 33 U.S.C. §908(h). If the actual earnings do not fairly and reasonably represent the claimant's wage-earning capacity, an ALJ may fix a reasonable amount, which may be determined by other factors, including the nature of the injury, the degree of physical impairment, the claimant's usual employment, and the effect of disability as it may naturally extend into the future. *Id*. The party contending the claimant's actual wages do not represent his wage-earning capacity bears the burden of proving they don't. *Del Monte Fresh Produce v. Director, OWCP*, 563 F.3d 1216, 1222 (11th Cir. 2009); *Grage v. J.M. Martinac Shipbuilding*, 21 BRBS 66, 69 (1988). An ALJ has significant discretion in determining a reasonable post-injury WEC under Section 8(h). *See, e.g., Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39, 43-44 (1996).

The ALJ acknowledged Claimant's testimony that he earned $9,000 in gross wages as a real estate agent in 2018 from two sales but found these earnings did not fairly and reasonably represent his true WEC, as he had no previous experience in real estate prior to attending classes in 2017, and the earnings failed to represent "the full extent of his capacity when considering his education and accumulated skills." D&O on Remand at 14; *see* HT at 98-99. According to Claimant's resume, he obtained a Bachelor of Science in criminal justice in December 1993 and since that time has undergone significant training in the security field, served in the military, and held highly skilled jobs with supervisory duties and requiring top secret government clearance. CX 22 at 173-175; CX 53 at 484. He also took classes to become a real estate agent in February 2017, received his real estate license in April 2017, and became self-employed as a realtor for Coldwell Banker in May 2017. CX 22 at 173; CX 26 at 267 (transcript p. 76). The record contains no evidence of his

earnings from this employment other than his own representations, and only for his earnings in 2018. HT at 98-99; CX 30 at 306-306A. For these reasons, the ALJ found the suitable jobs identified in Employer's labor market survey better utilized Claimant's education and employment history in the security arena and were "more indicative of his true WEC." D&O on Remand at 14; *see* CX 53 at 478-480. The ALJ's finding is supported by substantial evidence; specifically, Employer's establishment of better-paying realistic employment opportunities specific to candidates with Claimant's educational background and specific skill set, and within his physical restrictions. *Avondale Indus., Inc. v. Pulliam*, 137 F.3d 326, 328 (5th Cir. 1998); *Shell Offshore v. Director, OWCP*, 122 F.3d 312, 318 (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998); *Grage*, 21 BRBS at 69; *Neff v. Foss Mar. Co.*, 41 BRBS 46, 48-49 (2007).

We likewise reject Claimant's reliance on *Gen. Constr. Co. v. Castro*, 401 F.3d 963 (9th Cir. 2003), and *LIGA v. Abbott*, 40 F.3d. 122 (5th Cir. 1994), as justification for using his "relatively low" real estate earnings to calculate his post-injury residual WEC because he was pursuing a new career. Cl's PR at 11. Those cases held a claimant can be totally disabled, despite being physically cleared to perform some level of work, if he is unable to secure employment due to participation in school or training, a factor the ALJ should consider in determining the availability of SAE. *Castro*, 401 F.3d at 970-971; *Abbott*, 40 F.3d at 127; *see also Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 315 F.3d 286, 295 (4th Cir. 2002). But neither case addresses the calculation of post-injury WEC for purposes of determining a claimant's PPD compensation rate. Moreover, even assuming Claimant's participation in training for a new career should be considered in calculating his post-injury WEC under Section 8(h), it would have no effect in this case, as the entirety of Claimant's real estate training occurred in February through April 2017 before he was medically cleared to return to any form of employment, i.e., during the time the ALJ determined he was entitled to TTD benefits, for which a calculation of post-injury WEC is not required. HT at 80; D&O on Remand at 21. As the ALJ's method of calculating claimant's post-injury WEC is rational, in accordance with the law, and supported by substantial evidence, we affirm it. *See Hundley v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 254, 260 (1998).

Attorney's Fee (BRB No. 20-0435)

On January 3, 2023, Claimant's counsel, Jeffrey Winter, filed an Attorney/Paralegal Fee and Cost Petition (Fee Petition) for work performed before the Board in his original appeal of this claim, *Brown*, BRB No. 20-0435.[18] 33 U.S.C. §928; 20 C.F.R. §§802.203,

[18] By Order dated February 17, 2023, the Board consolidated the fee request with the appeals on the merits.

802.219. He requests a total fee of $6,347.70 for 12.75 hours of work performed by himself, an associate attorney, and a paralegal. Fee Petition at 12-15.

On February 12, 2023, Employer filed a motion to stay any resolution of Claimant's request for fees and costs pending the outcome of the pending appeals in BRB Nos. 23-0086 and 23-0086A. The Board issued an Order on February 17, 2023, denying Employer's motion to stay, allowing Employer ten days to file any objections to Claimant's fee petition, and consolidating his fee request with the pending appeals. On May 29, 2023, Claimant filed a Motion for Order Awarding Attorney Fees. Employer did not submit objections to Claimant's fee petition within the ten-day period the Board allowed, nor did it respond to Claimant's motion; therefore, we treat Claimant's fee petition as unopposed.

As noted above, the ALJ originally denied Claimant's traumatic injury claim as untimely under Section 13 of the Act, 33 U.S.C. §913, and denied Claimant's cumulative injury claim due to the lack of evidence of causation of the injury. Claimant appealed, and the Board reversed the ALJ's finding with respect to the timeliness of Claimant's traumatic injury claim and remanded for consideration of all remaining issues, including the timeliness of Claimant's notice of injury, the nature and extent of his employment-related disability, the calculation of his AWW and residual post-injury WEC, and his entitlement to medical benefits.[19] *Brown*, slip op. at 11-12; *see also* D&O on Remand. On November 18, 2022, the ALJ issued her Decision and Order on Remand, awarding Claimant PPD and medical benefits due to his employment-related back injury. D&O on Remand at 21. Consequently, the Fee Petition, submitted to the Board on January 3, 2023, was timely filed. 20 C.F.R. §802.203(c); *Eckstein v. General Dynamics Corp.*, 11 BRBS 781, 784 (1980); *Whyte v. General Dynamics Corp.*, 8 BRBS 706, 709 (1978).

We deem $6,347.70 in fees to be reasonable and commensurate with the necessary work counsel and his staff performed in his at least partially successful appeal of the ALJ's original Decision and Order to the Board.[20] 33 U.S.C. §928; 20 C.F.R. §802.203.

[19] In all other respects, including the ALJ's finding that tolling under Section 30(f) is inapplicable and that Claimant failed to invoke the Section 20(a) presumption of compensability with respect to the cumulative injury claim, the Board affirmed the ALJ's findings. *Brown*, slip op. at 6, 11-12.

[20] Unopposed fee awards such as this one do not set precedent with respect to counsel's hourly rate.

Accordingly, we approve Claimant's counsel's unopposed fee petition and award counsel a fee in the amount requested of $6,347.70, payable directly to counsel by Employer.

We note, however, both parties have indicated an intent to appeal the Board's decisions.[21] Therefore, this fee award is enforceable and payable only if and when an award of benefits that reflects the successful prosecution of the claim becomes final. 33 U.S.C. §928; *Chavez v. Todd Shipyards Corp.*, 28 BRBS 185, 191 (1994) (en banc); *Obadiaru v. ITT Corp.*, 45 BRBS 17, 24 (2011); *Richardson v. Cont'l Grain Co.*, 336 F.3d 1103, 1106 (9th Cir. 2003); *West v. Port of Portland*, 20 BRBS 162, 164-165, *aff'd on recon.*, 21 BRBS 87 (1988).

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring in part and dissenting in part:

I continue to respectfully dissent from the original Board decision to reverse outright the ALJ's conclusion, in her Original Decision and Order, that the October 2016 claim for the August 2013 weightlifting injury was untimely under Section 13(a). I would have vacated the finding of untimeliness and remanded the case for the ALJ to reconsider the issue instead of reversing and holding Claimant could not have had the requisite awareness earlier than May 2016. As I noted before, the Board is not permitted to engage in fact-finding. *See Volpe v. Northeast Marine Terminals*, 671 F.2d 697 (2d Cir. 1982); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 676 F.2d 110 (4th Cir. 1982). Therefore, remand was required for the ALJ to discuss other relevant evidence of record in the first instance and to reassess the date of Claimant's "awareness" of injury, as this affects

[21] In the event one or both of the parties appeals the Board's decision in this case, which arises in the Eleventh Circuit that requires appeals of the Board's Defense Base Act decisions be filed first with the appropriate United States District Court, the Board requests the petitioner(s) notify the Board of any appeal that is filed as the district courts often do not provide such notice to the Board.

both the timeliness of the claim under Section 13(a) and the timeliness of notice under Section 12(a). *See Brown*, 893 F.2d at 296.

Otherwise, and presuming the notice and claim are timely, I concur with my colleagues' affirmance of the ALJ's findings on Claimant's AWW, post-injury WEC, and extent of his employment-related disability. I also concur in the fee awarded for counsel's work before the Board in *Brown*, BRB No. 20-0435.

JUDITH S. BOGGS
Administrative Appeals Judge