**U.S. Department of Labor**

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

BRB No. 23-0291

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| WAHED A. HANIFZAI<br><br>Claimant-Petitioner<br><br>v.<br><br>MISSION ESSENTIAL PERSONNEL<br><br>and<br><br>INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA<br><br>Employer/Carrier-Respondents | ) | **NOT-PUBLISHED**<br><br>DATE ISSUED: 11/18/2024<br><br>DECISION and ORDER |

Appeal of the Second Order Granting Reconsideration, Vacating Decision and Order Issued February 7, 2023, and Amended Decision and Order of Chirstopher Larsen, Administrative Law Judge, United States Department of Labor.

Norman Cole (Brownstein Rask LLP), Portland, Oregon, for Claimant.

John R. Walker and Nicholas Earles (Schouest, Bamdas, Soshea, Ben Maier & Eastham), Houston, Texas, for Employer and Carrier.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Christopher Larsen's Second Order Granting Reconsideration, Vacating Decision and Order Issued February 7, 2023,

and Amended Decision and Order (2021-LDA-04078; 2021-LDA-04079; 2021-LDA-04080) 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). 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).

Claimant sustained multiple injuries while working for Employer as a linguist in Afghanistan between 2011 and 2019, including a back injury from a vehicle collision on September 30, 2011, a knee injury on October 8, 2016, while stepping out of a van, and psychological injuries from his war zone exposures. Hearing Transcript (TR) at 27, 37, 60.[1] He sought medical leave in February 2019 and returned to the United States to address his injuries. TR at 40.

While on medical leave, he consulted with several physicians for his physical and psychological injuries, including various mental health providers at Grand Desert Psychiatric Services, orthopedic surgeon Dr. Bernard Ong, and ankle specialist Dr. Roman Sibel. CXs 2, 6, 7. On September 16, 2019, psychiatrist Dr. Mathew Okeke diagnosed Claimant with chronic post-traumatic stress disorder (PTSD), major depressive disorder, and generalized anxiety disorder from his war zone exposures in Afghanistan. CX 2 at 20. Claimant began psychological treatment with therapist Willie Johnson on April 10, 2020, and continued treatment through April 14, 2022. CX 2 at 40, 135.

In addition to psychological treatment, Claimant reported to Drs. Org and Sibel to treat his knee and ankle injuries. Dr. Org performed surgery on Claimant's knee in May 2019 and concluded his knee condition reached maximum medical improvement (MMI), and he was able to return to work on September 25, 2019. CX 7 at 368. Dr. Sibel performed ankle surgery in 2022. TR at 47.

At Employer's request, Claimant presented to Drs. Boris Bacic, Randa Bascharon, and John Tsanadis for medical examinations. On December 13, 2019, Dr. Bacic evaluated Claimant's knee, reviewed his treatment records, and concluded Claimant's condition reached MMI, and he could return to his previous employment without any physical

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit because the district director who filed the ALJ's decision is in San Francisco, California. 33 U.S.C. §921(c); *McDonald v. Aecom Tech. Corp.*, 45 BRBS 45 (2011); *see also Global Linguist Solutions, L.L.C. v. Abdelmeged*, 913 F.3d 921 (9th Cir. 2019).

limitations. EX 8 at 51. However, on May 18, 2021, Dr. Bascharon also examined Claimant's knee and ankle and opined neither his knee nor ankle condition had reached MMI because he continued to have symptomology that required further treatment and physical therapy. EX 9 at 67-69. On May 21, 2021, psychiatrist Dr. Tsanadis conducted a psychological examination of Claimant, including a clinical interview, objective testing, and a medical records review. EX 11. Dr. Tsanadis agreed with Mr. Johnson's diagnoses and opined Claimant meets the clinical Diagnostic and Statistical Manual (DSM)-5 criteria for PTSD and had not reached MMI. EX 11 at 86-91.

Claimant filed a claim for his knee injury and amended his claim to include his ankle injury. CX 1 at 4. Employer initially paid compensation from February 2, 2019, to September 25, 2019, but it controverted Claimant's claim on October 17, 2019, based on Dr. Org's opinion that Claimant reached MMI and could return to work. CX 1 at 15-16. Claimant filed an amended claim on December 8, 2020, to include his back and psychological injuries. CX 1 at 7. He subsequently filed a motion for partial summary judgment on November 1, 2021, alleging there was no genuine issue of material fact regarding the work-relatedness of his injuries resulting in temporary total disability. The ALJ granted his motion in part, determining Claimant's psychological condition is work-related, but declined to award temporary total disability (TTD) benefits because genuine issues of material fact exist regarding the work-relatedness of Claimant's back, ankle, and knee injuries and the extent of his disability. *See* Order Granting Claimant's Motion for Partial Summary Judgment in Part at 5.[2]

The ALJ held a telephonic hearing on September 23, 2022, and issued a Decision and Order Awarding Benefits (D&O) on January 23, 2023. He found Claimant invoked the Section 20(a) presumption, 33 U.S.C. §920(a), with respect to his knee, ankle, and back injuries, and Employer successfully rebutted the presumption. D&O at 13-14. Then, on weighing the evidence as a whole, he found Claimant established his injuries resulted from the cumulative trauma of his working conditions and his prior work accidents. *Id.* at 15. Turning to disability, the ALJ found Claimant established a prima facie case of total disability for his orthopedic and psychological injuries, and Employer established the availability of suitable alternate employment. Consequently, he awarded Claimant

[2] Claimant filed a second Motion for Partial Summary Judgment, asserting his psychological and orthopedic injuries are work-related, and he was entitled to TTD benefits until at least April 18, 2022. On June 1, 2022, the ALJ found there is no genuine issue of material fact that Claimant was totally disabled from October 17, 2019, to April 18, 2022, but he stated there remained a genuine issue of material fact regarding the nature and extent of disability after April 18, 2022. *See* D&O at 6.

temporary partial disability (TPD) benefits at a compensation rate of $831.40 per week for Claimant's psychological and orthopedic injuries. *Id.* at 27-28.

Following the ALJ's decision, Claimant and Employer jointly moved for reconsideration, asking him to modify the amount owed based on joint stipulations regarding TTD benefits. *See* Order Granting Reconsideration, Vacating Decision & Order Issued January 23, 2023, and Amended Decision & Order (First Recon. Order) at 2, 19.[3] After the ALJ's First Recon. Order, Claimant again moved for reconsideration, requesting that the ALJ reinstate two holdings included in his original D&O which the ALJ removed from the First Recon. Order.[4] *See* Second Order Granting Reconsideration, Vacating Decision and Order Issued February 7, 2023, and Amended Decision and Order (Second Recon. Order) at 2. The ALJ granted Claimant's motion and reinstated much of the analysis from his original D&O.

Claimant appeals the ALJ's Second Recon. Order, contending the ALJ erred in accepting Employer's suitable alternate employment (SAE) evidence and finding him only partially disabled. Employer responds, urging affirmance. Claimant filed a reply brief.

In asserting he is totally disabled, Claimant contends his medical records establish he cannot return to work, and the labor market survey conducted by Ronnie Ducote failed to take his restrictions into account. Consequently, Claimant asserts Mr. Ducote's report is not sufficient evidence to establish the availability of SAE. He argues that while the ALJ correctly found Dr. Tsanadis more persuasive than Mr. Johnson, the ALJ failed to completely apply Dr. Tsanadis's restrictions when analyzing the jobs Mr. Ducote identified – specifically that he should return to work only on a part time basis until he completes eight to twelve psychotherapy treatment sessions. Claimant contends no evidence in the record indicates he received the eight to twelve treatments Dr. Tsanadis recommended;

[3] In the First Recon. Order, while the ALJ vacated his initial D&O, he reinstated his analysis and determinations but accepted Claimant's and Employer's joint stipulations and awarded Claimant $154,205.85 for 167 weeks of TTD compensation. First Recon. Order at 19.

[4] Claimant specifically requested the ALJ reinstate from the original D&O the ALJ's holdings that: (1) Employer/Carrier is liable for all past, present, and future reasonable and necessary medical treatment related to Claimant's psychiatric and orthopedic disabilities; and (2) Employer/Carrier must pay Claimant TTD compensation for the period beginning on April 18, 2022, at the rate of $831.40 per week, until his condition reaches MMI but no longer than five years from April 18, 2022. Second Recon. Order at 2.

therefore, those must be completed before he could perform the alleged SAE. Thus, he argues he is entitled to TTD from April 18, 2022, as a matter of law.

After a claimant establishes he is unable to perform his usual work, as in this case, the burden shifts to the employer to demonstrate the availability of realistic job opportunities within the geographic area where the claimant resides which, by virtue of his age, education, work experience, and physical and psychological restrictions, he can perform. *See, e.g., Edwards v. Director, OWCP*, 999 F.2d 1374, 1375 (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Brickhouse]*, 315 F.3d 286, 293 (4th Cir. 2002); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 543 (4th Cir. 1988); *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 202 (4th Cir. 1984). The employer need not obtain a job for the claimant but must establish the availability of realistic job opportunities which the claimant could secure if he diligently tried. *Kalama Services, Inc. v. Director, OWCP [Ilaszczat]*, 354 F.3d 1085, 1090 (9th Cir. 2004), *cert. denied*, 543 U.S. 809 (2004); *Edwards*, 999 F.2d at 1375. Evidence of a single job opening is insufficient; the employer must show the availability of a range of suitable jobs. *Lentz v. The Cottman Co.*, 852 F.2d 129 (4th Cir. 1988). Whether suitable jobs exist is a factual determination for the ALJ to make, and the Board must uphold those determinations if they are supported by substantial evidence in the record. *Del Monte Fresh Produce v. Director, OWCP*, 563 F.3d 1216 (11th Cir. 2009).

In considering the availability of SAE, the ALJ must determine the claimant's physical and psychological restrictions based on the credited medical opinions and apply them to the available jobs identified by the employer's vocational expert. *Villasenor v. Marine Maint. Indus., Inc.*, 17 BRBS 99, 103, *recon. denied*, 17 BRBS 160 (1985). Here, Employer submitted hearing testimony and a labor market survey from Mr. Ducote. Mr. Ducote interviewed Claimant and completed a vocational rehabilitation report on April 18, 2022. EX 13. He assessed Claimant's work history along with medical records from Drs. Ong and Bacic. Based primarily on Dr. Ong's opinion that Claimant could return to his prior employment with Employer, Mr. Ducote identified six available jobs he believed Claimant could perform, including an Entry Level Sales Representative with TQH in Las Vegas, Nevada, a Commercial Claims Adjuster Trainee for Progressive Insurance in Las Vegas, a Retail Sales Consultant for AT&T, a remote Telephone Interpreter for Language Line Solutions, a Pashto Linguist for Acclaim Technical Services in Reston, Virginia, and a Pashto Linguist/Translator for CWU, Inc. in Fort Gordon, Georgia. EX 13 at 5-7. However, Mr. Ducote admitted during the hearing that he did not consider any restrictions on Claimant's ability to work, as he primarily relied on Drs. Ong and Bacic's medical reports, who both concluded Claimant was physically capable of returning to his previous employment. TR at 87-88. Mr. Ducote also testified at the hearing that he did not consider

any psychological restrictions because he did not have access to Dr. Tsanadis's report. *Id.* at 89.

After finding Claimant could not return to his usual work with Employer, the ALJ analyzed the six positions in the vocational rehabilitation report to determine whether they were suitable and available to Claimant after April 18, 2022. Second Recon. Order at 21. The ALJ eliminated the Retail Sales Consultant position because it exceeded Claimant's physical restrictions, as well as the Pashto Linguist and Pashto Linguist/Translator positions because they were outside of Claimant's geographic area of Las Vegas, Nevada. *Id.* Turning to the other positions, the ALJ weighed the psychological evidence and determined Dr. Tsanadis's opinion was more credible than Mr. Johnson's unpersuasive opinion that Claimant could only work three hours per day. *Id.* at 22. The ALJ acknowledged Dr. Tsanadis's restrictions – that Claimant cannot work in a position that involves sensitive military information, he could return to work on a part time basis initially, and he could return to a full-time schedule after eight to twelve psychotherapy treatments. Further, the ALJ determined the Pashto Linguist/Translator position did not qualify as SAE because it involved transcribing and translating reports in support of military interrogations. *Id.*; *see* EX 11 at 12-14.

However, when analyzing Claimant's capacity to perform the Entry Level Sales Associate, Commercial Claims Adjuster Trainee, and Telephone Interpreter positions based on his technical and verbal skills, the ALJ did not consider Dr. Tsanadis's psychological restrictions; specifically, whether these positions would enable Claimant to work part time until he completes the eight to twelve recommended psychotherapy sessions before working full time. Consequently, the ALJ did not consider the totality of Dr. Tsanadis's psychological restrictions in assessing whether the jobs listed in Mr. Ducote's vocational rehabilitation report satisfy Employer's burden to establish SAE. *See Jones v. Genco, Inc.*, 21 BRBS 12, 14 (1988) (psychological conditions must also be considered in evaluating whether jobs are suitable).

That said, we decline Claimant's request to reverse the ALJ's finding as a matter of law. While the ALJ erred by not fully addressing Dr. Tsanadis's psychological restrictions, it is for the ALJ to weigh the evidence and determine in the first instance whether Claimant has received psychotherapy treatments that satisfy Dr. Tsanadis's eight-to-twelve-session recommendation, and the effect if any on the suitability of the alternate employment

Employer identified.[5] Thus, we vacate the ALJ's findings and remand the case for him to render findings on these issues.[6] *Jones,* 21 BRBS at 14.

[5] The record indicates Claimant visited Mr. Johnson for numerous therapy sessions as treatment for his psychological injuries as recently as April 14, 2022. CX 2 at 135. Dr. Tsanadis stated in his report, however, that Claimant should be receiving empirically supported treatment for his PTSD, such as Prolonged Exposure Therapy or Cognitive Processing Therapy, and that Claimant's treatment, at least as of the date of his report, had not been empirically supported. EX 11 at 12-13.

[6] If the ALJ again finds Employer established the availability of SAE and needs to assess Claimant's post-injury wage-earning capacity, we reject Claimant's argument that the ALJ erred in averaging salaries from the suitable jobs in the vocational rehabilitation report, as it is within his discretion to do so. *Johnson v. Director, OWCP*, 280 F.3d 1272, 1275-1276 (9th Cir. 2002). However, Section 10 of the Act mandates the claimant's average weekly wage be determined at the time of injury, and the statute requires a comparison between that figure and the claimant's post-injury wage-earning capacity; therefore, to account for inflation, the claimant's post-injury earning capacity must be adjusted downward to the rate paid at the time of his injury. *Cook v. Seattle Stevedore Co.*, 21 BRBS 4, 7 (1988); *Pumphrey v. E. C. Ernst,* 15 BRBS 327, 32 (1983); *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691, 695 (1980).

Accordingly, we vacate the ALJ's findings regarding SAE and remand the case for further consideration of that issue consistent with our decision. In all other respects, we affirm the ALJ's Second Recon. Order.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge