BRB Nos. 22-0018
and 22-0446

JASON BALLARD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
U.S. MARINE CORPS/MCCS	)	
	)	
and	)	
	)	
CONTRACT CLAIMS SERVICES, INCORPORATED	)	DATE ISSUED: 12/22/2023
	)	
Self-Insured Employer-Respondent/Third-Party Administrator	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits, Order Denying Motion for Reconsideration, and Order Denying Claimant's Petition for Modification Pursuant to Section 22 of Evan H. Nordby, Administrative Law Judge, Department of Labor.

Jeffrey M. Winter (Law Office of Jeffrey M. Winter), San Diego, California, for Claimant.

William N. Brooks II (Law Offices of William N. Brooks) Long Beach, California, for Employer.

Emma Cusumano (Seema Nanda, Solicitor of Labor; Barry H. Joyner, 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.

PER CURIAM:

Claimant appeals Administrative Law Judge Evan H. Norby's Decision and Order Awarding Benefits,[1] Order Denying Motion for Reconsideration, and Order Denying Claimant's Petition for Modification Pursuant to Section 22 (2017-LHC-01395) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *et seq.* (Act). We must affirm the administrative law judge'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 injuries to his neck, back, knees, and left wrist on March 26, 2014, following an electric golf cart malfunction while working for Employer as a recreational specialist at a Marine Corp's RV marina lot in San Diego.[2] JX 2 at 3. Employer voluntarily paid compensation from April 2014 until August 2014 when Claimant returned to work. JX 31 at 724. On October 2, 2014, Claimant visited a psychiatrist at the Department of Veterans' Affairs San Diego Medical Center ("VAMC"), where he reported, and was given medication for, psychological symptoms he alleged to be associated with his March 26, 2014, accident. JX 14 at 256-257.[3] Claimant also

[1] The ALJ's Decision and Order incorporates his Bench Decision dated February 26, 2021.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit because Claimant sustained his injury in San Diego, California. 33 U.S.C. 921(c); *see Roberts v. Custom Ship Interiors*, 35 BRBS 65, 67 n.2 (2001), *aff'd*, 300 F.3d 510, 36 BRBS 51(CRT) (4th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003); 20 C.F.R. 702.201(a).

[3] The history taken in the report reflects Claimant complained of "increasing stress, anhedonia, frustration, isolative behavior, since work related fall in March…." JX 14 at 256. He was prescribed therapy and medication for anxiety and insomnia. *Id.* at 257. In

reported physical and psychological issues he related to his accident to his chosen physician and orthopedic surgeon, Dr. William Tontz, Jr. JX 9 at 92 (Jan. 21, 2015, reported depression, anxiety, loss of sleep), 94 (Mar. 11, 2015, reported sleep disorder); *but see* JX 9 at 87 (Dec. 2, 2014, denied "history of depression, anxiety, drug or alcohol addiction, or sleep disorder"). In response to Claimant's complaints on May 12, 2015, in his May 13, 2015, report, Dr. Tontz requested authorization for Claimant to have a psychological evaluation.[4] JX 9 at 103. Claimant subsequently returned to the VAMC on May 15, 2015, and was further evaluated for depression and anxiety by psychiatrist Dr. Brian Tobe. JX 14 at 181.

Meanwhile, on March 27, 2014, the day after the incident, Employer filed its first report of injury. Shortly thereafter, on April 14, 2014, it controverted "chiropractic treatment" and "[l]ost time from 04/05/2014 and ongoing" "pending supporting medical documentation." JX 4 at 7. There is an undated LS-203 Form on which Claimant sought benefits for injuries affecting his knees, neck, wrist, back, and ears. JX 2 at 3. On May 21, 2015, in response to Dr. Tontz's May 13, 2015, report, Employer filed another LS-207 Form and controverted "stress and associated treatment ... pending further investigation."[5] JX 4 at 8. Claimant filed another claim for compensation on October 5, 2016, for injuries to his "[n]eck, back, bilateral knees, and bilateral wrists." JX 2 at 4. Neither claim form

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a report dated May 15, 2015, he complained of "on going [sic] stress and depression fr[om] work situation." *Id.* at 253.

[4] Dr. Tontz noted in his report that Claimant complained of "depression and anxiety with difficulty sleeping." JX 9 at 99. Dr. Tontz's "Treatment Plan," in addition to decreased work hours, suggested "Psychological assessment on industrial basis causing anxiety and stress." *Id.* at 100. On a "Request for Authorization" that applies under the California state workers' compensation system, Dr. Tontz specifically requested "psych evaluation/treatment" for Claimant. *Id.* at 103

[5] Employer's brief to the Board provides: "Petitioner argues throughout his Petition for Review that Dr. William Tontz's May 13, 2015, recommendation for psyche evaluation/treatment and Respondents' May 21, 2015, controversion of the same were sufficient to meet the timeliness requirements of Sections 12 and 13." Emp. Brief at 4. In describing facts supporting the ALJ's finding that Claimant failed to raise the psych injury claim despite numerous opportunities, Employer states: "Less than five months after Dr. Tontz's recommendation and Respondents' controversion of the same," Claimant amended his claim but did not include a psych injury. *Id.* We interpret these statements as affirmations that Employer filed its May 21, 2015, notice of controversion in response to Dr. Tontz's requested psychological assessment of Claimant.

made mention of psychological injuries. Employer eventually conceded Claimant's physical condition reached maximum medical improvement (MMI) as of February 18, 2016, and both parties stipulated Claimant's neck, back, bilateral knee, and left wrist injuries resulted from his March 26, 2014, accident. Hearing Transcript (TR) at 5. On December 10, 2018, the ALJ convened a hearing in San Diego, regarding the existence of a right wrist injury and the nature and extent of disability caused by the other injuries.[6] TR at 5, 14-20; Bench Decision (BD&O) at 6, 10. The parties filed post-hearing briefs. On February 26, 2021, the ALJ reopened the record and issued his Bench Decision during a telephonic hearing. BD&O at 1.

In his Bench Decision, the ALJ first determined Claimant did not invoke the Section 20(a) presumption, 33 U.S.C. §920(a), with respect to his right wrist injury claim. BD&O at 11-12. Relying on Section 12 of the Act, 33 U.S.C. §912,[7] he concluded the psychological claim raised in Claimant's post-hearing brief was untimely because Claimant did not file a claim for it, formally amend his pleadings to raise it either in his October 2016 amended claim or in response to the ALJ's pre-hearing order, or otherwise give notice that it would be an issue. *Id.* at 15-16.[8] Further, the ALJ determined Employer was prejudiced by Claimant's failure to timely raise the psychological claim and was unable to effectively investigate and respond to it. *Id.* With respect to Claimant's ongoing back pain, the ALJ gave great weight to Dr. Tontz's opinion and the work restrictions he issued. *Id.* at 26-28. Nevertheless, the ALJ credited Employer's vocational expert, Marci Winkler, over Claimant's vocational expert, Alejandro Calderon, and concluded Employer

[6] On March 27, 2018, the ALJ issued a standard Pre-Hearing Order which provided the parties must serve all parties with "the evidence that will be offered at the hearing 30 days before the hearing" and with their pre-hearing statements "no fewer than 30 days before the calendar call." Pre-Hearing Order at 3-4. Upon continuance of the hearing, the ALJ issued a duplicate order on August 8, 2018.

[7] Section 12 of the Act, 33 U.S.C. §912, sets time limits for providing notice of an injury. For the time bar to apply, 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 (1999).

[8] At the end of the Bench Decision hearing, Claimant explained he did not amend his original claim because his psychological injury is a sequela of his initial physical injury claim, and he sought only medical benefits for treatment of his psychological symptoms. In light of Claimant's explanation, the ALJ noted Claimant could file a motion for reconsideration to argue his psychological claim should have been considered as a sequela of his initial injury claim. BD&O at 46-47.

established the availability of suitable alternate employment. *Id.* at 33. Consequently, the ALJ awarded Claimant disability benefits for his orthopedic injuries based on an average weekly wage of $398.75 from April 2, 2014, through October 3, 2017.[9] *Id.* at 37. The ALJ also awarded medical benefits for these injuries. He prepared a written decision on March 31, 2021, memorializing his Bench Decision and holding Employer liable for Claimant's compensable spinal, bilateral knee, and left wrist injuries. D&O at 2.

On April 12, 2021, Claimant filed a motion for reconsideration, seeking medical benefits for his psychological injury as a sequela of his orthopedic injuries. Motion for Reconsideration (Mot. for Recon.) at 3. Despite indicating Claimant could file a motion for reconsideration if he thought the ALJ "missed anything or misspoke anything," the ALJ denied Claimant's motion noting there was no new evidence of change in circumstances to warrant reconsideration of the psychological sequela injury claim. Order Denying Motion for Reconsideration (Recon. Order) at 4. The ALJ found that regardless of Claimant's arguments concerning Dr. Tontz's May 2015 recommendation for a psychological evaluation and Employer's LS-207 notice controverting the request placing Employer on notice about his psychological injuries, Claimant was still expected to litigate his psychological injury claim in his case after receiving the ALJ's pre-hearing order.[10] *Id.*

[9] The ALJ awarded the following: temporary total disability (TTD) benefits from April 2, 2014, through August 14, 2014; temporary partial disability (TPD) benefits from August 15, 2014, through February 21, 2015, at a compensation rate of $73.83 per week, when Claimant worked a light-duty position at Employer's facility; TPD benefits from February 22, 2015, through May 11, 2015, at a compensation rate of $71.91 per week, following a small pay increase; TPD benefits from May 12, 2015, through February 17, 2016, at a compensation rate of $120.39 per week based on reduced work hours and Claimant's condition reaching MMI; permanent partial disability (PPD) benefits from February 18, 2016, through March 9, 2017, at a compensation rate of $120.39 per week; and TTD benefits from March 10, 2017, through October 3, 2017, while Claimant was participating in a vocational rehabilitation program. The ALJ terminated benefits after October 3, 2017, when Claimant stopped participating in the program, because he credited Employer's labor market survey which established the availability of suitable alternate employment paying wages higher than Claimant's average weekly wage. BD&O at 37-39; D&O at 2.

[10] The ALJ's pre-hearing order, dated August 8, 2018, required the parties to disclose issues to be litigated at the December 10, 2018, telephonic hearing at least 30 days beforehand. *See* Notice of Calendaring and Pre-Hearing Order (Aug. 8, 2018), at 2, fn. 2.

Claimant filed a motion for modification on June 8, 2021, alleging the ALJ made mistakes of fact in his suitable alternate employment determination by not considering the "new" work restrictions Dr. Tontz issued in his post-hearing deposition and by crediting Ms. Winkler's labor market survey. Motion for Modification at 8. In addition, Claimant argued he should receive TTD benefits from December 20, 2018, onward, as it otherwise would be unjust to endure lengthy delays for the payment of medical benefits due to the hearing process. *Id.* at 10-12. The ALJ denied this motion on July 13, 2022, holding he already considered Dr. Tontz's work restrictions when he analyzed the vocational experts' labor market surveys. Order Denying Claimant's Petition for Modification (Modification Order) at 4. He also dismissed Claimant's alternative argument in support of modification as a "novel theory" seeking a disability award for a hypothetical or constructive period of disability. Modification Order at 5-6.[11]

Claimant appeals all three of the ALJ's decisions, contending the ALJ erred in determining his psychological claim was untimely and in finding Employer established the availability of suitable alternate employment.[12] Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (Director), also responds, asserting the ALJ erred in finding Employer was prejudiced by the delayed notice of a

[11] Claimant also argued in his motion for modification that the ALJ committed a mistake of fact by determining his psychological claim was untimely. For the same reasons he gave in denying the motion for reconsideration, the ALJ also denied the motion for modification. Modification Order at 7-8. The ALJ concluded that while he could have considered whether to permit Claimant's psychological claim on modification under the guise of a Section 7 claim for medical benefits, 33 U.S.C. §907, Claimant did not meet his burden to show a mistake of fact or a change in condition for either compensation or medical benefits. *Id.* at 8.

[12] Initially, Claimant timely appealed the ALJ's Decision and Order Awarding Benefits and Order Denying Motion for Reconsideration to the Benefits Review Board on October 12, 2021, which was docketed as BRB No. 22-0018. As Claimant simultaneously notified the Board that he had filed a Motion for Modification with the ALJ, the Board dismissed the appeal without prejudice. *Ballard v. U.S. Marine Corps/MCCS*, BRB No. 22-0018 (Dec. 29, 2021). On July 22, 2022, Claimant appealed the ALJ's Decision and Order Denying Claimant's Petition for Modification, which was assigned docket number BRB No. 22-0446. Claimant subsequently filed, and the Board granted, a request to reinstate his original appeal and consolidate both appeals. *Ballard v. U.S. Marine Corps/MCCS*, BRB Nos. 22-0018 and 22-0446 (Sept. 19, 2022).

psychological sequela claim and abused his discretion in not re-opening the record for consideration of the psychological injury claim. Claimant filed a reply brief.

Psychological Claim

On appeal, Claimant and the Director each assert the ALJ erred in concluding Employer was prejudiced by Claimant's failure to give timely notice of his psychological claim. Claimant avers Employer had been put on notice about a potential work-related psychological condition following Dr. Tontz's May 2015 request for authorization of a psychological evaluation. Cl. Brief at 18; JX 9 at 99-100. Specifically, Claimant maintains Employer had actual notice of his psychological claim and cannot argue otherwise because it responded to Dr. Tontz's request on May 21, 2015, when it formally controverted Claimant's "stress" claim. Cl. Brief at 18-19; JX 4 at 8. Consequently, he contends Employer was not prejudiced but rather chose not to pursue an investigation into Claimant's psychological condition despite having actual knowledge of it and filing a notice of controversion "pending further investigation." *Id.* at 22-23; JX 4 at 8. Employer responds, asserting Claimant made no attempt to raise, amend, or argue a claim for a work-related psychological condition, and the ALJ rationally precluded such a claim for failure to litigate it.

The Director asserts Section 12, 33 U.S.C. §912, is irrelevant to Claimant's psychological claim because consequential injuries or natural sequelae of timely filed claims are not required to be separately pleaded. Dir. Brief at 7. Further, the Director avers Claimant's psychological claim is not time-barred as it is only for medical cost reimbursement, and medical benefits are never time-barred. *Id.* Alternatively, in the event Section 12 is applicable, the Director agrees with Claimant's argument that Employer was placed on actual notice of Claimant's psychological claim. *Id.* at 9. The Director states the ALJ's refusal to allow Claimant to raise his psychological claim amounted to too harsh of a sanction. *Id.* Thus, the Director asserts the ALJ abused his discretion by not reopening the record under 20 C.F.R. §702.336(b) for Claimant and Employer to fully investigate and litigate Claimant's psychological sequela claim. *Id.* at 10-11.

Claimant argues he developed psychological issues as a sequela of his March 2014 work accident, injuries, and pain. He raised this issue in his post-hearing brief and, at the Bench Decision hearing, explained more clearly that he seeks only medical benefits for this injury. Because Claimant asserts his psychological injury is a sequela, he asserts his claim should have been addressed in light of the Board's holding that a claimant is not required to give subsequent written notice of each sequela to his initial work-related accident, provided notice of the initial injury was timely. *Alexander v. Ryan-Walsh Stevedoring Co.*, 23 BRBS 185 (1990); *Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94 (1988); *see also U.S. Indus./Fed. Sheet Metal, Inc. v.*

Director, OWCP, 455 U.S. 608, 613 n.7, 14 BRBS 631, 633 n.7 (1982) ("[C]onsiderable liberality" is allowed in amending claims.).

We agree the ALJ's decision on the psychological injury claim cannot stand, and we vacate it. We do not reach the question of whether Claimant's condition is a sequela. Rather, we address only whether the ALJ erred in not considering the claim at all. Most significantly for this case, as medical benefits are not considered compensation under Section 13, and claims for medical benefits are never time-barred, Sections 12 and 13 are inapplicable. *Siler v. Dillingham Ship Repair*, 28 BRBS 38, 41 (1994) (decision on recon. en banc); *Ryan v. Alaska Constructors, Inc.*, 24 BRBS 65, 70-71 (1990). Therefore, the ALJ erred in ruling that Claimant's claim for medical treatment for an alleged sequela to his initial injuries is time-barred by those provisions. Claimant may be entitled to medical benefits despite a failure to timely raise his psychological sequela claim for disability benefits. *Wendler v. Am. Nat'l Red Cross,* 23 BRBS 408, 414 (1990).

While we agree Sections 12 and 13 are irrelevant to the issue in the underlying case, we decline to hold that the ALJ abused his discretion in not re-opening the record for investigation of the psychological injury claim because resolution of the matter is discretionary. The Director relies on Section 703.336(b) to support his contentions:

> At any time prior to the filing of the compensation order in the case, the administrative law judge *may in his discretion*, upon the application of a party or upon his own motion, give notice that he will consider any new issues.

20 C.F.R. §702.336(b) (emphasis added). This section gives an ALJ the discretion to consider new issues prior to entering a compensation order provided he notifies all parties and gives them an opportunity to respond.[13] *Taylor v. Plant Shipyards Corp.*, 30 BRBS 90, 95 (1996); *Klubnikin v. Crescent Wharf & Warehouse Co.*, 16 BRBS 182, 184-185 (1984).

In this case, after the record closed following the first hearing, but prior to the ALJ's Bench Decision hearing, Claimant filed his post-hearing brief. In it, he listed "Issues to be Decided" and identified the first as "Causation as to the psyche sequela of the injury" (p.3). Following a summary of his orthopedic injuries and treatment, he titled a section "Psychiatric/Psychological Sequela Injury" (p.22) and summarized his various psychological treatments. Under the causation section of his brief, he argued he has

[13] The ALJ's compensation order in this case summarized the previous decisions he made at his Bench Decision hearing.

established the work-relatedness of this injury as a sequela to the physical injuries (p.26), and under his medical benefits section he focused on the need for future physical treatments and referred to Dr. Tontz's recommendation for a psychological evaluation (p.31) in one sentence. Finally, in his conclusion, he claimed entitlement to treatment of his "adjustment disorder with symptoms of depression and anxiety" (p.33). Employer's post-hearing brief mentioned Claimant's depression diagnosis in its summary of the VAMC records (p.15) but otherwise did not address a psychological claim.

In his Bench Decision, the ALJ found Claimant did not "expressly allege a compensable psyche injury until his post-hearing briefing." BD&O at 12-13. He noted Claimant's records "discussed stress, anxiety, anhedonia, frustration, and that he's been isolating since the March 2014 injury, in resulting pain from that day." BD&O at 12. The ALJ stated Claimant's counsel mentioned "anxiety treatment" "in passing" in his opening statement at the hearing, and there were "two short references" to Claimant's psychological treatment during direct examination. *Id.* at 13. The ALJ determined Claimant had ample opportunity between 2014 and 2021 to raise his psychological injury claim and amend his original claim for compensation but chose not to. *Id.* at 13-14. Further, he noted Claimant's alleged work restrictions did not include any mention of his psychological injuries. *Id.* The ALJ ultimately concluded Claimant's failure to raise and litigate his psychological injury directly violated Section 12 and his pre-hearing order and prejudiced Employer. *Id.* at 16.

As we have noted, Section 12 does not apply here; however, because Claimant filed his post-hearing brief raising a new issue before the ALJ rendered a decision, Section 702.336(b) applies. The ALJ did not address this section or the discretion and authority it gives him to re-open the record to investigate the psychological claim. Instead, as stated above, he focused on Section 12's notice requirement which is inapplicable to a claim for medical benefits. Although the ALJ also mentioned Claimant's actions violated the pre-hearing order requiring parties to exchange evidence and pre-hearing statements one month prior to the hearing, and he has the discretion to enforce his pre-hearing orders, *see* 5 U.S.C. §556, Section 702.336(b) allows him to excuse that violation. Further, the ALJ has great discretion in admitting evidence and is not "bound by common law or statutory rules of evidence or by technical or formal rules of procedure[,]" 20 C.F.R. §702.339. *McCurley v. Kiewest Co.*, 22 BRBS 115, 118 (1989); *Hughes v. Bethlehem Steel Corp*., 17 BRBS 153, 155 n.1 (1985). This discretion, however, is tempered by his duty to "inquire fully into the matters at issue" "in such a manner as to best ascertain the rights of the parties." 20 C.F.R. §§702.338, 702.339.

That being said, a party also has an obligation to exercise diligence in developing its claims and arguments prior to and during the hearing. *Smith v. Ingalls Shipbuilding Division, Litton Systems, Inc.*, 22 BRBS 46, 50 (1989). Claimant did not adequately or

effectively raise and litigate his psychological injury claim, even if it related only to medical treatment, by waiting until either his post-hearing brief or the conclusion of the Bench Decision to raise the claim specifically for the first time. Nevertheless, because a claim for medical benefits is never time-barred, and the ALJ did not address the appropriate law, we vacate the ALJ's denial of consideration of Claimant's claim for psychological injury medical benefits.[14] On remand, the ALJ must reconsider whether to address this issue in light of Section 702.336(b), explaining the reasons for his determination. 5 U.S.C. §557(c)(3).[15]

Suitable Alternate Employment (SAE)

We next turn to Claimant's allegation that the ALJ erred in making his SAE findings, particularly in denying Claimant's motion for modification. Claimant contends the ALJ failed to consider as a change in condition the "new" work restriction Dr. Tontz recommended against prolonged sitting in his post-hearing deposition. Cl. Brief at 26. In addition, he maintains Ms. Winkler did not adequately describe how she applied Dr. Tontz's restrictions or explain the physical requirements for jobs she determined were within Claimant's physical capabilities. *Id.* at 26-27. He states Ms. Winkler only retroactively testified she accounted for Claimant's inability to sit for prolonged periods in excluding jobs from her labor market survey. *Id.* at 28. Claimant asserts the ALJ therefore committed a mistake of fact in denying his motion for reconsideration by relying on Ms. Winkler's labor market survey for purposes of determining whether Employer established the availability of SAE because the survey does not identify the actual physical demands of the jobs she concluded Claimant can perform. *Id.* at 29-30.

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, 30 BRBS 1(CRT) (1995). The party seeking modification – in this case Claimant – bears the burden of demonstrating a mistake of fact or change in condition. *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997); *Vasquez v. Continental Mar.*

[14] In light of our determinations, we need not address Claimant's or the Director's remaining timeliness arguments.

[15] Keeping in mind there is no time limit for filing a claim for medical benefits, if the ALJ declines to consider the injury as a sequela, Claimant may of his own accord, file a new claim with the district director. 20 C.F.R. §702.221.

of San Francisco, Inc., 23 BRBS 428 (1990). Once the proponent of the motion establishes modification is warranted, the normal legal standards apply. *Id.*

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 the claimant, by virtue of his age, education, work experience, and physical and psychological restrictions, can perform. In demonstrating the availability of SAE, 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. *See Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994). In order to satisfy its burden, the employer "must merely establish the existence of jobs open in the claimant's community that he could compete for and realistically and likely secure." *Palombo v. Director, OWCP*, 937 F.2d 70, 74, 25 BRBS 1, 6(CRT) (2d Cir. 1991). The employer must present specific, suitable jobs that are realistically and regularly available to the claimant. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). The ALJ should determine the claimant's physical and psychological restrictions based on the credited medical opinions and apply them to the available jobs identified by employer's vocational expert. *Villasenor v. Marine Maint. Indus., Inc.*, 17 BRBS 99, *recon. denied*, 17 BRBS 160 (1985). The employer must present evidence that enables the ALJ to make this determination. *Rivera v. United Masonry, Inc.*, 24 BRBS 78 (1990), *aff'd*, 948 F.2d 774, 25 BRBS 51(CRT) (D.C. Cir. 1991). As finding suitable jobs that exist is a factual determination for the ALJ, the Board must uphold such findings when "substantially supported by the record." *Del Monte Fresh Produce v. Director, OWCP [Gates]*, 563 F.3d 1216, 43 BRBS 21(CRT) (11th Cir. 2009).

After finding Claimant proved an inability to return to his usual employment, the ALJ addressed whether Employer established the availability of SAE through jobs Ms. Winkler identified in her 2017 labor market survey.[16] BD&O at 31-32; JX 29. In considering these jobs, the ALJ rejected the patient service representative and bowling alley positions because he concluded they would involve work exceeding Claimant's lifting

[16] Employer originally established the availability of SAE by providing Claimant a light-duty job at its facility, working 32 hours per week at the Tickets and Tours office. Claimant lost that job due to his own misfeasance. He filed a grievance and was later given an opportunity to sign a "Last Chance Agreement" to return to work. He declined, thinking it would make him return to full-duty work. Ultimately, he settled his grievance, which permitted him to resign instead of being terminated but a doctor had also stated he could not perform full-duty work. BD&O at 18-27. The ALJ then considered the vocational evidence.

restrictions. BD&O at 32. He concluded Ms. Winkler's report identified three security officer positions, two positions with the California DMV, a parking lot cashier position, a position with Advance America as a customer service representative, and an RV park supervisor position, that fit within Dr. Tontz's permanent restrictions of five pounds lifting and no repetitive lifting, bending, or twisting. *Id.* at 31.

In his order on modification, the ALJ noted he had credited Dr. Tontz's permanent work restrictions and the doctor's post-hearing deposition testimony in his initial Bench Decision. Modification Order at 4. He determined Dr. Tontz's "new" restriction – no prolonged sitting for more than 15 minutes in an hour – falls within the physical requirements in the jobs Ms. Winkler's labor market survey identified. *Id.*

The ALJ found Claimant told Ms. Winkler during his consultation interview that he could only sit for 2 to 10 minutes and stand for 5 to 10 minutes, which was consistent with Dr. Tontz's "new" restrictions. *Id.* He determined Ms. Winkler's hearing testimony showed she applied both Dr. Tontz's initial work restrictions and Claimant's self-described sitting and standing limitations when she identified each of the positions noted in her survey. *Id.* at 4-5. But the ALJ found Claimant made no attempt to secure any of Ms. Winkler's identified positions and did not proffer any evidence to show he could not perform any of the positions. Therefore, the ALJ determined Claimant did not show his condition changed since the December 10, 2018, hearing to warrant modification. *Id.* at 5.

We reject Claimant's allegations of error. As the ALJ found, Claimant told Ms. Winkler during his consultation interview that he could not sit for more than 2 to 10 minutes and stand for more than 5 to 10 minutes. JX 29 at 678. The ALJ permissibly found this consistent with Dr. Tontz's deposition testimony indicating Claimant could not stand for more than 15 minutes. JX 63 at 1339. During the hearing, Ms. Winkler testified that she specifically used Claimant's self-described standing and sitting limitations in her search for jobs the Claimant would be capable of performing. TR at 203-204. Therefore, there was no "new" sitting/standing restriction to constitute a "change in condition," as Claimant had already advised Ms. Winkler of that restriction at their meeting. *Kendall v. Bethlehem Steel Corp.*, 3 BRBS 255 (1976)**,** *aff'd mem.,* 551 F. 2d 307 (4th Cir. 1977).

Claimant also argues Ms. Winkler's testimony should not have been credited because her labor market survey report does not specify the physical requirements or limitations for the jobs she identified. Rather, he asserts she identified the job duties and some physical requirements (like lifting light items) and noted only her conclusion that the physical requirements did not exceed Claimant's reported capabilities. JX 29 at 680B-680K. Claimant contends this hindered the ALJ's ability to apply medical evidence to the specific jobs identified for SAE purposes. Cl. Brief at 28-29. We disagree. While Ms. Winkler did not specify all the physical requirements of each job listed, she reported and

testified to having considered all the relevant information regarding Claimant's experience and physical restrictions, and Claimant has not shown otherwise. JX 29 at 675-680A; TR at 198-208. This is sufficient. The ALJ's findings regarding Ms. Winkler's opinion and Claimant's SAE are rational and supported by the record. JX 29 at 680B-680ZZ; BD&O at 31-33; Modification Order at 4-5. The Board may not substitute its views for those of the ALJ. *See Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 36 BRBS 15(CRT) (9th Cir. 2002); *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999). Therefore, we affirm the ALJ's SAE determination and his associated denial of disability benefits. *Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108(CRT) (5th Cir. 1990); *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 107 (2003); *Ward v. Cascade Gen., Inc.*, 31 BRBS 65 (1995).

Accordingly, we vacate the ALJ's determinations regarding Claimant's alleged psychological sequela medical benefits claim and remand this case for further consideration consistent with this opinion. In all other respects, we affirm the ALJ's decisions and orders.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge