U.S. Department of Labor

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

BRB No. 22-0084

CARLOS GARCIA	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NATIONAL STEEL AND SHIPBUILDING COMPANY	)	
	)	
	)	DATE ISSUED: 8/09/2023
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of Decision and Order Awarding Benefits and Order Denying Motion for Reconsideration of Evan H. Nordby, Administrative Law Judge, United States Department of Labor.

Norman Cole (Brownstein Rask LLP), Portland, Oregon, and Theodore P. Heus (Quinn & Heus, LLC), Beaverton, Oregon, for Claimant.

Lisa M. Conner (Flynn, Delich, and Wise, LLP), Long Beach, California, for Employer.[1]

[1] Employer substituted Lisa M. Conner in place of Roy D. Axelrod (Law Office of Roy Axelrod, San Diego, California) as attorney of record on February 6, 2023. *See* Notice of Substitution of Lisa M. Conner. This Decision responds to Employer's briefs filed with the Board by Roy D. Axelrod.

Ann Marie Scarpino (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, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Evan H. Nordby's Decision and Order Awarding Benefits and Order Denying Motion for Reconsideration (2017-LHC-01310, 01311) rendered on claims filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (Act).[2] 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 worked as a shipyard painter for Employer when he sustained several injuries.[3] On October 10, 2005, Claimant injured his right hand when a high-pressure paint line burst and injected paint into his hand. Claimant's Exhibit (CX) 25; Employer's Exhibit (EX) 4; Hearing Transcript (TR) at 49.[4] Following several surgeries,[5] Claimant returned

[2] The processing of this case was substantially delayed due to the COVID-19 pandemic, which impacted the Benefits Review Board's ability to obtain records from the Office of Administrative Law Judges (OALJ) and the Office of Workers' Compensation Programs (OWCP). The Board received a portion of the record in March 2023 and had the complete record before it as of April 25, 2023, when it received the surveillance recordings.

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

[4] Both Claimant's and Employer's exhibits have their own unique pagination. Citations to the record in this decision will reflect the parties' exhibit labeling and pagination.

[5] Among other surgeries, Dr. Mark H. Mikulics' reports indicate Claimant had four surgeries to debride paint from his hand and one to cover an area of necrotic skin over his

to work on modified duty. *See* EX 2. He subsequently sustained a left shoulder injury in October 2009. EX 1 at 3. Claimant, however, continued to work. In June 2010, he reported a right knee injury after he attempted to climb aboard a ship while carrying equipment in his left hand. EX 1 at 2. Following this injury, Claimant was treated in Employer's medical facility by Dr. William Adsit. EX 31 at 580-81. Claimant's last day of work for Employer was June 28, 2010; he has not worked since. *See* CX 22; EX 21.

Claimant filed several claims for compensation, including a claim for cumulative trauma to his left shoulder, right knee, and spine. EX 1. He underwent numerous surgeries and was examined by several doctors, including his primary treating physician, Dr. Blake Thompson, and California medical examiner, Dr. Jerome Hall.[6] CX 1; EXs 22-23. Employer voluntarily paid permanent partial disability (PPD) compensation for Claimant's October 2009 shoulder injury and total disability compensation for his cumulative trauma injury through June 24, 2010. EX 6. A dispute arose thereafter over the extent of Claimant's disability.

Following a formal hearing, the ALJ issued a bench decision (BD&O) on November 17, 2020, and on January 25, 2021, he issued a written order (D&O) incorporating his bench findings. The parties stipulated Claimant suffered a right-hand injury in the course of his employment on October 10, 2005, which the ALJ found reached maximum medical improvement (MMI) on October 24, 2006.[7] BD&O at 6, 18. He weighed the opinions of Claimant's medical providers and credited Dr. Mark Mikulics, who assigned a 61% permanent impairment rating to Claimant's right upper extremity. BD&O at 17-18. The ALJ used Section 10(a) of the Act, 33 U.S.C. §910(a), to calculate an average weekly wage (AWW) of $705.24 at the time of the right-hand injury and awarded Claimant schedule member PPD benefits for the right upper extremity impairment in accordance with Section

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thumb. CX 9 at 1046. Following complaints of lack of mobility, Claimant also underwent arthroscopic surgery to repair torn cartilage in his wrist. *Id.* at 1025.

[6] Claimant also sought care and surgical treatment from Dr. James McSweeney and Dr. William Shoemaker for his right knee and left shoulder injuries (Dr. McSweeney performed the left shoulder surgeries), Dr. Mikulics for his right hand injury, and Southbay Spine and Sport for overall orthopedic care. CXs 2, 4, 9, and 11.

[7] The ALJ subsequently acknowledged the record reveals the correct MMI date for Claimant's right hand injury is August 24, 2006. BD&O at 19; *see* EX 29 at 543. Error in identifying the date as October 24, 2006, is harmless, as the ALJ's scheduled PPD award for the right hand is not tied to a certain date but is owed in one lump sum based on the extent of Claimant's permanent impairment. 33 U.S.C. §908(c)(1).

8(c)(1), 33 U.S.C. §908(c)(1), at a compensation rate of $470.16 per week, for 190.32 weeks. BD&O at 29, 31; D&O at 2.

Although the parties stipulated to the occurrence of a work-related left shoulder injury in October 2009[8] and a work-related right knee injury on June 4, 2010 (BD&O at 6), they disagreed as to whether these injuries constituted cumulative traumatic injuries resulting in Claimant's current disability. TR at 7. The ALJ weighed Claimant's testimony and the medical evidence and concluded Claimant suffered work-related traumatic injuries to his left shoulder and right knee at those respective times, creating one cumulative traumatic injury with an onset-of-disability date of June 29, 2010, Claimant's first day of unemployment as a result of his injuries. BD&O at 6, 18-19. Therefore, he calculated Claimant's AWW for the cumulative trauma injury as of June 29, 2010, under Section 10(a) to arrive at an AWW of $1,047.21. *Id*. at 30. The ALJ concluded the cumulative trauma injury rendered Claimant temporarily totally disabled from work beginning June 29, 2010,[9] until he reached MMI for his right knee on June 8, 2014. *Id*. at 22; D&O at 2.[10]

The ALJ then addressed whether Employer established the availability of suitable alternate employment from June 9, 2014. BD&O at 22-28. He analyzed the Labor Market Studies both Claimant and Employer submitted and found Employer's study to be less credible because Employer's vocational consultant, Joyce Gill, mistook Claimant's education and English-speaking ability to be more advanced than they actually were. *Id.*

[8] The ALJ noted Employer was willing to stipulate to the onset date of the left shoulder injury as October 29, 2009; the ALJ declined to use this date for disability onset purposes but accepted the stipulation that the left shoulder injury occurred. BD&O at 6.

[9] Despite finding a disability onset date of June 29, 2010, the ALJ determined Claimant was not medically restricted from employment until a physician took him off all work on September 27, 2011. BD&O at 22. However, because Employer failed to provide any evidence of suitable alternate employment from June 29, 2010, through September 27, 2011, the ALJ concluded Claimant remained temporarily and totally disabled during that time period. *Id.*

[10] The ALJ also found Claimant's left shoulder condition reached MMI on May 21, 2014, but that date did not affect his findings because he acknowledged Employer had previously paid temporary total disability (TTD) benefits from September 28, 2011, through June 8, 2014. BD&O at 32. He ordered Employer to compare the payments it had already made with the TTD compensation rate of $698.14 per week to determine whether additional compensation was owed for that time period, or whether Employer was entitled to a credit. *Id.*

at 25-26. After reviewing and weighing the evidence, the ALJ determined Claimant was unable to perform the tasks of the proffered jobs due to his education, language barriers, and injuries, and therefore found Claimant to be permanently totally disabled as of May 22, 2014. *Id.* at 27-29. Consequently, he ordered Employer to pay Claimant permanent total disability (PTD) benefits beginning May 22, 2014, minus a credit for any benefits already paid during this same time period. *Id*. at 32; D&O at 2.

The ALJ also found Employer entitled to relief from liability under Section 8(f) of the Act, 33 U.S.C. §908(f), and thus limited its liability for PTD benefits to a period of 104 weeks, with the Special Fund taking over payments thereafter. BD&O at 31-32; D&O at 2. In his written order, the ALJ noted Employer would be entitled to "reimbursement from the Special Fund for any benefits Employer has paid in excess." D&O at 2. Finally, the ALJ found Employer liable for all reasonable and necessary medical benefits related to Claimant's 2005 right upper extremity injury and his cumulative traumatic left shoulder and right knee injuries. BD&O at 31; D&O at 2. The ALJ stated the district director would make all computations and Employer must pay or be granted a credit as computed. *Id.*

On January 28, 2021, the district director issued a letter to the parties summarizing the ALJ's findings. He calculated the total amount of disability benefits that Claimant is entitled to as $216,373.81 and stated Employer had paid $175,066.66 of that amount. Therefore, he concluded Employer must pay $41,307.15 in past-due benefits plus $388.67 in interest. Petition for Reconsideration (Emp. Recon. Brief) Exh. D.

Employer filed a motion for reconsideration with the ALJ on February 6, 2021, asserting the district director's calculations of the ALJ's award did not grant it a credit for $30,099.68 in PPD compensation payments it had made for Claimant's left shoulder injury from November 5, 2018, to January 24, 2021. Emp. Recon. Brief at 2, 5, Exh. B. The ALJ denied Employer's motion for reconsideration, finding those payments were not related to the cumulative traumatic injury for which he awarded PTD benefits but arose from a separate injury. Order Denying Motion for Reconsideration (Recon. Order) at 3. According to the ALJ, "Claimant's unscheduled injuries to his right knee and left shoulder together…cannot be said to arise from a single injury, i.e., the right knee injury is not a sequela of the left shoulder injury." *Id*.

Employer appeals both the ALJ's Decision and Order and his Order Denying Reconsideration, alleging the ALJ erred in finding Claimant disabled, in concluding Employer failed to identify suitable alternate employment, in miscalculating Claimant's AWW, and in denying Employer a credit under Section 14(j) of the Act, 33 U.S.C. §914(j), for previously paid PPD compensation for Claimant's left shoulder injury. The Director, Office of Workers' Compensation Programs (Director) responds, asserting the ALJ did not comply with the Administrative Procedure Act (APA), 5 U.S.C. §557(c), as his decision to

deny Employer's motion for reconsideration and request for a credit – set forth in a series of three intertwined orders, including a bench decision – is not adequately explained.[11] Claimant responds to both Employer and the Director, urging affirmance.

Disability

Employer seeks reversal of the ALJ's finding that Claimant is entitled to PTD benefits, arguing it is not supported by substantial evidence. To obtain PTD benefits, a claimant must show: 1) he is disabled within the meaning of the Act, 2) the disabling work-related injury healed to the fullest extent possible, and 3) he cannot return to prior employment. *Gen. Constr. Co. v. Castro*, 401 F.3d 963, 968-69, 39 BRBS 13, 17(CRT) (9th Cir. 2005), *cert. denied*, 546 U.S. 1130 (2006). In addition, for the claimant to obtain total disability benefits, the employer must fail to establish suitable alternate employment, which the employee can perform and is available to the employee. *Id.*, 401 F.3d at 969, 39 BRBS at 17(CRT).

Employer claims the ALJ ignored inconsistencies in Claimant's testimony, which should have rendered it incredible and, consequently, established he was not disabled under the Act. Employer's Brief in Support of Petition for Review (Emp. Brief) at 4. It relies extensively on the video evidence resulting from surveillance conducted between February 2014 and May 2018, which Employer alleges contradicts Claimant's testimony regarding his ability to perform certain tasks. *See* EX 46. Specifically, Employer notes its vocational consultant, as well as its medical experts, reviewed the surveillance videos and determined Claimant misrepresented the extent and nature of his injuries. Emp. Brief at 5-9. In all, Employer lists 32 instances of Claimant's alleged misrepresentations involving the dates he was injured, his English-speaking proficiency, the nature and extent of his injuries, his computer and technology skills, and his admitted reliance on an illicitly obtained copy of the Employer's English literacy exam in advance of taking the required exam for hiring. *Id.* Employer suggests the ALJ's decision to "ignore" these inconsistencies and instead rely on the medical opinions of Drs. Hall, Mikulics, and Thompson, who did not change their opinions after viewing the surveillance video, was "inherently incredible and patently unreasonable." *Id.* at 12.

We disagree. An ALJ has broad discretion, as the finder of fact, to credit one witness's testimony over that of another. *Hawaii Stevedores Inc. v. Ogawa*, 608 F.3d 642, 650, 44 BRBS 47, 49(CRT) (9th Cir. 2010); *Duhagon v. Metro. Stevedore Co.*, 169 F.3d 615, 618, 33 BRBS 1, 3(CRT) (9th Cir. 1999). As such, the ALJ is entitled to make inferences from surveillance evidence and give medical testimony the weight he

[11] The Director declined to address any other issue.

determines it deserves, provided the decision is supported by substantial evidence. *See Jordan v. SSA Terminals, LLC*, 973 F.3d 930, 940 (9th Cir. 2020). In this case, the ALJ carefully reviewed the record in reaching his decisions. He detailed his rationale for crediting the medical opinions of Drs. Thompson, Hall, and Mikulics over Employer's experts, noting Dr. Thompson's extensive medical review which included a review of Claimant's surgical procedures, Dr. Hall's findings, and Dr. Mikulics's records. BD&O at 13-15. Likewise, the ALJ sufficiently explained his decision to give less weight to the medical opinion of Employer's expert, Dr. Christopher Behr, who, despite having reached a conclusion consistent with Claimant's physicians following an in-person evaluation of Claimant, changed his opinion based solely on the surveillance video. *Id.* at 15. As the ALJ found the activities seen on the video were consistent with Claimant's self-reporting and did not involve anything comparable to "the type of intensity" needed for full-time work, he concluded Dr. Behr's change of opinion was not credible, and the video does not diminish Claimant's credibility. *Id.* at 15-17.

Moreover, Employer's contention that the ALJ ignored the surveillance video, as well as the other alleged inconsistencies it identified, is without merit. The ALJ's bench decision provided a detailed discussion of the various surveillance videos, including descriptions of the videos showing Claimant working out in the gym, washing his car, and lifting his takeout order, along with explanations as to how these activities were consistent with Claimant's prior testimony and/or the physical recommendations and limitations put in place by his doctors, or how they were not as intense in nature as the physical demands of his full-time position as an industrial painter. BD&O at 17. The ALJ also addressed Employer's claims regarding Claimant's English-speaking proficiency and adequately explained why he credited Claimant's testimony and vocational expert over the conclusions of Employer's vocational expert. *Id.* at 8-9, 11-12, 23-28.

The ALJ's determinations are not "inherently incredible and patently unreasonable" simply because he did not arrive at the same conclusions as Employer after reviewing the surveillance video. An ALJ is free to credit a witness's testimony or make a finding in the face of another party's argument that the same witness is incredible as long as the findings are reasonable. *See Todd Pacific Shipyards Corp. v. Director, OWCP [Picinich]*, 914 F.2d 1317, 1321, 24 BRBS 36, 41(CRT) (9th Cir. 1990) (determining an ALJ's decision to weigh one witness's testimony over another was not inherently incredible or patently unreasonable). Thus, we decline to set aside the ALJ's credibility determinations.

Alternatively, Employer contends the ALJ erred in determining it did not establish the availability of suitable alternate employment. Once, as here, a claimant establishes he cannot return to his usual work, the burden shifts to the employer to demonstrate the availability of suitable alternate employment. *Castro*, 401 F.3d at 969, 39 BRBS at 17(CRT). In order to be suitable, alternate employment must be available work the

claimant can perform considering his limitations, age, education, and background. *Id.* Further, it is not sufficient for the employer to point to general work a claimant may be physically able to perform; rather, it must show specific jobs the claimant can perform. *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 1196, 21 BRBS 122, 123(CRT) (9th Cir. 1988).

Employer alleges its vocational consultant identified several jobs and job openings for Claimant based on the various medical restrictions assessed by the examining physicians. Emp. Brief at 17. Specifically, Employer's expert identified Claimant as a viable candidate for parking lot attendant and customer service order clerk positions. *Id.* Employer asserts Claimant could perform these jobs because they do not require a high school or GED diploma and "these employers generally preferred older workers." *Id.* at 18.

But the ALJ noted the identified jobs would be considerably more difficult for Claimant to obtain given his language and education barriers. Further, Employer's supplemental labor market survey reports did not account for these barriers when listing jobs Claimant can possibly perform under his physical restrictions. *See* EX 57 at 866-867. Notably, Claimant's vocational expert contacted several employers listed in Employer's surveys and determined the jobs either required a high school diploma, English proficiency, or greater physical activity than Claimant was permitted to perform given his medical restrictions. *See* CX 41 at 1332-1345. Therefore, substantial evidence supports the ALJ's conclusion that the jobs Employer identified did not take into consideration Claimant's restrictions and educational barriers, and thus do not constitute suitable alternate employment available to Claimant.[12] *See Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (finding suitable alternate employment is not shown when the recommended positions do not meet all the identified restrictions). As Employer has not satisfied its burden of establishing the availability of suitable alternate employment, Claimant is totally disabled. *Johnson v. Director, OWCP*, 911 F.2d 247, 24 BRBS 3(CRT) (9th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991); *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993).

[12] Employer also contends the ALJ erred by crediting Claimant's vocational expert, Alex Calderon, over Employer's expert because Mr. Calderon did not have familiarity with the "RAI-12" test. Emp. Brief at 18. This argument is not persuasive. As previously noted, the ALJ has discretion to credit or discredit testimony. *See Picinich*, 914 F.2d at 1321, 24 BRBS at 41.

Average Weekly Wage

Employer next contends the ALJ erred in calculating Claimant's AWW. Employer maintains the ALJ improperly relied on *Johnson*, 911 F.2d 247, 24 BRBS 3(CRT), rather than on *Deweert v. Stevedoring Services of America*, 272 F.3d 1241, 36 BRBS 1(CRT) (9th Cir. 2001), to determine when his left shoulder disability became "manifest" for purposes of calculating AWW. Emp. Brief at 11-12. In *Johnson*, the claimant's disability was latent and unknown, and did not become evident until more than three years after his accident – three years during which he continued to work. The United States Court of Appeals for the Ninth Circuit concluded his AWW should be calculated based on the date the disability attributable to his injury became manifest, rather than the date of his accident because he was not aware of any impairment to his earning capacity until his disability became manifest. *Johnson*, 911 F.2d at 250, 24 BRBS at 8(CRT). In *Deweert*, however, the Ninth Circuit used the date the injury occurred to calculate AWW, as the claimant was aware of his injury when it happened and worked with pain for a few weeks before losing time from work due to disability. The court noted *Johnson* was applicable only in "exceptional cases," where years had elapsed between the initial trauma and the onset of disability, and it concluded the facts and timeline in *Deweert* were distinguishable. *Deweert*, 272 F.3d at 1245-1246, 36 BRBS at 4(CRT).

Employer contends *Johnson* should not be applied because the eight months between Claimant's accident and the manifestation of his disability does not constitute an "exceptional case" as the Ninth Circuit envisioned. Emp. Brief at 11-12. Instead, Employer alleges the ALJ should have applied *Deweert* and used October 2009 to calculate AWW for Claimant's left shoulder injury.[13] *Id.* at 13.

Neither *Johnson* nor *Deweert* is applicable in this case, as neither dealt with a cumulative trauma injury. The ALJ awarded compensation for a cumulative trauma injury caused by Claimant's individual left shoulder and right knee injuries rather than for specific separate injuries to his shoulder and knee. BD&O at 30. Claimant's PTD award, therefore, is the result of the combination of his left shoulder and right knee conditions. Thus, Claimant's AWW should be computed based on the date the disability related to his cumulative injury became manifest. *See, e.g., Brady-Hamilton Stevedore Co. v. Director, OWCP*, 58 F. 3d 419, 29 BRBS 101(CRT) (9th Cir. 1995); *Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir. 1980); *Merrill v. Todd Pac. Shipyards Corp.*, 25 BRBS 140 (1991). As the ALJ awarded benefits based on one cumulative injury, the date the disability related to the cumulative injury became manifest and not the date of the

[13] Employer does not challenge the applicability of Section 10(a) in calculating Claimant's AWW.

single shoulder injury controls the AWW calculations in this case; there was no need to apply either *Johnson* or *Deweert.*

Consequently, Claimant's AWW should be calculated as of June 29, 2010 – the date the ALJ found his cumulative trauma disability became manifest. Therefore, while the ALJ's use of *Johnson* to determine the date for the AWW was improper, it is harmless error because he arrived at the correct date from which to commence calculating Claimant's AWW. *See generally Brown v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 110 (1989). Consequently, we affirm the ALJ's use of June 29, 2010, to determine Claimant's AWW with respect to his cumulative trauma injury. *Hastings*, 628 F.2d 85, 14 BRBS 345.

Section 14(j) Credit

Employer contends the ALJ erred in failing to award a credit for $30,099.66 in PPD compensation it paid to Claimant between November 5, 2018, and January 24, 2021, for his work-related 2009 left shoulder injury. Emp. Brief at 20; *see* Attach. B to Emp. Recon. Brief. It argues it is entitled to this credit under Section 14(j) of the Act, 33 U.S.C. §914(j), as the payment of benefits constituted an advance payment of compensation, the payments were subsumed into Claimant's later cumulative trauma injury, and denial of the credit unjustly overpays Claimant. Emp. Brief at 23-25. The Director asserts the ALJ did not adequately explain why he denied the requested credit, so the case should be remanded for the ALJ to reconsider and fully explain his decision. The Director also asserts any credit awarded would first go to the Special Fund.

According to Section 14(j), "if the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due." 33 U.S.C. §914(j);[14] *McCabe Inspection Service, Inc. v. Willard*, 240 F.2d 942 (2d. Cir. 1957); *LaRosa v. King & Co.*, 40 BRBS 29 (2006). The

[14] Generally, an employer is not entitled to be paid back for over-compensating a claimant. However, the Act contains three provisions permitting an employer to receive a credit for compensation it paid in excess of its liability. In addition to Section 14(j), Section 3(e) of the Act, 33 U.S.C. §903(e), allows a credit for payments made under another workers' compensation statute, and Section 33(f), 33 U.S.C. §933(f), provides an employer an offset for amounts the claimant recovered in a third-party suit involving the same injury for which the employer would be liable under the Act. Lastly, *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (en banc), permits an employer to receive a credit for benefits paid for a claimant's prior award under the schedule, 33 U.S.C. §908(c)(1)-(20), against its liability for a second injury to the same body part.

Act is construed to allow employers who voluntarily paid advance compensation to receive credit for prior payments made. *Scott v. Trans World Airlines*, 5 BRBS 141 (1976). Therefore, under Section 14(j), an employer's excess voluntary payments of temporary total disability benefits are credited against its liability based on an award of permanent partial disability compensation. *Nichols v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 710 (1978).

The ALJ awarded Claimant PTD benefits for the combined disabling effects of his left shoulder and right knee injuries as of May 22, 2014. BD&O at 19, 32. Employer seeks a credit for the PPD benefits it paid Claimant for his left shoulder injury, between November 5, 2018, and January 24, 2021, as the payments were made after the ALJ found Claimant's shoulder condition contributed to his PTD. The ALJ denied Employer's request for a credit because "the payment for the prior left shoulder injury was for a different injury than [his] permanent total award." Recon. Order at 2-3. Notably absent is any further explanation for why they are different injuries.[15]

The ALJ's reliance on *Tibbetts v. Bath Iron Works Corp.*, 10 BRBS 245, 248 (1979), as justification for his denial is particularly problematic. In that case, the Board allowed the employer to receive a credit for scheduled benefits paid for a leg injury against a subsequent award for unscheduled benefits for a back injury, when the back injury had caused the leg injury. The Board held the award for the unscheduled back injury "subsumed" the wage loss caused by the leg injury because it "include[d] all of the overall disability caused by related sequelae." *Id*. In short, both the scheduled leg injury and the unscheduled back injury shared a root cause, and thus the employer was entitled to a credit for payment of one against an award for the other. *Id*.

In this case, the ALJ noted the "unscheduled injuries to [Claimant's] right knee and left shoulder together," for which he awarded PTD, did not share a root cause but were the result of two separate incidents: "the right knee injury is not a sequela of the left shoulder injury." Recon. Order at 3. While we agree with the distinction between this case and *Tibbetts*, that distinction, without more, is not a sufficient reason to deny Employer a credit, as payment for a sequela injury is not the only reason to grant a credit. *See* n.14, *supra*. Employer is not seeking credit for payments made for a sequela injury to one body part against an award for an injury to a different body part.[16] Rather, Employer paid PPD

[15] The Director asserts this conclusory finding "leaves more questions than answers." Director's Response Brief (Dir. Resp. Br.) at 5.

[16] Because Claimant's right knee and shoulder injuries both contributed to his PTD status, and the ALJ awarded one PTD benefit based on the two injuries' effects in conjunction with each other, Claimant would not be able to recover a separate total

benefits for the left shoulder condition and is seeking a credit against a subsequent award of PTD benefits for a disability to which the left shoulder contributed.

The ALJ's denial also lacks any supportive facts or evidence; it merely concludes Claimant's prior left shoulder injury is unrelated to the left shoulder injury that makes up a portion of his cumulative trauma award. Recon. Order at 2-3. The lack of explanation warrants remand, considering the amount of evidence in the record suggesting the two shoulder injuries referenced by the ALJ are not only related, they are the same. 33 U.S.C. §557(c)(3)(A); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988).

The benefits for which Employer is seeking a credit were paid for a left shoulder injury that occurred on October 27, 2009. EX 61 at 916. The ALJ found Claimant's left shoulder began exhibiting "symptoms of overuse" in October 2009. BD&O at 18. Claimant completed a Notice of Injury Form in which he indicated he suffered an injury to his left arm[17] on October 27, 2009. CX 20 at 1165. The next day, he informed Employer he had hurt his left arm on October 27, 2009, "due to everyday work moving hoses lifting paint cans." CX 19 at 1163. When Employer completed a Form LS-202, Employer's First Report of Injury or Occupational Illness, for the purportedly unrelated left shoulder injury, it identified the date of accident as "CT 10/27/2008-10/27/2009" and described the injury as "onset of pain due to repetitive painting, pushing, pulling and lifting injuring his left shoulder." EX 1 at 3. Employer's Form LS-206 documenting the commencement of the benefit payments in question cited Ms. Gill's Labor Market Survey as the reason for the

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disability award for each individual injury. *See Korineck v. Gen. Dynamics Corp., Elec. Boat Div.*, 835 F.2d 42, 20 BRBS 63(CRT) (2d Cir. 1987) (PPD for hearing loss not permitted while PTD was due to a back injury); *Crum v. Gen. Adjustment Bureau*, 16 BRBS 101 (1983), *aff'd in pert. part, rev'd and remanded in part on other grounds*, 738 F.2d 474, 16 BRBS 115(CRT) (D.C. Cir. 1984) (where a claimant sustains multiple injuries at different times, concurrent awards for PPD benefits under 33 U.S.C. §908(c)(21) and PTD benefits under 33 U.S.C. §908(a) may be appropriate if the PTD award is based on the claimant's remaining wage-earning capacity after his first injury, provided the awards do not result in compensation greater than total disability compensation permitted under Section 8(a)). As separate awards are not pertinent here, we do not need to apportion or distinguish the disabling effects of the shoulder and knee injuries for purposes of determining any credit that Employer may be entitled to. *See generally Plappert v. Marine Corps Exch.*, 31 BRBS 13 (1997), *aff'd on recon. en banc*, 31 BRBS 109 (1997); *Rathke v. Lockheed Shipbuilding & Constr. Co.*, 16 BRBS 77 (1984).

[17] Although the form is completed in Spanish, the cause of injury includes the words "brazo izquierdo," which translates to "left arm." CX 20 at 1165.

PPD payments and rate (EX 61 at 917); this Survey, dated October 30, 2018, specifically identified purported suitable alternative employment opportunities both as to each individual injury (right hand, left shoulder, and right knee), and as to the combination of these injuries, indicating consideration of cumulative injury. EX 57 at 866.

The only evidence suggesting the existence of two different claims and/or left shoulder injuries is Employer's Form LS-206 dated November 5, 2018, for Claimant's work-related left shoulder injury that allegedly occurred on October 27, 2009, because it was filed under a different claim number (OWCP No. 18-097172). EX 6 at 916. Claimant argues this establishes the benefits in question were paid pursuant to a separate claim, and no credit is owed. Employer maintains this form may have been filed under the wrong claim number, but even if it did represent a separate claim, it is still entitled to a credit as the claim was for a related shoulder injury. Regardless, resolution requires fact-finding. We therefore vacate the ALJ's denial of Employer's petition for reconsideration and his denial of a credit. On remand, the ALJ should consider the evidence identified above, as well as any other evidence in the record related to the issue of Employer's entitlement to a credit under Section 14(j), and he should clearly explain his conclusion in accordance with the APA. 5 U.S.C. §557(c)(3)(A).[18]

[18] If the ALJ determines a credit is warranted, he must also decide which entity, Employer or the Special Fund, is entitled to the credit. *Director, OWCP v. Gen. Dynamics Corp.*, 900 F.2d 506, 23 BRBS 40(CRT) (2d Cir. 1990); *Director, OWCP v. Bethlehem Steel Corp.*, 868 F.2d 759, 22 BRBS 47(CRT) (5th Cir. 1989). If the Special Fund is entitled to the credit first, then he must also determine whether there is any remaining credit for which the Special Fund must still reimburse Employer. *Phillips v. Marine Concrete Structures, Inc.*, 877 F.2d 1231, 1234, 23 BRBS 36(CRT) (5th Cir. 1989).

Accordingly, we vacate the ALJ's Order Denying Motion for Reconsideration and remand for re-evaluation in accordance with this decision. In all other respects, we affirm the ALJ's Decision and Order Awarding Benefits.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge