BRB No. 96-1585

VICENTE DIOSDADO	)	
	)	
Claimant-Respondent	)	DATE ISSUED:
	)	
v.	)	
	)	
NEWPARK SHIPBUILDING & REPAIR, INCORPORATED	)	
	)	
and	)	
	)	
THE GRAY INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and Order on Reconsideration of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Harry C. Arthur, Houston, Texas, for claimant.

Fred L. Shuchart (Hirsch, Sheiness & Garcia, L.L.P.), Brownsville, Texas, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and Order on Reconsideration (94-LHC-1861) of Administrative Law Judge Lee J. Romero, Jr., rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3). The Board held oral argument in this case in Houston, Texas, on March 5, 1997.

Claimant, employed as a welder, slipped while walking along a barge and fell approximately eighteen feet to the floor of the dry dock, in the course and scope of his employment with employer on August 19, 1992. Immediately following the accident, claimant was taken to St. Joseph's Hospital where he was diagnosed with sprains/strains of the right wrist, cervical and lumbar spine, given medication and released.

On September 4, 1992, claimant visited employer's physician, Dr. McCluskey, who found no objective evidence of significant pathology and opined that as of that date claimant had reached maximum medical improvement with a zero impairment rating. Dr. McCluskey felt that no further diagnostic or therapeutic endeavors were indicated and that claimant was capable of returning to his usual employment. Claimant then visited Dr. Lazarz on September 14, 1992, who diagnosed claimant as having a cervical strain, lumbar strain, and spondylolisthesis. Dr. Lazarz recommended that claimant remain off from work until further notice and undergo physical therapy.

Dr. Lazarz thereafter examined claimant on a periodic basis, regularly noting claimant's ongoing symptoms, generally finding no improvement in claimant's lumbar spine condition and recommending that he remain off work and partake in physical rehabilitation. Dr. Lazarz first concluded that claimant reached maximum medical improvement on January 28, 1993, with a fifteen percent whole body impairment rating. In his report dated February 11, 1993, he determined that claimant remained symptomatic with regard to his lumbar spine, and again recommended that claimant remain off work until further notice. In May 1993, Dr. Lazarz acknowledged that claimant seemed to be able to do the light duty work associated with his position as a security guard, and in July 1993, Dr. Lazarz discussed with claimant the possibility of a spinal fusion. In a letter dated February 3, 1994, Dr. Lazarz placed physical restrictions on claimant's activities,[1] and subsequently determined, on July 20, 1994, that claimant reached maximum medical improvement for light work only with a fourteen percent physical impairment based on the spondylolysis and decreased motion in lateral flexion and lumbar flexion.[2]

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[1]Specifically, Dr. Lazarz restricted claimant from prolonged standing or walking, and placed a weight limitation of ten pounds on a constant basis and twenty-five pounds on an occasional basis.

[2]Dr. Lazarz specifically placed a fifty-pound weight restriction on claimant's activities. Additionally, Dr. Lazarz indicated that he felt that claimant was going to have problems working in the cold, in dampness and with high speed work.

Claimant was also examined on January 22, 1993, by Dr. Ponder, who diagnosed grade I spondylolisthesis of L5 on S1 secondary to a bilateral pars interarticularis defect with a superimposed traumatic event as the precipitating episode. As a result of his initial examination, Dr. Ponder opined that claimant had not yet reached maximum medical improvement, and recommended that claimant not go back to work and partake in a more aggressive sort of physical therapy. In addition, Dr. Ponder stated that if the physical therapy did not resolve claimant's symptoms, possible surgical treatment might be warranted. In a follow-up letter dated February 17, 1993, Dr. Ponder stated that he thought that claimant should be able to do light duty work in an environment obviating the necessity of repeated bending, heavy lifting and prolonged sitting, and in which claimant could avoid the use of his lower back.

Meanwhile, claimant first returned to work with employer in its tool shop in April 1993. Following his termination from employer on January 14, 1994, for failing his probation period, claimant worked for two weeks as a fire watch guard and welder with Petro-Chem Field Services in Los Angeles, California, before being hired as a welder at Bludworth Bond Shipyard (Sea Services) where he worked from July 8, 1994 through October 24, 1994.

In his Decision and Order Awarding Benefits, the administrative law judge awarded claimant temporary total disability benefits from August 20, 1992 to July 20, 1994. He then determined that claimant reached maximum medical improvement on July 20, 1994, that he was totally and permanently disabled beginning July 20, 1994, and that his average weekly wage was $376.92. Responding to motions filed by both parties, the administrative law judge issued an Order on Reconsideration on July 26, 1996, in which he amended his Decision and Order to increase the average weekly wage to $426.35 and awarded a credit to employer for all post-injury earnings of claimant.

On appeal, employer challenges the administrative law judge's findings regarding the extent of claimant's disability, the date of maximum medical improvement, and the calculation of claimant's average weekly wage. Claimant responds, urging affirmance. Employer has additionally filed a reply brief in which it reasserts its arguments on appeal.

Extent of Disability

Employer argues that the administrative law judge erred in finding that claimant is permanently and totally disabled. Employer first asserts that it cannot be liable for permanent total disability benefits because claimant has effectively waived any such claim. In support of its contention, employer notes that at the hearing claimant's counsel denied that the claim involved permanent total disability and rather stated that it only involved permanent partial disability. Employer also maintains that claimant, in his post-hearing brief, concedes that the claim involves only permanent partial disability.

Despite the existence of some statements by claimant's counsel that indicate that claimant may have been seeking benefits only for permanent partial disability,[3] the record contains evidence sufficient to establish that employer had knowledge of a claim for total disability, and specifically argued the issue of whether claimant's injury resulted in total disability. First, both parties' pre-hearing statements, Form LS-18, list the nature and extent of claimant's disability among the issues to be resolved at the formal hearing. Additionally, at the hearing claimant's counsel explicitly states that "we contend there was a period of total disability and then followed by now a permanent partial disability." Hearing Transcript (HT) at 20. Moreover, both parties addressed in their post-hearing briefs the issues related to establishing a *prima facie* case of total disability. Specifically, claimant argued that he cannot return to his regular employment and that employer had not met its burden of establishing suitable alternate employment. Similarly, employer distinctly averred that it has "clearly fulfilled its duty in finding alternative work" for claimant by submitting evidence regarding the nature of claimant's post-injury employment with employer and a vocational rehabilitation counselor's report identifying other available positions. Inasmuch as employer defended against a claim for total disability, we hold that employer's argument that claimant waived his claim for permanent total disability benefits is meritless. *See generally Duran v. Interport Maintenance Corp.*, 27 BRBS 8 (1993); *Bonner v. Ryan-Walsh Stevedoring Co.*, 15 BRBS 321 (1983); *Walker v. AAF Exchange Service*, 5 BRBS 500 (1977).

Employer next argues that inasmuch as claimant held welding positions with post-injury employers Petro-Chem Field Services and Sea Services, which are similar to his pre-injury job with employer, claimant has failed to establish that he was unable to return to his regular employment. Employer asserts that claimant's attempts to distinguish his job responsibilities with employer from those at his post-injury job sites must be disregarded since claimant is not a credible witness. Employer also argues that Dr. Lazarz's medical assessment of claimant's condition is questionable given that it is based, at least to some degree, on claimant's incredible statements. Alternatively, employer asserts that it has fulfilled its burden of establishing suitable alternate employment. Employer avers that claimant's post-injury position with employer is sufficient to establish suitable alternate employment. Employer further maintains that the administrative law judge erred in ignoring

[3]At the hearing, claimant's counsel stated that it is not claimant's contention that he is permanently totally disabled. Hearing Transcript at 20. Counsel seemingly reiterated this position in his post-hearing brief, wherein he acknowledges that "the injury involved in this case is a non-scheduled permanent partial disability contained in Section 8(c)(21)" of the Act.

the rehabilitation assessment report which it asserts is sufficient to establish suitable alternate employment.

The administrative law judge specifically considered the issue of claimant's credibility as it relates to his testimony that his post-injury work was not analogous to his pre-injury position and with regard to the statements he made to his treating physician, Dr. Lazarz, as to his physical condition. In addressing this issue, the administrative law judge first acknowledged that there were several variances between claimant's hearing and deposition testimony. However, the administrative law judge found that these inconsistencies were sufficiently explained. In addition, the administrative law judge found that claimant does not have a great memory, and that this fact coupled with his constant need for interpreters,[4] has had an affect on the preciseness of his answers. The administrative law judge, though, concluded that claimant has not been deliberately misleading or untruthful. Moreover, the administrative law judge further determined that since Dr. Lazarz was able to speak directly to claimant in Spanish, there was no doubt that Dr. Lazarz was able to understand claimant. As determinations regarding the credibility of witnesses are left exclusively to the administrative law judge, and the administrative law judge has, in the instant case, specifically addressed those factors cited by employer which arguably detract from claimant's statements, we affirm the administrative law judge's finding that claimant is a credible witness. *See, e.g., Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993) *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89 (CRT)(4th Cir. 1994).

In weighing the medical evidence of record, the administrative law judge initially found Dr. Lazarz's opinion to be better reasoned than the contrary opinion offered by Dr. McCluskey, since Dr. Lazarz regularly treated claimant and there was objective evidence of claimant's pain and condition. The administrative law judge then determined that claimant could not return to his usual employment based on the credible opinion of Dr. Lazarz, who opined that claimant was unable to return to his position with employer as a welder due to his work-related injury, which the administrative law judge further found supported by the medical opinion of Dr. Ponder. In addition, the administrative law judge accepted claimant's testimony that his post-injury work was not analogous to his usual work with employer.[5] Consequently, we affirm the administrative law judge's finding that claimant is

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[4]The record establishes that interpreters were used at the hearing.

[5]Claimant testified that his post-injury welding work was easier than his usual work since he was not required to lift heavy objects. Claimant specifically noted that at Petro-

unable to return to his regular or usual employment due to his work-related injury, as it is based on substantial evidence. *See Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991).

Where, as in the instant case, claimant is unable to perform his usual employment, claimant has established a *prima facie* case of total disability, thus shifting the burden to employer to establish the existence of realistically available job opportunities within the geographical area where claimant resides which claimant, by virtue of his age, education, work experience, and physical restrictions, is realistically able to secure and perform. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (CRT) (5th Cir. 1991); *see also Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT) (5th Cir. 1992). An employer can establish suitable alternate employment by offering an injured employee a light duty job at its facility which is tailored to the employee's physical limitations, so long as the job is necessary and claimant is capable of performing it. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93 (CRT)(5th Cir. 1996); *Larsen v. Golten Marine Co.*, 19 BRBS 54 (1986).

In addressing the issue of suitable alternate employment, the administrative law judge solely considered the testimony of claimant's supervisor, Mario Salinas, Jr., as it related to claimant's post-injury position in employer's tool room. Specifically, the administrative law judge noted that Mr. Salinas testified that he was never aware that claimant had a bad back, or that claimant was on light duty status. In addition, the administrative law judge acknowledged Mr. Salinas' testimony that claimant was transferred to his department as a full time employee and not as a temporary light duty worker, and that claimant was let go for failing his probation period. Based on this testimony, the administrative law judge concluded that claimant's work in employer's tool room cannot be considered suitable alternate employment.

Chem Field Services helpers brought the rods and other work items. Additionally, he noted that he was able to do the welding at Sea Services because "he needed the money to live," and that while he did that work his back gave him problems requiring him to return to the doctor.

The administrative law judge did not undertake a proper analysis of employer's suitable alternate employment evidence. In examining the position that claimant held with employer from April 1993 to January 1994[6] the administrative law judge did not specifically consider whether that position was necessary and whether claimant was capable of performing it. *See Darby*, 99 F.3d at 685, 30 BRBS at 93 (CRT); *Larsen*, 19 BRBS at 54. Mr. Salinas testified that the tool counter position is "pretty critical" to employer. HT at 159. Moreover, the record contains the testimony of claimant and Mr. Salinas regarding the physical requirements of the tool room position, HT at 61-65, 140, 143-144, 147-149,159, 166; Claimant's Exhibit 16, Deposition at 20, and the opinions of Dr. Lazarz and Dr. Ponder regarding claimant's physical capabilities. HT at 147-48. Inasmuch as the administrative law judge did not fully consider the evidence relevant to a determination regarding whether claimant's post-injury position in employer's tool room is suitable alternate employment, *see Darby*, 99 F.3d at 685, 30 BRBS at 93 (CRT), we must vacate the administrative law judge's finding on this matter and remand for reconsideration of this issue.[7]

Employer's contention regarding the labor market survey likewise has merit, in that this relevant evidence was not discussed by the administrative law judge and the positions identified in this report may be sufficient for employer to establish its burden to show the availability of suitable alternate employment. *See P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT)(5th Cir. 1991), *reh'g denied,* 935 F.2d 1293 (5th Cir. 1991); *Turner,* 661 F.2d at 1031, 14 BRBS at 156 (CRT); *see also Guidry*, 967 F.2d at 1039, 26 BRBS at 30 (CRT); *Jones v. Genco, Inc.*, 21 BRBS 12 (1988). Thus, on remand, the administrative law judge also must address the rehabilitation assessment entered into evidence by employer in which a vocational rehabilitation specialist, following a review of claimant's physical/medical status, social/educational background, employment history, and a relevant labor market survey, identifies a number of welding and non-welding positions which were arguably available to claimant. *Merrill*, 25 BRBS at 140.

Nature of Disability: Maximum Medical Improvement

Employer further contends that the administrative law judge erred in determining that claimant reached maximum medical improvement as of July 20, 1994, since the records of claimant's treating physician, Dr. Lazarz, show no significant improvement from September

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[6]Claimant had started in employer's tool room, then was moved to a guard shack, and later the maintenance office, before returning to the tool room. HT at 61-65.

[7]Mr. Salinas further testified that claimant was terminated not because of his physical condition, but rather only because of his "bad" work attitude. HT at 147-148. The fact that claimant was terminated from this job does not mean that the position was not suitable alternate employment, if claimant's termination in the instant case is unrelated to his work injury. *Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996).

14, 1992 through July 20, 1994, indicating that claimant's condition had stabilized well before then. Employer maintains that Dr. Lazarz saw claimant on twenty-two occasions from September 14, 1992 through July 20, 1994, and that on every visit there is a notation of some limitation of motion and on a majority of office visits there is some indication of muscle spasms, with no evidence of improvement. In addition, employer contends that Dr. Lazarz previously determined that claimant had reached maximum medical improvement as of January 28, 1993, a point which employer argues was not addressed by the administrative law judge.

A disability is considered permanent as of the date claimant's condition reaches maximum medical improvement or if the condition has continued for a lengthy period and appears to be of lasting or indefinite duration. *See Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. Tex. 1968), *cert. denied*, 394 U.S. 976 (1969). Moreover, if a physician believes that further treatment should be undertaken, then a possibility of success exists, and even if, in retrospect, it was unsuccessful, maximum medical improvement does not occur until the treatment is complete. *See Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22 (CRT)(5th Cir. 1994), *aff'g* 27 BRBS 192 (1993); *Worthington v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 200 (1986); *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982).

In the instant case, the administrative law judge determined that claimant reached maximum medical improvement on July 20, 1994, because this was the date that Dr. Lazarz found that claimant's disability plateaued. Employer is correct in stating that Dr. Lazarz initially found claimant reached maximum medical improvement on January 28, 1993, and that throughout the period Dr. Lazarz cared for claimant, he consistently noted that claimant showed essentially the same symptoms. Nonetheless, Dr. Lazarz attempted various treatments during the period claimant was under his care, initially consisting of physical therapy, and then in November 1993, after noting claimant's prolonged symptoms, progressing to repeated recommendations that claimant undergo a work-hardening program, which the administrative law judge found was impeded by employer's refusal to pay for such a program. In July 1993, Dr. Lazarz discussed the possibility of a spinal fusion with claimant, and one year later stated claimant's condition had plateaued unless claimant was willing to consider surgery, which the administrative law judge stated he was not. As the administrative law judge's finding that claimant reached maximum medical improvement as of July 20, 1994, is supported by the entirety of Dr. Lazarz's medical records, and is rational, it is affirmed. *Abbott*, 40 F.3d at 122, 29 BRBS at 22 (CRT).

Average Weekly Wage

Lastly, employer asserts that the administrative law judge incorrectly calculated claimant's average weekly wage under Section 10(a), 33 U.S.C. §910(a), since the evidence of record fails to establish the requisite information for such a calculation, notably the precise number of days that claimant worked over the year immediately preceding his injury. Employer argues that given the lack of specific evidence on this issue, claimant's

average weekly wage should be calculated pursuant to Section 10(d), 33 U.S.C. §910(d).

Contrary to employer's contention, Sections 10(a) and 10(d) do not provide mutually exclusive means by which the administrative law judge is to calculate a claimant's average weekly wage. Rather, the two provisions work in unison, in relevant situations, to give the administrative law judge a formula to determine claimant's average weekly wage. Section 10(a) specifically serves as one of three methods by which an employee's average annual wage is to be calculated. Section 10(d) then mandates that the administrative law judge divide the average annual wage by 52 to arrive at claimant's average weekly wage.

Section 10(a) is applicable where the employee has worked "substantially the whole of the year" preceding the injury and aims at a theoretical approximation of what a claimant could ideally have been expected to earn. 33 U.S.C. §910(a); *see Duncan v. Washington Metropolitan Area Transit Authority*, 24 BRBS 133 (1990). In the instant case, the administrative law judge initially determined in his Order on Reconsideration that since claimant worked substantially the entire year prior to his injury on August 19, 1992, with employer, claimant's average annual wage is to be calculated under Section 10(a). Reviewing claimant's payroll records with employer over that period of time, the administrative law judge rationally determined that claimant worked a total of 215 days,[8] during which time he earned $18,335.11, giving claimant an average daily wage of $85.27. The administrative law judge then determined that claimant worked a five-day week and accordingly, multiplied claimant's average daily wage by 260, as set out in Section 10(a), which yields an average annual wage of $22,170.20. Pursuant to Section 10(d), the administrative law judge divided claimant's average annual wage of $22,170.20 by 52 to conclude that claimant's average weekly wage is $426.35. As the administrative law judge's calculation of claimant's average weekly wage is rational and supported by substantial evidence, it is affirmed. *See generally SGS Control Services v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57 (CRT)(5th Cir. 1996).

Accordingly, the administrative law judge's determination that employer has not established suitable alternate employment is vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order Awarding Benefits and Order on Reconsideration are affirmed.

SO ORDERED.

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[8]As employer correctly states, the records do not set out exactly how many days claimant worked over the one year period in question. However, those records do reveal that claimant was paid for a total of 1,721 hours (72 of which are overtime) over the course of 49 weeks, which when divided by an average eight hour day, yields a total of 215 days worked. Consequently, we hold that the administrative law judge's determination that claimant worked 215 days over the one-year period from August 19, 1991 to August 19, 1992, is rational and supported by substantial evidence and thus, is affirmed.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge