BRB No. 04-0869

SHIRLEY A. BEAUDOIN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ELECTRIC BOAT CORPORATION	)	DATE ISSUED: 08/17/2005
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Carolyn P. Kelly (O'Brien, Shafner, Stuart, Kelly & Morris, P.C.), Groton, Connecticut, for claimant.

James T. Hornstein (Higgins, Cavanagh & Cooney, LLP), Providence, Rhode Island, for self-insured employer.

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2003-LHC-02004) of Administrative Law Judge Janice K. Bullard 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In June 1993, claimant sustained a tick bite on her neck during the course of her employment for employer as a stowage person. A reaction to the bite caused her neck to swell. Claimant underwent surgery to relieve the swelling, which, in turn, resulted in a nerve injury. This injury weakened claimant's right trapezius muscle and she developed chronic pain in her neck and right shoulder. On June 7, 1996, claimant aggravated her condition at work when a door struck her right shoulder. Claimant continued working until April 1, 1997, when she stopped due to her right shoulder condition. Employer

voluntarily paid claimant compensation for temporary total disability from April 2, 1997, to June 14, 2000, and for permanent partial disability from June 15, 2000.

In her decision, the administrative law judge accepted the parties' stipulation that claimant's right shoulder condition reached maximum medical improvement on September 7, 1996. The administrative law judge found the medical evidence establishes that claimant has limited, if any function, in her right shoulder, and that she is unable to return to her usual employment with employer. The administrative law judge credited the opinion of Dr. Willetts, as supported by the opinion of Dr. Goldblatt, that claimant is capable of performing sedentary work that does not require the use of her right upper extremity. The administrative law judge credited the August 15, 2003, labor market survey of Elizabeth Sinatro, which utilized the work restrictions listed in Dr. Willetts's April 24, 2003, medical report. In her survey, Ms. Sinatro identified eight positions as a cashier and front desk clerk which she testified are within these restrictions. The administrative law judge concluded that these positions establish the availability of suitable alternate employment, which claimant did not rebut. The administrative law judge credited the wages paid by one of the specific positions identified by Ms. Sinatro to find that claimant has a current wage-earning capacity of $440. The administrative law judge adjusted claimant's current wage-earning capacity for inflation and compared the adjusted figure to claimant's stipulated average weekly wage at the date of her 1996 work injury, finding that claimant sustained a loss of wage-earning capacity entitling her to weekly compensation of $289.81 for permanent partial disability. The administrative law judge ordered that compensation payments begin from the date of maximum medical improvement on September 7, 1996. Employer's claim for Section 8(f) relief was denied. 33 U.S.C. §908(f).

On appeal, claimant challenges the administrative law judge's finding that employer established the availability of suitable alternate employment. Alternatively, claimant argues that the administrative law judge erred by commencing claimant's award for permanent partial disability on the date of maximum medical improvement and in her determination of claimant's post-injury wage-earning capacity. Employer responds, urging affirmance.

Where, as here, claimant establishes that she is unable to perform her usual employment duties due to a work-related injury, claimant has established a *prima facie* case of total disability. The burden then shifts to employer to demonstrate that within the geographic area where claimant resides, jobs are available which claimant, by virtue of her age, education, work experience and physical restrictions can perform and which she can compete for and reasonably secure.[1] *Pietrunti v. Director, OWCP*, 119 F.3d 1035,

[1] Claimant can rebut employer's showing of the availability of suitable alternate employment, and retain eligibility for total disability benefits, if she shows she diligently

1041, 31 BRBS 84, 88(CRT) (2d Cir. 1997)*; Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *see also New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981).

Claimant first argues that the administrative law judge erred by not crediting the opinion of her treating physician, Dr. Hargus, that she is incapable of working. The administrative law judge rejected the opinion of Dr. Hargus that claimant is totally disabled due to work-related reflex sympathetic dystrophy (RSD) as she found this diagnosis inconsistent with the other evidence of record. Decision and Order at 23. The administrative law judge summarized the diagnoses of Drs. Lefferts, Maletz, Goldblatt, and Willetts, none of whom agreed with Dr. Hargus's diagnosis of RSD. CXs 6, 8, 9, 11; EX 2. The administrative law judge found that Dr. Hargus's opinion that claimant's pain increased due to the June 1996 door injury is contradicted by claimant's not seeking treatment from him for this injury until her next regularly scheduled appointment three weeks later and the absence of any significant change in claimant's pain medication or treatment regimen. CX 5. The administrative law judge also reasoned that Dr. Hargus did not document how claimant's condition worsened from July 1996 to June 2002, when he opined that claimant is unable to work, nor did he explain claimant's ability to return to work for seven months after the June 1996 injury, complete a 12-month training course as a medical assistant, and work for two years thereafter as a teaching assistant. The administrative law judge also found that Dr. Hargus did not provide a specific description of claimant's physical limitations and unreasonably limited his treatment of claimant's injury to pain medication in that he rejected the recommendations of surgeons that claimant wear a harness or brace. CXs 2, 3, 5, 7, 9, 13, 14; EXs 2, 4. The administrative law judge specifically declined to accord more weight to Dr. Hargus's opinion as claimant's treating physician in light of the countervailing evidence of record.

We reject claimant's assertion the administrative law judge erred in failing to accord determinative weight to the opinion of Dr. Hargus that claimant is unable to work. It is well established that an administrative law judge is not bound to accept the opinion or theory of any particular medical examiner but may instead draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co.,* 306 F.2d 693

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pursued alternate employment opportunities but was unable to secure a position. *See Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *see also Newport News Shipbuilding & Dry Dock Co. v. Tann,* 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986). In this case, claimant does not challenge the administrative law judge's finding that she did not diligently try to obtain suitable work. *See* Decision and Order at 27-28.

(5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). In this case, the administrative law judge rationally declined to credit the opinion of Dr. Hargus based on his status as the treating physician, as she found it outweighed by other, more persuasive opinions to the contrary. *See Pietrunti*, 119 F.3d at 1043-1044, 31 BRBS at 89(CRT).

Claimant further argues that the administrative law judge erred by crediting the opinion of Dr. Willetts that claimant is capable of working. The administrative law judge found that Dr. Willetts's opinion is better reasoned and supported by the record as a whole. Decision and Order at 25. Dr. Willetts opined that claimant is capable of performing sedentary work without using her right upper extremity. EX 6 at 14. Dr. Willetts specifically restricted claimant from using her right arm above the shoulder, climbing ladders, crawling, pushing, pulling, and lifting with her right hand. EX 2 at 7. The administrative law judge also credited Dr. Willetts's opinion that claimant's use of narcotic medication for pain does not prevent her from working. EX 6 at 20. The administrative law judge noted Dr. Willetts's observation that claimant is able to think rationally and communicate well, and she found that his opinion is supported by claimant's ability to work as a teacher's assistant and her capacity to perform housework and yardwork, to exercise, to drive, and to take care of children. EX 6 at 14-16. The administrative law judge found Dr. Willetts's opinion supported by the opinion of Dr. Goldblatt that claimant may perform light-duty work with no activity of the right upper extremity and only light grasping of the right hand. CX 6 at 2. Inasmuch as determinations regarding the weight to be accorded to the medical evidence is the province of the administrative law judge and claimant has not raised any error with regard to the administrative law judge's crediting of Dr. Willetts, we affirm the administrative law judge's rational finding that claimant is limited to sedentary employment with restriction on the use of the right upper extremity. *See Calbeck*, 306 F.2d 693; *see generally Pimpinella v. Universal Maritime Service, Inc.*, 27 BRBS 154 (1993).

Claimant next challenges the administrative law judge's crediting of employer's vocational evidence of suitable alternate employment. Claimant argues that employer's vocational consultant, Ms. Sinatro, based her labor market survey on an incorrect assessment of claimant's work restrictions and did not account for claimant's pain and reliance on narcotic pain medication. We disagree. In crediting Dr. Willetts's restrictions, the administrative law judge specifically discussed his deposition testimony addressing claimant's pain and her reliance on narcotic medication. Decision and Order at 24-25. Moreover, the administrative law judge found that the record does not establish that claimant's pain is totally disabling. The administrative law judge credited claimant's ability to work after her work injury, her successful completion of a twelve-month training program to work as a medical assistant, and her testimony that she can perform

daily activities such as driving, ironing, and exercising. Tr. at 38-41, 45-52. The administrative law judge also found that Ms. Sinatro adequately addressed how claimant's work restrictions are compatible with the jobs cited in her labor market survey. EX 7 at 7-11. Claimant argues that Ms. Sinatro equivocated in her deposition testimony as to claimant's ability to work as a desk clerk and cashier if she is unable to use her right arm and hand. This testimony, however, does not contradict her report and testimony that claimant is capable of working as a desk clerk and cashier, based on Dr. Willetts's work restrictions, because Dr. Willetts did not prohibit claimant from using her right hand for such activities.[2] EX 2 at 7. Accordingly, as Ms. Sinatro's labor market survey, identifying eight specific job openings as a cashier and desk clerk that she testified are within claimant's physical limitations, is substantial evidence of suitable alternate employment, we affirm the administrative law judge's finding.[3] *See Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *see Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 107 (2003); *Anderson v. Lockheed Shipbuilding & Constr. Co.*, 28 BRBS 290 (1994).

Next, claimant contends the administrative law judge erred in applying the finding of suitable alternate employment retroactively to the parties' stipulated date of maximum medical improvement, September 7, 1996, for purposes of commencing the award of permanent partial disability benefits. Claimant contends she is entitled to permanent total disability benefits until the actual date employer demonstrated the availability of suitable alternate employment. We agree that the administrative law judge erred in this regard, and therefore we must remand this case for reconsideration.

As claimant correctly asserts, partial disability does not commence until the date employer establishes the availability of suitable alternate employment. *Palombo*, 937 F.2d 70, 25 BRBS 1(CRT); *see also Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69(CRT) (D.C. Cir. 1990); *Livingston v. Jacksonville Shipyards, Inc.*, 32 BRBS 123 (1998). Claimant is entitled to total disability benefits for periods in which she did not work or no suitable alternate employment was identified. *See Pietrunti*, 119 F.3d at 1041-1042, 31 BRBS at 88-89(CRT); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991). In this case, employer's labor market survey is dated August 15, 2003. Moreover, the administrative law judge awarded claimant the same permanent partial disability benefits based on wages in the 2003 survey for earlier periods when she was

[2] In his deposition testimony, Dr. Willetts stated that claimant could perform sedentary work, in part, because of her ability to use her right hand. EX 6 at 14-15.

[3] We also reject claimant's assertion that the administrative law judge erred by finding that claimant can work a 40-hour work week. Dr. Willetts did not limit claimant to part-time work.

actually employed without determining her wage-earning capacity with regard to that employment. Claimant remained in employer's employ until April 1, 1997. Claimant did not work from April 1997 to September 2000. Claimant worked as teaching assistant from October 2000 to June 2002. Claimant has not worked since June 2002; she testified that she was not able to continue working as a teaching assistant due to her work injury. Tr. at 51-52. Accordingly, we vacate the award of benefits for permanent partial disability dating from September 7, 1996, and we remand this case for the administrative law judge to address claimant's entitlement to compensation for the various periods, consistent with this discussion as well as that pertaining to wage-earning capacity, *infra.*

Claimant also challenges the administrative law judge's determination of her loss in wage-earning capacity after August 15, 2003. Section 8(h) of the Act, 33 U.S.C. §908(h), provides that claimant's post-injury wage-earning capacity shall be her actual post-injury earnings if these earnings fairly and reasonably represent her post-injury wage-earning capacity. *See Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992); *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 16 BRBS 56(CRT) (D.C. Cir. 1984). If they do not, or if claimant does not have any actual earnings, the administrative law judge must determine a reasonable dollar amount representing claimant's wage-earning capacity. *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979). Considerations relevant to this inquiry include the employee's physical condition, age, education, industrial history, claimant's earning power on the open market and any other reasonable variable that could form a factual basis for the decision. *See* 33 U.S.C. §908(h); *see, e.g., Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994); *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 18 BRBS 12(CRT) (4th Cir. 1985); *Randall*, 725 F.2d 791, 16 BRBS 56(CRT).

Claimant first argues that the administrative law judge erred by not using the actual wages of approximately $7.30 per hour she earned working part-time as a teaching assistant from October 2000 to June 2002 to calculate her post-injury wage-earning capacity in August 2003 when employer established the availability of suitable alternate employment. Employer's labor market survey listed full-time jobs paying from $7.50 to $11 per hour. This evidence demonstrates that claimant has a higher wage-earning capacity based on the August 2003 survey than the wages she earned as a teaching assistant from October 2000 to June 2002. *See generally Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997). Given this fact and the absence of evidence that the teaching assistant position continued to be available to claimant, the wage for this job is relevant only to claimant's wage-earning capacity while she was working in that position. Accordingly, we reject claimant's contention that her wage-earning capacity in August 2003 should be based on her teaching assistant wages.

Finally, claimant argues that the administrative law judge erred by crediting the wages paid by the highest paying job identified in Ms. Sinatro's labor market survey to calculate claimant's post-injury wage-earning capacity. In her decision, the administrative law judge found that the wages reported in Ms. Sinatro's labor market survey for cashier and front desk clerk positions range from $7.50 to $11 per hour, which in 1996 equates to wages of $5.50 to $8 per hour. Based on this evidence, the administrative law judge concluded that claimant has a current wage-earning capacity of $440, which represents a wage-earning capacity of $320 in 1996. The administrative law judge subtracted $320 from claimant's average weekly wage at the date of her June 1996 work injury of $754.71, and divided the sum of $434.71 by 2/3 to derive a compensation rate of $289.81.

We agree with claimant that, in this case, the administrative law judge erred by relying only on the wage of the highest paying job identified in the labor market survey.[4] Specifically, the administrative law judge credited the wage paid for a front desk clerk position at Foxwoods Casino. Employer's survey states that the position pays $10 to $11 per hour depending on experience. EX 1 at 4. As there is no evidence that claimant has prior experience as a front desk clerk, the administrative law judge's determination, based solely on this position, that claimant has a current wage-earning capacity of $440 per week is not supported by substantial evidence, and it must therefore be vacated. *See Pietrunti*, 119 F.3d at 1040-1042, 31 BRBS at 88-89(CRT); *McCrackin v. Spearin, Preston and Burrows, Inc.*, 36 BRBS 136 (2002).

On remand, therefore, the administrative law judge must recalculate claimant's post-injury wage-earning capacity for the period commencing with the date of employer's labor market survey as well as for any prior period of permanent partial disability. The administrative law judge must address whether claimant's actual earnings for the periods she was employed represent her wage-earning capacity during that time. In making these determinations, the administrative law judge must base her findings

[4] The United States Court of Appeals for the Fifth Circuit has held that an average of the range of salaries identified as suitable alternate employment is a reasonable method for determining a claimant's post-injury wage-earning capacity since a fact-finder has no way of determining which job, of the ones proven available, the employee will obtain; thus, the court stated, averaging ensures that the post-injury wage-earning capacity reflects each job that is available. *See Avondale Industries, Inc. v. Pulliam*, 137 F.3d 326, 32 BRBS 65(CRT) (5th Cir. 1998); *Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998). The administrative law judge, however, is not required to utilize this method of determining wage-earning capacity. *See generally Devillier*, 10 BRBS 649.

regarding post-injury wage-earning capacity on relevant factors as applied to the evidence of record. 33 U.S.C. §908(b); *Deviller*, 10 BRBS 649. The objective of the inquiry concerning claimant's post-injury wage-earning capacity is to determine the post-injury wage to be paid to claimant under normal employment conditions as injured. *See Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149(CRT) (9th Cir. 1985). Claimant is entitled to total disability benefits for periods when she was not working at a suitable job prior to employer's showing of suitable alternate employment in the labor market survey. *Palombo,* 937 F.2d 70, 25 BRBS 1(CRT).

Accordingly, the administrative law judge's Decision and Order awarding permanent partial disability benefits from September 7, 1996 is vacated, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge