

BRB Nos. 05-0511
and 05-0511A

MICHAEL R. COUTLIS)	
)	
Claimant-Petitioner)	
Cross-Respondent)	
)	
v.)	
)	
NORFOLK SHIPBUILDING AND)	DATE ISSUED: 02/22/2006
DRYDOCK CORPORATION)	
)	
Self-Insured)	
Employer- Respondent)	DECISION and ORDER
Cross-Petitioner)	

Appeals of the Decision and Order and Order Denying Claimant's Petition for Reconsideration of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Ralph Rabinowitz (Rabinowitz, Swartz, Taliaferro, Swartz & Goodove, P.C.), Norfolk, Virginia, for claimant.

Dana Adler Rosen (Clarke, Dolph, Rapaport, Hardy & Hull, P.L.C.), Norfolk, Virginia, for self-insured employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order and Order Denying Petition for Reconsideration (2004-LHC-0930) of Administrative Law Judge Larry W. Price 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).

On December 17, 1987, claimant sustained a crush injury to his pelvis while working as a night shift superintendent at one of employer's plants. The accident necessitated several operations including one to claimant's right hip, the repair of an aortic aneurism in 1990, and multiple back surgeries, the latest occurring in 2002. Employer voluntarily paid claimant periods of temporary total disability benefits, as well as medical benefits. After 15 months of recuperation, claimant returned to work for employer as a planner in the Materials Department, but he was laid off on March 24, 2000, and removed from its employment rolls effective June 27, 2002. Claimant has not worked anywhere since his lay-off by employer. Employer reinstated claimant's temporary total disability benefits after claimant underwent a spinal fusion at L3-4 on July 23, 2003. CX B at 28.1. On November 13, 2003, when employer changed its payment from total to partial, claimant filed a claim for continuing total disability benefits.

The parties stipulated before the administrative law judge that claimant reached maximum medical improvement from his latest back surgery on May 4, 2003, and that as of April 6, 2004, employer agreed to pay permanent partial disability retroactive to May 4, 2003. They also agreed that claimant's average weekly wage at the time of his injury was \$1,027. At issue before the administrative law judge was whether employer established the availability of suitable alternate employment, and if so, the amount of claimant's post-injury wage-earning capacity.

In his Decision and Order, the administrative law judge found that employer established suitable alternate employment based on the testimony and labor market survey of Barbara Byers, a vocational rehabilitation specialist, who located a number of jobs which ranged in pay from \$8 to \$16.83 per hour. The administrative law judge found that claimant has a post-injury wage-earning capacity of \$320 per week. Moreover, the administrative law judge found that claimant did not establish that he diligently sought suitable alternate employment. Consequently, the administrative law judge awarded claimant continuing permanent partial disability compensation from October 31, 2003.

On claimant's motion for reconsideration, the administrative law judge rejected claimant's argument that he had erred in not finding him to be totally disabled based on the opinion of his treating orthopedic surgeon, Dr. Byrd. While acknowledging that Dr. Byrd opined that claimant is permanently totally disabled, the administrative law judge also stated that Dr. Byrd refused to opine whether claimant could perform the jobs that Ms. Byers found suitable. The administrative law judge stated that he credited the jobs Ms. Byers stated were available in her October 30, 2003 labor market survey, because he found them to be within claimant's restrictions. The administrative law judge also found that, contrary to the opinion of Mr. Edwards, the vocational rehabilitation specialist hired by the Office of Workers' Compensation Programs, claimant did not diligently seek

employment because of the self-limited nature of his job search. Accordingly, the administrative law judge denied that portion of claimant's motion for reconsideration which sought ongoing permanent total disability benefits. Nonetheless, the administrative law judge agreed with claimant's argument that in determining his post-injury wage-earning capacity the wages should be based on what the jobs listed in Ms. Byer's 2003 labor market survey paid at the time of his injury in 1987, using the percentage change in the national average weekly wage. The administrative law judge instructed the district director to make this adjustment.

On appeal, claimant challenges the administrative law judge's finding that he is not entitled to an award of continuing permanent total disability benefits. Employer responds, urging affirmance of the administrative law judge's award of ongoing permanent partial disability benefits. In its cross-appeal, employer contends that the administrative law judge erred in calculating claimant's post-injury wage-earning capacity as \$8 per hour in 2003 wages. Claimant responds, urging that in the event that the Board affirms the award of permanent partial disability compensation, the administrative law judge's wage-earning capacity finding, as adjusted to 1987 rates, should be affirmed.

The parties agree that claimant has established a *prima facie* case of total disability. Decision and Order at 8; Tr. at 20. Therefore, the burden shifted to employer to demonstrate the availability of a range of realistic job opportunities within the geographic area where claimant resides, which claimant by virtue of his age, education, work experience, and physical restrictions, is capable of performing and could secure if he diligently tried. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1999); *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir.1988).

Claimant first contends that the administrative law judge erred in failing to credit the opinion of Dr. Byrd that claimant is totally and permanently disabled as of April 12, 2004, as Dr. Byrd has treated claimant for thirteen years. In this regard, claimant contends that the doctor's status as claimant's treating physician entitled his opinion to "compelling weight." The administrative law judge in this case was not required to accord Dr. Byrd's opinion special deference. In July 2003, Dr. Byrd stated that, generally, claimant has a 15-pound lifting restriction, can engage in limited bending, walking and sitting, and cannot work with vertical ladders or on uneven surfaces. Cl. Ex. B at 37. Dr. Byrd requested that employer's vocational consultants provide him with job descriptions for his review. *Id.* at 38, 40. Subsequently, Mr. Edwards contacted Dr. Byrd with his opinion that suitable jobs were unavailable and that he doubted claimant could find employment. *Id.* at 43. Dr. Byrd therefore concluded on April 12, 2004, that, "given

the information obtained from Mr. Edwards it does not appear that I have any other choice but to permanently and totally disable the patient.” *Id.*

Given this sequence of events, the administrative law judge was not required to find that claimant was permanently totally disabled based on the statement of his treating physician. *See generally Consolidation Coal Co. v. Held*, 314 F.3d 184 (4th Cir. 2002). Dr. Byrd came to this conclusion based on his conversation with Mr. Edwards regarding claimant’s vocational capabilities. The administrative law judge, however, was free to credit instead Ms. Byers’s vocational assessment in conjunction with the actual physical restrictions Dr. Byrd supplied in July 2003. *See generally Consolidation Coal Co. v. Borda*, 171 F.3d 175 (4th Cir. 1999). Therefore, we reject claimant’s contention that the administrative law judge erred in rejecting Dr. Byrd’s April 2004 conclusion.

Claimant next contends that the administrative law judge erred in finding that employer established suitable alternate employment based on the testimony and October 30, 2003 labor market survey of Ms. Byers because she did not account for the work restrictions imposed by claimant’s cardiologists. In ascertaining the suitability of an alternate job, the administrative law judge must compare the duties of the position with claimant’s physical restrictions and vocational abilities. *See Hernandez v. National Steel & Shipbuilding Co.*, 32 BRBS 109 (1998). In accordance with Dr. Byrd’s July 2003 restrictions, Ms. Byers identified 11 positions as suitable for claimant. Ms. Byers contacted each employer on her survey to verify that the job was available and to determine whether it was within the restrictions of Dr. Bryd. The administrative law judge found that all identified positions are within the restrictions of Dr. Byrd and that employer established the availability of suitable alternate employment. This finding is not specifically contested on appeal,¹ and it is affirmed as it is rational and supported by substantial evidence. *See generally Lentz*, 852 F.2d 129, 2 BRBS 109(CRT).

We agree, however, with claimant that the administrative law judge did not address whether the jobs identified by Ms. Byers are suitable given the restrictions imposed by claimant’s cardiologists. Ms. Byers admitted that she did not consider the restrictions imposed on claimant by his cardiologists for his dissecting aortic aneurism, a condition employer has accepted as causally related to claimant’s 1987 work accident. Tr. at 93-99. Claimant’s cardiac surgeon, Dr. Espejo, initially restricted claimant from working at night, because of his concern that claimant’s blood pressure would become too low. CX F at 6. In 1998, Dr. Espejo stated that claimant cannot lift more than 50 pounds and should avoid extreme weather changes. CX F at 7. In summarizing the restrictions imposed by Dr. Patel, claimant’s current cardiologist, the administrative law

¹ Contrary to claimant’s contention Ms. Byers stated she took claimant’s back brace into consideration in assessing the jobs’ suitability. Tr. at 98.

judge merely stated that: “[Dr. Espejo’s] restrictions were all affirmed by Dr. Patel, claimant’s current physician who started treating claimant when Dr. Espejo retired.” Decision and Order at 7. On March 29, 2004, Dr. Patel did advise claimant to avoid night work and extreme changes in temperature, but the administrative law judge did not discuss Dr. Patel’s additional restriction that claimant should avoid any stressful situations which would increase his blood pressure. CX F at 10. We therefore vacate the administrative law judge’s finding that employer established suitable alternate employment. On remand, the administrative law judge must address whether the jobs Ms. Byers identified are suitable in light of claimant’s work-related cardiac restrictions. *See generally Moore v. Universal Maritime Corp.*, 33 BRBS 54 (1999).

We next address employer’s appeal regarding the administrative law judge’s finding that claimant’s post-injury wage-earning capacity is \$320 per week, in 2003 wages. An award for permanent partial disability in a case not covered by the schedule is based on two-thirds of the difference between claimant’s pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21), (h). This calculation requires that claimant’s post-injury wage-earning capacity be adjusted to the wages that the post-injury job paid at the time of claimant’s injury so that the wages are compared on an equal footing. *See generally Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 30 BRBS 1(CRT) (1995) (the Supreme Court noted the administrative law judge’s wage-earning capacity analysis in which he properly accounted for inflation); *Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 18 BRBS 100(CRT) (D.C. Cir.), *cert. denied*, 479 U.S. 1094 (1986).

Employer asserts that the administrative law judge erred in calculating claimant’s post-injury wage-earning capacity based, apparently, on the one job that paid \$8 per hour, when the wages for the positions identified by Ms. Byers ranged from \$8 to \$16.83 per hour. Employer notes that the administrative law judge found that all of these jobs were suitable and available to claimant, but that the administrative law judge did not explain why he chose the \$8.00 per hour figure, other than to state, “The survey demonstrates that even without additional training or education there is suitable alternate employment for claimant which will pay at least \$8 per hour. Using a forty-hour work week estimate, this figure yields a weekly wage-earning capacity of \$320.” Decision and Order at 10.

Section 8(h) of the Act states that a claimant’s post-injury wage-earning capacity should be calculated with reference to:

the nature of his injury, the degree of physical impairment, his usual employment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

See, e.g., Devillier v. National Steel & Shipbuilding Co., 10 BRBS 649 (1979). The administrative law judge did not discuss these relevant factors or the range of wage rates of the available jobs. *See generally Avondale Industries, Inc. v. Pulliam*, 137 F.3d 326, 32 BRBS 65(CRT) (5th Cir. 1998). Therefore, we must vacate the finding that claimant's post-injury in 2003 wages was \$320 per week, and we remand for a more complete discussion of the wage evidence in accordance with law.² *See generally Randall v. Comfort Control, Inc.*, 725 F.2d 791, 16 BRBS 56(CRT) (D.C. Cir. 1984).

² If the administrative law judge finds that the record does not contain evidence of the wages that the post-injury job paid at the time of claimant's 1987 work injury, the administrative law judge may use the percentage increase in the national average weekly wage to account for inflation. *See Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990).

Consequently, we vacate the administrative law judge's Decision and Order and Order Denying Petition for Reconsideration, and remand the case to the administrative law judge for further findings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge