BRB No. 07-0795

D.C.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BUNGE NORTH AMERICA, INCORPORATED	)	DATE ISSUED: 02/29/2008
	)	
and	)	
	)	
PACIFIC EMPLOYER'S INSURANCE	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Permanent Partial Disability Benefits of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Alton D. Priddy (Priddy, Cutler, Miller & Meade, PLLC), Louisville, Kentucky, for claimant.

Raymond L. Massey and B. Matthew Struble (Thompson Coburn LLP), St. Louis, Missouri, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Permanent Partial Disability Benefits (2005-LHC-2563) of Administrative Law Judge Edward Terhune Miller 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).

Claimant was involved in an accident while working for employer on May 14, 2001, which resulted in severe head and shoulder injuries.[1] Claimant was comatose for approximately two months following his accident and remained hospitalized for some time thereafter, including a five-month stint in a rehabilitative program. On January 22, 2002, Dr. Goris, claimant's treating orthopedist, released claimant to work with no physical restrictions due to his shoulder injuries. Subsequently, claimant's treating neurological surgeon, Dr. Weber, opined that claimant was mentally and physically capable of performing work in a position as a maintenance worker, without restrictions. Dr. Weber added that he felt it would be mistake for claimant not to return to work, but that he would defer to the vocational experts with regard to claimant's employability. Dr. Gray, who performed a neuropsychological examination on claimant on March 25, 2002, opined that claimant had the neurocognitive ability to do simple repetitive tasks as long as they were only one to three steps in nature and did not require stringent speed, quota component, or frequent shifts. On June 23, 2005, Dr. Oliveri conducted a neuropsychological evaluation, and at his subsequent deposition, opined that a return to unskilled activities, including work, would be a reasonable goal for claimant, adding that claimant would need, at least initially, a work environment with significant structure and supervision.

Based on these medical assessments, several vocational evaluations were conducted with claimant by Brenda Latham, on May 6, 2002, March 17, 2003 and July 12, 2005, by J. Stephen Dolan, on January 3, 2005, and by Timothy Kaver, on March 13, 2006. Ms. Latham and Mr. Kaver each believed that claimant was capable of performing entry-level type jobs involving simple repetitive tasks, and they identified job opportunities they believed claimant was capable of performing. Mr. Dolan, however, felt that claimant was employable only in a supported employment program, as he could not function in a normal competitive work environment without the ongoing support of a job coach. Additionally, Mr. Dolan testified that his subsequent contact with the potential employers identified by Mr. Kaver revealed that none of them had any positions available to someone, like claimant, who would need "extraordinary supervision" and who "might need a job coach." Hearing Transcript (HT) at 160-161. Employer voluntarily paid temporary total disability benefits from May 15, 2001, until June 9, 2003, at which time the parties stipulated that claimant's temporary total disability ended. Claimant thereafter filed a claim seeking additional total disability benefits.

[1] Dr. Weber diagnosed a brain stem torsion injury, a left basilar skull fracture, an open fracture of the clavicle on the left side, a left scapular fracture, a pulmonary contusion in the left upper lob, and a right pleural effusion.

In his decision, the administrative law judge found that claimant was unable to return to his usual employment, but that employer established the availability of suitable alternate employment. As claimant had not attempted to secure such employment, the administrative law judge concluded that he is not entitled to any additional total disability benefits. The administrative law judge calculated claimant's post-injury wage-earning capacity by using an average hourly wage based on the seven suitable positions identified by the vocational experts, multiplied by a 40-hour work week. Based on these calculations, the administrative law judge awarded claimant ongoing permanent partial disability benefits from June 10, 2003.[2]

On appeal, claimant challenges the administrative law judge's findings regarding suitable alternate employment as well as the commencement date and compensation rate for his award of permanent partial disability benefits. Employer responds, urging affirmance.

Claimant argues that the administrative law judge erred by crediting the labor market survey of Mr. Kaver to find that employer established the availability of suitable alternate employment. In particular, claimant argues that the information Mr. Kaver conveyed to prospective post-injury employers was misleading and inaccurate in that it did not express the full extent of claimant's condition and did not indicate claimant's probable need for a job coach. Claimant maintains that, in contrast, the administrative law judge should have relied on the hearing testimony of Mr. Dolan that none of the prospective employers would hire claimant in light of his need for extraordinary supervision and a job coach.

The administrative law judge found that employer established the availability of suitable alternate employment by presenting seven employment opportunities culled from the labor market surveys of Ms. Latham and Mr. Kaver.[3] Decision and Order at 16. The

[2] Based on the parties' stipulations that claimant reached maximum medical improvement "approximately two years post-accident" and that claimant's entitlement to temporary total disability benefits ceased as of June 9, 2003, the administrative law judge concluded that claimant reached maximum medical improvement as of June 9, 2003. Decision and Order at 2, n. 2.

[3] Contrary to claimant's assertion, the administrative law judge's decision clearly articulates his reliance, in part, on the one position identified by Ms. Latham in her March 16, 2003, labor market survey. Decision and Order at 16.

administrative law judge found that these positions required only a high school diploma and involved no specialized skills, and that none of them involved highly detailed or complex job tasks. Additionally, the administrative law judge found that they all offered on-the-job training, and that in some instances the prospective employers indicated that they were especially willing to accept applicants who need special assistance because of disabilities. The administrative law judge thus found that these positions are consistent with claimant's mental and physical capabilities, as identified by Drs. Weber, Goris, Gray and Oliveri.

The administrative law judge specifically credited Mr. Kaver's statements as to his contacts with prospective employers over those of Mr. Dolan, since Mr. Kaver submitted detailed written reports of the calls he made, while Mr. Dolan had nothing in writing to evidence the calls he made, nor did he provide any supplemental reports regarding those contacts. Additionally, the administrative law judge found that Mr. Kaver's inquiries to potential employers were more detailed and better framed to elicit reliable responses, as Mr. Kaver indicated that claimant remained in recovery from a brain injury, and as such, had particular deficits and needs. Decision and Order at 16. In contrast, the administrative law judge found that Mr. Dolan's description of claimant's needs lacked any detail regarding his specific deficits and instead was stated generally in terms of claimant's requirement of "extraordinary supervision." Decision and Order at 16. The administrative law judge also explicitly considered but rejected Mr. Dolan's conclusion that claimant would need a job coach in order to secure and maintain employment in a competitive environment. The administrative law judge acknowledged that the expert witnesses stated that claimant might need a job coach in order to obtain a job, but he rationally relied on opinions that this need was short-term. Decision and Order at 16. He thus found that Mr. Dolan's belief that claimant would need a job coach indefinitely did not accord with the other reasoned medical and vocational opinions of record.[4] Additionally, the administrative law judge found that Mr. Dolan's explanation of a job coach, as "someone who teaches an employee how to do a job," could be satisfied by virtue of the fact that a number of the identified positions involved on-the-job training.

[4] Claimant's potential need of a job coach is addressed, from a medical standpoint by Drs. Gray and Oliveri, and from a vocational standpoint, by Mr. Kaver and Mr. Dolan. Of these opinions, only Mr. Dolan opined that claimant's need for a job coach would be indefinite. In contrast, Dr. Gray, upon whom Mr. Dolan predominantly based his vocational opinion, stated in his May 2, 2002, report, that claimant appears to be someone who "early on *may* very well need a job coach." EX 12 [emphasis added]. Dr. Oliveri similarly opined that despite claimant's initial need for structure and supervision, he would anticipate that "as [claimant] made a successful re-entry into the job with oversight and supervision, those things would be able to be eliminated over time," perhaps, after weeks or months. EX 11; *see also* Joint Exhibit (JX) 2, Dep. at 46.

An administrative law judge is entitled to weigh the evidence and to draw rational inferences therefrom. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). As his decision to credit the vocational reports of Ms. Latham and Mr. Kaver over the contrary report and testimony of Mr. Dolan is rational and supported by substantial evidence, it is affirmed.[5] *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Thus, the administrative law judge's finding that employer established the availability of suitable alternate employment is affirmed. *Bunge Corp. v. Carlisle*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000), *aff'g* 33 BRBS 133 (1999); *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995).

Claimant alternatively contends that the administrative law judge erred by awarding permanent partial disability benefits retroactive to the date of maximum medical improvement, *i.e.*, June 10, 2003, since the labor market survey upon which the administrative law judge relied did not establish the availability of suitable alternate employment until March 16, 2006. Claimant therefore argues that the administrative law judge's award of benefits must be modified to reflect his entitlement to temporary total disability until March 16, 2006, and permanent partial disability benefits thereafter.

In his decision, the administrative law judge did not make a specific finding as to the actual date upon which employer first established the availability of suitable alternate employment. Rather, he found that employer met its burden by presenting seven employment opportunities gathered from the labor market surveys of Ms. Lantham and Mr. Kaver. Specifically, the administrative law judge relied on one position identified in Ms. Lantham's report of March 17, 2003, and six positions identified in Mr. Kaver's labor market survey dated March 16, 2006. Given the varying dates of these surveys, we must remand this case for the administrative law judge to make a specific finding as to the date upon which employer first established the availability of suitable alternate employment. Total disability becomes partial on the earliest date on which the employer

[5] Claimant's contentions that his unprovoked anger and/or mental fatigue would preclude his ability to work full time are likewise not supported by the record. Dr. Oliveri explicitly stated that he did not believe fatigue would be an obstacle to some of claimant's basic activities, including a return to work. JX 2, Dep. at 53. Given that employers will give a 15 minute break for every four hours worked, Mr. Kaver surmised that claimant was capable of full-time employment. *Id.* Mr. Kaver also indicated that he did not believe, based on claimant's own statements, that claimant's anger issues would prevent him from obtaining and holding a job. HT at 274-275.

establishes suitable alternative employment, rather than the date on which claimant's condition reaches maximum medical improvement. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991). On remand, the administrative law judge must consider whether the one job identified in the 2003 survey is sufficient to establish the realistic availability of suitable alternate employment at that time. *See Berezin v. Cascade General, Inc.*, 34 BRBS 163 (2000); *Holland v. Holt Cargo Systems, Inc.*, 32 BRBS 179 (1998). If not, claimant may be entitled to additional total disability payments until the date of Mr. Kaver's survey in 2006.

Claimant lastly contends that the administrative law judge erred in calculating his loss in wage-earning capacity. Claimant asserts that the administrative law judge's methodology in comparing his pre-injury 2001 average weekly wage to the 2006 wage rates of the alternate jobs to determine his loss in wage-earning capacity does not account for inflation. An award for permanent partial disability compensation in a case not covered by the schedule is based on 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); *Cook v. Seattle Stevedoring Co.*, 21 BRBS 4, 6 (1988). In order to neutralize the effects of inflation, the administrative law judge must adjust post-injury wage levels to the level paid at the time of injury. *See generally Sestich v. Long Beach Container Terminal*, 289 F.3d 1157 , 36 BRBS 15(CRT) (9th Cir. 2002); *Johnston v. Director, OWCP*, 280 F.3d 1272, 36 BRBS 7(CRT) (9th Cir. 2002); *Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990); *Cook*, 21 BRBS at 6. The Board has held that if the record contains no evidence regarding the wages paid by the alternate employment at the time of injury, the administrative law judge should use the percentage increase in the national average weekly wage to adjust current wages to the rates paid at the time of injury. *Richardson*, 23 BRBS 237.

In calculating claimant's post-injury wage-earning capacity, the administrative law judge averaged the hourly wage rates of the seven positions which he found constituted suitable alternate employment,[6] and then extended that figure to reflect a forty-hour work week. He compared the result to claimant's 2001 average weekly wage. This calculation was thus not adjusted to account for the effects of inflation; both claimant's average

[6] The administrative law judge upwardly adjusted the hourly rate of the position identified by Ms. Lantham on March 17, 2003, *i.e.*, from $5.15 per hour to $6.50 per hour, to reflect the minimum wage mandated by the State of Illinois as of the date of the hearing, which also corresponds to the minimum wage payable as of March 13, 2006, the date upon which Mr. Kaver identified the other positions deemed suitable for claimant.

weekly wage and post-injury wage-earning capacity must be determined as of the date of injury. *Richardson v. General Dynamics Corp.*, 19 BRBS 48 (1986). The administrative law judge's determination regarding claimant's post-injury wage-earning capacity is therefore vacated. On remand, the administrative law judge must determine what the suitable alternate employment paid at the time of claimant's injury, using the percentage increase in the national average weekly wage if the record does not contain the evidence necessary to make this determination, *Richardson*, 23 BRBS 327, and then compare that figure to claimant's average weekly wage.

Accordingly, the administrative law judge's finding that employer established the availability of suitable alternate employment is affirmed. His findings regarding the onset date of permanent partial disability and the amount of claimant's loss in wage-earning capacity are vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge